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Enhancing Access to Human Rights

The International Council on Human Rights Policy

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Enhancing Access to Human Rights

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CONTENTS

Acknowledgements

INTRODUCTION	1
I. THE PROBLEM	5
Context	6
Focus	9
II. OBSTACLES TO ACCESS	13
The urban poor	13
The rural poor	16
Indigenous peoples	19
Migrants and refugees	23
Women	28
Psycho-social barriers	31
Insecurity	33
III. INSTITUTIONAL RESPONSES	37
Formal institutions of government	37
Intermediary and local institutions	41
Human rights organisations	43
Other civil society institutions	46
IV. INFORMAL RESPONSES	51
Traditional local mechanisms	51
Customary law	54
Alternative mechanisms	57
V. TOWARDS SOLUTIONS	59
Responsibilities of the state	59
Relevance of the human rights framework	61
Strategic positioning and close co-operation	63
How can inclusion be ensured?	68
The role of national human rights institutions	69
VI. CONCLUSIONS	71
Select bibliography	75

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"Access to Human Rights: Obstacles and issues" by Stephen Golub, consultant and researcher, Boalt Hall Law School, University of California at Berkeley

"Human Rights Respected in Law, Abused in Practice" by Stephen Ellis, Senior Researcher at the African Studies Centre, The Netherlands

"Informal Obstacles to Accessing Human Rights" by Dimitrina Petrova, Executive Director of the European Roma Rights Centre, Budapest

"Informal Responses to Access to Human Rights" by Chidi Anselm Odinkalu, Senior Legal Adviser for Africa, Open Society Justice Initiative, Abuja

"Gender Issues in the Challenge of Access to Human Rights" by Ayesha Imam, freelance consultant on women's human rights

"Rural People's Access to Human Rights" by Christopher Sidoti, Director of the International Service for Human Rights, Geneva

"The Urban Poor: Problems of access to human rights" by James Cavallaro, Associate Director of the Human Rights Programme at Harvard University Law School

"Indigenous Peoples and their Access to Human Rights" by Rodolfo Stavenhagen, Special Rapporteur for the Human Rights of Indigenous Peoples, United Nations Commission for Human Rights

"A Road Strewn with Stones: Migrants' access to human rights" by Bimal Ghosh, Director of a global project on migration management, Geneva

"The Work of Formal Institutions in Providing and Ensuring Access to Human Rights: An experience from Latin America" by Martín Abregú, Ford Foundation Representative for Argentina, Chile, Peru and Colombia

These papers, and their translations into Spanish, are available on the International Council's website at www.ichrp.org.

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INTRODUCTION

In recent decades, the worldwide human rights movement has seemed to make progress in attempting to create support for its values. More governments have formally incorporated human rights principles into national law, and many countries have held elections that brought more democratic and pluralist regimes into power. This said, civil liberties and the foundations of multilateral co-operation have been set back by recent events. There is deep concern at the emergence of a more polarised and security-driven political environment since the attacks against the United States in September 2001. The progress of recent years can therefore be considered only partially successful.

At national level, many of those who have struggled to establish support for human rights are disillusioned to find that, even where new and democratically elected governments have been in power for some time, poor or otherwise marginalised communities remain sidelined and powerless, and in some cases appear to be even worse off than before. While their rights may be enshrined in international law and incorporated into new national laws and constitutions, they do not experience benefits from those rights. This has led human rights activists and organisations to ask themselves what else needs to be done, beyond law and legal reform, to ensure that rights and entitlements are available and accessible to all.

This report examines why so many people, sometimes including large groups, do not enjoy rights to which they are entitled, even when those rights are protected in law and when officials do not intentionally violate them.

To a greater or lesser degree, every society contains elements of social exclusion. In this respect, certain groups of people are particularly vulnerable. They include the urban and rural poor, migrants, displaced persons, indigenous and minority groups, women, children, the elderly and persons with disabilities. The causes of disempowerment are manifold and they often overlap and mutually reinforce each other. Illiteracy, physical distance and lack of resources may deny rural people access to courts or health clinics, for example. They may equally be inhibited by fear or distrust of official institutions. This report considers internalised inhibitions as well as external factors that contribute to social exclusion. Beneath them lie two deeper factors: poverty – here understood not simply as an impecunious state, but in terms of being resource-

poor, ill-informed, without social connections and therefore disempowered;¹ and gender relations dominated by men.

If the above factors prevent people from accessing their rights, what role do institutions play? Many institutions have a duty to protect rights or provide services that are essential to the protection of rights. They include institutions of the state and institutions created by civil society, as well as the alternative social networks and arrangements to which those who are excluded tend to turn. The performance of all such actors needs to be assessed, whether they are community-based organisations, non-governmental bodies, local or national government officials or intermediary institutions such as ombuds offices and human rights commissions. On their own admission, many of them fail to achieve their aims or fulfil their responsibility to provide services to all those who qualify for them. The report addresses the performance of such institutions and some of the reasons for their shortcomings.

Faced with seemingly insuperable barriers in the formal world of state institutions, those who cannot access their rights often prefer to fall back on their own customary institutions for resolving disputes and dealing with their problems. Traditional support networks and systems provide a significant degree of protection and security, which needs to be taken into account in any strategy to protect and advance the access of marginalised groups to their rights. At the same time, their limited capacity and in many cases gender bias (which also exists among formal institutions and non-governmental organisations (NGOs)), mean that they cannot provide all that excluded groups need to solve their problems and protect themselves, and cannot protect rights adequately.

For human rights activists, moreover, these institutions present particular challenges. Human rights law and activism have always considered that the state is the principal engine of social protection. Yet poor people and excluded communities frequently show ambivalence towards state institutions and prefer to put their trust in informal and customary processes.

This study, therefore, also discusses whether human rights organisations need to review their thinking and their approach to work they conduct with poor or excluded groups of people, and how they need to identify, raise and manage the resources needed to carry this out. Are strategies that depend on appeals to the rule of law and put the state at the centre of protection of rights likely to

¹ In May 2001, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) defined poverty as "a human condition characterised by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights". See CESCR, "Poverty and the International Covenant on Economic, Social and Cultural Rights" (E/C.12/2001/10), May 10, 2001.

work? How can human rights organisations and official institutions act in ways that will be more useful and seem more relevant to such communities? The report outlines possible courses of action for human rights groups and government institutions that face this challenge.

Underlying the overall argument is an assumption that human rights organisations will need to reposition their work if they are to become relevant to the struggle of the millions of people in the world who are insecure because they are poor or suffer systemic discrimination. That human rights *should* be relevant to such people ought to be self-evident. Making them so may turn out to be vital to the continued progress of human rights, and human rights values, in coming decades.

I. THE PROBLEM

During the last half-century, and in particular during the last thirty-odd years, human rights have been the focus of concerted advocacy by non-governmental civil society institutions and by some states. Largely as a result of this pressure, human rights have become more central to the policy discourse of most governments and international institutions.

Many human rights organisations have moved from a mainly adversarial relationship with states to one that includes forms of co-operation. While some human rights organisations have continued to document and publicise violations, insisting on complete independence, others have begun to train government and judicial officials, have co-operated with them in reform processes and accepted government financial support. As governments have introduced laws and constitutions that incorporate the provisions of international human rights law, and created mechanisms designed to ensure their protection, it has become easier to treat government not only as the primary violator of human rights but also as their indispensable and essential protector.

At the end of the century, however, it became clear that merely reforming law, or electing the government democratically, would not resolve deep structural problems within societies. Disappointment was felt acutely in Latin America, for instance, where human rights protest movements had been successful in helping to overturn repressive military regimes in Chile, Argentina, Brazil, Bolivia, Peru and other countries. As these countries returned to the rule of law and forms of reformist elected government, it was assumed that political change would have a positive impact on the region's acute economic and social inequities.

Yet social fissures deepened in many countries, even in those, like Chile, that introduced economic policies designed to restore a measure of social protection. Large sections of society, excluded under dictatorship, remained no less excluded under democracy. In industrial democracies, the introduction of competitive market reforms sharpened social inequality and increased the vulnerability and poverty of those who were least skilled or least protected by social advantage. In poorer countries, market reforms increased the vulnerability of numerous people – even as they created opportunities for countries and people that were in a position to take advantage of new technical and trading conditions. In rich and poor countries alike, social divisions were exacerbated wherever welfare provision was weakened or removed.

Particular groups suffer disproportionately in such periods of rapid reform and change. Those who are very poor are particularly vulnerable, because

they have no cushion to protect them against risk and no capital to invest in retraining or new activities. In addition, being often among the least educated, they may be least able to take advantage of new opportunities. People whose citizenship rights or status can be questioned are equally at risk – and they too are often poor: migrants, refugees, those who are homeless or displaced, and also minorities. Women figure prominently in all statistics on poverty, and suffer specific forms of social, political and economic discrimination as worldwide poverty figures demonstrate. The elderly and children are similarly disadvantaged.

Given the global scale of economic integration and innovation, the persistence of profound social injustice has become an acute challenge to governments, both nationally and internationally. It is no less a challenge to human rights organisations. The latter emphasise above all the dignity of human beings, and the duty of states to protect that dignity and the human rights on which it depends. If they cannot demonstrate that their methods will bring real and certain benefits to people who are poor and excluded – but will only be useful to those who are already well-off, well-educated and well-connected – what credibility will they have with poor and excluded communities when they claim that human rights are universal and should be enjoyed by everyone?

Context

It is important to indicate clearly at the outset that use of the term ‘access to rights’ does not imply that the most vulnerable groups of society have no rights: all human beings have inalienable and indivisible rights. It refers simply to the fact that many people are not able to obtain or enjoy those rights because of a set of obstacles and because their rights are not protected and promoted in ways that they can be enjoyed fully.

In practice, many factors and attitudes influence whether individuals or groups of people are unable to access rights to which they are entitled. Some of these are familiar. They include tyrannical government, the impact of international macro-economic policies, official and private discrimination (occurring on many levels), the absence of appropriate legislation (or the presence of discriminatory legislation) and, more generally, the absence in society of a culture of rights. These impediments present little intellectual challenges to human rights advocates, even if campaigning against oppression and discrimination remains as arduous as ever. Of other factors, this is less true, and the fact that exclusion occurs even where human rights laws are in place and officials are professionally competent, politically accountable and adequately resourced *is* a challenge.

Some of these less obvious causes are located outside government or concern public assumptions about government relations with the population it governs. Excluded groups may refuse to engage with official institutions for cultural and historical reasons. Some may mistrust all institutions of a state that has oppressed them and, by extension, refuse to engage with non-governmental service organisations that are viewed in the same light. For those living within a politically oppressive system, it may be a perfectly rational choice to choose appeasement as a survival strategy. For similar reasons, communities may prefer their own customary laws and institutions, however imperfect these might be, because they are accessible, low-risk and culturally comfortable. Indeed, for large numbers of people around the world, recourse to the formal court system is only ever contemplated, if at all, as a last resort.

Excluded groups may also quite simply not know their rights. They may not know how to formulate complaints or where to submit them, and they may not trust official processes. Where they do know how to articulate and advocate their interests, avenues of recourse may be absent or controlled by the groups against whom they are campaigning.

The incorporation of human rights into domestic legislation, often held up by governments as a measure of their respect for human rights, does not by itself ensure access to those rights. The law means little to ordinary citizens if it is not enforced effectively, and enforcement often occurs only when citizens interact energetically with the system and assert their claims. Even if enforcement is effective, it will not always ensure adequate levels of protection, since only some members in most societies actually engage with and benefit from the state's formal institutions.

In this context, access to human rights should not be confused with access to justice, in the narrow sense of access to courts. The notion of access takes in many types of claims: consumers' rights; the ability to report domestic violence to the police with an expectation that action will be taken; access to political representatives; rights to trade and to earn an income; protection from corruption; access to basic health care; provision of schools, street-lighting, sewage and waste disposal; safe roads; protection from crime and violence and so on. All these services and rights are of tangible value, not least to the poor, and are ordinarily not available to large numbers of people. In many countries, where democratic reform has failed to change this situation, many sections of the electorate have become disillusioned with the promise of citizenship rights.

The paradigm of the nation-state as protector of its citizens' rights, through law, is comparatively recent. It developed over the past four hundred years and is historically located in the development of Western European states. For millions of individuals around the world, this paradigm remains distant

and alien. It has been superimposed on existing customary and religious law, notably during colonisation, and perpetuated by dominant power elites whose interests state institutions protect. For many people, as a result, the notion of a universal standard of human rights is associated inextricably with this paradigm, just as the moral authority of national law has been undermined where it has been used to oppress subordinate social groups.

Not only do many states ignore the rights of asylum-seekers, treat undocumented migrants and indigenous minorities as non-citizens, and neglect the rights of their own socially marginalised citizens, but significant numbers of states do not have the resources or the political will to run an effective administration.

In some instances, these patterns of limited government remit are inherited from colonial powers that occupied economically useful areas and left more barren ones under military control. To this day, a large number of countries retain this pattern, subjecting citizens to military-style pass and control regimes that violate many rights. Elsewhere, following civil conflicts over access to vital resources or mineral deposits, state authorities have lost key powers over security forces or tax collection to private armies and criminal consortia. In such cases, civilians are at the mercy of lawless bands which make no pretence of respecting their rights, or semi-autonomous security forces which exact reprisals against them for economic advantage or because they supposedly harbour and succour rebel groups. Many human rights abuses predictably occur in these areas.

The international order in such zones of conflict is under severe strain. This regularly generates anomalous situations where the rules of diplomacy require recognition of states in which the law is used by unscrupulous elites and leaders to serve their own interests at the expense of the local population, and often to camouflage their misdeeds. Here, too, human rights abuses occur in full view of diplomats and international agencies. Such situations contribute to a slow loss of trust in the nation-state paradigm as a vehicle that can deliver and protect human rights.

Such full-view abuses also occur in 'Northern' industrialised societies, where, in a number of places, the rights of asylum-seekers are ignored, undocumented migrants and indigenous minorities are dealt with as non-citizens, and military-style security arrangements have proliferated.

Around the world, the emergence of fundamentalisms of all kinds is partly a response to a loss of faith in the secular law-based state. In reasserting traditional customary or religious values, such movements may promote rules and mechanisms that conflict with accepted human rights principles – but

they may also convey a vision and practice of community that provides satisfaction to people whose only experience of rights may be in their denial.

Where law and justice are separated, it is evidently much harder to establish the rule of law and the foundations of a human rights regime, as well as democratic forms of government. The challenge is particularly sharp for human rights activists, whose overall strategy has always been to ensure that every state should effectively protect the human rights of people within its jurisdiction through the rule of law.

Focus

Those who are excluded or inhibited from access to their rights tend inevitably to be poor. What is meant by 'poor' in this report?

The World Bank publication *Voices of the Poor* analysed definitions of poverty made by poor people themselves.² For them, poverty was multi-dimensional; material poverty was only one part of the equation. Other elements they mentioned included dependency, feelings of helplessness, inability to participate in culturally defining activities,³ humiliations suffered at the hands of state agents and private sector actors, and a sense of acute vulnerability should illness or a funeral remove their last bulwark against destitution. Recourse to short-term survival strategies known to be risky – including risk to life itself – was also identified as part of the mental pain of being poor.

These definitional elements are conditioned by culture and by discrimination – in the most widespread instance, by socially-determined unequal gender roles – and by politics, that is by the power relations that consign the poor to powerlessness and the marginalised to the edges of society. In general, 'exclusion' is an active process. The World Bank report showed clearly that the struggle for dignity and access to rights cannot be understood adequately without its political dimension – and this is true whether those who are poor live under autocratic rule, in transitional democracies or under traditional patronage systems.

Of course, many people may find themselves excluded from access to rights without necessarily being poor. They may be discriminated against for reasons that have more to do with the attitudes and mindset of those around them

2 Deepa Narayan et al., eds, *Voices of the Poor*, three volumes, Washington DC: the World Bank, 2000-2002.

3 The importance of social solidarity, expressed in rituals and festivities, was a high priority for the poor in the World Bank survey, which showed that poor people were prepared to invest scarce vital resources in them. The loss of social support networks – often referred to as 'social capital' – and the identity they confer is most evident among the forcibly displaced, with consequent loss of identity and an increased sense of helplessness.

than any inherent characteristics of their own. One clear example is the discrimination against people with HIV/AIDS, which can strike any member of society in any material condition. This said, one effect of discrimination is to increase the likelihood that those who suffer it will also become poor.

This report looks at the experience of four large groups of people who are particularly likely to be excluded from access to rights they have in law, or services essential to the protection of their rights:

- the very poor (as defined above by the World Bank survey);
- racial, ethnic and outcast minorities, including 'indigenous' and 'tribal' communities;⁴
- migrants, those forcibly displaced (internally displaced persons or cross-border refugees), and others 'without papers' or citizenship; and
- women, across all these groups and in general.

This list clearly does not capture all those who are subject to exclusion or lack of access to human rights. Children, youth, those who are unemployed, the elderly are all vulnerable in similar or comparable ways. Other out-groups who are likely to suffer discrimination because of their difference can also be identified, in particular persons with disabilities.

It should also be noted that these categories frequently cut across and reinforce one another. A widow may be dispossessed of her house and property on the death of her spouse and, with no social safety net to fall back on, may fall into destitution. People with certain illnesses may be expelled from the community, or confined to low-paid and low-status work. Unlicensed migrants working in rich economies may not only be forced into unskilled jobs but paid less than local people and refused social benefits.

Viewed generally, all these groups tend to share some of the following characteristics:

- they tend to be *invisible* to institutions of government – or seen only as 'others' (and even dehumanised in extreme situations);
- they are *voiceless* or their voices are not heard by decision-makers who have power to protect them or affect their lives;
- they are often *dependent* on patrons for benefits;

⁴ Racial and economic discrimination is discussed in two other publications of the International Council: *The Persistence and Mutation of Racism*, Geneva: ICHRP, 2000, and *Racial and Economic Exclusion: Policy implications*, Geneva: ICHRP, 2001.

- they tend to occupy a *subordinate* position in relation to others (within family, castes, classes or ethnic groups);
- they are more *vulnerable* to human rights abuse than dominant social groups; and
- they are *excluded* from important decisions about their lives, or only paid token lip-service in participatory forums.

Those who are very poor have, in addition, another defining characteristic that tends to determine their response to problems and opportunities that confront them. They are acutely and immediately insecure – not merely socially but *physically* as well (sometimes, more literally still, nutritionally). They cannot afford to take undue risks and require immediate benefits when they do so. For those who are concerned by human rights, this means that strategies to assist and promote the interests of people who are in this position need to recognise this insecurity – which also results from their isolation – and take it into account fully. Efforts that produce benefits in the long-term, or uncertain benefits, may not be viable or realistic strategies for such communities. This requires new thinking from officials and sets equally testing challenges for human rights activists.

II. OBSTACLES TO ACCESS

When looking at impediments to access for groups that suffer from lack of access to their rights, it is important to examine their actual behaviour. This is often shot through with ambivalence towards the state and state institutions, both as ostensible providers and as potential abusers of their rights. Many may be aware that they have rights, but unwilling to press for them using formal structures that remain alien and intimidating (and possibly distant, corrupt and costly). They may also be ambivalent for psychological reasons. Some communities face explicit public prejudice and have no faith in public institutions because of this experience; or lack the confidence and self-esteem needed to pursue their interest. As well as physical and institutional obstacles, therefore, psycho-social conditions affecting behaviour also need to be assessed and analysed in each context. These constitute internal obstacles.

Institutional responses create many obstacles to the full enjoyment of human rights. They include uneven resource allocation; corruption, patronage and nepotism; gender, class, disability, caste, tribal, ethnic and racial bias; ignorance and incompetence; and criminality. Other systemic obstacles can be due to defects in law, which often perpetuate exclusion and injustice, or criminalise the survival strategies of marginalised groups.

The legal profession may hedge itself with restrictive practices, and oppose legal aid and other schemes designed to help the indigent, because they are perceived to be a threat to professional status (and the ability to exact payment for it). Equally, where officials frequently enforce those laws that protect property rather than people and a climate of impunity becomes established, authority often not only fails to protect the excluded but comes to abuse them. Privatisation of services can also result in a two-tier system of service provision, where some buy access at the expense of others. When this occurs, the state has failed in one of its defining roles, that of protection. By and large, the excluded know this and are seldom tempted to tackle obstacles, which they understand to be insuperable.

The urban poor

The rights of people who live in poor urban communities are often violated directly. In addition, however, governments regularly fail to provide services or fulfil other responsibilities that they have. Lack of security is an evident example of this failure: around the world, countless city dwellers live in a state of insecurity that is officially tolerated. For many, this insecurity represents a direct and constant threat to their basic rights to life and physical integrity.

A 1988 study of Rio de Janeiro showed that police were twice as likely to shoot to kill in incidents involving residents of *favelas* than incidents in other parts of the city.⁵ In Brazilian police parlance, certain communities are even referred to as *torturável* (torturable) – in other words, without the social clout or the financial means to escape mistreatment. In such cases, social networks and financial privilege protect individual rights against institutions of law enforcement that otherwise act with almost complete impunity.⁶

Similar failures occur in relation to education and housing. Although states cannot be held so easily to account for these rights, discrimination is frequent in the provision of services to rich and poor. In general, fewer affordable schools are to be found in poor communities and they are less well-equipped and staffed, so that children from poorer families have less chance to go on to higher education. These obstacles are compounded by the existence of private fee-paying schools for the wealthy, which cream off the best teachers.

Parents often make enormous sacrifices to keep their children in school, knowing that education is their best chance for a brighter future. However, as poor parents sometimes cannot afford the cost of books and uniforms, they will keep some (primarily girls) or all their children out of school, where they can at least help with household chores or earn some small income for the family. When the new government of Kenya reintroduced free primary education as its first act on assuming power in January 2003, schools across the country were swamped with children whose parents had been obliged to keep them at home (or sometimes on the streets) for want of the necessary fees. By sending them to school, they were in effect reasserting their right to education.

In their search for employment, the urban poor tend to be found in sub-standard, overcrowded and makeshift housing with poor sanitation. They face higher risk from disease, accidental fires or structural collapse, and may be forcibly evicted if they are squatters. Such factors represent a direct threat to their economic and social rights, and again signal the failure of authorities to protect. As elsewhere, these physical impediments are compounded by internalised obstacles, since many urban poor communities are not well-organised to protect their interests. They may fear official retaliation. They are also likely to have lost faith in administrative or judicial mechanisms for defending their rights, and this distrust may extend to human rights and other civil society organisations.

⁵ James Cavallaro, "The Urban Poor: Problems of access to human rights", paper prepared for the International Council's meeting on Access to Human Rights, January 2003.

⁶ Ibid.

When states routinely fail to meet their international and domestic legal obligations to provide economic, social and cultural rights for their citizens, by failing to allocate sufficient resources to ensure their implementation, more often than not they are responding to political pressures which relegate the needs of the poor to a secondary status. These may be nothing more than a response to more skilled lobbying on the part of middle-class groups to have schools and other facilities located in their areas. However, often underlying these overt reasons lies a thinly-disguised contempt for the poor, an idea that they are less deserving than other sectors of society. The notion of 'need' is distorted into the opposite of 'rights'.

Under pressure to privatise services they owned or operated, states often abandon or reduce their involvement and the standard of services declines, especially to those who are least wealthy, as private enterprises seek to maximise their return on investment or reduce unprofitable activities.

Many countries have witnessed the depletion of branch railways and bus services in recent years, at the expense of users living in outlying districts and suburbs for whom these are a lifeline to office or market-place. In Bolivia, water privatisation was a controversial issue and people organised to protest against it. Power-cuts in poor urban areas of Rio de Janeiro, in the summer following privatisation of the electricity services, were traced to lack of investment by the newly-privatised company in those less profitable districts.⁷ Yet these neighbourhoods are peopled by tax-payers, however poor, who are denied their right to livelihood and security by discriminatory service provision.

The widespread privatisation of police and security services provides an even more telling example. Initially a response to the inadequacies of public service provision, in many countries the spread of private security firms has diminished the quality of service provided at state and municipal levels because their higher salaries attract top personnel out of the public sector. Some private firms also hire police in their off-duty hours, thereby reducing the quality of attention they can provide during their official duties.

Faced by weak policing, violent crime proliferates in poorer districts. Many communities form vigilante groups. While these groups may start out as a community-based response to insecurity, in many instances, they rapidly become criminal themselves, very often at the behest of local political leaders who support and gain from them financially. When gangs like the Bakassi Boys in Nigeria or the Mungiki sect in Kenya start terrorising and killing inhabitants of the urban slums, the latter have virtually no security left.⁸

7 Ibid.

8 The issue of crime and human rights is tackled more directly in International Council on Human Rights Policy, *Crime, Public Order and Human Rights*, Geneva: ICHRP, 2003.

Indeed, where governments make little attempt to investigate such crimes or bring those responsible to justice, official complicity is likely. The rights of poor and marginalised people to life, livelihood and physical integrity, as well as all the other civil, political, economic, social and cultural rights which hinge on these basic rights of existence, are considered without value – or only such value as behaviour coerced by intimidation can achieve. Access to rights in these circumstances is only what is decreed by those in positions of power. Yet, by using their right to vote in Kenya – exercised in the face of intimidation and fear of retaliation – urban slum-dwellers helped bring in a new government which, in one of its first acts, tackled the Mungiki as the criminal elements they were. Thus, access to one key right can open the way for others.

The rural poor

Rural people share many of the same problems that the urban poor experience, but they are compounded by distance and remoteness from remedies for rights violations which characterise life in many rural areas. Indeed, many urban-dwellers will have migrated from the countryside to situate themselves closer to the services and opportunities for employment that are concentrated in towns and cities. Rural-urban migration, which has been a feature of industrialising societies from the nineteenth century onwards, has increased at such a rate that the balance of population numbers is expected to tip in favour of urban-dwellers within a few years.⁹ These movements leave rural areas depopulated, and create a spiral of diminishing service provision that hastens further departures. Because most of those who leave for the towns are men, rural populations also contain an increasing proportion of women who, with their children and elderly dependants, tend to be considered in many societies as economically unproductive and therefore having fewer rights.¹⁰

Isolation is the main concern of rural communities when it comes to access to their rights. This involves both the *distance from mechanisms* capable of remedying rights abuses, and the *distance from public view* and consequent lack of recognition of the specifically rural character of certain human rights

⁹ See Christophe Sidoti, "Rural People's Access to Human Rights", paper prepared for the International Council's meeting on Access to Human Rights, January 2003.

¹⁰ While it may be true in many regions that it is mostly men who migrate, women's migration from rural areas is often overlooked. For example, most of the migration from and within the Caribbean is by women, many of whom are from poor, rural communities and may have left their children to be cared for by (older) relatives. See James Ferguson, *Migration in the Caribbean – Haiti, the Dominican Republic and Beyond*, London: Minority Rights Group International, 2003.

violations.¹¹ Failure to formulate those abuses in rights terms has contributed to this lack of recognition. Human rights organisations have a role to play in helping to articulate the demands expressed by rural people in rights terms, and reducing the isolation they experience by providing a real presence through the building of networks and alliances. These can link up with rural peoples' own social networks, which are built on a strong sense of community, compensating for their isolation and relative vulnerability to natural hazards.

In large countries such as China, Brazil or Australia, the sheer physical distances and widespread dispersal of rural communities across thousands of kilometres mean that people rely heavily on modern transport and communications systems, which are not always accessible because of cost. Even in relatively smaller countries, poor roads and bad telephone lines mean that rural people are often cut off from help in emergencies, and from access to markets and basic services. New information technologies have helped bridge these gaps in more industrialised countries like Canada, but have yet to be developed and distributed widely in poor countries, where they may prove unsustainable without provision of training, back-up services and maintenance. Today, isolation is increasingly the result not of the inherent remoteness of rural life but of poverty.

Rural poverty, as defined above to include both lack of material assets and dependency, is endemic in most countries. The high proportion of subsistence farmers in some countries means that many families *can* get by with basic essentials, but remain acutely vulnerable to climatic conditions and unforeseen expenditures. The high cost of medical and related travel expenses and of funerals is one reason why the AIDS pandemic has proved so devastating to precarious rural livelihoods.

Land ownership patterns are inequitable in much of the world. As a result, many rural people do not have access to vital resources, including land itself. Landless farm workers are particularly exposed to risk as women are, more generally. Their right of access to land is often unrecognised in traditional systems, or ignored when individual land registration occurs.

The historic process of land enclosure in Western Europe pushed thousands of dispossessed rural workers towards the urban centres, where their labour fuelled the industrial revolution. The same process of accumulation and dispossession is continuing in many Southern countries – not least those

¹¹ Only the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in its Article 14, mentions the rights of rural women, included after acrimonious debate at the insistence of African women.

where ostensible land reform programmes have simply shifted land ownership from one elite group to another. Recent land redistribution in Zimbabwe has taken some land from white capitalist farmers, who held it since colonial times, but given it to privileged former combatants and party workers known as 'war veterans', thereby rendering hundreds of commercial farm workers homeless, obliging them to return to unproductive 'communal lands' where their grandparents were confined under colonialism. Little attention has been paid to the loss of rights endured by these people, whose lack of access to formal remedies vividly illustrates the impact of distance on recognition of their rights.

The question of land rights is one of the most difficult to address in the rights lexicon. Many indigenous and traditional communities live in a spiritual symbiosis with land their ancestors occupied and are buried in, and they lay claim to it as a defining feature of their collective identity. Such traditions come into direct conflict with modern land title, which transforms land into an asset and a commodity.

Within rural populations, gender disparities exacerbate lack of rights. Women constitute the overwhelming majority of subsistence farmers in many parts of the world. Yet, in too many places, they have less access to land, credit, education, extension services and healthcare. This is in part because, under most customary law systems, women have only usufruct rights to the land's produce. They are not allowed to own landed property and, without it, they cannot raise capital or secure a bank loan. They can work the land and sell its produce at the market but their husbands and brothers will still pocket the proceeds. Between their child-bearing and child-rearing activities, fetching water, preparing meals, tending small livestock, tilling and planting the fields, and, increasingly, caring for sick relatives, rural women have little energy to even think of the rights which they are denied.

Yet women's NGOs, in tandem with developmental agencies, have been able to initiate small credit groups and income-generating initiatives to begin to counter the lack of access to credit and open up new possibilities to women formerly confined to this traditional drudgery. The women's rights movement across Africa well understands that rural women are denied access to basic economic, social and political rights.

The situation of the rural poor, and in particular of women and members of minority ethnic and indigenous groups, illustrates the web of mutually reinforcing obstacles to the full enjoyment of human rights. Access to schools, credit facilities and markets can unlock new opportunities for the rural poor but high rates of adult illiteracy (usually higher for women), low levels of nutrition, poor sanitation, lack of access to clean water, heightened vulnerability to preventable disease and exploitation, all prevent them from seizing such opportunities. In general terms, indicators show that the rural poor have less

access to their rights than urban communities and that women and minority groups are still worse off.¹²

Given the poverty and illiteracy prevalent in rural communities, particularly among minority and indigenous women and the high proportion of indigenous and minority people who are attached to the land, exploitation and violations of civil and political rights tend to occur frequently in country areas. In Brazil, for instance, an estimated 920,000 small farmers were expelled violently from their land to the advantage of agri-business corporations between 1985 and 1996. Arrests and killings by hired thugs and armed gangs continued into the new millennium and impunity for such acts of violence is more likely in remote rural areas. Biased or brutal policing, negligent public services, victimisation by rude or corrupt public officials all flourish in the rural world, perhaps more so than in more densely populated urban contexts that are more accessible to the media.

Many rural communities also experience insurgency and counter-insurgency operations. Settled rural populations find themselves caught in the middle of such conflicts and subject to reprisals by both sides for allegedly helping and succouring the other. Examples abound from Colombia, Central Asia, Indonesia, the Philippines and other countries. Modern military theories of insurgency and counter-insurgency promote the use of subterfuge, propaganda and selective violence to control populations.¹³ In rural conflict zones, arbitrary arrest and detention, torture, extra-judicial killings and forced displacement are more common than in cities.¹⁴ Yet the abuse of human rights in such areas tends to receive less attention from the media and from urban-based human rights groups. Distance, danger and difficulty of access again make violations of rights less visible.

Indigenous peoples

Indigenous peoples, most of whom live in rural areas, are still struggling for recognition of their 'right to have rights' as citizens and human beings.¹⁵ This struggle, waged in many parts of the world against the assimilationist tendencies of the state and the predominant developmental paradigm of sedentary agriculture and urban growth, now has a higher profile to the extent that 'indigenous' is now a political term. Yet the very notion of being 'indigenous'

12 See Sidoti, "Rural People's Access to Human Rights", pp. 4-6.

13 See Stephen Ellis, "Human Rights Respected in Law, Abused in Practice", paper prepared for the International Council's meeting on Access to Human Rights, January 2003, p. 5.

14 Sidoti, "Rural People's Access to Human Rights".

15 Rodolfo Stavenhagen, "Indigenous Peoples and their Access to Human Rights", paper prepared for the International Council's meeting on Access to Human Rights, January 2003.

remains contentious because it implies a prior claim on land and natural resources by certain social groups over others who arrived later.

In the African context, successive migrations have reconfigured the face of the continent, and still do, and many people of African descent claim to be 'indigenous'. Definitions are therefore awkward, but are understood clearly where forest-dwelling hunters or nomadic pastoralists find their land and livelihoods threatened by outsiders, often farmers and ranchers. In countries where indigenous populations were almost wiped out by colonisation, the notion of aboriginal 'first peoples' is sometimes used in preference to indigeneity, since the political context is more stark. In French-speaking countries, '*autochtone*' is preferred, '*indigène*' being seen as pejorative. 'Indigenous' remains relevant, nonetheless, because it is the term most used in international legal texts, including the International Labour Organisation (ILO) Convention 169 and the United Nations Draft Declaration on the Rights of Indigenous People.¹⁶

Indigenous peoples around the world have only recently found common cause in the types of problems they encounter. At the heart of their solidarity is a basic struggle for survival, as their modes of social organisation and fragile economies come under pressure from external social, economic and political forces. In rights terms, for indigenous people *all* key rights are interlinked: environmental rights are essential to their survival, while attachment to ancestral land is a vital element of their political claim to self-identification and ultimately to self-determination. Underlying the issue of self-determination (one of the first rights to be enshrined in United Nations (UN) conventions as part of the anti-colonial struggle, but one of the last to be tackled in relation to indigenous communities), in turn, are the rights to participate, to be listened to, to be accorded dignity and respect, and to be recognised as full partners in policy issues affecting livelihood and survival.

Land is the main defining issue for indigenous people around the world. It provides the vital resources on which they depend, and the geographical and social space within which they define their social organisation and political economy. As mentioned above, land rights can be defined in a variety of ways. The collective relationship of indigenous peoples to their land comes into direct conflict with 'modern' ideas of individual ownership through legal title. This is mainly an issue when developmental imperatives encroach on communal land, or where dam-building displaces local traditional communities – such as the Adivasis or tribal people who lost their land to the Sardar Sarovar Dam in India, or the Embera-Katio peoples displaced by the Urra 1 Dam as

¹⁶ The ILO's Convention 169 is the only international text that attempts a definition of 'indigenous' based on the concept of self-identification.

well as by armed conflict in Colombia. Such ownership conflicts also occur *within* communities, when some modernised members exploit their knowledge of law at the expense of other community members.

Denial of social and economic rights may also result from internal disparities. Given their subordinate status, women and lower castes and age-sets within indigenous communities are vulnerable to such treatment. Their only recourse may be to use their individual rights – to speak out, to seek redress – against the collective will of the community.¹⁷

Land and the valuable mineral resources it contains have prompted conflicts between indigenous communities and powerful business interests. In Central and South America, indigenous Indian communities inhabit resource-rich areas, bringing them into direct conflict with powerful commercial and mining interests which, with the backing of the state, can bulldoze access roads through forests and mountain areas, often in disregard of existing laws. In Central Africa, powerful logging companies and small farmers have encroached on the traditional territories of the forest-dwelling Batwa or pygmies. In both cases, contact with the modern world has resulted in subordination and exploitation of vulnerable indigenous communities and destruction of their fragile economies.

Game reserves and mineral exploitation have also uprooted communities. The Basarwa, a San people in Botswana whose existence is not recognised in the country's constitution, are currently being induced to move from the Central Kalahari Game Reserve by the suspension of all service provision by the central government. This is being done in spite of the millennial cohabitation of these 'Bushmen' with the animals and plants of the Kalahari, about which they have unrivalled knowledge. Traditional knowledge systems are also under threat from the pharmaceutical industry, which patents and markets herbal remedies to the detriment of communities who have unique knowledge of these plants and depend on them. Their intellectual property rights to such knowledge have only lately begun to be recognised.¹⁸

Going to court to protect their rights over vital resources is highly problematic. The laws themselves are weighted in favour of individual title to property, and court systems tend to favour the interests of businesses and property-owners who operate within modern state structures. The courts speak a different language, are staffed by an elite, apply mystifying rituals of court procedure, and are generally intimidating to indigenous people. They have little reason to use a justice system that does not correspond to their own ways, and does

¹⁷ This may itself incur risks: see for example pages 29, 52-53 below.

¹⁸ See Michael A. Bengwayan, *Intellectual and Property Rights of Indigenous and Tribal Peoples in Asia*, London: International Minority Rights Group, 2003.

not recognise indigenous customary laws. Many indigenous communities are equally reluctant to send their children to school, fearing that they will learn alien ways; however, some adopt a deliberate strategy of sending boys to school who can serve as interpreters for the community with the modern world.¹⁹

Human rights activists can assist indigenous communities to use courts effectively. However, even successful claims (like the Balabaig case in Tanzania) require skilled local lawyers and can drag on for years. Many court cases are not successful – as Oaxaca Indians discovered when the Mexican Supreme Court refused to recognise the validity of the evidence they presented.²⁰ In the absence of agreed conflict resolution mechanisms or official recognition of indigenous customary law, few mechanisms are usually available that indigenous groups can use to defend their land, their language and their traditional ways.

Many governments continue to resist or ignore the claims of minority and indigenous communities. In the worst instances, their struggle for recognition is criminalised as a law and order issue and governments turn a blind eye to human rights abuses committed by state security or surrogate forces, including hired thugs in the pay of commercial interests. In February 2001, the Vietnamese authorities responded to peaceful protests by several thousand highlanders (Hmong, Jarai, Koho, Manong and Rhade), by organising violent police and military operations, followed by the arrest of several hundred demonstrators, some of whom were tortured to extract public expressions of remorse. The protests were about the poverty, official neglect and repression these groups had experienced for years.

Underlying these responses to quite legitimate claims on the state is a pervading sense, common both to government officials and dominant ethnic or racial groups, that indigenous minorities in their midst are not full citizens – indeed, in some instances, not quite human. The Batwa pygmies of northeastern Congo were not included in any census, do not have citizens' identity cards, and cannot therefore vote (if indeed they wanted to). Official attitudes towards indigenous groups as being 'backward' or 'primitive' may be inherited directly from colonial times, yet they still serve to render these groups 'alien' to the dominant culture, a process that can help justify their exclusion from mainstream political life or strengthen the drive to assimilate them.

¹⁹ In colonial times, Sahelian pastoral communities preferred to send the sons of slaves to school; with independence, these educated elites assumed control of the new states and proceeded to exclude their former masters from access to the levers of power.

²⁰ Case cited at the International Council's meeting on Access to Human Rights, January 2003.

Faced with the apparent determination of many governments to exclude them from the body politic or forcibly assimilate them, members of indigenous communities have little incentive to join mainstream culture and politics. To these disincentives are added others when protective laws are passed by the state but flouted in practice. The Ibaloy, Kankaney and Kalanguya indigenous groups, whose livelihoods are threatened by the San Roque dam project in the Philippine Cordillera, were rebuffed when they petitioned the National Commission on Indigenous Peoples. The laws designed to protect them were in fact ignored.²¹ The hypocrisy of governments that pay only lip-service to indigenous rights is much criticised by indigenous communities. It has led to an armed standoff with the authorities in Chiapas state in Mexico, and prompted violent revolt by the Tuareg population of northern Mali.

The incompatibility of some traditional practises with accepted human rights standards may also render relations with local human rights activists problematic, particularly where activists themselves come from dominant social groups and share some of their prejudices. Human rights organisations need to learn from and about the indigenous peoples in their midst if they are to be useful to them. Further consideration needs to be given to the nature of collective rights, as well as to the right of individuals who live within such value-systems to challenge them.²² Indigenous groups seeking redress need also to organise among themselves and find strength in strategic alliances with others in a similar predicament, with backing where necessary from external sympathisers. The movement that has grown around the UN Working Group on Indigenous Populations and its regional counterpart bodies in Africa and the Americas, provides a forum and a context for such alliances to grow, as well as a body of 'soft law' jurisprudence around indigenous issues.

Migrants and refugees

The human rights of migrants are not recognised automatically by states, though some national constitutions do make provision for the rights of all those on national territory. It is widely assumed (even by many national human rights organisations) that only citizens are entitled to rights. However, this applies mostly to civil rights to vote and stand for office: other rights – to work, to education and healthcare – are determined usually by a migrant's status under national laws. In practice, for many migrants the basic human rights to life, livelihood and physical integrity – inherent in all human beings – are by no means secure.

²¹ Stavenhagen, "Indigenous Peoples and their Access to Human Rights".

²² For a discussion of these issues, see Michael Ignatieff, *Human Rights as Politics and Idolatry*, Princeton: Princeton University Press, 2001, p. 67.

International human rights law provides inadequate recognition of migrants' rights and provisions that exist are dispersed and fragmentary. The 1990 UN Convention on All Migrant Workers and their Families (ICMW) protects the basic rights of both legal and 'illegal' migrants, with wider protection being given to legal workers and their families. The fact that it was only ratified by the required minimum of twenty states until twelve years after its adoption speaks volumes about the lack of state commitment to protect the rights and well-being of migrants.²³

The marginal situation of migrants has been accentuated by the process of globalisation, which has everywhere swelled the informal economy, characterised by lack of labour standards, social security and other forms of social protection. These economic trends have increased both the 'pull' factor of the developed countries, whose unmet demand for low-wage workers is increasingly acknowledged, and the 'push' pressures on the poor to seek a better life elsewhere. At the same time, globalisation of trade and finance has not led to the free flow of migrants. The attacks on New York and Washington in September 2001 have increased the insecurity of migrant populations, particularly Muslims and those of Arab origin living in the United States and elsewhere, but have not stemmed the flow of those attempting to gain entry legally and without documents to the United States, Europe and many other countries.

Those who are admitted legally to richer countries tend, at least in the first generation, to be confined to the margins of society. They are often subject to discrimination (in disregard of national anti-discrimination laws) or outright xenophobia. As non-citizens, they are often disbarred from organising to protect their rights, which often they do not know. They are therefore subject to exploitative forms of labour, without always benefiting from police protection. Lonely and often isolated from their families, they frequently suffer from low self-esteem and depression as a result of their exclusion and marginalisation.

In all countries, migrants and non-citizens fall into a hierarchy of privilege, according to their degree of acceptance by the host state. Within the European Union, for example, skilled workers and full-status refugees are at the top of this hierarchy; at the bottom are those considered 'illegal' under national immigration laws – the trafficked, the asylum applicants rejected as 'bogus', the 'sans-papiers' who have fallen through the cracks in state bureaucracy. People in the latter categories will often have suffered from multiple human rights abuses, both before reaching the country's borders and once within them. They are liable for summary deportation, and may choose to remain marginalised if that is their best hope for remaining in the country.

²³ The ICMW entered into force on July 1, 2003. The various ILO Conventions dealing with equality of treatment and other entitlements of migrant workers have also received low levels of ratification.

There are essentially five main obstacles to access for these vulnerable groups:

- their '*illegal*' status, which renders them powerless and highly insecure, although some can be moved by skilful legal representation within recognisable legal categories;²⁴
- *prejudicial language* – the wording 'illegal aliens' illustrates the dehumanisation these excluded categories experience;²⁵
- the *failure of government* to protect and assist these groups;
- their *extreme vulnerability*, given the constant threat of expulsion, which means that they will often prefer not to approach government institutions, or even non-state bodies which might help them gain recognition; and finally
- media bias which in many countries has reinforced prevalent *stereotyping and scapegoating* of migrants.

In addition to these factors, the narrow definitions employed by the current international refugee protection regime, and its steady erosion even in those countries adopting a wider definition of refugee,²⁶ have helped to swell the numbers of those whose otherwise well-founded claim to seek asylum is rejected by receiving states.

Behind this process is rather a firm determination by states – notably in the European Union, the United States and Australia – to exclude unregulated migrants and even asylum-seekers. The means used – carrier penalties, prohibitive visa requirements, the 'safe third-country' rule, 'safe states' and quota systems – effectively disbar many people who have a legitimate claim to be fleeing persecution from lodging that claim through regular channels, but do not prevent people from moving and tend to force migration underground. Many are compelled to use illegal means to cross borders, and legitimate claims, once made, may be rejected on the grounds of illegal entry or entry via a third state.²⁷

24 This process was described as "an exercise in phenomenology" by a former immigration lawyer attending the International Council's meeting on Access to Human Rights, January 2003.

25 Such categorisations can be restructured to consider sub-categories of women, children and so on, to whom specific rights defined under international human rights law adhere. In this way, victims of human trafficking have in recent years benefited from successful human rights campaigns to rehabilitate them as victims of human rights abuse instead of as criminals liable for summary deportation.

26 See Bonaventure Rutinwa, "Declining Protection Standards in Africa", in *Working for Refugees' Rights: the role of NGOs*, Nairobi: RCK/UNIFEM workshop, June 2001.

27 Under the 1951 Geneva Convention the sole basis for adjudging refugee status remains "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".

Given the legalistic refugee law regime created by the 1951 Convention, which was designed for the specific conditions in post-war Europe, it is hardly surprising that its definition of “refugee” fails to cover many forms of “well-founded fears of persecution” that have become prominent in the ensuing half-century. It does not adequately include people fleeing civil conflict or state-instigated repression of minorities (though the 1969 Organisation of African Unity Convention does address these issues and accords *prima facie* status to mass influxes in Africa).²⁸ Those fleeing persecution at the hands of non-state agents, such as rebel armies, unrecognised quasi-state entities or surrogate death squads, may also find it difficult to prove a claim.

Those fleeing persecution at private hands, notably rape survivors, victims of domestic violence, and those at risk of forcible circumcision, are usually not considered for refugee status. However, some recent reinterpretations of the Convention’s use of “membership of a particular social group” as referring to women, have been adduced to allow status determination in favour of such categories in Australia, Canada and the United States.

By far the largest group of people who are not well-protected under international law are “unregistered” or “illegal” migrants, drawn towards other countries by the prospect of a better life, or forced to move because they have been displaced by drought, famine, natural disasters or development projects. Their attempts to settle and start a new life abroad often end in tragedy. The abuses to which illegal migrants are subject both during their journey and after their arrival are by definition somewhat hidden from view, while their basic rights as non-citizens remain rather unspecific even in law.

Once arrived, migrants and refugees often remain vulnerable to official persecution. Moreover, both groups suffer from a dramatic loss of status and from the disappearance of social networks that sustained them at home. This tends particularly to affect men, whose public role ensured their social standing, more than women, who more readily recreate social support networks and assume new coping roles as heads of households and breadwinners.

All suffer from the indignity of dependence on humanitarian aid, however. Those who live in refugee camps tend to have less access to remedies than self-settled refugees. While outside humanitarian aid may provide basic necessities, resources may not stretch to cover education and healthcare, while even basic nutritional needs are frequently reduced to the bare minimum. Recourse to justice for refugees is usually minimal despite high levels of

²⁸ In addition to the 1951 Convention definition, this instrument adds a further category of anyone who, “owing to external aggression, occupation, foreign domination or events seriously disturbing public order..., is compelled to...seek refuge...outside his country of origin or nationality”.

domestic and gender violence.²⁹ Confined to remote camps, denied freedom of movement or the right to engage in small trades or cultivate gardens, refugees can feel utterly dependent. Possession of identity papers, and the respect of others, become all-important assets for safeguarding their remaining rights.

People who settle 'illegally' in urban areas may have greater freedom of action but they are vulnerable to exploitation. They live at the mercy of repressive police and security agents, who ransom them with impunity, or hand them over to the courts if they cannot pay a bribe. Given their 'illegal' status, they have no incentive to use the courts or other complaints mechanisms to protect themselves. Even the international agencies charged with refugee protection may follow national laws and return them to the camps. Vast numbers of urban refugees in many countries exist beyond the reach of the United Nations High Commission for Refugees (UNHCR).

Few local and international NGOs are prepared to champion the rights of these people, whether in or outside camps, and UNHCR itself is criticised widely for having failed in its protection functions in recent years.³⁰ The position of people who are displaced within their countries is even worse, however, because their status is unrecognised in international law. Since they do not exist officially, they can make no claim on their own state to protect their basic rights, while no international organisation has a mandate to take responsibility for them.³¹ In a number of societies, large displaced populations subsist without any official assistance, either from the state or the international community.

The failure of governments to extend protection to their own displaced citizens – who in many cases are fleeing state-sponsored repression – draws attention

²⁹ See Guglielmo Verdramo, "Human Rights and Refugees: The Case of Kenya", *Journal of Refugee Studies* 12, 1999, pp. 54-77. Although refugee camps are subject to national laws, refugees at Kakuma Camp in Kenya were found to be employing summary justice and detaining 'convicts' in makeshift prisons, in the absence of any accessible formal court. Mobile courts have now been introduced to the Kenyan camps, though victims of rape and assault are still unwilling to use them for fear of reprisals. On the sometimes successful impact of gender policies in refugee camps, and the work that remains to be done, see Julie Mertus, *War's Offensive on Women – The Humanitarian Challenge in Bosnia, Kosovo and Afghanistan*, Connecticut: Kumarian, 2000.

³⁰ Verdramo, "Human Rights and Refugees." See also Human Rights Watch, *Hidden in Plain View: Refugees living without protection in Nairobi and Kampala*, New York: Human Rights Watch, 2002.

³¹ While there is no UN agency specifically charged with helping internally-displaced persons (IDPs), the Inter-Agency Standing Committee of the UN recently set up a co-ordination body on aid to IDPs. UNHCR also has a mandate to assist and protect IDPs where they are mixed in with returning refugees. The Secretary General's Representative on IDPs, Francis Deng, has produced a set of *Guiding Principles*, which are now widely followed by field agencies working in forced displacement situations.

to the fact that many citizens live in fear of their own governments and tend to rely on their own resources to protect themselves. This question is examined in Section Four.

Women

Women have particular difficulties in accessing their rights. This is because access is conditioned by attitudes to gender which usually consign women to a subordinate and more passive role in relation to men.

For example, it was recently discovered that Roma women in Slovakia and the Czech Republic were being sterilised without their informed consent, and in some cases even without their knowledge, during delivery by Caesarean section. The issue here, as with the sending of Romani children to schools for the mentally disabled in the same countries, was that of abuse of informed consent: women, and in some cases their husbands or mothers, had been pressured to sign sterilisation request forms. This racist practice exploited the lack of education of Romani women about sexual health and contraception, and the widespread blaming of Roma by the majority society for having more children than they can support. However, once sterilised, women in a number of cases have been regarded as inferior by Romani men, including their own husbands. Thus, the women have been doubly victimised – as women and as members of a marginalised minority community, one moreover which places a high value on the fertility of its women.

Gender bias is prevalent in all societies. From an early stage the women's movement saw the potential of using a human rights discourse to unlock women's rights. By re-examining women's marriage, property and inheritance rights, women's organisations have shown that women have been disempowered by customary laws which grant them only usufruct rights to property and deny them the product of their labour – even, in some societies, their children, who are deemed to belong to the father on divorce.

The laws of most states were likewise devised and enforced largely by men. They are frequently 'gender-blind' in making no distinction between men and women in their application. This can cause discriminatory effects. For example, both women and men may formally enjoy the right to work but this right may be curtailed for women because they are socially required to take on the bulk of household work. Women's freedom of movement, ostensibly equal for all, is similarly conditioned by the power that male heads of household exercise in many societies.³²

³² Examples given in Ayesha Imam, "Gender Issues in the Challenge of Access to Human Rights", paper prepared for the International Council's meeting on Access to Human Rights, January 2003.

Real legal equality is often undermined, not only by discriminatory laws (on marriage, divorce, inheritance, child custody and so on) but by discriminatory practice in the application of nationality rights, taxation, property ownership, credit, and other matters.

Many countries have multi-layered legal systems, including customary and religious laws as well as formal secular law. In some areas of justice – family law, for example – customary and religious law may be given precedence; in others, modern law will override traditional practice. For poor and marginalised groups, customary or religious justice is often preferred or the sole option. The sanctions offered by modern law are expensive and often unhelpful, for women in particular.

Fear of reprisal, or fear of losing a breadwinner should the perpetrator be sent to prison, frequently inhibits women from seeking justice, while fear of public reprobation and ostracism will prevent most rape victims from doing so. Even in industrialised societies, rape victims are often treated as the guilty party. On the other hand, many customary systems apply collective remedies for violations of traditional codes of behaviour, which may not be in the individual woman's interest. In order to redress the social disruption occasioned by rape or abduction, in some societies, family or clan honour may only be saved by marrying off the victim to the rapist or abductor. (Indeed, in some refugee communities, families may agree on a 'staged' abduction so as to avoid having to pay a bride-price which they cannot afford.) Elsewhere, reparations in kind may be paid, usually to the parents of the victim. In very poor communities, these 'fines' may be derisory. The individual rights and feelings of the woman do not enter into consideration, although her life may be shattered, her health at risk and her future marriage prospects destroyed.

In 'honour crimes' – more accurately 'dishonour crimes' – family or clan honour is the highest social value, which can be deemed by the men of the clan to be dishonoured by women overstepping cultural norms of propriety. The gender disparity here is notorious, since men and boys are rarely if ever deemed to have besmirched clan honour, which is considered to reside in the virtuous conduct of its womenfolk. Under this system, even young boys may be expected to kill an elder sister believed to have brought collective dishonour on her family. If arrested and tried under secular national laws, the perpetrators may well receive a lenient sentence or even acquittal from judges originating from and well-versed in clan justice systems. Thus, judicial interpretation of the law as well as community practices are conditioned by social attitudes. The rights of errant daughters will not be protected unless they manage to flee retribution and find a safe haven. Many women in Pakistani jails are rape victims placed in indefinite custody for their own protection.

International human rights law can offer little support in these circumstances, unless it is entrenched formally in national law following ratification. Moreover, many states have entered reservations to the main instrument designed to protect women, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Reservations among ratifying states are common with respect to Article 16, affirming equality in family and marriage law, and Article 2, the core of the convention, which obliges states to modify or abolish existing laws, regulations, customs and practices that discriminate against women. This said, judges in such countries as India and Nigeria have drawn inspiration from CEDAW to hand down gender-sensitive rulings, which help to build a corpus of protective jurisprudence.

Even when women are aware of their rights, they encounter many obstacles in asserting them. Most of these obstacles are shared with the excluded groups already mentioned, but to the extent that women and their dependent children form the majority of the rural poor, of urban heads of household in slum areas, and refugee populations, they encounter such obstacles to a greater degree and in larger numbers than men. While lack of access to land and property, education, healthcare, credit, information technology and so forth, all inhibit access to rights, it is women's systemic lack of power to make and implement decisions that is the critical factor. This powerlessness extends all the way from decision-making within the (male-headed) family or clan, to the harassment of women standing for public office. The low social status of women in many communities means that they have little or no possibility of speaking out for their rights. In many countries, women are not allowed to speak in public fora, and if they choose to take part in electoral contests, they often have to run the gauntlet of public derision, spoiling tactics and acts of violence.

It is now widely recognised that development approaches which focus on women's empowerment are one of the keys to more equitable and viable development for all. Even within the UN, the World Bank and other development programmes, however, women's empowerment is still not being addressed adequately.

Specific women's programmes, such as the United Nations Development Fund for Women (UNIFEM) and the United Nations Research and Training Institute for the Advancement of Women (INSTRAW), remain seriously under-funded within the wider UN family. Specific women's concerns in other programmes are likely to be 'mainstreamed' without any gender analysis, gender budget audits or use of gender-disaggregated statistics. The result is that they get subsumed within overall policies without regard for the systemic gender bias, which in all societies marginalises and disempowers women.

Lastly, under patriarchal systems of patronage, women – along with and as part of other marginalised groups – have to plead or bargain for favours instead of asserting their rights. In extreme situations of dependency (such as at emergency feeding centres) they may be obliged to trade sexual favours as the only commodity left for them to use as a bargaining tool. Huge numbers of women and girls thus exist from day to day in a high-risk environment, a subordinate group within an already poor and marginalised population, pushed to extremes by social pressures beyond their control. Only sustained policies of empowerment and awareness-raising can begin to reverse this rights-negating situation.

Nevertheless, much progress has been made in recent decades in raising women's awareness of their rights and their potential to access them. Adult literacy classes, education for girls, free legal advice, women's police desks, small credit groups, law reform, policy initiatives and the inclusion of gender desks or women officers within ministries have all contributed to this process. Even so, experience has shown that these gains are precarious. Human rights organisations can prove a key ally in this area. Using gender analysis can help human rights bodies, along with development agencies, to obtain greater insights into the deep-seated biases impeding access to rights, and thereby benefit other disadvantaged groups.

Psycho-social barriers

The processes of social exclusion and marginalisation described above reflect relations of power. Asymmetries of power mean that in all societies those without influence and resources are in a subordinate posture as claimants. Under repressive systems, marginalised groups may choose quite rationally not even to claim their rights. Within 'exclusive' democracies, they may have difficulty making themselves heard or securing attention to their claims. In patronage-based systems, they will be postulants, seeking favours from those with more influence and dependent for their survival on official patronage or charity.

Patron-client networks are not confined to traditional hierarchical and patriarchal societies, but may emerge even within democracies where opportunities for corruption exist and are exploited by dominant groups. Many of these systems are not truly reciprocal, but tend to perpetuate a giver-given relationship that nevertheless maintains postulant groups in a subordinate role.

In these contexts, less powerful or powerless groups exhibit a range of psycho-social responses. In many long-standing situations of exclusion, they may internalise the prejudices of dominant groups, which consider them to be

inferior. This is, or used to be the situation of Dalits (formerly known as 'Untouchables') in India and indigenous communities in Peru and Central America.

Deep internalisation of inferiority is clearly a significant barrier to remedial action of any sort. Amplified by often justified mistrust of official institutions, as well as poverty and illiteracy, it can lead to low self-esteem and depression, inhibiting energy at both a personal and a collective level.

The validating role of myths and collective histories is important to a community's perception of itself. Many Dalits and non-Dalit lower-caste Hindus who suffer similar discrimination accept their status in accordance with Hindu belief that they have been morally guilty in a previous life.³³ The assumption in many post-slavery societies in the Americas of a racial hierarchy based on skin colour was evident in the segregationist South of the United States but also maintained social hierarchies among the descendants of slaves in Brazil and the Caribbean. Such racial hierarchies echoed class hierarchies in the former colonial powers and served to keep subordinate social groups in their place.

Denial may also result from repeated unsuccessful attempts by marginalised groups to demand their rights. In these circumstances, as in all repressive situations, *fear* is the single most important motivational barrier to accessing rights.³⁴ Groups weigh the advantages of claiming rights against the risks and costs of doing so, or failure.

In certain areas that were the theatres of sustained violent repression over many years – for instance, the Luwero Triangle in Uganda or northwestern Somalia (Somaliland) – communities with deep levels of trauma have not only proved resistant to development initiatives but have passed on dysfunctional behaviour from one generation to the next.³⁵ Given the damage that modern internal conflicts inflict on civilian populations, other communities traumatised by extensive and sustained human rights abuse are likely to respond similarly. They may lack the will or confidence to pursue their interests under any new political dispensation.

Racial, ethnic and other social exclusions are deeply embedded in language, history and self-perception, in literature, popular culture and myth. They are ubiquitous and inescapable features of all societies, often expressed

33 These and following examples are drawn from International Council on Human Rights Policy, *Racial and Economic Exclusion*.

34 See Dimitrina Petrova, "Informal Obstacles to Accessing Human Rights", paper prepared for the International Council's meeting on Access to Human Rights, January 2003.

35 See field studies by ISIS-WICCE in Uganda, and by Jane Mocellin and Joop de Jong in Somaliland, UNDP, 2002.

unconsciously; and they are usually reflected in the behaviour of official institutions, notably law-enforcement agencies. Stereotyping and racial profiling may be common, often accompanied by scapegoating of communities that are visibly different. Such attitudes frequently persist after anti-discrimination legislation has been enacted, although anti-discrimination laws do enhance rights of access to groups that are subject to discrimination.

Indirect discrimination is much harder to tackle. It occurs where ostensibly neutral laws and policies are applied unequally or where (as with 'gender-blindness') they generate unjust outcomes. The experience of Roma in Hungary, Slovakia and the Czech Republic provides a telling example of indirect discrimination. In those countries, a disproportionate number of Roma children are classified as having learning difficulties and placed in special schools or classes. Referrals tend to be made summarily, on the grounds that the child has difficulty keeping up or is falling behind.³⁶ Parents are often informed after the event, whereas non-Romani children are usually given opportunities to catch up and their parents are consulted. The education authorities defend the objectivity of their decisions, although the disproportion is evident and it is known that Roma are often stigmatised socially as poor learners, lazy and uninterested in attending school.³⁷

It remains difficult to address social discrimination using law. Stanley Cohen has explored the multiple layers and various degrees of denial, where patterns of human rights violations are 'known' but prompt no reaction from fellow citizens, whether out of a sense of self-preservation, or from a process of blaming the victims who 'only get what they deserve'. Ultimately, this apparent failure of the sympathetic imagination on the part of otherwise 'normal' citizens prompts Cohen to note that "the problem is not to explain how people 'deny' – but how anyone pays attention".³⁸

Insecurity

Most of the large groups of people who suffer from exclusion are also poor. This raises specific issues for organisations in government that seek to provide services more effectively, and for human rights organisations that wish to work in ways that are more relevant and useful to poor people.

³⁶ This is also due, often, to the fact that the class is being held in a language that is not the Roma child's first language, and with limited facilities for them to gain an adequate understanding of the dominant language. It is also sometimes due to discrimination on the part of the teacher and the other children in class.

³⁷ Petrova, "Informal Obstacles to Accessing Human Rights", p. 13.

³⁸ Stanley Cohen, *Denial and Acknowledgement: The Impact of Information about Human Rights Violations*, Jerusalem: Centre for Human Rights, the Hebrew University of Jerusalem, 1995.

The 2003 Commission on Human Security report discussed many forms of insecurity and noted that security implies different things to different people.³⁹ For very poor people, insecurity has an immediacy that those who have more resources find hard to take fully into account. Rural and urban communities naturally experience different economic cycles, of course. In rural communities, poor people may have enough food for part of the year, while regularly experiencing shortages in other parts of the year. People living in cities, by contrast, may experience day-to-day uncertainty – solvency one week, indigence the next. In both cases those who have no ‘capital’ to fall back on or are without a steady income are permanently scrambling to make ends meet, and sometimes literally struggling to survive. As the testimonies collected for the *Voices of the Poor* World Bank project illustrated, disaster can overtake very poor people at any moment – as a result of illness, the death of a relative, a theft, a sudden storm. Choices are determined by the need to reduce insecurity, and people who are insecure cannot take risks lightly.

This helps explain many patterns of behaviour that sometimes seem irrational to people who have more resources. Social rituals involving considerable consumption may be important, because they cement relationships, which provide elements of security. People may accept expensive forms of borrowing, because they provide immediate help. They may spend surpluses, rather than save. They may even knowingly take life-threatening risks to meet urgent short-term needs. Parents may remove their children from school, though they know that education offers the only long-term path to greater security for their family, and so forth.

In sum, very poor people cannot defer benefits because their insecurity is so immediate, nor can they afford to take initiatives that might increase their level of risk – to put trust in people they do not know or resources into activities that have uncertain outcomes. *They cannot afford risk.* This has important implications for officials who seek to develop government programmes that increase the effective entitlement of very poor communities – particularly where those communities have long experience of being ignored, abused or exploited by state officials.

There are implications too for human rights activists. In particular, activists who seek to develop a human rights culture and human rights actions in poor communities need to ensure that their programmes will deliver immediate useful benefits for the communities concerned. However valuable they may be in the long-term, strategies that depend on taking cases to court, or engaging in processes of legal or institutional reform, are unlikely to attract

³⁹ Commission on Human Security, *Human Security Now: Protecting and Empowering People*, May 2003. The report can be accessed at www.humansecurity-chs.org/finalreport/index.html.

the attention, let alone the support, of very poor communities unless they are accompanied by actions that tangibly increase rather than reduce the community's security. For human rights organisations, which often deliver ideas rather than resources, this can be challenging.

The issue of trust also needs to be considered. As noted, poor communities have little trust in national or local government, while there is almost universal mistrust and resentment of police. All the same, there is no more than conditional trust for non-governmental organisations and religious organisations that are external to the community. In effect, these are trusted to the extent that they are helpful and deserve confidence. In most such communities, strong expressions of trust are confined to the communities' own leaders – though these individuals may be relatively unable to exert influence on outside institutions or provide resources to members of their communities. This means that in many countries officials face an uphill struggle to build the links with society on which effective governance eventually depends.

It also suggests that, if human rights organisations do wish to work in ways that will be useful to very poor people, they too will need to win their confidence – and this can probably only be done by working locally, in face-to-face ways, in many different communities. This in turn requires skills which many human rights organisations have not developed – but which many community, religious and development agencies have – and also a great investment of resources and people. Where are these to come from? If they are to engage effectively with very poor communities, human rights organisations will need to complement or develop the range of their current activities and in particular

- move out of the centre of cities,
- avoid abstraction,
- develop programmes that provide concrete benefits,
- establish a presence in numerous individual communities, and in many instances
- recruit and train staff who can work in, and be accepted by marginalised communities.

In the next sections, we look more closely at how different kinds of institutions have responded to the challenge of access, before returning to the question of what official institutions and human rights organisations might do to improve access for those who are excluded and marginalised.

III. INSTITUTIONAL RESPONSES

Numerous official institutions have a responsibility to provide resources and protection to individuals and communities. They include government ministries, judicial bodies, and police and law-enforcement organisations. The responsibilities of these bodies may or may not be framed in language that directly draws upon human rights principles. In almost all societies, however, state institutions have statutory obligations to provide assistance to members of the community who are in acute need and protect the security of citizens.

Below national state institutions lie tiers of local government, which have similar responsibilities devolved to them. In addition, a range of intermediary institutions, independent but linked to the state, include ombuds offices, human rights commissions and anti-discrimination agencies. In general, such bodies were created more recently and are more likely to frame their responsibilities in terms of human rights principles and international human rights law.

In civil society, numerous organisations accept a responsibility to support, defend, or protect members of society against the vicissitudes of life or abuses by the state, business or other actors. They include trades unions, formally-constituted NGOs, faith-based institutions and similar bodies.

This section looks at the performance of organisations of these kinds, focusing on the degree to which they enable very poor and excluded sectors of society to access their rights. In the following chapter, we look at the performance of informal organisations, to which those who are very poor and excluded themselves belong – social movements, community organisations, and traditional decision-making bodies at community level.

Formal institutions of government

The performance of governments and government officials varies widely – from outright repression via benign indifference to energetic and enlightened reform. No government is homogeneous; there are differences of approach among top officials, some of whom may support reform, while others delay or impede such initiatives for political or other reasons. The most well-meaning reform initiatives can fall foul of countervailing interests and allegiances, by failing to act strategically or excluding key allies from civil society. State institutions in many countries are bureaucracies that lapse into inertia in the absence of concerted public representation and advocacy. In some instances,

attempting to reform them may not be the best option for rights advocates. Civil and media campaigns may produce better results.⁴⁰

This being said, the role of the state is crucial in ensuring (or obstructing) access to rights. This raises essential questions of responsibility and accountability that cannot be confined merely to matters of (law) enforcement. State responses to poverty, for example, generate particularly sharp issues. In many cases, social aid programmes that grant subsidies, food or other kinds of resources are the only 'positive' interaction that poor communities have with the state. While these programmes often help recipients to survive and endure extreme poverty, in general they work against human rights access, because they consider people to be *beneficiaries* of these programmes rather than *subjects* entitled to rights. In these circumstances, social assistance programmes tend to reserve and entrench unequal relations of power and status.⁴¹

It is true that lack of financial resources is often a real constraint on governments – though many have been guilty of allocating resources to prestige projects or arms purchases to the neglect of social responsibilities. Budget audits, along the lines of the 'gender audits' initiated by women's rights groups,⁴² can be undertaken by civil society groups as a way of increasing public accountability.

However, it is clear that many poor countries are unable to generate the funds they need to respect international norms and obligations, particularly in the areas of social and economic rights. The funds are simply not available to support the programmes, salaries, equipment, and training required. While some monies will be available from outside donors, it will not be enough, and overdependence on external donors is not desirable to the extent that it is not sustainable.

Inadequate foreign aid or inappropriate sanctions, unfair trade policies and debt obligations, as well as domestic laws and policies that favour an elite, or cause unemployment, can all deplete the supply of funds available while swelling the numbers of people who need assistance.

Corruption is pervasive in many societies: it penalises the poor, denies revenue to government and siphons funds away from productive activities. In very

40 See Stephen Golub, "Access to Human Rights, Obstacles and Issues", paper prepared for the International Council's meeting on Access to Human Rights, January 2003.

41 Martín Abregú, "The Work of Formal Institutions in Providing and Ensuring Access to Human Rights: An Experience from Latin America," paper prepared for the International Council's meeting on Access to Human Rights, January 2003, p. 11.

42 "Gender budgeting" is an audit of governments' resource allocation in terms of women beneficiaries. These exercises have demonstrated how budgets are overwhelmingly slanted in favour of men's interests at the expense of women's. See UNIFEM press release of 18 October 2001 at www.undp.org/unifem/newsroom/gender_budgets.html.

poor societies, corruption can also be understood as a survival strategy, for officials who need to maintain an extended family network of dependants, and for their dependants who would otherwise be indigent. For the wider community of poor and excluded people, however, such practices prevent them from earning their living or obtaining services and rights to which they are entitled. Within judicial systems, corruption does enormous harm, further alienating those who might stand to benefit from fair application of the rule of law.

Bribery – not to speak of low moral and poor performance – are common where officials, including police and prison officials, have low pay and poor conditions of service. The frustration they cause also increases the incidence of police brutality against prisoners and suspected criminals.

Sentencing judges may rarely visit detention centres and prisons to see for themselves the abusive conditions to which they consign offenders. Only in recent years has community service for petty and first-time offenders really provided a workable alternative to the worldwide penal obsession with custodial sentencing. Prison affects the poor and marginalised – those unable to pay bail or fines – disproportionately.⁴³ Moreover, imprisonment unfairly penalises prisoners' families, who are often deprived of their breadwinner, and it isolates first-time offenders among hardened criminals, which may reinforce their criminal behaviour, rendering any return to the law-abiding community problematic.

Many prisons in poor countries function as microcosms within their own economy: anything can be bought – by those with the means to do so – but those without are abused and marginalised even within this marginal community by warders and prisoners who are power-brokers. Access to their rights for those at the bottom of the pile can only be achieved by radical policy changes backed up with financial support, and often it is only voluntary penal reform and human rights groups which draw public and political attention to years of neglect and abuse.

Petty corruption by officials works in tandem with patronage systems. Patronage blends with exclusive personal networks and clan or ethnic allegiances, which proliferate within power-broking institutions in many, if not most societies, to the exclusion and detriment of those without access to them. Favours, protections and services which should be available to all *as of right* are instead subject to preference based on kinship, 'old boy networks', personal indebtedness, common ethnic or political allegiance, whether freely entered into or imposed by force or threat.

⁴³ Although many of the excluded may engage in illegal or criminal activities as a survival strategy.

These are in many ways the antithesis of a rights-based culture, and extremely difficult to eradicate, since they flourish in enclosed, opaque institutions and serve their own logic of restricted mutual accountability. They often create systems, procedures and laws that bolster their own interests, against which those from small communities may be powerless to protect themselves. Mafias are only an extreme example of this type of political economy. Private clubs and exclusive professions represent more harmless variants.

Private interests may also influence agents of the state in ways prejudicial to particular social groups. Corporate interests have long been known to influence public policy, of course. However, private interests can also mean dominant or majority groups in society. In addition to undue influence in the form of bribes, threats, and other forms of inducement, these may share with the officials attitudes and biases against such groups – women, workers, tenants, asylum-seekers and so on – which serve to undermine the affirmative impact of policies and the impartiality of the law (where the law is not itself skewed by bias).

In many 'exclusive' and transitional democracies, elected politicians may be influenced by and exploit popular sentiment against subordinate or excluded groups to win favour and votes, often in alliance with sections of the media. The current campaigns against asylum-seekers in several 'Northern' countries are a case in point. Popular sentiment against them has reached a pitch unthinkable only a few years ago, against which rational arguments and descriptions of the rights violations that prompted their flight seem to have little impact. The voices of the refugees themselves are rarely heard in the popular press, while their rights – even of basic subsistence – have been whittled away by governments seemingly intent on deterring them by all conceivable means from exercising their right to seek asylum.

These trends are not confined to rich countries. Under pressure from parliamentarians in refugee-hosting areas, the Tanzanian government has since 1996 engaged in the forcible removal of recognised Convention refugees, some of whom have lived in the country for thirty years or more, leaving Tanzanian dependants behind them. The very protection regime that has safeguarded the rights of asylum-seekers and refugees for fifty years now appears everywhere at risk.

Ignorance of such internationally recognised rights, coupled with a lack of legal training among government officials working with disadvantaged groups, also impedes access. Such training as exists may be purely technical and devoid of any rights component which might dispel gender and other bias. Thus, pervasive societal attitudes may persist in public places: that a rape victim is at fault, that the poor do not deserve assistance, or that asylum-seekers or prisoners have no rights. Coupled with this is a failure to understand

that some members of excluded and particularly vulnerable groups may have no choice but to live on the fringes of legality.

In those societies where widows are dispossessed by their in-laws, many may turn to prostitution or illicit brewing to eke out a living as a basic survival strategy. Petty thieving and glue-sniffing are common among children abandoned on the streets of many cities around the world. Illegal migrants do not work in exploitative sweatshops out of choice. Yet people cannot themselves be 'illegal'; it is the law that defines their status and too often law enforcement officials do not make allowance for the straitened circumstances and limited choices within which most migrants have to survive.

Access to human rights for the poor is fundamentally constrained by the paucity of free legal aid and of services such as legal literacy training, advice and representation. Even where they may know their rights, lack of financial means to make use of courts and other available mechanisms inhibits access to them. Where state legal aid is provided, it is often underfunded or, in court cases, may be allocated to inexperienced junior counsel who fail to provide an adequate standard of advice, most notoriously in capital cases. In the United Kingdom, for instance, abuse of the state legal aid system by law firms led to the creation of a watchdog body to ensure that standards of representation were maintained.

The shortcomings of legal aid are compounded by non-existent or inadequate dissemination of legal information by government, the media, schools and voluntary associations. Restrictive practices by bar associations, which may appear more intent on guarding their own arcane knowledge of the law so as to preserve their professional mystique and prices, rather than assisting non-experts to understand and use it, have proved major impediments to accessing rights through law. The training of paralegals in some countries of Asia and Africa has shown that many disputes brought before the courts can be resolved at community level without recourse to lawyers. The spread of local alternative dispute resolution techniques is proving a popular route to distributive justice, which bypasses the courts. These strategies also help to increase the legal literacy of local communities and increase their confidence both in themselves and in a system of justice closer to their culture.

Intermediary and local institutions

In many countries, national human rights institutions (NHRIs) have been set up to provide an intermediate interlocutor between governments and people, with a view to prompting action on human rights abuses within the country in question. Such institutions can take many forms, as ombuds offices, peoples' defenders and human rights commissions. They may be entrenched

constitutionally or created by parliament, as government departments or part of the public prosecutor's offices.

This movement received international recognition when the Paris Principles were approved in the early 1990s.⁴⁴ These provide guidelines for the creation and terms of reference for national human rights institutions. They also serve as benchmarks for assessing the independence of NHRIs and evaluating how well they accomplish their objectives. It is still not entirely clear why some succeed and others do less well. Legitimacy, networking with like-minded bodies, popular acceptance, accessibility and interaction with them are, however, key components of their success.⁴⁵

The exact role of NHRIs in relation to the law and to government needs spelling out and explaining to excluded groups, as a way of educating them about their rights and remedies, but also to allay their fears of engaging with official bodies. Education reduces the risk that complaints will be received only from an educated minority. For the same reason, a purely complaints-led approach should be avoided in favour of a strategy that identifies key needs and vulnerable groups, and responds proactively to them. This requires a more programmatic approach, backed up with research, as well as a participatory and action-oriented methodology that can engage positively with disadvantaged communities.

The context in which NHRIs operate will determine to a significant extent whether or not they prove successful. Where there is perceived impunity for perpetrators, NHRIs may not make much impact on the conduct of government officials. While national human rights institutions can promote and validate a human rights culture in the right circumstances, they can equally remain ineffectual when they operate in a political culture that is antagonistic to human rights.

The same may be said of decentralisation. As part of a general trend to strengthen governance, in recent years many states have devolved some powers to lower tiers of government.⁴⁶ To the extent that such reforms bring policy- and decision-making closer to local communities, they have the

44 At the initiative of the United Nations Office of the High Commissioner for Human Rights, which has continued to support and monitor such institutions. The detailed set of principles on the status of national institutions was first developed in 1991 at a UN-sponsored meeting of representatives of national institutions held in Paris. These principles were subsequently endorsed by the UN Commission on Human Rights (resolution 1992/54 of March 3, 1992) and the UN General Assembly (Resolution 48/134 of December 20, 1993).

45 See International Council on Human Rights Policy, *Performance and Legitimacy: National human rights institutions*, Geneva: ICHRP, 2000.

46 See International Council on Human Rights Policy, *Local Rule: Decentralisation and human rights*, Geneva: ICHRP, 2002.

potential to improve access to rights – both democratic rights (to participation, to information and so on) and to economic and social rights (housing, environment, clean water, health, education services, and so forth).

Through the election of local officials, decentralisation can provide for the direct exercise of civil and political rights of consultation and popular participation, as well as for accountability of local elected officials to their local constituencies. By including quotas for women, lower castes or minority groups, it can enhance their involvement in decision-making through affirmative action and thus empower them. It also has the potential to provide for greater minority and indigenous participation in public affairs, thereby reducing latent conflict and providing an alternative to secessionist movements.

However, these benefits may prove non-existent in areas where there is an underlying culture of corruption, patronage, patriarchy and non-accountability. Where central government powers are devolved into such a setting, reform initiatives may be undone or reversed. Central power may be lost to traditional local elites associated historically with human rights abuses, who seize this opportunity to re-empower themselves at the expense of their 'historic subordinates'. Without proper accountability to central government, local councils can slip into bad habits: diversion of funds, corrupt allocation of local contracts, manipulation of elections, biased appointments and other forms of favouritism, all involving discrimination and lack of accountability to their local constituencies. The result will be a further disempowerment of local communities and disadvantaged social groups.

Decentralisation, even when well-managed, can also accentuate regional disparities and highlight ethnic divisions where these have been the basis for drawing district or provincial boundaries. In the Russian Federation or China, for instance, richer regional or city authorities have used their local government powers to restrict rights of access, residence and participation for 'outsiders'. Control of such local fiefdoms will tend to benefit certain groups at the expense of others. To be successful in terms of human rights, therefore, decentralisation needs to be democratic in character. Because the process of democratisation may also generate conflict at local level – as in India, where entrenched elites have reacted violently when challenged by lower-caste or women candidates for office – decentralised institutions also need to be plural in their composition, to provide legitimacy and develop trust within the community.

Human rights organisations

Paradoxically, human rights groups have been open to accusations of ignoring certain glaring social disparities and rights violations. The criticism has resulted in part from their early concentration on civil and political rights and comparative

disregard of social and economic rights; and in part from an unwillingness to involve themselves in political activities such as with social protest movements that have been the engine driving change among many disadvantaged groups and sectors of society.

Focusing on the legal and constitutional dimension of human rights has led some human rights groups to neglect social movements premised on community self-interest – the ‘we’ as distinct from the ‘all’ of international conventions. Yet it is often from these communal struggles that new rights cultures have been forged. We have already mentioned how the women’s movement appropriated the language and methods of rights to pressure human rights organisations into recognising that women’s rights were also human rights. Many poor and marginalised communities do not yet see themselves or their interests reflected adequately in the work of human rights organisations, which will need to develop new and imaginative approaches to meet this challenge.

The focus of human rights law on state responsibilities led human rights organisations to concentrate initially on national governments and on civil and political rights. The state was perceived as an adversary, to be monitored and held to account. Human rights in the private domain (violations committed by domestic, non-state or proxy actors) and the more difficult issues of accountability raised by social, economic and cultural rights were not addressed in a serious way until relatively recently, often as a result of campaigning by groups working from outside the mainstream human rights movement – as seen in the case of women’s rights. Human rights organisations are now considering a wider range of actors, including violations of rights by businesses and other non-state actors, and are more consistently undertaking work on social, economic, cultural and latterly, environmental rights.

Broadening the human rights mandate has been beneficial, because work has begun with communities and social groups who had hitherto been neglected, and because this new thinking has restored the notion that all rights are interconnected. Human rights organisations are not only addressing many new areas of concern – bringing the rights to free speech and representation to bear on efforts to safeguard threatened environments, for example, or working to ensure that girls from minority communities have the same entitlement to adequate education as boys. The ‘human rights framework’ has also become more relevant to those working in related fields, such as development, economics and humanitarian action, prompting fruitful debate about how these different strategies can be reconciled, both at NGO and inter-governmental level.

In the process, human rights NGOs have begun to reposition themselves in relation to the state. The latter remains the principal target of human rights

advocacy because it is responsible for committing most human rights violations and carries the greatest and most direct responsibility, under international law, for protecting human rights. It can be an ally as well as an adversary, nonetheless, and various forms of co-operation have emerged between civil society and government in recent years, particularly in countries where governments have formally integrated human rights principles into their domestic law, and their domestic and international policies.

However, the relative success of campaigners in 'mainstreaming' human rights principles conceals an obvious danger. States do not cease to breach their obligations under international conventions merely because they have signed and ratified them, and many continue to violate or deny rights to some of their citizens and non-citizens. Human rights NGOs therefore need to remain vigilant and identify violations by official institutions even while co-operating with them to improve their capacity.

The unwillingness of many human rights organisations to get involved in the raw work of political advocacy, particularly as it is conducted by many mass social protest movements, is often ascribed to the fact that they see themselves as non-political and objective, and thus *au-dessus de la mêlée*. This attitude is somewhat reinforced by the legal character of much human rights thinking, which distances the approach of some human rights organisations from forms of community struggle that tackle multiple social problems and use different approaches to do so. At the same time, new human rights values and new human rights issues have frequently emerged out of these grassroots community movements.

Indeed, social protest movements deserve closer examination by human rights activists. They bring huge energy to new issues, and challenge the human rights movement to take on board new social justice initiatives and position themselves more closely to groups and communities that are claiming their rights. At one level, professional human rights organisations feel a legitimate reserve: there may be good reason for saying that some social and community movements are talking about *needs* rather than rights. There may also be concern that social protest movements may be subversive and support illegal action, and in so doing may undermine the rule of law and thereby worsen protection of rights in the country.

Nevertheless, if human rights organisations wish to be useful to communities that are excluded and very poor, they need to *engage* – and this implies engaging more actively with social movements and community organisations of all kinds. As noted earlier, in doing so, organisations that come out of the human rights tradition – particularly the tradition that has used legal advocacy to protect civil and political rights – need to understand that very poor people are wary of taking risks, and will avoid taking actions that do not bring

immediate and tangible benefits. Human rights strategies here must therefore be practical. Activists must also be prepared to invest in local relationships over a long period. In this respect, institutions that have deep local roots, including community and religious groups, may be natural allies for human rights organisations, which are often small in number and size, dominated by middle-class professionals and based in urban centres.

In the final analysis, the failure of democratic societies to guarantee successful access to rights for the very poor and excluded represents a challenge to human rights organisations. Establishing and monitoring the law is not enough. New thinking and new forms of action will be required, and human rights organisations will need to develop new strategies if they are to be relevant and useful to people who are currently excluded.

Other civil society institutions

Many civil society associations and networks are rooted in local communities. Where this is so, they may not face the same dilemmas as human rights and other intermediary groups. Movements for social justice are the most visible and dynamic sign of civil society's capacity to champion the rights of the excluded.

Though widely used, the notion of 'civil society' remains somewhat ill-defined. The World Bank speaks only of non-governmental organisations (NGOs) and community-based organisations (CBOs), which it classifies as either "operational" (in humanitarian action or development) or "advocacy" (which seek to influence policy and practice). Others refer to CBOs as "grassroots" or "people's organisations" composed of individuals who come together at local level to further their common interests (e.g., credit circles, youth clubs or co-operatives); and NGOs as "intermediary" groups formed to serve others at national or international level, through service delivery or advocacy. In this context, NGOs are open to criticism when they disempower CBOs or communities which they profess to serve.⁴⁷

There is growing interest in understanding civil society and the variety of roles that local communities and actors play in relation to the state and devolved local government institutions. In a country like Somalia, where central government has broken down in the south and centre, civil society organisations have expanded to take on a range of functions that were formerly the preserve of government – including development initiatives, relief, rehabilitation and reconstruction. They act as service-providers, advocates

⁴⁷ See Dawit Zawde, "Changing the Approach to Capacity-Building", *ICVA Talk Back* 3-4, September 12, 2001.

and peace-makers.⁴⁸ Somali civil society has created community-based universities in the north, and hospitals and courts in the south. Moreover, the components of this civil society comprise not only CBOs and NGOs on the 'Northern' model, but traditional craft and fishing co-operatives, local clan elders, religious leaders, women's and youth groups, credit circles, sports associations and professional associations of teachers and lawyers, poets and composers.

In countries like Mexico or Tanzania, or in Eastern Europe, by contrast, one-party states were entrenched for a prolonged period and civil society, independent of the state, never really emerged. People worked around and outside state-sponsored institutions to tackle local land and environmental issues, but had no truly independent mechanism to challenge the state or its local representatives. Independent civil society institutions and a culture of contestation have accordingly taken root after democratic reform, but only slowly. This points to the need to examine each situation in its own terms and context. Outside organisations may do harm too, if they force the pace for new civil society bodies which have yet to find their voice or lack confidence to tackle controversial issues. The pace of change needs to be set by those with a direct stake in the issues involved.

This said, local social movements have frequently been powerful agents of change. Landless peasants or communities displaced by dams or major development projects have often developed their own solutions and, in doing so, asserted their rights. They have not always succeeded, of course, but, even where they have not, they have often transformed public and political attitudes.

Such movements can appear in repressive political contexts where communities have no way to make their voices heard. In making their demands – on the state, on local landowners, on development agencies – protesters forge a new political agenda, sometimes using human rights language. Rights language may also be used by institutions that are under attack, and repressive authorities will often label social movements as illegal, violent or criminal.

What role do human rights organisations have in helping to manage or reduce the risks and costs associated with social movements? (Advocates also need to consider the costs to repressed and excluded populations of *not* having access to their rights.) Many of those who are extremely poor and disadvantaged know these costs intimately, of course, and base their daily survival strategies on a practical assessment of risks that are often life-

⁴⁸ See NOVIB Somalia, *Mapping Somali Civil Society*, Hargeisa-Nairobi, 2003.

threatening. Human rights activists need also to understand the perspective and experience of such groups.

As noted above, in many societies, marginalised groups are often held in forms of dependence – by private and family patronage, or caste relations, for example, or alternatively by state hand-outs or other discretionary social benefits. People often regard those that provide such help as their protectors and may not conceive of their claims for help in terms of rights or entitlements. If they come to do so, for example in the context of public education or advocacy by human rights and other civil society organisations, this can have explosive consequences, politically and for social relations between those involved. Here again, the insecurity of vulnerable groups needs to be taken seriously. This implies thinking through the interests of such communities, to identify their key demands, their immediate needs and their political and economic vulnerabilities, and ensuring that campaigns for reform are feasible and have a realistic probability of success.

The complexity of working in such contexts is well illustrated by the experience of human rights NGOs in *favelas* in Rio de Janeiro. After a number of violent raids, the police withdrew from one *favela*, leaving drug-dealers to occupy the vacuum thus created. When members of the community launched several initiatives to deliver services which had previously been delivered by government officials, a human rights NGO from outside the *favela* offered to provide legal aid. It found, however, that the community was not really interested in using the courts, but preferred to solve disputes through local customary methods. Eventually, the group therefore switched its focus to supplying this need.

The lesson for this organisation was that litigation as a rights strategy was a last resort for people distrustful of the justice system. Not only could they not expect to get a fair hearing in the courts, but they were afraid of being exploited by human rights litigators acting in their own interests rather than that of the community. Most of all, the *favela*-dwellers wanted their voices heard by those who lived on the *asfalto*, more prosperous neighbourhoods with tarmac roads. They asked the organisation to help them get their message across this physical and social divide. Here again, the strategy was determined by the intended beneficiaries, in ways the human rights activists might not have considered or prioritised.

Such work requires long-term commitment from human rights organisations. Time is required to build up the trust of the community and follow programmes through. In northern Nigeria, a women's rights group has adopted a range of strategies, some confrontational, all of them imaginative, for assisting local women, both Muslim and Christian, in situations of high inter-communal tension. In this work, the organisation is conscious of ethical considerations

in suggesting options to the intended beneficiaries, always leaving the choice of strategy to them. This has led to a constant reinvention or reconstruction of rights, based on the local assertion of rights in terms that local women can relate to. In Nigeria, this may imply finding solutions that match Shari'a law more than international human rights law, if this is what the local women's interpretation of the Shari'a requires.

Similarly, Somali women in Baidoa say they are happy with the local Shari'a courts they helped set up, since these dispense a justice which the women approve of and which is acceptable to the community at large. Exercising the right to choose one's preferred system of justice is here the key to access. In the next section, we consider in more detail some of the alternative and informal systems, which excluded or marginalised groups often prefer to formal mechanisms of redress.

IV. INFORMAL RESPONSES

Large numbers of people in communities worldwide solve their problems using mechanisms and remedies outside the formal structures of the state. Not only courts are bypassed; they also have little or no contact with social security systems, educational institutions, or official development agencies. For many, the family and the immediate community provide social security, with an emphasis on collective duties and responsibilities to family members. Within this close framework, the extended family and the immediate community supply the primary mechanisms that define and protect rights.

In traditional communities, the extended family provides many things: it socialises and transmits values, controls and disciplines, determines access to property, mediates and arbitrates conflict, and is a safety net in difficult times. Where land is held in trust by the family for generations, family members are guaranteed access to subsistence and shelter based on their need. Family land-holding is thus the basis for certain protections of economic, social and cultural rights, providing a bulwark against forced eviction, homelessness and denial of livelihood and human dignity, in economies where ties to the land determine status as well as well-being.⁴⁹ In such societies, the loss of status and ties to the land through banishment or ostracism is the highest form of punishment.

However, these protections are not usually conceived as human rights, formally speaking, but rights that accrue to members of the collective. Traditional communities are often discriminatory towards women, especially those who marry into the family and who may return to their parental home on separation or divorce. Women may have no right to participate in family decisions in some traditional families; in others, matriarchal authority may be as strong, or stronger, than the patriarchy prevailing in the public domain. Here again, cultural context will determine a wide variety of gender and other political roles. Religious and customary law will also set out rules for family law, relating to identity, property, marriage, inheritance, divorce and other areas of mutual obligation.

Traditional local mechanisms

As we have seen, members of insecure and marginalised communities will tend to avoid official structures and prefer informal ones. The official court system is often difficult to access, speaks a different or legally complex

⁴⁹ See Chidi Odinkalu, "Informal Responses to Access to Human Rights", paper prepared for the International Council's meeting on Access to Human Rights, January 2003.

language, and adopts intimidating, off-putting procedures. Claimants are by no means sure of receiving a fair judgement or satisfaction, since their case may be thrown out, subject to endless delay, or taken to appeal by powerful and wealthy adversaries. Local traditional systems of adjudication, on the other hand, are perceived to be approachable, affordable, familiar and culturally relevant. They are conducted by community leaders, who speak the local language and understand local problems, and their rulings are likely to be accepted by the community at large. The process is not usually adversarial but involves consensual rulings, which will allow community members to continue living side by side.

In this respect, they can be effective, and politically legitimate, without necessarily meeting international standards of fair trial or other human rights norms. For example, they tend not to recognise women's rights, and are often defined or manipulated by class or caste interest in ways that discriminate against lower castes and classes. Usually, they are not open to appeal, are not accountable (though conducted in public view), and are undemocratic in both their recruitment and procedures. (In these respects, it may be said that traditional systems are no less subject to forms of bias than official institutions and courts.)

These traditional systems, present in great variety around the world but sharing many of the features outlined above, demonstrate the gap that exists between the normative universality of human rights and the lived reality and subjective enjoyment of rights by ordinary people. Human rights principles may indeed be universal; the vigour of informal institutions nevertheless shows that they are experienced and articulated in a wide variety of ways. The effectiveness of such mechanisms in affording access to rights is determined not only by cases won or lost, but by the *quality* of the rulings handed down and the *satisfaction* these afford the applicant. This points to the importance of understanding cultural and psycho-social dimensions when assessing access to and enjoyment of rights.

These mechanisms also highlight the tensions between collective and individual rights. In certain societies, collective remedies may provide 'satisfaction' because they restore harmony between families and clans, but at the expense of individuals (often, but not exclusively women). From a human rights viewpoint, any subordination of individual to collective rights is difficult to tolerate. From a traditional view, however, the individual enjoys in the context of the collective and when the collective's rights are satisfied.

If, for instance, a woman rape victim seeks to contest a settlement which requires symbolic reparations to be paid to her parents, she may be condemned for dissent or lack of respect because she has set herself against her family. The only proper response, on this view, is one that restores family

honour and harmony by submitting to the collective decision of traditional elders, against which there is usually no right of appeal.⁵⁰

In general, human rights organisations have not done enough to explore the degree to which informal mechanisms solve or fail to solve problems that people have, in ways they consider to be just and legitimate. The strong emphasis in human rights law on the state's responsibility to protect and promote rights has caused human rights groups (along with other commentators) to ignore or denigrate their role. Nor should it be supposed that such mechanisms are only to be found in the South. From the Irish *Mehele* to the Kenyan *Harambee*, local mutual aid systems around the world provide forms of communal solidarity that protect people against insecurity and provide a counterweight to external powers; 'If we want to achieve our rights, we must do so together.'

Often, moreover, it is within such local processes that a culture of human rights is likely to take root. Certainly, it is unlikely to endure if imposed from above. Here too, the role of classic human rights organisations in promoting such cultures is a delicate one. They run the same risk of disempowering local initiatives as some development NGOs do when they promote community-based initiatives. As international human rights organisations have been able to amplify the demands of local human rights groups, so strategic alliances between national human rights groups and local social movements may help articulate in rights terms and advance the claims of those acting at community level.

An example may be found in the field of reproductive rights, which emerged from the struggles of women's organisations worldwide. Campaigns by international women's rights groups against female genital mutilation (FGM) as practised in Sahelian Africa and the Horn contained a strong rights message, but had little influence within most of the communities concerned. The countervailing argument for FGM at community level – that girls who failed to undergo it would never become fully adult and thus never marry and become full members of the community – proved to be strong. Refusing FGM meant ostracism and loss of identity.

Changes to these attitudes, and to social practise, could only come from within the community concerned, when community leaders (men as well as women) challenged them. They have been supported by women's rights groups, who have provided moral support, ideas for alternative rituals, arguments about health risks, and even alternative livelihood options for the traditional midwives whose job it is to perform the operation. However,

⁵⁰ Michael Ignatieff explores this dichotomy and concludes that group rights are needed to protect individual rights and vice-versa. See *Human Rights as Politics and Idolatry*, pp. 63 ff.

'ownership' of the struggle to change local patterns of behaviour remains with the community concerned.

In more explicit social campaigns, such as strike action by local peasant groups, human rights and other groups can provide alternative sources of livelihood, as well as contacts, innovative ideas, lobbying skills and publicity. Human rights activists in India set up a co-operative to provide an economic alternative for people at risk of being discharged when they agitated for their labour rights. In Mexico, where forced unpaid labour is forbidden, a human rights group helped a traditional community in Oaxaca redefine communal labour as tax paid in kind. Both these cases are examples of human rights work that was successful partly because it was both imaginative and generated immediate and tangible benefits for the community involved. Innovative thinking of this sort also requires patience and dialogue on both sides (and, in the Mexican case, lawyers who were flexible in their application of statutory law).

Women's group in northern Nigeria (see previous section), working in tense and difficult circumstances of inter-communal violence, have employed a wide range of strategies without worrying too much whether they were using a human rights approach or not. They found themselves constantly redefining rights issues that arose, using terms the communities could understand, citing Koranic texts where necessary, and always basing their approach on local assertions of rights. In this respect, they interpreted the women's demands to the authorities, while giving the women access to a wider network of contacts for support and publicity.

Customary law

In countries that were colonised, customary laws and practices were subordinated to Roman or Common law systems, or a combination of both.⁵¹ Even in countries that were not colonised, such as Ethiopia or Turkey (both imperial powers in their own right), foreign laws were introduced as part of the modernising process during the twentieth century, with consequent subordination of existing customary and religious laws to those on the statute books. A majority of the world's population may therefore be said to experience their formal legal system as something alien in relation to customs with which they are familiar. Moreover, many of these millions hold the law in low regard or even disrepute, considering it to be a façade behind which powerful interests manoeuvre in support of their interests.⁵²

⁵¹ English common law was itself a codification of customary law, as the accumulation of precedents in its jurisprudence indicates. Roman or Napoleonic law is by contrast prescriptive in nature.

⁵² See Ellis, "Human Rights Respected in Law, Abused in Practice", p. 8.

Colonial regimes either repressed customary laws under the assimilationist systems preferred by France and Portugal, or subordinated them as Britain did, using a model of 'indirect rule'. This made use of traditional systems of governance to control the colonised population. The degree to which customary law survived also varied according to whether the territory was considered a settlement or trading colony, a protectorate or a trusteeship, although these distinctions tended to fade with time.⁵³

In several British colonies, customary laws were codified into statute on condition that they were not held to be 'morally repugnant' (a caveat that survives in several post-colonial legal systems to this day).⁵⁴ Since many 'repugnant' practises, such as polygamy, were to be found in the area of civil law governing marriage and inheritance rights, these areas were not legislated for. Statutory civil laws applied only to Europeans, a discrimination that reflected the racial hierarchies of colonial rule. Thus, while some customary laws were codified, those primarily affecting women's status and rights were consigned to the area of 'custom' and effectively ignored by the law books. Only Islamic Shari'a law, dispensed in formalised *kadhi* courts in East Africa and by *alkali* courts in Nigeria, allowed for formal inheritance of property for 'native' women. Under many African customary systems, which co-exist with statutory and religious laws, women only have usufruct rights to property, and lose these in the event of divorce or widowhood.

Co-existence between statutory and customary laws has always been uneasy. The former tend to recognise the latter only when there is no conflict with its own definitions of public policy and natural justice. As states have ratified international human rights conventions and incorporated human rights mechanisms into law, the question of the compatibility of customary law with national Bills of Rights and constitutional safeguards has become a live issue.

In some African countries, customary law is held to be beyond the reach of constitutional standards, for example those outlawing discrimination. By contrast, it has been suggested that the colonial 'repugnancy' test could be reframed to test compatibility with human rights norms.⁵⁵ In South Africa, the Law Commission argued in 1998 for the repeal of the 'repugnancy' clause, saying that it had been superseded by the Bill of Rights. The African Charter on Human and Peoples' Rights recognises the value of traditional African

⁵³ Trusteeship territories were former German colonies in Africa administered by the British, Belgian, French and later South Africans after the two World Wars.

⁵⁴ Thereby ossifying what were very fluid and shifting pre-colonial forms of social organisation. See Eric Hobsbawm and Terence Ranger, *The Invention of Tradition*, Cambridge: Cambridge University Press, 1983.

⁵⁵ See Odinkalu, "Informal Responses to Access to Human Rights", p. 7.

practices, but only those which are consistent with international norms of human and peoples' rights.

Customary systems for dispensing justice are usually undocumented and unregulated, other than by public consensus and the respect accorded to traditional elders for their wisdom and integrity. Such systems function within communities bound by kinship or wider ethnic ties, whose defining entitlements include access to such non-formal systems. However, these are not available to strangers, and are often not available to women. They can be exclusive and therefore discriminate against those who do not qualify for inclusion. Discrimination may also extend to people of low caste, who are sometimes deemed not to qualify because of conquest or tributary status dating back centuries. To the extent that such non-formal systems may appropriate and commodify the human person, they are not consistent with fundamental principles of human rights which assert that all individuals are equal in dignity and possess certain rights as human beings.

On the other hand, customary systems certainly provide access to rights and benefits for many people and have shown proof of remarkable persistence and resilience. Not only do they express the culture in which members have been socialised and grown to adulthood, but they adapt to changing circumstances. They move with people from the countryside to the town and travel with migrants into foreign countries.

Where community members are dispersed around the world, some non-formal systems can even be described as 'globalised'. Traditional survival strategies of nomadic pastoralist groups are to be found in the patterns of emigration employed by Somali families who deploy their members strategically in refugee camps and overseas, from whence remittances can ensure that remaining family members survive in their war-ravaged country.⁵⁶ Within these scattered communities, kinship ties provide lasting mutual support and clan allegiance continues to determine behaviour.

Customary law and behaviour are likely to be reasserted by communities who feel themselves excluded or under threat, in what may be described as a form of 'fundamentalism', a reinvention of or retreat into traditional values. The recent rise of the Mungiki sect in Kenya marked a revival of traditional Gikuyu practices (including attempts to forcibly reimpose FGM) in an essentially urban setting, among disaffected youth from the city slums. Its degeneration into political thuggery echoes the adoption of traditional accoutrements by armed militias such as the Mayi-Mayi in Eastern Congo or rebel groups in

⁵⁶ Cindy Horst, *Transnational Nomads. Somali Coping with Refugee Life in Dadaab, Kenya*, Amsterdam University, doctoral thesis, 2003.

West Africa. Many of the rebel recruits in Sierra Leone were young men who were denied the right to marry and settle down because land (usually allocated by traditional secret societies) was unavailable. They felt they had 'no future' and nothing to lose by taking up arms (often a survival strategy in hard times): in this their choice may be compared to the behaviour of young men who join city gangs in industrial cities.

The links between exclusion and the assertion (or perversion) of traditional values have yet to be explored in depth. Behaviour of the kind described above may represent a breakdown of traditional community life or re-invention and re-appropriation of its more visible traditions.

Alternative mechanisms

In recent years, traditional courts and conflict mechanisms have been revived. Rwanda, for example, faced with the backlog of thousands of cases of alleged *génocidaires*, revived *gacaca* or grassroots community courts to try them.⁵⁷ Local village and district courts were also set up recently in Uganda after the virtual collapse of the formal justice system under successive regimes. These 'resistance courts' were composed of local people, including a quota of women, and dealt with civil matters. The appeals system included a district, provincial and national level, the last being formal courts. However, the justice handed down at local level was often summary. The courts sometimes heard criminal cases well beyond their mandate, and even handed down death sentences. In other cases, traditional patterns resurfaced: reparations for rape were derisory – a chicken or a wheelbarrow – and were awarded to the parents of the victim.

The advances made in promoting local alternative dispute resolution (ADR) appear more promising. National and international NGOs have been involved in ADR training across Africa for a number of years, though very little evaluation of its impact is available in the public domain. One experience among warring pastoralist communities in northern Kenya has deliberately excluded all outside agents, whether of the state or from non-governmental bodies. Instead, it has used participatory ethnological research to help community elders revive traditional conflict resolution procedures and rites. In so doing, they have identified historical sites of former peace accords and produced symbolic

⁵⁷ Despite the lack of procedural safeguards such as representation by a lawyer and the lack of sustained legal training on the part of thousands of local judges, these courts will operate at local level in the presence of survivors of the genocide, who will thus, it is hoped, see justice done locally. However, the degree of 'satisfaction' accorded by these courts can never match the wrong done to the survivors, and the lack of remorse shown by many of the accused does not bode well for lasting reconciliation being attained. There remains the risk of revenge attacks should the courts not live up to expectations.

artefacts – the equivalent of ‘pipes of peace’ – whose existence was previously unrecorded.

This work, initially supported through the National Museums of Kenya, is still continuing, though again its impact on traditional cattle-rustling and cattle-wars (which are now conducted with sub-machine guns) remains to be evaluated publicly. One additional problem, echoing the distortion of traditional values touched on above, is that the young warriors in such age-set communities no longer respect their elders in the ways that tradition demands. The insertion of new and powerful technology in the form of small arms may have damaged beyond repair the traditional mechanisms of reconciliation and reparation.

Many NGOs provide legal aid to broker settlements amicably rather than in court. A written agreement (to abstain from future domestic violence and abuse, for example) entered into before an NGO paralegal or jurist, can sometimes acquire almost the same level of status as a court judgement. In Uganda, the Association of Women Lawyers (FIDA) is one organisation that promotes this kind of solution, which is particularly efficient in urban environments.

Customary systems should not be romanticised; they are not a miracle solution. They are open to manipulation and may endorse violations of internationally recognised human rights. They merit analysis and dialogue with their proponents because of their human rights potential. They are more relevant than ever because they have spread among diasporas across the world.

V. TOWARDS SOLUTIONS

Informal mechanisms present an opportunity and a challenge to human rights groups that wish to reach out to the large number of people who rarely use formal or official institutions. This said, they may complement but cannot replace formal mechanisms. The role of states in protecting and providing access to rights remains central.

Responsibilities of the state

Under international norms but also in practice, states play a key role in initiating reform and ensuring that protective legislation is implemented and complied with. Human rights organisations should continue to bring pressure to bear on governments, because exclusion is sustained by their failure to protect and enforce rights.

Human rights thinking about the state's role remains a work in progress. The most simple model of action assumes that to protect rights it is sufficient to establish a sound legal regime. It is evident, however, that many people remain poor and excluded even in advanced industrial states, which have modern bureaucracies and well-established democratic procedures. It is equally obvious that numerous states are not well-equipped to provide adequate legal or economic protection for their people because they are too poor to support the administration or provide the services required. Other governments, finally, are dysfunctional, even criminal in character: those in authority are incapable and also unwilling to fulfil the obligations that states are expected to meet under international law.

In practice, therefore, human rights organisations relate in more complex ways to state institutions. While some continue to monitor and condemn violations, others are engaged in training and capacity-building programmes in association with government. Some of this work is being conducted in the area of economic, social and cultural rights. A number of governments are also consciously promoting the capacity and participation of civil society in a range of public activities.

Though the inadequacies and incapacity of many states are evident, and human rights organisations have expanded advocacy in relation to 'non-state actors' (business, armed groups, other private organisations), the central importance of states continues to be accepted. It is the over-riding justification for investing effort in strengthening the capacity of government, even where government institutions are particularly weak or corrupt.

In some countries, civil society institutions have taken on quasi-governmental functions. This is the case in parts of Congo-Kinshasa and Somalia, for example, where they provide many essential services. However, civil society institutions cannot replace government; indeed, the effort involved in the countries named above makes visible the need for it. In those parts of the world where customary law upholds collective rights to the disadvantage of women, women's organisations have concluded that they too need an effective state if their rights are to be protected.

Many state weaknesses are generated from below and are local in character. The quality of government is also threatened, however, by market-led models of macro-economic reform. These tend to deregulate markets and privatise economic institutions managed by the state. The effect of such reforms can be profound. In many cases, large groups of people have lost their employment (while others may acquire new jobs). The government's tax base may also narrow, weakening its ability to manage the social costs of reforming or generate the investment required to make reform successful. Unregulated market reform has tended to produce a situation in which, nationally and locally as well as globally, those who are equipped to seize the new opportunities do so while those who are least equipped suffer disproportionately.

From this economic perspective too, the role of the state remains fundamental to the protection of human rights. States alone are in a position to focus the political and economic resources that are required to make the key investments that are essential to a society's long-term sustainability and progress. Provision of education, health services, infrastructure, environmental protection, government (including the penal and judicial systems) and social security are the most expensive investments a society makes. None could be financed adequately by the private sector. In this sense, governments underwrite and finance the large investments that are essential for prosperity, even if they may not run or manage them. Admittedly, state bureaucracies often impose regulation on business, including the poor people's micro-businesses, and this can fuel corruption. Similarly, many states protect inefficient, poorly performing businesses in ways that undermine economic progress and frustrate job creation.

With respect to human rights, only governments can provide social and economic rights protection, through equitable budget allocation and social security legislation. Likewise, only the state and communities of states can properly regulate the behaviour of markets and ensure that economic actors can operate in a transparent and fair economic environment, and that adequate social protection is available to those who are sick, old or would suffer insecurity or loss of rights as a result of economic reforms.

This report has argued, nevertheless, that alternative means of access to rights have a role to play. They are often preferred by those who cannot access their rights. This implies that *both* state and non-state mechanisms can and should be used to improve access. The same applies to strategies. Action to augment accountability and participation, or challenge discrimination and exclusion, can strengthen grassroots social movements, bolster the state's capacity, or reveal abuse. All these goals may be appropriate. According to circumstances and at one level human rights activists are simply facing a familiar dilemma: How best should they engage with the state, which is both adversary and ally?

At another level, nevertheless, this is not so. If the aim is to improve access for the many people who are very poor or remain excluded from services to which they are legally entitled, fresh answers and new thinking may be required – which may have important practical implications for human rights organisations that wish genuinely to become more relevant and useful to such people.

Relevance and 'added value' of the human rights framework

Many communities solve their problems and meet their needs through struggle – and that struggle often generates a new understanding of rights, sometimes new rights. The example of women's rights is often cited in this respect. For many years, the claim made by women's organisations that they were defending and advancing *rights* was contested by some human rights organisations. Eventually, the claim was accepted and as a result many notions that were developed in relation to women were introduced in human rights standards developed for other purposes. The inclusion of women's rights enriched human rights in many areas. Human rights organisations (like all organisations) tend to be conservative in their thinking, and need to be challenged if they are to continue to innovate.

The importance of local processes of campaigning and advocacy are therefore vital both to innovation, and the creation of a culture of human rights, locally and internationally. At the same time, not all advocacy, and not all claims against injustice, involve rights. Indeed, sometimes human rights are best advanced not by invoking international human rights law but by focusing community-level needs and priorities that disadvantaged people have identified themselves.

What, then, is specific about the human rights tradition, and about the human rights framework? What does it offer, to the very poor and those excluded from access to rights, that other forms of action and organisation do not?

The human rights framework and human rights organisations offer a combination of options – some helpful, others less so. Human rights standards are set out in the form of laws that have been negotiated and approved by states. They therefore have the authority of law, at least theoretically. This means, in turn, that human rights is an official language of government discourse (unlike the language of development, or ethics, for example). Moreover, human rights organisations have developed rather precise techniques, which emphasise accuracy and objectivity and attach claims and calls for action to obligations set out in human rights law. When they are most effective, human rights advocates lock governments (and other actors subject to human rights law) into a rational argument based on a consensual understanding of legal obligation. These can be powerful levers of advocacy.

There is, naturally, a downside. Pulling these levers adroitly is a complex matter, because human rights law is both patchy and subject to interpretation. Its obligations are skirted and hedged by conditions and exceptions. This explains partly why organisations that acquire expertise in human rights law are considered to be aloof or elitist by many more popular organisations; and why many professionals in other disciplines find human rights lawyers complicated and abstract. The strengths of human rights can become weaknesses; the framework's holistic and systemic character is a barrier to easy participation in more populist or pragmatic movements.

This is one reason why human rights organisations, particularly those with expertise in legal rights, have engaged less successfully with economic, social and cultural rights than they have with political and civil rights. The economic, social and cultural policy world is not peopled by lawyers and has never been closely governed by law. This said, the fundamental values that underpin human rights command intuitive support from a very broad audience – from economists, developmental specialists and ordinary citizens. These core operational values include the following:

- *inclusion* – all people have dignity and should be treated with respect;
- *no discrimination* – people should be treated fairly;
- *accountability* – those in authority should act justly and be answerable for their actions;
- *transparency* – to make accountability possible, information must be available; and
- *participation* – people should be able to participate in society and in decisions that affect them.

Specific techniques for applying each of these operational values have been developed by human rights organisations, and they have become skilled in

using them. Non-discrimination tests have been developed on the basis of international standards that define different forms of discrimination (against women, against children, on grounds of race, religion and so on) and many practical operational standards have been established to identify and eliminate different forms of discrimination.

Techniques to improve accountability include detailed reporting of policies and their implementation, assessment of decisions against human rights standards, and implementation of requirements that governments should monitor and regulate the behaviour of institutions, of national and local government and report periodically to relevant parliamentary and international institutions, including human rights treaty bodies of the United Nations. Transparency is measured against the international standards on freedom of information and the right to free expression; and by monitoring the quality and quantity of the information gathered and divulged by states, including the collection of statistics. Participation is measured against the rights to organise and participate in elections, and by the degree to which governments permit or encourage a range of institutions to participate in reaching decisions that affect them.

These values, shared by most organisations and individuals, are not controversial, but their practical application has been taken further by human rights organisations than by many other kinds of groups. In addition, these groups can use such techniques to connect with international law, thereby generating a degree of official status. This makes the techniques of human rights work specific and useful, which means that using the human rights framework can be both relatively precise and relatively effective.

If the framework appears accessible, the techniques for applying the values have been more rarely achieved, however. Much of the work conducted by human rights organisations – at the international level certainly, but also at the national level – is rather abstract. This presents a further challenge to human rights organisations with real legal expertise that wish to be useful to groups of people who are very poor and excluded.

Strategic positioning and close co-operation

Those who choose to work on behalf of others always run the risk of romanticising and idealising them, which can prove a real obstacle to accessing their rights. Human rights activists are no exception. However, this risk is minimised if human rights groups take the time needed to learn from and understand local partners. This requires humility and patience is needed to build up trust, as well as staying-power to remain involved with the local struggle over a prolonged period. This is why religious communities, when they live

alongside local people and share their suffering, are respected and trusted. Human rights groups can listen and learn from such organisations, just as they can offer valuable skills, which can assist people to exercise their rights more effectively.

Human rights bodies need to understand the inner dynamics of community struggles in order to help effectively. They need to know who they are interacting with and identify the more representative members of the community. They can put money and skills at the service of the local community, but also need to be careful not to disempower local struggles. Ownership of initiatives needs to remain with local communities.

Trust is crucial. Those who are poor and excluded can mistrust governmental authorities and non-governmental organisations alike. Their loyalty and trust tend to be local, communal. To win confidence (and be effective), human rights officials and activists need to build long-term and transparent relationships with the communities concerned. This represents an intellectual as well as a logistical challenge.

‘Going local’ has important logistical implications. Building alliances with organisations that are well implanted and trusted – such as religious communities – is demanding. In many cases, local human rights organisations will need themselves to be present in communities over prolonged periods of time.

Human rights groups need to be resourceful in devising strategies. Legal remedies are often likely to fail, because of flaws in the system or because legal victories will not alter the real situation of communities on whose behalf the cases were brought. ‘Naming and shaming’ can be effective but only where governments and other institutions are responsive.

Human rights education has received considerable support in recent years, partly because donors include it in their good governance agenda. However, the long-term impact of such programmes is difficult to evaluate. They can best be tested, not in terms of what people learn, but by how they apply that learning in practice, and at present there is only a feeling that much human rights education may prove ineffectual in those terms. Training police cadets in human rights norms may work well in the classroom but experience suggests that such training has little impact on police behaviour on the street, particularly where ethnic or political allegiance count for more than good conduct. Training based on corporate pride may be more effective: police are often more likely to worry when a case is thrown out of court because they failed to follow proper procedures than because there has been a breach of principle.

Where the initiative for action comes from community groups and civil society organisations at local level, often appropriating human rights language, human

rights groups can and do get involved with them. Sometimes they may have to redefine their own work and mandate to do so. Human rights groups in Bangladesh, Ecuador and South Africa have successfully employed different combinations of paralegal training, formal litigation and policy advocacy to help communities attain their goals. Some human rights groups have helped women organise themselves to use dispute resolution mechanisms, backed up with court litigation or the threat of it. In Cambodia, a human rights association helps communities to strategise, persuades them against using violence, encourages them to take part in local decision-making bodies, and gives them a voice by publicising what they do.

Admittedly, the organisations have to face the dilemma between confrontation and collaboration with government, as they must counter attempts by opponents to present their work as political. Yet here again, as in the Brazilian and Nigerian examples cited earlier, a mixture of techniques adapted to each specific circumstance and always guided by the wishes of the community concerned, has proved workable. However, little of this work has been documented, or the lessons learned from it shared across borders.

The recent shift within the human rights movement to encompass economic, social and cultural rights more fully has brought it much closer to development work. Greater and deeper dialogue is needed to explore the implications of this shift. Many of those working in the field of social development claim to have already taken human rights on board in their poverty-reduction work. However, this claim requires a caveat much like that issued on 'gender mainstreaming', which is said by some to be merely a 'detrimental acknowledgement' of gender. Just as 'gender blindness' in development work refers to policies which fail (or refuse) to acknowledge the different needs of men and women in project design, so a 'human rights approach' to development may also be employed as a blanket term to justify existing policies. It is not uncommon for development specialists to say that they have been 'doing' human rights all the time, though under another name.

Much more extensive dialogue is needed between these different approaches to explore what a human rights approach can mean in practice. As with the so-called 'gender lens', the approach could open new perspectives in policy analysis and design. For those development practitioners hoping to incorporate a rights-based approach, this means primarily integrating more democratic principles, particularly in the form of participation of intended beneficiaries in the design, monitoring and evaluation of projects.

These new areas of work have helped reframe the priorities of development agencies and contributed to the development of new guidelines on good working practice. Inevitably, a new jargon of 'agency, entitlement and empowerment' has sprung up, but also a new focus on educational

workshops, backing for community organisations and legal mechanisms which can enhance access to rights. More work is aimed at strengthening local capacity and self-confidence and on forging collective strategies.⁵⁸

New analysis is also relevant. The human rights framework can be used to look critically at resource allocation, at the position of have-nots in society, the degree to which excluded groups or minorities genuinely participate in decisions that affect them, in households, at the level of local and national government, and even internationally. Methods can be developed to identify social groups and issues that public policy is not addressing. Statistics can be disaggregated to show discrimination and exclusion, and analyse the distribution of benefits.

Not enough work is done to analyse social institutions, such as schools, where case-studies examining attendance, gender and the type and quality of education provided could serve to highlight hidden areas of discrimination. Gender-disaggregated statistics have shown the high drop-out rates for school-age girls in many countries, but such statistical breakdowns are not readily available for other social issues. A special effort might be made to identify groups that are vulnerable to human rights abuse and have not been noticed – those who are deaf or HIV-positive, and older people, for instance – and ensure that their needs are addressed.

Through the human rights framework, one might examine the costs of lost access for excluded groups, and the risks that keeping them excluded create – including loss of productive capacity, social dislocation, violence and alienation. Competition for access to diminishing resources is a prime cause of social conflict in many countries of the South. Using a human rights framework to measure inequity and take steps to redress it, could help minimise these costs and risks by helping to bridge the divide between dominant and excluded groups. A key expression of human rights is the ability to participate in decisions and select priorities.

The principle of accountability can also be applied at several levels. While governments remain most directly and obviously responsible for protecting and governing people, other institutions should also be accountable for what they do – including community leaders and non-governmental actors. Monitoring, evaluation and communication of information are tools that are no less useful than accountability in helping to assess and improve their performance. These non-governmental institutions also play a key role in promoting purposeful and honest public conduct.

⁵⁸ See Maxine Molyneux and Sian Lazar, *Rights Here, Rights Now: Democratisation of Development in Latin America*, Institute of Latin American Studies, University of London, Research Report 7183, 1999.

Human rights workers can adopt a developmental approach, continuing to do what they do best, but extending it to those social actors who are most excluded. Thus, capacity-building at individual and institutional levels can be conducted informally by working alongside poor communities, exchanging experiences with similar groups, publicising successes and analysing failures, and drawing on informal networks of contacts for support and information. They can assist local community groups in accessing the resources they need to carry out their work, including through formal and informal mechanisms, and can develop strategic alliances and coalitions with a range of different types of organisations in support of those taking the risks of local activism, and backing them up where needed.

All such activities need documenting so that activists can learn from each other and avoid mistakes. New indicators could be developed to help monitor progress on economic and social rights. Current development indicators are often inappropriate, since they attempt to measure what in rights terms may be unquantifiable. More thought could be given to ways of measuring access, and assessing mechanisms designed to promote access to rights.⁵⁹ Indicators of good governance within institutions could be developed. Parameters might focus on participation, transparency, accountability, internal democracy and organisational coherence.⁶⁰

New areas of training might be developed – for instance on budget monitoring, along the lines of existing ‘gender budgeting’ – and donors brought on board to fund these strategic activities. Donors also need persuading that short-term project funding inhibits the sort of long-term commitment required to help communities out of poverty and exclusion, and that sustainable change is better served by support to both community-based institutions and those bodies capable of providing genuine assistance to them in their struggles.

Perhaps the most evident value of development assistance adopting a human rights approach is its potential to convert an essentially top-down approach to policy design and implementation based on identified needs, to a bottom-up approach providing voice and input from the intended beneficiaries. However, the dilemma for development aid remains how to reach the very poor, the outcast and destitute, when more accessible groups or individuals may interpose themselves as potential beneficiaries.

⁵⁹ In the area of education, the work of Katarina Tomasevski, the United Nations Special Rapporteur on the Right to Education, is a case in point. She adopts a ‘4-A scheme’ (availability, accessibility, acceptability and adaptability) to analyse governmental obligations on the right to education.

⁶⁰ Molyneux and Lazar, *Rights Here*.

How can inclusion be ensured for the most excluded groups?

Human rights groups are today faced with the challenge of adopting a new agenda aimed at ensuring access to rights for those social groups and categories which find themselves excluded from rights protections. It is not easy to address this, given the numerous blind spots and structural obstacles outlined in this report.

Clearly, participation of excluded groups is a vital element in any process of inclusion and must be voluntary; yet many excluded groups and individuals mistrust official processes and mechanisms. How, then, to create conditions in which excluded groups will see merit in participating in processes designed to help them access their rights?

Force of example can prove a powerful incentive, where successful campaigns by others prove the effort is worthwhile. This implies that knowledge of such examples should be shared, and encouragement given in an appropriate format to the right people within the community. Identifying which community leaders can serve as true interlocutors for outside agencies implies good local knowledge, which can only be acquired by sustained presence and collaboration with the community. Involving community members in decisions that affect their struggle for inclusion is also an important factor.

For individuals and communities habitually excluded from debate, particularly women, effective participation may imply rights-awareness training and confidence-building. Rights groups should be alert to the risk that groups with interests to defend may try to intimidate or co-opt, and members of the community may do this too.

Work with communities to promote and encourage inclusion should go hand in hand with campaigns to reform formal institutions, notably the courts and the judiciary, since it is the interaction of people with official systems that can kick-start the latter into working well. Test-case litigation can highlight deficiencies of government while promoting change. Care should be taken to ensure that communities agree with the objectives of class actions brought on their behalf by human rights groups.

As the examples given in this report indicate, human rights groups can employ an imaginative mix of strategies, but these should always have regard for what members of the affected community want. Consultation and participation are crucial democratic elements, without which no campaign based on rights can really respond to, or be owned by those it is intended to benefit.

Ultimately, the costs and risks of public advocacy can only be assessed by those whose interests are directly at stake. This said, however, human rights groups can assist, by providing advice based on their own and other

organisations' experiences as well as practical support – shelters for battered women, union funds to support those who lose jobs because of strike action. They can also be highly effective in applying their traditional skills to influence the state when officials use or threaten to use repressive powers to suppress legitimate actions that communities take to obtain their rights.

Where communities act illegally or employ violence to promote their cause, human rights groups face particular dilemmas. They may need to explain to the wider public why the affected group was driven to extreme action. They may want to reaffirm the importance of effective legal remedies and the rule of law. They may also in certain cases need to dissociate themselves from certain actions or certain members of the community, while continuing to defend their cause. Here again, actions geared to reform government performance need to go hand in hand with practical useful actions that support the community concerned.

The role of national human rights institutions

As outlined above, many national human rights institutions have been created in recent years. As intermediate bodies positioned between the state and citizens, they have the potential to play a crucial role. Most need to record, monitor and evaluate their work in more focused ways in order to do so.

Their position between government and governed means that they are well-placed to influence government spending priorities – to challenge arms purchases, for instance, in favour of more spending on rights of access to health and education, or assess the impact of government spending on major projects, such as dams and road-building, in terms of improved rights rather than in purely economic terms. Most crucially, they can monitor the government's performance in addressing poverty and reaching excluded groups, and subject local patterns of exclusion to scrutiny in national and international fora.

To be genuinely effective, NHRIs will need to become better at identifying and reaching out to sectors of the community who do not access official institutions. This implies adoption of a programmatic rather than a case-based approach. Commission staff need to establish links in remote communities and inner city areas, and be aware that members of some communities will not be able to speak out and may be subject to intimidation or coercion.

National institutions also need adequate funding to send their message out through appropriate media, and to travel to meet those in need of their help. Selection of NHRI officials and their terms of service need to show transparency and, because they call for official accountability, their own record needs to be above reproach. They need to be open to strategic alliances with other actors,

particularly those from civil society, but they must also remain independent to sustain their credibility and authority. Striking a balance between engagement and independence may be their most difficult challenge.

VI. CONCLUSIONS

As they adapt to a new political environment, preoccupied by security, unequal distribution of power and weaknesses of national and international governance, human rights organisations are evolving. While continuing to play a traditional adversarial role focused on legal reform and advocacy, many are broadening their mandate to include social, economic, and cultural rights, and are co-operating with other institutions, including official ones, to implement reform programmes.

These changes are still the subject of experiment and discussion. It is clear, however, that entire categories of people in many societies do not benefit from their rights and entitlements. Human rights organisations need to respond to the reality of this exclusion. To do so, they need to

- *improve state performance* (notably the delivery of services, justice, and physical security to all those under their jurisdiction);
- *recognise that rapid improvement cannot be achieved everywhere*, and that mere emphasis on law will not resolve the problem of access adequately; and
- *engage in and apply new thinking*, required if the poor and excluded are to be reached and assisted effectively by human rights organisations.

Human rights practitioners need to look beyond the formal power structures and legal mechanisms that are ostensibly available and examine how poor and marginalised communities cope. This report suggests that they should consider how local procedures for dispute resolution and dispensation of justice are used, and why such communities are often reluctant to seek assistance or protection from official institutions. For the development of good human rights policies, this is probably essential to the survival strategies of excluded communities (within cultures of patronage and patriarchy).

When they are invited to claim their rights, many excluded groups which can internalise patterns of prejudice and discrimination, face difficult dilemmas. Women are often forced to choose between their individual rights and their standing in the community. Ethnic groups may have to reconcile their customary values with human rights principles. Indigenous peoples may find that they are at risk of losing their identity. They and other groups may have to come to terms with the fact that their demands for reform will trigger prejudice and repression. For these reasons, many who know they have rights may opt not to exercise them. Human rights exponents therefore need to examine how poor and excluded people analyse their situation and interests. They

need to ask what would be required to make it viable for those concerned to assert their rights, taking account of risks and costs.

In the course of such analysis and repositioning, human rights organisations must resolve several difficult issues themselves. How should they respond if communities behave illegally or violently to advance their interests? How can outside organisations engage without co-opting the organisations they seek to support? What mix of confrontation and dialogue or co-operation with official institutions will be most useful and effective? Human rights organisations will need to adapt their techniques and mandates to develop a multi-issue approach to complex community matters.

In addition, they will need to learn to work locally, in very specific social environments. They will need to be clear about what their role can be in assisting such communities, and develop methods and skills that will make them useful. This will require long-term investment of effort and resources.

The state and its formal institutions are the final guarantors of rights for citizens and non-citizens, and have the primary responsibility to ensure that all those who live within their jurisdiction have access to the rights to which they are legally entitled. At present, governments fail to reach the most disadvantaged in most societies – and in many, large numbers of people are deprived of protection or benefits as a result. National human rights institutions and civil society organisations have important roles to play in encouraging governments to connect more efficiently with those that are excluded, and develop methods for doing so.

The informal mechanisms and remedies favoured by the excluded deserve closer examination by human rights practitioners, since, despite their deficiencies, they offer cheap, accessible and legitimate services to the communities that use them. While they cannot replace the ultimate responsibility of the state for ensuring access to rights, they can be pursued *in addition* to formal state institutions as a way of answering some of the immediate needs of many communities. Efforts can also be made to improve the accountability of those who have authority within traditional systems, and improve the degree to which informal and traditional decision-making avoids discrimination, particularly against women.

Human rights activists need to adopt imaginative and innovative strategies to use both formal and informal avenues for accessing rights, and can only do so effectively by working in close collaboration with communities that lack access to services and rights to which they are entitled. To be effective and useful, they need to adapt their legal and reporting skills to the needs of the communities in question. They need to 'go local' – if necessary by making alliances with organisations that are already trusted and well-implemented. They

need to develop strategies that will deliver immediate benefits, and will reduce risk for the communities concerned.

NGOs will need to develop new strategies and innovative ways of applying the human rights framework, collaborating at times with development and other organisations to do so. Human rights groups can play an important part in holding governments to account over budgeting and resource allocation. In so doing, the groups need to show that they are accountable and transparent by documenting their activities and sharing evaluations with other interested parties.

In an increasingly globalised international context, the risks and costs of *not* reaching out to the excluded may far outweigh those involved in attempting to bring them within the scope of those bodies and mechanisms responsible for ensuring enjoyment of their rights. A new human rights agenda will be needed if the human rights project, which advanced very quickly in its first fifty years, is to remain relevant and effective.

A number of immediate tasks may be suggested for human rights organisations and governments:

- ❑ encourage governments to *monitor access* and collect disaggregated statistics to measure it
- ❑ encourage *participation in decision-making* at all levels
- ❑ develop techniques of *budget monitoring and resource allocation* to influence government spending priorities
- ❑ support grassroot *integration of human rights and development*
- ❑ look into the *risks and costs* for very poor communities and at ways of minimising them
- ❑ look at issues of *accountability*
- ❑ build human rights *awareness* among the excluded
- ❑ encourage strategic *networking and issue-based alliances*
- ❑ monitor and *support intermediate* semi-state *human rights bodies*
- ❑ examine *informal mechanisms* and remedies for their human rights potential
- ❑ develop *indicators for economic and social rights*
- ❑ adopt a more *holistic approach to human rights work*
- ❑ put access to rights on the *international agenda*.

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ABOUT THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

The International Council on Human Rights Policy was established in 1998 following an international consultation that started after the 1993 World Conference on Human Rights in Vienna.

The Council's Mission Statement reads:

The International Council on Human Rights Policy will provide a forum for applied research, reflection and forward thinking on matters of international human rights policy. In a complex world in which interests and priorities compete across the globe, the Council will identify issues that impede efforts to protect and promote human rights and propose approaches and strategies that will advance that purpose.

The Council will stimulate co-operation and exchange across the non-governmental, governmental and intergovernmental sectors, and strive to mediate between competing perspectives. It will bring together human rights practitioners, scholars and policy-makers, along with those from related disciplines and fields whose knowledge and analysis can inform discussion of human rights policy.

It will produce research reports and briefing papers with policy recommendations. These will be brought to the attention of policy-makers, within international and regional organisations, in governments and intergovernmental agencies and in voluntary organisations of all kinds.

In all its efforts, the Council will be global in perspective, inclusive and participatory in agenda-setting and collaborative in method.

The Council starts from the principle that successful policy approaches will take account of widely diverse geographical and political interests. It co-operates with all that share its human rights objectives, including voluntary and private bodies, national governments and international agencies.

The International Council meets annually to set the direction of the Council's programme. It ensures that the Council's agenda and research draw widely on experience from around the world. Members help to make sure that the Council's programme reflects the diversity of disciplines, regional perspectives, country expertise and specialisations that are essential to maintain the quality of its research.

To implement the programme, the Council employs a small secretariat of six staff. Based in Geneva, its task is to ensure that projects are well designed and well managed and that research findings are brought to the attention of relevant authorities and those who have a direct interest in the policy areas concerned.

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Examines how levels of crime or perceptions of crime influence the work of human rights organisations.

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Sets out the arguments for saying that richer societies and states have an obligation to help poorer societies protect the economic and social rights of their citizens.

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Human Rights after September 11, 2002 ISBN 2-940259-31-3, 75pp. Available in English. Also available in German from: Deutsches Institut für Menschenrechte, Zimmerstrasse 26/27, 10969 Berlin, Germany. Tel.: (49 30) 259 3590, www.institut-fuer-menschenrechte.de.

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The Persistence and Mutation of Racism, 2000, ISBN 2-940259-09-7, 26pp. Available in English, French and Spanish. Also available in Arabic from: Human Rights Information & Training Centre, P. O. Box 4535, Taiz, Yemen. Tel.: (967 4) 216 277, fax: (967 4) 216 279, hrtic@y.net.ye.

Surveys some of the main issues that preoccupy people who suffer from racism or who study its effects.

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