

FIDA INTERNATIONAL CONVENTION  
HONG KONG 23 SEPTEMBER 1996

"TOWARDS THE YEAR 2000"

**HUMAN RIGHTS AND ECONOMIC DEVELOPMENT**

The Hon Justice Michael Kirby AC CMG

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THE HUMAN RIGHTS REVOLUTION

Nobody watching the international scene could have failed to notice the growing power of the idea of universal, fundamental human rights. The idea has an ancestry that may be traced to the writings of ancient prophets and philosophers. But in terms of the modern, global community, its international flowering follows the adoption by the General Assembly of the United Nations on 10 December 1948 of the *Universal*

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*Declaration of Human Rights*. This has been described as "a major step forward in the promotion of the rule of law at the international and national levels. The Declaration comprises, in one consolidated text, nearly the entire range of what today are recognised as human rights and fundamental freedoms"<sup>1</sup>.

Critics, writing from the point of view of women, have pointed out that (as might have been expected from documents based on notions of the Rights of Man, drawn up by conferences of men) many of the early international attempts to express fundamental human rights were inadequately attentive to the concerns of women. They reflected, all too often, men's realities, having less meaning in relation to women's lives<sup>2</sup>:

"Most women, because of their lack of access to public spheres of power, will be relatively poorly served by traditional civil and political rights. This is exacerbated by the usual characterisation of these rights as individual rights. Women in their usual role as care-givers are not individuals in the same sense as men perhaps can be. Individuality denotes autonomy, something which women are rarely seen as possessing or able to possess. Yet the newer category of 'peoples' rights, which departs from the notion of individual rights, rarely addresses itself to the specific needs of women who comprise at least

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<sup>1</sup> Eide and Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Eide and Ors, *Economic, Social and Cultural Rights*, Nijhoff, Dordrecht 1995 at 15.

<sup>2</sup> Wright, "Human Rights and Women's Rights" (1993) vol 18 no 3.

50% of most population groups, if not 'peoples' in and of themselves".

One does not have to agree entirely with this comment to accept that the international moves to express and defend fundamental human rights have not always responded adequately to the practical needs of women. The human rights of women may indeed be protected in the letter of the law. But in practice, they are all too often ignored. Writing on the subject of "women's human rights", Florence Butegwa<sup>3</sup> calls attention to the following hard statistics:

- Some 500,000 women die every year from pregnancy-related causes.
- In a detailed family planning survey of 733 women in Kisii district of Kenya 42% admitted to being regularly beaten by their husbands;
- In Bangladesh, killings of women by their husbands account for 50% of all murders;
- In the United States of America a woman reports a rape to the police every 5-6 minutes.
- In San Diego, Chile, 80% of women have suffered physical, emotional or sexual abuse by a male partner or relative."

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<sup>3</sup> Butegwa, "Women's Human Rights - A Challenge to the International Human Rights Community" (1993) 50 ICJ Review 71.

According to Ms Butegwa these statistics are just the tip of an iceberg for there are few reliable studies to bear out the impressionistic, anecdotal data that, in the business of human rights, women suffer special, particular and additional burdens:

"For instance, the majority of women in Africa and Asia do not have access to property, credit and other economic resources to the same extent as men have. Male children enjoy greater access to education and leisure. In employment, women are denied opportunities for certain jobs, and advancement purely because they are women"<sup>4</sup>.

It is not only in developing countries that there are legal disadvantages affecting women. Even in my own relatively enlightened country, discrimination, inherited from the past, lingers on in law and in attitude<sup>5</sup>.

The critics of the international response for the protection of human rights acknowledge that the one area in which some effort at least was made, in and after the *Universal Declaration*, to address the particular problems faced by women was that of economic, social and cultural rights. The *Universal Declaration* was followed by a call from the General Assembly of the United

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<sup>4</sup> Butegwa, "Women's Human Rights - A Challenge to the International Human Rights Community" (1993) 50 ICJ *Review* 72.

<sup>5</sup> See eg *Yerkey v Jones* (1939) 63 Cwlth LR 649.

Nations, to convert its broad and general language into a legally binding treaty. At first it was envisaged that a single Convention would be adopted. However, at the time, in the midst of one of the frostiest periods of the Cold War, the Western States were resistant to the idea of a treaty with binding obligations concerning economic, social and cultural rights. This was seen by many Western jurists as the language of the communist states. The result was the decision of the General Assembly to divide the rights contained in the *Universal Declaration* into two separate international Covenants, one on civil and political rights (ICCPR) and the other on economic, social and cultural rights (ICESCR)<sup>6</sup>. A great deal of attention has been given by jurists to the ICCPR. In many countries the First Optional Protocol renders infractions accountable on the individual petition of citizens. Much jurisprudence has grown up around the provisions of the ICCPR. But the other Covenant (ICESCR) is relatively unexplored territory for lawyers.

Yet it is here that at least some matters of special interest to women are mentioned. Thus Article 10(2) mentions "special protection" for "mothers during a reasonable period before and after childbirth" including paid maternity leave. Article 12(2)

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<sup>6</sup> GA 543 (VI) 5 February 1952.

refers to "provision for the reduction of the still-birth rate and infant mortality". Article 7(a)(i) also envisages "equal pay for equal work"<sup>7</sup>. A purpose of my contribution is to draw attention to the ICESCR and to suggest ways in which lawyers, including women lawyers, can promote its objects and enhance its impact.

The ICESCR, and its subject matter, suffered years of neglect. This was in part because of ideological differences and in part for technical legal reasons. To some the rights collected in the ICESCR are not true "rights" at all. To others, they are more important rights having priority over civil and political rights on the suggested footing that affording to every citizen a full stomach is more urgent and important than securing "developed" or "western rights" of a political or legal character<sup>8</sup>. As Asbjorn-Eide and Allan Rossas observe<sup>9</sup>:

"Regrettably, adherence of opposing schools of thought resort more to catchwords and political sloganism than to serious analysis of economic, social and cultural rights as individual, enforceable rights. ... At least some of the rights falling into the

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<sup>7</sup> Wright, 125.

<sup>8</sup> Eide and Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Eide and Ors, *Economic, Social and Cultural Rights*, Nijhoff, Dordrecht 1995 at 17.

<sup>9</sup> Eide and Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Eide and Ors, *Economic, Social and Cultural Rights*, Nijhoff, Dordrecht 1995 at 17-18.

category of economic, social and cultural rights lend themselves to what is often referred to as 'justiciability'. ... A crucial question is whether we, as human beings, are willing to uphold the vision of a universal rule of law embracing civil, political, economic, social and cultural aspects of human existence and to promote the concern with solidarity which is essential to integration, both at the national and international level. Alternatively, we might have to be prepared to allow the world to break up even more than before into profit-centred individualism in some parts of the world, and into ethnically and culturally defined entities in other places - entities which might contain a degree of solidarity within the group while excluding others."

Some writers, tracing the development of human rights since the establishment of the United Nations discern what they describe as different "generations" of human rights, reflecting different stages of their conception, institutionalisation and achievement. The so-called "first generation" human rights are those dealing with basic civil and political matters. They were conceived and expressed early in the history of the international human rights movement. In many countries they have a long history of institutional protection. Since the *Universal Declaration* they have been addressed both in the ICCPR and in numerous regional conventions and national constitutions. Whilst there are still many infractions of civil and political rights, there are national and international institutions which have some effectiveness in sanctioning departures.

The "second generation" of human rights are those dealing with economic, social and cultural rights. Many of these were conceived at the same time as the statement on civil and political



rights. But their development has been retarded. The institutional arrangements for their enforcement are still very weak. Until 1986 the ICESCR existed only as a textual reference point<sup>10</sup>. It was in that year the United Nations Committee on Economic, Social and Cultural Rights, comprised of independent experts, was established to receive state reports on the carrying into effect of the high objectives of the Covenant. According to expert observers "the Committee has begun the important but lengthy process of normative development"<sup>11</sup>.

The "third generation" of human rights, so-called, comprises group or "solidarity" rights. These are often contested<sup>12</sup>. Into this group are placed by some the notion of the peoples' right to self-determination. Others (reflecting the mention of this right in both of the foregoing Covenants) treat it as an entitlement of individuals. The group rights usually dealt with in the so-called "third generation" category are the

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<sup>10</sup> Craven, *The International Covenant on Economic, Social and Cultural Rights - A Perspective on its Development*, Clarendon, Oxford, 1995, 1.

<sup>11</sup> Craven, *The International Covenant on Economic, Social and Cultural Rights - A Perspective on its Development*, Clarendon, Oxford, 1995, 1.

<sup>12</sup> Rosas, "The Right to Development" in Eide and Ors, *Economic, Social and Cultural Rights*, Nijhoff, Dordrecht 1995 at n 1, 247.

suggested right to a healthy and sustained environment and the right to development<sup>13</sup>.

The notion that the people of the world have a claim on economic and social development is reflected in the United Nations *Charter*, adopted in the aftermath to the Second World War. Thus Article 55 requires the United Nations to promote higher standards of living and conditions of economic and social progress and national development. It requires the United Nations to find solutions to international economic, social, health and related problems. It requires universal respect for human rights and fundamental freedoms. By Article 56 all member states of the United Nations pledge themselves to take joint and separate action, in cooperation with the Organisation, for the achievement of the purposes of Article 55.

No-one now questions that the right to self-determination is a principle of international law and one of the most important at this time for the peace and security of the world. But the existence of a fundamental human right, of the third generation,

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<sup>13</sup> Tomasevski, "Environmental Rights" in Eide and Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Eide and Ors, *Economic, Social and Cultural Rights*, Nijhoff, Dordrecht 1995 at 257.

to economic development is still controversial<sup>14</sup>. So far as can be discovered, the first mention of the existence of such a right was made by the Foreign Minister of Senegal in the context of a call for a new international economic order in 1966, the year of the adoption of the Covenants<sup>15</sup>. In 1969 the General Assembly adopted a Declaration on Social Progress and Development. The idea of a separate right to development was put forward by Judge Kéba M'baye in 1980<sup>16</sup>. Meanwhile, the United Nations Commission on Human Rights had called for a study of the international dimensions of the right to development. The idea that such a right existed was given impetus by the inclusion in the *African Charter on Human and Peoples' Rights* of the following article:

"22.1 All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States have the duty, individually or collectively, to ensure the exercise of the right to development."

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<sup>14</sup> Rosas, "The Right to Development" in Eide and Ors, *Economic, Social and Cultural Rights*, Nijhoff, Dordrecht 1995 at 247.

<sup>15</sup> Rosas, "The Right to Development" in Eide and Ors, *Economic, Social and Cultural Rights*, Nijhoff, Dordrecht 1995 at 247.

<sup>16</sup> M'Baye "de Droit au Developpement" in Dupuy (ed) *Le droit au developpement au plan international* 1980 at 72.

In 1986, the General Assembly adopted a declaration on the right to development. It was adopted by a vote of 146 to 1 with 8 abstentions. The United States of America was the sole dissident. The abstaining states were the Nordic countries (except for Norway), Germany, Israel, Japan and the United Kingdom. This declaration was followed up by numerous expert meetings. In June 1993, the United Nations' World Conference on Human Rights in Vienna adopted, by consensus, a Declaration and Programme of Action containing passages reaffirming the right to development as:

"a universal and inalienable human right, and an integral part of fundamental human rights"<sup>17</sup>.

When compared with earlier international assertions, the *Vienna Declaration* was rather softer in respect of this right. It required only that the right to development *should* be fulfilled whereas the earlier declaration of the Rio conference on environment and development in June 1992 had adopted the principle that the right to development *must* be fulfilled "so as to equitably meet

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<sup>17</sup> World Conference on Human Rights, Vienna Declaration and Programme of Action, United Nations Document A/Conf/157/23 para 1/10.

developmental and environmental needs of present and future generations"<sup>18</sup>.

Following the *Vienna Declaration* the United Nations Commission on Human Rights established a working group on the right to development. It held its first session in November 1993. In 1994 it adopted a resolution calling for the establishment of a permanent evaluation mechanism on the right to development. But by this time it had become clear that many developing countries saw the issues involved in the "right to development" as being concerned with equitable economic relations, favourable economic environments at the international level more to the liking of developing countries and relief from the crippling burden of servicing international loans. It is perhaps because of these divisions that the proposal of the Commission on Human Rights that the working group should address global economic issues such as the debt problem saw a sharp division in the membership of the Commission on Human Rights. Whilst 43 states supported the proposal, 3 (Japan, the United Kingdom and the United States of America) voted against. Eight countries (of Europe) abstained. The vote shows the "continuing

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<sup>18</sup> Rosas, "The Right to Development" in Eide and Ors, *Economic, Social and Cultural Rights*, Nijhoff, Dordrecht 1995 at 250.

divergencies of views as to the implications of the right to development and its follow-up"<sup>19</sup>.

The content of the supposed human right to development is not at all clear. Some state representatives have asserted that it belongs to states as such. But this view has never been sanctioned by the United Nations working group. It lists as the beneficiaries only "individuals" and "peoples" and "groups" (eg minorities) but not states. As the *African Charter* recognises, States have duties but not rights in respect of development.

Three elements in the content of the right to development can be noted. The first is the importance of *participation*<sup>20</sup>. Individuals and peoples have the right to participate in and contribute to and enjoy development. Significantly, the 1986 Declaration of the United Nations recognised specifically in Article 2(1) the need to ensure that "women have an active role in the development process".

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<sup>19</sup> Rosas, "The Right to Development" in Eide and Ors, *Economic, Social and Cultural Rights*, Nijhoff, Dordrecht 1995 at 251.

<sup>20</sup> This draws on the analysis of Rosas, "The Right to Development" in Eide and Ors, *Economic, Social and Cultural Rights*, Nijhoff, Dordrecht 1995 at 253.

Secondly, the Declaration makes reference to the need to ensure that the improvement of the well-being of the entire population and of all individuals takes place on the basis of their participation not only in development but also in "the fair *distribution of the benefits* resulting from it". This envisages the eventual elimination of extreme poverty and gross disparities in income distribution within nations and as between nations.

Thirdly, the Declaration emphasises both national policies and international cooperation. The right to development envisages that individuals, groups and peoples have rights against their own governments where they neglect or frustrate the achievement of that right.

The best evaluation of the third generation "right to development" that I have seen is written by Allan Rossas<sup>21</sup>:

"The right to development should, perhaps, be seen as an umbrella concept and programme rather than a specific human rights. It may be of particular relevance as a summary and pointer of the human rights dimension for development cooperation and development aid purposes, including the notion of 'human rights impact statements'. It could then play a role in planning and implementing *policies and programmes*, rather than function as a legal

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<sup>21</sup> Rosas, "The Right to Development" in Eide and Ors, *Economic, Social and Cultural Rights*, Nijhoff, Dordrecht 1995 at 254-5.

mechanism per se. For the right to development to play a constructive role in such contexts, however, there must be less political controversy and more analytical and critical discussion surrounding the concept."

#### UNIVERSALITY AND INTEGRATION IN PRACTICE

From this level of generality, with a description of the international developments affecting human rights, I now wish to descend into the engine-room. Until 1 May 1996 it was my privilege, for two and a half years, to serve as the Special Representative of the Secretary-General for Human Rights in Cambodia. My resignation from that office arose following my appointment to the High Court of Australia. However, my period of service gave me the rare opportunity to see the implementation of specific programmes for human rights protection in a particular country sorely afflicted in the past by human rights derogations. As that country is in the Asian region and as particular emphasis was lately given by me to the rights of women, it may be of interest to consider my experience and to observe the way in which the United Nations contributes in practical ways to human rights protections.

There are about 30 Special Rapporteurs and Special Representatives working to the Commission on Human Rights. Some have thematic responsibilities (eg summary executions, independence of the judiciary, rights of women). Others, like myself, have country responsibilities. Most of these lie in the



field of "Special Procedures", designed to respond to urgent concerns about reported human rights abuses. My own responsibilities fell under that item of the agenda of the Commission on Human Rights dealing with "Technical Assistance". It derived from a provision in the *Paris Peace Agreements* by which peace was brought to Cambodia after decades of war, revolution, genocide, invasion and resistance.

Entering upon my responsibilities in Cambodia, I was very conscious of the suggestion that there are different priorities for human rights in countries in the Asian region. Some commentators have even suggested that there is an Asian exception to the universality of human rights, reflective of the traditional emphasis placed by at least some of the philosophies of Asian societies upon duties not rights; upon the community not the individual; and upon the rule of powerful men of virtue not the rule of law<sup>22</sup>. One observer describes the emerging debate thus:

"The ideological debate between East and West then, and between North and South now, has ... affected the realisation of [human] rights. In the past, socioeconomic rights were seen as requiring a strong state and forceful state action. They were thus championed strongly by the former Soviet Union and Eastern European countries. The

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<sup>22</sup> *The Confucian Renaissance*, Sydney, 1993.

countries of the west, on the other hand, sometimes did not even recognise them as rights. This was one reason why the General Assembly adopted two Covenants and not one.

A similar ideological clash is taking place now. Countries of the South, led by China, India, Indonesia and Malaysia, argue that socio-economic rights are equally important as, if not more important than, civil and political rights. Very few of these countries have recognised socio-economic rights as human rights, though they have spoken strongly in favour of these issues at several international fora. Their views, however, have been given increasing prominence because some of these countries are in the forefront of the economic boom that is now taking place in the Asia-Pacific region<sup>23</sup>.

When proponents from the West speak of the universality of human rights, perceptive commentators from the East point to the imperfect protection, in earlier decades in Western countries of rights now claimed to be universal and fundamental. Thus women did not secure the vote in England until this century. African Americans did not have an effective right to vote in some parts of the United States until 1965. Homosexual citizens were criminalised and punished until even more recently. These points are made to emphasise that perception of what are fundamental human rights takes time. Accordingly, Western countries, and their citizens, should not be insensitive to the different stages at

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<sup>23</sup> Gomez, "Social Economic Rights and Human Rights Commissions" (1995) 17(1) *Human Rights Quarterly* at 155, 161-2.

which Asian countries find themselves in the process of "enlightenment"<sup>24</sup>.

Within the resolutions and declarations of the United Nations, the notion of an Asian cultural exception, or of the division of human rights into different priorities, has been rejected. Thus the *Vienna Declaration* of June 1993 affirms:

"All human rights are universal, indivisible and inter-dependent and inter-related ... While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms"<sup>25</sup>.

This is not the place to review my work in Cambodia. My duty was to produce two reports each year, one to the General Assembly of the United Nations and the other to the Commission on Human Rights in Geneva. From the beginning, however, I reported not only upon progress and problems in the area of civil and political rights but also in the fields of economic, social and cultural rights. Thus, every report contained some scrutiny of

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<sup>24</sup> Statement to the Vienna Conference by the Singapore Minister for Foreign Affairs.

<sup>25</sup> World Conference on Human Rights, Vienna Declaration and Programme of Action, United Nations Document A/Conf/157/23 para 1/10, n 18.

issues such as the right to health; the protection of cultural rights; the furtherance of rights to education; and protection of the right to a healthy environment and of the right to sustainable development<sup>26</sup>.

In each of the reports, I called to notice the progress that had been made in the economy of Cambodia. Predictably enough, following the end of war, and the confinement of rebellion to a small area of the country, economic activity began to flourish. With it came job opportunities, educational demands, and a gradual improvement (at least in the cities) of general standards of living. Derelict buildings were repaired to provide office and housing space. Long abandoned canals were restored. A ready measure of economic progress could be seen in the number of motor cars and motorised bicycles visible upon every fresh visit to Cambodia. Although economic development is not a necessary assurance of improvement of human rights, it is difficult to provide the environment for respect for the whole range of human rights referred to in United Nations' instruments without the basic necessities that a modern economy can provide. Credit must be given to the Government of Cambodia

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<sup>26</sup> Report of the Special Representative of the Secretary-General for Human Rights in Cambodia. UN doc E/CN.4/1996/93 (26 February 1996).

for promoting at least some of the improvements in the infrastructure that is necessary for modern economic development. Amongst other things, such developments raised the aspirations of those people who are its beneficiaries. They begin to demand reading matter and access to informative, non-propagandist radio and television. They travel, including overseas. They become aware of derogations from basic human rights in their own country. They organise themselves and lift their voices calling for improvements.

These are the positive sides of economic development which were clearly visible in Cambodia relevant to human rights. But there are negative sides as I observed in my last mission in January 1996. I dealt with these in my last report under the heading "Right to a Healthy Environment and Sustainable Development" and "Rights of Vulnerable Groups".

The protection of Cambodia's environment is particularly important because of the vulnerable eco-system and the damage already done by the large-scale destruction of forest timber and the substitution of large-scale agri-business. The danger of enduring damage to the environment for short-term, and relatively modest, economic returns was presented as a danger to fundamental human rights because of the potential of such developments to affect, in the long run, the living standards of all Cambodians.

During my last mission I visited the province of Rattanakiri in the remote north-east of Cambodia. I received many complaints of the intrusion of foreign-backed developers who reportedly, for a relatively small fee, gained concessions. These entitled them to clear forest areas, sell the removed timber and substitute palm oil and other agri-businesses to the destruction of the environment of indigenous people who had lived there since time immemorial. In one of my recommendations I called attention to the particular vulnerability of women in minority communities<sup>27</sup>:

"Women, especially those in indigenous communities, may often be in the disadvantageous position of traditional subservience and subject to onerous work and child-rearing obligations. ... This is not always so. For example, in many such communities adult women enjoy significant freedom in their choice of spouse and other rights which are not universal. ... The Government of Cambodia [should] introduce sensitively into minority communities the awareness that women in such communities have human rights which will be upheld. In particular, they have freedom of personal relationships and reproductive rights which must be respected. Such women must be fully consulted and involved in decisions affecting the future of their communities and their economic, cultural and other interests. Such issues should not be disposed of by male members of such communities with the excuse of traditional practises. ... The appropriate NGOs, in consultation ... [should] continue their study of the

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<sup>27</sup> Report of the Special Representative of the Secretary-General for Human Rights in Cambodia. UN doc E/CN.4/1996/93 (26 February 1996) para 90 (page 26).

particular vulnerability of women and girls in traditional indigenous communities."

When I was in Rattanakiri and spoke to the Jarai people who were affected by the suggested development concession, the consultation had to take place first with the men and then, separately, with the women. It is essential that the differential impact of economic development on males and females should be considered both by the United Nations and by the governments of member states. Often it is women who bear the great burdens. The male members of the village escape to the towns. The women are left behind with children and with farming - often in reduced conditions consequent on the grant of concessions to multi-national businesses.

In my last report on Cambodia I concentrated upon a number of particular ways in which the human rights of women were especially disadvantaged in Cambodia. By reporting this, I do not mean to infer that Cambodia is more neglectful than other countries of the region in this regard. But one function of the United Nations Commission on Human Rights, and its Special Rapporteurs and Special Representatives, is to bring the jurisprudence of the *International Covenant* down to the grass-roots, offering commentary on local practises when measured against the international standards. The aim is to assist the governments of member states and their peoples and to translate to fine language of the international instruments into practical reality.

Amongst my recommendations were some directed to the need to provide education for women in schools concerning their rights; to provide education to judicial officers about the vulnerability of women; and to support the establishment of shelters (some of which I inspected) that afford temporary and long-term sanctuary to women subjected to sexual, physical or mental violence. I called attention to the imbalance in female participation in education in Cambodia. I drew to notice the need to provide basic school education in mathematics and sciences in day classes rather than night classes which female students often find it difficult to attend. I recommended a review of all laws and practices for compliance with the non-discrimination provisions of the international treaties that Cambodia has signed. I called to notice the special needs of women in Cambodia's dilapidated prison system. Securing more women in governmental positions and in political office is a problem that needs to be addressed. The provision of maternity leave as required by the Women's Convention and by the Cambodian Constitution itself is still missing from the law. The special vulnerability of women in squatter communities and in communities of former sex workers was drawn to notice. I recommended to my successor ongoing and special attention to the human rights of women in Cambodia. Women form more than 60% of the population - one of the consequences of prolonged war. They perform an enormous amount of unpaid and lowly paid work in Cambodia. In practice, they have



diminished educational opportunities. With the advent of economic development, they are particularly susceptible to disadvantage and exploitation.

The United Nations treaty and human rights mechanisms, may not be perfect. But at least they provide standards to measure basic human rights and institutions to scrutinise compliance. They create fora in which people can lift their voices when compliance. It is easy to condemn the weaknesses of the treaty system and of the institutions (including of office-holders such as I, until recently, was). Many of the recommendations I made gained the concurrence of the Government of Cambodia. Relevant to women, the only item in the response of the Government of Cambodia which was negative concerned my suggestion that the criminal law should be changed in order to introduce an offence of rape within marriage. It was suggested that such an offence would not be appropriate at this stage of Cambodia's development. Some of my proposals will doubtless be overlooked or ignored. But others, I feel sure, will influence policy and legal development in Cambodia to the improvement of human rights generally and specifically those of women and other vulnerable groups.

This is one of the ways in which the United Nations contributes to the protection of basic human rights. The work of the United Nations agencies can also be directed and mobilised in

this way in order to target those areas needing particular support and assistance.

### THINGS TO BE DONE

Economic development is closely entwined with human rights protection for many reasons which have now been mentioned. I want to close with some particular comments on this issue from the specific point of view of women and of jurists.

Women have a special concern in issues of economic development because, taken as a group in the world today, they are seriously disadvantaged:

"In a world in which women perform two-thirds of the hourly labor and receive 10 percent of the income and hold merely 1% of the property, disempowerment is clearly economic. In a world in which women are more than 51% of the population, fewer than 5% of the heads of government and fewer than 10% of the [lower house] parliamentarians, disempowerment is clearly political. In a world in which it is acceptable, inter alia, for women to be raped by their husbands; for female detainees to be raped by the police; for women to be educated at half the level and literacy for men; for women to have no access to birth control or abortion; and for women to have no unilateral freedom of movement domestically or internationally, disempowerment is clearly social. To these indicia of societal inequity might also be added the practices of dowry, murder and aborting female fetuses, the murder of female babies and nationality laws that are male determinative. The breadth and depth of the critical problems addressed in feminist studies suggest that the undertakings need demonstrate no further that there are academically

worthy questions to be asked about gendered economic, political and social systems"<sup>28</sup>.

One might quibble with particular elements in this angry statement of a feminist perspective of international human rights norms. But the fundamental point is well made. In the areas of economics, politics and influence, women around the world suffer from gross disempowerment. The disempowerment of children is even more acute. These realities will not change overnight. But it is essential for all who are committed to basic human rights to recognise the problem. It is a privilege for those who are educated and empowered, to raise their voices and do things for those who are not. Only in this way will there be a contribution to an improvement of the shocking deprivations of fundamental human rights that trace their origin to disempowerment of women and other vulnerable groups.

What can jurists do about this? In many of the legal systems of the world, particularly those derived from the English common law, one can see splendid and heroic assertions of fundamental civil and political rights but a crippled response to assertions that the law should also protect and uphold fundamental social and economic rights essential to equitable

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<sup>28</sup> Binion, "Human Rights: A Feminist Perspective" (1995) 17(3) *Human Rights Quarterly* at 509, 511-12.

development. For example, in *DeShaney v Winnebago County Department of Social Services*<sup>29</sup> the United States Supreme Court ruled that under the Constitution of that country the government had no affirmative duty to provide positive rights to individuals. In *Webster v Reproductive Health Services*<sup>30</sup> the same Court held that the government had no affirmative duty to provide medical care to individuals. Commentators have explained that these cases (which find reflection in decisions in England, Australia and elsewhere) may be traced to a particular liberal conception that the best government is one that leaves its citizens alone. For government to provide positive freedoms to the disempowered would be to limit the content of the individual freedoms of others<sup>31</sup>.

In some of the civil law countries, a different stance has been taken by the law. Thus the German Constitutional Court has played an active role in stimulating the acceptance by government of its social obligations to facilitate a just social

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<sup>29</sup> 489 US 189 at 196-7 (1989).

<sup>30</sup> 492 US 490 (1989).

<sup>31</sup> Motala, "Socio-Economic Rights, Federalism and the Courts: Comparative Lessons for South Africa" (1995) 112 Sth Af LJ at 61, 71.

order<sup>32</sup>. It has never ruled that a legislative enactment is invalid because it does not comply with principles of social justice. But its concept of the rule of law certainly includes social justice.

In South Africa, which bridges the common law and continental legal traditions, a great deal of attention is now being paid, in the constitutional and legal context, to the jurisprudence of the European courts dealing with social and economic rights<sup>33</sup>. One of the keenest debates in the design of the new Constitution of South Africa, truly written for a new millennium, was whether it should address socio-economic matters as a reflection of the disparities of past government spending on social services for different races. Perhaps other countries, including Australia, in the midst of reconsidering their own constitutions drawn up in an earlier age, will watch the developments in South Africa with close attention.

It is constantly said that jurists are not really concerned in economic and social rights because they are not justiciable.

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<sup>32</sup> Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 1989, 248.

<sup>33</sup> Motale, "Socio-Economic Rights, Federalism and the Courts: Comparative Lessons for South Africa" (1995) 112 Sth Af LJ at 74ff; Harris, "The New South African Constitution" [1995] NZLJ at 17, 18.

They are not readily enforceable in courts of law. The International Commission of Jurists (ICJ) has repeatedly sought to demonstrate the close inter-relationship of the effective attainment of economic, social and cultural rights with the full enjoyment of civil and political rights. It did so in 1986 when it adopted the Limburg principles<sup>34</sup>. These examined the nature and scope of the obligations of states under the ICESCR. More recently, in 1995 at Bangalore, India, the ICJ adopted the *Bangalore Declaration and Plan of Action*. This calls for:

“equal attention and urgent consideration ... [to] be given to the implementation, promotion and protection of economic, social and cultural rights, as well as civil and political rights.”

The *Bangalore Declaration* deplores the “professional failure and indifference which has often marked, in the past, the response of lawyers” to the rights enshrined in the ICESCR:

“For lawyers to exclude themselves from a proper and constructive role in the realisation of [economic, social and cultural] rights would be to deny themselves a function in a vital area of human rights. ... The lack of involvement of jurists in the realisation of more than half of the field of human rights, vital to humanity, is no longer acceptable.”

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<sup>34</sup> (1986) 37 ICJ *Review* 33.

The Action Plan lists action that can be taken, individually, nationally and internationally to strengthen the attainment of economic, social and cultural rights, including by the contribution of lawyers. Individuals are urged to ensure that their professional organisations include such rights within their human rights strategies. At the national level, the Plan of Action proposes increased attention to the obligations contained in the ICESCR, which many states have ratified and then largely ignored. Judges are encouraged to apply domestically in the cases coming before them the international human rights norms in the field of economic, social and cultural rights. It is acknowledged that the implementation of economic, social and cultural rights in legal decision-making demands both "legal skills and imagination".

At the international level, a call is made to secure more ratifications from countries in the Asia/Pacific region of the ICESCR. Renewed efforts towards the adoption of an Optional Protocol to ICESCR, akin to that under the ICCPR, to provide a complaints mechanism for alleged violations is mentioned. Attention to the reduction of manufacture, sale and purchase of armaments and greater equity in debt repayments is listed as

practical ways for improving the position of economic, social and cultural rights, especially in poorer countries<sup>35</sup>.

To say that ordinary citizens are more interested in a full stomach, in educational chances for their children and health facilities, in a clean water supply and in protection of local culture than they are in what happens in courts, police stations and legislatures is a serious over-simplification. I have learned in Cambodia that "ordinary citizens", in so far as such mythical people exist, are interested in all aspects of human rights. Truly, they are inter-related and indivisible. It is for that reason that lawyers should, as the *Bangalore Declaration* urges, become more knowledgeable about, and interested in, the "other half" of human rights. They should realise the occasional potential of the law to provide support for the achievement of those rights<sup>36</sup>. Particularly in relation to the disadvantages suffered by women, they should recognise that achievement of true respect for human rights requires not only protection of civil and political rights but of economic, social and cultural rights, as well. In this way economic and social development march in step with the

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<sup>35</sup> See Hunt, "Reclaiming Economic, Social and Cultural Rights" [1996] NZLJ 69 at 68 quoting *The Bangalore Declaration and Plan of Action*, International Commission of Jurists, Bangalore, India, 25 October 1995.

<sup>36</sup> *Interights Bulletin* (Autumn 1995), vol 9, no 3, at 97.



attainment of basic civil and political rights. Increasingly it is being perceived that economic liberty and progress are on the other side of the coin which celebrates progress in political and civil liberties. They are inter-related and inter-dependent. The new millennium will see all of these rights attained. Lawyers have a particular responsibility to promote them all.