

# Twenty Years of Economic and Social Rights Advocacy

Marking the twin anniversaries of CESR and the Vienna Declaration and Program of Action



CENTER FOR ECONOMIC AND SOCIAL RIGHTS  
SOCIAL JUSTICE THROUGH HUMAN RIGHTS

Cover photos courtesy of (clockwise from top left) Lorena Pajares, Stephen Long, Brett Casper, Gigi Ibrahim, Victor Villanueva.



# **Twenty Years of Economic and Social Rights Advocacy**

**Marking the twin anniversaries of the Center for Economic and  
Social Rights and the Vienna Declaration and Program of Action**



# Table of Contents

---

<b>FOREWORD</b> <i>Mary Robinson</i>	<b>05</b>
<b>INTRODUCTION</b> <i>Ignacio Saiz</i>	<b>07</b>
Twenty years on the vanguard of economic and social rights <i>Chris Jochnick</i>	<b>09</b>
CESR and Vienna at 20: taking stock <i>Alicia Ely Yamin</i>	<b>12</b>
<hr/>	
Human rights in the 21 <sup>st</sup> century global economy <i>Nicholas Lusiani and Kate Donald</i>	<b>15</b>
Reclaiming globalization: four challenges for the human rights movement <i>Olivier de Schutter</i>	<b>17</b>
Economic policies for human rights in the market economy <i>Sakiko Fukuda-Parr</i>	<b>23</b>
Development without human rights is no progress at all <i>Jayati Ghosh</i>	<b>28</b>
<hr/>	

---

Inequality as injustice – the evolution of equality struggles since Vienna 33

*Kate Donald and Luke Holland*

Vienna's legacy: feminism and human rights 36

*Charlotte Bunch*

A shared world: indigenous peoples and women 41  
20 years after the Vienna Declaration

*Tarcila Rivera Zea*

Racial equality in the post-2015 era: can we overcome history's legacy? 45

*Gay McDougall*

---

Towards implementation: monitoring and enforcement 49

*Allison Corkery and Gaby Oré Aguilar*

The road we've travelled, the road ahead 51

*Philip Alston*

Keeping our promises: lessons from South Africa 56

*Pregs Govender*

Access to (what kind of) justice? 62

*Bruce Porter*

Operationalizing rights: legal empowerment as a tool for poverty eradication 66

*Irene Khan*

---

# FOREWORD

MARY ROBINSON

In keeping with the pioneering role it has played within the human rights movement for more than 20 years, the Center for Economic and Social Rights offers this timely and forward-looking reflection on the progress made in realizing economic and social rights since their reemergence on the human rights agenda two decades ago at the 1993 Vienna World Conference, and on the challenges that lie ahead.

It comes at a pivotal moment. 2015 marks the culmination of two global processes of critical significance for economic and social rights: a new sustainable development framework applicable to all countries and a robust climate agreement to keep global warming within acceptable limits. These are not separate issues; they are inextricably linked and, if we are to prove successful, it is absolutely crucial that the full range of human rights be taken as the normative standards underpinning both.

As we look to an uncertain future, we must face up to some challenging realities. By 2050, nine billion people will be living in a world with more climate shocks and significantly depleted resources. However, if we succeed in carrying the economic and social rights agenda forward, adapted and revitalized to meet the new and emerging challenges of our time, that world can also be one characterized by social justice and respect for the inherent dignity of every human being, as well as respect for planetary boundaries.

This will only be achieved if governments are compelled to honor the spirit and substance of the Vienna Declaration with regard to the indivisibility and equal importance of all human rights, and if those working to defend economic and social rights are able to draw upon the lessons learnt over the last 20 years as they renew their struggle. I congratulate CESR on this publication, which is an invaluable contribution to these critical endeavors.



**Mary Robinson**

Mary Robinson is President of the Mary Robinson Foundation – Climate Justice. She served as President of Ireland from 1990 to 1997 and UN High Commissioner for Human Rights from 1997 to 2002. Between March 2013 and August 2014 she served as the UN Secretary General's Special Envoy for the Great Lakes region of Africa. In August 2014 she was appointed the United Nations Secretary-General's Special Envoy for Climate Change.



# INTRODUCTION

IGNACIO SAIZ

**M**ore than twenty years have passed since the international community, gathered together in the Austrian capital Vienna, recognized the indivisibility, interdependence and equal status of all human rights, whether civil, political, economic, social or cultural. Putting an end to the outdated divisions of the Cold War, the 1993 Vienna Declaration confirmed the simple truth that freedom from fear and freedom from want go hand-in-hand, and it is futile to prioritize one over the other.

The Center for Economic and Social Rights (CESR) came into being that same year to address the long-standing neglect of these rights on the international agenda. Prompted by the twin twentieth anniversaries of the Vienna Declaration and CESR's founding, this new CESR publication, ***Twenty Years of Economic and Social Rights Advocacy***, takes stock of the progress made in recognizing, defending and enforcing these rights over the past two decades. It draws on a series of events organized by CESR in 2013 and 2014 to reflect critically on achievements and challenges in the economic and social rights field.

As highlighted by all the activists and practitioners who came together for these reflections, many of whose voices are gathered together in this publication, a great deal has been achieved since Vienna. Economic, social and cultural rights are now much more fully codified in international standards, better protected in national laws and constitutions, and more effectively safeguarded by national and international oversight bodies. They have been claimed by individuals and communities across the globe to challenge unjust policies affecting their rights to health, education and food, among others. The human rights movement has paid increased attention to economic, social and cultural rights, developing new tools, techniques and strategies to monitor and enforce them.



Ignacio Saiz

Ignacio Saiz is Executive Director of the Center for Economic and Social Rights. He has formerly served as Director of Policy at the international secretariat of Amnesty International (AI), and as AI's deputy director for the Americas.

But the stark reality is that many millions of people continue to suffer daily deprivations that should be unconscionable in the 21st century. Nearly 7 million children die before the age of five each year, while 72 million, the majority of them girls, do not have access to primary education. Close to a billion people are undernourished, while similar numbers live in precarious and insecure conditions in informal settlements. Access to even minimum levels of water, sanitation, health care and housing remain elusive for large parts of the human family.

***'The stark reality is that many millions of people continue to suffer daily deprivations that should be unconscionable in the 21st century'***

The dogma of fiscal austerity imposed worldwide in the wake of the global financial and economic crises has represented a renewed assault on economic and social rights. As CESR has shown, austerity policies in both developing and industrialized countries have contributed to escalating levels of inequality and wealth concentration, affecting the rights of marginalized communities disproportionately. This recent trend has worked in a dysfunctional synergy with others, such as accelerating climate change and environmental degradation, persistent corporate impunity and a pronounced lack of accountability in economic governance at both the national and international levels. Despite the lessons of recent years, and the recognition of economic and social rights on paper, many governments still behave as if human rights were irrelevant to economic and social policy-making.

CESR was born of the conviction that, in a world of unprecedented wealth, resources and technological know-how, such chronic deprivation cannot be seen as “natural” or “inevitable”, but is the result of unjust policies and abusive practices by governments, corporations and other powerful actors, for which they must be held to account. CESR seeks to unleash the transformative potential of human rights as a pathway to seek accountability for these injustices, and to mobilize for change.

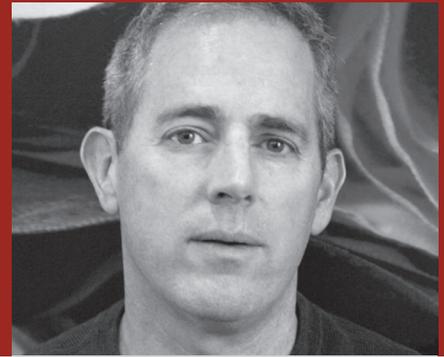
This publication analyses how the movement for economic and social rights has evolved over the past 20 years, what it has achieved and how it can address the urgent challenges it faces as it looks to the future. It is not intended to provide an exhaustive account of developments in the field over the past two decades, but rather an exploration of key trends and milestones, along with lessons learned and opportunities ahead. Bringing together some of the leading economic and social rights advocates from across the globe, it provides a concise overview of the state of the field that we hope will be a useful resource not only for the human rights community but for all those committed to the call of economic and social justice.

The publication is divided into three sections, each with an introductory chapter accompanied by pertinent think pieces from leading figures from the human rights, development and social justice fields.

The first section, **Human rights in the 21st century global economy**, explores progress in applying human rights standards in the sphere of economic and development policy. Human rights norms have increasingly engaged with issues of corporate governance, fiscal and monetary policy, industrial policy, financial regulation and unpaid care work. A dynamic movement has emerged to advance the applicability of human rights norms in relation to the environment. However, the implementation of these evolving standards has been piecemeal at best. Contrasting the triumphalist “spirit of the age” of 1993 with the uncertain realities of our current time, as evidenced by increasing global disorder, the reemergence of market fundamentalism, and the limits to economic growth posed by planetary boundaries, the chapter considers continuing challenges to the operationalization of human rights in the economic and ecological spheres. With a strong focus on the transformative impact of human rights-based approaches to development, Section 1 also details the ongoing campaign to ensure human rights are fully incorporated into the post-2015 sustainable development framework.

# Twenty years on the vanguard of economic and social rights

Chris Jochnick



Chris Jochnick

Chris Jochnick is Chief Executive Officer of Landesa, the Rural Development Institute, in Seattle. Prior to this, he was Director of the Private Sector Department at Oxfam America. In 1993, Chris co-founded the Center for Economic and Social Rights together with Roger Normand and Sarah Zaidi. He also co-founded and led Centro de Derechos Economicos y Sociales in Ecuador.

**T**wenty years after its founding, it is great to see the Center for Economic and Social Rights (CESR) thriving. While the field of economic, social and cultural rights (ESCR) faces many of the same challenges now that it did two decades ago, the promise and opportunities for ESCR advocacy have only grown in this time.

When we set out to build a small ESCR organization we had a clear vision. It wasn't just that mainstream human rights practice was too narrow, but that in a post-Cold War world, it was largely reinforcing the free market, liberal democratic status quo. We believed that in a world with such profound injustices, human rights had to be subversive to be meaningful. Human rights had to continually challenge abusive structures – not just abusive acts. We believed that ESCR provided both the vision and the means to do that.

ESCR are inherently subversive – they take as their starting point that thousands of kids dying of preventable diseases, over a billion people living on the edge of survival, a billion more without access to potable water, were not

natural occurrences, but reflections of massive human rights violations resulting from deliberate decisions of powerful authorities. ESCR gave those issues a language and legitimacy as 'rights' to challenge vested interests.

***'In a world with such profound injustices, human rights had to be subversive to be meaningful'***

Economic and social rights also forced advocates to look to new sources of power and new approaches. Twenty years ago, ESCR lacked many of the advantages of civil and political rights (CPR) – they were poorly defined, unrecognized by legal systems, lacked the financial and political support of powerful actors, and lacked effective tools. CPR advocates could leverage Northern governments, sympathetic western media, local courts, international treaty bodies, even major corporations like Reebok and Nike. ESCR had to find other constituencies, forcing a turn to social movements, grassroots organizations, community groups, and to more political, bottom-up strategies.

We were confident that the end of the Cold War would open up new space to promote ESCR and that the movement would flourish. Looking back, we haven't seen nearly as much uptake as we had hoped for, but the conditions for it have only ripened. ESCR are still largely marginalized by major foundations (with a few notable exceptions), by international bodies, and by the courts. However, ESCR advocates have clearly debunked three myths that long impeded the movement, by demonstrating that: (i) ESCR are in fact 'rights' equal to CPR (broadening acceptance from the sphere of treaty bodies to the mainstream of human rights advocacy), (ii) ESCR are justiciable

and (iii) ESCR can be practically and effectively advocated. The existence, spurred by CESR, of an international network on economic, social and cultural rights (ESCR-Net), the effective work of its many constituent organizations, and the rich database of caselaw it curates all speak to these truths. Beyond that, new political space has paved the way for thousands of new NGOs which have, in many ways, seized the human rights agenda from traditional human rights elites. Technology has helped level the playing field, allowing smaller groups based in the South to communicate and advocate effectively. Economic issues have driven mass social protests, with inequality rising to the top of global agendas.

Moreover, the bottom up approach required by and animating ESCR has clearly taken hold. The broad array of smaller NGOs, community groups, social movements, labor groups, and development organizations that have taken up the banner of ESCR see it as

a matter of faith (if not always practice) that people affected by human rights abuses have to be their own advocates. Change comes from strong civil society groups making demands on local elites, not by outside groups pressuring foreign governments through traditional media and diplomatic channels. While groups like Human Rights Watch and Amnesty are challenged to make sense of a changing world in which top-down human rights advocacy is quickly losing traction and legitimacy, ESCR advocates are well-placed to define the next human rights wave.

The evolving debate around ESCR reflects these changes. We are (happily) no longer discussing existential questions, but more practical ones. Three in particular stand out:

Firstly, the move away from formal, apolitical, top-down models has been crucial to invigorating ESCR advocacy, but risks undermining the universal legitimacy and authority of treaty

body-defined human rights. How is this tension best managed?

Secondly, ESCR offers a big tent to social movements and grassroots protests, but as those mobilizations gain traction and power, collaborating ESCR NGOs may be hard-pressed to challenge attendant CPR violations. How do groups help build the political power of grassroots movements while maintaining enough independence to watchdog them?

And finally, an issue close to my own trajectory; what do we make of the fast moving business and human rights space so critical to ESCR? Can we leverage soft standards (e.g. the UN Guiding Principles) and the commitments of powerful companies, or must we remain consistently defiant in the face of corporate hegemony? These and other profound debates around human rights reflect a maturing movement, in which ESCR will play an increasingly important role.

The Vienna Declaration's emphatic recognition of the universality, interdependence and indivisibility of rights made it clear that the enjoyment of all rights is inevitably bound up with larger patterns of social, political and economic inequality. Since then, however, the entrenchment of neo-liberal economic policies and the triumph of the globalized free market has worsened economic inequality in nearly every region of the globe, leading to a groundswell of popular mobilization all over the planet. **Section 2, Inequality as injustice**, examines conceptual and normative progress in invoking the principles of equality and non-discrimination in response to the structural and historic challenges affecting

marginalized groups such as women, children, racialized groups, indigenous people, persons with disabilities and the LGBTI community. It analyses how discrimination and marginalization have exacerbated disparities in general socioeconomic terms, before assessing the problems besetting particular groups. Major milestones in advancing the economic and social rights of traditionally disadvantaged groups, such as the adoption of new treaties and significant advances in jurisprudence, are discussed, along with the role of social movements representing these communities. Common challenges towards achieving equality and non-discrimination in practice are also explored.

Another key contribution of the Vienna Declaration and Programme of Action (VDPA) was its recognition of the need to strengthen the monitoring and enforcement of economic, social and cultural rights. With this important fact in mind, the third section of the document – **Towards implementation: monitoring and enforcement** – analyses progress in these key areas, examining the increasingly rich body of case law and the new treaties and oversight bodies with particular significance for economic and social rights. It also explores the unique challenges involved in monitoring these rights and the advances achieved in this regard. Section 3 further reflects on the extent to which the jurisprudence of national, regional and international mechanisms has been mutually complementary and advanced the justiciability of ESC rights. The final section also takes stock of successes in advancing economic and social rights claims through local mobilization and popular engagement with international

oversight bodies. Ways to overcome (or at least mitigate) the challenges we face moving forward, including strategic litigation and innovative ways of organizing and campaigning in a more globalized, interconnected world are likewise addressed.

As a movement we have travelled far, and accomplished much, over the past 20 years. But new strategies to make a reality of rhetorical commitments and normative advances must be devised, and there is a pressing need for more effective synergy between different strands of economic and social rights advocacy in order to confront the common obstacles we face in a changed geopolitical, economic and environmental landscape.

It is CESR's hope that the insights shared in this volume will provide a resource and inspiration for economic and social rights advocates everywhere as we embark on this endeavor together.



### CESR in action: redressing imbalance, promoting indivisibility

CESR was founded to address the neglect of economic and social rights on the agenda of the human rights movement and to unlock the potential of human rights as a pathway to economic and social justice. Since its inception, it has supported the recognition of ESC rights in international standards and domestic legal norms, it has helped national partners build evidence of ESC rights violations for use before national and regional adjudication bodies, and it has created forums and networks for collaborative advocacy and skills-sharing. While focusing on economic and social rights, CESR's work has always highlighted how interconnected human rights violations are across the spectrum in any given setting. In this image, a displaced woman sits on a bed next to the remnants of her burned-out house in Khor Abeche, South Darfur. Photo: Albert Gonzalez Farran, UN Photo

# CESR and Vienna at 20: taking stock

*Alicia Ely Yamin*



**Alicia Ely Yamin**

Alicia Ely Yamin, JD MPH is Lecturer on Global Health and Policy Director of the François-Xavier Bagnoud Center for Health and Human Rights at Harvard University, and a founding fellow of the Centre on Law and Social Transformation at the University of Bergen, Norway. She was Chair of the Board of the Center for Economic and Social Rights from 2009 to 2014.

In 1991, at the end of the first Gulf War, a group of classmates of mine at Harvard Law School, together with others, travelled to Iraq to assess the devastating impact of war and sanctions on the civilian population. The interdisciplinary Harvard Study Team brought together legal, social science and public health expertise to document how the destruction of the civilian infrastructure had affected people's access to food, water, sanitation and health, resulting for example in a threefold increase in child deaths from diarrhea. The findings exposed the human cost of "collateral damage" and made headline news around the world.

The Iraq project was the seed that led to the establishment two years later of the Center for Economic and Social Rights, one of the first international human rights organizations set up specifically to challenge social and economic injustices of this kind as violations of international human rights standards. Its mission was to expose abuses of economic and social rights (ESC) in situations where they are most at risk, and to help the communities affected seek accountability for these violations, making use of the tools

and mechanisms of human rights to challenge social and economic injustice.

A key challenge in those early days was not only that these norms were relatively undeveloped, but that there was little serious attention to economic and social rights violations from the mainstream human rights community. During the Cold War, economic, social and cultural rights (ESC rights) had remained contested and marginalized on the human rights agenda as vague aspirations not susceptible to legal enforcement. ESC rights had been codified in an International Covenant in the 1960s, yet international law continued to treat those rights differently than civil and political rights, which were set out in a "twin" covenant. And at the time, neither the UN human rights system nor most international human rights NGOs devoted much work to advancing ESC rights, as real rights.

CESR's founding in 1993 was thus a watershed, and coincided with another pivotal moment for the human rights movement in the aftermath of Perestroika and the end of the Cold War. At the World Conference on Human Rights in Vienna in June 1993, 171 countries adopted the Vienna Declaration

affirming that all human rights – whether civil, political, economic, social or cultural – were indivisible and interdependent, and should therefore be treated on an equal footing.

For the last two decades CESR has been working to hold governments to this pledge. The organization has carried out path-breaking investigations on issues as diverse as the environmental effects of oil exploitation in Africa and Latin America, the socio-economic rights impacts of conflicts and military interventions in the Middle East and Asia, and the role of unfair tax and budget policies in widening inequalities in Europe and the Americas.

The interdisciplinary approach and the bridging of global and local advocacy which characterized

the Iraq project have remained hallmarks of its work ever since. CESR has brought landmark ESC rights complaints before international human rights bodies in partnership with national organizations. And it has helped to build a stronger architecture of legal and institutional protection of these rights at the national, regional and global levels. CESR has also helped to grow a vibrant transnational movement for ESC rights, giving rise to new organizations and networks, such as the International Network on Economic, Social and Cultural Rights (ESCR-Net), and building the capacity of civil society groups across the globe to address these rights more effectively.

Twenty years on, the landscape has changed enormously. ESC rights are now more effectively protected in international and domestic legal frameworks. The pioneering work of legal advocates across the globe has resulted in a rich body of case law putting flesh on the content of ESC rights and making governments answerable for the reasonableness of their policy decisions. And an adjudication mechanism under the International Covenant on Economic, Social and Cultural Rights has now finally entered into force, redressing the forty-year imbalance with its

sister treaty. Today, it is no longer an issue of whether ESC rights are justiciable, but how they can be enforced more effectively, and function in practice as binding principles of socio-economic and development policy.

***'The affirmation by member states in Vienna that human rights and development should be seen as "mutually reinforcing" still has a hollow rhetorical ring twenty years on'***

The backsliding in economic and social rights protection seen in the wake of the global economic crisis, and the persistent challenge of securing human rights on the international development agenda, indicate how far we still are from this goal. CESR has been one of the few international human rights NGOs consistently drawing attention to the alarming human rights consequences of fiscal austerity policies imposed since the global economic downturn of 2008, in developing and emerging economies as well as in industrialized countries, where inequalities have escalated.

Since 2010, CESR has seized the opportunity presented by the imminent expiry of the Millennium

Development Goals in 2015 to push for a new development paradigm that has the realization of all human rights for all the world's people as its goal. But the call from civil society to place human rights at the core of the new agenda has met with considerable pushback from governments, as well as from powerful corporate interests. The affirmation by member states in Vienna that human rights and development should be seen as "mutually reinforcing" still has a hollow rhetorical ring twenty years on.

But while many of the challenges for ESC rights have persisted over the last two decades, the most dramatic change is that CESR is no longer a lone voice in the wilderness, but part of a vibrant and diverse global community of activism for economic and social rights.

If the human rights movement is to effectively build on the progress achieved over these past 20 years, it is imperative that lessons be drawn and innovative strategies designed to address the long-standing and emerging challenges highlighted in this publication. We hope this report will serve as an invaluable resource to all those working to fulfill the promise of human rights as a transformative pathway to social and economic justice.

20



Human rights in  
the 21st century  
global economy

# Human rights in the 21st century global economy

NICHOLAS LUSIANI AND KATE DONALD

## VIENNA AND THE NEW 'REALITIES OF OUR TIME'

The complexity, volatility and uncertainty which characterize today's global economic context stand in stark contrast to the triumphalist "spirit of the age" invoked in the preamble of the 1993 Vienna Declaration. The rebirth of market fundamentalism, intense resource scarcity, rampant economic inequality and environmental crises of planetary proportions all present distinct challenges to the contemporary human rights movement from those it confronted twenty years ago.

This chapter reflects on progress in bringing human rights to bear in economic, environmental and development policy in the two decades since Vienna, at both the normative and operational levels. On the economic front, the myriad challenges for human rights posed by intensified globalization at the end of the Cold War have prompted a reimagining and deeper application of human rights norms in areas such as corporate governance, fiscal and monetary policy, financial regulation and the unpaid care economy. The flowering of environmental rights advocacy at the national and regional levels, and an increasingly sophisticated human rights analysis of climate change duty-bearers, likewise illustrates the tremendous evolution in the application of the human rights framework in connection to the environment. The past twenty years have also witnessed a deeper conceptualization of the relationship between human rights and development, aided by the enormous strides made in the definition and recognition of economic, social and cultural rights and their central relevance to tackling the phenomenon of poverty.



Nicholas Lusiani

Nicholas Lusiani is Director of the Human Rights in Economic Policy Program at CESR. He previously worked for the International Network for Economic, Social and Cultural Rights and Centro por los Derechos Economicos y Sociales in Ecuador. He has also worked in Syria and Mexico.



Kate Donald

Kate Donald is Director of CESR's Human Rights in Development Program. Previously, she worked as Adviser to the UN Special Rapporteur on Extreme Poverty and Human Rights, and held positions at the Office of the High Commissioner for Human Rights and the International Council on Human Rights Policy.

As this chapter highlights, the notable advances made at the normative level have not been matched at the level of implementation. The application of these evolving standards in the process of designing, monitoring and scrutinizing public policy has been patchy and uneven at best. Holding governments, international institutions and powerful private actors accountable in practice for abuses committed in the economic, environmental and development spheres remains a pending challenge. The chapter concludes by charting out some central obstacles and opportunities for shaping new visions of the economy, ecology and sustainable development in the 21<sup>st</sup> century grounded in human rights.

# Reclaiming globalization: four challenges for the human rights movement

*Olivier de Schutter*



**Olivier De Schutter**

Olivier De Schutter is a Member of the UN Committee on Economic, Social and Cultural Rights and a former UN Special Rapporteur on the right to food (2008-2014). A specialist on economic and social rights and global governance issues, he teaches international human rights at the University of Louvain (Belgium) and at Sciences Po (France).

It is perhaps ironic that the success of the international community in building a human rights regime came at the price of human rights being marginalized by other competing regimes.

The Universal Declaration of Human Rights set out a duty of international cooperation for the realization of economic, social and cultural rights, to be achieved “through national effort and international cooperation.” This duty requires the establishment of an international economic order supporting states in the fulfilment of that objective.

The creation of the International Trade Organization (ITO) as a specialized UN agency was proposed in 1946, to promote trade as an instrument of economic development. The Havana Charter that was intended to establish the ITO defined unemployment as a common concern calling for international cooperation; it stated that the promotion of trade should not happen at the expense of the protection of fair labor standards. But the hopes it created were short-lived. In December 1950 US President Harry Truman announced the US Congress would not approve the ITO Charter. Instead, the General Agreement on Tariffs and Trade (GATT), initially concluded in 1948 as a purely

provisional arrangement, took over as a forum for the negotiation of trade liberalization. Progress towards international cooperation for a consistent approach to trade, employment, and economic development was halted.

Human rights developed in later years, with important normative developments in the 1960s and 1970s, and increased levels of ratification of key normative instruments in the 1990s. By then however, international law had become irremediably fragmented. Trade negotiations aimed at lowering barriers to international exchanges, and a web of investment treaties, designed to facilitate the free movement of capital, granted extended rights to foreign investors in order to secure their assets in the countries in which they sought to operate. Both the trade and the investment regimes all but ignored human rights considerations: rights would follow, it was assumed, once economic growth was stimulated; and in any case, human rights had their own treaties and institutions, which it was unnecessary to duplicate. Even the Millennium Development Goals (MDGs), agreed in 2000, did not include any human rights language. Not until the MDG Review Summit in 2010 did development talks raise human rights concerns, albeit hesitantly. For 10 years

development objectives were considered as “needs” to be fulfilled by a combination of technocratically-driven policies and humanitarian support, rather than by empowering people to hold governments accountable for the realization of their basic rights.

How can global governance be reformed, to better contribute to the fulfilment of human rights, particularly economic and social rights? There are four major challenges to be met.

A first challenge is the fragmentation of international law. International trade and investment law, international environmental law, international human rights law, and other regimes of international law, have increasingly developed in isolation from one another, each with their own set of norms, specialized dispute-settlement

bodies, and communities. As a result, inconsistencies may emerge. Trade and investment agreements may impose on states certain obligations that conflict directly with their obligations under human rights instruments, or make it more difficult for them to comply with such obligations, particularly those that concern the progressive realization of economic and social rights. Moreover, where such conflicts occur, states may be strongly inclined to prioritize their obligations under trade and investment agreements, both because of the risk of counter-measures being imposed on them if they violate such agreements, and because of the need for states to attract foreign investors.

Fragmentation is a problem, and bridges should be built across the different regimes of international law to avoid such inconsistencies.<sup>1</sup> But fragmentation is at least as much a matter of different policy communities coexisting, as it is a matter of legal significance alone. The WTO for instance is not just a rule-setting and rule-enforcing organization: its influence resides as much (or even to a larger extent) in the socialization process it encourages, and in the collective learning it leads to.<sup>2</sup> The WTO regime is a 'teaching' forum, instructing policy-makers, as it were, about what it means to be a liberal trading nation. What is required is for the human rights community, therefore, to become relevant to the debate on desirable

trade regimes, encouraging policy learning and the production of new ideas about desirable trade policy.

A second difficulty is what some have called the "paradox of the many hands": the larger the number of states involved in a situation that creates obstacles to one state fulfilling its human rights obligations, the more difficult it will be to assert a responsibility of any individual state in that situation. Indeed, where a state encounters obstacles in seeking to fulfil economic and social rights because of an unfavorable international economic environment, this only rarely may be attributed to a single state alone: instead, it is the *combined* effect of the conduct of a number of states that results in such an environment.

In international law, the responsibility of the state may be engaged even though the adoption by that state of a different conduct may not have led to a different result.<sup>3</sup> Thus, a particular violation of economic, social and cultural rights may be attributed to the conduct of one state, even if other, intervening causes, or the conduct adopted by a number of other states, have also played a role in the violation. Yet, it will still be politically difficult to challenge any one state for not remedying a situation many other states could have contributed to address. It is one thing for a state to be found responsible for implementing trade policies that destroy local producers' ability to compete in their own domestic markets; it is quite another to seek to engage the responsibility of that state for not ensuring that the multilateral

trading system works for the benefit of the state which, due to its poor trade balance, finds it difficult to make progress on development indicators.

A third difficulty is that in the post-World War II era, economic globalization has proceeded to a significant extent through international organizations guiding the development efforts of poor countries, or helping them access financial support on international markets. But international human rights law has largely developed through treaties meant for states.

Of course, as subjects of international law, international organizations are in principle bound by human rights as a part of general international law.<sup>4</sup> Yet, the potential avenues to allege the responsibility of international organizations, including in particular international financial institutions, for violations of economic and social rights, remains very limited.<sup>5</sup> Unless international organizations acknowledge that they are bound to comply with human rights in the exercise of the powers attributed to them, and establish mechanisms that will ensure adequate accountability, this is an area in which impunity may remain the rule.

Finally, the human rights obligations of states only extend to the situations that fall under their 'jurisdiction'. Human rights

1 For instance, by assessing the human rights impacts of trade agreements in the course of their negotiation: see Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreement, 2011, Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum (UN doc. A/HRC/19/59/Add.5), 19 December 2011.

2 A. Lang, «Re-Thinking Trade and Human Rights», *Tulane Journal of International and Comparative Law*, vol. 15(2), 2007, pp. 335-414.

3 International Court of Justice, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment of 26 February 2007), *ICJ Reports*, para. 430.

4 International Court of Justice, Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt (Advisory Opinion of 20 December 1980), *ICJ Reports*, para. 37.

5 O. De Schutter, «Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility», in Jan Wouters et al. (eds), *Accountability for Human Rights Violations by International Organisations*, Intersentia, Antwerp-Oxford-Portland: Intersentia, 2010, pp. 51-129.

bodies have interpreted the notion of 'jurisdiction' as referring to the situations over which the state exercises a certain degree of *de facto* control, whether or not in accordance with international law. But, in contrast to the primarily negative duties to abstain from interfering with the enjoyment of the rights of the individual, the duties to fulfil economic, social and cultural rights, may require the exercise of powers that are those of the territorial state or of an occupying state acting as the *de facto* territorial sovereign. This results in limiting the range of situations to which economic and social rights can be invoked. Thus, in its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice remarks that, whereas the International Covenant on Civil and Political Rights applies "in respect of acts done by a state in the exercise of its jurisdiction outside its own territory", there is no such clause attached to the International Covenant on Economic, Social and Cultural Rights: the Court believes this to be "explicable by the fact that this Covenant guarantees rights which are essentially territorial".<sup>6</sup> It thus seems to presume that the Covenant requires for its implementation that the state does exercise "quasi-sovereign" powers – for instance, to establish a system of schools, to build health care centers, or to implement a program for social housing. This illustrates the difficulty of imposing extraterritorial obligations in the area of economic, social and cultural rights, at least if we remain

6 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004), *ICJ Reports*, paras. 111-112 (emphasis added).

trapped in the current (and still dominant) mindset that sees such rights as imposing positive duties on the state, whereas civil and political rights only (or primarily) would impose negative duties of abstention.

***'Unless human rights are allowed to play their civilizing role in the process of economic globalization they will be further marginalized'***

Human rights treaty bodies have increasingly acknowledged the existence of extraterritorial obligations, however. The emerging consensus in this regard is illustrated by the adoption in 2011 of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, and by the endorsement within the Human Rights Council of the Guiding Principles on Human Rights and Extreme Poverty, which refer to extraterritorial obligations.<sup>7</sup>

This is also significant in the area of the responsibilities of corporations towards human rights. Indeed, it is on this point that the Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in 2011, are perhaps the least satisfactory. The Guiding Principles provide that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations" (Principle 2). This sets the bar below the current state of

7 Guiding Principles on Extreme Poverty and Human Rights. Final draft submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona (UN doc. A/HRC/21/39) (endorsed by consensus by the Human Rights Council in res. 21/11 of 27 September 2012), para. 61.

international human rights law. The United Nations treaty bodies have repeatedly expressed the view that states should take steps to prevent human rights contraventions abroad by business enterprises that are incorporated under their laws, that have their main seat or their main place of business under their jurisdiction. The Committee on Economic, Social and Cultural Rights affirms that states should prevent third parties from violating rights in other countries if they are able to do so by way of legal or political means.<sup>8</sup> Both the Committee on the Elimination of Racial Discrimination (CERD) and the Human Rights Committee consider that states should protect human rights by preventing their citizens, companies and other national entities from violating rights in other countries.

These four challenges form what might be called the agenda for a humane globalization. Tools are increasingly being developed to address these challenges. Significant progress has been made in recent years, in each of the areas discussed above. But the task is an urgent one, and it is a race against time: unless human rights are allowed to play their civilizing role in the process of economic globalization, they will be further marginalized, and the damage caused by the never-ending pursuit of growth and efficiency shall be even more difficult to repair.

8 Committee on Economic, Social and Cultural Rights, General Comment No. 14, 2000, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 2000, para. 39; Committee on Economic, Social and Cultural Rights, General Comment No. 15, 2002, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, 26 November 2002, para. 31.

## HUMAN RIGHTS IN ECONOMIC POLICY: FROM GROWTH TRIUMPHALISM TO THE AGE OF AUSTERITY

With the end of the Cold War, free-market economics enjoyed hegemonic dominance across the globe. By 1993 a ubiquitous sense of triumphalism became apparent, with many heralding the historic inevitability of an efficient, private market-oriented economy unfettered by the constraints of state control. At the same time, human rights were also a victor of the Cold War, with adherence to human rights norms and values emerging as a relatively undisputed indicator of political legitimacy at the international level. But while free market ideology is premised on limiting state interference in the workings of an unbridled marketplace, human rights standards are founded upon the notion of a capable and robust state with both negative and positive duties to uphold human dignity. The two decades since Vienna have therefore witnessed a troubled relationship between these two competing value systems.

***'While free market ideology is premised on limiting state interference in the workings of an unbridled marketplace, human rights are founded upon the notion of a capable and robust state with duties to uphold human dignity'***

Witnessing the depth and breadth of abuses occurring as a result of economic developments throughout the 1990s and 2000s, the human rights community sought ways to adapt its instruments and strategies to address the implications of an increasingly influential private sector and de-nationalized economic policy. Confronted with a litany of business-related human rights abuses, touching all aspects of people's lives in all parts of the world and in all economic sectors,<sup>1</sup> the initial focus was, on the one hand, to document and expose the human suffering caused at the individual and community level, and on the other, to fill the normative protection gaps which allowed large companies to operate with impunity. The UN Human Rights Council adopted the Guiding Principles on Business and Human Rights in 2008, affirming with greater precision the obligations of companies to respect human rights, and those of states to protect against, and provide remedy for, corporate abuses. Since then, there have been

ongoing efforts to build on these principles, and to address the inadequacy of voluntary corporate responsibility initiatives, by pressing for new binding instruments to hold private businesses accountable.<sup>2</sup>

In analyzing the backdrop to these injustices, human rights advocates increasingly began to recognize the critical significance of national and global macro-economic decision-making in shaping the environment within which private actors exert influence over people's lives. Several sets of guidelines were developed to attempt to bring trade and investment regimes into line with international human rights norms.<sup>3</sup> An increasingly comprehensive set of human rights impact assessment methodologies aimed at providing tools for monitoring and challenging trade and investment-related abuses were also developed. As fiscal austerity measures introduced in the wake of the global economic downturn of 2008 have resulted in increased socio-economic deprivation and inequality in many countries<sup>4</sup>, economic and social rights defenders and progressive economists have teamed up to audit governments' national and international tax and fiscal policy-making in line with their human rights duties.<sup>5</sup> At the national level, meanwhile, several innovative strategic litigation initiatives have set out to challenge austerity-driven cutbacks to human rights through the courts.

Since the late 1990s, human rights advocates in Latin America, Asia and Eastern Europe have been addressing the human rights implications of public debt crises and austerity measures imposed

1 For more on this, see the Business and Human Rights Documentation Project at : [www.bhrd.org](http://www.bhrd.org) and the Business and Human Rights Resource Center at: <http://business-humanrights.org/>

2 For more on this, see the work of the Treaty Alliance, at: <http://www.treatymovement.com/>

3 "Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements", Report presented at the 19th Session of the United Nations Human Rights Council.

4 Lakner, C., Milanovic, B. "Global Income Distribution: From the Fall of the Berlin Wall to the Great Recession" The World Bank Development Research Group, 2013. See: [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2013/12/11/000158349\\_20131211100152/Rendered/PDF/WPS6719.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2013/12/11/000158349_20131211100152/Rendered/PDF/WPS6719.pdf)

5 For examples of work by human rights practitioners and inter-governmental human rights experts building the normative basis for applying human rights to fiscal and tax policy, see: Special Rapporteur on Extreme Poverty and Human Rights, "Fiscal and Tax Policy", OHCHR, 2014; International Bar Association Human Rights Institute report "Tax Abuse, Poverty and Human Rights", 2013; Saiz, I., 'Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective', chapter in *Human Rights and Public Finance* (Hart, 2013); Balakrishnan, R., "Why MES with Human Rights: Integrating Macro Economic Strategies with Human Rights", (Marymount Manhattan College, 2005); Balakrishnan, R., Elson, D., Heintz, J., & Lusiani, N., "Maximum Available Resources & Human Rights," Center for Women's Global Leadership, Rutgers University, 2011; Council of Europe, "Safeguarding Human Rights in Times of Economic Crisis", 2013.



### CESR in action: Confronting unjust austerity measures

Over the past seven years, many countries have seen a stark deterioration in economic and social rights as governments have implemented harsh fiscal austerity measures in the wake of the global economic downturn. CESR has challenged the harmful impacts of austerity before regional and international human rights bodies. Its work in Spain, for example, prompted the UN Committee on Economic, Social and Cultural Rights to call on all states considering such measures to take all necessary steps to avoid retrogression or backsliding in human rights protection. In 2013, the Council of Europe's Human Rights Commissioner issued CESR-drafted guidelines to member states on safeguarding human rights in times of crisis. Austerity is a global trend, with social spending cuts and related reforms affecting some 130 mainly developing countries. Photo of protestors against health budget cuts in Spain courtesy of Olmo Calvo, Flickr.

in the name of 'structural adjustment'. Initiatives have included innovative and at times successful efforts to use the human rights protection regime to compel debt restructuring,<sup>6</sup> capstoned by the adoption of the UN Guiding Principles on Foreign Debt and Human Rights.<sup>7</sup> As the policy roots of the global financial crisis have become painfully clear, economic and social rights advocates have increasingly invoked human rights arguments to push for more effective regulation of private actors in the still-opaque realm of financial regulatory law and policy. Financialization of the

economy makes more vulnerable the enjoyment of several economic and social rights. These include the rights to housing, thanks to household debt and mortgage crises; the right to food, due to the future derivatives market which makes global food prices more volatile; and the rights of indigenous peoples and small scale farmers, due to land grabbing and the activities of extractive industries.<sup>8</sup>

Each of these initiatives represents an essential step forward in effectively applying human rights norms to the complex world of economic policy-making. Nonetheless, transforming normative commitments into concrete changes in national and global economic policy requires more strategic and coherent engagement by the human rights community in matters of economic policy.

6 For more on this, see work of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, at: <http://www.ohchr.org/EN/Issues/Development/IEDebt/Pages/IEDebtIndex.aspx>

7 Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, 2011, "Guiding Principles on foreign debt and human rights". Available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/20/23](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/20/23)

8 For more on this, see the work of the Righting Finance Initiative at: [www.rightingfinance.org](http://www.rightingfinance.org). CESR serves on the Steering Committee of the Righting Finance Initiative.

Two key trends over the last two decades which require more effective responses from the human rights community are the increasing privatization of public goods and services, and widening economic inequality.

***'As protests mount worldwide against the injustice of extreme inequality and wealth concentration, many within the human rights community are beginning to speak out more strongly against abusive and regressive practices'***

The global economic downturn provoked by the near collapse of the financial system in 2007 highlighted the need to reclaim the centrality of the public sphere, after three decades of governments ceding key elements of their sovereignty to the private sector. In the decades since Vienna, private values, standards and legal institutions, especially driven by multinational corporations and international financial institutions, have been further inserted into the public domain, effectively capturing key areas of public policy. One example is the proliferation of investment treaties—designed and agreed to by sovereign governments—which protect the right of companies to sue governments in unaccountable arbitration tribunals for regulatory measures perceived as threatening their profits, even when such measures include necessary health or environmental protections. The increasing involvement of the private sector in the delivery of formerly public services, and the widespread trend towards public-private partnerships and institutions, has reinforced a belief in the superiority of private regulation, circumscribing the policy space of public actors in the national and global economy. This challenge is exacerbated by imbalances of political and informational power: many transnational private actors understand far better how to operate within the complex and fragmented global economic system than do many national public actors responsible for upholding human rights guarantees, including many government agencies and civil society organizations.

A second trend with which the human rights community must grapple more effectively is widening economic inequality. Whether measured by income or wealth, material inequality has skyrocketed over the past two decades, in rich and poor countries alike. Recent

efforts to apply human rights norms to some of the areas of government policy most critical to addressing economic inequality—such as tax and fiscal policy, or decent work protections—<sup>9</sup> will need to be built on creatively in the years ahead. This will include the further development of methodologies to more effectively demonstrate the links between economic policies and widening human rights disparities, and partnering with economists to develop clear recommendations for policy alternatives to prevent these, as well as appropriate remedies to redress them. As protests mount worldwide against the injustice of extreme inequality and wealth concentration, many within the human rights community are beginning to speak out more strongly against the abusive and regressive practices of governments and businesses which facilitate these, and to call for human rights-centered redistributive policy reforms at both the national and global levels.

## **HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT: FROM HRBAS TO THE SDGS**

The Vienna Declaration and Plan of Action in 1993 marked an historic step forward in articulating the links between human rights and development, describing extreme poverty as a violation of human rights and re-imagining human well-being rather than economic production as the central aim of sustainable development. Since then, some piecemeal progress has been made in bringing human rights to the center of development policy. Human rights-based approaches to development (HRBA) have to a large degree been recognized and institutionalized. From the Common Understanding on the Human Rights Based Approach to Development, agreed by the UN system in Stamford in 2003<sup>10</sup>, to the UN Guiding Principles on Extreme Poverty and Human Rights, adopted by the Human Rights Council in 2012, human rights have become increasingly recognized as a normative framework which should guide poverty eradication efforts at the national and global levels.<sup>11</sup>

9 See: "Advancing Fiscal Justice: A summary of CESR's publications on fiscal policy and human rights", 2015, at: <http://www.cesr.org/downloads/CESR.fiscal.justice.publications.pdf>

10 *UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (the Common Understanding)*, adopted by the United Nations Development Group (UNDG) in 2003. See: <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies#sthash.G1gxCTnL.dpuf>

11 Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full

# Economic policies for human rights in the market economy

Sakiko Fukuda-Parr



Sakiko Fukuda-Parr

Sakiko Fukuda-Parr is Professor of International Affairs at the New School. She is a development economist who has published widely on a broad range of development policy related issues including poverty, gender, technology, capacity development and agriculture. She is best known for her work as director and lead author of the UNDP Human Development Reports from 1995 to 2004. She is a member of the UN's Committee on Development Policy and serves on the Boards of the International Association of Feminist Economics and Knowledge Ecology International.

How should a new global goal for international partnership be defined? Millennium Development Goal 8 called for a global partnership for development, but it lacked concreteness and quantitative targets, was narrow in scope and failed to mobilize attention. The targets set out in this goal were problematic in a more fundamental respect; they reflected a conceptualization of 'partnership' focused on development aid as the major responsibility of international cooperation, and on social spending as the essential economic policy for development and human rights. Current debates about the post-2015 agenda and the Sustainable Development Goals provide an opportunity to rethink what we mean by 'international partnership' and reconsider the priority international economic issues that pose obstacles to development and human rights.

The provision of aid has dominated policy advocacy for international development cooperation since the 1950s, and continues to be central today. While access to concessional development finance for public spending will be important for most of the least developed countries, this should not be the central objective of partnership in the post-2015 agenda for both normative and empirical reasons.

The obligations for international cooperation extend far beyond providing concessional financing. While Article 22 of the Universal Declaration articulates the right to economic, social and cultural rights "through national efforts and international cooperation", Article 28 states explicitly that "Everyone is entitled to a *social and international order* in which the rights and freedoms set forth in this Declaration can be fully realized" (emphasis added). The 1998 Declaration on the Right to Development took this further, explicitly calling on states to act collectively – through international cooperation – as well as individually, to create an enabling environment for development, particularly by removing obstacles and creating opportunities (Preamble, articles 1, 2, 4, 7).

Empirically, countries face numerous obstacles to development that they cannot resolve on their own. National governments can address the consequences but addressing the systemic causes to prevent future threats requires international cooperation as some of these arise from the unstable nature of global markets. For example, the 2008 global financial crisis and the ensuing great recession threw millions out of jobs and provoked many other negative consequences. Spikes in world food prices led to price increases

threatening food security. Other obstacles require global public goods, such as a cure or vaccine for the HIV/AIDS pandemic that continues to afflict millions. Yet another arose from global rules that create obstacles to development such as the TRIPS agreement that constrains the diffusion of access to life-saving medicines, or the trade agreements on agriculture that constrain the ability of governments to support the small-scale farmers who make up a large proportion of the poorest and undernourished in the world. These are some examples of priority actions that are urgently needed to advance human rights in the 21st century.

The UN High Level Task Force on the Right to Development identified a more complete list of key priorities including measures to address: risks of international economic and financial crises; volatility of commodity prices, especially food prices; non-discriminatory international trading system; access to technology; environmental sustainability; access to financial and human resources; and equitable approaches to sharing the benefits and burdens of development, such as environmental burdens and shocks. Moreover, the Task Force identified measures to ensure that the processes of international cooperation reflect the core principles of non-discrimination, participation, accountability and self-determination. These priorities and the concept of international obligations for international cooperation should guide the formulation of the partnership goals in the post-2015 development agenda.

Just as financing has dominated concerns for international cooperation, recent attention to economic policies in human rights advocacy has focused on social spending. Provision of schooling, healthcare, clean water supply and many other goods and services are a necessary means for the substantive enjoyment of rights. Recent trends in defunding or underfunding of social welfare provisions through Europe and North America, and the implementation of austerity measures through much of the world, is a major threat to economic and social rights. Attention to social expenditures

as a priority for human rights advocacy is welcome but should not lead to an unquestioning acceptance of social spending as the principal economic strategy for realization of economic and social rights, again for normative and empirical reasons.

***'One of the most important innovations in human rights practice has been the increasing attention to economic policies such as the scrutiny of budgets, taxation, and social security systems'***

Economic and physical access to necessary goods and services is an important part of the enjoyment of economic and social rights. But in most market economies, these goods and services are not entirely provided by the state. State provisioning has little to do with access to food, employment and housing. Even for education, health and social security, the state is not the only source of provisioning. The essential role of the state may not be in direct provisioning but in drawing up regulatory and incentive policies to ensure accessibility. For example, in the case of the right to adequate food, General Comment 11 states: "The obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide..... The obligation to fulfill (facilitate) means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security" (UN Committee

on Economic, Social and Cultural Rights, 1999, para 15). The General Comment goes on to explain that the 'means' the state must deploy include a wide range of policy instruments that "should address critical issues and measures in regard to all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security." (para 25)

International human rights norms are intended to be neutral with respect to economic systems (UN Committee on Economic, Social and Cultural Rights, 1990). An essential function of human rights in the 21st century however, is to humanize the global market economy. The obligations of international cooperation require states to take positive action to design and implement global governance arrangements that provide an enabling environment for the right to development. At the national level, the state obligations are to put in place a policy environment that advances the progressive realization of human rights. One of the most important innovations in human rights practice has been the increasing attention to economic policies such as the scrutiny of budgets, taxation, and social security systems. Moving forward, the challenge will be to move beyond public expenditures to designing appropriate policies for market economies pursuing growth in a competitive global marketplace that also advances human rights.

Yet, there remains a persistent disconnect between normative recognition and practical implementation of human rights in development policy. There is still a widespread tendency among many development

actors to reduce the concept of 'rights-based approaches' in their programming to a concern for procedural rights, such as improved transparency, participation and accountability in development processes, disregarding the economic and social rights duties governments are also bound by, which should have a critical bearing on the substantive content

---

enjoyment of all human rights, 2011, "Guiding Principles on foreign debt and human rights". Available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/20/23](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/20/23)

of development policy. This 'human rights-light' approach to development is a long way from a truly human rights-centered development policy that enshrines the realization of human rights as its ultimate aim, and applies the full range of human rights as operational standards to guide the process and outcomes of development.

The Millennium Development Goals (MDGs) were emblematic of the gap between rhetorical recognition and practical application. Human rights principles were referenced in the Millennium Declaration but undercut by the design of the goals themselves and – in many cases – the policies pursued in their name.<sup>12</sup> The process to agree a new set of Sustainable Development Goals (SDGs) to replace the MDGs in 2015 therefore provides an ideal moment to promote a more transformative rights-centered vision of development, seen as a matter of justice rather than charity.<sup>13</sup>

Although at the time of writing the final content of the new goals was still taking shape, the efforts of those such as CESR who have campaigned to secure human rights at the core of the new framework appear to be paying off. The SDGs will be more far-reaching, comprehensive and equality-sensitive than the MDGs, and they will apply universally, moving away from outdated dichotomies of aid-giving and aid-receiving countries.<sup>14</sup> However, the inclusion of references to existing human rights norms and obligations has been contentious in the political negotiations, with some member states arguing that human rights are 'too political' or controversial for inclusion in a global sustainable development agenda. After 20 years of HRBAs, this is a worrisome reality check. Nonetheless, the efforts of human rights advocates to influence the goals, targets and indicators of the post-2015 sustainable development framework has fostered greater synergies between the development and human rights communities at both local and global levels,

and the process has provided a space for a clearer and more comprehensive elucidation of the centrality of human rights to development.<sup>15</sup>

Efforts by the human rights community to meaningfully shape the future understanding and practice of development will need to be waged on several fronts, taking into account emerging trends over the last two decades. These include the renewed challenges of development financing, especially with the relative decline in importance and availability of official development assistance from industrialized countries and the rise of South-South cooperation;<sup>16</sup> the increasingly manifest limits to growth imposed by planetary boundaries; the growing role of private actors in development; and the abundant potential for cross-border impacts of State and corporate actions in a globalized world.<sup>17</sup> Human rights principles and standards can provide a much needed normative underpinning for addressing these challenges and designing a new development architecture for the 21<sup>st</sup> century.

## HUMAN RIGHTS AND THE ENVIRONMENT – FROM GENERATIONS OF RIGHTS TO THE RIGHTS OF FUTURE GENERATIONS

Coming a year after the Rio Conference on Environment and Development, and amidst a growing groundswell of research and advocacy illustrating the human rights consequences of natural resource extraction,<sup>18</sup> participants in Vienna were well aware of the harsh impacts of environmental degradation. Echoing the 1972 Stockholm Declaration, the Vienna Declaration asserted that one of the aims of the international community should be "to meet equitably the developmental and environmental needs of present and *future* generations." What was not yet apparent at the time was the extent and depth of these environmental threats, particularly the catastrophic implications of climate change in which the right to life of whole communities – and indeed whole nations – is at stake.

12 CESR, Office of the High Commissioner for Human Rights, "Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda", 2013. <http://cesr.org/article.php?id=1482>; Fukuda-Parr, S., and Yamin, A.E., "The Power of Numbers: A Critical Review of MDG Targets and Indicators from the Perspectives of Human Development and Human Right", Working Paper, François-Xavier Bagnoud Center for Health and Human Rights, Harvard University, May 2013.

13 CESR, "A Matter of Justice: Securing human rights in the post-2015 sustainable development agenda," <http://cesr.org/article.php?id=1456>

14 Post-2015 Human Rights Caucus, "Post-2015 Human Rights Caucus Response to the UN Secretary-General's Synthesis Report", 2015. [http://cesr.org/downloads/HR\\_Caucus\\_response\\_SG\\_Synthesis\\_Report\\_Jan22.pdf](http://cesr.org/downloads/HR_Caucus_response_SG_Synthesis_Report_Jan22.pdf)

15 For a useful summary on this, see: CESR, Danish Institute for Human Rights, "Realizing Rights Through the Sustainable Development Goals: The Role of National Human Rights Institutions", 2015. [http://cesr.org/downloads/NHRI\\_realizing\\_rights\\_sdgs.pdf](http://cesr.org/downloads/NHRI_realizing_rights_sdgs.pdf)

16 For more on this, see: CESR, "A Post-2015 Fiscal Revolution", 2014. <http://cesr.org/article.php?id=1584>

17 CESR, Third World Network, "Universal Rights, Differentiated Responsibilities: Safeguarding human rights beyond borders to achieve the Sustainable Development Goals," 2015. [http://cesr.org/downloads/CESR\\_TWN\\_ETOs\\_briefing.pdf](http://cesr.org/downloads/CESR_TWN_ETOs_briefing.pdf)

18 See for example, CESR, "Rights Violations in the Ecuadorian Amazon: The Human Consequences of Oil Development", 1994. This report was written while the Vienna Conference was ongoing



## CESR in action: Securing human rights on the post 2015 development agenda

2015 is a pivotal year for the global development and environmental agendas, with a new set of Sustainable Development Goals to be agreed at the UN in September and a new agreement on climate change to be achieved in Paris in December. CESR has been at the forefront of efforts to ensure the new framework is firmly anchored in human rights, both in terms of the content of the goals and their mechanisms for implementation, financing and accountability. Development must be seen as a matter of justice if it is to deliver the transformative impact people all over the world are calling for. Photo of sugarcane fields in Brazil being burned by Eskinder Debebe, UN Photo

Extreme and volatile weather patterns, severe drought, brutal storm swells and major flooding are already having devastating impacts on human rights,<sup>19</sup> but the incidence and severity of such disasters are only set to increase.<sup>20</sup> Even if current climate commitments are fulfilled, global temperatures could rise by 4°C from pre-industrial levels by the end of the century.<sup>21</sup> Such catastrophic climate change would have dire consequences for the whole spectrum of human rights, in particular the human rights to life, to food, to water, to health, to adequate housing, and to the right to self-determination.<sup>22</sup>

It is estimated that some 330 million people would be permanently or temporarily displaced through flooding alone.<sup>23</sup> Many experts agree that violence, civil unrest and 'climate wars' would follow such momentous breakdowns in social cohesion and environmental balance.<sup>24</sup> Already-disadvantaged communities are disproportionately exposed to climate and disaster risks, and will bear the overwhelming burden of adaptation. Whether it is Sahelian farmers, Inuit hunters in the Arctic, or poor communities of color in US coastal cities, the heightened vulnerabilities and human rights risk exposure resulting from climate change and climate-induced disasters represent some of the

19 UNISDR and CRED, "2012, Disasters in Numbers", 2013. See: <http://reliefweb.int/report/world/economiclosses-disasters-set-new-record-2012>

20 ODI, "The geography of poverty, disasters and climate extremes in 2030", 2013.

21 Sherwood, S., Bony, J., Dufresne, L., "Spread in model climate sensitivity traced to atmospheric convective mixing", *Nature*, 505, MacMillan Publishing, January 2014.

22 OHCHR, "Analytical Study on the Relationship between Human Rights and the Environment, Report of the United Nations High

Commissioner on Human Rights" (UN Doc. A/HRC/19/34), 16 December 2011.

23 UNDP, Human Development Report 2007/2008. [http://hdr.undp.org/sites/default/files/reports/268/hdr\\_20072008\\_en\\_complete.pdf](http://hdr.undp.org/sites/default/files/reports/268/hdr_20072008_en_complete.pdf)

24 Climate Change Adaptation Roadmap, U.S. Department of Defense, 2014. [http://www.acq.osd.mil/ie/download/CCARprint\\_wForeword\\_c.pdf](http://www.acq.osd.mil/ie/download/CCARprint_wForeword_c.pdf)

most fundamental new threats to the exercise of human rights by marginalized communities around the world.

As the systemic importance of environmental protection for human dignity has become clearer, efforts have been made to apply and evolve human rights protections to environmental policymaking and disaster risk management. Two related developments have been particularly significant.

First, environmental rights have been better codified in human rights legal instruments and mechanisms. More than 90 countries have in one form or another explicitly integrated the human right to a safe, sustainable and healthy environment into their constitutions.<sup>25</sup> Several regional human rights systems also formally recognize environmental rights.<sup>26</sup> Many of these legal instruments include strong procedural guarantees on people's right to information and participation in environmental decision-making.<sup>27</sup> Recent constitutions in Ecuador and Bolivia, meanwhile, have taken the innovative approach of protecting the inherent rights of nature itself against degradation, independent of the human harm incurred.<sup>28</sup>

As environmental rights become more explicitly protected under constitutional and human rights law, several initiatives have in turn been developed to seek out remedy for ecologically-related human rights violations. Advocates have challenged environmentally destructive activities using national constitutional guarantees.<sup>29</sup> For example, Niger Delta communities successfully brought a suit in Nigerian federal court against the government and Shell for the practice of gas flaring. The court ruled that the practice was unconstitutional as it violates the fundamental rights to life and dignity provided for in the Constitution and in the African Charter on

Human and Peoples Rights.<sup>30</sup> Additionally, in countries such as Bolivia and Ecuador, advocates have demanded (sometimes successfully) the observance of the rights of nature,<sup>31</sup> for example in the Ecuadorian Galápagos Islands, where a judge invoked human rights arguments to stop the construction of a highway in order to preserve the unique ecosystem of the islands.<sup>32</sup> Advocates have also sought environmental justice in regional and international courts, such as the African Commission on Human and Peoples' Rights, the European Court of Human Rights, the Inter-American System of Human Rights<sup>33</sup> and the International Court of Justice.<sup>34</sup>

### ***'Human rights are beginning to play a more prominent role in how we think, and how we act, on climate change'***

Secondly, human rights are beginning to play a more prominent role in how we think, and how we act, on climate change. Thanks to the leadership of those communities and nations most exposed to, yet least responsible for, climate catastrophe – such as the Inuit and the Maldives<sup>35</sup> – pioneering steps have been taken to leverage the principles, instruments and mechanisms of human rights to more effectively confront catastrophic climate change. While some question the wisdom of inserting human rights into a heavily politicized climate negotiation process,<sup>36</sup> human rights can make significant contributions in this arena.<sup>37</sup> The

<sup>25</sup> Boyd, D.R., *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, Vancouver, Toronto, UBC Press, 2012.

<sup>26</sup> African Charter on Human and Peoples' Rights; the Additional Protocol to the American Convention on Human Rights; Aarhus Convention; the Arab Charter on Human Rights; and the Human Rights Declaration adopted by the Association of Southeast Asian Nations; "Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox - Preliminary report", 2013, A/HRC/22/43, p. 5

<sup>27</sup> "Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox - Preliminary report", 2013, A/HRC/22/43, p. 5

<sup>28</sup> Gudynas, E., "La ecología política del giro biocéntrico en la nueva Constitución de Ecuador", 2009, *Revista de Estudios Sociales* 32: 33-47.

<sup>29</sup> Preston, B., "Climate Change Litigation (Parts 1 and 2), Land and Environment Court of New South Wales", University of Sydney - Faculty of Law. P. 31

<sup>30</sup> *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd et al.* See more at: [http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file\\_id=163003](http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=163003)

<sup>31</sup> Fish, L., "Homogenizing Community, Homogenizing Nature: An Analysis of Conflicting Rights in the Rights of Nature Debates", 2012, *Social Science*.

<sup>32</sup> Suárez, S., "Efectivación de los Derechos de la Naturaleza", 2012, *Temas de Análisis Centro Ecuatoriano de Derecho Ambiental*, 27.

<sup>33</sup> Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox - Preliminary report", 2013, A/HRC/22/43.

<sup>34</sup> Harrison, J., 'Significant International Environmental Law Cases: 2012-14,' *Environmental Law*, 2014, 26 (3): 519-540. doi: 10.1093/jel/eqou28

<sup>35</sup> Cameron, E., and Limon, M., "Restoring the Climate by Realizing Rights: The Role of the International Human Rights System", 2012. *Review of European Community & International Environmental Law*, 21: 204-219. doi: 10.1111/reel.12004

<sup>36</sup> "Many climate change professionals (like economic and development practitioners) fear that human rights can easily become politicized and controversial, injecting added complexity and cleavages into an already polarized global challenge." Limon, M., *Ibidem*.

<sup>37</sup> Cameron, E., and Limon, M., op cit fn35; See also Limon, M., "Human rights and climate change: Constructing a case for political action", 2009, *Harvard Environmental Law Review* 33 (2), p. 450-454

# Development without human rights is no progress at all

Jayati Ghosh



Jayati Ghosh

Jayati Ghosh is Professor and Chairperson at the Centre for Economic Studies and Planning, School of Social Sciences, Jawaharlal Nehru University, New Delhi. She is also Executive Secretary of International Development Economics Associates (IDEAS), an international network of heterodox development economists. Her research work has been awarded with the 2005 UNDP Award for excellence in analysis, the NordSud Prize for Social Sciences 2010 of the Fondazione Pescarabruzzo, Italy and the ILO Decent Work Research Prize in 2011.

There are those who argue that human rights are not just about legal systems or the operations of political processes, but rather should be seen as a way of life, informing every aspect of economic, social, cultural and political interaction. Thinking about human rights in this manner would certainly involve changing the way most of the world currently thinks about economic policies, processes and systems. Yet the laws and conceptual frameworks within which policies are developed seem to be moving further and further away from that ideal, despite the efforts of many social actors to bring human rights-based legislation and other demands into the focus of economic decision-making.

Our legal frameworks are certainly culpable in this respect. The way in which economic transactions are governed in most societies means that corporate entities are typically given legal acceptance as independent actors and often have greater weight in terms of securing their rights, even when these “rights” conflict with basic human rights. This problem has been intensified by international trade and investment regimes. For example, cross-country investment treaties and economic partnership agreements feature rules on compensation for expropriation (which tends to be very broadly defined), providing substantial protection to investor interests.

This can often lead to citizens’ concerns about displacement, over-extraction of natural resources, pollution and other forms of environmental degradation, along with health and safety concerns for workers and consumers, being underplayed or even brushed aside.

***‘The way in which economic transactions are governed means that corporate entities often have greater weight in terms of securing their rights, even when these “rights” conflict with basic human rights’***

Furthermore, the right to development is impeded not only by international economic patterns, including in trade and investment, but also by patterns of knowledge generation and dissemination. The privatisation of knowledge and its growing concentration, through the proliferation and enforcement of intellectual property rights, have become significant barriers to the necessary technology transfer and social recognition of traditional knowledge that are so necessary for effective realization of the right to development. This is clearly evident in access to essential medicines and crucial technologies for food cultivation. It is also very much the case in the arena of industrial technologies as well as the transfer of critical knowledge required for mitigating and adapting to climate change

and associated natural disasters. The national and international institutional structures that should provide checks and balances on the privatization of knowledge, and ensure that knowledge production and dissemination are not subservient to a small elite but instead directed towards social goals, have become more fragile and less effective in recent times. In this context, democratizing the production and dissemination of knowledge has become essential.

Within countries, a change in macroeconomic direction is now more necessary than ever. This is necessary not just to reduce or reverse the pervasive inequality that characterized the previous boom and is deepening in the current phase of the crisis, but also to allow for a return to stable economic expansion.

This requires a shift in strategy towards domestic wage- and employment-led growth. And this in turn necessitates a reversal of the current obsession with macroeconomic discipline and fiscal austerity, which is not only heavily procyclical but also deeply counterproductive, since it pushes economies into a downward spiral that actually makes all fiscal indicators look worse than before. Fiscal space is not a static variable: expansionary fiscal policies increase demand and private sector revenues and thereby generate more tax revenues, while fiscal tightening can be self-defeating when it reduces GDP growth and so fiscal revenues. At the same time, much stronger re-regulation of finance is required, not the halfhearted approach currently on display in most countries.

To ensure the realization of economic and social rights, the focus of macroeconomic policies must be on the generation of decent work and on improving conditions of life, not on income growth per se. This is important because it makes the provision of basic needs (employment as well as access to food, sanitation, housing, health and education), and improving the quality of life of all

citizens, central guiding principles. Quantitative GDP growth targets, that still tend to dominate the thinking of policymakers, are not only distracting from these more important goals, but can even be counterproductive.

The strategy must emphasize the expansion of and better delivery systems in the provision of public services, especially in nutrition, sanitation, health and education. This allows for improved material and social conditions and has positive employment effects both directly and indirectly through the multiplier process. This in turn requires increases in public employment, which incidentally sets the floor for wage levels and improves the bargaining power of workers. A related issue is the need to provide much better social protection, with more funding, wider coverage and consolidation, more health spending and more robust and extensive social insurance programmes including pensions and unemployment insurance. This is important in itself, particularly for reducing human insecurity and gender gaps in living conditions. It also has great macroeconomic significance because it increases the presence of countercyclical buffers that reduce

the negative effects of economic downturns.

Much of this can and should be financed through progressive taxation, which provides a means to redress the dramatically increasing inequality in assets and incomes that has come to dominate the global economy. It is increasingly evident that, across the world, conscious efforts to reduce economic inequalities, both between countries and within countries, are needed. We have clearly passed the limit of what is "acceptable" inequality in most societies, and future policies will have to reverse this trend. But greater state involvement must be associated with efforts to make such involvement more democratic and accountable to the people, especially those who have been marginalized or dislocated by the economic growth process. Also, it is not enough to talk about "cleaner, greener technologies" to produce goods that are based on older and increasingly unviable patterns of consumption. Instead, we need to think creatively about such consumption itself, and work out which goods and services are more necessary and desirable for our societies.

human rights perspective, according to experts, has helped to render a previously technical debate about complex, physical systems into a discussion on the disproportionate risks faced by human beings and communities as subjects of universal and inalienable rights. As well as potentially wresting some of the decision-making power from technocrats and politicians, the resulting change of emphasis adopted by advocates and the Inter-Governmental Panel on Climate Change (IPCC)<sup>38</sup> may be more likely to catalyze public action.

Human rights also help to clarify and delineate the respective domestic and cross-border responsibilities of states for finding solutions. It can be argued that all states party to the ICESCR have a legal duty to mitigate climate change through international cooperation to reduce emissions to safe levels

consistent with the full enjoyment of these rights.<sup>39</sup> Human rights can also provide operational standards to help guide measures to mitigate climate change, such as the aggressive promotion of biofuels, the Reduced Emissions from Deforestation and Degradation (REDD)+ program, or the Kyoto Protocol's Clean Development Mechanism (CDM).<sup>40</sup> But without comprehensive human rights safeguards, many of these projects have instead resulted in displacement, and other human rights abuses.<sup>41</sup>

39 UNHCR, "Analytical Study on the Relationship between Human Rights and the Environment", Report of the United Nations High Commissioner for Human Rights (UN Doc. A/HRC/19/34) 16 December 2011; Declaration on Climate Justice. <http://www.mrfcj.org/media/pdf/Declaration-on-Climate-Justice.pdf>

40 Center for International Environmental Law and Friedrich Ebert Stiftung Foundation, "Human Rights and Climate Change: Practical Steps for Implementation", 2009. [http://www.ciel.org/Publications/CCandHRE\\_Febog.pdf](http://www.ciel.org/Publications/CCandHRE_Febog.pdf) p.2

41 Center for International Environmental Law and Friedrich Ebert Stiftung Foundation, "Human Rights and Climate Change: Practical Steps

38 See for example, IPCC Working Group 2, "Climate Change 2014: Impacts, Adaptation, and Vulnerability" at <http://www.ipcc.ch/report/ar5/wg2/>

Human rights principles of transparency, participation, and free, prior and informed consent, for example, can help prevent such foreseeable impacts.

***'One of the most concrete benefits of a human rights approach to climate change would be to unlock paralyzed political debates through the use of the harder aspects of human rights law'***

One of the most concrete benefits of a human rights approach to climate change would be to unlock paralyzed political debates through the use of the harder aspects of human rights law, in particular through the use of accountability, redress and remedy mechanisms. The Inuit indigenous people, for example, sought relief from violations of the Inter-American Charter resulting from the impacts of climate change caused by conduct of the United States,<sup>42</sup> while the glacier-dependent community of Khapi, Bolivia also appealed to the Inter-American Commission on Human Rights to consider the threat that climate change poses to the community's human right to water.<sup>43</sup>

Advocates have succeeded in some first steps toward implementing human rights standards into the process and substance of the climate change regime. At the sixteenth Conference of the Parties (COP) in Cancún in December 2010,<sup>44</sup> states party to the UNFCCC agreed for the first time to include explicit human rights protections into a climate change instrument. The agreements<sup>45</sup> identify the direct and indirect adverse human rights effects of climate change, and recognize both the principles of non-discrimination and equality, and the rights to participation and information. Further, the agreement unequivocally confirms consensus

that "parties should, in all climate change related actions, fully respect human rights." All told, these agreements represent a potentially powerful entry point to begin operationalizing human rights into all aspects of the climate regime.<sup>46</sup>

As the Independent Expert on human rights and the environment has affirmed, despite the aforementioned progress in the recognition of norms in relation to the environment, these do not yet constitute a coherent, universal set of environmental rights standards, nor the clear articulation of the right to a healthy environment as part of the international bill of human rights.<sup>47</sup> This has hindered a broader recognition and application of these rights outside of specific geographical locations or issue areas.

Another key normative challenge revolves around the protection of the rights of future generations. Considering the predictable, profound, and permanent impacts current generations are having on the human and natural systems within which future generations will have to live, a human rights approach to environmental justice must adopt an inter-generational perspective, which human rights practice and scholarship is only beginning to engage with.<sup>48</sup>

A third very practical yet profound challenge to effectively protecting environmental rights is the intimidation, criminalization and repression faced by environmental rights defenders. Until basic rights of security of person and freedoms of assembly and association are guaranteed to human rights and environmental defenders, conditions will not exist to give effect to the considerable normative advances in the recognition of environmental rights.<sup>49</sup>

---

for Implementation", 2009. [http://www.ciel.org/Publications/CCandHRE\\_Feb09.pdf](http://www.ciel.org/Publications/CCandHRE_Feb09.pdf), p. 11

42 "Petition to The Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States", Inter-American Commission on Human Rights, 2005. See: [www.ciel.org/Publications/ICC\\_Petition\\_7Dec05.pdf](http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf)

43 Earthjustice, "Agua Sustentable, Petition to Inter-American Commission on Human Rights for a Hearing on the Relationship between Climate Change, Access to Freshwater, and Human Rights", 2011. See: <http://earthjustice.org/sites/default/files/IACHR-hearing-request-2011-01-24.pdf>

44 This included a significant effort by the government of the Maldives to secure a consensus resolution, United Nations Human Rights Council Resolution 7/231 on climate change and human rights in March 2008.

45 Cameron, E., and Limon, M., "Restoring the Climate by Realizing Rights: The Role of the International Human Rights System", 2012. *Review of European Community & International Environmental Law*, 21: 204–219. doi: 10.1111/reel.12004

46 United Nations Framework Convention on Climate Change – Ad-Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA), 2010; For more on this, see CIEL, "Analysis of Human Rights Language in the Cancun Agreements", 2011, at: [http://www.ciel.org/Publications/HR\\_Language\\_COP16\\_Mar11.pdf](http://www.ciel.org/Publications/HR_Language_COP16_Mar11.pdf); See also: Cameron, E., and Limon, M., "Restoring the Climate by Realizing Rights: The Role of the International Human Rights System", 2012. *Review of European Community & International Environmental Law*, 21: 204–219. doi: 10.1111/reel.12004

47 "Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox - Preliminary report", 2013, para. 38.

48 See for example Moir, K., "Intergenerational Equity and Large-Scale Mining in Latin America: The Implications of Limited Human Rights Protections for Future Generations", University of Essex, Sept. 2012.

49 Report of Michael Forst, Special Rapporteur on the Situation of Human Rights Defenders to the Human Rights Council. This report will be available in August 2015 at: <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/SRHRDefendersIndex.aspx>

## THE NEXT 20 YEARS

While they are distinct efforts largely carried out by discrete communities of practice, the various struggles to secure human rights in economic, environmental and development policy share striking commonalities. Firstly, all three domains highlight the imperative of developing and applying the concept of extraterritorial human rights obligations. Financial instability, climate change, poverty, extreme inequality and environmental degradations are all collective action problems, resulting from the behaviors of a plurality of actors. Yet the recurrent failures of global economic and environmental governance present a host of new challenges for securing human rights accountability across borders. Facing resistance from powerful privileged interests, the key principle of common but differentiated responsibilities emerging from Rio and the UNFCCC, for example, is often more declaratory in its use than operational and transformative.

A growing body of norms emerging from the cross-pollination between development practice and human rights, criminal and environmental law—from the Declaration on the Right to Development to the Maastricht Principles on Extraterritorial Obligations—have clarified and delineated the respective human rights obligations of states outside of their own borders. The challenge now is to successfully invoke these norms to bring about greater transnational accountability in each of these policy settings.

Attributing financial instability, growing economic inequality or climate change to the particular conduct of a specific actor in the global economy presents many difficulties. For the most part, these collective problems stem from complex, cumulative and routine activities.<sup>50</sup> The proliferation of responsible agents complicates the conventional approach of establishing a violation, a duty-bearer and then seeking redress retroactively. Taken together, these factors suggest that an emphasis on forward-looking preventative approaches which target systemic root causes rather than symptoms is necessary. Such an approach would be based on the precautionary principle and would seek to integrate human rights into policy planning and practice.

Another persistent parallel across the economic, environmental and social fields over the last decade is the common backdrop of crisis. As the ramifications of enmeshed food, climate, economic and financial crises continue to unfold, the state of emergency is no longer felt as acute and exceptional but chronic and normalized.<sup>51</sup> Moreover, there has been a worrying trend of political and economic decision-makers taking advantage of the crisis context to curtail channels of information and deliberation, concentrate executive powers and push through regressive austerity measures detrimental to human rights.

***'There has been a worrying trend of decision-makers taking advantage of the crisis to curtail channels of information and deliberation, concentrate executive powers and push through regressive austerity measures'***

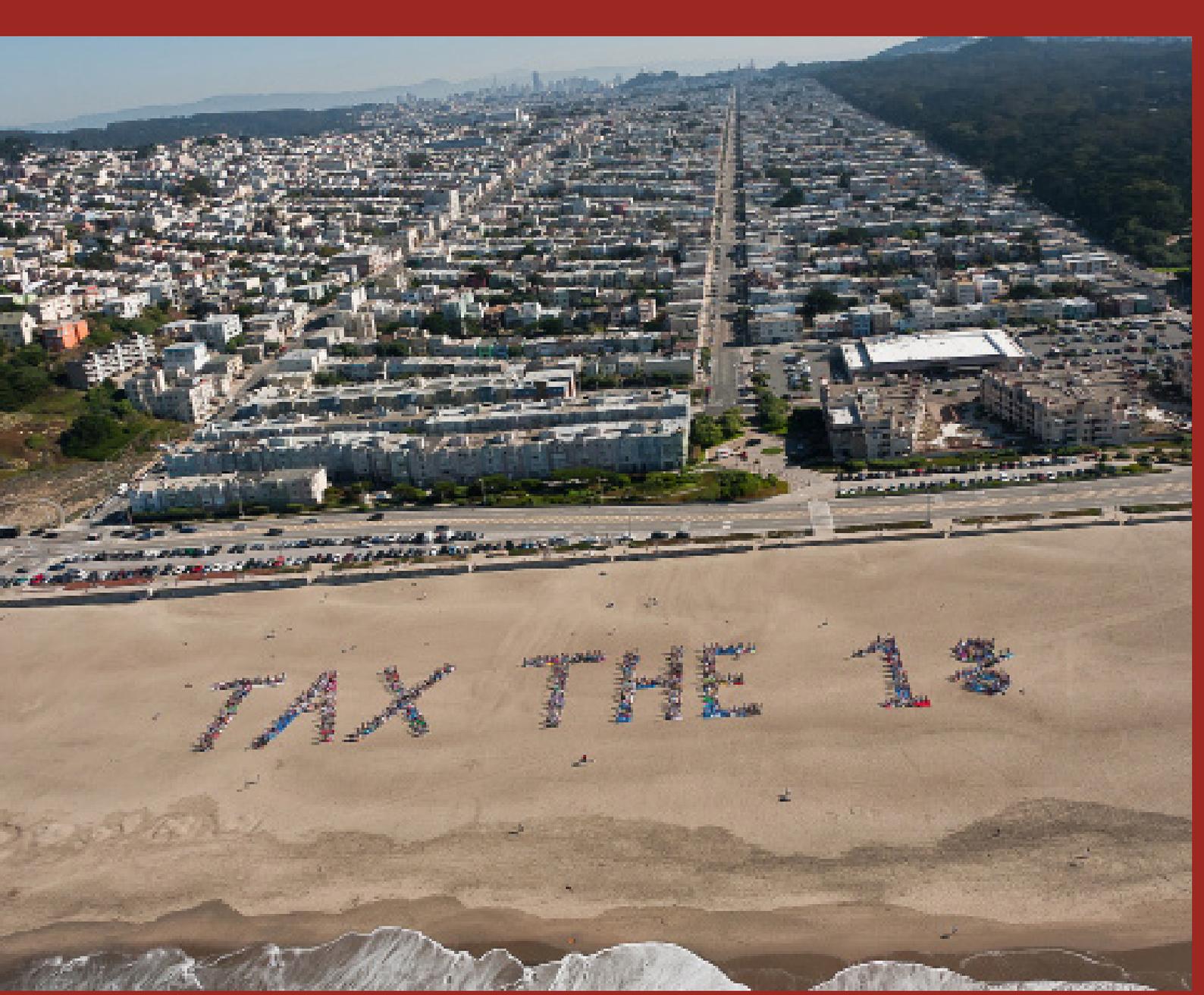
Most fundamentally, each of these domains teaches a basic lesson on the power dynamics behind economic and social injustice. It is too often the people least responsible who are disproportionately vulnerable to climate, environmental and economic shocks, precisely because they are politically, socially and economically excluded, with little access to resources, influence, information or decision-making power. Ensuring human rights in development, economic and environmental policy inevitably means confronting the privileges enjoyed by powerful public and private interests vested in the status quo.

While the 'realities of our time' are in many respects quite different from those referred to in the Vienna Declaration two decades ago, the overriding objective of this seminal document – to promote the practical implementation of all human rights – remains as pertinent today as it was then. The last two decades have seen economic and social rights more widely recognized at the normative level, yet all too often routinely ignored and flouted in socio-economic, environmental and development policy and practice. The challenge for the next two decades will be to bring human rights to bear more fully and operationally in all spheres of public policy, and to unleash their transformative potential to advance social and economic justice.

<sup>50</sup> Sassen, S., *Expulsions: Brutality and Complexity in the Global Economy*, 2014, Harvard University Press.

<sup>51</sup> Beck, U., "Living in and Coping with World Risk Society: The Cosmopolitan Turn", *Polis. Political Studies*. No 5. 2012, Moscow., p.10.

20



Inequality as injustice:  
the evolution of  
equality struggles  
since Vienna

# Inequality as injustice: the evolution of equality struggles since Vienna

KATE DONALD AND LUKE HOLLAND

## INTRODUCTION

The Vienna Declaration and Programme of Action (VDPA) committed states to tackling entrenched patterns of discrimination and marginalization, and the conference certainly provided an important springboard for equality concerns. As the contributions in this chapter reflect, Vienna gave momentum to many advocates for the rights of marginalized groups of all sorts, enabling a more robust and holistic vision of equality to emerge and be enshrined in law and jurisprudence at national, regional and international levels. While the Declaration can be faulted for not advancing critical concepts such as 'substantive' equality, subsequently elaborated on by the human rights treaty bodies, its emphatic recognition of the universality, interdependence and indivisibility of rights was a vital contribution from the equality perspective, leading to greater understanding that the inability to equally enjoy one right threatens the enjoyment of *all* rights, and is inevitably bound up with larger patterns of social, political and economic inequality.

The injustice of economic inequality has become more manifest over the last two decades. Since Vienna, the entrenchment of neo-liberal economic policies and the triumph of the globalized free market has worsened economic inequality in nearly every region of the globe.<sup>1</sup> The idea that social and economic gains that accrued to the asset-owning class would 'trickle down' to the rest of society has been decisively disproved as



Kate Donald

Kate Donald is Director of CESR's Human Rights in Development Program. Previously, she worked as Adviser to the UN Special Rapporteur on Extreme Poverty and Human Rights, and held positions at the Office of the High Commissioner for Human Rights and the International Council on Human Rights Policy.



Luke Holland

Luke Holland is Communications Coordinator at CESR. Before joining CESR, he worked as a journalist at The Irish Times, The Mirror (UK) and Independent Television News (UK), where he was a producer on Channel 4 News and ITV News At Ten.

the most advantaged capture an ever-greater slice of the pie, even in times of crisis.<sup>2</sup> In the last few years, this has provoked a rumbling and then explosive groundswell of outrage and concern about economic and social inequalities – all of which have marked correlations with race, sex

1 Fuentes, R., Galasso, N., "Working for the Few: Political Capture and Economic Inequality", Oxfam Briefing Paper, 2014.

2 Stiglitz, J., *The Price of Inequality*, Penguin, July 2013. For illustrative data on wealth concentration in the United States, see Robinson, P., "Top 1% Got 93% of Income Growth as Rich-Poor Gap Widened", Bloomberg News, 2 October 2012. <http://www.bloomberg.com/news/2012-10-02/top-1-got-93-of-income-growth-as-rich-poor-gap-widened.html>

and disability status, among other grounds of discrimination. Even the high priests of orthodox economics – such as the International Monetary Fund (IMF) – now admit that current levels of inequality are damaging to social cohesion and economic growth.<sup>3</sup> Yet human rights are rarely invoked in current policy debates on economic inequalities, reflecting the need for the human rights movement to leverage the framework and instruments of human rights more effectively in efforts to tackle and redress these disparities. Nevertheless, over the last twenty years human rights advocacy, research, litigation and the jurisprudence of UN and regional human rights bodies has further elaborated and advanced the meaning of equality and non-discrimination from a human rights perspective, clarified the prohibited grounds of discrimination, and provided guidance on the behaviors, policies, laws and actions that can violate or threaten these central tenets of human rights law. In general, this work has allowed us to see and analyze more clearly the structural barriers that hamper the fulfillment of economic and social rights, and articulate these more forcefully as human rights concerns.<sup>4</sup> However, overcoming and deconstructing these obstacles clearly remains a pending task. Key milestones and ongoing challenges are outlined below, with specific aspects analyzed in more depth in the expert contributions to this chapter.

## MILESTONES IN ADVANCING EQUALITY SINCE VIENNA

Perhaps the most obvious positive trend in the last 20 years is the multi-faceted effort to ‘fill in the gaps’ in patchwork protection from discrimination, at all levels from the grassroots to the international. Over two decades, multiple international legal instruments, declarations, mechanisms and resolutions have recognized the systemic discrimination and human rights violations faced by particular groups, and codified the obligations of states to end these. From the Convention on the Rights of Persons with

Disabilities, to the Declaration on the Rights of Indigenous Peoples; from the Special Procedures mandates on minority issues and migrants to the UN Permanent Forum on Indigenous Issues; from the Global Strategy for Women’s and Children’s Health to the Global Commission on International Migration – all of these new initiatives (spurred by civil society activism and advocacy since Vienna) have drawn international attention to marginalization and discrimination and in some cases provided avenues for justice. All have built on territory claimed at Vienna (which in turn built on grassroots and national advocacy from around the world).

Some groups that suffer disproportionately from disadvantage, stigma and discrimination were directly named in the Vienna Declaration while others were not. However, advocates for all such groups were arguably given some momentum and new platforms by Vienna. For example, while the VPDA itself does not make any explicit references to the rights of Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) persons, the civil society statement – which included a clear articulation of the human rights issues at stake in sexual orientation and gender identity matters – demonstrated the emergence of a new consciousness in the human rights movement. This was a key development given that in 1993 the United Nations human rights mechanisms had yet to make any references to sexual orientation and gender identity issues. The obligation of states to prevent discrimination on the grounds of sexual orientation has now been repeatedly affirmed by the United Nations Treaty Bodies, most notably by the Committee on Economic, Social and Cultural Rights;<sup>5</sup> the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women.<sup>6</sup>

Admittedly, progress in the UN intergovernmental forums was slow to gather speed amidst entrenched resistance; a resolution on the rights of LGBT people submitted to the General Assembly in 2008 was never formally adopted, but it was an important milestone as the first such initiative in the United Nations. Three years later in 2011 the Human Rights Council passed a resolution leading to the first comprehensive UN report on the rights of LGBT peoples, and the first formal debate by a UN intergovernmental body

3 See for example Ostry, Berg and Tsangarides, “Redistribution, Inequality and Growth”, IMF Staff Discussion Note, 2014; Lagarde, C., “Economic Inclusion and Financial Integrity—an Address to the Conference on Inclusive Capitalism”, May 2014. <http://www.imf.org/external/np/speeches/2014/052714.htm>

4 A significant contribution to the understanding of equality in the sphere of economic, social and cultural rights is General Comment 20 (2009) of the Committee on Economic, Social and Cultural Rights on Non-Discrimination in Economic, Social and Cultural Rights.

5 CESCR General Comment No 20 on Non-Discrimination in Economic, Social and Cultural Rights.

6 CEDAW, General Recommendation No 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, tackles the intersectionality of discrimination, including sexual orientation and gender identity (para 18).

# Vienna's legacy: feminism and human rights

*Charlotte Bunch*



**Charlotte Bunch**

Charlotte Bunch is Founding Director and Senior Scholar at the Center for Women's Global Leadership, Rutgers University. She has been an activist, writer and organizer in the feminist and human rights movements for over four decades. She is on the Board of the Association for Women's Rights in Development (AWID), and also serves on the Global Civil Society Advisory Group to UN Women.

**T**he United Nations World Conference on Human Rights in Vienna is widely recognized as the tipping point in efforts to gain international acceptance that 'women's rights are human rights'. The affirmation of women's rights as full universal rights, and the identification of violence against women as a key issue on the global human rights agenda, initiated a process of integration of women and of gender-based perspectives into human rights theory and practice.

This success did not come about in a vacuum. Women organized for the Vienna Conference as part of the growing global feminist movement that emerged in the 1980s and 90s - a social movement that crossed Global South and North lines and saw the UN as an important international space for advancing women's rights.

The Global Campaign for Women's Human Rights in Vienna was kicked off in 1991 with a petition to the UN Conference that asserted, "violence against women violates human rights," and calling on it "to comprehensively address women's human rights at every level of its proceedings." The petition touched a nerve. In this pre-internet era, it was translated at the grassroots level into 25 languages and quickly

circulated in some 124 countries, arousing feminist interest in the upcoming conference and sparking widespread debate over why women's rights were not already considered human rights.

The campaign aimed at transforming human rights to be more inclusive by bringing women's experiences and feminist gender analysis to bear on all issues. We sought to demonstrate what violations of human rights such as torture, denial of the freedom of expression and movement as well as of the right to food and security look like in the lives of women. Further, the campaign did not present women only as victims who are "vulnerable" to abuse, but also as activists with agency who are a powerful human rights constituency for change.

The VDPA assertion that human rights are universal and that the "promotion and protection of all human rights is a legitimate concern of the international community" is one of Vienna's most important achievements. Since the human rights of women are often at the center of challenges to the universality of human rights, this aspect of Vienna is especially important for women. Moreover, the defense of the universality of rights for women is

also crucial to any defense of the universality of human rights; if the violation of the rights of half of humanity can be conditional in the name of culture, religion or nationality, then the rights of anyone can be so conditioned.

After Vienna, a number of gains were made in the effort to establish more systematic standard-setting on women's human rights in general, and especially around gender-based violence. The UN General Assembly adopted the Declaration on the Elimination of Violence Against Women (DVAW) in December of 1993, and the Commission on Human Rights, at its first session after Vienna, appointed a Special Rapporteur on Violence Against Women. In 1994, the Commission adopted its first resolution on gender integration, which paved

the way for regular sessions on this topic at the Human Rights Council, as well as a wide range of efforts to bring women's perspectives more fully into work on human rights. For example, the inclusion of gender-based persecution and a gender quota for judges in the founding statute of the International Criminal Court broke new ground in addressing women's rights from the beginning of the creation of a global human rights body, rather than trying to tack it on later. Advances have been made at the regional level also, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

The refrain "women's rights are human rights" became a guiding principle in other areas beyond the formal human rights system and coincided with the effort in the 1990s to mainstream human rights into development and other aspects of UN operations. It was adopted by those working to affirm reproductive and health rights in the 1994 Cairo International Conference on Population and Development, to reinforce women's socio-economic rights at the Copenhagen Summit on Social Development in 1995, and to produce a Platform for Action framed around human rights at the Fourth World Conference on Women, in Beijing in 1995.

The Vienna, Cairo, and Beijing conferences also inspired greater grassroots interest in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and gave impetus to the creation of the Optional Protocol that strengthens CEDAW as a vehicle for implementation of women's rights.

Feminist perspectives have also influenced national and global work on gender in relation to issues of war and armed conflict. The first ever Security Council resolution (1325) on women, peace and security was adopted in 2000, followed by further Council measures on violence against women in conflict.

***'A fundamentalist backlash against women's claims to equality, and especially to sexual and reproductive rights, has seized on national sovereignty, culture and religion as excuses for perpetuating patriarchal discrimination and violence'***

Since Vienna, feminist thinking has contributed to human rights through its critique of the socially constructed separation of the public and private spheres, demonstrating how human rights violations that might be denounced in the 'public sphere', such as violence and confinement, are often tolerated or excused when they are committed in the so-called private arena of the family. This has added to a growing human rights understanding of the importance of addressing violations by "non-state actors," and how the state is often in collusion with private actors like the family, corporations, private militias, or others.

Another crucial contribution of feminist analysis has been in looking at the body and sexuality as key sites of human rights violations. This is most often expressed in the concept of 'sexual rights', linking reproductive

rights to sexual orientation and gender identity. It underpins an understanding that many gender-based violations are centered on the control of women's sexuality, whether through female genital mutilation, stoning and 'honor killings', or the 'corrective rapes' and forced marriages imposed on women who transgress gender norms. While most often applied to women, gender constructions are clearly linked to abuses of gay men and transgender people as well.

Advances in women's human rights were accelerating after Vienna, but the forces of backlash against such fundamental social change have also been strong. A fundamentalist backlash against women's claims to equality, and especially to sexual and reproductive rights, has seized on national sovereignty, culture and religion as excuses for perpetuating patriarchal discrimination and violence. Most governments pay no more than lip service to their obligations to the human rights of women, and with economic austerity policies on the rise in the past few years, resources needed to bring about substantive equality for women are sorely lacking.

A major challenge today is the growing gap between women whose economic and personal status has improved and those who have been further marginalized as the gap between rich and poor, connected and powerless, has widened.

*This is an edited version of a presentation delivered at the 'Vienna+ 20' International Expert Conference, Vienna, on 27 June 2013*



### CESR in action: Combating inequality through rights-based tax policies

Widening economic inequality has emerged as one of the defining social ills of our time. Progressive and fair taxation is both a social necessity and a human rights imperative to tackle this trend. CESR is working to challenge tax policies at the national and global levels which fuel inequality and human rights abuses, so as to ensure governments provide sufficient resources for the progressive realization of human rights. Photo of New York protestor courtesy of Scott Lynch, Flickr.

on the subject.<sup>7</sup> In 2014, a further resolution was adopted by the Human Rights Council,<sup>8</sup> resulting in a follow-up analytical report.<sup>9</sup>

Moreover, the commitment to non-discrimination set out in the Vienna Declaration helped pave the way for responses to discrimination against LGBTI persons through the international human rights infrastructure.<sup>10</sup> There have also been significant advances at the regional and national levels.<sup>11</sup>

7 UN High Commissioner for Human Rights, "Discriminatory Laws and Practices and acts of violence against individuals based on their sexual orientation and gender identity", November 2011. [http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41\\_English.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf)

8 HRC Resolution 27/32

9 United Nations High Commissioner for Human Rights, "Discrimination and violence against individuals based on their sexual orientation and gender identity", 2 May 2015. [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A\\_HRC\\_29\\_23\\_en.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_23_en.doc)

10 In 1994, the case of *Toonen v Australia*, which challenged Tasmanian prohibitions of same-sex sexual contact, led to a landmark ruling by the Human Rights Committee which found the law in question to be in violation of Articles 17 (1) and Article 2 (1) of the ICCPR. Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992. <http://www1.umn.edu/humanrts/undocs/html/vws488.htm>

11 For example, just a few years after the VPDA, in the case of

The VDPA, issued during the International Year of the World's Indigenous People, gave important attention to the egregious discrimination and rights violations often endured by indigenous peoples. The Declaration called for a permanent forum on the rights of indigenous peoples to be set up within the UN, a task which was finally accomplished in 2002. Largely thanks to the efforts of grassroots activists and human rights defenders, the struggles of indigenous peoples to secure their rights have become increasingly visible over the past 20 years. Later in 1993

*Vriend*, the Supreme Court of Canada concluded that issues of sexual orientation could not be excluded from non-discrimination laws. In 2007, the Supreme Court of Nepal set a crucial precedent by recognizing "people of the third gender" in the case of *Sunil Babu Pant v Government of Nepal*. In 2011 the Council of Europe adopted the first intergovernmental agreement on the rights of LGBT people, including provisions on employment, health, housing and education. Council of Europe, Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity. See: <https://wcd.coe.int/ViewDoc.jsp?id=1606669&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>. That same year, the Organization of American States approved the resolution 'Human Rights, Sexual Orientation, and Gender Identity', three years after OAS presented their Declaration on Sexual Orientation and Gender Identity to the United Nations General Assembly: <http://www.oas.org/en/iachr/lgtbi/docs/GA%20Res%20202721.pdf>

the Working Group on Indigenous Populations finalized a draft text for a Declaration on the Rights of Indigenous Peoples, after 11 years of debate. The Declaration would have to wait a further 14 years and overcome the resistance of key countries including Canada, the US, Australia and New Zealand, before finally being adopted by the General Assembly in 2007.

While the declaration is not legally binding, it represents a critically important step forward in the recognition of legal standards that should be applied to protecting the rights of indigenous peoples, including return of confiscated territory and compensation for historical grievances. The indigenous peoples of the world still do not have a specific United Nations human rights treaty of their own with a proper oversight and accountability body to more effectively protect their rights and those of their communities (although the International Labor Organization's Convention No 169 on Indigenous and Tribal Peoples addresses issues of land rights, equality and participation in development processes). The Permanent Forum has itself hinted that the declaration may be a precursor to such a treaty, stating that it "represents the dynamic development of international legal norms and it reflects the commitment of the UN's member states to move in certain directions".<sup>12</sup> National and regional human rights mechanisms have played a major role in continuing this 'dynamic development'. For example, the jurisprudence of the Inter-American system has expanded the right to property to recognize the right of indigenous peoples to communal property over their ancestral lands, territories and natural resources; firmly linked to the enjoyment of economic and social rights.<sup>13</sup>

Perhaps the most important conceptual development since Vienna in this realm is that of 'substantive equality', a concept which has been given far greater life and meaning over the last twenty years – in particular in the context of women's rights advocacy and jurisprudence. Time and again, treaty bodies, courts and other human rights mechanisms have reaffirmed that equality does not mean sameness, neutrality or identical treatment. Rather, tackling inequality requires engaging with the whole host of

structural barriers that disadvantaged groups face in securing all their human rights – and taking proactive measures to overcome them.

The key normative advance in this respect is CESCR General Comment 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights, providing a framework for substantive equality in the context of these rights, although it has to be acknowledged that the Committee's application of its own interpretation has sometimes been lacking.<sup>14</sup> Similarly, the CEDAW Committee has not always been consistent and clear in its interpretation of substantive equality, although flexibility may in some respects be positive and necessary. More specific guidance on the steps needed to ensure women's substantive equality has meanwhile been provided by UN Women.<sup>15</sup>

***'Perhaps the most important conceptual development since Vienna is that of "substantive equality", a concept which has been given far greater life and meaning over the last twenty years'***

Advances in the conceptualization of substantive equality have succeeded in adding nuance to our understandings of the structural barriers to the enjoyment of economic, social and cultural rights – for example regarding the 'social determinants' of key rights such as health. Maternal health and mortality have been conclusively recognized as a human rights issue and the types of policies, services and protections that States should put in place regarding pregnancy and childbirth have been elaborated. Concerns and ideas about substantive equality have been central to these efforts – pregnancy and childbirth being of course uniquely female experiences that cannot be dealt with through gender-neutral laws or policies. In *Alyne da Silva Pimentel Teixeira v. Brazil* (2011), the first maternal death case to be decided by an international human rights body, the CEDAW Committee used a substantive equality framing to find that "the lack of appropriate maternal health services in the State party clearly fails to meet the specific, distinctive health needs and interests of women."<sup>16</sup> Gains have also been

12 United Nations, "Frequently Asked Questions on the Declaration on the Rights of Indigenous Peoples". [www.un.org/esa/socdev/unpfi/documents/FAQsindigenousdeclaration.pdf](http://www.un.org/esa/socdev/unpfi/documents/FAQsindigenousdeclaration.pdf)

13 See Inter-American Commission on Human Rights, "Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System." Available at: <http://cidh.org/countryrep/Indigeno-Landsog/Chap.I-II.htm#I>

14 CESCR, General Comment 16, 2005, <http://www2.ohchr.org/english/bodies/cescr/docs/CESCR-GC16-2005.pdf>

15 UN Women, "Transforming Economies, Realizing Rights: Progress of the World's Women 2015-2016". Available at: <http://progress.unwomen.org/en/2015>

16 CEDAW/C/49/D/17/2008. Alyne da Silva Pimentel died of complications resulting from pregnancy after her local health center misdiagnosed her symptoms and delayed providing her with

made in accountability and monitoring states' commitments regarding maternal health under the Millennium Development Goals.<sup>17</sup>

Different tools, frameworks and mechanisms – such as affirmative action and quotas - have been proposed and used towards the achievement of substantive equality, with varying degrees of success and resistance. Gender neutral or gender-blind policies and laws are however increasingly considered inadequate and potentially discriminatory from a human rights perspective. CEDAW's General Recommendation 25 (2009) has laid out a strong framework and normative justification for temporary special measures, building on the aforementioned CESCR General Comment 16.<sup>18</sup>

Outside of the realm of women's rights, other innovative frameworks for substantive equality have also been developed, recognizing the particular needs of specific groups and the obstacles they face. For example, in the case of indigenous peoples, normative advances have focused on the need to protect their land, culture, traditions and resources and respect their right to self-determination.<sup>19</sup> The need to obtain the free, prior and informed consent of indigenous peoples before adopting any law or policy that may affect them was a central tenet of the Declaration on the Rights of Indigenous Peoples, building on ILO Convention 169; such consent being an indispensable prerequisite for their equal and adequate enjoyment of human rights.

The Convention on the Rights of Persons with Disabilities (CRPD) has made a profound contribution to the normative evolution of equality. The CRPD (which entered into force in

---

emergency care. The Committee found that "Brazil's maternal mortality rates are disproportionately high for a country of its economic status, and the chances of dying in pregnancy and childbirth are greatest among indigenous, low-income, and Afro-descendant women such as Alyne." For the CEDAW Committee decision and related documents, see <http://reproductiverights.org/en/case/alyne-da-silva-pimentel-v-brazil-committee-on-the-elimination-of-discrimination-against-women>

17 See CESR and OHCHR, "Who Will be Accountable? Human Rights and the Post-2015 Development Agenda", 2013, p55.

18 CEDAW General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (CEDAW). <http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20%28English%29.pdf>

19 Key recent cases include for example: Inter-American Court of Human Rights, *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 131; and *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 124, 131.

2008) was the first major international human rights convention to be enacted in the post-Vienna era, and thus owes more to the VDPA than any of the preceding treaties. With 151 State Parties at the time of writing, the CRPD reaffirms the indivisibility of different categories of human rights, and includes a strong focus on the participation and inclusion of persons with disabilities in all areas of society and development. Article 33 of the CRPD further requires the establishment of independent mechanisms to monitor implementation of the convention, which (it is explicitly specified) must fully involve persons with disabilities in the monitoring process. Most notably, the CRPD articulates 'respect for difference' as a core principle and enshrines the concept of 'reasonable accommodation' as an integral part of the obligations of equality and non-discrimination. It thus explicitly signals that different treatment and positive measures ("necessary and appropriate modification and adjustments") are integral to realizing rights and addressing systemic discrimination for persons with disabilities, and that denial of this reasonable accommodation can itself be a basis for a claim of discrimination. 'Reasonable accommodation' is thus recognized as a facilitator and building block of substantive equality.<sup>20</sup>

## COMMON CHALLENGES

Despite the significant progress made in terms of normative recognition and conceptualization of the principle of non-discrimination, there are several setbacks and challenges common to this field that hinder the human rights of all groups that suffer inequality and discrimination. The first and most obvious of these is inadequate implementation of relevant international legal standards and court judgments. In many cases, encouraging developments at the normative, legal and policy levels have not yet translated into real change in the lives of most women, indigenous peoples, persons with disabilities, LGBTI persons or other disadvantaged groups.

The Special Rapporteur on the rights and fundamental freedoms of indigenous peoples reports that there is a pronounced human rights "implementation gap", which is most marked

---

20 Lord, J.E., and Brown, R., "The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities", 2010. Available at SSRN: <http://ssrn.com/abstract=1618903>

# A shared world: Indigenous peoples and women 20 years after the Vienna Declaration

*Tarcila Rivera Zea*



**Tarcila Rivera Zea**

Tarcila Rivera Zea is the founder and current president of CHIRAPAQ, the Centre for Indigenous Cultures of Peru. A prominent human rights activist and indigenous Quechua leader, she is also a co-founder of the Continental Network of Indigenous Women of the Americas, ECMIA, and the International Indigenous Women's Forum, FIMI-IIWF. She contributed to the creation of the United Nations Permanent Forum on Indigenous Issues and the drafting of the United Nations Declaration on the Rights of Indigenous Peoples.

**C**reating a world for all people requires that we open a fraternal dialogue, that we share and combine our visions for life and for the spirit. Building a sustainable future means sharing the world in equity, solidarity and equilibrium, and in order to do this we must find a fair balance between life and technology, between culture and economic growth, between utopia and reality.

The holistic vision that indigenous peoples have of our material and spiritual environment, we also apply to our interpretation of human rights. In our world view, the life of human beings is intimately enmeshed with that of other beings and elements with which we cohabit the world, and if we take too much from the Earth, that will affect both it and ourselves. As such, just as we have the rights to life and integrity, so too – in our vision of life, development and sustainability – do the Earth and the other beings that inhabit it.

For indigenous women and peoples, furthering this vision over the past two decades has been beset by many difficulties, and for this reason we have sought dialogue through the appropriation, use and strengthening of international instruments such as the

international human rights treaties and the body of principles that have derived from it.

Nothing exemplifies the interdependence of rights and their utility to redress inequalities more than the situation of indigenous peoples and especially of indigenous women, given that the racism and exclusion on which colonial states were structured has left us in a situation of disadvantage, expressed in poverty stemming from prejudice and the destruction of our ways of life in both the material and spiritual realms.

This situation, with the passing of the years, became a structural problem. It has become part of the imagination and social representation of indigenous peoples, in such a way that poverty comes to be a characteristic and stereotype that identifies us, rather than an expression of an unjust system, especially given that much of the wealth that generates economic income for states is found in indigenous lands and territories.

The impoverishment and stigmatization of indigenous peoples has serious consequences for the realization of our human rights, as our communities are excluded from dominant cultural paradigms, and models of social and economic development. Furthermore, our communal rights

are even considered an obstacle to the advancement of society. Socio-economic and cultural exclusion has a strong impact on our political representation, in the exercise of our rights and in our indigenous citizenship within the structures of states. This fuels discord rather than the promotion of diverse societies which respect indigenous peoples' rights.

Human rights offer indigenous peoples a framework within which we can make visible our diversity, but states are often not ready to diversify the exercise of power, which in turn affects the ability of our peoples to exercise decision-

making power on those matters which affect or concern us. It is contrary to the idea, concept and perspective of human rights of indigenous peoples that many states do not respect quality of life and life itself, and prioritize development and economic growth as indicators of progress, thereby devaluing social justice, diversity, and free self-determination as pillars bolstering our society.

The World Conference on Human Rights recognized the contribution of indigenous people to development, recognized the value and diversity of indigenous peoples' identities and made a commitment to our economic, social and cultural well-being. For this reason, indigenous women and peoples draw on the Vienna Declaration and Program of Action's articulation of social and cultural issues with development and economic matters, and note that this includes the recognition of our communities as dynamic agents within states rather than subjects for assistance from governments and their public policies.

It was with this perspective of participative action that we advocated for the formulation of the United Nations Declaration on the Rights of Indigenous Peoples, as a specific human rights instrument. The process towards the adoption of the Declaration demonstrated both the need and willingness of indigenous peoples for a dialogue with states and their determination in engaging the paradigms, principles and

budgets of states in order to build a horizontal dialogue and relationship and strengthen the conceptual enrichment of these frameworks.

Since the formulation of the Vienna Declaration and Program of Action, the global panorama has seen fundamental changes. The political paradigm based on the democratic model has become hegemonic, with human rights considered a pillar of democracy; a model in which indigenous communities seek to find opportunities for dialogue.

***'Economic, social and cultural rights are essential to the formulation of what we consider a dignified life'***

However, states are not democratic when it comes to power sharing and decision making with indigenous peoples, thanks to the structures and power relations inherited from the colonial era on the base of which current structures are organized. These structures undermine the advance of democracy by weakening social relations and fuelling conflict through the imposition of economic models which attack the principles of life and existence of indigenous peoples. In these contexts, human rights as a whole become a powerful discourse, an instrument and a mindset for overcoming structures of exclusion and poverty.

Problems such as climate change, the growth of religious and political fundamentalism, social and political instability in diverse regions of the world, and the current economic crisis, present us with the dilemma of rethinking almost the only common language or framework to which we can all appeal: that of human rights. In this way, concepts enshrined in human rights such as respect for life, free determination, cultural identity, the eradication of violence and peace-building need to be expanded to prove meaningful to everyone, including indigenous peoples.

Economic, social and cultural rights are essential to the formulation of what we consider a dignified life, flowing from our identities, our visibility and our direct participation in the design of policies that affect us. Indigenous women and peoples do not have a purely academic or juridical concept of human rights, but we live and experience them vitally in our daily lives and in each moment of our existence as we demand a dignified life, with the opportunity to dream and make those dreams a reality; to see our children and our communities healthy and educated in our culture, and to see them benefit from everything that new technologies and all systems of knowledge may offer.

The road to recognition of indigenous rights has been a long hard one. For our elders it was all but impossible; for our children we want it to be easier. For this reason, today we are doing the work that needs to be done.

wherever there are natural resources at issue.<sup>21</sup> For example, in 2001 the Inter-American Court of Human Rights found that Nicaragua had violated the land rights of the Awas-Tingni community in its logging concessions; but the ruling was only the beginning of a new battle as the affected community was obliged to take a series of cases forcing the government to

comply with the ruling.<sup>22</sup> Similarly, Chevron-Texaco's continued refusal to pay the \$9 billion compensation it was ordered to pay in the *Aguinda* case (Ecuador) for the devastation it caused to the community's lands and lives is emblematic of the recalcitrance often faced by affected communities, even in the wake of court victories.<sup>23</sup>

21 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples. A/HRC/4/32

22 Gómez Isa F., (ed.), "El Caso Awas Tingni: derechos humanos entre lo local y lo global," 2013, Deusto.

23 For more on this, see: Business and Human Rights Resource Center,

In some cases, deficits in the implementation of human rights treaties or global political commitments can partly be attributed to flawed international cooperation and glaring gaps in global governance. The question of migration illustrates this particularly starkly. It is a cruel irony that migrants remain among the most disadvantaged and stigmatized groups in our societies, after several decades of vigorous promotion of the free movement of money, goods and markets. Current estimations suggest approximately 215 million people live outside their country of origin, many of them undocumented and as a result disproportionately exposed to human rights abuses, despite the fact that discrimination on the grounds of legal or citizenship status is clearly prohibited under international human rights law, and as such migrants should be afforded all the rights set out in the UDHR and both human rights covenants. The International Convention on the Protection of All Migrant Workers and Members of their Families (ICRMW) was adopted in 1990, just three years before the VPDA - which called for its ratification, among other steps to guarantee the rights of migrants. However, implementation of the ICRMW faces severe resistance from many States: at the time of writing only 47 countries have ratified the ICRMW, most of these being migrant "source countries" with an interest in protecting the rights of their expatriots. Rigid views of national sovereignty and the pursuit of cheap labor both play into reticence on the part of policy-makers.<sup>24</sup>

A marked lack of international cooperation to protect the rights of migrants has also hampered implementation. Where there has been progress in cooperative governance of migration, this has been directed towards the furtherance of economic interests and political goals rather than the human rights of those involved. Lack of global governance combined with unregulated corporate-driven globalization also remains a great threat to the human rights of indigenous peoples. From the much-publicized 'mega-dam' projects in China and India to industrial agriculture in Africa and hydrocarbon extraction in Latin America, indigenous peoples continue to be driven off their land and

robbed of their resources in all corners of the globe. Environmental degradation and climate change at the global level – enabled and worsened by stark failures in global environmental governance and regulation – is also undermining the rights of indigenous peoples and indeed many other communities already vulnerable to poverty and disadvantage.

***'The indivisibility of different categories of human rights is nowhere more evident than in the experience of LGBTI persons, for whom stigmatization and prejudice present barriers to accessing the full gamut of economic, social and cultural rights'***

The reality of prejudice and stigma also poses very profound challenges to efforts towards greater equality. The indivisibility of different categories of human rights is nowhere more evident than in the experience of LGBTI persons, for whom stigmatization and prejudice present barriers to accessing the full gamut of economic, social and cultural rights. In many countries, this stigma has been codified in law through criminalization, which has a particularly pernicious impact on access to healthcare, including access to HIV antiretroviral drugs as has been noted by the former Special Rapporteur on the Right to Health.<sup>25</sup> In many cases, however, stigma and prejudice cannot only be tackled through legal avenues but rather will require sustained social and cultural engagement by advocates and activists.

Unfortunately the political and economic context in many countries is decidedly adverse for this type of social change and attitude shift. Austerity-driven measures are eroding some hard-won gains towards equality and economic empowerment for groups including women, ethnic minorities and migrants, while also fuelling scapegoating and increased hostility – in particular towards immigrant populations.<sup>26</sup> At the international level, we have seen a definite and concerted backlash towards women's rights<sup>27</sup> (in particular sexual and reproductive rights) and the rights of LGBTI

---

*Texaco/Chevron Lawsuits re Ecuador* at: <http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador#cg332>. For CESR's earlier work on the case, see "Rights Violations in the Ecuadorian Amazon: the Human Consequences of Oil Development". <http://cesr.org/downloads/Rights%20Violation%20in%20the%20Ecuadorian%20Amazon%20The%20Human%20Consequences%20of%20Oil%20Development%201.pdf>

24 Global Migration Group, "International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60<sup>th</sup> Anniversary of the Universal Declaration of Human Rights", 2008. [http://www.globalmigrationgroup.org/sites/default/files/uploads/documents/Int\\_Migration\\_Human\\_Rights.pdf](http://www.globalmigrationgroup.org/sites/default/files/uploads/documents/Int_Migration_Human_Rights.pdf)

25 Grover, A., "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to the 14<sup>th</sup> Session of the Human Rights Council", 2010. Available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>

26 These disparate and discriminatory impacts are documented in several CESR publications on the human rights consequences of post-crisis austerity measures. See the Rights in Crisis page of the CESR website: <http://www.cesr.org/section.php?id=139>

27 See the contribution by Charlotte Bunch in this chapter.

people, seeking not only to stall further progress but also to actively backtrack on existing norms and commitments.

The question of how to effectively incorporate, integrate and relate different grounds of discrimination in the work of human rights mechanisms (and in the work of the UN and its agencies) is a matter of ongoing debate and experimentation. The existence of different conventions and treaty bodies dedicated to the rights of different groups somewhat inevitably leads to a silo effect. At the normative level, the Committee on Economic, Social and Cultural Rights has elaborated on the recognition of multiple grounds of discrimination including socio-economic status as prohibited grounds under Article 2 of the ICESCR.<sup>28</sup> There has also been improvement in treaty bodies taking account of the work of their counterparts (see for instance the CEDAW Committee's constructive use of the CESCR's interpretation of the right to health in *Pimentel v Brazil*) and translating the interdependence and interrelation of rights into normative frameworks and findings. For example, the Human Rights Committee has recognized that criminalizing abortion is incompatible with states' obligation to ensure the equal rights of women to the rights in the ICCPR, and indicated that deaths due to unsafe abortion are evidence of discrimination against women.<sup>29</sup> However, communication and integration across the human rights system undoubtedly need to be improved.

Meanwhile, gender 'mainstreaming' in UN initiatives and national laws and policies has struggled to transcend the dominant 'add women and stir' approach. On the whole, intersectional discrimination is a concept that cries out for better understanding and implementation by national, regional and international human rights mechanisms, by policy-makers and even by civil society. The way in which discrimination and inequality in multiple forms tend to overlap with poverty – which in turn can also lead to discrimination on the basis of socio-economic status – is ever more abundantly documented. For example, an extensive study found that disability was more prevalent in poorer quintiles of the population in all the 49 countries examined,<sup>30</sup> while a 2010 World

Bank study found that indigenous people made up 4.5 percent of the global population, but 10 percent of the world's poor.<sup>31</sup> However, the connections and causal links with State policies, actions and omissions need to be better understood and made by human rights bodies.

This in turn presents another challenge, in that often the data available is not sufficiently disaggregated or high-quality to really identify the depth and precise nature of the inequalities that plague our societies. The pervasive (and often politically convenient) lack of adequate data makes it extremely difficult to evaluate trends in the inequality experienced by indigenous persons, persons with disabilities or migrants, for instance, while gender inequality and income inequality are chronically underestimated due to the lack of data on intra-household distribution of resources and the hidden wealth of the richest 1%, respectively. The current push for a 'data revolution' in the context of the post-2015 development agenda is heartening with respect to its emphasis on the need to collect disaggregated data for identifying, monitoring and tackling inequalities.<sup>32</sup>

### ***'Debates around the post-2015 development agenda are a useful lens through which to view the current state of play on inequality and discrimination in the international political arena'***

Indeed, the debates around the post-2015 development agenda are a useful lens through which to view the current state of play on inequality and discrimination in the international political arena, from outside the human rights domain. Although it remains to be seen how the final framework and goals will be formulated, at the time of writing the need to tackle inequality had been placed firmly on the agenda, enshrined as one of the 17 stand-alone goals proposed by the inter-governmental Open Working Group (OWG) and also mainstreamed as a concern under many other goals. This is a huge shift from the Millennium Development Goals, which were widely criticized for being blind to inequalities. The OWG's proposed goal on inequality includes a target which emphasizes the need to work towards both equality of opportunity *and outcome*, including through "eliminating discriminatory laws, policies

<sup>28</sup> CESCR General Comment 20, 2009.

<sup>29</sup> Center for Reproductive Rights, "Safe and Legal Abortion is a Women's Human Right", Briefing Paper, 2011. [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub\\_fac\\_safeab\\_10.11.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_fac_safeab_10.11.pdf)

<sup>30</sup> Hosseinpoor, A.R., (et al), "Socioeconomic Inequality in Disability Among Adults: A Multicountry Study Using the World Health Survey", 2013, *American Journal of Public Health*. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3682610/>

<sup>31</sup> World Bank, "Indigenous Peoples: Still among the poorest of the poor", Policy Brief, 2010. Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINDPEOPLE/0,,contentMDK:22551137~pagePK:210058~piPK:210062~theSitePK:407802,00.html>

<sup>32</sup> See the UN Independent Expert Advisory Group on the Data Revolution, "A World That Counts", 2014.

# Racial equality in the post-2015 era: can we overcome history's legacy?

*Gay McDougall*



**Gay McDougall**

Gay McDougall is a Distinguished Scholar-in-Residence at the Leitner Center for International Law and Justice, Fordham School of Law and Chair of the International Council of Minority Rights Group International. She was UN Independent Expert on Minority Issues from 2005 to 2011.

In 1993, as the Vienna Conference on Human Rights convened, South Africa was in the midst of its transition from an apartheid government to one that was democratically elected. The international community had for decades focused its attention regarding racial equality on the monumental task of decolonization, including ending South Africa's illegal occupation of Namibia (which won independence in 1991) and ending apartheid in South Africa. Nelson Mandela had been released from prison only two years earlier and the liberation movements, having been recently unbanned, were deep into negotiations with the apartheid government over the details of the then-upcoming transfer of power.

In the year following the Vienna Conference the first democratic elections in South Africa were declared by the international community to be free and fair and largely without violence. There was a sense that finally the issue of the most egregious forms of racial discrimination were off the global agenda. This was the end of an era.

The discussions at the Vienna Conference and the language in the Declaration on the topic of racial equality and minority rights were appropriate in condemnation,

but failed to deeply analyze the nature of discrimination as a societal or global phenomenon.

Over the ensuing decade other UN conferences and institutional forums opened space for a greater and more diverse collection of civil society actors to mount pressure for a new international perspective and agenda on racial discrimination.

It was the Third World Conference Against Racism, Racial Discrimination and Xenophobia, held in Durban in 2001, that made the critical difference. There, governments acknowledged that racial discrimination existed in every country, in every region; that the fight against racism is an international priority for all nations. The past abuses of the trans-Atlantic slave trade and the system of colonialism were addressed in what became an historic discourse. Equally important, the Conference developed a picture of what racial discrimination looks like in the 21<sup>st</sup> century.

The World Conference against Racism defined the problem as not solely one of 'bias' in the sense of sociological preference. The problem was articulated clearly as one of social and economic exclusion, placing the emphasis more fundamentally on

economic and social rights. Racial discrimination was placed squarely in the context of globalization and the economic disparities that exist along racial lines both within and between countries. Economic exclusion was seen as a cause, a manifestation and a consequence of entrenched discrimination against certain racial and ethnic minorities in both developed and developing countries.

For many civil society and affected groups, Durban was a hugely empowering experience. New networks were born and new momentum created which was taken back to communities. Connections were made between the situation of African descendants in the diaspora, Roma, Dalits, migrants and indigenous peoples.

The World Conference Against Racism and later reforms of the UN human rights system created

new institutional structures in which civil society actors from racially disadvantaged groups around the world could continue to meet, further refine a collective analysis of racial discrimination in the 21st century and exchange promising practices for tackling its manifestations. Out of these exchanges have come a number of key understandings and necessary approaches.

At the global level, challenges such as the worldwide financial crisis, global food shortages and climate change have exacerbated problems faced by racially targeted communities. Austerity policies and budget cuts hit those at the bottom of the economic strata with greater impact. People in poverty lack reserves to ride out tough times or natural disasters. Also times of economic crisis increase social pressures to blame those who have the least power. These tendencies can lead to violence against disadvantaged communities and can threaten democracies by giving rise to racist policies or racist political parties.

At the national level, discrimination is now more broadly recognized as a key determinant of poverty. Targeted racial groups are disproportionately concentrated in low-wage, low-skilled labor sectors, including in domestic work, agricultural labor and street vending; sectors unprotected by labor laws and social security whether in urban or rural areas. And now we all see more clearly the complex burdens borne by women; burdens of poverty, ethnic prejudice and gender-based restrictions, all overlapping in ways that form profound obstacles.

In addition to the disempowering personal impact that racial prejudice has on its victims, it is critically important to understand

its structural nature. In societies where racial prejudice has been endemic over many eras, it becomes self-perpetuating in the social institutions that determine economic survival and social advancement. Discrimination has a life of its own separate from matters of personal bias, thereby allowing the realities of racism to sink below the level of conscious thought and intent.

***'Discrimination has a life of its own, separate from matters of personal bias, thereby allowing the realities of racism to sink below the level of conscious thought and intent'***

This key understanding about the structural nature of racial inequality must be central to fashioning remedies. Of course, it is essential to have comprehensive anti-discrimination legislation and strong enforcement institutions with procedures that can be initiated by victims and their representatives. Additionally, there needs to be a comprehensive approach that recognizes the importance of tackling legal regimes, policies and practices that have negative disparate impacts on communities disadvantaged by racial discrimination, regardless of intent.

Governments should undertake robust special measures to address disparities in the participation of racial groups in economic life. Aggressive programs should be undertaken, especially in the fields of employment, education and training, political representation, financial services, land tenure and property rights. Labor protections and social security policies should be extended to low wage and informal sector workers such as in the care industries, domestic

workers, agricultural workers, and service workers.

Affirmative action measures should be undertaken within a broader comprehensive equality strategy that should cover a spectrum of legislative reforms, targeted budgetary supports, tools, policies and practices, and should include benchmarks, quotas, targeted recruitment, hiring and promotions. Decisions on policy choices should be made in meaningful consultation with disadvantaged groups, be transparent and be supported by disaggregated data that reveal the existing inequalities.

Now more than ever, the banners in demonstrations for racial justice in countries around the world call for "the right to work," "the right to housing," "an equal right to quality education," and "the right to a living wage." This is the case in both countries with economies that are still developing and in highly-developed economies.

It is encouraging that there is also a growing consensus within global development institutions around the importance of addressing the current extremes in both income inequality and poverty levels. This is a lesson learned from the fact that efforts in some countries to meet the Millennium Development Goals failed to change the realities of groups who are victims of endemic discrimination.

As the international community looks forward to the future, it is a hopeful sign for the racial justice and minority rights movement that one of the core principles for the Post-2015 Sustainable Development Agenda is to "leave no one behind." But it remains to be seen whether we really make change happen in the post-2015 era.

and practices". A separate goal on gender equality is also included and has received wide support. Violence against women and girls, which was entirely left out of the MDG gender equality goal, is solidly on the agenda as are important determinants of women's ESC rights, including unpaid care work, access to land, inheritance rights and public services. However, the inclusion of "access to sexual and reproductive health and reproductive rights" proved controversial enough to almost derail the whole document.

OWG members also committed to adopting fiscal and wage policies to counter economic inequality, improving the income growth of the bottom 40% against the national average and achieving decent work for all. The document shows a strong commitment to the rights of persons marginalized from the development process, especially people with disabilities. However, the grounds of discrimination articulated in the document fall short of the grounds of discrimination prohibited in international law: notably absent are language, political or other opinion, and sexual orientation or gender identity.

A conceptual challenge facing advocates working to bring human rights understandings of equality into development debates is around the discourse of 'equity'. Many development and environmental organizations (including UN agencies such as UNICEF) – and even some feminist organizations – are increasingly choosing to use 'equity' rather than 'equality' in their work and discourse.<sup>33</sup> Many do so feeling that equity goes further and is more progressive than equality, understood restrictively to mean formal, legal equality and treating likes alike – a 'one size fits all' approach which the human rights movement has in fact moved far beyond<sup>34</sup>. The human rights notion of substantive equality still appears very far from being widely known and understood in the

development arena. This shift is worrying, not least because 'equity' is ill-defined and therefore malleable to cooptation. Using equity rather than equality risks overlooking fundamental issues of power, discrimination and rights which are embedded in a human rights understanding of equality.

## CONCLUSION

The principles of equality and non-discrimination are the cornerstone of human rights; their recognition has been the primary battlefield of social movements since Vienna. Human rights advocates have worked hard to develop a fulsome understanding of equality that has clearer definition and legal weight, along with a comprehensive body of standards to combat discrimination which most governments have pledged to abide by. It is imperative to ensure that these are used and understood more widely beyond the international human rights law community and to realize their transformative potential. At a time of growing popular outrage about inequality and its link to other systemic disparities, human rights advocates have crucially important insights and experience to offer and unmissable opportunities to seize.

---

33 UNICEF published a document called "Promoting Gender Equality: An Equity-Focused Approach to Programming" (2011), which states that "UNICEF's long-standing commitment to and obligations regarding the full realization of girls' rights – and, more broadly, gender equality – thus find expression in the organization's renewed focus on equity." See also Dairiam, S., "Equity or Equality for Women?", Center for Women's Global Leadership blog <https://cwgl.wordpress.com/2014/07/01/equity-or-equality-for-women/>

34 For example, UNICEF's 2010 paper "Re-Focusing on Equity: questions and answers", argues: "It is important to emphasize that equity is distinct from equality. Equality requires everyone to have the same resources. Equity requires everyone to have the opportunity to access the same resources. The aim of equity-focused policies is not to eliminate all differences so that everyone has the same level of income, health, and education. Rather, the goal is to eliminate the unfair and avoidable circumstances that deprive children of their rights."

20



Towards  
implementation:  
monitoring and  
enforcement

# Towards implementation: monitoring and enforcement

ALLISON CORKERY AND GABY ORÉ AGUILAR

## INTRODUCTION

A key contribution of the Vienna Declaration and Programme of Action (VDPA) was its recognition of the need to strengthen the monitoring and enforcement of economic, social and cultural rights. The VDPA called on States to make a "...concerted effort to ensure recognition of economic, social and cultural rights at the national, regional and international levels",<sup>1</sup> including by incorporating international standards in domestic legislation and strengthening "national structures, institutions and organs of society which play a role in promoting and safeguarding human rights".<sup>2</sup> It also called for the strengthening of existing structures at the international level and requested that the then Commission on Human Rights and the Committee on Economic, Social and Cultural Rights "continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights".<sup>3</sup>

Much has been done to meet these calls. As Langford observes, "a gradual and reflexive diffusion of the idea that economic social and cultural rights (ESC rights) are, and should be, legally enforceable" has accelerated over the past two decades.<sup>4</sup> At the national level, there has

1 The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 25 June 1993, at p.98.

2 Ibidem at p.83.

3 Ibidem at p.75.

4 Langford, M., "Judicial Review in National Courts: Recognition and Responsiveness," in Riedel, E., Giacca, G. & Golay, C. (eds.),



Allison Corkery

Allison Corkery is Director of the Rights Claiming and Accountability Program at CESR. Prior to joining the Center, she worked with the Australian Human Rights Commission in Sydney and the National Institutions Unit of the Office of the High Commissioner for Human Rights in Geneva. She was the recipient of the 2010-2011 David W. Leebron Human Rights Fellowship from Columbia Law School.



Gaby Oré Aguilar

Gaby Oré Aguilar is Deputy Executive Director at CESR. Before joining CESR she was a grantmaker with the Ford Foundation in Santiago, Chile. She is also a Board member of the UN Voluntary Fund for Victims of Torture. She previously led the Latin America program at the Center for Reproductive Rights and worked as an attorney at the Instituto de Defensa Legal, Peru.

been an explosion of constitutional and legislative guarantees of ESC rights. Courts fit within a broader web of accountability, which, at the same time, is increasingly encompassing a range of other quasi-judicial, administrative, political and civil society bodies mandated to monitor ESC rights.<sup>5</sup> For example, the number of National

*Economic, Social, and Cultural Rights: Contemporary Issues and Challenges*, Oxford University Press, 2014, at p.417.

5 OHCHR and CESR, "Who Will be Accountable? Human Rights and

# The road we've travelled, the road ahead

*Philip Alston*



**Philip Alston**

Philip Alston is the UN Special Rapporteur on Extreme Poverty and Human Rights and previously served as the chair of the UN Committee on Economic, Social and Cultural Rights (1991-1998). He is Professor of Law at New York University Law School. He has published extensively on economic, social and cultural rights. He is an honorary board member and founding chair of the Center for Economic and Social Rights.

**T**he past twenty years have seen an extraordinary surge in the attention given to the implementation of economic, social and cultural rights (ESCR). But it would be a mistake to assume that this has led to the creation of effective mechanisms for promoting, monitoring, and enhancing compliance with these rights. In truth, the flurry of activity and the significantly expanded array of actors involved has resulted in much less progress, in terms of tangible outcomes, than might have been hoped for.

But before reflecting on what should be done next, we should certainly acknowledge the great progress that has been achieved. In the lead-up to the Vienna Conference, *The Economist* magazine dismissed economic and social rights (ESR) as mere goals and urged the West to ignore them in the upcoming negotiations. And the outgoing head of Human Rights Watch celebrated the fact that “none of the leading international non-governmental groups concerned with human rights has become an advocate” of ESR. In addressing the conference on behalf of the UN Committee on ESCR, I observed that “despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials”

of ESCR. In response, the Vienna Conference gave modest but important support to ESCR and the following 20 years witnessed major breakthroughs in institutional terms.

In 1993 constitutional recognition of ESR was very limited. South Africa broke the mold most dramatically, but the momentum has not been lost, as illustrated most recently by the very progressive Kenyan Constitution of 2010. Even more problematically, the notion that ESCR were justiciable to any meaningful extent was heavily contested. At the national level there were only a handful of significant cases, and internationally there was strong resistance to justiciability. Today, the highest courts in many national jurisdictions have generated important jurisprudence on ESR and at the international level there is now an Optional Protocol to the Covenant.

Today, in pointed contrast to 1993, the major human rights NGOs have significant programs addressing ESCR, although a great deal more could be done. And CESR, a specialist NGO that aimed to fill at least part of the huge vacuum that existed, was set up and has flourished. At the time of Vienna, there were nine UN special rapporteurs or working groups addressing various aspects of civil and political rights, but not one concerned with ESCR. Today,

there are special rapporteurs focusing on many of the rights contained in the Covenant.

In terms of political support within international institutions it is time for the United States to abandon its longstanding policy of obstructionism in relation to ESCR. A much-publicized 2011 announcement that this would happen has amounted to very little in practice. American diplomacy in 2013 was only barely more constructive on this front than it was 20 years ago, even under a President who has embraced the importance of the right to health.

Domestic courts in a great many countries are today both enabled and sometimes willing to adjudicate issues relating to ESCR, but the much trumpeted progress towards justiciability remains

somewhat illusory. Too many courts continue to avoid ESCR as a matter of principle, and many of those who do address them fail to do so in a systematic, doctrinally defensible, or sustainable fashion. And there is much to be said in support of the proposition that the South African Constitutional Court, once the leading light in this area, now avoids much of the real substance of ESCR in favor of formalist proceduralism.

In terms of international monitoring of these rights, the Committee on Economic, Social and Cultural Rights has played an important role over the years, although there is space for it to do better. It is not clear that its concluding observations are always sufficiently compelling as to have real impact where it counts, which is at the national level. And its General Comments now tend to resemble standard UN-style declarations, containing a reward for every interest group that participated in the drafting process but attaching little importance to the desirability of actually interpreting the Covenant as opposed to making sweeping pronouncements across entire issue areas. Furthermore, the various other

UN treaty bodies, many of which have expansive ESCR mandates, have not contributed as much as might have been hoped in this area. Similarly, while the Human Rights Council's Universal Periodic Review process is gradually making significant inroads in holding states to account, the ESCR component of its recommendations remain relatively underdeveloped.

***'Too many courts continue to avoid ESCR as a matter of principle, and many of those who do address them fail to do so in a systematic, doctrinally defensible, or sustainable fashion'***

International complaints procedures are gradually becoming more effective in this area, but this progress has been tortuously slow. The European Committee on Social Rights has shown that significant progress is possible, while the Inter-American system has achieved rather mixed results in its limited efforts to implement its ESCR mandate. The European Court of Human Rights, despite a few important forays, has also failed to live up to the hopes

that occasional judgments have stimulated. Looking to the future, the UN Committee on Economic, Social and Cultural Rights must demonstrate that it can develop a principled, consistent, and respected approach in response to complaints submitted under the new Optional Protocol.

What then should the principal focus be going forward? Various challenges have already been identified, but the most important is to develop more effective national-level mechanisms. Human rights institutions at the national level, and not only those formally designated as national institutions, continue to focus overwhelmingly on civil and political rights. While more specialized arrangements dealing with groups such as women, children, and indigenous peoples have done important work in the economic and social spheres, these efforts often fail to have the appropriate implications for the broader ESCR agenda. Without strong national institutions, especially civil society groups focused specifically on these rights, international mechanisms are condemned to remain marginal.

Human Rights Institutions (NHRIs) around the world has grown exponentially since the Vienna World Conference—from fewer than ten to more than 100 internationally accredited institutions.<sup>6</sup>

Regionally, the ESC rights jurisprudence of the African, Inter-American and European human rights systems has also matured. Periodic state reports to these various bodies have been important, as well. In Europe, in particular,

it has provided a channel for more detailed interpretation of the somewhat broad and imprecise provisions of the European Social Charter. The Inter-American System of Human Rights has become “a privileged arena of civil society activism which produced innovative strategies to make use of the international repercussion of the cases and situations denounced at the national level”.<sup>7</sup>

At the international level, general comments and concluding observations on state reports by

---

the Post-2015 Development Agenda”, 2013.

6 Corkery, A. & Wilson, D., “Building Bridges: National Human Rights Institutions and Economic, Social, and Cultural Rights” in E. Riedel, G. Giacca & C. Golay (eds.), *Economic, Social, and Cultural Rights: Contemporary Issues and Challenges*, Oxford University Press, 2014, at p.474.

7 Abramovich, V., “From massive violations to structural patterns: New approaches and classic tensions in the Inter-American Human Rights System”, *Sur Journal*, vol. 6, issue 11, December 2009.

the UN Committee on Economic, Social and Cultural Rights (the Committee) have provided authoritative guidance on interpreting the Covenant's provisions. The Human Rights Council mechanisms also play an important role in overseeing the Covenant, in particular, through the establishment of special procedures mandates related to ESC rights issues. Currently eight out of 36 special procedures focus specifically on ESC rights. Others have addressed the ESC rights dimensions of their mandates as well. Special Procedures shed analytical light on patterns of human rights deprivations within their mandate, and contribute to the development of international law in the field; their reports are invoked by treaty bodies, national human rights mechanisms, the media, governments and civil society.

To date, the Universal Periodic Review (UPR), the Council's peer review mechanism, has shown a strong bias in favor of civil and political rights. Nevertheless, it also has an important role to play in monitoring ESC rights. Because it covers all rights contained in the Universal Declaration on Human Rights, it is able to evaluate the ESC rights records of all countries, regardless of whether they have ratified the Covenant.

Notably, developments at the national, regional and international levels have been highly complementary, with a great degree of cross-pollination of norms between bodies. For example, jurisprudence from the African Commission has had an impact on sub-regional bodies like the Economic Community of West African States (ECOWAS) Community Court of Justice. Its impact at the domestic level can also be seen in the 2010 Kenyan Constitution and national legislation in Nigeria that makes the Covenant enforceable.

## NORMATIVE DEVELOPMENT

Prior to Vienna, the long-standing perception that ESC rights were qualitatively different from civil and political rights was reflected in their limited normative elaboration through courts and international human rights bodies in comparison to civil and political rights. Unlike Article 2(3) of the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights does not recognize an explicit right to a remedy. For this reason, although it was generally accepted that states should be monitoring their progress under the Covenant as part of their reporting obligations, the judicial and quasi-judicial enforceability of these rights was far less recognized—as reflected in the jurisdictions of courts and mandates of NHRIs at the time.

Nevertheless, the Committee's bold statement that there were specific provisions in the Covenant that "would seem to be capable of immediate application by judicial and other organs in many national legal systems" in its General Comment No. 3 spurred greater attention to defining the legal character of these rights.<sup>8</sup> The jurisprudence that has evolved over the past two decades demonstrates that the concepts and obligations underpinning ESC rights can be defined with sufficient precision to form legally binding and enforceable standards.

## STRENGTHENING INDIVISIBILITY THROUGH INCREASING RECOGNITION OF JUSTICIABILITY

Although many countries—in all regions and across common and civil law systems—provide some degree of recognition of ESC rights in their constitutions or through legislation, ESC rights have often been relegated to non-enforceable directive principles. Regionally, the San Salvador Protocol only makes two rights directly justiciable in the Inter-American system: the right to unionize and the right to education.<sup>9</sup> The European Committee on Social Rights, which monitors compliance with the European Social Charter, lacks the judicial powers of the European Court of Human Rights, which adjudicates on the primarily civil and political rights provisions of the European Convention on Human Rights. Likewise, the Committee did not originally allow for individual complaints, as the Human Rights Committee did. Nevertheless, the trajectory of ESC rights litigation has emerged in three principle ways.

First, numerous bodies have expanded their jurisdiction to encompass ESC rights through broad interpretations of civil and political rights. For example, the Inter-American Court of Human Rights has read 'Chapter II' rights, including the rights to life and to legal personality, broadly or as procedural devices to protect ESC rights.<sup>10</sup> This trend is also evident in the work of the Human Rights Committee,<sup>11</sup> the European Court of Human

8 CESCR, General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1), January 1991, Contained in UN Doc. E/1991/23, at p. 5.

9 See, Melish, T.J., "The Inter-American Court of Human Rights: Beyond Progressivity," in Langford, M., *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge University Press, 2008.

10 *Ibid.*, at p.375.

11 See, Scheinin, M., "Human Rights Committee: not only a committee on civil and political rights", in Langford, M. (ed.), *Social Rights*

Rights<sup>12</sup> and the UN Committee on the Elimination of Racial Discrimination<sup>13</sup> that have ruled on issues concerning ESC rights by reading civil and political rights expansively. Several national courts have followed suit. There has been a proliferation of ESC rights jurisprudence in Canada, for example.<sup>14</sup> In India, the content of ESC rights is primarily contained in the non-enforceable Directive Principles of State Policy in Part IV of the Constitution, but is also being expanded through interpretation of the right to life.<sup>15</sup>

Second, prohibitions on discrimination, which exist in most jurisdictions, have proved to be another important strategy for the enforcement of ESC rights. Importantly, the recognition of positive obligations to eliminate discrimination has given substance to ESC rights claims brought by disadvantaged groups. This is evident in the work of the Committee on the Elimination of Discrimination against Women,<sup>16</sup> as well as the United States Supreme Court.<sup>17</sup> The

mandates of many NHRIs have an explicit anti-discrimination dimension. In Europe, national equality bodies have been established in over 30 countries on the basis of EU equal treatment directives, to provide independent assistance to victims of discrimination, conduct independent surveys, and publish independent reports and make recommendations on any issue relating to discrimination. The protection against discrimination in the Inter-American System has evolved into 'a notion of substantive equality' through jurisprudence that seeks to offer special protection to groups that have endured structural or historical discrimination.<sup>18</sup>

Third, there has been a visible trend towards explicit recognition that ESC rights can be subjected to formal judicial review. Of 146 countries sampled in the Toronto Initiative on Economic and Social Rights (TIESR) dataset in 2013, 100 (69%) have at least one judicially enforceable ESC right, for example, while all 16 rights are enforceable in 55 (38%).<sup>19</sup> Regionally, the African Charter on Human and People's Rights was the first regional treaty to give ESC rights the same weight as civil and political rights, with no differentiation between them in regards to enforcement. While internationally, the entry into force of the Covenant's optional protocol in May 2013, after a lengthy drafting process, marks a significant milestone (see think piece by Bruce Porter later in this chapter).

The jurisprudence of judicial and quasi-judicial bodies has been crucial in clarifying the contours of ESC rights. Though there is variation in the way that different bodies have approached different rights, their pronouncements have contributed to a greater articulation of the substance of various ESC rights. For example, the Committee has asserted that each right carries bundles of claims relating to the availability, accessibility, acceptability, adaptability and quality of services necessary for the realization of the particular right.<sup>20</sup>

---

*Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge University Press, 2008.

12 For an example of a case involving active state violation of socio-economic rights, see *Buckley v. UK*, no. 20348/9223 (judgment date Sept. 25, 1996). For a case concerning violations caused by inaction, see *A v. UK*, no. 35373/97 (judgment date Sept. 23, 1998) (which held that state parties have an obligation to prohibit the abuse of children, by legislation). The Court assumes jurisdiction over the latter set of cases through a combined reading of Arts. 1, 3 and 8 of the European Convention on Human Rights. The Court has created 'remedial obligations' where socio-economic rights violations can be attributed to states, specifically in the area of housing, healthcare, education and social security. See: *Belgian Linguistics Case No. 2* (1968), 1 EHRR 252 (which held that despite its negative formulation, the right to education in Article 2 of Protocol No. 1 encompasses a right to the education facilities that already exist).

13 See, e.g., *A. Yilmaz Dogman v. Netherlands*, Communication No. 1/1984 (1988), UN Doc. CERD/C/36/D/1/1984.

14 See, *Slaight Communications v. Davidson* [1989] 1 SCR 1038 (which held that the Canadian Charter should be interpreted to ensure compliance with the Covenant on Economic, Social and Cultural Rights).

15 *MC Mehta v. Union of India* (1998) 6 SCC 63. This is also the broad approach of Brazil, Bangladesh, Nepal, Pakistan and Sri Lanka. Recently, the right to education in India was moved from being a Directive Principle to a fundamental right, indicating that some socio-economic right are being made judicially enforceable. Byrne, I. and Hossain, S., "Economic and Social Rights case law of Bangladesh, Nepal, Pakistan and Sri Lanka", in Langford, M. (above fn 9).

16 Farha, L., "Women Claiming Economic, Social and Cultural Rights—The CEDAW Potential", in Langford, M. (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge University Press, 2008.

17 Cathy Albisa and Jessica Schultz argue that the right to education decisions of the United States Supreme Court are predicated on the Equal Protection Clause. Albisa, C. & Schultz, J., "The United States: A Rugged Patchwork" in Langford, M. *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge University Press, 2008.

18 Abramovich, op cit fn 7.

19 Langford, op cit fn 4, at p.422.

20 See, e.g. CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11), May 12, 1991, UN Doc. E/C.12/1999/5; CESCR, General Comment No. 13: The Right to Education (Art. 13), December 8, 1999, UN Doc. E/C.12/1999/10; CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), August 11, 2000, UN Doc. E/C.12/2000/4.



### CESR in action: Addressing the challenges of monitoring and claiming ESC rights

CESR works to build the skills and capacity of the human rights movement to address the particular methodological challenges involved in documenting economic and social rights violations and making the case in a compelling way, whether publicly, before the courts or to non-judicial accountability bodies. It has developed a comprehensive analytical framework – ‘OPERA’ – to assess how states are complying with their obligation to fulfill ESC rights. The OPERA Framework has been used by human rights groups around the world, from grassroots organizations to national human rights institutions (NHRIs). Thanks to their unique bridging role between the government, civil society and the international human rights system, NHRIs can play a powerful role in advancing economic, social and cultural rights. CESR is now collaborating with the Asia Pacific Forum of NHRIs to build the capacity of its member organizations to produce strong and methodologically sound reports on governments’ efforts to fulfill their economic and social rights obligations. In the picture above, a participant from SUHAKAM, the Malaysian National Human Rights Commission, participates in a workshop on the ‘OPERA’ Framework.

It has also led to the recognition of implied rights. The Committee has recognized the right to water and sanitation as a component of the right to an adequate standard of living, for example. Despite its strong pronouncement on indivisibility, the articulation of ESC rights in the African Charter is fairly minimalist, in terms of the number of rights enumerated (only six) and in terms of articulating entitlements. Nevertheless, the jurisprudence of the African Commission shifted post-2001; in particular, it began to draw more on international human rights law. One effect of this was the emergence of decisions that began to recognize implied rights in the Charter. For example, in *SERAC & CESR v Nigeria* (2001), a foundational ruling on ESCR which CESR helped to bring about, the Commission elaborated on the right to health and the right to a clean environment, as well recognizing implied protection for housing and food.<sup>21</sup>

Perhaps most contentiously, the Committee has asserted that, while some provisions of the Covenant are subject to progressive realization depending on available resources, states must “ensure the satisfaction of, at the very least, minimum essential levels of each of the rights” regardless of their level of economic development.<sup>22</sup> Failure by a state to meet these minimum levels would lead to a *prima facie* presumption that it has violated the Covenant—a presumption that can only be discharged if the state can demonstrate that “every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations”. Finding consensus on the content of the minimum core concept and its application to specific states has proved difficult.<sup>23</sup> Courts in some countries, such as South Africa, have rejected the concept, though others,

<sup>22</sup> CESCR, op cit fn 8, at p. 10.

<sup>23</sup> Young, K., “The Minimum Core of Economic and Social Rights: A Concept in Search of Content”, *Yale Journal of International Law*, vol. 33, 2008.

<sup>21</sup> *SERAC & CESR v. Nigeria*, no.155/96 (judgment date May 27, 2002).

# Keeping our promises: lessons from South Africa

Pregs Govender



Pregs Govender

Pregs Govender is Deputy Chair of the South African Human Rights Commission. After South Africa's first democratic elections in 1994, she served as an African National Congress MP in the National Assembly. As Chair of the Parliament's Committee on Women, she ensured that most of its priorities aimed at advancing women's rights and gender equality were enacted. She resigned in 2002, after holding public hearings on HIV/AIDS in 2001 and being the only MP to register opposition to the arms deal in the Defence Budget vote. She is the author of *Love and Courage, A Story of Insubordination*.

**T**he Universal Declaration of Human Rights recognizes that "the foundation of freedom, justice and peace in the world" is the "recognition of the inherent dignity and the equal and inalienable rights of all members of the human family". Woven from the devastation of World War 2, the Declaration proclaimed "a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want". It inspired the possibility of creating a world at peace, free from hate, greed and fear of war. It encompassed the universality, indivisibility and interdependence of all human rights.

Twenty years ago, the hard work of human rights activists and the movements they were part of resulted in the Vienna Declaration. Since then, there have been significant advances. In South Africa, a Constitution was adopted by our new democracy that committed to civil and political rights as well as socio-economic rights. The key institution established to advance these rights, the Constitutional Court, made groundbreaking judgements on socio-economic rights, such as in the case of Irene Grootboom. Globally, progressive law reform, human rights treaties, resolutions, court cases and human rights campaigns and programs have

affirmed socio-economic rights such as water, sanitation, health, education and food security as human rights.

Why then are we so far from a world in which human beings enjoy their economic and social rights? One of the key reasons is the fact that international law and agreements governing finance and economic policy and practise remain largely uninfluenced by human rights principles. The General Agreement on Trade in Services, as well as many bilateral trade agreements and commodity markets, begin with the premise that these are not rights but commodities, to be bought and sold. The result is that the majority of the earth's citizens experience the worst impacts of unemployment, precarious employment, poverty, inequality, climate change and militarization. Economic, military and religious fundamentalism feed off each other. Institutionalised violence results in death from preventable disease and diminished personal safety and social security.

Recently, at the 2014 World Economic Forum, the main owners of global wealth agreed that inequality is the most urgent challenge of our times. Yet, their companies are the main driver of that inequality. Economic growth measures their profit, whether

from war or pollution. Significant contributions to human life, including women's contribution to subsistence farming and peacebuilding are not valued in the gross domestic product (GDP) used to measure economic growth. In South Africa, the spatial apartheid landscape remains deeply entrenched. Those who do not enjoy their rights are mainly poor, black and female. They remain trapped in South Africa's former Apartheid homelands, townships and informal settlements. They are expected to be patient as they watch their children die (as happened this year to a six-year-old child who fell into a pit latrine toilet at his school). South Africa's

national election year began with a community protest about the lack of water in Madibeng Municipality, at which police responded by shooting, killing four people.

Madibeng, a municipality in South Africa's North West Province, means "place of water" in the Bantu language Setswana. There are four dams here – more than enough water for everyone. The world's third largest chrome producer and the richest Platinum Group Metals reserve are also in Madibeng. The wealthy owners of the mines, tourist companies, agribusiness and other large industries that have unlimited access to these dams, do not experience water shortages or water cuts. Yet communities who are black and poor, living next to the dams go without water for days, weeks and months. The Commission investigated and made its finding against this municipality. There are numerous challenges, from a lack of political will, to meaningful community engagement, a militarised police leadership, and corruption of those in government by businesses tendering for lucrative government contracts.

The Commission's work on water and sanitation has been systematically conducted across the country, through public hearings in the poorest parts of each province that linked individual complaints to a demand for systemic responses from government. The Presidency, in its report to the Commission, outlined the status of these rights, the causes of the problems and the plans to address them. In Madibeng, the Commission's findings connected the need for immediate remedies to long-term sustainable solutions. There are key structural challenges such as the terrible inequality in access to and

payment for water. In Madibeng, as in most parts of the world, wealthy industry pays less per kilolitre of water than households do. They are seldom held to account for significant wastage; for cleaning up their pollution of groundwater with dangerous chemicals or the water-theft that some commit.

This is not about one right: many people who are poor are denied many human rights. In poor communities there are endless queues for water. Children miss school because they have to carry containers that weigh more than they do. Illness and death from preventable water-borne disease is not uncommon. Women and girls' safety is compromised by high levels of gender-based violence as they walk in search of clean water. Their time is consumed with managing the effects of the lack of water and sanitation on their role in social reproduction, and they pay with their health and lives.

***'Those who own wealth own power that informs and shapes the priorities of those entrusted with the mandate to protect human rights'***

In nearby Marikana in 2012, police shot and killed 34 mineworkers who had been striking against Lonmin, a British mining company. Many saw this as a powerful indictment of what the world valued and in whose interests South African police acted. Pre-1994, the priorities of the Apartheid state were shaped by capitalist interests that entrenched white privilege. Despite the Democratic Constitution's promise of the 'inherent dignity' of every human being, Madibeng reiterated the old standard that the lives of those who are black and poor are dispensable.

During South Africa's Truth and Reconciliation Commission, the question of business collusion with apartheid was raised. A minimal tax was proposed as compensation for accumulating enormous profit through the institutionalised violence of the migrant labour system. Business opposed this proposal and it died quietly. Those who own wealth own power that informs and shapes the priorities of those entrusted with the mandate to protect human rights. This influence often occurs in spaces free from the scrutiny and activism of institutions dedicated to human rights. A key weapon is the threat of withdrawing investment and the economic growth and employment that it promises to yield. South Africa's post-1994 arms-deal and the FIFA World Cup secured huge profits for the global corporations involved, but there was little employment creation or other benefits for the country, beyond securing submarines and stadiums that stand as costly white elephants.

Historically, most governments do not protect human rights against violations incurred in the search for profit. Such violations include speculation on food; the derogation of land, water and air that drives climate change; 'intellectual property' manipulation that keeps critical medicines out of reach for those who most need it; and terrible wages and working conditions of millions of workers, including many women and children, leaving them vulnerable to gender-based violence. These facts notwithstanding, there are important instances when governments have upheld human rights against such violations. Recently, South Africa's Health Minister, who is widely respected for his dedication and commitment, exposed the global pharmaceutical

industry's campaign against South Africa's attempt to change its intellectual property regime to ensure affordable medicine. The South African Competition Commission's cases against bread price-fixing and the construction industry are other instances where state institutions have successfully challenged the status quo.

The local, regional and international monitoring and enforcement institutions, laws and mechanisms, outlined in this chapter and publication are powerful. They can facilitate the movements and solidarity that can shift the balance of power. It is possible to transform an unjust, militarised and unequal world order. Best practice in one locality, country or region can help

address global structural problems in a coordinated fashion. We can honour the Universal Declaration of Human Rights' affirmation that "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized". Another world is possible.

such as Germany and Switzerland, have used it to translate constitutional principles of human dignity into positive state obligations.<sup>24</sup> Despite its imprecision, the appeal of the concept lies in its insistence that states must give first priority to fulfilling a basic minimum of rights enjoyment, universally, for all those within its jurisdiction; this creates a higher standard of proof for states to demonstrate they are using maximum available resources to achieve these outcomes.

In relation to states' obligations, the Committee has articulated a tripartite taxonomy, namely to "respect, protect, and fulfill" ESC rights. This has helped erode the perception that civil and political rights tend to primarily involve the negative obligation to respect while ESC rights primarily involve positive obligations. It has also provided a conceptual template, which adjudication bodies have used to analyze the variety of claims that might be made in respect of human rights. Importantly, adjudication bodies in various jurisdictions are increasingly carving out a role for themselves in questions concerning the fulfillment of ESC rights.

As a result of the willingness to treat the obligation to fulfil as a reviewable standard, the scope of progressive realization has been articulated in more detail by regional mechanisms to grant more substantial protection to ESC rights. The Inter-American Court has fleshed out progressive realization by urging that mere legislation is insufficient and that the law must have true domestic legal effect. In the landmark decision of *Velasquez-Rodriguez v Honduras* it

was held that public power in general must be organized to ensure the full enjoyment of human rights.<sup>25</sup> Recent jurisprudence of the Inter-American Court has clarified that 'progressive realization' must be understood vis-à-vis the population as a whole, not in respect of only the complainant.<sup>26</sup> Therefore, in determining progressive realization, courts must take cognizance of the standard of living of a wide range of individuals. The African Charter contains no progressive realization clauses. Although it has been argued that this implies that state parties are under obligation to immediately realize rights,<sup>27</sup> the African Court has adopted the 'reasonable measures' test whereby states can be held liable in the absence of taking reasonable measures to implement ESC rights.<sup>28</sup> This represents a higher standard than the mere existence of legislation.

The willingness of judicial bodies to grapple with the fulfillment of ESC rights has prompted debate about the appropriate parameters of the judiciary's role. In interpreting these concepts, judicial and quasi-judicial bodies have developed various tests to judge legislative or administrative action, commonly framed as 'reasonableness', 'adequacy' or 'proportionality'. Adjudication bodies in various jurisdictions have

<sup>24</sup> Ibidem.

<sup>25</sup> *Velasquez-Rodriguez v Honduras*, (judgment date Jul. 29, 1988) Inter-Am. Ct. H.R. (Ser. C) No. 4, at p.162, p.164.

<sup>26</sup> *Five Pensioners v. Peru* (judgment date Feb. 28, 2003) Inter-Am. Ct. H.R. (Ser. C.) No. 98 (2003).

<sup>27</sup> Odinkalu, C.A., "Implementing Economic, Social and Cultural Rights under the African Charter on Human and People's Rights" in Murray and Evans (eds.), *The African Charter On Human And People's Rights The System In Practice 1986-2000*, Cambridge University Press (2002).

<sup>28</sup> *SERAC & CESR v. Nigeria*, no.155/96, judgment date May 27, 2002, at p.52.

varied considerably in the degree of deference they give to governments in their observance of international obligations. The European system, broadly, has offered a wide margin of appreciation to states in cases of ESC rights violations.<sup>29</sup> In *Kokkinakis v. Greece*, for example, the Court conceptualized its task as being “to determine whether the measures taken at national level were justified in principle and proportionate”.<sup>30</sup> This wide margin of appreciation has been adopted in cases involving property rights and social security benefits.<sup>31</sup>

## MILESTONES AND IMPACT

As the following examples show, we are in a completely unrecognizable position compared to 1993 with regard to the constitutionalization, legalization, and justiciability of ESC rights.

In India, for example, the right to food movement began with public interest litigation in *PUCL v. Union of India and Others*.<sup>32</sup> The Indian Supreme Court has not yet delivered a final order, but has been passing ‘interim orders’ every year and has appointed commissioners to monitor the right to food at regular intervals. So far, over 70 orders have been passed by the Supreme Court in this manner.<sup>33</sup> This constitutional innovation has been termed ‘continuing mandamus’. The order strengthened the bargaining power of civil society groups campaigning for the right to

food. It is estimated that an additional 350,000 girls per year are enrolling in school due to the increased availability of school meals following the litigation.<sup>34</sup>

***‘We are in a completely unrecognizable position compared to 1993 with regard to the constitutionalization, legalization, and justiciability of ESC rights’***

The question of food security in India has recently moved from the judicial to the legislative realm, with the passage of the *Food Security Act, 2013*. This legislation aims to provide access to basic food grain to individuals below the poverty line and grain at subsidized costs to other poor families who may not meet this standard. There has been much controversy about the law’s exorbitant costs, its coverage and its true motivations. However, the legislation and the ongoing litigation are crucial first steps towards food security in India.

In South Africa, the Treatment Action Campaign (TAC) challenged the government’s policy of only trialing the anti-retroviral drug Nevirapine to certain mothers. TAC, an NGO whose aim is to protect the rights of those affected by HIV/AIDS filed a constitutional claim that the right to healthcare had been violated. Ruling in favour of TAC, the South African Constitutional Court held that the restrictions on the use of Nevirapine were unreasonable. Notably, the court rejected the notion that there is a minimum core obligation that is enforceable as against a penumbra that is subject only to progressive realization. Even the minimum core, consequently, is subject to a test of reasonableness. “It is impossible to give everyone access to even a core service immediately”, the court states, based on the notion of separation of powers that “the state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The courts will guarantee that the

29 Spielmann, D., “Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?”, CELS Working Paper Series, February 2012, at p.16. Available at [http://www.cels.law.cam.ac.uk/cels\\_lunchtime\\_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf](http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf).

30 *Kokkinakis v. Greece*, no. 14307/88 (judgment date May 25, 1993), at p.47. *Kokkinakis* was considered in the case of *Manoussakis v. Greece*, no.18748/91 (judgment date Sept. 26, 1996) at p44. The Court confirmed its dilution of the doctrine of margin of appreciation by stating that: “In delimiting the extent of the margin of appreciation in the present case the Court must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society” (case concerned the rejection of an application by Mr. Manousakkis to convert a property to a place of worship for Jehovah’s witnesses and their subsequent arrest for unauthorized operation of a place of worship).

31 See, e.g., *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, ECHR 2005-VI.

32 WP(C) 196/2001.

33 The orders passed are available at: [http://courtnic.nic.in/supremecourt/casestatus\\_new/caseno\\_new\\_alt.asp](http://courtnic.nic.in/supremecourt/casestatus_new/caseno_new_alt.asp)

34 Amnesty International, “Why Laws must be More than Paper”. Available at: <http://amnesty.org/en/campaigns/demand-dignity/issues/making-rights-law/cases>



### CESR in action: Using international mechanisms to promote accountability - Egypt

Four years after the Arab Spring uprisings, living conditions for vast swathes of the Egyptian population have deteriorated as a succession of governments have implemented budget cuts, privatization and other austerity measures rather than answering protesters' calls for social justice. Drawing on extensive experience of strategic advocacy before UN human rights bodies, CESR has supported Egyptian civil society organizations in their efforts to hold their government accountable through the Universal Periodic Review and treaty monitoring processes. From Angola to the United States of America, CESR has worked with human rights defenders and organizations in dozens of countries to make effective use of international and regional human rights mechanisms to bring about greater accountability for economic and social rights domestically. Photo courtesy of Gigi Ibrahim.

democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1".<sup>35</sup>

TAC is significant for its analysis of the degree to which positive rights are enforceable. The case has been cited across jurisdictions by nations as well as supranational bodies. However, more importantly, TAC has created a valuable method of using litigation – not necessarily with the object of victory but as a method of prompting public discussion of policy alternatives. The litigation strategy used by TAC has produced "a renewable source of political energy from below, at the grassroots level", creating impetus for more efforts at campaigning for better policies.<sup>36</sup>

<sup>35</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075, 5 July 2002.

<sup>36</sup> Forbath, W., "Cultural Transformation, Deep Institutional Reform and ESR Practice: South Africa's Treatment Action Campaign", in White, L. & Perelman, J. (eds.), *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty*, Stanford

University Press, 2011, at pp.55-74.

Collaborations with a variety of actors, including trade unions, as well as protests against state organs became a path of legal reform and the case provided much inspiration for further healthcare litigation.<sup>37</sup>

A milestone in the work of the Committee on Economic, Social and Cultural Rights is the 1997 General Comment No. 7 on forced evictions. The comment is significant for several reasons. First, it makes several important propositions regarding the subject matter of the right against forced evictions.<sup>38</sup> It states that (i) any interference with a person's home requires substantive justification regardless of the legality of the occupation. This is in line with the requirement under Article 17(1)

<sup>37</sup> Berger, J., "Litigating for Social Justice in Post-Apartheid South Africa", in Gauri, V. & Brinks, D. (eds.), *Courting Social Justice*, Cambridge University Press, 2010, at p.87.

<sup>38</sup> CESCR, *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, May 20, 1997, UN Doc. E/1998/22.

of the Covenant on Civil and Political Rights and distinct from the right to housing which is subject to progressive realization;<sup>39</sup> (ii) due process must be followed and as far as possible, there must be consultation with stakeholders and compensation where eviction is necessary;<sup>40</sup> (iii) nobody should be rendered homeless, particularly groups such as women and children who are disproportionately affected.<sup>41</sup> Second, the General Comment has influenced legal reform in national courts and supranational bodies across the world. The Council of Europe has recently utilized these principles in the protection of the rights of Roma people for example.<sup>42</sup> The General Comment was also directly used by the African Commission on Human Rights as well as the courts in Argentina.<sup>43</sup> Similar language was also used by the Human Rights Committee in adjudicating upon the right to civil housing in Kenya.<sup>44</sup> Arguably, the Committee has established an international standard with this General Comment.

## CHALLENGES AND OPPORTUNITIES

A key challenge is the misperception—not just within international mechanisms, but within the entire human rights movement—that claimants in ESC rights cases are somehow different from claimants in civil and political rights cases, and that focusing on legal remedies therefore alienates the grassroots movement. Social movements are the essence of the ESC rights movement; mobilization cannot be replaced with lawyers going to court, but there is scope for greater integration of these two approaches. In Latin America, for example, a diverse range of groups and social movements have used

the Inter-American system to challenge public policy in key areas with collective impact and as a result have increased the system's awareness and connection with local social concerns and contributed to a more preventive approach to the effects of structural problems in the Court and the Commission's jurisprudence. Access to justice is a critical win. For this reason, the entry into force of the Optional Protocol reflects a massive paradigm shift with genuinely transformative potential.<sup>45</sup>

That said, making the vision of access to justice for ESC rights a reality remains difficult because violations of these rights are often structural, affecting whole communities not just individuals; and resulting from the actions of an array of actors and institutions rather than individual officials. The main obstacles to the fuller realization of ESC rights are often the "routinized institutional practices that support widespread exclusion, discrimination and poverty", rather than "malicious individuals, dysfunctional agencies or 'corrupt' states".<sup>46</sup> There is some doubt about how responsive courts and other quasi-judicial bodies can be to these structural issues and, as such, their value as a catalyst for social justice.<sup>47</sup>

A key issue in this regard is the need for better tools and methods to build evidence of ESC rights violations, whether for adjudication by courts or for monitoring and reporting more generally. Testimony from victims and witnesses—the core methodology of traditional human rights fact-finding—is less equipped to grapple with chronic socio-economic deprivations. Establishing that such deprivations amount to a human rights violation requires uncovering the impacts of laws and policies on different groups and over time; fiscal policies are of particular interest in this regard, given the central importance of resources for the fulfillment of ESC rights.<sup>48</sup>

---

39 *Ibid*, at p.8

40 *Ibid*, at p.13

41 *Ibid*, at p.10

42 Council of Europe: Committee of Ministers, *Recommendation Rec(2004)14 of the Committee of Ministers to Member States on the Movement and Encampment of Travellers in Europe*, 1 December 2004, 14, available at <http://www.refworld.org/docid/4278d1d44.html>

43 Buenos Aires Supreme Court – *Comision Municipal de la Vivienda v. Saavedra, Felisa Alicia y otros s/Desalojo S/Recurso de Inconstitucionalidad Concedido*, 7 October 2002.

44 Concluding Observations of the Human Rights Committee: Kenya, 28 March 2005, CCPR/CO/83/KEN.

---

45 See think piece by Bruce Porter on following page.

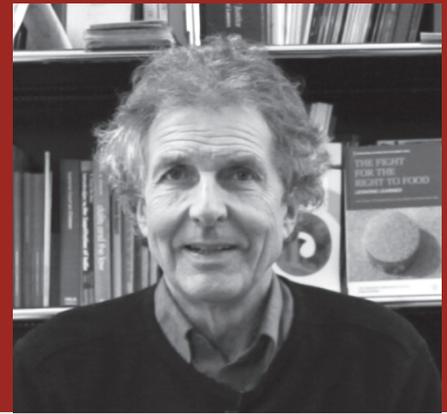
46 Houtzager, P., & White, L.E., "The Long Arc of Pragmatic Economic and Social Rights Advocacy," in L. White & J. Perelman (eds.), *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty*, Stanford University Press, 2011, at p. 174.

47 For more on this, see Open Global Rights page, 'Debating Economic and Social Rights', at: <https://www.opendemocracy.net/openglobalrights/debating-economic-and-social-rights>

48 See, Corkery, A., "Investigating Economic, Social, and Cultural Rights Violations" in Alston, P. and Knuckey, S. (eds.), *The*

# Access to (what kind of) justice?

*Bruce Porter*



**Bruce Porter**

Bruce Porter is the Director of the Social Rights Advocacy Centre in Canada, where he oversees social rights research and advocacy initiatives both within Canada and internationally. He was a founding member of ESCR-Net and he coordinates ESCR-Net's Strategic Litigation Initiative and Adjudication Working Group. He is a member of the Steering Committee of the NGO Coalition for the OP-ICESCR.

**T**he adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), which provides for the adjudication of petitions alleging violations of all components of ESC rights, is potentially the most significant advance in international human rights in a generation.

The denial of adjudicative space for the hearing of ESC rights claims created a profound exclusion within the international human rights movement, denying fundamental participatory rights and equal citizenship in rights to members of the most marginalized groups. Denying access to justice for the most pressing human rights issues affecting the most disadvantaged groups skewed evolving interpretations of universal human rights and damaged the integrity of the human rights system. It also sustained an inordinate acquiescence by courts and international bodies to widespread violations of ESC rights, too often tolerated as 'policy choices' within the 'margin of discretion' of states.

The OP-ICESCR is, of course, a modest procedural advance potentially affecting only a limited number of claimants. It is the paradigm shift it represents, however, affirming a comprehensive and inclusive approach to access to justice for

all human rights violations, that has truly transformative potential. This new holistic paradigm of access to justice emerged from social movements, rights claimants and advocates at the domestic and regional levels, who have proved that ESC rights can indeed be competently and legitimately adjudicated by courts without encroaching on the role of elected governments.

Debates within the Open-Ended Working Group mandated to draft the OP-ICESCR focused on one critical issue: Would the 'OP' apply to victims of violations emerging from systemic patterns of poverty and social exclusion linked to failures to realize ESC rights? Or would it, in the alternative, restrict access to justice to those types of claims which fit the traditional civil and political rights model of adjudication? There were various considerations at stake – whether to exclude progressive realization from the OP, to provide selective opt-out provisions or to include a wide margin of discretion to states in relation to socio-economic policy decisions – but the controversy always boiled down to the overarching issue of whether the principle of access to justice by the most marginalized should prevail over more restrictive models of adjudication. In the end, the adoption of a comprehensive approach to the OP-ICESCR and

the rejection of proposals to include a reference to a margin of discretion to states was historic because it affirmed for the first time at the UN level the principle of inclusive access to justice.

The OP-ICESCR heralded a new approach to justiciability by deciding that preconceived restrictions on the kinds of claims and issues that can be adjudicated by courts or treaty monitoring bodies must give way to the principle of inclusion and equal dignity and worth of all claimants. Those whose rights have been violated by systemic patterns of neglect rather than by discrete actions of government interference must have access to justice.

The critical question now is whether the vision behind the adoption of a comprehensive OP

will actually take root – whether formally equal access to justice will be translated into substantive justice equality when petitions are adjudicated under the OP-ICESCR and as social rights claims continue to come before domestic courts in various domestic systems.

Old paradigms do not give up the ghost without a fight. If the spirit behind the text is not respected, the OP-ICESCR could still be reduced to a more traditional complaints procedure privileging individual allegations regarding discrete government acts of interference with rights over systemic claims addressing states' failures to take positive measures to realize rights. Most claims contain both individual and systemic dimensions. The transformative potential of the OP-ICESCR and the potential of access to justice to address the most egregious violations of ESC rights could thus be thwarted by inflexibility with respect to standing, evidence and the framing of violations. Social rights claims that can be pressed into the mold of traditional civil and political rights deprivations rarely challenge the most egregious and systemic violations.

Even if the Committee on Economic, Social and Cultural Rights is open to systemic claims under the OP-ICESCR, challenging states' failures to adopt reasonable measures to realize rights, there are barriers to such cases being developed through domestic procedures. In the strategic litigation initiative at ESCR-Net we are finding that traditional negative rights paradigms still dominate the case selection and case development process in many countries. Legal challenges which directly challenge

the structural causes of poverty, homelessness, hunger and which demand systemic remedies and strategies are rare. This is not surprising. Prevailing legal paradigms encourage individuals to consider legal action when evicted from housing or when water is disconnected, rather than when governments have failed to take reasonable action to ensure access to housing or water services. Those in the most desperate circumstances are often the least likely to claim their rights. Lawyers are trained to work with individual clients within traditional legal frameworks and may be reluctant or lack resources to organize systemic claims with involvement of civil society organizations. Courts often seem to be more interested in preserving preconceived ideas of their proper role than in adapting procedures and approaches to adjudication so as to ensure access to justice for systemic violations.

***'As long as social rights claims are seen as outliers to our predominant paradigm of rights, judicial systems will offer no true equality for those living in poverty and deprivation'***

Realizing the potential of the new inclusive architecture of rights affirmed in the OP-ICESCR will require a broad-based commitment to ensuring access to justice for the most egregious and widespread violations of ESC rights, rather than only for those which fit the traditional mold of justiciable rights claims. Justice must be reconceived in light of what is needed to ensure competent and fair adjudication of ESC rights claims, ensuring participatory rights for expert

opinion (amicus briefs) in support of such claims, along with appropriate notions of standing and proactive measures to secure all necessary information and evidence.

The inclusive paradigm of access to justice must be pursued in many different venues, not only under the OP-ICESCR – ranging from village councils to municipal or workplace charters of rights, to national framework legislation and more inclusive interpretations of constitutional protections. Access to justice must be institutionalized from the ground up so that participatory rights and effective remedies are provided when and where they are needed, not only in formal legal challenges. The OP-ICESCR must become only one component of broader strategies grounded in social mobilization and public and judicial education.

Transformative change does not occur overnight, of course. New forms of access to justice for social rights claimants should strengthen social movements, enhance democratic space and create opportunities for meaningful engagement and accountability to human rights norms. As increasing numbers of social rights claims are brought forward, lawyers, courts and human rights bodies will be encouraged to develop new approaches and ensure that they fulfill their new responsibilities competently and fairly. As claims bring to light the experience and dignity interests of members of society who have previously been denied access to hearings, the structural causes of ESC rights violations will be rendered more transparent and the value of rights-based approaches should become clearer. Claimants will be able to identify and challenge the barriers to meaningful and productive

social and economic participation and play a part in the formulation and implementation of effective remedies.

States should also reconceive their role in relation to social rights adjudication, responding to petitions as an opportunity for constructive dialogue and meaningful engagement in the service of realizing rights within a framework of democratic participation. Settlement discussions should be used as a means of addressing both individual concerns and the systemic issues behind them, and an opportunity for states to improve implementation of the ICESCR by better understanding and addressing the circumstances of those whose rights are being violated. Governments must provide courts and treaty bodies with all of the evidence and information they require to consider the range of interests at stake in an issue, engaging meaningfully with

stakeholders, and implementing remedies in a timely and effective manner.

What would our human rights world look like 20 years from now if this new inclusive human rights paradigm was realized in human rights practice? Every level of government and every National Human Rights Institution will ensure access to meaningful hearings and accountability mechanisms for violations of ESC rights. Court systems will spend as much time and resources on ESC rights cases as on civil and political rights, with reformed procedures to ensure fair hearings. Lawyers will be trained to be equally capable and committed to advocating for ESC rights. And distinctions between ESC rights and civil and political rights will largely disappear.

As long as social rights claims are seen as outliers to our predominant paradigm of rights, judicial systems will offer no true equality for those living in poverty and deprivation. Social rights advocates have been cautious in the past about promoting legal advocacy because of the ways in which legal procedures and approaches can alienate and disempower claimant communities. However, the time has come to address concerns about the inadequacies of prevailing paradigms of justice and insist that these be changed. Treaty bodies, human rights institutions, courts and human rights advocates should start from the principle that the first priority in the administration of justice is to ensure access to justice for the most egregious and widespread violations of human rights. If we work from that principle, the transformative paradigm affirmed with the adoption of the OP-ICESCR will begin to take hold.

Much thinking has gone into how to broaden the research methods used in ESC rights monitoring to do this kind of analysis—in particular, by adopt a more interdisciplinary outlook that draws on array of quantitative approaches such as identifying indicators, scrutinizing statistics, and analyzing budgets. For its part, CESR has developed OPERA (so called because it groups the norms and standards that underpin obligation to fulfill around four dimensions: Outcomes, Policy Efforts, Resources and Assessment), a framework under which a range of quantitative and qualitative research methods can be combined.<sup>49</sup>

Lawsuits that fail to change black letter law may dislodge power structures when they “create a public spectacle or spark public movement”.<sup>50</sup> For example, even though the plaintiffs in the *Mazibuko* case in South Africa were ultimately unsuccessful, the pre-paid water meters they were fighting against were not

set up.<sup>51</sup> In other cases, however, the plaintiffs won but the problem was not rectified or they had already moved by the time the judgment was handed down. Thus a key question will be how to better nourish collaborations between social movements and lawyers, shifting the dynamic so that litigation is done with and for clients, not on behalf of them, so that, even without a win in court, legal strategies can be leveraged strategically as part of broader campaigns.

A second key challenge is the implementation of court decisions and recommendations from other mechanisms. Irene Grootboom, the plaintiff in South Africa’s most iconic housing rights case, was still living in a shack when she died, despite the court ruling in her favor. The Open Society Justice Initiative concludes that “an implementation crisis currently afflicts the regional and international legal bodies charged with protecting human rights”.<sup>52</sup> Decisions and recommendations that are not effective undermine the authority of the institution making them.

---

Transformation of Human Rights Fact-Finding, Oxford University Press (forthcoming).

49 CESR, “The OPERA Framework: assessing compliance with the obligation to fulfill economic, social and cultural rights”, 2012.

50 Perelman, J., & White, L.E., “Stones of Hope: Experience and Theory in African Economic and Social Rights Activism, in L. White & J. Perelman (eds.), *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty*, Stanford University Press, 2011, at p.150.

---

51 *Lindiwe Mazibuko & Others v City of Johannesburg & Others*, Case CCT 39/09, [2009] ZACC 28.

52 Open Society Justice Initiative, “From Judgment to Justice: Implementing International and Regional Human Rights Decisions,” 2010, at p. 11.

Notions of justiciability are dominantly defined by a focus on negative obligations under the civil and political rights paradigm. Yet, traditional individualized notions of justice, adjudication, and remedy are ill-equipped to grapple with structural causes of ESC rights violations. In many cases, securing a meaningful remedy requires systemic reform to address government non-compliance. On the one hand, it is important to expand these notions of justiciability. On the other hand, there is a need for more work around the size of a case, the complexity of orders sought and how that impacts on the degree of implementation. There are “a number of valid options available in structuring the relationship between courts and the elected branches of government”.<sup>53</sup> In particular, dialogic remedies such as structural interdicts hold great potential, as they allow for a range of stakeholders to engage in the process of identifying a solution, with a degree of judicial supervision. Promoting a ‘self-imposed remedy’ by the defendant should also make implementation more likely.<sup>54</sup>

***‘Traditional individualized notions of justice, adjudication, and remedy are ill-equipped to grapple with structural causes of ESC rights violations’***

Implementation is also weakened by the fact that enforcement mechanisms often operate in silos; stronger connections between them need to be built, both horizontally (between mechanisms at the same level) and vertically (between mechanisms at the national, regional and international levels). For example, the impact of a mission by a Special Rapporteur varies according to their relationship with civil society groups, NHRIs, UN country teams etc. Similarly, there is scope for mandate holders to interact more with the judiciary, for example by acting as amicus in particular cases. In some instances NHRIs have been vested with responsibility for monitoring the implementation of a court decision, though they have not always done so effectively.<sup>55</sup>

Nevertheless, some good practice has developed in this respect. Most, if not all, mandates require special rapporteurs to interact with other bodies that work on similar issues. For example, treaty bodies provide input for rapporteurs’ guiding principles. Similarly, the Committee’s AAAQ criteria build on the work of the Special Rapporteur on the right to health.

NHRIs have particular institutional significance in this respect. They play a series of bridging roles—between the national, regional and international arenas, between government and civil society, between ESC rights and civil and political rights, and between denunciatory and propositional advocacy. This means they are well-placed to navigate the gaps we continually confront in the enforcement of ESC rights, creating space for genuine dialogue, mediation and negotiation to resolve specific ESC rights problems. As ‘human rights bureaucrats’, NHRIs can advance the systematic integration of human rights in policy structures through their statutory powers, including the ability to launch formal inquiries, go to court, intervene in court cases and treat non-compliance as contempt of court—a role that NGOs don’t always have the capacity to play. In the United Kingdom, for example, there are some 600 outstanding recommendations from international bodies. Implementing them is a massive challenge for the government. NHRIs can help ensure the process of prioritizing and monitoring such recommendations is participatory, evidenced-based and legitimate, for example by facilitating the development of a national human rights action plan.

The UN Office of the High Commissioner for Human Rights (OHCHR) is another key actor in creating greater synergy between accountability mechanisms. The Office’s work is largely modeled around the mandates given to it by the Human Rights Council. Developments related to water, cultural rights, and human rights and the environment, came after reports and panels organized by the OHCHR, for example.

---

<sup>53</sup> O’Connell, P. *Vindicating Socio-Economic Rights: international standards and comparative experiences*, Routledge, 2012, at p.177.

<sup>54</sup> *Ibid.*, at p.196.

<sup>55</sup> For example, the South African Human Rights Commission was tasked with monitoring the implementation of the Grootboom case. However, it was not required to report back to the Court and did not follow up on what steps were taken to change the national housing programme to bring it in line with Grootboom. See, Pillay.

---

K, “Implementing Grootboom: Supervision needed”, *ESR Review*, vol. 3 no. 1 2002.

# Operationalizing rights: legal empowerment as a tool for poverty eradication

Irene Khan



Irene Khan

Irene Khan is Director-General of the International Development Law Organization (IDLO). Ms Khan was Secretary General of Amnesty International from 2001 to 2009. Prior to that, she worked for the UN High Commissioner for Refugees for 21 years. She sits on the boards of several international human rights and development organizations, including the Center for Economic and Social Rights.

In Char Jabbar in southern Bangladesh, river erosion displaces thousands of farming families every year. The sedimentation creates new land along the riverbanks. State policy is to accord this land to the displaced but a corrupt and inefficient land titling system means that the claims are rarely recorded and the land is grabbed by the rural elite. Some years ago, a local NGO, *Nijera Kori* helped to mobilize the poor people at Char Jabbar to register their land. When local businessmen unlawfully obtained a lease on the land and hired thugs to destroy the crops and uproot the poor farmers, the latter responded by combining collective mobilization with legal action. They persuaded the thugs – also poor, landless people – not to attack them, and then, with help from *Nijera Kori*, they sought and won an injunction from the High Court against unlawful leasing.

Although it did not stop the practice of illegal leasing, it showed that knowledge of rights, protected by law and backed by social mobilization, can be a powerful tool to fight poverty and exclusion. This is legal empowerment: a bottom-up effort to mobilize those living in poverty and arm them with knowledge of their rights so that they can effectively engage official institutions.

Laws are essential for enforcing rights. It is through laws that a state gives effect to international human rights obligations. But in many countries the wealthy and well-connected both make the law and evade it at their choosing, while poor, powerless people frequently find that the law is ignored to their detriment, or applied against them.

The law may facilitate the exploitation of poor people, for instance, when it permits compensation so low and employment conditions so onerous that the workers remain impoverished, or when it skews land rights in favor of landowners and against tenant farmers. The law may discriminate against women, impoverish and entrap them in poverty. It may exclude poor people from its protection, for example, when it denies citizenship or identity cards to them without which they cannot access government services such as health and education. Laws may create bureaucratic barriers (often encouraging bribery in the process) in order to get work, go to school or be treated in hospital, that are impossible for poor people to overcome. The law controls poor people rather than promoting their freedom, for instance by banning labor unions. The law may instill fear in poor people when rules against street vending or

squatting or vagrancy are robustly enforced or when the poor are victimized by the police and have no recourse.

Poor people, and especially poor women, distrust the law and state institutions because they often lack the power to make them work fairly. Knowledge and action to claim rights can alter both the power imbalance and the disillusionment.

Legal empowerment strategies are not just about litigation, although that may be an important element in countries with well-defined constitutional and legal rights and an independent judiciary. Legal empowerment is often about helping poor people gain the knowledge and tools to engage with those who actually administer the laws that affect their daily

lives – land registration bureaux, local government agencies, rural relief schemes, to name but a few.

Through legal empowerment, those living in poverty can exercise their right to access land, fight discrimination, ensure that their government delivers the health, education and other services to which they are entitled and participate in community and government decision-making that vitally affects their lives and livelihoods. In short, legal empowerment allows human rights to be 'operationalized'.

To achieve legal empowerment, knowledge of the law and rights is important, but so too are skills in advocacy, negotiation and mediation. In the Philippines a movement of Alternative Law Groups (ALG) applies legal and organizing tools to advance the rights of disadvantaged groups in diverse ways, including legislative lobbying, grassroots aid and practical help to ensure that legal reforms are enforced on the ground. In Liberia, Timap has used a mixture of paralegal and mediation activities to address land and petty corruption issues.

Most disputes involving poor people in developing countries are processed by traditional justice systems, which, while being accessible and affordable, are often plagued by gender and class biases and other human rights deficiencies. The International Development Law Organization's report "*Accessing Justice: Models, Strategies and Best Practices on Women's Empowerment*" highlights a variety of ways in which legal aid, community development and women's groups have sought to empower women and enhance their rights in informal justice systems

***'In short, legal empowerment allows human rights to be operationalized'***

Legal empowerment is not the only means by which the poor may claim their rights. Using social mobilization, solidarity and collective power, poor people fight exploitation and oppression through a variety of non-legal as well as legal means, embedding their efforts in broader socio-economic development issues.

Looking ahead, how can legal empowerment be strengthened as a tool for poverty eradication?

The Millennium Development Goals do not currently acknowledge access to justice as a crucial element in the struggle against poverty. The post-2015 Sustainable Development Goals could help to set this straight. Targets might include legal literacy and the extension of legal and paralegal services to people living in poverty.

Legal education is not generally concerned with how to work with those living in poverty, listen to them, learn from them or support them. Law schools might consider training development-oriented lawyers and other professionals who can help make legal empowerment a reality.

Experience shows that collective efforts to claim rights through law will usually stand a far greater chance of success than individual efforts. Championing the rights of the poor means championing their right to organize, learn and fight for their human rights. People living in poverty must be given the freedom, space and support to come together and organize for this purpose.

## CONCLUSION

The imbalance favoring the monitoring and enforcement of civil and political rights over ESC rights remains. While there have been clear advances in the recognition, justiciability and enforcement of economic and social rights over the past two decades and these rights have become part of the agenda of the largest international NGOs and national human rights organizations, many challenges to the realization of these rights remain. The kinds of issues that have been denied equal treatment in a legal sense have also been deprived of equal treatment in funding and space in international forums. By way of example, 70% of OHCHR funds come

from external funding, and Western donors are generally reluctant to fund ESC rights. Among NHRIs, the picture is similarly uneven. Although there has been a great deal of ESC rights work done among ombudsman institutions in Latin America, as well as among commissions in Africa, the organizational capacity to deal with ESC rights varies greatly from institution to institution.<sup>56</sup> To use a rights framework to challenge the unjust power relationships that perpetuate socio-economic inequalities, considerable work thus remains to be done in developing and strengthening judicial, quasi-judicial and non-judicial accountability mechanisms.

<sup>56</sup> Corkery, A. & Wilson, D., op cit fn3, at p.488.

## About CESR

The **Center for Economic and Social Rights (CESR)** was founded in 1993 to work for the recognition and enforcement of economic, social and cultural rights as a powerful tool for promoting social justice and human dignity.

CESR's **vision** is of a world in which everyone enjoys the full range of human rights necessary to live with dignity; where individuals and communities deprived of their economic and social rights have effective access to justice and remedies; and where economic and social policy makers are held accountable to their human rights obligations.

In fulfillment of this vision, CESR's **mission** is to hold governments and powerful institutions accountable for human rights abuses arising from unjust economic and social policies. It does so by producing rigorous, interdisciplinary analysis of economic and social rights violations in different contexts, and making strategic use of human rights mechanisms at the national, regional and global levels to challenge these abuses and seek accountability for them.

CESR's current **program goals** are:

1. To promote human rights as guiding principles of economic policy, including in contexts of economic crisis and political transition
2. To secure human rights at the core of the global sustainable development agenda
3. To strengthen the capacity of civil society organizations and human rights accountability bodies to monitor and enforce economic and social rights

CESR's **governance** is overseen by a Board of Directors made up of eminent figures in the human rights and development fields. Its international staff team is based in New York, Lima and Washington DC.

CESR's annual operating **budget** for 2015 is US\$1,000,000. Current and past funders include: Ford Foundation, Open Society Foundations, MacArthur Foundation, Sigrid Rausing Trust, Jacob and Hilda Blaustein Foundation, Oxfam Novib, Oxfam Intermón, Christian Aid, Canadian International Development Agency, International Development Research Center, the Foreign Affairs Ministries of Finland, Norway and Spain, and anonymous donors.

## Board

**Philip Alston** (Honorary Board Member)  
Professor of Law, New York University School of Law

**Geoff Budlender**, South African Constitutional and Human Rights Lawyer

**Alicia Ely Yamin**, Policy Director, François-Xavier Bagnoud Center for Health and Human Rights, Harvard University

**Manuel José Cepeda**, Professor, Universidad de los Andes; former President, Colombian Constitutional Court

**John T Green (Treasurer)**, Professor of Professional Practice/Nonprofit Management, The New School

**Richard Goldstone**, Honorary President, Human Rights Institute, International Bar Association; former Constitutional Court Judge, South Africa

**Irene Khan (Vice Chair)**, Director General, International Development Law Organization (IDLO)

**Karin Lissakers**, Founding Director, Revenue Watch Institute

**Elizabeth McCormack (Secretary)**, Adviser, Rockefeller Family & Associates

**Sharmila Mhatre**, Program Leader, Governance for Equity in Health Systems, International Development Research Centre

**Carin Norberg, (Chairperson)**, Former Director, Nordic Africa Institute

**Magdalena Sepúlveda Carmona**, Senior Research Associate, United Nations Research Institute for Social Development (UNRISD)

**Executive Director:** Ignacio Saiz



© 2015 Center for Economic and Social Rights.  
This work is licensed under a  
Creative Commons Attribution-NonCommercial-  
NoDerivs 3.0 Unported License.

20



# Twenty Years of Economic and Social Rights Advocacy

*Twenty Years of Economic and Social Rights Advocacy* takes stock of the progress made in recognizing, defending and enforcing economic, social and cultural rights over the past two decades. With contributions from 12 leading human rights figures from across the globe, it analyses how the movement for economic and social rights has evolved over the past 20 years, what it has achieved and how it can address the challenges posed by today's economic, geopolitical and environmental landscape.

Drawing on a series of events organized by CESR to mark the twin twentieth anniversaries of the Vienna Declaration and CESR's founding, the publication focuses on three themes: the role of human rights in the 21st century global economy; the evolving struggle against the injustice of inequality; and the challenges of monitoring and enforcing economic and social rights. It provides a concise overview and critical assessment of the state of the field that is intended as a useful resource not only for the human rights community, but for all those committed to the call of economic and social justice.

*"In keeping with the pioneering role it has played for more than 20 years, the Center for Economic and Social Rights offers this timely and forward-looking reflection on the progress made in realizing economic and social rights... I congratulate CESR on this publication, which is an invaluable contribution" – Mary Robinson.*



162 Montague Street, 3rd Floor,  
Brooklyn, NY, 11201, USA  
Tel: +1 718 237 9145  
info@cesr.org  
www.cesr.org



**CENTER FOR ECONOMIC AND SOCIAL RIGHTS**  
SOCIAL JUSTICE THROUGH HUMAN RIGHTS