PROCEEDINGS OF THE 20TH ANNIVERSARY CELEBRATION OF THE HARVARD LAW SCHOOL HUMAN RIGHTS PROGRAM

Speeches, Panels, and Roundtable Held at Harvard Law School October 2004

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HARVARD LAW SCHOOL HUMAN RIGHTS PROGRAM

The Harvard Law School Human Rights Program, founded in 1984, fosters coursework together with the engagement of students in human rights work through scholarly research and writing and through clinical work involving practical engagement and assistance to the worldwide human rights community. HRP forges cooperative links with human rights scholars, activists and organizations worldwide through its student summer internships, visiting fellows (scholars and activists), guest speakers, applied research and clinical work. It also plans and directs roundtables and conferences on human rights issues and publishes their proceedings. The publications, together with a description of HRP's many activities, its newsletter and other related documents, are available at the HRP website, www.law.harvard.edu/programs/hrp, or upon request.

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Table of Contents

Preface

The Harvard Law School Human Rights Program organized a weekend conference on October 16–17, 2004 to celebrate its 20th anniversary. Over 200 alumni of HRP—Harvard graduates who were linked to the program as students and former visiting fellows—attended the event held at the school together with present students. This publication of HRP records the celebration.

The event included speeches by two guests, Secretary General Irene Khan of Amnesty International and Judge Navi Pillay of the International Criminal Court. Six panels of speakers addressed diverse themes figuring in present debate about the human rights movement. A roundtable examined university-based human rights programs and centers. Over 90 percent of the 42 principal speakers, panelists, and roundtable participants were HRP alumni or members of its direction and staff.

Although the celebration's emphasis on exploring human rights issues gave it primarily an academic character, it also had a more institutional and personal tone. Dean Elena Kagan made remarks about the life of the program including its role in the school. Since these events took place soon before I left the direction of HRP in June 2005 and became professor emeritus, I gave a talk of a more personal character. Both appear herein.

The principal speakers' remarks all appear in full. The HRP staff prepared summaries of remarks at the six panels that the panelists approved. The participants in the roundtable approved their remarks after the staff edited the transcript. Biographical statements for all speakers appear in the Annex.

I am grateful to Jim Cavallaro and Mindy Roseman and to the students whom they enlisted for all their work in bringing the events at the celebration to publication. HRP has simultaneously published a magazine on the celebration and on its own history and achievements.

Henry J. Steiner
Founder (1984) and Director (until June 2005)
Harvard Law School Human Rights Program

PART I:
TWO DECADES OF THE HUMAN RIGHTS PROGRAM

REMARKS

Elena Kagan
Dean, Harvard Law School

I am delighted to be here tonight celebrating the 20th anniversary of the Human Rights Program—truly one of the Law School's brightest lights—and I can imagine no better tribute than this terrific conference.

To my mind, two features of the Human Rights Program deserve special mention. The first is its insistence on combining theory and practice, critical reflection and engagement—in other words, its commitment to bringing together academics and activists. It is a hallmark of this program that these elements and individuals are brought together to nourish and enhance each other. Theory makes practice better, and practice makes theory better. And I'd take that one step further to say that practice is the single best reason for theory. In the end, the main point of thinking in this area, as in so many others, is doing. It is a great and ever growing strength of the Human Rights Program that it recognizes this truth.

The second feature of HRP that makes it so wonderful is the partnership between students and faculty. Faculty members have encouraged students to take part in shaping the program, and students have responded at every turn. It was students who founded the *Harvard Human Rights Journal* in 1988. It was students who, only a few years ago, founded the HLS Advocates for Human Rights. These students had approached Henry Steiner and me with a fully developed proposal, which we adopted as part of the expansion of the Human Rights Clinical Program under the spectacular direction of Jim Cavallaro. Students have been actively involved in all aspects of HRP. As a result, a remarkable number have continued human rights work after graduation, vastly improving people's lives and conditions in the larger world.

Of course, generous financial support has been critically important to the program. I especially would like to mention the Ford Foundation and some of our own alumni: Joseph Flom, Rita and Gus Hauser, Robert and Phyllis Henigson, Dan and Prudence Steiner, and Marco Stoffel.

But even with such impressive showings by students, faculty, and donors, this program is primarily the work of one great man. Henry Steiner saw the need for this kind of program twenty years ago. The program's goals and principles and essential character are due to him. The program has achieved what it has achieved because of him. The Human Rights Program at Harvard Law School—this I promise and guarantee to you—has a very exciting future. It has this future because Henry founded and sustained it every single day.

At this point, I invite everyone to stand, except for you Henry, and to raise their glasses, to toast the leader of Harvard Law School's Human Rights Program: the quite extraordinary Henry Steiner. To you Henry, thanks from all of us.

I am now going to disturb the order of things, as initially set down, and invite Makau Mutua to come up and present Henry with a gift. Professor Mutua was the Associate Director of the Human Rights Program for many years and now runs his own human rights program at SUNY Buffalo where he is a law professor.

Makau Mutua
Professor and Director
Human Rights Center, Law School at SUNY Buffalo

This is an emotional moment for me, and I am reminded of a saying by a man much wiser than I: "That when the world looks so difficult and incomprehensible, remember that ideas begin from some home neighborhood."

In 1984, I was a student at Harvard Law School at the inception of the Human Rights Program. I recall the first class that I took with Henry, and I remember the small number of students in that class; there were about ten of us. At that time, human rights were not a discipline in law school teaching. Over the years, the Human Rights Program has expanded so tremendously; the number of alumni is just

overwhelming as the multitude in this room suggests. The work of the program, the relentless support, vision, and development of it—with, of course, the backing of exceptional deans such as Dean Kagan—has nonetheless been in important part the work of Henry Steiner.

Henry is a personal friend. He was my teacher. He is my mentor, and in some respect, I would not be the person I am without his support, leadership, guidance, and love. I would like to add that my story is not unique; it is replicated hundreds of times. When I look at the many human rights programs at law schools in this country and abroad, I see the leading roles, including founders and directors, played in many of them by HRP's alumni. The same can be said for NGOs. I think I speak for all of us who have been fortunate and privileged to be Henry's students and HRP alumni, that we are all in some sense his mentees. Even for those of us who are skeptical about human rights, I know that skepticism also came from Henry. He is a man with a complex duality. He believes in the project of human rights; yet on the other hand, Henry is a real teacher. He questions, explores, critiques, and doubts, but he never abandons the project.

I believe the best products to have passed through Henry's classes and HRP are these students, whether they have gone on to become professors or activists who remember what he taught—that the human rights project is, in fact, just that, a project. It is not the final truth. It is a process of getting to the truth, which works at the intersection between power and powerlessness.

I want to say to you, Henry, some former students and colleagues have agreed to contribute one or two paragraphs about what you meant to them and their careers. We compiled those reminiscences into a book. Here is the book with over 100 entries. It is from our hearts to your heart, from the deepest sense of ourselves to you. I would now like to present it to you.

Henry Steiner
Professor, Founder, and Director
Harvard Law School Human Rights Program

I'm very moved by Elena's and Makau's remarks and by this wonderful book and welcome. Thank you all so much.

These are moments for me of keen pleasure in the sheer exuberance and intellectual richness of this event. At the same time, I feel a certain sadness, probably from an awareness that my past days with the Human Rights Program are far more numerous than those that lie ahead. Since I shall soon assume the status of professor emeritus, the celebration holds the sense of departure. My rational side argues that this parting holds great promise for HRP and me. I must agree! Undeniably the program will profit from fresh and young leadership infusing it with renewed energy and other ideas. I concur with Elena Kagan's view that HRP will enjoy a bright future at this school, given high student demand for education in human rights, the program's achievements, and her enthusiastic support. For myself, I look forward to upsetting established patterns and turning my life in more varied directions, some related to and some radically different from the work of these two decades.

This celebration surely honors our program, including the superb staffs that have been responsible these decades for so much of its success. But it honors above all our alums, the people now making a difference as academics and activists in the world of human rights. The speeches, panels, and roundtable featured by this conference well suit the celebration of a program committed to the exploration and development of the human rights movement. My own remarks will however break from this pattern. Given tonight's circumstances, I shall speak more personally, particularly about the reasons for my engagement with HRP and about what HRP has meant for me.

For 18 of the last 20 years, I've offered a seminar on human rights research limited to ten students who sat in a close circle in my office. They came from all over, connected to their fellow students by a common belief or faith in human rights ideals and absorption in human rights issues. Many brought with them painful histories—young people caught up in violent conflict, members of minority groups and women subjected to raw discrimination, political opponents of brutal regimes, victims of systemic poverty. We devoted the first three sessions to a half-hour self-exploration by all participants seeking to explain why they were committing substantial

time and energy to human rights research. These were richly rewarding experiences for all of us, students and instructor.

Indeed, these narratives amounted to something of a tour of the world's principal human rights concerns. They suggested a common sense of wrong and injustice, however diverse the described experiences. Through the student presentations, I came to perceive how an intense commitment to human rights and the public interest often grew out of searing, sorrowful, personal experiences. Often those experiences generated the broad themes explored in the 75-page seminar papers. If not determining the students' chosen concentration and career, autobiography deeply influenced them in merging the personal, political, moral, and intellectual.

My own narrative presentation to the seminar seemed to me tame relative to the arresting histories of the students. I was not from a developing state, nor had I personally experienced in my own country such phenomena as systemic violence, extreme governmental repression, malign discrimination or poverty. Never had my writing or conduct incurred risk of a brutal government reaction. In my years of human rights work traveling to many countries, I always felt the gap between the courage or initiative necessary for my own human rights pursuits and the vastly greater courage and initiative required of those I met who, sometimes at great risk, acted in more dangerous contexts as advocate, protester, agent of radical change, and explorer of the misery, abuse, and corruption in their own societies. They fascinated me, drawing my deep admiration and respect. They were the kind of people I wanted to know better, hence an incentive for my decision to concentrate on human rights work

Several themes grew out of reflection for my own self-presentation in the seminar. The first stemmed from my Jewish ancestry. I reached some degree of political awareness over the early postwar years when the horror of the Holocaust together with the war-related deaths of tens of millions others became broadly known. My ethnic and religious identity to which a part of such catastrophes was particularly relevant doubtless made it easier to empathize with diverse individuals and groups at risk in many ways from their many states and societies—as it had been relevant earlier in my academic

career when I did pro bono civil liberties work. The cardinal principles of the human rights movement, none more fundamental than the postulate of equal human dignity, readily became articles of faith. Over the years, I have come to understand my own attraction to those principles as stemming from a naturalist impulse, from a sense of their essential foundation to any world that I wished to inhabit, rather than from the elaborated theories of a Locke, Kant, Rawls or others who contributed so profoundly to a liberal tradition respectful of rights.

Another theme had to do with my consulting for a project in the late 1960s to create a model for reforming legal education in Brazil, which seemed necessary to nourish that country's rapid economic growth. Those 18 months of working with an American colleague in Rio de Janeiro to transmit our reform ideas to the Brazilians bore some fruit but left several of us puzzled and frustrated. True, our model informed by legal realism, the New Deal, and the American pedagogic style in law faculties—labeled by Brazilians the *método novo*, or new method—did produce better trained graduates to fill the burgeoning positions in the rapidly expanding regulatory regimes, businesses, and schools. But the new curriculum and method lacked a base of moral values from which to assess and critique the military dictatorship of the period with its contempt of rights. I suspect that my commitment to a human rights program was to some degree an effort to repair that failure, to integrate political and moral ideals with the drive toward economic development, to bear in mind that training only in technique and in methods of understanding and analysis could equally well serve authoritarian or participatory and democratic paths toward growth.

I should also note my keen sense by the 1980s that I needed a change from teaching and writing in transnational law and torts. Partly this was my search for a fresh intellectual challenge, partly for a different kind of life embracing not only scholarship but also engagement with an outside community that I respected, one shaped and bound together by common goals and ideals. Academic life imposes its solitude in research and writing. Perhaps I was attempting some escape from that solitude through absorption in such a program and movement and related scholarship. Perhaps I sought the company

of people I admired who were so different from me in identity, background, and circumstance. Surely my life has been the richer for my knowing so many of you.

Becoming associated and identified with this community and in some modest way helping it develop have deepened my perceptions of human rights, both through working with our foreign graduate students and visiting fellows and through travels. Those travels have yielded many instances of becoming aware in a fresh and striking way of some ideas that I had long discussed in writing or class. Consider one example related to the dilemmas of universalism and particularism. In some ways, I think that contrast informs much of the human rights movement. At the personal level, we are aware of the complex relationships between one's particular ethnic, religious, racial, gender or other identity and one's universal character as a human being of equal dignity with all others. We see this drama played out at a lower level today in many multicultural states in the competing pulls of particular identities and national citizenship. At the societal level, assertions of the universality of human rights—the official position of the basic treaties and leading spokespeople and institutions for the movement—collide with arguments for cultural relativism: understanding rights as stemming from and imbedded in particular cultures and thus lacking a "supracultural" or transcendent character. Imposing rights prominent in one political, moral, and cultural system like liberal democracy on a radically different system of a communitarian or theocratic character, under the premise that rights have universal validity, is simply (the counter argument goes) imperialism in disguise.

Several years ago I visited Kuwait under a US program to lecture about women's right to vote, a hot topic at a time of pending elections. The women were very divided, the men mostly opposed, within the usual contrasts of tradition vs. modernity, small communities vs. the city, religious vs. secular. The last talk was before a university audience. In the first row sat some young women, conservatively dressed and likely not on my side of the issue. One of them, determined and articulate, put a straightforward question: Why do you come to Kuwait to tell us to do what we cannot and should

not do? It would be wrong since against Allah's commands, she insisted, for her to vote. I assured her of our common belief that any effort to force her to vote would be wrong. Indeed it would constitute a violation of her human rights. But why, I asked her, could she not abstain from the vote while accepting that other Kuwaiti women understood Islam differently, as indeed did several other Sunni states and even the Shia theocracy across the Gulf? Why should the understanding that she and many Kuwaitis deeply held lead them to deny others in her country a different understanding on a matter posing fundamental issues of right? Their exercise of the ballot would not interfere with her abstention. Was this not an occasion for individual choice on such controverted issues? She looked at me in deep astonishment. "It is not a question of choice," she said, "but a question of Allah's will. There is no choice."

I felt that our conversation in that public setting could go no further, that we had cut to basic and contradictory postulates and convictions. This indeed was an instance of the particular rejecting the asserted universal. But could that characterization of our conversation be understood as itself ethnocentric and particular? Perhaps my interlocutor believed that her view expressed a universal and eternal command of God, whereas mine spoke to an aberration of several centuries, Western liberalism tied to capitalism and democracy and committed to notions of individual choice. Moreover, how should I respond to her query about why I had come to Kuwait? After all, it was clear to her as it perhaps may be to some of you that I am neither a woman, nor Arab, nor Muslim. What then was my mandate or authority to urge change in her tradition and belief? Perhaps the answer lay within the human rights system, in its abhorrence of any particularity or specific identity in its articulation of rights. The rights declared and the conduct prohibited in the basic treaties use the language of "everyone," or "no person," drawing only the rare distinction between categories of human beings. Perhaps I lectured as an abstract human being, purged of any particular identity, speaking to equally abstract human beings, a carrier of the gospel, a missionary for a common humanity.

Through such experiences and indeed in all its manifestations, human rights work has given me a remarkable two decades. I am sometimes stunned by the movement's audacity, its transformative ambition and the uncompromising reach of its ideals into so diverse, factious, and often ugly world. We are all aware of its internal dilemmas and contradictions. We know that even in its norms and the understanding of its ideals, the movement has changed considerably over six decades and will undoubtedly continue to do so. We have different "takes" among us on some issues or concepts. We perceive its fragility, mistakes, failures and the hypocrisy of both states and many of its own organizations. But we are also aware that despite the movement's youth, its norms and institutions have implanted a new discourse and set of ideas in our world. It has played important roles in some stunning successes. It continues to push and change ideas and ideals. It will not go away. So we continue, realists in our appreciation of the power and powers against us including the base aspects of our own human nature, but idealists and believers in our cause.

The universities play their role. Over these two decades, programs like ours have become not quite a commonplace, but ever more common. They too will not go away. I mull a lot about their future directions. Even while enjoying this 20th anniversary, I must confess to gnawing worries about our 50th. There are so many vexing questions. Where, for example, should it be held? Given tonight's audience, no law school room will suffice. Must HRP rent a coliseum to accommodate the numbers? It will surely be a grand event. I expect to be there, and hope to see all of you!

PART II: EXPLORING HUMAN RIGHTS ISSUES

PRINCIPAL SPEAKERS

Irene Khan
Secretary General, Amnesty International

When I came to Harvard Law School in 1978, there was no Human Rights Program. Human rights were still in the process of becoming a respectable area of study for budding lawyers. However, the writing was on the wall. Just the year before, in 1977, the Nobel Peace Prize was awarded to Amnesty International, and in that same year, in 1978, Human Rights Watch (HRW) was created. These were acts of great courage at that time. The Nobel Peace Prize probably saved Amnesty International (AI) from attack and annihilation by the British government, which was very angry about AI's work in Rhodesia. Our office in London was regularly broken into, our staff was harassed, volunteers threatened, and a smear campaign launched against Peter Benenson, AI's founder, to the extent that AI seriously considered relocating to Sweden.

We were seen as subversives—and there are, of course, still too many parts of the world where human rights activists are seen as subversives. And, from one point of view, human rights activists are subversives agitating for change. We challenge the absolute power of the sovereign state and work to make governments accountable to international scrutiny. We believe in a world in which the powerful and the powerless have equal rights and equal protection, a world that is safe and fair not only for the privileged but also for the poor.

History has shown repeatedly—from Menacham Begin to Nelson Mandela—that subversives can become respectable citizens. And that's exactly what has happened to human rights groups. Today, there is an explosion of human rights NGOs, at the international, national, and local levels. Using a range of tools, based on investigative research, the techniques of naming and shaming, the power of astute lobbying and media work, they have become powerful players on the international human rights stage. Some feel perhaps too powerful.

But most would accept that it is thanks to NGO pressure that governments can no longer hide behind the cloak of sovereignty and avoid international scrutiny of their human rights record. It is thanks to NGO lobbying that the Universal Declaration of Human Rights has spawned a plethora of treaties and laws that, for instance, outlaw torture, abolish the death penalty, and recognize women's equality and children's rights. The number of human rights treaties, ratifications, and declarations continues to grow. The UN has appointed an official champion of human rights in the High Commissioner for Human Rights and set up an elaborate system of mechanisms and procedures to scrutinize state behavior on human rights.

The human rights movement—international and national—played a major role in disbanding apartheid in South Africa and the development of democratic governments in Latin America, Eastern Europe, and parts of Africa and Asia. From Peru to Pakistan, from Brazil to Bulgaria, governments have adopted laws, set up national human rights institutions, or introduced constitutional provisions incorporating fundamental principles of human rights and made human rights education a part of the curriculum.

In many parts of the world, such as Latin America, we see the tide turn against impunity. Judge Navi Pillay and her fellow panelists spoke of achievements in international criminal justice, not least the International Criminal Court, as a beacon of hope for those who have suffered egregious human rights crimes. Michael Ignatieff describes human rights as the "dominant moral vocabulary in foreign affairs."[1] Reed Brody calls it "one of the world's dominant ideologies."[2] There is little doubt that, for better or worse, human rights are increasingly becoming the vocabulary of other movements—women's movements captured the human rights agenda at the 1993 World Conference on Human Rights in Vienna. Development organizations speak of a rights-based approach to development. Indigenous peoples, landless

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[1] Michael Ignatieff, "Is the Human Rights Era Ending?" *New York Times*, Section A, Page 25, February 5, 2002.

[2] Reed Brody, "Right Side Up: Reflections on the Last Twenty-Five Years of the Human Rights Movement," *Human Rights and Armed Conflict*, Human Rights Watch, World Report 2004, January 2004.

peasants, and the disabled are all plotting their own place in the landscape of human rights. It is not a bad list for half a century considering what went on in the previous half. But we should not get carried away with that list because a dark reality of unfinished business, half truths, and ineffective outcomes lies behind it.

Just a month ago, I was in Darfur. In Camp Riyad, which looks like the worst kind of urban slum, with blue plastic sheeting on sticks providing shelter from the hot desert sun and piles of garbage everywhere, I sat in the sand with a group of women. Zainab, one of the women, told me her village had been attacked by uniformed men and bombed from the air as well. So many men had been killed that there were no men left to bury the dead. She, together with her friend now sitting next to her, had buried seven men. When the women lacked the strength to bury any more, they put the bodies under a shelter. But the Janjaweed came that night and burnt the shelter. She kept repeating two words, "hunger and thirst, hunger and thirst;" that is all she and the other survivors, who walked for 60 days until they reached the camp, could think about. Zainab has lost everyone and everything except her grandchildren, and she is too scared to return home or even to step out of the camp. These were simple, rural folk. They did not understand human rights; they had no expectations of me as a human rights activist. They were just happy to unburden their sadness, even to a stranger who did not understand their language.

But I was burdened by my own guilt, angered by my own impotence. Earlier that week, I had seen the site of the destroyed African villages where grass is now sprouting and Arab nomadic tribes are grazing camel. I had seen village after village abandoned, a few broken pots and a child's shoe lying on the ground as a poignant reminder of the panic of the people who had fled. What could AI do? Name and shame the government? We have been vociferous in denunciation and vigorous in our discussions with the ministers in Khartoum, but the killings and displacement continue. Lobby the UN? I met recently with Kofi Annan and pressed on him the urgency of deploying the African Union monitors. He agreed, but both of us know that it will be weeks, if not months, before anyone is on the ground. Even then, their impact remains unknown.

Recently, I testified before the Human Rights Committee of the US Congress. The Congressmen and women listened attentively. For them, the answer is simple: They see it as genocide. But they could not tell me what action should follow that labeling. They remained silent when I asked that if they believe it is genocide, shouldn't the UN Security Council refer the case to the International Criminal Court (ICC)? How could they say anything given the US administration's blind opposition to the ICC? The word "genocide" seems as meaningless to me as human rights do to Zainab.

The truth is that, as a human rights NGO, AI has managed to put human rights on the international and national agendas, but these agendas have not always translated into action. NGOs have failed to galvanize massive public outrage that could bring about that action. There is a dangerous disconnect between rhetoric and reality, a gap between our influence and our impact, and if we do not close that gap, our credibility as human rights advocates could be undermined.

Human rights embody common values of human decency and dignity, equality and justice. As such they are the basis of our common security, but, now, in the name of security, they are being attacked and eroded. Human rights are based on universal standards and legally binding treaties, but these instruments are now being flouted with impunity and audacity. Human rights are protected and promoted by the international community of states through the United Nations, but that system seems unable to hold states to account. Not surprisingly, Michael Ignatieff asks, "Is the human rights era over?" David Kennedy sees the international human rights movement as "Part of the Problem?" Makau Mutua scorns human rights activists as self-appointed saviors who feel good but do not necessarily do good.

As I struggle to make my own organization more effective and accountable, there are times when I am tempted to agree with Michael, David, and Makau, but thankfully, more often than not, I disagree with them. We are living through tough times, and there is a crisis of faith in the value of human rights among our friends as well as our foes and a crisis of governance in the systems—governmental and non-governmental—that are supposed to uphold human rights. Dramatic changes are needed, not only in the human rights system,

but in the way in which human rights NGOs operate so that we can bring about those changes. But I am convinced that our optimism, our creativity, and our resilience will prevail, that human rights NGOs will once again recapture their subversive spirit—their spirit of challenge and change—and rejuvenate the struggle for human rights.

Our struggle will be defined by how we tackle two of the biggest challenges of our times—the fight against terrorism and the fight for economic, social, and cultural rights.

In May, AI released its annual report, which stated that there had not been such sustained attack on the human rights framework since the Universal Declaration of Human Rights was adopted. We were immediately attacked. What about Pol Pot? Gulags in the Soviet Union? The dictatorships in Latin America? Apartheid in South Africa? But our critics missed the point. We are not speaking of atrocities committed by individual dictators. What is new is the attack on the framework—the body of values, principles, laws, and standards —on the Convention against Torture, the Geneva Conventions, the International Criminal Court, and the UN Charter itself.

Although President Bush said that "this new paradigm . . . requires new thinking," what we see emerging are old abuses: denial of habeas corpus, detention without charge or trial, official commentary on the presumed guilt of detainees, unfair trial use of incommunicado and secret detention, sanctioning of harsh interrogation techniques, and torture. In 1973, AI published its first report on torture in which it found that: "Torture thrives on secrecy and impunity. Torture rears its head when the legal barriers against it are barred. Torture feeds on discrimination and fear. Torture gains ground when official condemnation of it is less than absolute."[3] The pictures from Abu Ghraib show that what was true thirty years ago remains true today.

In 1973, AI wrote that "those who consciously justify torture . . . rely essentially on the philosophic argument of a lesser evil for a greater good. They reinforce this with an appeal to the doctrine of necessity. . . ."[4] In January 2004, the US authorities cited military necessity to refuse the International Committee of the Red Cross

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[3] Amnesty International, *Report on Torture*, 1973.
[4] Ibid.

access to eight detainees in Abu Ghraib, who were later alleged to have been tortured. I have been on radio shows with Alan Dershowitz when he has propounded his ticking bomb story to justify judicial sanction of torture. Thirty years ago, AI wrote: "History shows that torture is never limited to 'just once.' . . . As soon as its use is permitted once, as for example in one of the extreme circumstances like a bomb, it is logical to use it on people who might plant bombs, or on people who might think of planting bombs, or on people who defend the kind of people who might think of planting bombs. . . ."[5] In the end, the absolute prohibition of torture and cruel, inhumane and degrading treatment rests on moral grounds. Torture is the ultimate corruption of humanity.

But while human rights groups may have prevented some damage to the fabric of human rights, we have not had unqualified success. On the contrary, the trend is bucking human rights in almost every country from Australia to Zimbabwe. Public passivity to the war on terror is the single most powerful indictment of the failure of human rights NGOs today. This is particularly bad when viewed through public opinion in Western countries from which large NGOs like AI and HRW normally draw most of their support. This is why we need to ask: Where have we gone wrong and how do we put it right?

The second major challenge for human rights NGOs is the issue of economic and social rights and how we confront the battle against poverty and growing inequity. Although the Universal Declaration of Human Rights integrates all human rights without hierarchy, during the Cold War, ideological differences meant that Western governments championed civil and political rights and the socialist bloc promoted economic and social rights. Rooted in the West or under Western influence, most NGOs picked up that same bias, neglecting, marginalizing, sometimes even contesting these rights, and that remains true to this day.

AI would be the first to admit its role in the gross neglect. For forty years, we worked on a limited range of civil and political rights. It was only in 2001 that AI members expanded the mandate to include

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[5] Ibid.

work on economic, social, and cultural rights. Many more human rights NGOs have picked up these rights, working with other development organizations or on their own, contributing to the elaboration of the rights, taking cases to court to test their justiciability, and promoting greater accountability of governments and corporate actors. But what is being done is clearly not enough.

More than a billion people out of a global population of six billion live on less than $1 a day. More than 3,000 African children die of malaria every day, over three times the number of people killed as a direct result of armed conflict. Over half the population of Africa lacks access to life-saving drugs, and only 50,000 of the 26 million people infected with HIV/AIDS in Africa have access to the health care and the medicine they need.

Should human rights NGOs tackle these issues? How should they do it? Neo-liberals would say no because they dispute the very existence of economic rights. Some human rights NGOs would say that international human rights NGOs should work on only those economic, social, and cultural rights violations that are discriminatory and arbitrary because here the state can be held to account, and we can use our traditional tools of naming and shaming. But this approach would leave us silent on many of the egregious denials of these rights. Professor David Kennedy would say that the human rights movement is structurally ill-suited to this task because it is not in the business of distributive justice, yet the fulfillment of economic, social, and cultural rights requires an approach based on distributive justice. The human rights movement looks at abuse—and not the causes.

There are others who would say that these rights concern resources and require skills that human rights NGOs know nothing about and should stay out of. I believe that is really a red herring. One of the most costly rights is the right to a fair trial. Has that ever stopped us from making recommendations to improve the criminal justice system? The denial of economic, social, and cultural rights as much as civil and political rights is the root of most human suffering in the world. If we turn our back on that suffering or say that a human rights response has no place in alleviating that suffering, then human rights as well as the human rights NGOs will have no meaning for the

vast majority of the world's population. We will remain truly what Makau Mutua says we are: an elitist bunch working for the rights of the elite—those who cannot read the newspaper of their choice rather than those who cannot go to school. If we fail in our work on economic, social, and cultural rights, we will also fail in our work on terrorism and human rights. And let us remember Kofi Annan's words: "We now see, with chilling clarity, that a world where many millions of people endure brutal oppression and extreme misery will never be fully secure, even for its most privileged inhabitants."[6]

Working on economic, social, and cultural rights will require a whole new approach for human rights NGOs. We must redefine equality not simply as the absence of discrimination but more substantively, as Amartya Sen has done, as equalizing capabilities (the unequal distribution of public goods to benefit the weakest members of society). We must review the notion of responsibility for human rights abuses to extend beyond the national state to multinational corporate and financial actors and, in some cases, to third states.

Economic globalization and the war on terror are changing the agenda and actors of human rights NGOs more profoundly than we might have thought at first glance. That change means that we must also change our approach, alliances, and, last but not least, our own accountability. Let us quickly summarize the key issues for change and challenge. They are actors, approaches, alliances, and accountability.

On actors, whether in the context of terrorism or globalization of international relations, the nature of the state is changing. Sovereignty is shifting upwards to international organizations like the World Trade Organization or to supranational entities like the European Union. Some of the shift is informal in the case of corporations or international financial institutions (IFIs) or insidious in the case of armed groups or terrorists. Yet the state is central to the delivery of human rights. As human rights activists, we must work with governments and the UN to define what Robert Archer has called a "human rights vision of the state"—in other words, identify what only the state can do to deliver human rights and lobby for its fulfillment.

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[6] Kofi Annan, Address to the General Assembly, September 23, 2003.

The state's accountability cannot be limited to the public sector but also to private action; one in three women is a victim of violence, mostly at the hands of their partners.

Furthermore, we must work to strengthen the accountability of armed groups and terrorist groups. AI has worked on violence by armed groups like the Revolutionary Armed Forces of Colombia and the Liberation Tigers of Tamil Eelam. But we have avoided the term "terrorism" because of governments' political motivation in labeling some instances of violence as terrorism and not others. But we cannot expect to address the war on terror by continuing to avoid defining the problem. We must begin to look at the international and regional standard-setting exercise around terrorism that is taking place sometimes totally divorced from human rights concerns. There will be political hurdles. Terrorism, like other forms of armed violence, has intractable, complex causes and cannot be reduced to a simple duality of good and evil on which human rights activism is based. There will be controversial debates within the human rights movement as to whether we are succumbing to the government agenda, and we must recognize that we will be vulnerable to manipulation by governments.

Moreover we must ensure that there is a framework for transnational accountability of corporate and financial actors. Globalization affects human rights transnationally and may need to address transnational responsibilities. Otherwise how do we handle the denial of economic, social, and cultural rights arising from external debt or structural adjustment or international trade agreements? The approach to accountability is voluntary, but there are limits to voluntary schemes and resistance to legally binding ones. Companies and IFIs in a globalized economy wield huge responsibility, and we must not allow an accountability gap to open. The UN Norms for Business provide an opportunity to gradually build a framework of human rights standards for companies.

Finally, we must be aware that in the vacuum of sovereignty, traditional or religious authorities are stepping in or emerging as powerful actors, leading sometimes to a state within a state: clan leaders in Somalia, Moqtada al-Sadr types in Iraq, or warlords in Afghanistan. Again, we need to be mindful of the state's role.

On approaches, we must review the tools and methods of our work. New actors and issues demand new approaches. For instance, in the context of terrorism, how do we influence their behavior? Naming and shaming is unlikely to work. We need to investigate and expose those who fund the terrorist groups and bring pressure to bear on them. We need to reach out to communities where the terrorists find their support. Hopefully, through this more comprehensive approach, we can mobilize better grass roots support for our work to preserve human rights while promoting security.

When it comes to economic, social, and cultural rights, we will need a new approach analyzing the progressive fulfillment of these rights. Again, naming and shaming may be less effective than, for instance, mass mobilization, engaging in litigation, pressing for broad national plans, and providing technical assistance. Rescuing individuals is not enough. We are talking about changing systems. Women's rights bring a new dimension. Not just private and public but also economic and political arrangements cannot be left unchallenged. The real issue with women's rights is a question of power.

Another aspect of new approaches of work is that, as more and more governments and societies accept the concept of human rights, naming and shaming become less useful. The approach towards the Turkish government that is keen to deliver human rights in anticipation of its admission to the EU must be quite different from the approach to the Sudanese government that is in denial of its human rights violations. As human rights NGOs, we will increasingly find ourselves having to use a range of approaches and tools, sometimes working within the system, sometimes outside.

Thirdly, on alliances, NGOs are also changing. With the growth of different layers, there are NGOs that work at different levels, locally and globally, as well as those that work internationally but not necessarily globally. What is the role of global solidarity when most human rights abuses are local? How do we promote the notion that human rights abuse anywhere is the concern of people everywhere without creating a culture of imperialist advocacy? The key here is to build capacity of local NGOs and empower and maximize the synergy, based on partnerships and coalitions, between the local and global.

The future of NGOs is not only institutions but networks. For example, Amnesty International's Stop Violence Against Women campaign is genuinely global, involving both the North and South, and involves working on one's own country and others and working with women's NGOs. It has led to change within AI as well.

With regard to the accountability and legitimacy of NGOs themselves, we recognize that responsibility and accountability comes with power. Under increased scrutiny, we must apply to ourselves the same as we expect from others. For AI, which is a democratic movement, internal accountability is strong although tensions between staff and volunteers always exist. However, for us, the challenge is external accountability. There are two theories of accountability. First, there is performance accountability. We will be judged by our results. But how good are advocacy NGOs at evaluation? Second is voice accountability. Whom do we represent? The middle-class human rights elite or a broader constituency? This is why our Stop Violence Against Women campaign is also accompanied by an internal accountability plan. There are several layers of accountability: to members and supporters, to donors, to those who suffer human rights violations, and to other human rights organizations. It is an evolving area and one that will grow, given NGO Watch and the neo-right pressure of NGOs.

At Harvard Law School, the tendency is to talk about human rights as law. But in practice, human rights are also about voice—not text. It is about the lived experience; it is about galvanizing peoples' imagination and energy. It is about putting morals over law; it is about values over systems. Most importantly it is about people—the people who care, who are passionate, angry, and optimistic. We are subversives to governments that fear human rights. But to people who are struggling to win those rights, as Peter Rosenblum the eternal optimist said, we are "hope mongers."

To close, I recall the story of the Israeli man who lost a family member in a bombing and said, "I could have made my grief a tool for revenge, but I decided to make it a platform for change." And he founded the forum for bereaved families. "It is better to light a candle than curse the darkness."

Navi Pillay
Judge, International Criminal Court

A basic human right is the right to justice. I will speak on the subject of international criminal justice from the perspective of an insider, that is, as trial judge for eight-and-a-half years and president for four years of the International Criminal Tribunal for Rwanda (ICTR) and now as judge of the International Criminal Court (ICC).

At the outset, it must be acknowledged that international justice entails a multi-faceted approach. In fostering democratic governance and promoting access to justice and human rights, we must recognize the critical link between the rule of law and poverty-eradication, human rights, and sustainable development. As emphasized in the report of the UN Secretary General:

Any effective and sustainable justice reform program must be comprehensive and integrated and at the same time driven by the needs and capacities of national stakeholders and their meaningful participation including justice sector officials, civil society, traditional leaders, women and minorities.[1]

The report is an outcome of the heightened awareness in policy and human rights circles of the importance of establishing the rule of law in securing international peace and stability. Establishing equitable justice and respect for human rights is pivotal to peace-building and reconstruction in the aftermath of conflict. An end to impunity by holding those accountable for serious crimes against humanity is a critical component of equitable justice as failure to address impunity jeopardizes the prospects of achieving sustainable peace and development and increases the risk of a resurgence of violent conflict. Such failure undermines respect for the rule of law and the entire criminal justice system.

In my lifetime, the world of international relations has changed radically. Public and private international law as I and those of my generation knew it has acquired new labels: international criminal law, international humanitarian law, and international human rights law. It will not surprise anyone that they have a great deal in common, that is,

[1] Report of the Secretary General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," UN S/2004/616, August 3, 2004.

universal principles recognizable by anyone exercising reason. When great conflicts fought by societies ruled by a system of law have ended, recourse to the apparatus of law to judge the conduct of defeated leaders has been tempting. Reaching its apotheosis at Nuremberg and Tokyo in 1945, judicial power backed by punishment was exercised for the first time on behalf of the international community. International criminal justice lay dormant for the next half-century until the UN created the *ad hoc* tribunals for the former Yugoslavia in 1993 and the ICTR in 1994. These were followed, in 2002, by the establishment of the ICC for the prosecution of genocide, crimes against humanity, and other serious violations of international humanitarian law.

It would be true to say that the last ten years have seen more rapid growth in the international rule of law than at any time since the inception of the Nuremberg Tribunal. Some might say that the pace mirrors the same slow development of common law itself within national boundaries. International law increasingly plays a role in shaping state policy and domestic law in advancing protection of human rights. If we add the growth of international criminal law and its emphasis on the criminal responsibility of the individual to this trend, the picture is clear. The role of the individual as a subject and object of international law is unassailable. Serious crimes have been brought within the reach of international law along with an acceptance of the notion that individual accountability is integral to the maintenance of international peace. In the last few years, the effectiveness and utility of the tribunals for the former Yugoslavia and Rwanda as well as the hybrid courts for East Timor, Kosovo, and Sierra Leone have come under critical scrutiny, particularly in the context of ongoing armed conflicts, wars, and terrorist attacks.

The role of the tribunals as credible, efficient mechanisms for dispensing justice in post-conflict societies and aiding reconciliation has been questioned in light of their excessive cost, long delays, and small dockets. Showing symptoms of tribunal fatigue, some states want to abandon international criminal justice altogether. As judges, we do not use the public domain to ventilate our expectations; however, judges' concerns and their requests for intervention have

been well-documented in the annual reports submitted to the UN Security Council and General Assembly by the tribunal presidents.

The court transcripts are also a record of the difficulties experienced by the defendants, defense, prosecution, and witnesses: lack of administrative support and resources, bureaucratic and logistical impediments to holding trials expeditiously in remote areas, and partial, inconsistent state cooperation. These documents are a public record of how things could have been done differently. An obvious concern expressed by judges was the possible violation of the rights of defendants held in detention over lengthy periods without the prospect of their trial commencing within a reasonable time.

I echo what Justice Jackson of the Nuremberg Court said when he acknowledged, at the conclusion of the Nuremberg Trial, that "Many mistakes have been made and many inadequacies must be confessed [but I am] consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future."[2] Let me take the opportunity to highlight some of these concerns.

First, the *ad hoc* tribunals were unwieldy bureaucratic structures comprising three independent organs. The registrar was in charge of administrative and financial matters and was accountable to the UN Secretary General, not to the tribunal's president. The procedures followed by the Registry were faithful to UN practice but were not adapted for law courts or to facilitate fair and expeditious trials. The independent functioning of the Office of the Prosecutor to investigate cases and recruit staff was hampered by the Registry's control over allocation of resources and personnel. The notion of the independence of judges and prosecutor also did not sit well. All three ICTY prosecutors—Richard Goldstone, Louise Arbour, and Carla Del Ponte—were discouraged from indicting Karadzic, Mladic, and Milosevic by certain member states that were holding peace talks with these individuals. This failing was tacitly recognized in the ICC's structure, which is not a UN organ, but falls under the supervision of the Assembly of State Parties. Article 42 of the Rome Statute establishes the prosecutor's independence as a separate organ of the

[2] Report of Robert H. Jackson, US Representative to the International Conference on Military Trials, London 1945, p. 440.

court with full authority over management and administration of his office. Article 43 provides for the Registry to carry out the non-judicial aspects of the administration and servicing of the court and stipulates that the registrar shall exercise the functions under the tribunal president's authority.

Second, there was little or no planning and backup for the physical establishment of the *ad hocs*. The acquisition of premises and host agreements were negotiated long after the judges were elected. The first courtroom was only ready two years after the tribunals were established. The ICTY began its first trial three years after its creation. Judge Cassese, the first ICTY president, told me that he had to get on his bicycle and scout around the Netherlands in search of a suitable detention facility. A change of prosecutor also delayed the start of investigations at the ICTY for at least eight months. In the ICTR, the judges were not put in office for an entire year after their election by the UN General Assembly, and, at one stage, as a consequence of the US withholding contributions, there was a freeze on funds to the detriment of the tribunals. In November 1995, I confirmed the first indictment in a hotel room using a borrowed typewriter, since premises for the court had yet to be negotiated.

Another example of insufficient independence concerns the Rwandan authorities' objections to the appointment of Louise Arbour as prosecutor. She was denied entry into Rwanda. Until the impasse was resolved, investigations stalled. Trials often came to a standstill when the government called a boycott of the ICTR and refused to allow witnesses to travel to the court or obstructed the prosecutor's access to sites. This was done when the prosecutor began to investigate the involvement of the pro-RPF government in the genocide. The fact that cooperation agreements had not been entered into between the UN, Rwanda, and neighboring states worked to the disadvantage of the prosecutor.

With more foresight, the ICC set up an advance task force, six months prior to the election of the judges, to get the court ready. Premises, facilities, resources, and necessary policies and relationship agreements were planned ahead. Only recently, the ICC signed Memorandums of Understanding on Privileges and Immunities with

Uganda and the Democratic Republic of Congo that will enable the prosecutor to conduct unimpeded investigations inside those countries. The three organs of the ICC, that is, the chambers, prosecutor, and registry, cooperate as one tribunal. With flexibility over practices and procedures, and under judicial supervision, the work of the court has proceeded smoothly and efficiently so far.

Third, the tribunals have proved to be very costly, prompting some states to call for their closure. Of course, this begs the question as to why the costs had not been anticipated and appropriated. The expenses are indeed high. At the rate of $100 million per annum for each tribunal, the cost amounts to 10 percent of the entire UN budget, which is not seen as justified by the small number of cases completed. However, it must be noted that the cost of justice is much cheaper than war. The point was made by Jordan's ambassador to the Security Council who is also president of the Assembly of State Parties. "With an international community prepared to spend almost one trillion US dollars a year on weapons—that historic companion to war—how can we say that anything we have spent thus far on justice, the surest companion of peace, is too expensive?" he asked, pointing out that the amount spent annually to prosecute those responsible for war crimes in former Yugoslavia is less than one-twentieth of what the UN paid annually during the war for peacekeeping.[3]

Fourth, the remoteness of the seat of the courts to the crime scenes not only deprived victims of access to the trials but placed considerable additional burdens and cost on investigations, arrests, and transfers, and travel of witnesses, counsel, and staff. The ICTR was further challenged by its situation in the hardship region of Arusha, Tanzania.

Let me briefly describe the conditions we worked under. Imagine how you would have functioned under similar circumstances. In the first months, we did not have a bank account and were paid in bank notes flown in from Nairobi. There were frequent water shortages and power fluctuations, a single telephone line, only very basic food and

[3] Prince Zeid Al Hussein quoted in Edith M. Lederer, "Security Council Told to Stop Complaining About High Cost of War Crimes Tribunals," Associated Press, October 7, 2004.

health supplies. We lost many staff to malaria, typhoid, and road accidents on the unlit dirt roads. Unlike in The Hague, a detention center had to be constructed before detainees could be received, and a conference building was revamped for court premises. I was once quoted in the local press as having to read briefs by candle light. On one occasion, I complained to a judge about having to take cold showers for an entire week because we lacked heating. He replied, "You have water. I haven't had water for a whole week."

All the windows in our offices and the courtrooms were removed and replaced by brick walls, apparently out of security concerns. But apart from a tiny vent, no provision was made for fresh air or air-conditioning. We judges wrote three unanswered letters to then-Secretary General Boutros Boutros Ghali asking "Please, may we have windows?" It was not until our fifth year at the tribunal that the windows were finally replaced.

The ICTR's slow progress and small number of cases completed made press without reference to these realities. Six judges, sitting three to a chamber and hearing one case each, extending on average for one year, cannot hope to cope with the cases of more than 50 persons awaiting trials. The number of judges was increased to nine in the second year and proved woefully inadequate. The ICTY successfully requested *ad litem* judges and the new complement of 18 judges enabled them to finish more cases. A similar request made shortly thereafter by me, as president of the ICTR, to the Security Council, but was not placed on the agenda for 18 months, when nine *ad litem* judges came on board and the pace of trials improved.

The ICC begins its work with 18 judges and will thus hopefully circumvent the unworkable situation in which the ICTR found itself. While there is no question that the *ad hoc* tribunals have both been slow and expensive, it is also widely acknowledged that they improved over time as systems developed. Each of the tribunals is beginning to find its stride now, just in time for the completion strategy. This is inherently inefficient, and this inefficiency is addressed by the creation of the permanent ICC. The rejection of the ICC by certain governments has resulted in the creation of at least one *ad hoc* tribunal to try a former head of state. That is not efficient.

The ICC is a wholesale improvement in the administration of international justice. It is incorrect to say that the ICC judges are unaccountable.[4] The judges are bound by the Rome Statute and Rules and under Articles 46 and 47 are accountable to the Assembly of State parties, which has the statutory power to discipline judges including removal from office. The Rome Statute's preamble makes clear that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes. The court does not have universal jurisdiction. The court will only act when states are unwilling or unable to bring transgressors to justice; this principle is known as complementarity. States retain the primary role in punishing even the crimes over which the court has jurisdiction. Described as most serious, they are genocide, crimes against humanity, and war crimes.

In an ideal world, all states would include the ICC crimes in their domestic laws and subsequently investigate and prosecute these crimes. Indeed, a benefit of the ICC's creation, even before the beginning of its operations, has been the reinforcement by a number of states of their domestic legislation. If all national systems had appropriate legislation prohibiting the crimes within the ICC's jurisdiction and acted to enforce these laws, the ICC would never need to hear a single case. As the Chief Justice of the Philippines stated:

> We should have all learned the lessons by now that when we refuse to abide by a legal order, we make ourselves vulnerable to the onslaught of lawlessness and stand unprotected to bear the brunt of its devastating winds. . . . The surest guarantee that our soldiers and men are not indicted before the court is not to refuse to recognize its jurisdiction but to see to it that our soldiers and men always act above suspicion in full and unqualified compliance with Law's demands.[5]

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[4] During the presidential debate of September 30, 2004, US President George W. Bush stated that he was opposed to US diplomats and troops being tried before the ICC as the judges were foreign and unaccountable.

[5] Philippine Chief Justice Hilario Davide, junior, speaking at the Seventh International Conference on Human Rights, at Pasig City, Manila, Philippines, October 11, 2004.

During the negotiations leading to the Rome Statute, one concern was that the court could be "politicized." But there is a high threshold before crimes can be brought before the ICC, including the gravity of the offence, that is, the most serious crimes of international concern[6], and meeting the criteria of the specified contextual elements. The court's jurisdiction over persons is limited to nationals of a state that has ratified the statute or in whose territory the crime occurred.

Many safeguards are built into the statute against abuse. The prosecutor is subject to checks and balances. The pre-trial chamber must be approached for authorization to begin investigations *proprio motu*. State parties and states that would normally exercise jurisdiction over the crimes concerned have a right to be notified once the prosecutor initiates an investigation. States can also be heard before the pre-trial, trial, and appeal chambers. Therefore we can say with confidence that the Rome Statute does not allow the court to proceed on the basis of spurious, politicized charges. The court's proceedings are grounded on the principles of independence, impartiality, and fairness.

It follows from the characterization "most serious crimes" that the intention is to investigate those most responsible. "Who gets charged?" is a question that arises out of the experience of the *ad hoc* tribunals. The first judgments of each tribunal were directed at Dusko Tadic, a low-level camp guard, and Jean Paul Akayesu, mayor of a small Rwandan town called Taba. Do these individuals really represent the type of defendant who should be tried by an international tribunal? Nuremberg was a trial of the top brass—the military, political, and other leaders. There were no defendants comparable to Tadic and Akayesu. How did it happen that the international tribunals became the forum for the trials of what the press calls "small fish?"

Well, the court was set up, the judges were in place, and there was a huge public expectation of imminent action, just as now the question addressed most frequently to the ICC is "When will you hear the first case?" This was not a framework conducive to strategic planning by the prosecution. Richard Goldstone, who took up appointment as

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[6] Article 1 of the Rome Statute.

prosecutor in August 1994, was told in the UN that the budget for the ICTY would not be approved unless he produced an indictment by November 1994.

In principle, the time and expense of international criminal justice, which is inherently more costly than the administration of justice at a national level, is only justified in cases where it is needed. These would be top-level cases—heads of state, military generals, leaders of political parties, and others who acted on a national scale in their countries. These are people who cannot so easily be tried in a national jurisdiction. It may be harder to guarantee security, and there is a risk of public perception that such trials represent victor's justice. Moreover, it may also facilitate the process of reconciliation to have an independent, external court that is removed from national political influences hold national leaders accountable.

The *ad hoc* tribunals were set up with the goal of achieving peace and reconciliation in the Balkans and Rwanda. There is little support for the notion that the tribunals alone can bring this. What was wanting is the provision of compensation for victims. Justice is not only about punishing perpetrators but also about restoring victims' dignity. Rwandans called a boycott of the tribunal, giving the injustice of no compensation for victims as one of their reasons. They were particularly aggrieved that the tribunal was providing HIV anti-retro viral medication to detainees whereas victims of sexual crimes during the genocide had none.

The Secretary General's report on the rule of law states that both the demands of justice and the dictates of peace require that something must be done to compensate victims. It acknowledges that the ICTY and ICTR judges have realized this and have suggested that the UN consider creating a special mechanism for reparations that would function alongside the tribunals.[7] Whatever discomfort we felt working at the ICTR, some of which I alluded to earlier, pales into insignificance in comparison with the massive scale of loss and suffering endured by Rwandans. Still they came forward with great

[7] See S/2000/1063 and S/2000/1198, letters addressed to the Security Council by Judge Pillay, President of ICTR and Judge Jorda, President of ICTY.

courage to testify in the hope that they would see justice being done. They are justifiably angry with the deep injustice done to them. Proper care and respect for victims has been built into the ICC statute by specific provision of reparation for victims. The court is authorized to order reparation, including restitution, compensation and rehabilitation. A trust fund has been established for the benefit of victims. The rules further provide for protective measures for victims and witnesses and for their direct representation before the court.[8]

I wish to stress that the tribunals succeeded against all expectations to hold key perpetrators to account. The tribunals' success must be measured not by short-term frustrations but by the historical importance of the body of jurisprudence they created that will be developed by all courts, national and international. The tribunals are credited with providing the "single greatest impetus in the development of international humanitarian law concerning rape and sexual violence."[9]

The ICTR delivered the very first conviction of the crime of genocide under international law[10] in the case of Jean Paul Akayesu. The case was remarkable because of its explicit inclusion of rape as an instrument of genocide, finding that rape and sexual violence constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular targeted group. It described rape and sexual violence as some of the worst ways of inflicting harm on the victim since it inflicted both bodily and mental harm.

The court also extended the definition of rape as torture. Acknowledging that there was no accepted definition of rape in international law, the judgment included a definition of rape:

> The chamber defines rape as the physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered

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[8] Articles 75, 79, and 85; rules 87–98.

[9] Mark Ellis, executive director, International Bar Association, United Nations Conference on Gender Justice, September 16, 2004.

[10] *Prosecutor vs. Jean Paul Akayesu*, ICTR-96-4-T, September 1998.

to be any act of a sexual nature which is committed on a person under circumstances that are coercive.[11]

This contextual, gender-neutral definition is expected to have significant impact on the treatment of rape in armed conflict. It has been incorporated, in part, in the Rome Statute. My hope is that these advances in gender justice will promote greater attention to crimes against women in national jurisdictions. Violence against women has not been adequately recognized as a human rights violation and incorporated in the work of the international human rights movement.

The ICTR also delivered the world's first conviction and sentence of life imprisonment of a head of government for the crimes of genocide and crimes against humanity in the case of Jean Kambanda, prime minister in Rwanda's interim government. It is an important departure from the immunity that normally shields political leaders from prosecution.[12]

In a decision delivered on December 3, 2003, in which I also participated,[13] called the "media case," the owner and editor of the newspaper, *Kangura*, and the founders and directors of the RTLM radio were convicted of genocide and other crimes for publishing incendiary propaganda with the intention of committing genocide against the Tutsi ethnic group. The court stated that the case raises important principles concerning the role of the media, which have not been addressed at the level of international criminal justice since Nuremberg. The power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for its consequences. RTLM was a private radio station in which President Habyarimana was the major shareholder. Many RTLM broadcasts are excerpted in the judgment. In one such broadcast, aired on June 4, 1994, during the genocide, the radio told listeners:

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[11] Ibid, paragraph 38.

[12] *Prosecutor vs. Jean Kambanda*, ICTR-97-23-DP.

[13] *Prosecutor vs. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, ICTR-99-52-T.

> We should all stand up so that we kill the *Inkotanyi* [the Tutsi] and exterminate them. . . . [T]he reason we will exterminate them is that they belong to one ethnic group. Look at the person's height and his physical appearance. Just look at his small nose and then break it.[14]

Articles in *Kangura* conveyed contempt and hatred for the Tutsi ethnic group and for Tutsi women in particular as enemy agents. The court noted:

> . . . [It] has been argued by defense counsel that United States law, as the most speech-protective, should be used as a standard, to ensure the universal acceptance and legitimacy of the Tribunal's jurisprudence. The chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards. The chamber notes that the jurisprudence of the United States also accepts the fundamental principles set forth in international law and has recognized in its domestic law that incitement to violence, threats, libel, false advertising, obscenity, and child pornography are among those forms of expression that fall outside the scope of freedom of speech.[15]

The case sends a strong message that the independent media has the responsibility to maintain a critical distance from propaganda that incites violence and hatred such as threats of terrorists and that with particular reference to my continent, the independent media should not allow itself to become the tool of bad governments.

The tribunals have helped to bring justice to victims, end impunity, and develop the jurisprudence of international criminal law as precedent for the world's first permanent international criminal court. The ICC must have the cooperation and support of states and

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[14] Ibid, paragraph 27.
[15] Ibid, paragraph 90.

other international institutions to continue to ensure that the rule of law prevails over the rule of force.

COMMENTATORS

Pascal Kambale

I will offer a few comments on an issue which Judge Pillay raised, that of the contrast between the rapid growth of international criminal law and to the slow development of domestic criminal law in certain nations. The danger of such a gap is obvious, for example in the prosecution of Chad's former dictator, Hissène Habré, in Senegal. One major reason why Habré's indictment was eventually thrown out by the investigative magistrate was because the case was entirely based on recent international criminal justice jurisprudence. We argued the Habré case before a Senegalese court; Senegal's domestic law had not yet incorporated these developments.

My experience in this prosecution left me frustrated and angry. Yet I learned an important lesson: developments in international criminal justice will be meaningless unless national and local communities "domesticate" this jurisprudence, that is, legitimize these developments. National communities—including judges, courts, lawyers, journalists, and civil society—affected by crimes being tried before international fora must understand or at least accept these international norms and institutions and take ownership of them.

In early 2001, Human Rights Watch, together with national and international organizations, embarked on a vast campaign to ratify and implement the Rome Statute. An important component of the campaign was to build a "domestication" process. This unprecedented process has resulted in specific legislation pending (or soon to be) before parliament in countries such as Benin, Burkina Faso, the Democratic Republic of Congo (DRC), Mali, Niger, and Senegal.

The importance of domestication of the ICC can be seen in the difference in public perception of the court between Uganda and DRC where the ICC prosecutor opened his first investigations. The announcement, in January 2005, that the Ugandan President Museveni had referred the 17-year-old conflict in northern Uganda to the ICC

took the world by surprise. By the time of the referral, discussion in Uganda focused on the means to end the war, with some, including President Museveni, advocating a military solution, while others, particularly in northern Uganda, were pleading for a political one. Bringing the rebels to justice was far from the central concern. As a consequence, the ICC was greeted with deep suspicion and sometimes with overt hostility. Even some strong advocates for justice found themselves denouncing the ICC investigation as undermining the peace process and the popularly supported amnesty law.

On the other hand, in the DRC, when President Kabila referred a situation to the ICC in March 2005, one local newspaper in Kinshasa ran the headline "Finally the ICC is officially invited." Some in the Congolese human rights community wondered why it had taken so long to invite the ICC as various civil society groups in the DRC had long been focused on accountability and bringing people to justice through the ICC even before the Rome statue entered into force. Prior to ratification, the Minister of Justice convened a three-day seminar in Kinshasa on the ratification and implementation of the Rome Statute. There, judges, law professors, lawyers, and human rights activists discussed how the Congolese Penal Code and Code of Penal Procedure would have to be amended to comply with international criminal justice norms. When the DRC ratified the statue in 2002, it was widely expected that the next step would be to send the case to the ICC. As a result of this preparation, unlike in Uganda, the ICC is part of the national legal context.

Peter Rosenblum

Pascal Kambale's comments on what international justice can mean, and should not mean, as applied to different country contexts demonstrates how political and strategic choices are essential to the question of whether the International Criminal Court succeeds or goes down in history as one of those great moments in folly of the international community.

I consider myself to be a qualified optimist, qualified because I think serious problems and question remain. But optimistic because the story of human rights generally has been a story of progress,

embedded in the context of contradictions and gaps and often hypocrisy, with countries joining together to make grand declarations and treaties that they had no intention in implementing. Yet, we are here today speaking of a human rights movement that has grown and, in many ways, thrived despite these deep and longstanding contractions and hypocrisies. It is worth recalling that in the United States, five percent of males are estimated to have participated in the ratification process of the Constitution—a Constitution adopted during slavery and other institutions of exclusion that, even to this day, have not been fully removed. To recognize that there are hypocrisies does not, however, undermine the ultimate project.

The *ad hoc* tribunals themselves were a product of grand hypocrisies. We know that there were attacks from both the left and the right—that the tribunals were a matter of victor's justice, as in the case of the *ad hoc* tribunal for Rwanda, but more generally toward international justice dating back to Nuremberg. If not victor's justice, the criticism was that the tribunals were a top-down notion of Northern justice imposed on countries in the South. Another criticism was that the *ad hoc* tribunals represented a fig leaf to cover the international community's ineffectual interventions, and more robust interventions could have prevented harm in the first place. As Judge Pillay noted, the initial prosecutions by the *ad hoc* tribunals focused on minor figures, seemingly incidental to these horrible crimes for which the tribunals had been created. We are also familiar with the attack from the right—that the tribunals lack accountability, that they claim to represent a notion of an international community based on some idea of democracy, though skewed by particular NGOs and particular countries, to the detriment of other countries.

At this moment, the ICC is acting in a context where a number of countries do not support it. The United States, as well, overtly acts to undermine it at every opportunity. There is serious reason to believe that the United States can succeed in that effort. But at the same time, let us recall that the efforts to build international justice came at a time when it was perceived to be an idea, a march that could not be stopped. Along with the momentum to establish the *ad hoc* international tribunals came a whole raft of initiatives concerning

domestic criminal justice that have led us to believe that accountability could triumph. We saw the victories in terms of the Pinochet doctrine. We saw victories in the use of universal jurisdiction. We saw major triumphs such as the Israeli Supreme Court finally taking on the issue of torture in its own community. We saw the changes in South Africa and accountability on the march. For a moment there was a hiccup in the case of Sierra Leone, where the world community, the international community, and the UN seemed willing to sacrifice accountability for the sake of peace. And then we saw that process dissolve, and we saw it overwhelmed, suggesting that there would be accountability, that things would move forward.

But much of that progressive momentum has actually stopped. The United States has successfully impeded the march of universal jurisdiction. The Belgian court, which was engaged in the process of prosecutions around the world, is no longer very active. The international community no longer has the will to engage in creative gestures like the mixed Sierra Leone tribunal. This is so in the case of Congo, where there was a call for international justice and a criminal court. There was a long time when it was difficult to explain to the Congolese or even to ourselves why the UN would not come forward with an *ad hoc* tribunal for the Congo. There was no means to go beyond the limited capacities of the ICC. So all hope is now in the ICC, and all of our efforts lie there.

Luis Moreno Ocampo, the ICC's chief prosecutor, knows that his every step is scrutinized and attacked from all sides. The choices to go into the Congo or into Uganda were choices made under extreme political pressure. Ocampo fears he would be caught, as Carla Del Ponte was in Rwanda, seeking to prosecute those that the state would not allow to be prosecuted. He fears he would be thwarted by the United States, which is undermining his efforts, because he could not get a deal in the Congo allowing the UN to protect its own staff on the ground.

As a result of having to make compromises to enable Ocampo to move the investigations and prosecutions forward politically, we have these situations. In Uganda, it looks like he's going to back one side as opposed to the other, a stance that the NGOs and the community

itself don't back. In the Congo, Ocampo is being watched by all parties to the peace accord who have told him "Don't do anything that upsets this fragile peace accord." And this severely circumscribes his ability to prosecute those who are high in the chain of command. The United States is very cagey, even in the case of the Congo, where it has no dog in the fight, and may undermine any ICC prosecution because it doesn't want the court to succeed.

These are all reasons that we should be skeptical and concerned and remember that progress can be reversed. The notion of accountability, especially given the lack of a massive multilateral force that is able to intervene when crises arrive, means that international criminal justice will always be, to some degree, a fig leaf.

QUESTIONS FROM THE AUDIENCE

Kieran McEvoy

My question to Judge Pillay refers to the philosophy of sentencing in international justice. In much of the literature about international justice, advocates stress the deterrent capacity for sentencing. Now there's a lively debate within national jurisdictions about the efficacy of deterrence, for example, centering on the death penalty in the United States. Given what we know about the complicated reasons for genocide, I'd be interested in your reflection on the deterrent capacity or otherwise of sentencing under international criminal justice.

Navi Pillay

In fact, the maximum penalty in the ICTR is life imprisonment. The Yugoslav tribunal started off with three to four years, and they have increased their penalty. When we sentenced John Kambanda, the prime minister, I was on that bench. He was a head of a government. He's already committed crimes. How will a sentence against him be a deterrent against heads of state? What about all the other criteria we usually apply in sentencing, such as rehabilitation? We didn't take the fact that he pleaded guilty into account. In that judgment, we said that we were taking all of those factors into account. We consider genocide so serious that we cannot sentence to less than life.

Nitmala Chandrahusen

I would like to ask Judge Pillay whether she would agree that the most important aspect of the international tribunals is the extension of the jurisdiction of international humanitarian law into internal conflicts and whether she would consider this an erosion of the concept of domestic sovereignty.

Navi Pillay

Even the notion of setting up an international tribunal is an invasion of national sovereignty. When the Security Council used Chapter VII, all states were obliged to comply with that resolution at the expense of their national sovereignty. With regard to the reach of international law within areas of internal conflict, I agree that that's new. But the Security Council had to find that there was a threat to international peace and order, and they found it in the fact that there was a spillover of refugees from Rwanda to other countries.

I am, of course, not sure how the Security Council will act to intervene in other areas of internal conflict if that component of threatening international peace is not established. As a judge working in that system, I agree with what the judges of both tribunals have said: crimes against humanity are crimes against people wherever they occur, and we shouldn't just limit protection to areas of external conflict.

Makau Mutua

My question is about the kind of optimism I hear in the presentations. Our tendency as human rights advocates and scholars is to over-promise and to over-congratulate ourselves with respect to some of these initiatives. What I see as a process of establishing universal jurisdiction, for example, appears to be more of a hoax and, at best, a promise that is very tenuous. The term "universal jurisdiction" suggests serious effort that's overwhelming and could transform the way we respond to mass atrocities and administer justice.

Yet we ought to be careful about using legal processes as a response to mass atrocities at the international level. I see no evidence whatsoever of the connection between the collapsed societies that

have been wracked by massive tragedies and the processes that are set in place in Rwanda or in Yugoslavia. I see no connection between those processes on an international level and the process of reconstruction in those countries. I don't see any effect whatsoever. The Rwandese fate is now being defined in a state that is bent on the exclusion of Hutus. It is now imposing Tutsi supremacy over the Hutu, who are the majority. The Tutsis have refused to accept democratic elections and only had a sham election. For all practical purposes, what is going to happen in Rwanda is another genocide.

The same could be said for Yugoslavia. I see no particular organic connection between the ICTY and what is happening in the former Yugoslavia. The ICC itself is a more tenuous proposition in terms of exerting its influence on domestic processes. Apart from just assuaging our consciences, as human rights activists, by talking about these legal processes, I would like to hear some commentary about this disconnection.

Peter Rosenblum

It's always a pleasure to hear Makau Mutua speak from the dark side of my own brain. The success or failure of the Rwanda tribunal will not be measured by events in Rwanda. It may equally be measured by events in Ecuador, Equatorial Guinea, or the United States. Whether we measure the impact of these tribunals on what happens inside the particular country seems disproportionate to what the tribunals are able to achieve. Was Nuremberg about Germany or was Nuremberg about constructing an international morality around the concept of "never again?" Was it about how your children are raised, and my children, and the children in communities around the world who think about what it means to commit genocide or wars of aggression?

I would say yes. Now that doesn't answer the question because what is occurring in Rwanda is a tragedy. Nevertheless what's come out of the tribunal and what the tribunal has achieved is quite powerful. The ICTR achieved the arrests and conviction of major figures in the genocide. It achieved innovative jurisprudence on rape and wartime violence against women linked to genocide. Let's remember that many scholars say that Nuremberg's impact was felt

when the Germans started their own prosecutions inside Germany. Will that happen in Rwanda in an honest and sincere way? We can all be pessimistic at this in view of what's happening in Rwanda.

I like to think of the story of international justice as a shell game, one that I'm participating in fully. We are hope mongers, we human rights people, we want to create a sense of optimism and belief that there is reason to engage in these processes, but we want to do it when there's just enough going on in the world to sustain that element of hope. We can't help it. We all looked to what happened in South Africa as a story that inspires us and others. It creates hope, and we hope that will be the impetus for taking action.

When the prosecution of Hissène Habré was going on (before the Senegalese put a stop to that effort), I was traveling in Cameroon, listening to a radio broadcast out of Gabon, and the subject was "Who's next?" "Who's next, who's accountable, and how are we going to hold them accountable, and how do we move forward?" And if it can be Habré, if it can be a leader in Africa prosecuted in Africa, then everybody potentially is next. So let's consider that this is a shell game. Let's consider when it's reasonable and when hopes outride reasonable expectations, and it becomes an act of folly. I don't think we've gotten to that point.

Pascal Kambale

When I left Dakar after the case against Habré was thrown out, I was so frustrated and angry. I didn't want to be involved in any other international justice projects. Then I went to my home town in the Bukavu region of eastern Congo. Bukavu is one of the areas where conflict and war has been so devastating. While I was getting out of class at the local university, I was approached by an old woman whom I didn't know. She told me that she was the widow of a local politician who was killed by one of the local rebel leaders just a few months ago. And she said "My daughter told me that the Pascal Kambale whom we used to hear on radio from Dakar is in town, and I came to you." She had a very thick dossier, and she said "I came to you because I want you to bring the case of my late husband to international justice." This occurred in Butembu, a very remote village in eastern Congo, and so I

decided that maybe the whole venture of international tribunals was worth it. As Peter Rosenblum said, the failure of the tribunals of Senegal or the ICTR should be also measured beyond the immediate country boundaries. I, too, am a qualified optimist.

PANELS

The six panels that follow address some of the important issues now facing the human rights movement. Unlike the preceding sections, the texts below are not faithful to the transcript but consist of summaries of remarks prepared by the HRP staff and approved by each panelist. Biographical information about each panelist appears in the Annex.

The Effects of 9/11 on the UN Charter, Laws of War, and Human Rights

Analysis and proposals for change within the broad framework of the humanitarian laws of war and norms on resort to violence, including relationships between national security concerns and human rights

Mohammad-Mahmoud Ould Mohamedou

The panel's objectives are to examine the post-9/11 environment and explore current and proposed responses from a human rights perspective. Three concerns that have human rights implications set the stage for these papers.

First, there is a concern about the legal definition of terrorism and the definition and application of policies to suppress it (counter-terrorism). Specifically, the misuse of legal terms and political leaders' use of polarized and imprecise rhetoric creates a political environment in which certain groups of people (notably prisoners, religious and ethnic minorities, migrants, and dissidents) are vulnerable to repression and violation of their rights. Second, there is a concern that approaches to solving international problems based on the rule of law are giving way to approaches that are security-driven, which will increasingly marginalize human rights values that rely on responsible use of procedures and respect for law for effectiveness. Third, there is a concern that recourse to military solutions, as the first rather than last response to political violence, will create new risks of conflict in many parts of the world and will not deal effectively with international terrorism. Military responses tend to envenom disputes and rarely

resolve them in the absence of political initiatives that tackle the causes of alienation and violence.

Terrorism creates three problems: the political problem; the potential subjectivity problem (the statement that "your terrorist is my freedom fighter" is a very real issue); and the accountability problem (states that have signed on to international human rights agreements have a duty to respect and uphold those agreements and are accountable if they do not).

There is an overarching question to be considered: Is 9/11 a new paradigm? How should the attacks on September 11 be characterized? Did they differ from previous terrorist attacks and did this justify the scale of the United States' response. The attacks were made without warning, they were indiscriminate, and they targeted civilians. On these grounds, the attacks were not distinguishable, except in scale, from other attacks associated with terrorism. As such, the conventional response would have been to treat them as criminal acts subject to the law and proper legal process.

This was not the United States government's response. The American authorities regarded the attacks as an act of war and declared that the government would take global action to defeat Al Qaeda and "every terrorist group of global reach." Under the United Nations Charter, in cases of self-defense, states are permitted to use force to defend their territory and citizens from attack, and the United States justified its actions on these grounds. Territorial aggression is the classical justification for self-defense. However, those who attacked the United States had no territorial ambitions.

Secondly, the self-defense justification assumes that both parties—the attacked and the attacker—are states. However, the military response in Afghanistan was not against another state but against an informal force present in the country. The Taliban government was attacked on the grounds that, by shielding Al Qaeda, it was complicit in Al Qaeda's acts of terrorism and thereby made itself an enemy of the United States. This represented a second departure from the classic understanding of self-defense. Thirdly, the self-defense justification was not confined to a specific enemy or specific territory. Although the initial intervention took place in

Afghanistan, in effect a new doctrine emerged, which asserts that all parties that support or harbor terrorists with ambitions to target United States property or citizens are enemies and subject to attack.

The "international campaign against terrorism"—which is open to criticism in terms of its legitimacy, proportionality, and duration—has led to a range of violations concerning:

- unfair trials and trials of civilians by military commissions;
- discrimination and racial profiling (Arabs and Muslims);
- illegal arrests and secret detentions;
- illegal extradition procedures and violations of the rights of asylum-seekers;
- denials of freedom of expression.

For human rights organizations, there are serious issues concerning the legal ambiguity of a campaign that has been described as a war, lacks a defined geographical scope or limit, has failed to define its enemy in a clear manner, and has refused to position the conflict in terms of human rights law or humanitarian law.

Eyal Benvenisti

This talk is meant to be provocative. It endeavors to explain and even support the so-called Bush Doctrine on preemptive self-defense from the perspective of human rights. The starting premise is that the September 11 attacks demonstrated that globalization means global risks. Certain risks are no longer local or regional but rather affect the international community as a collective entity. Terrorism is the prime example of these new global security risks—not terrorism aimed at a specific country such as Israel, Russia, India, or the Philippines, but a global phenomenon of terrorism that is directed against the public global order as we know it. The other global risks are environmental and health risks and humanitarian catastrophes such as genocide. Such risks are no longer deemed local events but events that have global impact and oblige the international community to react collectively.

The problem with the globalization of these risks is that they require a global response, which creates a collective action problem. In many situations, we do not have this collective response because nobody is willing to take responsibility (nobody is willing to share the

burden of providing the collective good of more security) such as providing more protection of minorities or minimizing health risks. A potential solution might be for the stronger parties within the collective that have the ability to provide the collective good unilaterally to do so for the entire community's benefit. However, this creates a phenomenon in which the relatively weaker actors free-ride on the abilities and capabilities of the stronger parties. Thus, the weak, in a way, exploit the strong.

The United States is the party that is able and willing to provide security globally. Therefore, other actors have no real interest to contribute. There are two reasons for this. First, they do not think they need to since the good is being provided by somebody else. Second, by not getting involved, they distinguish themselves from the United States and thereby deflect the terrorist activities that are now aimed to respond to the United States' action.

It is difficult for the US to elicit cooperation from other states in the security effort when those states can resort to international law to explain why they will not contribute. This is because, under this law, the US has no authority to act preemptively when it is not in a situation of self-defense from armed attack according to Article 51 of the UN Charter and when the Security Council did not act under Chapter VII to approve such an attack. Some countries do not want to contribute for valid reasons in that they disagree with the US regarding the appropriate policy against terrorism or they have a different assessment of the risk or of the ways to manage the risk.

The resulting challenge concerns shaping the global decision-making process when, on one hand, there is a tendency of the weaker parties to exploit the stronger, and on the other, real differences of risk-assessment and risk-management exist. The question is whether the law should remain as is, with its impediments to unilateral action, or whether the law should allow for more discretion, at least discretion of the permanent five members of the Security Council, to allow some room for proactive coercive action when necessary.

The Security Council's current equilibrium is an "equilibrium of inaction," based on the fact that majority support is required for the adoption of a new measure. We should consider the pros and cons of

moving to a different regime in which there is a process through which actors who wish to act against global threats have the opportunity to explain their motivation, to put forward the reasons for action and an opportunity for the Security Council to review such reasons, and to decide against them if it believes the need for that measure is not there. This approach is based on the concept of derogation in emergency situations in human rights law that gives countries the opportunity to derogate from their treaty obligations.

Sovereignty is not only a right but also a duty. If a state allows terrorists to use its resources to organize against others, the concept of sovereignty should be reevaluated. This derogation from sovereignty relates not only to terrorism but also to states that fail to protect minorities or fail, in the long run, to protect their own citizens from malnutrition and health risks. From a human rights perspective, when such a failed state exists, the idea of non-intervention should be considered and derogations allowed in extreme cases.

There should be a process of derogation from the general obligations to abstain from using preemptive force so the question of whether to use such force outside the confines of Article 51 can be debated before action is taken that gives the Security Council the possibility to veto the proposed use of force. Such a process can have unprecedented impact. This is a concept that changes the entire concept of international law and changes the meaning of sovereign equality, but perhaps the world is different and perhaps the law is now out of sync with reality. The Bush Doctrine, it must be emphasized, was not simply created by the current Bush administration. It has taken almost a decade for US administrations to comprehend the nature of the new threats and come up with the Bush Doctrine. Such a claim is supported by the 9/11 Commission report's description of the long chain of events leading to the invasion of Afghanistan. This analysis suggests that the Bush Doctrine will remain US policy in other administrations because it responds to a real threat in an effective way. We should take it seriously as an attempt to respond effectively not only to the threat of terrorism but also to threats of genocide and other catastrophes that are not regulated by a collective and therefore may requite unilateral action.

Kenneth Watkin[1]

Conflict at the dawn of the twenty-first century has been presented with a number of significant challenges including the breakdown of nation states and the emergence of transnational private actors capable of inflicting nuclear terror and computer network attack. These new security threats have strained the legal order that regulates armed conflict. One of the most important challenges in responding to these changes is the lack of dialogue between the human rights community and the humanitarian law community.

In *Just and Unjust Wars*, Michael Walzer noted that "lawyers have created a paper world which fails at crucial points to correspond to the world the rest of us live in."[2] We should, therefore, examine treaties and ascertain whether the existing treaty framework truly matches the type of conflict that the world presently faces. Many international humanitarian law (IHL) lawyers believe that IHL, namely the Geneva Conventions and the Additional Protocols, provide a comprehensive regime where there are no gaps in protection. This has included the view that the "categories" of participants in hostilities are limited to the "bright line" terminology of combatants and civilians. However, after an initial denial, acknowledgement that "unprivileged belligerents" and "unlawful combatants" also exist in customary law, if not treaty law, has increased.

This is an area of the law that has neither been resolved nor is as certain as some would like to think. During the 1907 Hague's warfare regulations, for example, the delegates did not actually agree on the definition of a lawful combatant. That was the genesis of the famous Martens clause that now has much broader applications.[3] One

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[1] The opinions expressed in this article are those of the author and do not necessarily reflect the views of the Government of Canada, the Canadian Forces, or the Office of the Judge Advocate General.

[2] Michael Walzer, *Just and Unjust Wars,* Basic Books; (January, 2000).

[3] The drafters of the 1907 Hague Land Warfare regulations could not agree on exactly who fit within the definition of combatant. The agreement to disagree was the basis for a statement by Martens setting out a general requirement to apply the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience.

commentator, J.M. Spaight, believed that the 1907 delegates "almost shirked their task." Yet is there a resolution to this ambiguity? Most legal commentators on the 1949 Geneva Conventions were of the view that Article 4 of the Geneva Convention III did not provide a realistic solution to that challenge. The lack of certainty in the law is reflected in the comments of Richard Baxter, a Harvard law professor and former International Court of Justice judge, who stated, in 1951, "as the current trend of the law of war appears to extend the protection of the prisoner of war status to an ever-increasing group, it is possible to envisage a day when the law will be so retailored as to place all belligerents, however garbed, in a protected status."

In IHL treaty law, there is a bright line distinction between combatant and civilian. However, some civilians, when taking a direct part in hostilities, become lawful targets and are referred to as unlawful combatants or unprivileged belligerents. The term "unprivileged belligerent" was introduced following the Second World War to address the fact that the Allies had encouraged resistance movements throughout Europe to attack the occupying power. Such activity was not considered illegal under international law although it could be contrary to the laws of the capturing state. A detained unprivileged belligerent could be prosecuted under domestic law and possibly receive the death penalty.

However, it is the dissatisfaction with this extension of combatant status and the suggestion in Additional Protocol I Article 44(4) that an "unprivileged belligerent" should be provided "protections equivalent in all respects to those accorded prisoners of war" that remains a significant impediment to its universal application as a treaty or its recognition as customary international law. Nearly 30 countries, including the United States, have not accepted the Additional Protocol I's provisions.

In contrast to the humanitarian law advocate view that there are no gaps in the law, some in the human rights community consider that prisoners taken during the post-9/11 conflict have entered legal black holes. No doubt some would argue that the apparent differences of view could be solved if the existing law of either normative framework was fully applied. However, the rhetoric is often expressed in absolute

terms seemingly leaving little room for applying existing law. While efforts such as the ICRC-sponsored customary law project and initiatives to develop soft law should result in pressure to apply IHL norms, the reality is that treaty law binding states offers the best means to ensure proper protection for detained "enemies" in times of emergency and conflict. However, there are significant challenges in seeking to change existing treaty law.

There are three possible impediments to change. The first is the myth that *jus ad bellum* and *jus in bello* are completely distinct from one another. While *jus in bello* should be separated from a number of *jus ad bellum* concepts, the difficulty is that the manner in which people are treated under humanitarian law is integrally tied up with a *jus ad bellum* principle of fighting for the "right authority." Ultimately, attempts to extend POW status to unprivileged belligerents will run up against significant resistance by states because of a concern it may legitimize the non-state actor. The answer may be similar to the approach used for "internees" in Geneva Convention IV, namely, to develop more neutral terminology for "detained persons," thereby avoiding terms such as combatants and prisoners of war.

The second point is whether the Geneva Conventions and IHL have a constitutional status. In other words, whether these documents can be altered, amended or repealed without significant effort. Underlying this contention are the questions of whether IHL is linked to the international human rights corpus and if international human rights, in turn, has a constitutional status. Suggestions that humanitarian law documents and doctrines lack such status can sometimes provoke a negative reaction from some legal advocates.

To illustrate the idea that IHL concepts should not be seen as having constitutional status, it is worth noting that Geneva Convention III has 143 articles and five annexes and addresses issues such as the supply of clothing and footwear, how meals are to be cooked, and the process of censoring mail. While connected ultimately to rights, such matters are not normally thought of as constitutional principles that should never be subject to amendment. This highlights the fact that IHL documents were developed out of need, since, in times of emergency, there is a historical requirement for state actors

and non-state actors to be provided clear and detailed direction on the treatment of detainees. While the principles outlining the protection for captured persons should be fundamental ones, it becomes problematic if the paper world of rules for the treatment of detainees cannot be altered to address changes in modern conflict because 50-year-old law is seen as constitutional in nature.

The third point concerns conflicting views of the supremacy of the two legal regimes—IHL and human rights. International humanitarian law operates as a *lex specialis* in respect of the right to life under the International Covenant of Civil and Political Rights. At the same time, as is reflected in Article 75 of Additional Protocol I, international human rights is the fallback legal regime for protecting detained persons who do not benefit from more favorable treatment under the Geneva Conventions. It can be asked whether IHL offers a more fulsome standard of treatment or if human rights advocates reliance on human rights norms indicates a more comfortable space within which to operate. Enforcing human rights norms can be fraught with challenges even in times of peace. Further, history has indicated that detailed practical standards are required during times of emergency. There is considerable danger in rushing to embrace the general standards of human rights principles over the traditionally detailed provisions of humanitarian law.

The answer may be to separate the standard of treatment from the status of detainees. This would be consistent with the existing practice of many nations that all detainees will be treated by the standard of prisoners of war. This could mean extending Geneva IV's internee protections to everyone who is captured in conflict regardless of whether s/he is detained in an occupied state.

In conclusion, the standard of treatment afforded to those detained in relation to an armed conflict must contain the most fulsome and clearly articulated protections available under the law and must be stated in the form of obligations. This ultimately means treaty law. Those protections should not be affected by the legitimacy of the detainee's cause, the constitutional aspiration of the law and its advocates, or an artificial determination of the paradigm within which those standards should reside. In the final analysis, it is the

humanitarian treatment that is afforded to our fellow humans by which the law and we should be judged.

Kenneth Anderson

This talk addresses the questions of humanitarian and human rights law in current conflicts. The conflicts that the US has been involved in recently, namely Iraq and Afghanistan, are not conflicts that have dominated human suffering in recent history. Any revisions or alterations to regimes that govern conflicts must also consider wars such as those in the Congo and Colombia. Perhaps this is provocative, but it is worth considering the extent to which 9/11 has affected conflicts such as those in Congo and Colombia, in which the US is not involved. September 11 has decreased the profile of such conflicts in ways that are profoundly detrimental.

Therefore, the question to ask is: How well do we think the current legal regime maps onto the ways people fight in the world? One of the possible areas of conflict that is not properly addressed by the regimes is the rise of asymmetrical warfare exemplified in Iraq and Afghanistan. The Taliban's or Al Qaeda's kidnappings and murders of actors who are often in these countries for purely humanitarian or reconstruction reasons, such as the International Committee of the Red Cross or civilian contractors, achieve some leverage over their adversary. While hostage-taking as a means to achieve certain goals is not new in warfare, the difference now is the extent to which kidnapping is aimed at people who would not be seen as being involved in the fighting under classical standards and would, therefore, not be considered targets. The willingness with which parties to conflict have resorted to taking innocent hostages does not map on onto the existing categories in international law very well. This has created complacency about the observance of the laws of war to the extent that there is a sense that only one side is obliged to follow these laws and the other, though not excused, is not expected to reciprocate.

This is clearly morally unacceptable, especially when the targets of the rule violation are non-combatants. The inherent risk of such a situation where only one side is perceived to be bound to obey the law is that the perceived rule-bound actor may decide that there is no

point in playing by the rules since reciprocity does not exist. It may simply employ a unilateral standard of how it thinks it should conduct warfare. This represents the loss of reciprocity as the underpinning of the law of war by not equally holding both sides to the same standards in some meaningful way. One solution to this impasse may be to identify people as unlawful belligerents because they target non-combatants, including humanitarian workers.

As for the "war on terrorism," this can be conceptualized either as a true war or as a matter of coordinated domestic and international police-work across a variety of jurisdictions. Both these conceptualizations are correct in a fundamental sense and raise the question of whether the US needs a special regime for dealing with terrorism, something akin to the special anti-terrorism laws in places such as the UK. While the US has not traditionally gone down that road, it is now facing the question of whether it would be better to create special provisions regarding terrorism or whether it should contain its responses within the context of war, invoking *lex specialis* or domestic police-work standards, which would seem, to many people, to be too restrictive to confront international terrorism.

The real question is whether it would be better to forge an intermediate regime that attempts to bridge the gap between those two and attempts to recognize the nature of operations as being an intelligence war, a covert war, in some ways. This question is complex and fraught with unanswerables. Ultimately, though, the US will have to decide whether the changing nature of conflict can be contained within the two opposite paradigms of war or police work or whether it will have to create something that straddles and stands between those two poles.

The UN and Human Rights: Criticisms and Reform Proposals

What is right or wrong—and if wrong, changeable—in the present structure, institutions, and processes of the UN with respect to human rights? Analysis and evaluation of some current institutional reform ideas and other proposals for change.

Payam Akhavan

This panel's theme concerns how the normative framing of issues and their distribution within the UN human rights system has far-reaching implications for their substantive treatment. The question is not what sort of implementation mechanisms exist, but rather how issues are framed and how their allocation within that system can have far-reaching consequences as to whether a situation is or is not effectively redressed.

Two examples come to mind. First, in the case of Rwanda, officials at the US State Department were instructed not to characterize what was happening in Rwanda as genocide, for fear that this would warrant some sort of intervention. Yet after the massacres, the international community—including through the jurisprudence of the International Criminal Tribunal of Rwanda (ICTR)—began to overcompensate for the initial reluctance to characterize what was happening in Rwanda as genocide, in the case of *Akayesu*. The real issue is: Why the desperation to call what happened in Rwanda genocide? Do we assume that genocide is the crown of ultimate importance, and everything else is second-best, falling into the big black hole of "crimes other than genocide?" Is this really a means of surfacing the horrors of what happened in Sudan, Bosnia, Rwanda or elsewhere, or is it merely engaging in an exercise in hierarchical abstraction, which privileges distance over intimacy, abstractions over engagement, and deludes us into believing that we have made progress by condemning a crime by its proper name?

The second example is the Lord's Resistance Army (LRA) in Uganda. For the past two decades during which the LRA was active, the international community was wholly indifferent; their only constructive proposal was for the government to try and negotiate

with this group of psychopathic killers who lacked tangible political objectives. In December of last year, the possibility arose of referring this case to the International Criminal Court (ICC). What has happened in the last few months is remarkable, less than a year after this case was referred to the ICC. Immediately after the referral, the European Union made a statement condemning the atrocities committed by the LRA, after many years of indifference and silence. The Sudanese government fortunately had concluded a peace agreement with the Sudan People's Liberation Army (SPLA) in the South and no longer needed the LRA. The government was pressured to allow Ugandan forces to come into the south and attack the bases from which the LRA launched its operations. In the past six months, the LRA's attacks have significantly diminished, to the point where thousands of people in northern Uganda are being resettled in their communities, and the fear of abductions and atrocities, while not disappearing altogether, has significantly diminished.

So this is food for thought. How could something as modest as the "institutionalization" of this long-standing, long-forgotten war so dramatically change the fortunes of people in Uganda? And how can it take so little to transform the political equation favorably?

José Alvarez

Most of us accept the proposition that violent acts directed at civilians and intended to terrorize them constitute a grave human rights violation and may even be an international crime. Most of us would also accept that counterterrorism actions by governments also pose threats to human rights or, as we like to call them in the United States, civil liberties. The UN has fallen short in acting on these propositions and is therefore failing to protect both the human rights of terrorists' victims as well as the rights of those unjustly caught up in overzealous or opportunistic counterterrorism efforts.

Three main arguments will be presented: First, those parts of the United Nations that we normally turn to for normative development of the law, in particular the General Assembly, have not succeeded in clearly delineating the threat to human rights posed by terrorist acts, the underlying rights-based concerns that may help explain the

motivation of terrorist acts or of those who sympathize with them. They have also not called attention to human rights abuses committed in the name of the war on terrorism. Second, those parts of the United Nations that we turn to for collective enforcement—principally the Security Council—are themselves threatening to undermine human rights through their counterterrorism measures, in particular through Chapter VII actions. Third, the Security Council's Chapter VII measures are only the tip of the iceberg of the problems that we must face as we go forward with more proactive, more legislative, and more "judicialized" enforcement methods by international organizations. We need to think more clearly and strenuously about what it takes to promote human rights accountability by international organizations such as the UN.

The General Assembly has a noble history of helping to define the normative contours of international human rights law, but with respect to terrorism, it has fallen short in promoting effective normative development. To be sure, the General Assembly regularly passes countless resolutions on the subject. Since 1991, it has addressed terrorism through two different types of resolutions; the first falls under the rubric of "measures to eliminate international terrorism." An example is the 1994 resolution that famously defined terrorism in an all-inclusive fashion: "Any criminal act intended or calculated to provoke a state of terror in the general public is unjustifiable, regardless of the considerations of a political, ideological, racial, ethnic, religious, or any other nature that may be invoked to justify it." This formula has been regularly used since 1994, but we know that the General Assembly, or rather the states that adopted the resolution, do not really mean what they said. That is, they remain divided about whether some terrorist acts might be justifiable if committed for the right reasons, in particular for the right of self-determination. The international community "speaks with forked tongue" about whether all acts of violence against civilians should be seen as violations of the right to life.

For example, on one side of the ledger, Middle East states have entered into the 1998 Arab Convention on Terrorism. That treaty has as an exception to its ban on terrorist acts, namely violent acts

committed in the cases of armed struggle, foreign occupation, liberation, or self-determination. On the other side of the ledger, those states that are clearly opposed to terrorism, such as the US, resist condemning violent acts against civilians as "terrorism" when these are committed by government actors because the phrase "state terrorism" has become associated with the actions of one particular state (namely Israel). Ironically, the US has also resisted calls in the General Assembly to classify terrorist acts even by non-state actors as "violations of human rights." The US argues that only governments can undertake international human rights violations. Apparently the US fears that if non-state actors (terrorists) can commit human rights violations, it will prove irresistible to claim that another non-state actor (for example, a corporation) might be guilty of the same thing.

The second type of resolution adopted by the General Assembly falls under the rubric of "human rights and terrorism." This set of resolutions initially held some promise for acknowledging that the battle against terrorism may infringe the due process rights of those singled out for scrutiny or detention. But after 9/11, states' positions have hardened, so that some now see sympathetic references to understanding the "root causes of terrorism" as code for accepting the validity of terrorist acts. They also see an emphasis on due process or other rights of terrorist suspects as reflecting an outdated "criminal justice" model for tackling terrorism. This fragmentation has sidelined the General Assembly's work on these issues.

The Security Council has stepped into the gap and this is where most of the action is with respect to the UN's war on terrorism. The Council now releases a periodically updated list of suspected individual terrorists or those who materially assist them. They are identified by the Council's 1267 Sanctions Committee as associated with Al Qaeda or the Taliban. Most of those listed have been identified by executive agencies of the US or the UK. Once listed, all of the assets of individuals and organizations, are, under binding Chapter VII order, frozen. In addition, these individuals cannot travel or receive government benefits.

At the same time, the Council is pursuing a broader legislative agenda to force states, again under binding Chapter VII order, to

adopt counterterrorism legislation modeled on US legislative efforts and best practices. Under Security Council Resolution 1373 and its progeny, the Council's Counterterrorism Committee (CTC) examines how states are complying with the Council's various edicts to criminalize terrorism. The CTC aims to provide technical assistance to states so that they pursue effective measures against terrorism. The idea is to use that body to endorse a global template for counterterrorism legislation and regulatory efforts. As originally articulated by officials in the Bush administration, that template was to be modeled on the US Patriot Act.

UN members have responded at an unprecedented rate to the CTC's demands for information. There are now well over 400 or 500 state reports to the CTC, and most states have been only too willing to comply. Unfortunately, one suspects that some are complying for all the wrong reasons. Resolution 1373 does not define the terrorist acts that it demands states criminalize. This has been a boon for opportunists around the world who now have a new excuse for human rights violations, namely "the Security Council made me do it." One example was one of the lengthiest responses received by the CTC: Cuba's initial 143-page report recounting the many measures it has taken against "terrorists and saboteurs." (Presumably some of these are living in Miami.)

Human rights advocates have expressed qualms about the Council's two-track counterterrorism approach. The listing of particular individuals for purposes of sanction raises a number of interesting questions. Consider what actually happens: the Security Council announces to the world that individual Z is on its 1267 terrorist list. At a minimum, Z cannot draw on his bank account, loses government benefits, and is barred from interstate travel. In most cases, Z, and sometimes his spouse, also loses his job. The sons and daughters of Z may be hounded at school—or worse. The entire Z family may be ostracized from the local community. Obviously, the Council's smart sanction directly affects individuals, but the process by which this occurs is non-transparent in terms of who does the listing and delisting or what criteria are applied. Delisting remains dependent on the willingness of states, which initially target individuals, to admit

that they made a mistake. Individuals' challenges to being listed have so far proven unavailing in national courts, although mistakes have clearly been made. The most publicized instance involved Somali nationals in Sweden, some of whom ultimately convinced the US Office of Foreign Assets Control (who listed them) that they were innocent. Note, however, that the burden was apparently on them to prove that they had no connection to terrorism.

To date, the Security Council seems bent on inflicting at least a criminal financial sanction, without defining what the relevant crime is—such as what constitutes material assistance to terrorists. There is no benefit of any due process and the burden of proving innocence lies on those whom the Council chooses to punish. And its legislative agenda is equally troublesome, especially given qualms about the ways some states, including the US, have struck the balance with respect to civil liberties and questions about whether some models for counterterrorism are really appropriate in contexts where there are less reliable checks and balances on government action.

Both of these initiatives are being institutionalized at the UN. There are subsequent Security Council resolutions to establish a monitoring team to assist the CTC, which requires the states to submit written reports on their compliance. The Russians have introduced a proposal that would extend the listing procedure beyond members of Al Qaeda or the Taliban. Just what criteria would be used to include such individuals are yet to be determined.

Security Council actions reflect hegemonic power more than the rule of law and pose potential human rights ripples. Furthermore, there are real problems with trying to control the Council or make it more accountable, given the limited checks and balances within the UN Charter. No one believes, for example, that the Secretary General can serve more than as a bully pulpit. And of course, there is the problem that Security Council actions are subject to political agreement by the Permanent Five and therefore often result in intentionally vague resolutions that can lead to abuse as applied by member states. Of course institutional reforms could ameliorate potential abuses, including judicial review by national courts or the International Court of Justice, procedural protections within the

Security Council prior to listing and delisting, greater resort to regional organizations, and even outright defiance by those states that do not approve of the Council's actions.

There needs to be more serious thinking about what exactly the UN Charter is. It is too easy to say that the UN as an organization, as well as its organs, is subject to human rights. We need to be specific about which human rights apply to an organization that cannot be party to most human rights treaties. This is not an issue that is limited to the UN. Many international organizations are taking actions with direct human rights impacts: whether it is the IMF regarding economic, social, and cultural rights, the World Bank regarding the rights of indigenous peoples, or International Criminal Tribunals and the rights of alleged perpetrators.

We are most familiar with human rights dilemmas resulting from the inactions of international organizations, such as Rwanda or Darfur. But we also need to be aware of human rights dilemmas when these agents of the international community act. When the Security Council actually does something, does it rest on human rights grounds? Seeking remedies against human rights abuses by international organs is difficult, even for human rights lawyers. Moreover, when these organizations act, gaps in human rights law may emerge. For example, there is no guarantee of procedural due process for persons, like those subject to Council listing, who have not been charged with a crime under Article 14 of the Covenant on Civil and Political Rights. Defenders of the Council's listing procedures argue that a mere temporary deprivation of property should not trigger the protections of Article 14. As with respect to civil forfeiture actions in the US, there are serious questions about the line between such actions and criminal sanctions as well as questions about the type of due process that ought to apply.

For too long, human rights lawyers have assumed that all would be well if we simply turned over our human rights dilemmas to representatives of the international community. But what makes us think that governments (in the plural) will respect human rights any more than any individual government would? What makes us trust these organs when they may be controlled by the hegemon—

especially when we have doubts whether the hegemon itself respects human rights?

Hillary Charlesworth[1]

This talk addresses the project of gender mainstreaming as a UN reform strategy in the human rights area. Gender mainstreaming as a term has become a mantra in many international institutions as the technique for responding to the well-documented inequalities between women and men. The meaning of the term comes from its implied contrast with the notion of specializing in issues of women and gender, or what we could call gender "sidestreaming." The idea is that questions of gender must be taken seriously in mainstream, normal institutional activities and not merely left in the marginalized peripheral backwater of specialized women's institutions.

The term "mainstream" was first used in the 1970s in educational literature to describe a method that puts many different kinds of learners in the same classroom instead of separating students according to their learning abilities. We first find the rather ungainly term "gender mainstreaming" seeping into institutional discourse mainly from the sphere of development. The UN Decade for Women that began in 1975 focused attention on the effect of aid policies on women. The women in development movement that came to prominence at this time was later seen as inadequate because it did not challenge the underlying assumptions of economic development policies. So the interest in gender mainstreaming arose as an alternative mechanism to broaden the concept of development to respond to women's lives. Then, the buildup to the 1995 Fourth World Conference on Women (Beijing) prompted a search for strategies to respond to the inequality of women. Gender mainstreaming was seized on as one concrete outcome of the Beijing conference. The term has now achieved great popularity; almost all UN bodies and agencies have adopted it formally.

In 1997, ECOSOC defined it as follows:

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[1] An article length version of this talk appears in *Harvard Human Rights Journal* 18: 1 (2005).

> Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of the policies and programmes in all political, economic and societal spheres so that women and men benefit equally, and inequality is not perpetuated. The ultimate goal is to achieve gender equality.[2]

It has been adopted in the mission statements of nearly all UN specialized agencies. Gender mainstreaming is endorsed in the Millennium Development Goals. It is everywhere.

The bland, bureaucratic acceptance of the term "gender mainstreaming" suggests that it is a problematic term. It distracts attention from the deep ways in which inequalities are woven into the international system. Gender has become a rather contradictory concept and has lost its political bite. In fact, the use of gender mainstreaming as a reform strategy makes issues of inequality much harder to address.

What does gender mainstreaming actually mean in the human rights field? It first appeared at the 1993 World Conference on Human Rights, where documentation reported statements that women's human rights form an integral part of human rights activities. Much of this talk came from the Office of the United Nations High Commissioner for Human Rights. This idea was endorsed as one of the outcomes of Beijing, and ECOSOC's definition summarizes the request from the UN and the Commission on Human Rights to encourage all parts of the UN system to take gender seriously.

We have, then, rich rhetoric. What has been the product? There has been very little produced in the human rights field. The Committee on Economic, Social, and Cultural Rights has referred to the position of women regularly in its reports and General Comments. But its guidelines are very general and quite uneven.

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[2] UN Doc. E/1997/SR 20 (1997), p. 24, paragraph 4.

In 1996, the Committee on the Elimination of Racial Discrimination (CERD) expressed positive antipathy to integrating sex and gender into its work; there is the famous statement of CERD's chair that "Any request to integrate gender into states parties reports is fundamentally misconceived." But in 2000, CERD issued its General Recommendation 25 on Gender Related Dimensions of Racial Discrimination. It was disappointing, merely announcing that the "Committee, when examining forms of racial discrimination, intends to enhance its efforts to integrate gender perspectives, incorporate gender analysis, and encourage the use of gender-inclusive language in its sessional working methods, including its review of reports submitted by States parties, concluding observations, early warning mechanisms and urgent action procedures, and general recommendations."[3]

The Human Rights Committee (HRC) has given very patchy attention to these issues. The HRC's August 2004 reports ask questions about women in the public sphere, but generally pay little attention to women or gender in a systematic way. For example, in the HRC's General Comment on Torture, there is scant attention to women and gender.

In other parts of the UN system, such as in the work of the Special Rapporteurs on Afghanistan over the last 10 years (there have been three in this time period), one would think that there would vivid attention paid to women given the oppression of women under the Taliban. On the contrary, there are but a few paragraphs, and the language is nonspecific.

The way gender mainstreaming has been incorporated into the UN human rights system indicates a more general problem with the entire project. Four general problems exist. First, ECOSOC's definition of gender mainstreaming is so inclusive as to be almost meaningless. It assumes that there is symmetry of position between women and men and that gender equality is just a matter of giving men and women equal time.

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[3] CERD General Recommendation 25, paragraph 4.

A second problem relates to the actual impact and development of gender mainstreaming programs. Progress is quite variable and gender mainstreaming fatigue is apparent in certain areas of the United Nations. Responsibility for gender issues has tended to remain with specialist staff, and it has encountered sustained resistance in some areas. Reviews of gender mainstreaming policy in various UN bodies have shown inadequate budgeting for the projects' gender components, insufficient analytical skills, and a general lack of political commitment, both within the organizations concerned and at a national level. At the World Bank, for example, proponents of gender concerns are required to show rigorous evidence of "efficiency gains" before the project can be implemented. What is striking is that there has been no work on measuring progress; the indicators have not been developed. But the project of gender mainstreaming has allowed for the reduction of resources for specialized women's units within UN agencies. This is mirrored in the human rights field; it has been relatively easy to obtain revision of reporting guidelines—most committees have agreed to those—but very difficult to have practical follow-through. This is the much larger problem of impact.

The third problem is the limited sphere contemplated for gender mainstreaming. It is striking that mainstreaming has been seen as applicable to policy development only in certain areas. In the European Union, for example, there has been resistance in the area of competition policy; although in human rights it has been seen as applicable. Within the UN, gender mainstreaming has not moved into so-called "hard" areas of law. It has not been included in any of the mandates of, for example, the International Law Commission.

The fourth, most profound, problem with the issue of gender mainstreaming is the way it has depoliticized the notion of gender. Gender has been used as a synonym for "sex." Many UN documents draw a distinction between the two and give the standard definition that sex is about biology, while gender is about social roles. Many feminist scholars would find this problematic in itself. Recent scholarship points to the classification of biological sex differences as a function of gender. This paradoxically makes gender somehow natural and difficult to change, precisely what it is not. A perfect

example of this depoliticization of the notion of gender in this area is Security Council Resolution 1325, adopted in 2000, which was hailed as a great step forward by many feminist groups.

Security Council Resolution 1325 directs governments to give special attention to women and peacekeeping and to mainstream gender in all conflict resolution. But it translates gender as giving attention to the special needs of women and girls during repatriation, supporting local women's peace initiatives, and protecting the rights of women and children in any new legal order. In other words, it is all about women as females. Gender, it would appear, is only about women. The resolution is silent on men. The resolution could have considered masculine identities in times of conflict and the violent patterns of conduct that are accepted precisely because they are coded as male.

The tale of gender mainstreaming with respect to human rights illustrates the problem facing the use of feminist concepts once they are let loose in both the institutional and policy arenas. The technique of gender mainstreaming has effectively reduced the concept simply to a synonym for sex. What is ironic is that the term gender began and has remained a much contested one internationally. For example, there was a great furor over the use of this term at Beijing. So, in some contexts, gender remains a radical concept. The United Nations gender mainstreaming program has reduced it to a static concept and removed consideration of the relational aspects of gender and of how patterns of gender reproduce patterns of subordination. Women's problems therefore can easily be explained within the UN's use of gender as issues of culture or poor information: they under specify the power relations that sustain women's inequalities.

The notion of gender has not affected the mainstream, but the mainstream has defanged gender. So the question is: What should be done with gender? One choice is to make it unsettling and more radical: allow it to focus on the power relationships between women and men in specific contexts. Because gender mainstreaming suffers now from so much misuse, it is time to abandon this term and to regroup on the less comfortable periphery—on the banks of the mainstream.

Paula Escarameia

The way in which we categorize and submit human rights matters to certain United Nations' bodies has a profound impact on the way the issue is treated and resolved. East Timor clearly demonstrates this. There were different phases of UN involvement. The first phase begins with the invasion of East Timor by Indonesia in 1975 and continued until approximately 1982. During this period, the UN reacted to what happened in East Timor through the Security Council; the situation was characterized as aggression or invasion, and two resolutions were issued. Later, the situation was addressed by the General Assembly. Since 1999, the UN has been heavily involved in East Timor, again classifying the situation as one of aggressive invasion and allowing peacekeeping forces to be directed by the Security Council. Again, Security Council resolutions were adopted.

The point is that the categorization of the situation was not random; there were sufficient facts to classify each matter as aggression or self-determination. However, the classification of issues leads to their assignment to one UN body or another, which in turn has dramatic consequences for action.

To put this in the context of everyday situations in the UN, the Sixth Committee addresses international law issues and the Third Committee, normally, deals with human rights issues. There is also an entire network of machinery related to human rights at the UN: the Commission on Human Rights, the UN treaty monitoring committees, and so on. Ordinarily, the Sixth Committee is not considered a human rights organ, although many of the resolutions and conventions negotiated concerned human rights. Why is this important? The individuals who sit in the Third Committee and in the Sixth Committee have quite different training. The Sixth Committee is peopled with jurists. The Third Committee is comprised of diplomats, with backgrounds in international affairs or political science. The Third Committee tends to engage in political argumentation, while the Sixth Committee tends toward legal argumentation. This makes a difference for decision-making processes. The Third Committee works through negotiating blocks of like-minded states acting in consort, while the Sixth Committee does not. The Sixth Committee

works by consensus; perhaps in my entire career there, one or two matters were put to a vote. In the Third Committee, however, issues are decided as a result of a vote. Another major difference between these committees is the presence of NGOs. In the Third Committee, NGOs participate, while in the Sixth Committee, they are generally absent, with the important exception of the negotiations for the International Criminal Court. NGOs can exert useful pressure. It is ironic, then, that the presence of NGOs is a function of an arbitrary classification of a matter into the Third or Sixth Committee, and this has consequences.

With the enhanced powers of the Security Council in the post-Cold War period, the implications became far reaching. There are many restrictions on who can even enter the Security Council chamber, and the proceedings are dominated by the Permanent Five members. All that can be done is to draft resolutions that might be acceptable to everyone. Constructive ambiguity is the technique of choice. There is much pressure for consensus in the resolutions. The decision-making process is not transparent. All that is officially recorded are the formal sessions. However, decisions are actually taken during the informal proceedings, or the informal informal ones, where there is no record. This makes it difficult to participate.

There is also the International Law Commission (ILC), not composed of state representatives, but of 34 technical experts who act in their individual capacities. The ILC considers matters that have implications for human rights. For example, at the moment, the ILC is dealing with reservations to treaties, and reservations to human rights treaties are a problem. It is also working on some environmental treaties, which, while not strictly about human rights, affect the enjoyment of all human rights (access to water, for example). The ILC's manner and method of work has implications for human rights. The ILC works in total isolation from the outside world. A typical session begins in the morning with individual monologues where positions are stated. Even when mini-debate, as it is called, occurs, this is not an occasion for meaningful dialogue. In the afternoon, drafting committees assemble and get to work. There is no formal provision

for a negotiating mechanism. When difficulties arise, they are resolved, but not in open negotiations.

The ILC tends to replicate what already exists. It is not innovative. Yet in the UN Charter and in its own statutes, the ILC is supposed to develop international law, as well as codify it. The development aspect has largely lagged, so in the main, the ILC codifies very cautiously. It tends to exclude human rights. For example, the extension of diplomatic protection to refugees—a potential human rights concern—was explicitly shunted to the other UN human rights bodies to consider. Because such protection was viewed as a human rights issue by members of the ILC, it was not included in its elaboration of international law. Therefore, those who are in most need of diplomatic protection do not have it. This sort of compartmentalization is continually repeated. It is the persistence of the paradigm of the Westphalian model.

To conclude, the main question is how to characterize and classify human rights issues, and to pay attention to their assignment among United Nations bodies. States and NGOs alike need to be aware of the differences among these bodies and the processes that they use. They have great importance for how human rights concerns get discussed. What might appear to be a dry, if not inconsequential, matter of bureaucracy turns out to be quite alive and significant.

Rights Rhetoric and Court-Centric Advocacy

Comparison of traditional rights-based advocacy with other discourses and rhetorical strategies—including interest-based, consequentialist, and utilitarian arguments—as an avenue toward realizing certain goals.

James Goldston

If you want to change the world, why go to court? To begin with a caveat, one must be wary when lawyers from the United States talk about litigation and particularly international litigation—because as with everything else, Americans tend to impose their own views and experience on phenomena, and, in fact, American litigation is quite a distinctive species. International litigation is often very different from what happens in US courts.

Notwithstanding this caveat, public interest litigation as an avenue toward change, as the title of this session states, does have a long history in the United States. There are a number of lessons to be learned. The US just celebrated the fiftieth anniversary of *Brown v. Board of Education* with an examination of what went right, what went wrong, and the decision's impact. *Brown* succeeded as a powerful and fundamental declaration that, from that point forward, African Americans would no longer be officially regarded as second class citizens. *Brown* changed the political discourse in irrevocable ways.

At the same time, *Brown* failed to end racism; it failed to end segregation in schools, which, though barred by the law, has only worsened markedly in recent years. Part success and part failure is probably a reflection of the mixed blessing of human rights litigation in many parts of the globe. In assessing the impact of litigation, it is probably necessary first to ask, what do you want the litigation to achieve? Public interest litigation has a number of possible goals including remedies for clients, establishing legal precedents, shaming governments, and changing public discourse about a topic.

Yet litigation may not be the best route to these goals. Litigation takes time, and its results are uncertain. Lawyers are often not committed to change, and many NGOs lack the human resource capacity to pursue litigation effectively. Notwithstanding these

limitations, litigation can be worth the effort, particularly as part of a broader movement for change in which courts and judges are not the only players.

A useful example is from the current battle for racial equality in Europe. In the post-Nazi era, racial or ethnic classifications were widely discredited. Yet racial discrimination persisted in much of Europe. In the East, racism was frozen in the grips of communism; in the West, racism was the common response to increasing immigration from the former colonies and elsewhere. Throughout Europe, millions of Roma continued to be treated as second-class citizens. Thus, for most of the twentieth century, much of Europe has lacked the tradition of challenging and combating racial discrimination.

At the regional level, the anti-discrimination norm in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms offered only subsidiary protection in the enjoyment of civil and political rights and said virtually nothing about the enjoyment of the vast swaths of social and economic life where discrimination was rampant. While numerous directives prohibiting discrimination on grounds of gender were issued, there were hardly any on race or ethnicity, even though the EU was forged in part to prevent a repeat of the ethnic horrors of the Second World War.

Europe's relative silence came to an end with the fall of the Berlin Wall. Three parallel developments helped bring about change. In the East, politicians in post-communist societies exploited racial prejudice for political ends (i.e. Yugoslavia) while, in the West, a grassroots movement concerned with xenophobia campaigned for a Europe-wide norm against racial prejudice. They drafted what was called the Starting Line proposal for an all-embracing EU law against racial discrimination. And all over, the opening of political space following 1989 created the opportunity for a nascent movement for Roma rights to stake its claim on the European agenda.

In 1997, perhaps moved by all three of these trends, European leaders inserted in an EU treaty, for the first time, authority for the EU's executive arm to legislate on issues of racial discrimination. Only after the success of Austria's Joerg Haider and his right-wing Freedom Party were the European leaders galvanized into action. In 2000, the

European Commission pushed through a legislative directive on racial discrimination; this new law prohibited both direct and indirect discrimination in housing, education, and provision of social services. The Race Directive, as it is known, is a major leap forward and began a time-bound process of legislative amendment in all 25 EU member states. Millions of euros are being spent on public education, fortifying administrative bodies, and training the judiciary to measure and fight discrimination. This occurred by legislative fiat—not through judges or courts.

Against this backdrop of popular activism from below and normative transformation from above, what started as a trickle became, over the past decade, a stream of litigation. This litigation has pushed the boundaries of legal protection outward in two doctrinal areas of importance to ethnic minorities.

One series of cases has broadened the scope of human rights protection under Articles 2 and 3 of the European Convention on Human Rights (the right to life and freedom from torture and inhuman or degrading treatment or punishment, respectively). This new jurisprudence has held that governments must not only refrain from affirmative harm, they must also investigate thoroughly and effectively credible allegations of abuse. In grafting procedural requirements onto what were previously understood to be substantive rights, this consistent line of authority has effectively amended the European Convention to impose substantial new obligations on law enforcement officers and protect victims of police misconduct who are often ethnic minorities.

The European Court of Human Rights has not moved as quickly, but this may change soon. In February 2004, for the first time ever, the Court found a violation of Article 14 of the European Convention (non-discrimination) on grounds of race in a case of the racially motivated shooting deaths of two Bulgarian Roma.[1] In another case, the Court is faced with the first systematic challenge to racial

[1] *Nachova v. Bulgaria*, European Court of Human Rights (ECHR), Judgment of February 26, 2004. In July 2005, this portion of the judgment was affirmed by the Grand Chamber of the European Court of Human Rights. *Nachova v. Bulgaria*, ECHR, Judgment of July 6, 2005.

segregation in European schools; observers believe the Court will relinquish jurisdiction to the Grand Chamber—a sign of the significance of the case and determination that the highest judicial body should render the judgment.

The Court's expansion of doctrine in the fields of racial violence and discrimination has been made possible by legal advocacy—specifically, an ever-growing flow of well-documented complaints pursued through domestic judicial systems. But this litigation has expressly drawn on the broader legislative and political developments previously mentioned. Thus, in prescribing a reversed burden of proof for the resolution of discrimination claims, the European Union Race Directive established a new standard of review that has directly influenced, and been incorporated into, the Court's jurisprudence. More generally, much as they may try, the judges who sit on the Court cannot remain immune from the political debates concerning racist, anti-Semitic, and anti-Muslim sentiments now coursing through many European societies. In both these ways, political ferment may have helped push the Court to be a bit more courageous on these questions than it otherwise might have been. In turn, the Court's evolving jurisprudence has lent legitimacy to, and sometimes encouraged, further political and legislative efforts to curb racist action.

Though the process has evolved in fits and starts, over the past decade and a half in Europe, court-centric advocacy and broader public education and political efforts have reinforced one another in clarifying and expanding legal protection against racial discrimination and violence. To be sure, in Europe, unlike in the United States, there has been no single seminal decision like *Brown* with the far-reaching political reverberations to fundamentally reorder how people think and talk about race relations. At the same time, the very bureaucratic nature of the EU—its patient and sometimes overbearing attention to detail in legislative amendment, institutional transformation, and training of judges and enforcement officers—may ultimately yield more effective implementation of anti-discrimination norms.

Alicia Ely Yamin

At least in the United States, there continues to be a wide-spread conception that the character and origin of civil and political rights fundamentally differ from social and economic rights, which, as a result, are not enforceable in courts in the same way. However, these differences are more relative than absolute. Courts in a number of countries are expressly coming to articulate that "justiciability" or "legal enforceability" is a fluid concept more aptly applied to dimensions rather than to categories of rights. For example, procedural protections are as important to both economic and social rights as they are to political and civil rights. If a state undertakes to implement economic and social rights, courts have an obligation to see that they are enforced in a non-discriminatory way that affords recourse to legal protection.

Similarly, courts are increasingly being confronted with cases where the boundaries of these sets of rights are blurry: categories are porous so that the right to life may be inextricably intertwined with the right to health care. Courts may therefore be expansively interpreting the right to life not just as preventing the arbitrary taking of life but also to include positive obligations to prevent avoidable and unnecessary loss of life. This is tantamount to enforcing the right to health. Thus, there is greater affirmative intervention by the courts to enforce the programmatic dimension of social and economic rights.

Often this entails declaring a violation of a clearly defined normative obligation—some kind of due process, for example—even though it happens to be intertwined with a social and economic right, and then sending it back to the appropriate governmental organ for a remedy. This is frequently what happens in the right to health: legislation or regulations may direct that anti-retroviral drugs (ARVs) be made available to all those infected with HIV. In practice, ARVs are not made available on a consistent basis—for example, due to budgetary constraints. Here we have a clear obligor—the state through its Ministry of Health—and a clear remedy—the provision of ARVs. Courts increasingly understand the right to health in such terms.

However, bolder interventions by courts can increasingly be

expected, such as instructions to political bodies on criteria for complying with constitutional norms. Or a court itself may define social policy and establish itself as the guardian of its implementation, for example, when the Treatment Action Campaign brought a case against South Africa's Ministry of Health when the Constitutional Court ordered the extension of Nevarpine treatment to prevent the maternal transmission of HIV to a child. In cases where the remedy is simply declaratory or even where there is non-compliance, the judicial decision is still valuable in establishing a dialogue between judicial and political branches by changing the nature and context of the claim in question. For instance, in the *Treatment Action Campaign* case, the court was really chiding the executive branch as not regarding the HIV epidemic as the national emergency that it is in South Africa. This cannot be emphasized enough.

In Latin America, there has been a great degree of judicial activism related to economic and social rights. This is no coincidence since there has been a very strong NGO movement able to translate these social disputes into adversarial legal claims in combination with a historic weakness of democratic institutions. This has allowed for the transfer of these important social policy issues to the judicial arena and alters the way we answer the question of the democratic legitimacy of judicial action. Thus, as Victor Abramovich has argued, in discussing the margin of action that the judiciary has with respect to other branches of government, it is important to look at the context and examine the empirical evidence and not simply consider the abstract notions of separation of powers to ascertain courts' legitimacy.

There are clearly enormous obstacles and limitations to prevailing, winning, and enforcing any court judgments. Paraphrasing Justice Albie Sachs of the South African Constitutional Court, the question is no longer whether social and economic rights can be enforced by courts, but how it can best be done. To address this question, court-centric advocacy can neither be the beginning nor the end of any strategy. Lawyers must grapple expressly with courts' limitations in creating any systemic change.

A good example emerges from the work of the US-based NGO Mental Disability Rights International (MDRI) in Paraguay. In

Paraguay, there is only one national neuro-psychiatric hospital with a capacity of approximately 460 beds. There are no out-patient psychiatric or psycho-social rehabilitation programs, and one must be a hospital inmate to get psychotropic medication. There are no public shelters for victims of domestic violence and no psycho-social services or rehabilitation programs. The conditions are beyond appalling. Imagine Dante's inferno: naked men and women sitting and rocking, tied down in beds, in cages, with open sores, no functioning toilets or baths, wretched smells of urine and feces, pregnant female inmates complaining about constant sexual abuse by guards. It was clear that no treatment, therapy, rehabilitation, or activities were provided. MDRI documented the conditions of two teenage boys held in isolation cells for six years. They each had a small board that served as a bed; for one of the boys, it was too short for him to lie down. There was a small hole in the floor that was supposed to be a toilet, but it was caked over by excrement. The boys were covered in excrement. They were fed gruel, handed to them through the bars, to eat with their hands. Both boys had lost the capacity for speech because of their confinement. They were only allowed out of these tiny cages every other day to roam in other cages that were equally wretched.

MDRI, in conjunction with the Center for Justice and International Law, immediately brought a petition for precautionary measures to the Inter-American Commission on Human Rights on behalf of the patients. The Commission, for the first time, granted precautionary measures in relation to a psychiatric hospital. Subsequently, Paraguay's president visited the hospital, was appalled by the conditions, promptly fired the director, and called for sweeping reforms. Some reforms have since been instituted, and money has been spent to refurbish the facility. Yet, during MDRI's follow-up missions, egregious problems were still found. This has raised the question of whether the domestic remedies have been exhausted and whether MDRI needs to file a full case before the Commission.

This case reflects the potential for court-centric advocacy to secure health rights by injecting standards into mental health care and conditions (where previously there had only been discretion), creating rights-holders among the most abused and abandoned, and creating

the possibility of expanding the conceptualization of what the rights to life, health, equal protection, and freedom from inhuman and degrading treatment mean in light of patients' experiences. However, it became clear that Paraguay's government had very little idea of how to provide mental health services effectively, much less keeping to international human rights standards. But this is not unusual. According to the WHO, over 40 percent of countries lack national mental health policies and 90 percent lack policies for adolescents and children. Litigation cannot substitute for that lack of policy and programming. Litigation might improve conditions and facilitate the transition from institutional to community care. It might allow for dispensing psychotropic medications by community health workers on an out-patient basis. But there are a wide array of issues related to the delivery of health care that litigation simply cannot address.

Litigation does not get at underlying structural factors in society that contribute to the situation. For instance, a large number of patients in this hospital are social patients in the sense that they would not need to be institutionalized if they had the minimum family and social support. Paraguay is a desperately poor country with an unequal distribution of income. Mothers were grateful that their children were in these institutions because at least they could get food there. These women could not feed their children otherwise. Imagine what that means for the hundreds of thousands who are mentally or physically ill and need care. Obviously, it is difficult to address all of these structural and underlying factors. But they cannot remain the background out of which we identify a single violation and proceed to secure a remedy. We need to more systematically address and develop the contextually specific ways in which we can enable people to truly enjoy their rights—economic, social, civil, and political.

Where does that leave us in terms of strategies and conceptualization of human rights work? Acknowledging the limits of court-centric advocacy does not undermine its importance or the centrality of seeking accountability for economic and social rights. It would be self-defeating to create a dichotomy between legal and political strategies. There is evidence that linking the legal strategy with political mobilization ultimately makes both more effective. One

example in which an incredibly stigmatized population used litigation to become a political player comes from Venezuela. In the 1990s, HIV-infected people brought a series of successful cases for securing ARVs; this spurred the creation of committees of HIV-positive people and people with AIDS to monitor the implementation of decisions, political policies, and budget making while also conducting education and outreach that, in turn, fostered further litigation. Their use of rights helped to underpin their political claims.

Similarly, indigenous people in a number of Latin American countries have brought cases related to the rights to health and a healthy environment against logging and other extractive industries on their lands. This led them to organize into movements and political parties, not only to administer the revenues from these cases, but also to project this discourse of rights and elaborate visions of what an authentically multi-cultural society might look like.

Raising awareness of rights must be linked to real forms of accountability. It could be through judiciaries or alternative mechanisms. But rights education must be applied. Simply speaking about the right to health or citing the UN documents is insufficient as it is not connected to the lived experience of people whose children die, for example, because there is no functional health care system. Accountability is key.

However, with economic and social rights, there is a risk or dishonesty in transforming a social struggle into a lawsuit. The leading groups have legalized many struggles, and there is a resulting gap with the social movements. One finds incipient resistance to human rights NGOs by social movements for a variety of reasons: the legalization of the claims of the social struggles, the different relationship that human rights NGOs adopt toward the state—that is, negotiating or being neutral and not political—although this neutralization of the political discourse of social change also happens within the social movements, such as in the women's movement.

Resituating litigation in broader strategies might also imply changes in the way we think about society and human rights work. In the narrow view of litigation and human rights—name the violation, identify and shame the perpetrator, and obtain relief—the goal is to

reset the status quo. This is a limited and palliative understanding of human rights. The examples above, and others from economic and social rights work, suggest a different conceptualization of society as being in constant flux and undergoing a constant power struggle where patterns of health and ill health are products of power relations, as much as other biological or behavioral factors. Securing health and rights to health is a matter of destabilizing entrenched power structures and subverting power relations. Court-centric advocacy, then, is more than restoring a prior legal order but part of changing the social order, a tool in a much broader effort to diffuse economic and political power, both within and among societies, whether it is against the state or non-state actors.

Kieran McEvoy

This talk pays tribute to Stephen Livingstone, a former colleague, who died tragically earlier this year. Stephen was an LL.M. graduate of Harvard and later became Dean of Queens University Law School. He was a prominent human rights activist in Northern Ireland, who was inspired at Harvard to take up the human rights mantle and certainly inspired a generation of activists, including myself, to become involved. We are all lessened by his passing.

There is a tendency for those who study Northern Ireland to focus primarily on the conflict and peace process through the state's actions. This paper, however, focuses on the involvement of a non-state actor, the Republican Movement, and in particular the relationship between court-based advocacy and litigation strategies and other strategies of armed and political struggle by the Irish Republican Army (IRA) and Sinn Fein. What is important to assess is the ways in which the increased resort to law by IRA and Sinn Fein has transformed the Republican movement as a whole.

In framing this talk, there are a number of implicit conceptual elements. First, with due deference to Habermas, law is a dialogical process. Second, law and litigation are instrumental and symbolic forms of resistance. Third, law in the furtherance of the military and political struggle is, in part, constitutive. Four examples will illustrate these interconnected elements: (a) the trials of the IRA defendants; (b)

the use of international fora, such as the European Court of Human Rights and other national courts by Republicans during extradition hearings; (c) judicial reviews sought by IRA political prisoners; and (d) the judicial reviews of the political process sought by Sinn Fein from the 1980s until the present. The Republican movement, it must be noted, was unusual in that the political wing (Sinn Fein) has traditionally been subservient to the military movement (the IRA). Over the years this has shifted due, in part, to the use of law.

First, the trials of IRA defendants were sites of resistance as well as repression. Until the 1970s, dating back at least 150 years, defendants would simply refuse to recognize the legitimacy of the courts' jurisdiction. The courts were seen as the tangible symbol of British occupation in Ireland. This was part of an internal dialogue within Republicanism that helped legitimate the use of violence in the 1970s, as it recalled the historical tradition of armed resistance dating back over 100 years. The practical consequence of this strategy was to inculcate IRA volunteers with a sense that the struggle continued even though they were incarcerated and to prevent security information from leaking out during interrogations. This non-recognition strategy would, in turn, prepare defendants for the long war ahead in prison.

By 1976, the practice of non-recognition of the court dissipated. This strategy was never completely an uncontested tradition anyway. Many prisoners thought if they fought the case and won, they could get out of jail and rejoin the fight. Even the IRA leadership recognized this. So, there was a sentiment from the rank and file that this position was purist but impractical. Thus, when the practicalities of this approach were challenged, the orthodoxy was reframed. The IRA was already waging an economic war on Great Britain—the bombing campaign of civilian and military targets in Ireland and Great Britain. Its rationale was to tax the resources of the British exchequer. The prisoners then began to fight every case, even those that were patently unwinnable, as a means of tying down judicial and security resources. As you can imagine, the British courts were saturated with these cases. By the 1980s, a pragmatic accommodation was reached between the defendants and the judiciary called "adopting the evidence"—not plea bargaining per se, as it is not technically allowed—but the defendant

would not contest the evidence, and, in exchange, sentences were reduced.

Secondly, in the international arena, Republicans used law as a means of resistance by fighting extradition cases in other countries and through the claims-making processes of the European Court of Human Rights. The extradition cases are fascinating because these were fought even when the IRA was refusing to acknowledge both the courts in the North and South of Ireland (as that government was seen as illegitimate as well). The legal issue for extradition hearings was whether the offences could be deemed political and this clearly trumped the non-recognition instincts of Republicanism. Extradition proceedings went to the core of the Republican understanding of the conflict. In using the European Court of Human Rights, Republican cases were first framed squarely to the European Commission. In 1978, a group of protesting prisoners claimed they should be deemed political prisoners under Article 9 of the Convention (freedom of thought, expression, and religion). The Commission disagreed. The next strategy was more oblique and challenged their conditions of arrest, such as denial of access to a lawyer (under Article 6) or under Article 2, the right to life with respect to the execution of unarmed IRA activists by British forces in Gibraltar. Although they lost more cases than they won, the contest primarily had symbolic and political, rather than instrumental, significance. These international actions provided a challenge to the British hegemonic representation of the conflict as simply a law and order question. In addition, they presented an opportunity to have evidence of British collusion with Loyalist paramilitaries, torture, extra-judicial executions, and so forth written into the record and presented to the international media.

The third site is IRA prisoners' use of law from within the prisons through systematic judicial review of prison management and conditions. The British courts tended to have a hands-off approach to prison administration. This changed after an important 1979 European Court of Human Rights case (the *St. Germain* case). This decision (to use the courts) coincided with the end of the hunger strike era during which ten prisoners starved themselves to death, and the movement was looking for less self-destructive forms of struggle.

Litigation fit nicely within this new post-hunger strike era. The first cases were brought by IRA leadership as well as rank and file members, some of whom had refused to recognize the court when they were initially convicted. Theses cases were also influenced by some IRA prisoners who were held in England and whose cases went up before the European Court of Human Rights.

This strategy brought some tangible benefits to the Republican Movement. First, the IRA prisoners received legal aid from the British state. Thus they were funded, from their perspective, by the enemy. Second, the prisoners often became highly expert lawyers. These challenges also effectively dismantled the prison discipline system. That is, while a case was pending, for example, a guard's imposition of a disciplinary action, such as suspension of privileges, the prisoner would be granted interim relief, and the "sentence" would be suspended for that time. As there were hundreds of such challenges, little could be done to enforce disciplinary actions. This wore down the guards and irritated the British in the eyes of the Republican prisoners. By late 1980s, approximately one-half of all judicial reviews in Northern Ireland were taken by paramilitary prisoners.

Lastly, there was the use of judicial review by political figures to challenge gerrymandering and other tactics that aimed to exclude Republicans from the political arena. By way of background, the evolution of Sinn Fein begins in the hunger strike era, with the election of Bobby Sands as a Member of Parliament. Gerry Adams and Martin McGuinness and others saw the potential of an "armalite and ballot box" strategy—that is, the joining of armed struggle with political struggle. In 1983, Adams won a seat in Parliament representing West Belfast; in 1985, Sinn Fein won 59 local council seats. At this point, the IRA campaign was raging. Therefore, for the Unionists, having Sinn Fein Councilors sitting beside them in Council Chambers was extremely difficult—many of the Councilors had lengthy prison records for their IRA activities. The Unionists would engage in various antics to exclude the Sinn Fein Councilors such as delegating Council business to a subcommittee from which Sinn Fein was excluded or blowing loud whistles during the sessions so that they could not be heard, and so on. The Republicans

challenged this in court, and they won a significant number of these cases. This tradition of using the courts in the political arena continues.

A story illustrates how important using law as a strategy has become to Sinn Fein. In 1993, a Republican constituent challenged the victory by a SDLP candidate (Sinn Fein's opposition within Nationalism in Northern Ireland). The SDLP candidate won the West Belfast seat illegally on the face of evidence that he had overspent his campaign budget. (There are strict limits in Northern Ireland.) The court, however, ruled in favor of the SDLP despite the law and facts being on Sinn Fein's side. Sinn Fein was furious. An observer from the IRA remarked (using Northern Irish vernacular that cannot be repeated in polite company) "There goes your faith in the British judicial system." Nonetheless, Sinn Fein and the Republican Movement continue to use law as a political strategy.

To conclude, there is a considerable critical literature concerning what Scheingold calls the "Myth of Rights," the idea that revolutionary potential becomes side tracked or co-opted by the use of human rights and court based strategies. In other words, to remain alive, revolutionary and radical movements must stand in a relationship of contradiction to the prevailing system. This is a live debate in the critical human rights world. Can resorting to the law and courts be considered selling out? This is exactly the charge that dissident Republicans, those who are opposed to the peace process, have made against Sinn Fein and the IRA—that they were simply selling out. Mainstream Republicans, like Gerry Adams, would argue that rights discourse was always a part of the struggle. One of the effects of using litigation was to provide an additional weapon to the political side of the Republican movement as well as the peace process. But it also made them address fundamental issues about their own strategies, to begin to countenance consideration of the rights of the "other"—in this context the Unionist community. The assertion of rights was not simply another element of the Republican armory; it contributed to a fundamental reshaping of Republican ideology and practical methods of asserting their political objectives. That is something for which everyone in Northern Ireland is grateful.

Cleavages in the Human Rights Movement

Analysis and comparisons of basic cleavages with respect to understandings of human rights in general or particular kinds of rights, issues such as civil/political vs. economic/social rights; North vs. South perspectives, and policies bearing on human rights and universalism vs. relativism on cultural/family matters.

Simon Tay

Implicit in this panel is the notion that cleavages in the human rights movement are problematic. However, the persistent and deep cleavages of the human rights movement are natural because of its claim of universality, and application of individual rights in the state systems cannot go unchallenged. That is why these cleavages appear over and over again. No movement with such an ambitious claim can go unexamined. In the context of Southeast Asia, it is important to look at the origins of these cleavages and ascertain if and how they have healed.

The first cleavage in Southeast Asia was the claim, which surfaced in the early 1990s, that Asian values necessitated a different standard of and approach to human rights and democracy. In the early 1990s, in Professor Henry Steiner's seminar at Harvard Law School, we rehearsed this discourse, and some students became skeptical. Time has born fruit to this sense of weariness. When we reexamine this discourse, we see it was not about culture and values; rather, it was about state views and the power of elites within those states. The Asian values debate was vitiated by the 1997 Asia financial crisis. The real claim underlying Asian values was that rights would interfere with economic programs. Now, we see that, bereft of human rights and democracy, these states would falter on their purely economic footing.

The Asian values debate creates a false dichotomy between East and West that has revealed itself to be something of a mask for Asian governments to justify their economic policies. However, the question remains whether all cultures see the universality of humanity in the same way. The Asian value debate is gone—but there are subtle differences that must be addressed even as we work for progress. If admitting Asian values suggests that there are permanent, fixed

differences in human rights or that the values are dictated by the state, the argument is empty. But we do need to recognize transitional differences between East and West as both working toward progress and commonality in human rights.

In the wake of this economic crisis, democratization and consciousness of human rights in Southeast Asia has increased. For example, the thirty years of the Suharto regime are over; this year marked free elections in Indonesia. This may open an era of great hope or it will prove to be a period of muddling through. As a result, the human rights movement has become part of the norm in Southeast Asia. Through voting and other means, people have clearly indicated that they want to be a part of the movement and not return to the pre-1997 days.

But people are dealing with the great realities of politics. Despite the positive developments such as elections and changes of norms, some among the authorities would like to slow the progress of human rights. The human rights movement still needs to win over more people, to reverse its status as the opposition, and become a new mandate or compact between a government and the people.

We can see the fragility of the nascent human rights norms by reference to the cataclysm of 9/11 in America, which had repercussions throughout the world. Its impact on Southeast Asia, specifically on human rights, has been largely negative. In a way, it narrowed the cleavage between the governments of Southeast Asia and the United States. But united for what purpose? Almost universally, human rights have gone in the wrong direction. NGOs have done their work, but state and interstate cooperation have been headed in a retrograde direction regarding individual rights. The de-emphasis on human rights has often meant that either the US acquiesces in repressive state action, such as in Aceh, or if it does not, as in Myanmar or Cambodia, its human rights policy is merely rhetorical. The US government has not put any real pressure on the Southeast Asian governments to improve their human rights records. The US is handing the human rights issue back to the governments in the region. It should, of course, be stressed that Southeast Asians should not become supplicants to an all powerful America and

beseech it to turn its power to address these problems. But when we leave states to themselves, we must be cautious of regional norms and practices and how these institutions will behave.

An example of the limitations of regional practices would be useful. In Southeast Asia, the Singapore Institute of International Affairs, the think tank that I head, advised and critiqued the governments of the region, often with success. Most recently, we joined other NGOs and experts in the region and pushed the idea of an ASEAN economic community, which the governments adopted very quickly. For six years, however, I tried to promote the idea of an ASEAN human rights mechanism. The culmination came in 2002 when I resigned. Sometimes we succeed and sometimes we do not. In comparison, our advisory work to advocate an ASEAN Economic Community and Security Community has quickly gained acceptance, and ASEAN leaders adopted these goals at their summit in 2003.

For human rights within the Southeast Asian states, during the run-up to the 1993 World Conference on Human Rights in Vienna, there was some discussion of human rights and regionalism, but political will to implement regionalism was lacking. People were propounding the ASEAN human rights mechanism, and it has been much easier to talk about establishing a mechanism—and even to raise funds to talk about it—than do the hard work to actually make such a mechanism real by both pressing and persuading governments. A third source of frustration with this effort was the lack of external attention and pressure of the right kind, which could have been brought to bear by the US, to facilitate the establishment of Asian regional human rights machinery.

In view of these frustrations, it was apparent that this regional effort could not go further. So what should be done next? Clearly, there should be unity between East and West, but at a level below the state. There should be a unity among the views of NGOs, both within the country and internationally. More broadly, there should be unity between the human rights movement and civil society. Whether in Myanmar, Aceh, Cambodia, or Indonesia as a whole, there must be a broader coalition that deals with human rights in terms of governance, anti-corruption, and the administration of justice, as well as reacts to

the much questionable development discourse. We need a form of unity at the level of peoples, rather than between governments.

In conclusion, cleavages should not be understood as irredeemable. They represent a broad and necessary spectrum of views within the human rights movement. Cleavages are always of some use. There is a richness in different perspectives. For example, NGOs that single out particular prisoners and cases belong to the same movement as more scholarly NGOs and professors who study history, reforms, and deeper institutional and legal questions related to human rights. Somewhere between the two extremes, there is space for those who want to use human rights to improve current state practices rather than to destroy the state. In Southeast Asia, the individual-case based approach of the human rights movement, which has a more oppositional character, has been most dominant. So, in the spectrum of the ways that human rights exists, it is time to turn to cooperating with regional partners to create a stronger and more broadly based human rights movement.

Amr Shalakany

The framework of this panel discussion should be challenged. The implicit assumption is that cleavages exist when there are two polar opposites with meaningful differences. Viewing cleavages in such a binary form focuses on exploiting differences at the polar ends of the binary. Instead, it would be useful if we focused less on the differences between and more on the differences within.

Glancing at the characterizations of the cleavages in this panel description, the list is traditional: North versus South, national versus international NGOs, universalism versus relativism, internationalism versus national sovereignty. This structure would be useful only if you assume that the North actually constitutes a meaningful term in opposition to the South. If one looks more closely, one can see differences and cleavages within each of these terms. First, there is no real consensus or set definition for North or South. There is a series of differences within each of these terms. For example we may state that legal systems in the East are more spiritual than those in the West, which are materialistic, or the West is more individualistic than the

East, which is socialistic. But when the West is examined more closely, the idea of individualism itself is contested. Consider Rousseau's work. He may be at the origin of the Western liberal legality and rights tradition, yet his language is replete with discussion of social and economic rights.

So the problem between viewing cleavages in a binary form is that it is intellectually incorrect; such a view ignores the internal contradictions between the two points that create the cleavages. More importantly, such a dichotomy glosses over that fact that the differences within allow for creation of unexpected and useful alliances. Often these can be uncomfortable and unstable. For example, the North has the rich NGOs that have the money and might be inclined to impose an agenda on the local NGOs of the South, who must take up the agenda if they want the money. Yet this is intellectually incomplete and oversimplifies the power dynamic between the North and the South. If the international NGOs want to play in the game, they have to get the local NGOs to play along. This complicates, if not subverts, the direction in which power runs.

Two examples from the Middle East, both of which involved cleavages between national and international NGOs, make this more concrete. The first example is what is known as the *Queen Boat* case from 2001 (also sometimes called the *Cairo 52* case). In that case, 52 Egyptian gay men were arrested under a law that banned homosexuality. An uproar ensued, and several international NGOs intervened. This created a cleavage between the approach of local NGOs and that of the internationals. The international NGOs used the language of gay identity rights. Local NGOs claimed this characterization was counterproductive and that it would give rise to a flawed litigation strategy and bring bad publicity to the local groups. In a word, the international intervention made life more difficult for the local NGO actors.

Finally, in its March 2004 report, "In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct," Human Rights Watch took many of the criticisms from local Egyptian NGOs on board. One criticism was that the international NGOs used a discourse of identity rights that did not correspond to the reality in

Egypt, particularly in matters related to sexuality. The Human Rights Watch report consciously avoided using any gay identity language and instead framed the situation as one of torture. The first line of the report starts with testimony of one of the victims "Every place we were held somebody beat us. . . . We asked why? It was like they weren't dealing with human beings at all." Clearly, this report stresses torture rather than persecution because of gay identity as the human rights violation. The report also consciously tried to counter the globalization of an American-based understanding of identity. It explicitly stated that identities were fluid and that it would not impose a Western understanding on Egyptians' experiences. So Human Rights Watch, an international NGO, problematized identity to be sensitive to the criticism of local NGOs.

As a companion to the report, Human Rights Watch issued a statement on torture in Egypt, although not referring to the Queen Boat case, but to the many documented cases of torture. There have been no arrests of gay men in Egypt since the report came out. Is there a correlation? As a strategy, the report and statement seemed to work. Thus, one can see that the cleavage between national and international NGOs is not absolute. The former can actually influence their much richer and more powerful partners by exploiting the latter's internal differences.

The second example involved the Middle East Partnership Initiative (MEPI).[1] In its own words, MEPI is a "presidential initiative founded to support economic, political, and educational reform efforts in the Middle East." It is a "forward strategy of freedom in the Middle East," with a sizable budget, and founded on four pillars of reform: an economic pillar, a political pillar, an educational pillar, and a woman's pillar. The context of MEPI is similar to the Queen Boat case. Before the emergence of MEPI, several local NGOs in the Middle East had been demanding that the US intervene aggressively and sever its funding for many of the Gulf leaders who rule by virtue of US support. Egypt is the second largest recipient of US aid.

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[1] More information on MEPI is available on the State Department website at www.state.gov/p/nea/rls/rm/26019.htm.

Until President Bush, no president had been serious about reform in the Middle East. His administration, however, has put pressure on the Middle Eastern governments to implement democratic reforms. So suddenly, this president has done what the local NGOs have been asking him to do. The problem, though, is that it was George W. Bush who was promoting regime change.

The local NGOs were put in a complicated situation. All over the region, but particularly in Egypt, discussions about democratization are taking place. There are explicit expressions in the press that Mubarak should not be elected to a fourth term, that there should be open elections, and so on. It is understood that these conversations are finally happening because the US is putting pressure on the government. However, local NGOs must pretend that US pressure is irrelevant, as if people have always wanted to discuss reforms. In other words, a gun is in plain sight in the room, yet everyone is pretending not to see the gun. There is an uncomfortable and unadmitted alliance between Bush and local NGOs. This is a similar parallel to what happened between the local NGOs and Human Rights Watch. To my mind, it is unclear where all theses tacit and contradictory alliances will go. They might lead to an opening up of reform; then again, they might not.

To conclude, examining the number of cleavages listed, one wonders how the human rights movement functions at all, given so many pairs of polar opposites. What these two examples demonstrate is that there are differences, but those differences that matter are within the local and international movements themselves. Only by recognizing this can we understand how human rights, as a discipline and field of practitioners and theorists, can continue to work successfully despite these various cleavages. The actors, in their various locations, recognize that there are possibilities of alliances. These alliances are possible because the cleavages do not cut across in the clean cut and dichotomous way we presuppose.

Chris Jochnick

For the prior generation of progressive lawyers, Critical Legal Studies was the rage, and there was much discussion of power and

legitimation and questions about liberal lawyering. At that time, the critique was limited largely to domestic spheres. Today, human rights are coming in for similar questions, with folks like David Kennedy, David Reiff, and Michael Ignatieff describing a human rights movement that risks, on the one hand, being irrelevant to the issues of the day, out of touch with popular movements and a large part of civil society, and, on the other hand, doing possible harm to the extent that it backgrounds or ignores underlying structural inequities and channels energy and attention into less pressing issues.

These may be the most important cleavages facing the human rights movement. The Western-based, civil and political rights-focused, mainstream human rights movement, as epitomized by Human Rights Watch and Amnesty International, is marginal to many of the big issues of the day, less relevant than it was during the Cold War certainly. It is a little more relevant with the so-called war on terror, but still fails to address the most pressing issues of poverty, inequality, and marginalization affecting large majorities in most countries. These mainstream groups do not have a social movement or natural base behind them, lack a power analysis, and take pains to present themselves as beyond politics.

Economic and social rights present a useful challenge to traditional groups, forcing advocates to address some of these issues and hopefully leading toward a more effective, progressive, and broad-based movement. Economic and social rights have faltered not only for ideological reasons but because of significant practical obstacles going beyond those faced by civil and political rights advocates. However, the relative clarity and ease of civil and political rights advocacy may, in the end, be part of the problem for the movement. The fact that the advocates can be so effective by focusing on individual victims and discrete negative violations; that these liberal rights are so compatible with the most powerful actors in society and with formal democracies; that they enjoy so much legal support and acceptance in the West and elsewhere has created a situation in which a core of professional, legal advocates in the mainstream movement can be very successful (just look at the doubling in size of Human Rights Watch in the past few years) while remaining at the margins of

the issues that are the most threatening to human dignity. This success encourages a certain complacency that is dangerous to the human rights movement even as it grows in funding and prestige.

Economic and social rights are not like that because you cannot practice economic and social rights in the same way as civil and political rights. Economic and social rights do not have the same level of acceptance among politicians, lawyers, and the general population. Advocates cannot rely on a state-centered violation model but have to look to a wide range of other actors—multinational banks, corporations, even the international community itself—which are just as likely as governments to be implicated in economic and social rights violations. Economic and social rights raise systematic and structural inequalities which challenge the basic social framework, along with the dominant actors in society. So you will not get Levi Strauss and Reebok, or Northern governments, with all their human rights programs, supporting economic and social rights, and there is very little legal or institutional support for these rights. The consciousness, a legal or political recognition of economic and social rights, is simply not there in most countries. To elaborate on a slightly different dimension, there is also a real risk of cooptation of the human rights discourse by banks, corporations, and human rights groups that have divergent interests. When the focus of advocacy is too narrow, it risks legitimizing or overlooking the larger structural issues or the broader impacts of any particular target. This can be addressed by taking a broader look and understanding the overarching goal of human rights as empowering local groups and victims so that they become part of the advocacy process.

Economic and social rights advocacy requires an entirely new type of practice, a practice that starts with a new constituency (we do not have the lawyers, professionals, and elites supporting these rights). The new constituency is a natural constituency—the victims themselves. As opposed to the standard model of a Northern group saving a victim of torture in the South. Here it is the victims of education and health problems, poverty, and inequality becoming the protagonists. This requires a great deal of effort to raise awareness and build capacity and motivate people—all of which human rights can do.

It also requires an interdisciplinary practice, alliances between North and South, an analysis of power and attention to basic root issues.

So even while Amnesty is moving to defend a wider range of individual rights, it will still miss what is at stake with economic and social rights violations if it focuses on the "defense of defenders." Power for long-term change does not lie with the leaders of mass movements. The challenge for human rights is in mobilizing more people in those countries to take into their own hands some of these basic issues of economic and social justice. We need to protect the leaders, of course, but we ought to work to build capacity and promote new constituencies, and empower the base.

As the Amnesties and Watch groups try to tackle economic and social rights, it will be interesting to see if they manage to bridge some of these cleavages, including their distance from social movements, non-state actors, and poverty-related problems. They will likely stay at the margins, because economic and social rights require such a fundamental shift in focus and practice. Instead, the forces to bridge some of these divisions will likely come (and are already coming) from outside the traditional, mainstream human rights movement, in the form of indigenous, labor, development, women's, and grassroots groups, where the focus is on autonomy and placing victims as subject-protagonists and building movements around those constituencies.

What Happens When We Win? Problems Confronted By Human Rights Advocates Joining Reform Governments

What happens in states that have experienced relatively peaceful electoral change displacing authoritarian regimes or when authoritarian regimes relax their repression so that human rights advocates criticizing those regimes now assume high positions in government?

Raif Zreik

Today's panel concerns the relationship between rights and power. What happens when human rights activists become part of the political establishment? What is the relationship between rights and power? The observations that follow can be grouped under the title, "Notes on Rights, Reason, and Resistance."

In general, there are two contrasting images of human rights and human rights activists. The first image is of resistance. Here, human rights discourse and advocacy delimit the scope of the political. Rights stand against power and restrain it. Viewed as such, there is some affinity in the roles of the intellectual and the lawyer. The intellectual speaks truth to power while the human rights lawyer or activist speaks law to politics. This is an image of confrontation, of a fight of good against bad, of rights versus might. Or, it might be seen as a wall. There is a wall of separation between the advocate of rights and the holder of power.

The other image of human rights and its advocates is one of a bridge. Here, the image of rights is an image of universality, where rights represent an ultimate domain of communality that brackets differences and transcends conflict. In this view, rights embody a notion of peace as distinct from conflict. Human rights are like a solid bridge that allows communication, a bridge that joins all rights-conscious persons and activities in one community of action.

These images are not complementary. There are tensions within and between these contrasting images of rights. The first image points to the conceptual presence of a wall between right and might, a radical difference, a quantitatively immeasurable one, which portrays an image of rupture and discontinuity. The second image, on the other hand

suggests a notion of continuity and communality. On the tensions internal to the images, in the first image of speaking law to politics and rights to power, the law seeks to communicate with political power but requires the political to understand what is being spoken. In order to speak to power, therefore, there must be some shared language, some possibility of translation. For human rights law activists to effectively speak to power, they must be in some sense powerful, and they must be able to cross the bridge. The first image admits of no bridge.

This is where the second image becomes relevant. With the bridge, human rights becomes the business of experts and professionals and its discourse something practitioners share. Human rights have become so basic that they can be taught in schools. Rights are fact. As such, it does not make any radical difference whether one is working in the public defender's office or in the prosecutor's office, so long as s/he is committed to the processes and the fundamental principles of human rights.

To this should be added that it is the universality and independent existence of the process that allow the bridge to be crossed and remain in human rights terrain. But, from the traditional human rights position, the danger in crossing the bridge is the risk of impurity. Something is lost in the fight for the good and radical; the resistance against radical evil can be lost in crossing the bridge. The difference between good and evil becomes tenuous. The concept of the universality of rights, their *a priori* nature and purity, could inadvertently provide a justification for their corruption. While the idea of the purity of rights invites conflict and resistance in one moment, in the next, it invites images of professionalism that diffuse conflict or could form the basis for suspending conflict. As such, rights embody our aspiration both to conflict and reconciliation.

We need to reformulate the dilemma of the relationship between the human rights movement and power in terms of negative and positive actions or freedoms. The role that human rights activists often ascribe to themselves is the limited role of a watchdog, someone who raises a red flag each time the state crosses the line. Here, the action of human rights groups is only reaction; the state acts and the

human rights actor reacts. Despite the regulatory value of this position, its negativity carries the risk of marginality or of being the "beautiful soul." There is, therefore, an alternative position that human rights activists might occupy, one of being a participant who creates the enabling context that allows individuals to create the conditions for positive freedoms. Thus human rights groups are not referees throwing down flags but players in the playground. The risk is again of impurity, the possibility that the activist confuses human rights with politics if ever there were a distinction between the two.

A different way of thinking about the tensions inherent in human rights is of symbolic capital versus real capital. Human rights activists are acknowledged in many national contexts as having gained symbolic capital and a special status as guardians of precious moral values. How is this symbolic capital valued? Can we value it outside a system of exchange? What do we do with this symbolic capital after we have gained it? What are we to exchange it for and under what circumstances and conditions? The dilemma is clear if we think of symbolic capital as property that human rights groups own. Does this property bear value outside the regime of exchange? In legal terms, can we conceptualize property without the concept of contracts?

All human rights groups have led campaigns to generate symbolic capital and gain the status of a qualified speaker whose power has to be reckoned with and included. The moment of possible inclusion in the bargaining is the moment of crisis. In every bargaining for a contract, one must give up some principle because the notion of consensus implicit in every contract also implies compromise. A compromise of principle might be the cost of human rights activists participating in official governance. Therefore there is no *a priori* way to resolve the tensions of activist participation and relationship to the state. What must be asked is: What symbolic capital is lost and how much real capital is gained? The balance is unavoidable.

The hope is that human rights activists and groups make the correct calculation, taking account of all factors, including the reality of their symbolic capital. The process of negotiating participation must be done with full transparency to the activist's organization and

constituency. When a revolution wins, it dies. A revolution that wins becomes a constitution. Winning and losing therefore are the same.

The problem remains with the nature of rights: rights are resistance. Human rights advocates know what they do not want; they do not know what they want. In the Soviet Union, rights wanted a purely moral state resistance: a nonpolitical revolution. That is problematic. For symbolic capital, which is a form of moral power, requires materialization. If it does not materialize, it stops being capital. Yet, once it does materialize, it is no longer symbolic. Therefore bargaining can only be tantamount to perpetual anxiety.

Ariel Dulitzky

What happens when human rights defenders win political power in Latin America? In the last twenty years, Latin America has witnessed the emergence of a wave of new democracies, with the end of civil wars and military dictatorships. In the southern cone, the military dictatorships in Paraguay, Uruguay, Brazil, Chile, and Argentina are over. The early nineties saw the end of civil wars across the region and in Central America. These two tendencies form the background for the following analysis of the new political experience in Latin America.

We need to take a more critical approach to the idea of human rights defenders winning and ask three principal questions. First, what does it mean to win? Winning means different things depending on the specific country context and what changes occurred. Second, who are we? And finally, how do human rights defenders relate in the government, with the government, and with their colleagues in the human rights movement?

What does it mean to win? Every change has its peculiarities and the political space opened in every state is not the same. How human rights defenders engage with new governments is conditioned by the type of change that has occurred. In Chile or some Central American countries, the armed forces remain very influential in government and exclude some human rights defenders from power. Or exclusion occurs in spite of the resounding victory of democracy with the end of civil wars and military dictatorships.

Argentina demonstrates another tendency. There has been a great distrust of government although it has proclaimed its commitment to constitutional democracy for over two decades. As a result, human rights defenders have hesitated to join the government. Only in the last few years are human rights activists becoming more involved in the Argentine government. To win an election does not mean that all power is won. Strategies change, and there are different levers to pull. Lula's government in Brazil is a good example of the tensions inherent in accommodation.

Now, to the question of who are we? "We" are the traditional human rights defenders and activists working for NGOs, but this definition must be expanded to include all rights-conscious political actors. For example, Argentina's President Alfonsine was the founder of a main human rights organization, but he never really worked as a human rights defender per se. He was more of a political activist. There are also governments led by people committed to human rights defense but who are not engaged in traditional human rights activities. So "we" could be supporters of the human rights movement who are not necessarily human rights defenders or activists.

However, the role of traditional human rights defenders is more interesting, particularly because they face the more difficult questions of participation in government. In Latin America, when human rights activists come to positions of power, they enter as assets to the government. Most activists have international training and enter government laden with international contacts, degrees, expertise, and legitimacy. This new international face of human rights defenders competes with the presence and influence of economists with analogous international backgrounds. This, in turn, leads to an interesting tension. The economists favor policies that promote new markets, privatization, reform, and international trade, which has a huge impact on the enjoyment of social and economic rights. The human rights activists, who are not usually engaged in these sectors of government, nonetheless may have different perspectives.

In Latin America, traditional human rights activists are not usually appointed to very relevant ministries; for instance, many activists head the Foreign Ministry's human rights division. There, they do not

implement domestic human rights policy; they focus on defending the state internationally or simply promoting international law. They do not define policy on the role of the armed forces in the new democratic societies or on what it means to promote social and economic rights. Further, they do not deal with police abuse, brutality, or prison conditions. The state will usually create a human rights division in the interior ministry and marginalize its role in governance. Some activists appointed as ombudspersons, performing reactive as opposed to pro-active, powerful roles. So, human rights activists may now have a friend inside a ministry but that person may not have the power to generate or implement public policies. One exception is Peru where human rights defenders were in charge of the Ministry of Interior for a few years. In that time, they defined national security policy, instituted police reform initiatives, and played other roles central to the functioning of the state. Very impressive, but in the larger Latin American landscape, Peru is an isolated example.

Finally, how do human rights defenders relate within government, with government, and with their former or current colleagues in the human rights movement? In many Latin American countries, the mere presence of human rights activists opens up democratic space within the state. Human rights defenders act as a bridge between civil society and the government. They are the channel of communication. Human right defenders speak to the government, not only on behalf of the traditional human rights movement, but also on behalf of other civil society and social groups, such as trade unions and professional associations. It is important that they bring such demands to the government in a region where governments had been closed to working with civil society organizations.

Human rights defenders often clash with the international economist groups when they bring these voices and demands to government. This is where the tensions arise between the international human rights defenders and economists within the various ministries. Because human rights defenders often raise human rights issues within the government, they are often isolated within the power structure as many sectors of the government consider these issues to be alienating. Nonetheless, there is tremendous value for human rights defenders to

be involved with government. It helps them to understand what was traditionally considered enemies—the armed forces, police, and other similar types of actors. They are able to dialogue with these actors. In the end, human rights defenders are able to engage with government more effectively and understand the issues facing state actors.

The relationship between human rights activists in government and the traditional human rights movement is very complicated. The relationship reflects, and is conditioned by, the nature of change that has occurred in any one society, be it a change from military dictatorship to democracy, a change of political parties or the end of civil wars. It is a two way problem of how human rights defenders deal with former colleagues. In many cases, human rights defenders fail to come to terms with their new role as government actors. Such human rights defenders are no longer part of their former NGOs, and they ought not to participate in the critical strategy meetings. The reverse side of this consideration is that human rights defenders are often at loss as to why their former colleagues criticize them. They often feel that as friends, allies, and former comrades in the human rights struggle, their colleagues in the human rights community, should not criticize them. Many personal friendships have been strained and even damaged when a human rights defender takes a position of power.

A possible approach to enabling constructive relationships is for human rights activists to define their roles with clarity. Human rights activists should make the limits and possibilities of their role clear to their colleagues. This would allow non-governmental actors to define more fruitful terms of engagement with activists in government. Friendships can last where there is transparency and loyalty. NGOs are often perplexed by their former colleagues in government, as the NGO tradition in many countries has been to fight the government and all it represents. NGOs decide that the new government, which includes human rights defenders, is friendly, and should not be criticized. Or, they may proceed to criticize the government in power, carefully overlooking, in their scrutiny, the part of the government where human rights defenders work. Finally NGOs might consider the government as totally new and try to develop a novel approach.

The latter approach could still be one that views the state as the problem and challenges everything the state does and produces. NGOs adopting this approach often employ the same language as when confronting hostile military regimes. That said, some NGOs have evolved and are engaging in new areas of work, strengthening democratic cultures, and establishing workable human rights policy.

In conclusion, despite learning at Harvard Law School that everything is problematic, winning is good. Having a democratic government and being rid of a military dictatorship is good. What human rights defenders bring to the government is a winning contribution in itself. Even if human rights defenders are not completely successful in implementing their policies, they bring new approaches to old problems, new ideas to old issues, and open new spaces that cannot be closed. From a tradition of continually challenging power from outside the state, human rights defenders must now articulate a strategy for confronting abuse of power from within power and formulate how to prevent and make reparations for the past abuses.

Yash Ghai

As a member of the Constitutional Review Commission of Kenya, my presentation is based on my experience in my homeland Kenya to give an indication of the promise of reform, democracy, and social justice that seemed to be opened up by the newly elected government in 2002 and explain why that promise was not fulfilled. Those who assumed power in early 2002 were celebrated locally and worldwide for their commitment to human rights. Some of them had received distinguished awards for their human rights activism.

Kenya had been ruled for many years by a very authoritarian government. All the while, the country had a constitution with a chapter containing a bill of rights. This enumeration of rights had little impact on the state's institutions and policies. About three years ago, the Kenyan Parliament and the president invited me to chair the constitution review process during a time when the momentum for reform was strongest. During this time, a national consensus emerged that a new constitutional order was necessary to achieve the objectives

of national progress, objectives that had been agreed to though a series of national conferences. Many Kenyan human rights activists who are now in government played significant roles in the processes leading up to the formal review of the constitution. Many were lawyers and many of these activists joined political parties when the constitution was modified to transform Kenya from a one-party to a multi-party state. They carried on the struggle, after a fashion, through political parties.

The work of the Constitution Review Commission was abruptly halted when President Moi dissolved parliament in October 2002. After intensive consultations with the people, a draft constitution had been completed and had been presented to the public for debate. The National Constitutional Conference, which was to adopt the draft constitution, was about to meet. But the process had to be suspended pending the election of a new parliament. Nonetheless, the elections that soon followed brought welcome change to many Kenyans. The old government was defeated; those supporting human rights were elected, including activists allegedly committed to implementing the new draft constitution and more effective protection of rights than had been the case under Moi's 24-year rule. It was regrettable that the new government constituted by these activists—despite their many honors for the struggle for human rights—reneged on all the promises of their political campaign. They maintained the old authoritarian constitution; they did not proceed with effective reforms in the judiciary, bureaucracy, or the police. Ultimately the new government sabotaged the draft constitution.

Against this background, the first question is, Who are we? Though similar to the question posed earlier by Ariel Dulitsky, the approach is different. Although key members of the new government had presented themselves as human rights advocates, they were not truly committed to human rights or reform. Kenya's current president, Mwai Kibaki, for example, managed to establish and convince the people that he was completely committed to human rights, democracy, and social justice. Somehow it was forgotten that when Kibaki was vice president under Moi a few years earlier, he introduced a constitutional amendment that made Kenya a one-party state, banning all but the ruling party. Later, in the 1980s, Kibaki also introduced

amendments that removed the constitutional protection of judges' tenure. Someone with that record could not have an overnight human rights conversion after being demoted by Moi and deciding to fight him through a new political party.

So we have to explain, firstly, why politicians consider the rhetoric of human rights important in their search for political power, and secondly, why do they so quickly abandon promises of human rights? It seems that in Kenya, as other parts of Africa, when in opposition, politicians find it convenient to espouse human rights ideology. First, there is the political necessity to attack the government, and it is expedient to use human rights as a standard for criticizing the government's conduct. More importantly, these opposition actors are often politically isolated. Lacking access to resources and influence on policies and administration, they were not particularly sought after. Engaging in the discourse of human rights gives them a certain status, particularly in the eyes of the international community and resident diplomats. Advocacy of human rights becomes functional to generating material resources and moral support. The same can be said of others who, in the run up to the elections in Kenya, defected from the government sensing that it, as well as the president, was going to lose. They reinvented themselves as human rights or democracy defenders.

Advocacy of human rights also helps to garner domestic support, particularly from NGOs. They are able to raise funds from the international community (also using the ideology of rights) and are able to offer politicians a degree of institutional and moral support, leading to a sort of parasitic relationship.

Unlike the dilemmas of human rights activists in Latin America that came to power, such contradictions did not apply to many actors in the Kenyan government because they were never really committed to human rights in the first place. Their basic concern was the consolidation of their power base, principally through the accumulation of material resources. The state is still the major source for illegal accumulation, a prime object of plunder. Such a project is fundamentally incompatible with respect for human rights. For instance, corruption is a major underlying cause of human rights

violations in the state. Yet no one in the current Kenyan government has addressed corruption. Land policies and property rights have major implications for human security and human rights, another area neglected by the new government. The cooptation or suborning of the judiciary, using the law to hide crimes or convict those who challenge the government, is another prerequisite of corruption. Although public support for the government has declined significantly, the government does not seem unduly worried and certainly not deterred.

Why is this? If we consider the circumstances in which activists or parties committed to human rights win elections, it would seem that rights are not a critical issue. In Kenya, even though the opposition's platform was based on human rights issues, it did not win because of this commitment—or even because the people tired of Moi (who had an egregious record of human rights violations). President Moi received as many votes as he had in previous elections. The opposition won because they were able to form a coalition that banded together as one party against Moi. What this reveals is that the vote was, to a significant extent, ethnically driven, similar to previous elections. There is reason to be pessimistic, not only with regard to the politicians, but also with respect to a public whose voting patterns illustrated that it had not changed.

Having lived through the long trauma of the Moi regime, Kenyans were voting for ethnic leaders in a way that possibly made it easier for the government to renege on its human rights promises. Perhaps Kenyans did not really expect the human rights reforms to be implemented. Kenyans voted for opposition candidates along the same lines they always had with the expectation that if the individual representing their ethnic group won, there would be rewards for their group—more roads, schools, jobs, hospitals. When the Constitution Review Commission traveled around the country, polling Moi's constituency, most individuals complained that they had been marginalized in the new Kenya, despite their link to the ruling party. This underscores the point that people are beginning to realize that having their own ethnic leader in power does not mean that the community benefits. Indeed, only a few families reap the rewards.

That said, Kenyans greeted the election results and the renaissance they symbolized with genuine energy and excitement.

The ease with which the government was able to step back from its human rights agenda illustrates something about the state of human rights consciousness. Even in the human rights community, a profound understanding of what human rights are, how they apply, and what they mean in terms of institutions and policies seems absent. There is a kind of abstract quality about the understanding of rights. Civic education has failed to relate rights sufficiently to oppression, much less use them to mobilize people or form the basis of social movements. Nor are human rights seen in terms of institutional design. In designing the new constitution, it was insufficient to include a bill of rights. But what the constitution needed was to be rights friendly, to create the conditions that enabled the very institutions and structures and the relationships among them to promote rights. Kenya's politics is still largely an ethnic politics of patronage; even human rights NGOs have a tendency toward ethnic bias. Thus even if there were greater human rights consciousness among the people, there are few institutions that enable the expression or channeling of their preferences or anger in ways that are politically significant.

There is a similar ambiguity about the role of the international community. It has not always played a supportive role for human rights promotion and protection. It has a propensity to work with governments, even authoritarian governments, rather than civil society or opposition parties. There is a need to examine the persistence of the colonial state structures in contemporary Africa that are left untouched by international policies and agencies. Despite new and progressive constitutions such as in Uganda, institutional structures do not advance the cause of human rights. Even after a human rights friendly government sets the agenda and challenges structural inequalities, the international community is likely to sabotage reform. Poverty eradication is not compatible with the agenda of international players, whether bilaterals or intergovernmental agencies.

The World Bank and International Monetary Fund are cases in point. These actors have no interest in fundamental change in Kenya. Indeed, if Kibaki had been reform-minded, he would have been

neutralized very quickly by these agencies. As it happened, his interests have coincided with those of both institutions, and we can expect that his government will be in power for a long time. The government has very little power, and it cannot change much. But it has the capacity to exploit, particularly at the local level. This is critical. Human rights can only be achieved if government is effective. We must enhance the government's capacity to manage and promote development. Democracy is important, but the only good example of democratic change in Africa is in South Africa. And even there, the pernicious effects of ethnicity have not been abolished, although the government has tried to minimize ethnic identities with some success. But the Mbeki government is also an example of weakness. The state has many human rights activists and is endowed with resources. Yet Mbeki buckled under pressure from the international financial institutions very quickly and surrendered to a model of development that boded ill for human rights. This kind of free-market development in the context of globalization is a metaphor for appropriation and for the denial of the commons. The link of this to the prospect of human rights is seldom explored.

What New Human Rights Issues Will Become Significant?

Discussion of some issues that have first arisen and become prominent during the half century of the human rights movement, together with anticipation of new topics and themes to which the movement is likely to give or ought to give prominence over the coming decade.

Michael Stein

The forthcoming United Nations Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities is both exciting and challenging. To begin with the challenges, the first and foremost one lies with conceiving of "disability" as an appropriate area for human rights protection. Value systems such as human rights are often defined not so much by what they exclude but rather by what they include. They therefore contain inherent tensions.

The logic and progression of human rights has been toward greater inclusiveness. The mantra, so to speak, of human rights is that every human being, by nature of being human, is equal in dignity and rights. Historically we can see among countries, and even internationally, an extension of human rights to all people, regardless of race, religion, sex, and so on. While the progress has occurred at different speeds depending on the country context or the international document, we see this progressive extension of human rights to all categories of embodied difference. However, working against this trend is a concern that human rights protections might become overextended or diluted. In its simplest terms, the fear could be stated as (after Gilbert and Sullivan), "if everybody is somebody, then no one is anybody." Although we may feel that everyone has human rights by virtue of being human, some believe that the special potency of human rights, in theory or practice, lies in its circumspection. By having a special carved out area of human rights protection, those protections ought to be limited. As a result, some challenge the inclusion of disability in this progressive continuum of human rights protection. We can see an example of this in a prevalent idea in civil rights doctrines and at the United States Supreme Court, which lumps race and sex together

as one type of protected category, but views disability as a separate category. This idea that race and sex are different from disability leads into my consideration of the next challenge.

The second challenge involves demonstrating that "reasonable accommodations" are pivotal to ensuring non-discrimination objectives. The dominant approach regarding human rights is that civil and political rights solely involve an attitudinal adjustment. Thus if a country has a discriminatory rule that women or ethnic minorities are barred from entering medical school, an anti-discrimination norm can be promulgated that asserts that women are as good medical students as men and enforces their right to participate, leveling the playing field.

Part of the traction against disability rights, which comes from human rights and civil rights traditions, is that an attitudinal change alone does not suffice. Although attitudinal biases do exist against the disabled, something else is required to achieve equality for people with disabilities—namely "reasonable accommodations." Unlike typical first generation rights, the attitudinal bias against people with a disability does not come in the form of an express rule, but rather the discrimination comes in the form of the created environment. For example, there is no express rule against disabled people becoming politicians, but the parliament is located up a cathedral load of stairs. This effectively prevents anyone in a wheelchair from being a member of parliament. Or there may be no express rule against blind students becoming medical students, but if the medical school has a rule that no animals are allowed in the building, the student and his or her dog will be excluded.

At first glance, the attitudinal shift that occurs in response to this scenario looks much like an attitudinal shift in race and gender areas, in other words, all that needs be changed is the rule to allow guide dogs to enter the building. However, beyond changing the formal rule, there is an additional cost with disability rights, namely the cost of modifying the environment such as building a ramp. The United States Supreme Court has found that this element, that of additional cost, makes disability rights distinctly different. But consider if reasonable accommodation is more expensive than requiring a medical school to

admit women, where it would have to build separate facilities/locker rooms for women. This empirically unproven assumption that reasonable accommodation is costly while attitudinal adjustments are costless drives the distinction of discrimination based on disability from that of gender or race.

A practical concern that builds on the notion of reasonable accommodation is the third challenge concerning disability. To make the interdependence of first and second generation rights real and fulfill their enjoyment, even more costs exist. Assuming we have a strictly enforced anti-discrimination mandate that requires reasonable accommodation, a problem still exists. For example, to declare the right of people with disabilities to work is meaningless unless there is transportation to get them to work. In the case of developed countries, this may entail ramping up public transport. And in the case of developing counties, it may mean prosthetics or even skateboards. The enjoyment, in other words, of economic, social, and cultural rights are the underlying determinants of the right of disabled people to non-discrimination. These considerations make sharp questions for priority setting in the allocation of resources, particularly when international financial institutions are involved in the overall picture as they are in developing countries.

With reference to the fourth challenge, the need to monitor compliance raises many of the same difficulties as monitoring other human rights issues. Few would claim that the present devices for monitoring human rights are effective. What is of most concern is creating a monitoring policy and process that would do more than simply create rights on paper. The new United Nations Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities should go before the General Assembly by the end of 2006. Some surprising allies of this Convention, such as China, have come forward in the drafting process. There is no small irony in noting, however, that the United Nations conference area where this Convention is being negotiated has only one accessible bathroom. In addition, it lacks special presentations for hearing or visually impaired participants.

Rugemeleza Nshala

This panel asks us to predict the future. Corruption will surely become one of the issues that human rights activists and academics will be engaging with in the future. It causes economic and social problems for the majority of people in this world, particularly in Africa. Corruption has been defined as outright theft but also encompasses embezzlement, nepotism, and the general abuse of public authority to exact privileges and payment.

Corruption is not only a problem in Africa. Enron, the election of 2000 in the United States, and the influence of oil companies in the US all raise the specter of corruption. Yet it has hit Africa hard. The misappropriation of public funds and the erosion of the social contract have led to politicians amassing mountains of money while the population becomes impoverished. Another aspect of corruption comes into play when public investors come from overseas and utilize political connections within the country to exploit natural resources.

Academics have tried to examine corruption as a general pattern that allows inefficient producers to remain in business. The practice of bribery distorts economic incentives; entrepreneurship is discouraged, slowing economic growth. But corruption is more than market distortion. The price of corruption is terrible for those who depend on public sector services, which are severely compromised by corrupt practices. As such, corrupt practices constrain the enjoyment of economic and social rights, indeed all human rights. Powerful companies have been able to acquire concessions to exploit natural resources. People have been displaced from their land because private companies want to develop parks. These people have no knowledge or resources to take any remedial action.

Corruption thus thrives where the rule of law is weak, where people lack a voice, where governments lack accountability, and where courts are bought and judges are bribed. With corruption, the incentive is to protect the status quo.

How does the government manage to maintain law and order in such a state of affairs? Simply, it enacts draconian legislation that allows elites to exercise control over the populace. Rights are infringed. Examples from Nigeria, Gabon, and Equatorial Guinea

illustrate how Africans continue to be poor despite the presence of abundant natural resources. A significant part of the explanation is corruption. Indeed, a recent African Union report stated that corruption costs Africa an extraordinary $150 billion per year.

Nigeria provides the United States with 7 percent of its oil. Despite this, the revenue generated by this oil has had no tangible impact on the Nigerian people. When the country started producing the oil in 1965, per capita income in Nigeria was $245; in 2004, it was $265. A total of $350 billion has been misused, flowing into the bank accounts of political elites in Switzerland, rather than into public coffers. Why? The military dictatorship pursued its own interests, and corruption continues to exact this unconscionable tax on the welfare of the Nigerian people. Equatorial Guinea, to take another example, has a population of 600,000. It has an agreement with Texaco, which gives the country 12 percent of the revenue Texaco makes there. Even this meager 12 percent never makes it to public accounts but rather goes into the president's pocket. The same can be seen in Angola where $4 billion has been lost from oil revenues, going directly into the overseas private bank accounts of government elites.

Corruption does not thrive purely because of the actions of African leaders. These leaders are encouraged by companies from abroad, which profit from the total breakdown of the rule of law. In 2003, the former chief executive officer of Elf, a French oil company, was jailed for five years and, after a trial in France, fined $375,000 for engaging in corrupt activities. This trial shed light on the corrupt practices that occur in Africa. It was asserted that 70 percent of Elf's profits came from Gabon alone, and yet only the company and Gabon's president benefited while the 2.5 million Gabonese continued to live in poverty. Contrast this with the situation in Botswana, a country of 1.6 million, whose per capita income is $4,000. Gabon is blessed with more oil and resources than Botswana—but cursed with corruption. The consequences for human rights are obvious.

The international community is working to come up with a solution to corruption. It has enacted legislation and tried to enlist support of countries to fight corruption. In 1996, the Organization of American States passed the Inter-American Convention against

Corruption. In 1997, OECD countries adopted the Convention against Bribery of Foreign Public Officials in International Business Transactions. The Europeans have enacted both a Criminal Convention on Corruption and a Civil Convention on Corruption. In 2003, the African Union and the UN also promulgated conventions against corruption. (The UN convention was ratified by 30 countries and will enter into force by the end of 2005; progress is being made toward ratifying the AU convention.) Passage of these conventions is clear evidence that the world believes corruption must be tackled.

Beyond these conventions, some additional progress is being made. Countries share more information with each other. Actions are taken to pierce bank secrecy laws, for example. Extradition of perpetrators is increasingly a possibility for those who, having committed corrupt activities, seek haven elsewhere. There is potential for civil prosecutions as well.

Countries are also taking up the issue internally. There has been a prosecution case against the corruption involving the former president of Zambia. In Kenya, the Goldenberg scandal, which involved the former rulers of the Kenyan government, figures in judicial proceedings. These are hopeful indications that something is being done. We will see a growth in reporting on corruption, of naming and shaming. As we see weaknesses in these new instruments, we will be able to amend them to strengthen the anti-corruption machinery and improve the human rights situation.

Kerry Rittich

This presentation discusses an encounter that is important for the field of human rights: the encounter between human rights and development. During most of the post-World War II era, human rights and development were almost entirely separate fields. Over the past five years, there has been a significant incorporation of human rights into the development agenda, particularly that of the international financial institutions (IFIs). Since 1999, it has become conventional wisdom within the World Bank that development not only encompasses economic growth but a whole host of social, structural, and human concerns, as the Bank puts it. Human rights

have pride of place in this refashioned agenda. For example, in a widely cited restatement of the development agenda, the Comprehensive Development Framework, former president of the World Bank James Wolfensohn made the claim that equitable development is not possible without attention to human rights. And following the release of Amartya Sen's *Development as Freedom,* human rights are now widely identified as both instrumental to and constitutive of development. In short, it is now common to speak of development and human rights in the same breath and to identify them as complementary rather than opposing projects and objectives.

At the discursive level, this represents a dramatic shift in the priorities of the development institutions. This is also a significant moment for the human rights community as activists are being invited to shift from a stance of critical engagement with the international financial institutions to one of shared governance in the development enterprise. At minimum, the mainstreaming of human rights into development seems to signal a move toward a more civilized and humane approach to development and a retreat from the singular focus on economic growth that has provoked complaints from those in the human rights and social justice communities. It also seems uncontroversial as there are many areas of mutual interest and concern across the development and human rights constituencies. For example, human rights activists have long pressed for the recognition of civil and political rights. Those in development now recognize these rights as central to the protection of property rights and the promotion of favorable investment climates. Similarly, NGOs have long been central to the promotion of human rights norms; development institutions are now promoting a greater role for civil society as well.

However, beneath this convergence over the value and importance of human rights, much uncertainty and many potential areas of conflict remain. This is particularly true in the area of economic, social, and cultural rights. While this uncertainty and conflict is not evident in the abstract commitment to human rights norms, it becomes more clear when we look at the manner in which human rights and related social and distributive justice objectives are

conceptualized, institutionalized, and operationalized and at the larger governance frame in which they are placed.

There are three sets of nested questions that are fateful to the encounter between development and human rights:

- Which paradigm, development or human rights, serves as the overall frame of analysis?
- What are the institutional underpinnings of human rights?
- What is the relationship between efficiency and equity?

At present, a number of human rights scholars, treaty bodies, and activists are promoting the idea of a rights-based approach to development. The basic intuition behind this effort is to civilize economic development by subordinating it to public international law and human rights norms. Among the policies and practices that human rights and social justice activists have identified as inimical to their objectives and that might be restrained by this approach are fiscal austerity drives that limit the resources available for spending on health and education, macroeconomic policies that lead to increases in unemployment and poverty, and privatization and market deregulation that shifts the balance of power between groups, both within and between countries, and aggravates global inequality.

Because of their institutional mandates, neither the IMF nor the World Bank are likely to accept the proposition that human rights should serve as the frame of constraint for development policies. These institutions have long argued that their Articles of Agreement limit their responsibilities for concerns that cannot be strictly linked to economic issues and justify the priority they give to economic development. However the IMF and the World Bank are not opposed to human rights. Rather they contend that economic development is a fundamental precondition for the realization of human rights. In other words, their response to the call for a rights-based approach to development is that development is essential for human rights.

In so doing, they have served notice that even though they may not disagree about the value of human rights, they have different strategies and priorities for their attainment. In the process, they have also posed an important challenge to the human rights community. Even if a wide range of issues, such as food, housing, and health care,

are characterized as matters of human rights, it is still necessary to establish priorities and allocate resources. If conflicts arise or actions that advance one goal create difficulties elsewhere, choices must be made, and trade-offs may be necessary. While this kind of cost-benefit analysis is already familiar to those in the field of development, it has not been central to either the practices or the vocabulary of human rights. Instead, human rights activists have simply taken the position that all human rights are interdependent and indivisible. However, the risk of this approach is that conflicts, both potential and actual, may be avoided rather confronted. Human rights activists, too, may have priorities that are controversial. They, too, may fail to address the effects of their actions on different groups. Moreover, a commitment to human rights does not, in itself, resolve the question of how they should be realized. This is where many of the controversies currently arise, particularly with respect to economic and social rights.

This brings us to the second issue: how human rights are institutionalized and how they intersect with development objectives. Here, a key issue is the state's role. For the last 15 years, the international financial institutions have been elaborating and promoting ideas about good governance and best practices in market societies at the heart of which lies a fundamental reconceptualization of the state's role in economic and social life. They advocate a shift from a Keynesian or New Deal state, whose role included the regulation of markets for protective purposes and the redistribution of resources among citizens and social groups, to a state whose primary function is to facilitate efficient transactions and create the conditions for competitive markets.

In this view, beyond generating economic growth, the state's primary social role is to facilitate participation in the market, rather than directly guarantee the social needs of the population. There is a clear point of conflict, or perhaps engagement, between human rights and development. The entire edifice of human rights is predicated on state responsibility. With respect to economic and social rights, this may not merely entail the provision of market opportunities but responsibility for specific outcomes as well. So one question is whether the market can supplant the state and perform the role of

delivering social outcomes that are adequate from the standpoint of human rights. Another question is whether these institutional arrangements are even intended to serve the goals of greater distributive justice, the animating intuition behind social and economic rights. The re-conceptualization of the state ultimately is not just about the state as an institution of governance. Rather, it is about the re-organization of social life in which we move to a world where there is less collective and greater individual assumption of risks and costs. On the other side, can human rights activists continue to vest their hopes for strengthening human rights in a strong state when that very state is being questioned elsewhere and perhaps displaced?

The third issue is the relationship between equity and efficiency. Part of the debate over the relationship between human rights and development concerns the forms of regulation that are appropriate. The IFIs are committed to the idea of efficient regulation, in which mechanisms that advance distributive justice may be market distorting and thus discouraged unless they address market failure. Thus, social justice advocates are invited to make the business case for equality initiatives. This dramatically narrows the scope and purpose of appropriate governance and regulation. Rules and market mechanisms to ensure workers' or tenants' rights or consumer protection, for example, may now be rejected in the name of efficient regulation. This can be disastrous for those who are interested in social goals. One of the tasks for those interested in human rights is to challenge the claim that distributive concerns have no place in market institutions. Indeed, consideration of the way that rights and resources are allocated through market institutions only becomes more important in a market-centered world.

One of the ways in which the World Bank has addressed the conflict between distributive justice and efficiency is to search for congruence between the two goals. Thus, its has emphasized the way in which efficient markets promote equality and inclusion by drawing a larger number of participants into the market and expanding the pool of people who benefit from economic development. Another approach has been to argue that some forms of equality, such as gender equality, promote economic growth. In this way, the Bank tries

to appeal both to the human rights community and to those who are primarily focused on economic outcomes. Yet while these objectives may overlap, they may also diverge and conflict as well. To manage this conflict, the Bank has also transformed the underlying vision of social justice. For example, it has proposed a new market-centered vision of gender equality that contests some of the visions and strategies found elsewhere, such as in the Convention on the Elimination of Discrimination against Women and the 1995 Beijing Platform for Action. In the Bank's vision, the road to gender equality lies not only, or even primarily, through rights but through the enhancement of women's human capital, reliance on market incentives, and improved opportunities to participate in the market. A similar move can be noted in the field of labor and employment, where the Bank promotes a shift away from the traditional labor agenda and substantive employment standards to a focus on workers' rights. Thus, the Bank promotes labor market deregulation, more attention to workers' human capital, and limited protection of core workers' rights.

The bottom line is that through their broader market reform efforts and their direct engagement with human rights issues, the international financial institutions are transforming human rights at the operational and conceptual levels. They are altering the content of human rights norms and reordering social goals and priorities. They are also opening and closing the routes through which human rights can be realized through ideas about good governance, the nature of efficient regulation, and the appropriate role of the state in a market society. This is shifting the terrain on which human rights activists do their work and will compel a reassessment of previously taken-for-granted assumptions about issues such as the state's role in the promotion and respect for human rights. Human rights officials, activists, and scholars will have to engage in more concrete discussions about the merits and demerits of different market rules, institutions, policies, and priorities in particular contexts. This, in turn, will require deeper engagement with the institutional details and debates about market design, issues that often recede into the background and that, so far, have been mostly left to economists.

ROUNDTABLE

Analysis and Evaluation of Law School Human Rights Programs

The roundtable discussion was co-chaired by Ryan Goodman, Assistant Professor at Harvard Law School, and Jim Cavallaro, Clinical Director of HRP. The interactive roundtable compares, analyzes, criticizes, and proposes changes for law school human rights programs/centers in the US and a few foreign countries. It includes both academic and clinical components of these programs. All participants in the roundtable hold or recently held high positions as directors of programs or heads of clinical work in such programs. They represent over ten university programs, principally within law faculties, in five countries. The edited transcript was approved by each participant with respect to his or her remarks. Biographical information about each participant appears in the Annex.

Ryan Goodman

We conceived of this roundtable to mark the twentieth anniversary of the Human Rights Program at Harvard as well as to present an occasion for renewal, expansion, and reflection. We thought there was no better way to celebrate than to have the Program's family and friends meet to think collaboratively about advancing ideas and contemplating the possibility of joint efforts. I would like to begin with three opening remarks to frame our discussions for this roundtable. First, there has been a broad expansion of HRP's clinical aspects. Second, the program self-consciously attempts to foster a synergistic relationship between the critical, reflective, academic, and scholarly side with the practice, engaged, and advocacy side. The practice and scholarly aspects inform each other in a deliberative effort to ensure balance, without one outdistancing the other. Third, I would call your attention to some of the background readings.

The roundtable discussion in 1999, organized and published by HRP and entitled "The University's Role in the Human Rights Movement," provided a common foundation that we can now build on. It discussed the university's role writ large in the human rights movement and took up issues such as academic freedom within the

differing social and political contexts of universities located in the North and South. What was missing in the 1999 discussion was the question of exchange, interchange, and the relationship between universities and programs around the world. We hope that we can pay attention to that question today. A concrete response to this lacuna is what the Human Rights Program is now trying to develop—human rights student exchanges between our program at Harvard Law School and others in Western Europe and the global South. An exchange program with a center in Santiago, Chile, for example, has already been established.

Another issue concerns the dichotomy between Northern and Southern NGOs and centers, as well as the relationships between international and local actors. Are there divisions and overlaps among centers? How do we overcome these divisions? Should we? Another issue to consider is the question of accountability. Who is the constituency of human rights programs? To whom should we be accountable? Another thought-provoking theme in the background material—in the Harvard Law School tradition of thinking outside the box—is the obligation of human rights programs. Universities in the North might be regarded consciously or subconsciously as having an obligation to proselytize or develop universal relationships. In his remarks during the 1999 discussion, Makau Mutua considered the obligation of human rights centers in the South as fostering and developing their own understandings of human rights. Is there space for a different sort of relationship with centers in the South? We might think that we are fostering synergistic relationships when in fact we are undermining them.

Jim Cavallaro

The focus of today's discussion is human rights centers and programs in law schools, although questions of interdisciplinary relationships may also arise. Indeed, the relationship between these centers and the world, including other aspects of the university, will arise in the course of our discussion. In the US, new programs and centers in law schools have rapidly grown; this development is paralleled in Latin American countries as well as other parts of the world. Thus, the subject matter

of our discussion is dynamic and changing. This is a good time to imagine the future of these relatively new programs and of the more established ones and to address those issues. What should law school centers and programs do as the human rights movement negotiates its relevance in a rapidly changing world?

Finally, we have attempted to organize the roundtable around three broad themes: first, academic aspects of human rights programs at law schools; second, clinical aspects of those programs; and third, the relationships between these academic and clinical programs and the world at large. We recognize that these categories may overlap and even collapse into each other over the course of our deliberations today. But they may nonetheless prove useful.

Academic Aspects of Human Rights Programs

Makau Mutua

One of the most important aspects of human rights programs in universities is their relative youth. This gives them an elastic and experimental status. They are not frozen in time or captive to unconditional biases. As a result, they have potential to grow and to look at age-old and current questions. Nonetheless, a review of these programs, in particular their clinical aspects, yields troubling signs.

First, these programs were constructed from the same blueprint: they all publish journals, pursue coursework, hold seminars and speaker series, produce research papers, award fellowships to senior human rights advocates, run apprenticeship models of human rights advocacy, and serve as a training-ground for cadres of the human rights movement. Occasionally they engage in field work. This hodge-podge of activities blurs the line between scholarship and activism. Underlying this great range of activity is their belief that they produce the truth and engage in advocacy of the truth. This failure to problematize their roles within the human rights movement is one of the questions I want to raise today.

The prevailing view in most human rights programs is that they are an integral part of the human rights movement. In effect, they proselytize. They are part of the message of the good society. For this

reason, many human rights programs pursue their duty with an evangelical zeal whether it is teaching or clinical work. The human rights corpus is treated as holy text or writ. These programs assert a kind of fiduciary relationship to the human rights corpus and consider themselves the intellectual guardians of the movement. But it is wrong for human rights programs to proceed from these assumptions because universities should not be sites of uncritical advocacy of the human rights project. Given the relationship between human rights, liberalism, and Western civilization, it is tragic for universities to fail to examine human rights as a language of power. Or even to view human rights as one of the weapons in the arsenal of the empire.

The academic aspects of human rights programs therefore ought to unpack, flesh out, and bridge the gaps between the doctrine and discourse on human rights, its corpus and its movement. The programs must critically examine the corpus to identify its conceptual gaps, inconsistencies, cultural relevance, and legitimacy or illegitimacy.

The second role human rights programs ought to play is that of a distant skeptic of the NGO community, which, as foot soldiers, is the real guardian of the human rights corpus. In this respect, human rights programs should be the thinking core of the movement. Human rights organizations are often too busy to reflect on the divergent nature of human rights and generally have a moral certitude about their work. Simply because of this, criticism of the human rights project is properly left to the university human rights programs.

Third, the university program ought to be a forum where individuals who wish to work in human rights are trained. This training ought to be directed toward producing a questioning activist who is alert to the complexities of the human rights corpus—someone who is skeptical, yet keeps faith, while remaining engaged in the human rights project. Human rights programs ought not be involved in direct advocacy—filing briefs, conducting field missions, or denouncing governments—except in the narrowly tailored field of clinical projects to demonstrate to students how the work is done. HRP's work has been a good example of such narrowly defined work. In general, participants in human rights programs can engage in these activities on an individual basis but not institutionally or collectively as

a program. My point is that these human rights programs should not be absorbed into the human rights vortex of self-righteousness because then they lose the sense of studied distance and skepticism that is essential to effectiveness as academics.

Human rights programs should develop along these lines so they can play a useful role in constructing a movement that avoids the pitfalls of power and bias and that shuns religious zealotry. Those based in law schools need to view human rights as an experimental project founded in human dignity and toward reducing powerlessness. Human rights programs ought to see themselves as guardians of the search for the truth but not as implementers of that truth.

Karen Engle

I begin from a different starting point than Makau Mutua. I would contend that most human rights programs tend to be critical most of the time. The crucial question for me, then, is not whether we should be critical, but what issues we should be addressing critically.

Before turning to that question, though, I do want to point to two areas in which human rights programs tend to be less critical than I think Makau or I would hope. It is, ironically, when they act most and least like lawyers. Thus, in clinical work, there is an ongoing struggle to incorporate the work being done from the more critical perspective coming out of academic programs. Sometimes it just feels as if there is no time for critical reflection in the day-to-day workings of the clinic, but also there is often a concern (rightly or wrongly) that experimentation would risk a loss for clients. I'm often struck by how the lack of critical thinking about human rights law also sometimes appears in multidisciplinary settings where scholars from other disciplines take off their critical hat when thinking about law. They come to human rights talks, for example, expecting that law will provide them with the answers and will not be fraught with the uncertainty brought by their own disciplines.

Let's now consider the question, "what issues should we be addressing critically?" The world is, in some ways, quite different from the way it was in the late 1970s and early 1980s when human rights was becoming institutionalized within the US and when human rights

programs began to be imagined. Non-state actors are now thought to pose at least as much of a challenge to international human rights as states. While that has arguably been true in a number of areas for some time, Halliburton's role in the war against Iraq has unearthed the extent to which non-state actors might play a role in war—an area that has been considered to reside firmly in the state-centered paradigm. So perhaps human rights programs need to consider the denationalization of human rights—to seriously rethink about the agents, actors, and responsible parties under international law.

A focus on denationalization will also bring attention to the economic, an area that is center to the mission of the Rapoport Center for Human Rights and Justice at the University of Texas, of which I am director. We have been considering, for example, economic disruption rather than state action as a factor in immigration and migration by considering the simultaneous flow of labor in one direction and capital in the other. What are the factors that cause workers to move to the US? Can immigration law and policy alone attend to them? Other related questions we might consider are: What are the effects of neo-liberal economic projects as implemented through IFIs or multinational corporations? Do we have to tie the latter to state action for it to be considered an issue of human rights? Should human rights address the deregulation of the labor market?

In other words, if human rights are de-nationalized (that is, no longer about state action per se) are they properly thought of as human rights? Would it be clearer to speak of social justice than human rights? Which would help shift the paradigm the most? My instinct is that it is best to refuse to distinguish human rights from larger issues of social justice (even while perhaps adding "and Justice" to the title of one's center to make the linkage clear). One of the methods that our center on "Human Rights and Justice" is using in redefining human rights is to engage with anthropologists to examine how people understand and talk about human rights. Some of the work that colleagues and I have done in Chiapas, for example, suggests that folks on the ground have a variety of ideas about what human rights means. Some of the ideas are very traditional and are about, for example, state police power and due process. Some

activists, however, use human rights as a means to call for autonomy and self-determination. Still others raise considerations of economic development and attendant social displacements. We need to stay attuned to these multiple meanings that human rights might have for those who deploy the discourse.

Smita Narula

On the question of denationalization, this endeavor is difficult because we continue to focus on the obligation that human rights impose on states as opposed to the rights inherent in individuals as human beings. When there is not a state-specific solution to a problem, we throw our hands up. We are starting to work in different ways around that when we work with multinational corporations and international financial institutions, but there is an inherited bias that if the state is not an actor, human rights has no answer. We need to do better with our work on non-state actors.

Doug Cassel

I am one of those who glimpses eternity in the values that underlie human rights. So, I am not fully persuaded by Makau Mutua's argument. As I understand him, Makau argues that the essential role of the university—because it is unique to a university—is to play the skeptic. NGOs cannot be skeptical. The reason a human rights center per se should not engage in activism is not that it is inherently bad. But that this role is inconsistent with that of a distanced critic and would tend to overwhelm the intellectual distance necessary to look objectively at the contradictions of the human rights movement. In other words, he surmises that since we cannot walk and chew gum at the same time, we best just walk and leave off chewing gum.

Most human rights centers have struck the balance probably too much in the enthusiastic direction and have not been sufficiently critical. There are four reasons, however, why I would want to think long and hard before accepting the position Makau put forward. All have to do with the value that university or law-school based human rights centers contribute to the movement while at the same time maintaining intellectual integrity.

First, it is simply a question of resources. In most countries, including the United States, there are not enough human rights NGO resources. To say that the university centers can not be additional resources in support of human rights in the world is to make a very serious statement about cutting back on the availability of resources to defend, protect, and promote human rights. That is a very high cost to pay to take what is an absolutist position.

Second is expertise. To give an example, dozens of lawyers in the US are working on the Guantanamo cases of US military detentions and trials. Yet those of us who teach international humanitarian law and international criminal law know that those lawyers, good as they are, with major law firms backing them in many cases, do not have the expertise necessary. They come to the half a dozen or so of us at law school human rights programs for expertise and help. That is just one example. Law schools can bring the kinds of expertise that sometimes the legal profession and NGOs require.

Third is institutional prestige. It is one thing for an amicus brief to be signed by a law student or a group of students from Harvard Law School and it is another thing for the amicus brief to be signed by the Yale Law School Human Rights Center. I think that, as a tactical and practical matter, the value of our institutional names needs to be considered.

Fourth and finally, is engagement of students. To the extent that students have opportunities to engage in human rights work through clinical programs, this is, at minimum, a good experience, and it may be good preparation for a future generation of leaders.

Flávia Piovesan

It is important for human rights education to promote critical thinking. It is also important to take into account the political context. In Latin America, for instance, we are part of the first generation of human rights education and are still trying to prove the relevance of the field instead of looking critically at aspects of the human rights field. As professors and professionals in this context, most of us are in the active human rights movement. We wear both hats. Sometimes we act as missionaries trying to spread the religion of human rights and

international human rights standards and democratic values. But this has to do with specific Latin American political realities. It is therefore important to contextualize our remarks about human rights education.

Laurel Fletcher

Makau Mutua's presentation sets out polarities in a way that brings out the many nuances in the debate. I want to go beyond that, and build on Karen Engle's framing the conversation in terms of "what issues should we be addressing critically?" It is not only what but how. From the background materials and discussion thus far, it seems that we are looking primarily at centers and clinics in a way that leaves out the critical component of university work—research. I would define research as the production of new knowledge and stress that university- and law school-based human rights centers are uniquely situated to engage in research, consistent with our service mission, in a manner that fosters our critical capacities. How we should engage in research depends largely on our own situations and proclivities.

Balakrishnan Rajagopal

To follow-up Makau Mutua's and Flávia Piovesan's points, there is a genuine difference between the role of human rights academics in the West and the Third World. In the Third World, academics may be working in areas like constitutional law and criminal law even if they do not call their work human rights. Often they become enmeshed in human rights struggles simply because, as academics, they are prominent leaders of the community who are expected to take positions on contemporary issues. A comfortable zone of separation between academic work and activism in human rights does not exist in the Third World.

As for the synergistic relationship between critical reflection and practice, this is more of a necessity for law school human rights programs in the West, especially the US, as opposed to human rights programs in the Third World. US-based human rights centers in law schools need to be more self-critical. The real problem in the Third World might be the extent to which human rights centers or programs actually even exist. Sometimes they may be called governance

programs, or called by more neutral terms, rather than as human rights programs per se. In the Third World, the academics who engage in human rights work are often engaged in critical reflection that challenges the dominant assumptions of international human rights practice. They do not take a position of neutrality as if human rights practice were merely a matter of implementing norms. Take for example, the campaign to bring justice to victims of the Bhopal gas tragedy. The impunity of multinational corporations has been largely ignored by international human rights mechanisms and groups, but the human rights academics in India engaged in this campaign have advanced a theory and practice of human rights which is self-critical.

Dori Spivak

I agree with Balakrishnan Rajagopal. And I would add that the role of the university is not only one of critiquing practice but also of innovating practice. Bringing a critical attitude to the human rights movement is not the same as bringing new and innovative ideas to it and putting those ideas into practice. Specifically, within human rights programs, one of the major role of clinics is to figure out how new ideas can be put into practice.

Jim Silk

I want to try to understand Makau Mutua's concern about human rights programs engaging in advocacy. He proposes an almost psychological analysis of the contradiction that he sees—that, as individuals, we are not capable of practicing and criticizing practice at the same time. That seems a limited understanding of our human capacity for self-reflection. Is there really a problem? Second, Makau's enumeration of exceptions to his rule against advocacy pretty much covered his concerns. If we can advocate through clinical projects, and individuals can advocate in their own capacities, why is it and where is it that law school human rights programs cannot do human rights advocacy work? Finally, there was a contradiction in Makau's final statement that human rights programs ought to train students to do human rights work but should do that work skeptically to produce what Peter Rosenblum has called ambivalent activists. But how can

they be trained in this manner if they cannot actually do the clinical work and then question it? They are not going to be effective skeptics if they are limited to completely academic exercises.

Deborah Anker

It is worth thinking back to the origins of clinical legal education to 1972 when the Ford Foundation began funding some of the first substantial programs. It seems that now, in the new millennium, we are at another watershed moment, something that might be considered a new beginning. The basic insight of clinical education is learning through doing: you have to actively engage with legal institutions and clients to understand what law is, the doctrine, and the policies.

In this context, I think about the relationship between Harvard Law School's Human Rights Clinic and the Harvard Immigration and Refugee Clinics. The many actions co-filed before the Inter-American Commission on Human Rights, for example, have not only produced specific outcomes, advanced human rights and the rights of asylum seekers, but have contributed fundamentally to our and our students' understanding of the policy issues and dynamics of the field. Our contribution would certainly have been different if we did not have a clinical program that had its roots in practice. We would not have had the same conversations with NGOs if our work had been only academic, if it were not also rooted in work with real institutions, and with real individuals. Human rights clinical work, especially as we have done in refugee law and linked to client work as well, provides a special opportunity to join theory and practice.

Notably, clinical education sometimes can, when not executed correctly, be limited too, not taking advantage of the opportunity practice gives us to reflect critically on the underlying policies and doctrines, and most importantly, our own work. Hopefully, we are now at beginning of a new era, a joining together of theory, practice, and critical reflection. I look forward to the future, and I am grateful to the Human Rights Program for the opportunities it has and I know will continue to provide.

George Edwards

With due deference to Makau Mutua, I respectfully disagree in part with his introductory remarks. The Program in International Human Rights Law I founded at Indiana University School of Law at Indianapolis in 1997 fits in the mold of academic human rights programs described by Makau. Our mission statement includes the following goals: furthering the teaching and study of international human rights law; promoting scholarship in international human rights law; assisting human rights governmental, inter-governmental, and non-governmental organizations on international human rights law projects; and facilitating student placements as law interns at domestic and overseas human rights organizations. Thus, like such programs at other schools, we seek to satisfy traditional teaching, research and service goals.

Makau suggests that human rights programs tend uncritically to adopt as gospel the corpus of human rights, and oppressively seek to impose this on students, which blinds students to blemishes in the human rights system, including inconsistencies within the human rights movement, conceptual gaps, issues of cultural relevance or irrelevance, and issues of general legitimacy or illegitimacy. The argument appears to be that such programs tend to produce students incapable of healthy, critical thinking about human rights.

I cannot speak for other human rights programs, but I can speak about our Indiana program. Since 1997, many students who have joined our Program have been enthusiastically idealistic. After being exposed to a wide range of human rights perspectives in the classroom, then venturing out to work as human rights interns, virtually all of our students returned to campus with critical insights. Our students recognized for themselves, through academic and practical inquiry and field exposure, those blemishes Makau identified and that he suggested students might be deprived of experiencing. Though many students returned to campus as eager as ever to launch into an international human rights law career, their eyes had been opened to valid criticisms of the field.

My job is not to proselytize, to try to persuade students to accept certain human rights beliefs, or to try to convince them to enter into a

human rights career path. My job is to assist students in the intellectual pursuits that they expect as law students, and help facilitate practical, career-preparation experiences for them. Our Program is responsible for presenting students with a range of beliefs and experiences—classroom and practical—and permitting students to formulate opinions and assess the human rights movement on their own. Diversity of perspectives and attitudes is honored in our program. We facilitate exposure and let the students decide; we encourage law students to be free-thinking and critical. We do this while satisfying the three-fold general law professorial responsibilities of teaching, research, and service.

Makau also was critical of human rights programs being involved in direct advocacy, except in narrow circumstances where the projects demonstrate how such advocacy work is done. The suggestion is that by engaging in advocacy work, the programs lose the studied distance and skepticism essential to academic efficacy. I agree and disagree in part.

I disagree in that I believe that advocacy work is appropriate for students attached to human rights programs, and I do not believe that advocacy work necessarily compromises the educational experience of students. "Service" is a healthy component of our Indiana program. However, no student should be forced to work on an advocacy project with which she does not agree. Likewise, no student should have a forced affiliation with any project. The backbone of our program is our students, of whom we have a wide range with differing views on many issues. I generally agree with Makau regarding institutional submission of advocacy pieces. Our practice has been that individual names be attached to submissions, followed by the program name representing an affiliation. Thus, the individuals take the stance (and do the work). There is no need to canvas any governing body to try to reach a consensus as to whether the program should take a particular position, as the program does not generally take positions.

Comments from the Audience

Marcella Davis
Professor, University of Iowa College of Law

I know Makau Mutua to be a provocateur, and I will follow in his footsteps with this example. What if a class was studying the issue of nondiscrimination and the professor decided that it would be good to have students work with an NGO that opposes affirmative action in law school admission processes. The professor justifies his choice by disclaiming that he endorses the NGO's position on affirmative action. He states that students would bring their critical perspective to the issues, would be able to differentiate the strong points and weak points of the NGO's work. Wouldn't we think that the professor has a biased agenda and would wonder about the value of the exercise?

I think that we are not being as rigorous as we suppose. This is the case, in part, because we believe that we are coming from the right perspective. Because we believe we are on the right side of the issue, we think that we do not really have to deal with the challenging questions that Makau raised.

Yash Ghai
Professor of Law, University of Hong Kong

I participate in a regional human rights program at the University of Hong Kong. We have taught individuals from 12 countries in the region. One reason we started this program was to bring a distinctive Asian perspective to human rights. We were under attack from the Asian values school (which sought to posit Asian values against human rights as understood in the West). On the other hand, there was a feeling that the hegemonic influence of the Harvard and Columbia Law School Programs was pushing a very distinctive perspective on human rights. We were in the difficult position of defending human rights in an area where human rights were not very much appreciated. But, at the same time, we wanted to fight the hegemony from the US, which, negatively from our perspective, was emphasizing universality. We were inevitably forced into a much more critical analysis of the historic, philosophical, and materialistic

foundation of rights. We had to contextualize human rights. It made no sense to teach human rights without a major engagement with social and economic rights, globalization, and imperialism—and without regard to the uses of the ideology of human rights. That led us into a very different kind of analysis of human rights, their production and limitations. So we really could not have taught that course without a critical stance toward human rights. Ultimately, many of us were committed to those human rights that responded to the economic and political situations of countries in our region.

At the beginning of our program, I stated that we should not use any Western textbooks. Rather we should produce our own local materials, whether it was on the situation of fishermen in southern India or indigenous people in Indonesia. More attention needed to be paid to national values and legal systems (and regional thinkers) than international human rights conventions and ideas of Western thinkers, which tend to be the staple in university human rights programs. It turned out not to be that easy because of the prominence of Western textbooks and financial resources. When I went to Kenya (on leave to work on its new constitution), my colleagues adopted these books for their courses. What I thought important in teaching human rights in Asia, Africa, or Latin America was developing and retaining the local perspectives on human rights even at the risk of breaking the universalism of our discipline.

Jim Ross
Senior Legal Counsel, Human Rights Watch

I speak as someone who receives the products of your universities. I work in the Legal and Policy Office at Human Rights Watch and have spent many hours with researchers who have been trained at various law schools. Let me propose three don'ts in terms of what you could be doing or not doing. First, don't send your new graduates to Human Rights Watch. When somebody graduates from law school, they need to be out in the field, working in different countries. They should not be working in New York. Maybe down the road they would want to work for us, but I would rather work with someone who has an acquaintance with the real world.

Second, don't turn them into lawyers. I get too many things written by people who have learned how to make arguments and think that any argument backed up in law is a good argument. That doesn't work. Lawyers who set out every possible legal argument do not write persuasive human rights reports. Third, don't just teach them human rights law. If someone is working on Francophone Africa, he or she needs to know the French criminal law system and its history. He or she must know how to consider information critically. It is not enough to be analyzing human rights law.

It is not true that human rights organizations do not think about the broader issues. Rather, we do not write reports about them. Perhaps we do not think about them enough. The younger researchers are not part of the discussions we have in Human Rights Watch about these issues. So it does help if they arrive with a critical understanding.

Raul Sanchez
Professor of Law, University of Idaho

If human rights programs were as cold, dispassionate, and purely academic as Makau Mutua proposes, students would not be interested in them. Students get involved in human rights programs because they have concern and passion for the mission.

Maria Green
Assistant Professor, Brandeis University

I work in economic and social rights, which means that typically I work with NGOs, Community Based Organizations, or students who are not approaching the issues from a human rights perspective. They come from a problem, and they want to know what human rights can do for them. That is a very interesting perspective in terms of how we teach human rights. I now teach human rights to students studying international development in a school whose tagline is "knowledge advancing social justice"—the social justice part is a given.

We need to look closer at the definition of human rights. Are we defining human rights to cover the entire field of social justice or as a specific tool within the field of social justice? If it is the latter, we have a different project and criticism in front of us. We must teach human

rights, particularly social and economic rights, because there is a whole domain of knowledge there that is useful for social justice.

Human rights is not the only answer, and I am certainly not a proselytizer of human rights in the sense that I want to go out to groups or students who have been deeply engaged in social justice and say, "I want you to change all your paradigms and now start taking the Universal Declaration as your only paradigm." What I want to be able to say is that we can add an extra tool to the human rights tool belt by dealing with non-state actors as well.

Clinical Aspects of Human Rights Programs and the Relationship between the Academic and Clinical Programs

Doug Cassel

If we ask, where should we strike the balance between advocacy and intellectual reflection in law school human rights centers, there is no uniform answer. It depends on circumstances. I have made a short list of what seem to be the most prominent circumstances that must be taken into account by any law school based center.

First, we must ask whether the center is in a democratic country that allows space for advocacy by a university center or in a repressive country? Second, does the proposed advocacy have a domestic or an international focus? To the extent that one is criticizing one's own government, powerful toes close to home are getting stubbed. There may be less space to operate freely, whether the government is a democratic or repressive regime, than if the criticism were of human rights violations abroad. Of course many human rights centers do both. On the other hand, while there might be less space to step on powerful domestic toes at home, there may be more need to do that because other countries may not be paying sufficient attention.

Third, we should consider the political context of the university and the law school. My impression of Harvard's human rights program is that it was born when the law faculty was deeply ideologically polarized. If there was going to be a human rights program at Harvard, it had to be established very cautiously. That may have been one factor that led to the more academic tilt of the Harvard

Law Program as opposed to the programs at most of the other law schools with which I am familiar. In contrast, the first center I started was at DePaul Law School in 1990, a school that is somewhere in the third tier of *U.S. News and World Report*'s 200 rankings. There, the university administration and the law school leadership were in rapture with the idea of having a human rights center. It was part of their mission to put a small local school on the map. It did. There was plenty of political space, and we could afford to be more activist than Harvard. The political context of the law school, therefore, can make a dramatic difference in terms of the choice that any director makes for how to manage the trade-off between criticism and activism.

Fourth, what are the strengths and weaknesses of program faculty and staff? Some faculty are more academically oriented and more comfortable with internal reflection; others will be quite comfortable with advocacy. Programs should not artificially impose an institutional mold on the personalities that are uncomfortable with the role that they are asked to take.

Fifth, a similar point obtains with regard the level of sophistication of students. Jim Silk suggests that, at Yale, they teach their students human rights, not human rights law. At DePaul, this was not the case. International human rights law is evolving, fraught with ambiguity, and employs varying institutional structures. Simply teaching the law to these young law students was a very important focus of what we did. How to orient a human rights program depends in part on the capability of students.

Finally, what is the relevant advocacy market of that law school? For Harvard, the relevant advocacy market is national and international. For other schools the relevant advocacy market may be national. In the case of Northwestern Law School in Chicago, our principal advocacy market, although sometimes national, is local. It is part of our mission to educate the Bar, the media, public officials, and the public at large about human rights and human rights law.

Raymond Atuguba

For the last five years I have been working with others to develop a clinical legal education program in Ghana, and I base my comments

on those experiences. As part of this program, every year, in conjunction with several people in this room—Professors Lucie White and George Edwards—we export students from various human rights centers from the US to Ghana to work on human rights issues. From these experiences, I want to raise four provocative issues.

The first issue is the missionary methodology. That is, clinical legal education is a one-way US export to Africa of human rights. There is a lack of reciprocity. Traffic runs one way. I am sure some Ghanaian interns would be able to do some work regarding the 2000 election and America's program on anti-terrorism, for instance.

My second provocation concerns the matter in which clinical education is exported. The way in which it is funded and designed can either stifle or develop human rights programs abroad. There have been several different attempts. Harvard Law School is involved in the Harvard Africa Initiative, which has a clinical component. The amount of preparation that is going into that initiative—discussion, critical comments—will lead to a better set of interventions in the area of clinical export than is currently happening. The way in which it is designed and deployed can aid or cripple human rights abroad.

The third point of provocation is that the export has the potential of revolutionizing legal education abroad. Take Ghana with its strong British legal tradition, complete with wigs and gowns. Bring to this the interaction between US and Ghanaian law students and professors. Already we are finding positive effects from this interaction in the types of cases and arguments that are being brought before Ghana's courts by a new generation of human rights activists. So the impact can be great in terms of transforming the legal system and tradition and changing the way people think about human rights.

Clinical legal education and human rights programs have their goals, and the people who fund them also have their own goals. The institutions and the armies of students who work with them also have their own goals and constituencies. The two do not always coincide. By predetermining which institutions to work with and what issues individuals coming from here should work on when they get there, there is an indirect predetermination of what human rights issues are important and on which human rights problems we are going to work.

A clinical student from a human rights program in the US needs a faculty member to sign his/her application for an internship program abroad before he or she departs. The agenda can be set as a result of that process. In practical terms, there is often a clash between issues that students want to work on when they get there, because the human rights program and funders require it, and the interests of the constituencies and institutions for whom they are working.

Jim Silk

I will talk from a perspective of law school programs based in North America. We know that there is some tension between the clinical and the academic, but these tensions are not the sort of polarities that have been described. Rather we have a set of multiple duties that may or may not conflict with one another. The nature of these tensions is an open question. The duty we owe to our students is a pedagogical duty. That duty is, in part, discharged by academic teaching. There is also the duty to undertake research and scholarship as part of our function in the law school and university. Finally, there is a duty to the rest of the world and to the human rights movement.

How is this duty to the larger world fulfilled? Partly through research, advocacy, and preparing students—duties that are all connected. Yet there are tensions among these duties. Who are we educating? For what are we educating them? There has been talk here that we are educating human rights advocates or human rights lawyers. Maybe, though, we are educating lawyers about human rights. When future lawyers who are not going to become human rights advocates take a human rights clinical course, it makes me happy because they will gain some understanding of and respect for human rights. When they are working as corporate lawyers, they will make decisions that are likely to have more effect on human rights than the work of most of us who do human rights advocacy full time.

Another question is: Are we too focused on law? There has been much talk about multidisciplinary approaches. Do we really need to teach differently? Do we need to involve elements from other parts of the university in our teaching? Are we out of sync with the contemporary demands of human rights? The issues have changed,

not just with regard to economic rights. Issues involving trade, development, and investment are of increasing importance. When these words come up, the eyes of colleagues from my generation glaze over. We have to bring more resources to these issues.

In considering how human rights programs connect to the world, there are issues with dimensions that cut across advocacy and academic spheres, including economic and social rights, the role of non-state actors, and increasing demands for the accountability of universities themselves for the human rights implications of the way they conduct their business. An example of this is campus activity to ensure that university merchandise is produced according to labor codes and not in sweatshops. Is there a duty for universities—and for law school human rights programs—to act here? Are there other issues on which our long-term legitimacy will depend? There is a movement for more human rights work on domestic issues. How do we do that responsibly? Are human rights a valuable analytic or advocacy tool for thinking about domestic social justice issues?

Let me note a few more questions about how we relate law school programs to the larger world. Do we focus too much in our clinics on partnerships with well-established Northern NGOs? Should we be working more with NGOs in the global South? In the abstract, many of us would say yes. But there are real problems given the constraints and benefits of such an expansion. Who benefits? Our students? Our programs? The organizations in those countries? We need to focus more on our relationships with universities and law schools in the South. We have expertise, but are we apt to be superficial in understanding their needs? Can we do it sensitively? Is it feasible? Will it divert time and resources from our students and our commitments to research and advocacy? Can we do it in societies that are in transition to democracy and respect for human rights?

Are we too enamored of particular issues such as transitional justice and international criminal justice? Are we too busy with the project of holding state actors accountable for the few very worst abuses? Are we somewhat negligent and inattentive to the deprivations that affect most of the people most of the time—that is, poverty? We talk a lot about doing work on social and economic rights, but poverty

is a much larger issue. Rights address poverty narrowly. We do not work on issues of pervasive poverty, the distribution of wealth, and powerlessness in the way that Makau Mutua has spoken.

If the duty of human rights programs to speak and tell the truth is a primary duty, have we not failed significantly in the past few years? We have done a good job questioning our own human rights dogma, but we have failed to question the new dogma that is pervasive in the US today in the post-9/11 context. We have acquiesced in an underlying assumption: that the world dramatically changed on 9/11 and that we have to adjust, lower our expectations, and take into account a new kind of human rights abuse and threat to our security. Despite our criticism of specific policies, perhaps we have been too willing to accept this set of assumptions about a changed world, assumptions that, in turn, may damage our own long-term legitimacy.

Flávia Piovesan

From the perspective of the South, two main questions must be considered. First, the continental legal system, particularly as applied in the Latin American context, is highly abstract, technical, formalist, and divorced from reality. From the traditional legal culture, reality seems to be fiction while fiction seems to be reality.

The second is the complexity of our social and political reality as well as its serious, endemic, and persistent pattern of human rights violations. Consider Brazil. Despite having the tenth largest economy in the world, Brazil is considered the fourth most unequal and violent country, accounting for 14 percent of the world's homicides with less than 3 percent of its population. At the same time, we face these problems with weak institutions and a poorly developed rule of law.

The challenge for human rights programs is to move from the unrule of law to the rule of rights. Considering this, we cannot disconnect from the real world and engage all these tensions. Our experience in human rights clinical education in the South, which breaks with the tradition of providing legal aid for the poor, has focused on two main goals.

First is the pedagogical approach to change legal culture. There is the imperative of changing the formalistic legal culture and legal

teaching, encouraging critical thinking, and developing analytical and practical skills from an interdisciplinary perspective. The second is to emphasize the role that the university human rights program should play for social change in our society. Human rights are a tool for social change. What should be the relationship between the university and the human rights movement? Who should serve whom? What should be the purpose of the NGO-university link? Does one's location in Cambridge or São Paulo require different responses? How do we respond to the challenge of not converting the university into an NGO? How do we increase the university network between South and North in human rights litigation, research, and teaching?

Dori Spivak

I want to give an example of my own work at Tel Aviv University that speaks to our institutional limits when we undertake clinical human rights projects. We want to engage in clinical work but at the same time ensure that we can continue our work within an academic institution. It was mentioned that, in universities in the South, it might be dangerous to do that work. But even in countries like the US and Israel, we have to make difficult decisions and not attempt to do all kinds of human rights work.

One choice we had to make was not to work on human rights violations by our own institutions and universities. We have also made the difficult decision not to do human rights clinical projects in the Occupied Territories. There lie clearly the gravest human rights violation by the State of Israel and the Israeli Army. Although the university human rights program is involved in research and other academic activities that criticize the government's deeds in the Occupied Territories, when we litigate court cases, we limit ourselves to defending the rights of the Arab citizens of Israel and fighting against their discrimination. We do not cross the green line and litigate cases in Occupied Territories. Human rights advocacy in the Occupied Territories is usually labeled as less legal and more politically motivated action than human rights advocacy within Israel-proper. To get the maximum level of freedom in litigating cases within Israel without exposing ourselves to institutional and political interference, we took

the tough decision of not engaging in this kind of litigation. In clinical work and especially when a human rights clinic is trying to bring about social change through litigation, one should be aware that we cannot do everything. We chose to leave the crucial and tough field of fighting the injustices of the occupation to more independent NGOs that operate outside the realm of academia.

Peter Rosenblum

I begin by noting how times have changed. Some established human rights organizations have recently changed their names: the International Human Rights Law Group is now Global Rights, the Lawyer's Committee for Human Rights is now Human Rights First. We have gone through a period of paradigm explosion in terms of what human rights is, what the movement means, and what human rights programs do—human rights and business or human rights and this or that. That is part of the paradigm explosion.

At the same time, we have raced back to the past because old issues are on the table again, and we need expertise in areas such as torture and detention. That works in some way for human rights clinics, groups, and centers that have held on to the language that is human rights and remains credible. Karen Engle's radical social transformation clinic can call itself human rights, and that works. Makau Mutua's concern, and some of the concerns I hear around the table, are the concerns of a founder's generation, of a moment when all was at stake because of a few human rights programs in a few universities with limited choices. We are just not there anymore. There is so much going on in so many places. The issues are very different.

That brings us back to Karen's point about what we should be critical about. What should we move forward on? How do we mold the initial insights and the power of what is there into the language of human rights as we move forward into these new places? Human rights advocacy is already in there, in previously unthought of areas, so that is that. We are past legitimizing. We are legitimate. We invent clients. We choose our clients; we write briefs.

Human rights are so broad. We might be facing new problems and attacks. On the large issues, we have to be mindful that we are

now a power source for we have established legitimacy and trained people who have an effect that has expanded to other parts of the world. We are a legitimizer of other programs, organizations, and school programs in the developing world and that is a place that we have to push ourselves in other parts of the world. How do we use that power and those linkages?

Karen Engle

This remark relates to Raymond Atuguba's comments and specifically to his suggestion that we rethink the way we export students for human rights work. But it also responds to Jim Silk's skepticism of using rights to combat poverty. If we see rights as too narrow to address the issue, I fear that we reinforce the idea that human rights—and therefore human rights programs—cannot address structural economic inequalities. Perhaps we are unrealistically ambitious, but our aim at the Rapoport Center is precisely to tackle those inequalities, at home as well as abroad.

When human rights programs send students abroad to work on human rights, the definition of human rights is often relatively expansive, involving international and municipal law. But when we sponsor students to work in the US, we generally look for organizations or projects that work explicitly with international human rights law. Our experimentation with the transnational worker rights clinic at the Rapoport Center seeks to break down that distinction. While sometimes it involves projects with an explicit international legal focus, the bulk of the clinic's work is representing undocumented immigrant workers in claims for unpaid wages that are generally based on local law. The clinic pursues those claims through attention to larger calls for human rights and social justice made by the workers. While the Center does export students in the summer, our hope is that the work that we do in our own backyard, through the transnational worker rights clinic and the immigration clinic, will lend some humility to our work abroad. I think we should pursue greater involvement for non-US students in our clinics as well, though, in part to ensure that we bring similar humility to our work at home.

Laurel Fletcher

I would like to comment on the skills and mandate issue. Which bodies of law and knowledge become relevant to our human rights work is defined by the nature of the problem. We should listen to how the NGOs with which we work frame the nature of the problem and think of ourselves as problem-solvers rather than lawyers. It goes back to the question of who we are training: human rights lawyers or lawyers who know something about human rights? Or, are we training problem-solvers that have come through the law school? This leans toward another paradigm and way of thinking. Therefore, the question I would like to raise is: Who defines the problems?

The answer to this question requires engagement with actors outside the university, those who are stakeholders in the problem. Depending on the problem, the stakeholders might be the police, social movements, national, local, and international NGOs, governments, and a whole array of other actors. We seem only to view NGOs as the relevant actors. But from a problem-based approach, there are more actors who are directly implicated and ought to be both part of defining the problem as well as accountable for its solution. This suggests a different kind of methodology than those found within the rights-based paradigm.

Lucie White

I have worked in the university for many years around issues of social inequality and injustice. Inequities of power, primarily economically linked, only recently came into the human rights field. I have worked experimentally with and against various social groups in the US and abroad. Being involved in the Harvard Africa Initiative, what strikes me is how the language of collaboration and partnership has been continually framing the work. I wonder how much that language of partnership and collaboration comes out of the missionary, colonial, and deeply inequitable set of global power relationships? Does it mask both inevitable realities and also stymie our sense of how to confront and negotiate them? Does it limit our sense of what kind of spaces might be opened up for truly struggling around those issues?

Closing Remarks

Ryan Goodman

Three main issues emerged from our discussion. One relates to spheres of responsibility and the relationship between accountability and legitimacy. The sphere of responsibility seemed to move from the university to the local (its involvement with eradicating sweatshops for instance), the national (related to anti-poverty advocacy for example), and the international (related to the unequal distribution of resources). Programs arguably need to be involved in these spheres to gain legitimacy.

The second is the global exchange idea. Lucie White just touched on this. What are the relationships? Does the context we have now still mask relationships of power that we are trying to remove?

The third returns to what Makau Mutua started us off with, the connection between reflexivity and praxis. While I agree strongly with Jim Silk and Doug Cassel, contra Makau Mutua, I do not think we have really answered a fundamental part of Makau's critique. We do not truly structure our programs around having reflection on the very clinical projects in which we involve our students. Do we really send our students out during the summer and then critically engage ideas with them afterwards. At the end of the semester, do we always have an opportunity for reflexivity? Do we really select all of our projects for opportunities that foster these intellectual exercises?

I think we leave the discussion having raised more questions than answers. I think we have also answered some questions. Perhaps raising new questions and reframing old ones can also be a sign of progress. Let us regard this roundtable as another important session in what has become an on-going conversation that started in 1999.

ANNEX

Biographies of Principal Speakers, Panelists, and Participants in the Roundtable

Degree (J.D., LL.M. or S.J.D) and year following the name refer to Harvard Law School. "VF" and year following a name refer to visiting fellow status with HRP. Over 90 percent of the speakers in the celebration fall within these categories.

Payam Akhavan (LL.M. 1990; S.J.D. 2001) (Canada/Iran) is a Senior Fellow at Yale Law School and at the Yale University Genocide Studies Program, working on issues of international criminal law, human rights policy, and transitional justice. He was the first Legal Advisor to the Prosecutor's Office of the International Criminal Tribunal for the former Yugoslavia and Special Advisor on transitional justice in Cambodia, East Timor, Guatemala, Peru, and Rwanda. He has appeared before various international courts and tribunals, is counsel to Uganda in the Lord's Resistance Army case, the first state referral before the International Criminal Court, and was *amicus curiae* in *Yasser Hamdi v. Donald Rumsfeld* before the US Supreme Court. He is also the cofounder of the Iranian Human Rights Documentation Centre. Akhavan has served as Distinguished Visiting Professor of Law at the University of Toronto and has taught at Leiden University and Yale Law School. His book, *Reducing Genocide to Law*, is forthcoming from Cambridge University Press.

José E. Alvarez (J.D. 1981) (US) is Professor of Law and the Executive Director of the Center on Global Legal Problems at Columbia Law School. He has co-taught the basic human rights course (with Professor Louis Henkin) as well as a seminar on teaching and scholarship in human rights for aspiring human rights law teachers. Alvarez is on the editorial boards of the *American Journal of International Law* and the *Journal of International Criminal Justice* and has served in a number of capacities for the American Society of International Law (most recently as Vice President). He has published widely on matters of public international law, international tribunals,

and international economic law. He is completing a book on the impact of international organizations on international law.

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James Cavallaro (US), Clinical Professor and Clinical Director of the Human Rights Program, Harvard Law School, joined the HRP in the fall of 2002. Before coming to HLS, he directed the Global Justice Center, a Brazilian human rights NGO that he founded in 1999. In 1994, Cavallaro opened a joint office for Human Rights Watch and the Center for Justice and International Law (CEJIL) in Rio de Janeiro and served as director of the office, overseeing research, reporting, and litigation against Brazil before the Inter-American Commission and Court of Human Rights. Cavallaro is the author of numerous publications on human rights issues. In his two years at HRP, student engagement in clinical human rights work has increased markedly.

Hilary Charlesworth (S.J.D. 1986) (Australia) is Professor in the Regulatory Institutions Network, Research School of Social Sciences and Professor of International Law in the Law Faculty, Australian National University. She has taught at the universities of Melbourne and Adelaide and has been a visiting professor at Washington & Lee School of Law, Harvard Law School, and the Global Law Faculty at New York University. Charlesworth's extensive writing on human rights has stressed gender issues and the use of armed force in international relations. She is the author, with Christine Chinkin, of *The Boundaries of International Law: A Feminist Analysis* (Juris Publishing Inc., 2000).

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Laurel Fletcher (J.D. 1990) (US) practiced complex civil litigation, including representing plaintiffs in employment discrimination class actions before joining the Boalt Hall faculty in 1998. Fletcher directs the International Human Rights Law Clinic where she utilizes an interdisciplinary, problem-based approach to human rights research, advocacy, and policy. The Fulbright Commission invited Fletcher to lecture in Sri Lanka regarding her work on providing HIV treatment as a human rights obligation. She serves as counsel on cases before the

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firm before joining the law faculty at the University of Chicago. After earning tenure, Kagan returned to Washington to serve as Associate Counsel to President Clinton (1995–96) and later Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council (1997–99). From 1999–2001, she was a visiting professor at Harvard Law School before being appointed Dean and Charles Hamilton Houston Professor of Law in 2003. Kagan's academic interests include administrative and constitutional law. She is the author of numerous scholarly publications.

Pascal Kambale (LL.M. 1999) (Congo) works with Human Rights Watch, developing strategies for implementing the International Criminal Court treaty, particularly in Africa. He previously worked with the UN in Sierra Leone and with a coalition of human rights groups involved in the prosecution of Hissène Habré, the former leader of Chad. Kambale remains engaged in human rights activism in his country of origin, the Democratic Republic of Congo, where he recently helped to establish a Center for Judicial Assistance and made substantial contributions to the DRC draft law implementing the International Criminal Court statute.

Irene Zubaida Khan (LL.M. 1979) (Bangladesh) became Amnesty International's seventh Secretary General in August 2001. Khan began her work as a human rights activist with the International Commission of Jurists in 1979 and joined the UN High Commissioner for Refugees in 1980. From 1991–95 she was Senior Executive Officer to Mrs. Sadako Ogata, then UN High Commissioner for Refugees. Khan held major posts in that organization, including Deputy Director of International Protection.

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Example of a Multi-level Empowerment Intervention for Low-income Women with Depression" (with Angela Littwin, Lusa Goodman, Amanda Bohlig, Sarah Weintraub, Autumn Green, Joy Walker & Nancy Ryan) in *Promoting Social Justice Through Mental Health Practice* 1 (E. Aldarando ed., Laurence Erlbaum Associates, forthcoming 2006) as well as numerous other books and articles.

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