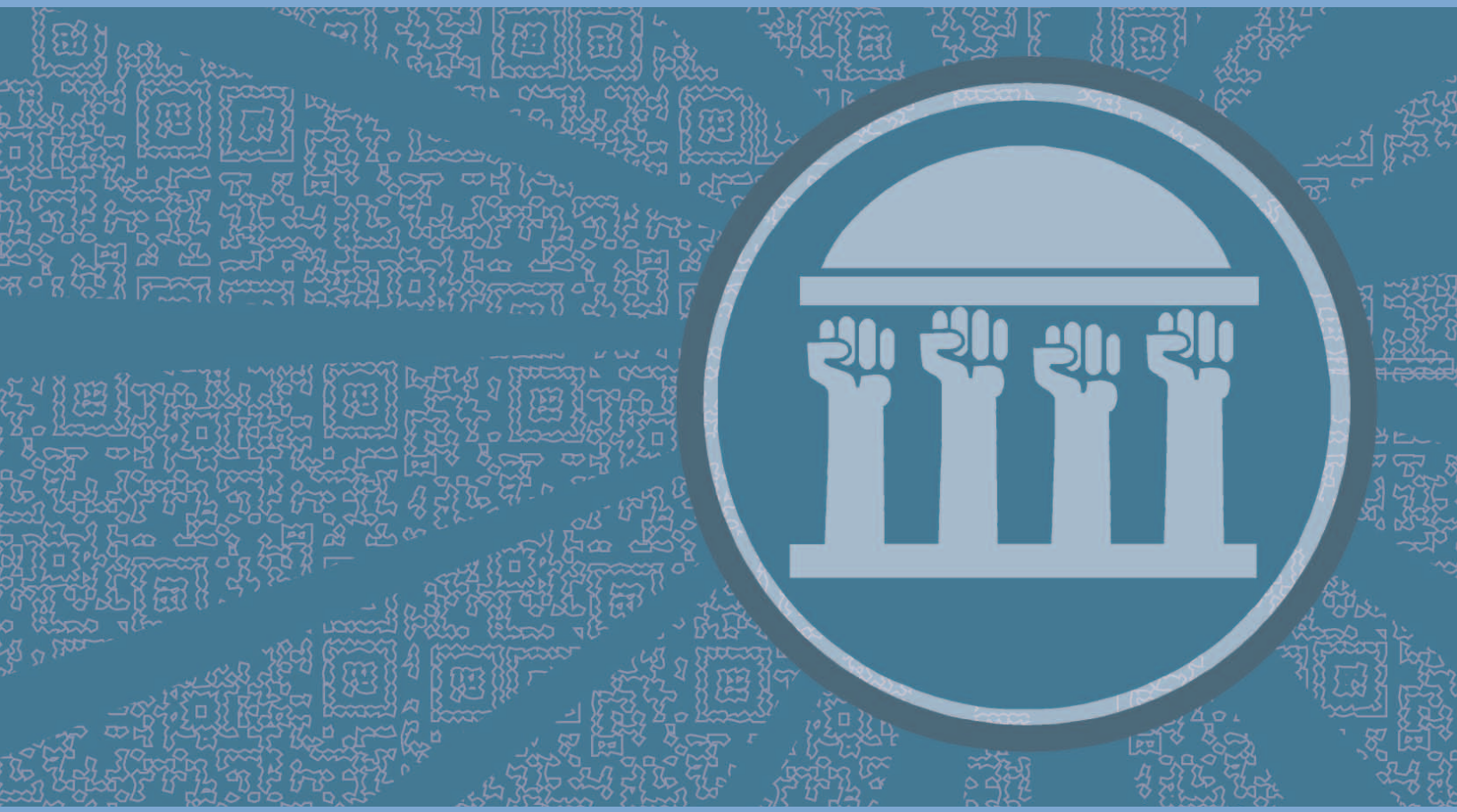
REPARATIONS:

A Dialogue between Human Rights Academics and Activists

A publication of the MIT Program on Human Rights and Justice



Massachusetts Institute of Technology

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A DIALOGUE BETWEEN HUMAN RIGHTS ACADEMICS AND ACTIVISTS

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The MIT Program on Human Rights and Justice, founded in 2001, encourages research and teaching towards a better empirically grounded, culturally sensitive and ethically and politically responsible approach to human rights. As a joint initiative by the Center for International Studies and the Department of Urban Studies and Planning, PHRJ provides a forum for discussion and collaboration among faculty and students and serves as a resource to the wider MIT community. The Program offers opportunities for real world experience through internships and applied research and regularly hosts visiting research fellows and guest speakers. By creating a cutting-edge, inter-disciplinary environment for teaching, research and practical application in new areas of human rights, PHRJ aims to demonstrate the relevance of a human rights framework not only to law and politics, but also to science, technology, business and society.

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Table of Contents

Introduction

This volume comprises the proceedings of a conference held at MIT in March 2002 on 'Racism, Colonialism and Reparations: A Post Durban Dialogue between Human Rights Activists and Academics'. That conference brought together an extraordinary group of activists who are directly involved in battling the cruel legacies of racism and colonialism, as well as a set of original thinkers who have contributed much to the understanding of the limits and possibilities of emancipatory legal and moral discourses in tackling these legacies. The conference also benefited greatly from the official participation of the Office of the UN High Commissioner for Human Rights, Ms. Mary Robinson (as she then was), who had shown tremendous commitment to encouraging a global dialogue on the difficult and contentious issues relating to racism and colonialism at the Durban World Conference on Racism in 2001. It was perhaps the first conference after Durban that brought together such diverse individuals for a scholarly and activist assessment and reflection. I thank all the participants and the Office of the UN High Commissioner deeply for making the conference such an interesting intellectual and political exercise. I am grateful to Professor Phillip Clay, the Chancellor of MIT, for opening the conference and for his strong and generous support for the project of bringing human rights to MIT.

The Durban Conference was historic in many ways. It was the first international conference of states in which slavery and Transatlantic slave trading were acknowledged to be crimes against humanity. Colonialism was acknowledged to be a source of racism, intolerance and the suffering of massive populations. The rights of minorities, migrants and indigenous peoples against discrimination were acknowledged within the framework of inter-state cooperation. The conference was also a mobilizing tool for a range of social movements and groups such as the *dalits* from India, who raised the issue of descent-based discrimination. Yet, its achievements were almost completely overshadowed for several reasons. The first and primary reason was the attack on the United States on September 11, 2001 by Islamic militants, a day after the Durban conference concluded. That effectively removed the Durban conference from public focus. Second, the United States and Israel walked out of the conference, leading to serious polarization among states and a media black-out of the Durban conference by the ever-faithful US media. The controversies at the conference over the issues of Israeli treatment of Palestinian populations under their control threatened to drown out the other achievements of the conference. Third, the way in which the war against terror was shaped since 9/11 as a war against Al-Qaeda, effectively undercut a major conclusion of the conference that rising Islamophobia – and rising anti-Semitism – were matters of great concern which must be tackled by the international community.

Despite these reverses, the momentum behind the Durban conference is still being carried on by a great number of groups and individuals around the world. The idea that historical wrongs must be meaningfully addressed has truly arrived among the victim populations. Societies such as South Africa have tried to address historical wrongs through a combination of prosecutions and truth and reconciliation commissions. Canada and the US have provided compensation for historical wrongs such as the unjust taking of indigenous land and internment of citizens of Japanese ancestry after World War II. Recently, Jewish groups have successfully sued German corporations for slave labor

during World War II. African-American groups have now sued US corporations for complicity in slavery. The Durban Conference thus energized the debate about the politics of apology and reparation in domestic and international contexts.

It is also important to recall the historic results of the Durban conference at this juncture in history when calls are increasingly heard for a resurrection of colonialism and imperialism as antidotes to what their proponents see as a chaotic world. The word 'empire' has suddenly acquired political and, to some, even moral, salience. It is useful to recall that racism and its parent, colonialism, were ugly manifestations of brutality with devastating consequences for victim populations, which were nevertheless couched in respectable terms of civilization and progress. Calls for bringing democracy or for modernizing Islam through force seek to reenact this ugly period of human history and must be rejected.

In the following essays, the contribution of the Durban conference to human rights activism is assessed by experts who were involved in its proceedings (Mushakoji, Wiseberg). Others explore the legal and moral case for reparations as well as the areas where proper responses to the legacy of racism and colonialism could be designed (Purohit, Anghie, Andrews, Arnwine, Grovogui, Mohamedou, Gathii). The essays end with the accounts of activists who explain the impact of the Durban conference and the discourse of reparations on their own activism (McClintock, Aiyetoro, Sreedhar). They come from major international human rights groups such as Lawyers Committee for Human Rights and Human Rights Watch, domestic human rights groups such as Lawyers Committee for Civil Rights and N'COBRA (National Coalition of Blacks for Reparations in America) as well as dalit rights advocates. The essayists include leading academics from the fields of law and political science. This volume is a modest contribution to an on-going social struggle and intellectual debate about how to confront and resolve one of the most difficult and tragic issues of our day.

Professor Balakrishnan Rajagopal
Director, MIT Program on Human Rights & Justice

Foreword

Thank you very much Professor Rajagopal, and good morning.

I want to take this opportunity to welcome all of you here—those of you who are neighbors and those who have traveled here from elsewhere.

I am delighted because this is an opportunity to play host to a group of American and international scholars and activists who are working on an important subject which was raised at the World Conference against Racism (WCAR) in Durban, South Africa, in September 2001, namely, a continuation of the dialogue of how to address issues of racism. We know that human rights are not always high on the agenda of universities or the agendas of councils of government. The very forces that will keep human rights off the agenda are the same forces that make the "isms" you fight much more difficult to combat.

I am also delighted that our Center for International Studies—Professor Rajagopal and his colleagues—have undertaken the important initiatives that they have in setting up the Program on Human Rights and Justice at MIT, in generating interest among our students, and attracting faculty to these issues.

I am obviously happy to be here. However, in my case and on this particular issue, I like to consider myself an old friend and not a friend of convenience.

In hosting any conference at MIT we always ask whether the goals of the sponsoring group and the individuals will advance our institutional mission. After all, you could meet at a hotel or at a country retreat. But, the reason that we are delighted to host this meeting is simple. This is a chance to tie an important issue such as human rights to our research, teaching, and service agendas.

MIT as an institution was established about 150 years ago, with the mission of connecting the work of the mind and the hands. And we have embraced that in a variety of ways. We welcome not just the technological and industrial challenges, but the human and social challenges as well. We see them as related, as I will try to demonstrate in a moment. I also note that this is a conference of activists and academics, and I want to say in that regard that this is an important point in time for us as a university. Many of you were around when there were certain words which you will find prominent today in our catalog that were not always prominent. I can remember, for example, that you could look through the catalog of any university, certainly this one, and find no evidence of words like "environment," "enterprise," "global," "entrepreneurial," etc. All those words are now very prominent, because research, teaching, and engagement in the world made them a part of us. We have not established that your set of issues has that type of academic cachet. I would hope this is one of the many enterprises that will ensure that the efforts and issues related to human rights take their rightful place as subjects of thoughtful and rigorous academic inquiry. We assuredly want that.

We have in this university and in many other universities the opportunity to get the attention of students on a variety of issues. This university is far more diverse than many institutions that students will fan out to across the country and around the world. This is a perfect venue for practicing human rights and modeling diversity. Students have an opportunity—indeed, we force them into many opportunities—to work with each other, and to do it with increasing degrees of intensity. I would like to ensure that we figure out ways to guarantee that the young people who leave here each year leave with a

good deal more sensitivity, not just to the issues, but also to their responsibility as players who make change.

In the wake of 9-11, I heard one question in some variety almost a thousand times. That question was, "Why Are They so Angry with Us?" That question has at least four lines of inquiry in it. Why? Why the conflict or why the acts of terrorism? They? Angry, or some other passion like hate, indifference, or misunderstanding, and then Us? Who is "Us"? These are important questions, but they require framing, and they require framing in ways that are not ordinary for ordinary faculty members. That is one other reason I hope this movement will take seriously the challenge of integrating itself into the educational ideology.

I also do not believe that this generation is any less open to change or to influence than was our generation. I do not sense that this generation is any less progressive than our generation was thirty, forty, fifty years ago when similar issues emerged with us. Those leaders in the '50s, '60s, and '70s were patient with us, and I hope you will be patient with our young people and bring them aboard. I think they are open to it, and I think they will be loyal participants—and helpful ones as well.

The next issue that I want to bring to your attention is an observation I made of our department of urban studies and planning about ten years ago during a strategic planning exercise. Our department focuses on studies and professional work related to developing communities and places. We began to recognize then that the state was shrinking as an influence in world affairs. Increasing in influence were religion, ethnic allegiances, regional interests, corporate interests, and a host of other identities and affinities that have emerged as influential in what actually happens in the world.

As faculty focused on state action and intervention, this was new to us. We have tried over the last ten years to change our curriculum and our teaching to reflect the need to focus on non-governmental organizations and entities and to reflect on people as well as their institutions. I do not claim, and I do not believe my colleagues would claim that we have fully succeeded in that mission, but we have embarked on it and I would like to commend that point to you.

The third point that I want to emphasize is the need—and this could not be a more important place for it to start—the need for a dialogue between the human rights community and the technology community. There are two stark realities that we have to face. On the one hand, there is a world of hate, famine, oppression, and disease. These four sometimes combine in a single place; sometimes they combine in two or more ways in different parts of the world affecting billions of people. Simultaneously, technologies are developing—and when I say technology, I do not mean machines; I mean all kinds of technology, financial technology, political technology, social technology—are developing and have increasingly the power to enrich and isolate the few from the difficulties experienced by the many. I would also like to believe, because I know some technologists, that they are not necessarily pursuing these technologies with the purpose of continuing famine, oppression, disease, etcetera. Sometimes they are simple-minded enough to believe that technology will do good, because they feel good about what they think they will do.

There needs to be a dialogue about technology and its power to address the issues of famine, hatred, poverty, ignorance, disease and the like. Only when there is this dialogue will the tools of progress—which we have forged in some places of the world,

for the freedoms of some people of the world, for the reductions of some inequality in the world—be expanded and generalized. And, technology is here to stay, including in places where we have realized in the last six months that technology is imperfect as a means of either protecting or isolating a population. Now we know the power of technology, and we know the power of human passion. We should look for ways of taking advantage of technology to advance equality to reduce the "isms" that you are so committed to reducing and eliminating. I know you will not accomplish all that today, but I hope you have a productive day as you continue the dialogue that started with such great passion and promise in Durban and elsewhere.

Thank you very much.

Phillip L. Clay
Chancellor of MIT

Chapter 1

The Post-Durban Problematique

Kinhide Mushakoji
Secretary-General, International Movement against all Forms of Discrimination and Racism
Advisor, Delegation of the Government of Japan

The Durban World Conference against Racism was an epoch-making event, and its historical meaning will become gradually clearer to us. Truly, its meaning has been enhanced by the events of September 11 and the following "War against Terrorism" waged by the United States. We will try to present the complexity of the task that all NGOs and all peoples concerned with racism, colonialism and reparation, must consequently assume.

All the NGOs accredited to the United Nations have experienced, since the end of the Cold War, an interesting period in which the UN has organized a series of global conferences. The unique aspect of these conferences is their accompaniment by an NGO Forum that transmits recommendations to the governments of the participating states. These global conferences have produced a series of Declarations and Programs of Action, which reflected, more or less, the NGOs' recommendations. The NGOs have thus assumed the role of "watchdog" for these UN resolutions, seeing that their respective governments implemented, as agreed by them, the different clauses in the Programs.

Unfortunately, the Durban WCAR was probably the last of such conferences in the UN agenda, due to their unpopularity among the member states because of their economic and political cost. The governments, pressed to reduce their public goods expenses, have been less and less willing to make costly commitments to civil society. The Durban Conference, however, was quite controversial for an entirely different reason. It was the first global conference organized by the UN that addressed the historical responsibility of the Global North (the Tri-lateral industrial democracies, or simply the rich countries), and the problems of their neo-liberal policy of promoting a deregulated global mega-competition among MNCs and States.

The Durban WCAR became, for this reason, a "politicized" conference, which experienced two anomalies: First, the retreat of the United States together with Israel, and second, a long delay in the adoption of the Declaration and Program of Action. A series of informal discussions with friends from the Office of the High Commissioner for Human Rights (OHCHR) has convinced me of the difficulties facing the UN to follow-up the WCAR under such a potentially politicized environment. It was apparent that the NGOs should give sufficient time to permit the OHCHR to develop its activities, while avoiding too hasty criticism of the post-Durban process that would build further obstacles to the arduous task of the UN Secretariat.

The various valuable paragraphs of the Declaration and Program of Action have to be implemented by the member states of the UN, and the NGO community should play its role as it did in other global conferences. This would not be possible within such a politicized environment that gives the respective governments a good pretext to sabotage the implementation of the Durban agenda. The NGO community concerned by racism

and discrimination would also have to follow this line, avoiding politicization and choosing specific points in the Program of Action to implement, and thus advance the cause of the discriminated peoples in substantial ways.

All the NGOs that fight racism, colonialism and demand reparations will have to mobilize peoples in developing national, regional and international networks, and will also have to appeal to the international community. In particular, their activities will have to influence the UN human rights mechanisms, and they will have to help develop standards and institutions binding the member states' governments with their civil societies and corporate sectors in fulfilling the Durban Program of Action. Since the inter-governmental Program of Action does not adequately cover the true historical issues of racism, colonialism and reparations, it will be the NGO Program of Action which will help develop the joint action of all the concerned NGOs. The Intergovernmental documents, however, touch upon quite a number of issues, and can provide a base for reminding the governments of the commitment they made in Durban. For example, the issues of the African descendants and Asian descendants can provide a good entry-point into the questions of racism, colonialism and reparations. Durban provides for the NGOs and the governments a good starting point for an in-depth dialogue on racism, colonialism and reparations, the more so because it has left so many questions unsolved. The post-Durban period is in fact a period when all the unfinished business in Durban and elsewhere has to be taken up. Colonialism and reparations are at the core of such problems, whose solution should not be found by the violent oppositions between indiscriminate terrorism and state terror, but by a non-violent means respecting the human rights: political, economic, social and cultural of all peoples, especially of the vulnerable ones.

Needless to say, the new "apartheid" regime imposed on the Palestinians by the Israeli government, and the Islamophobia accompanying the "War against Terrorism" of the United States (for example in the profiling of "potential" terrorists), are part of the unfinished business dealt with by the NGOs but ignored by the governments in Durban. These issues, removed because of the politicization of the Durban WCAR and in spite of the concern of the UN to de-politicize the post-Durban process, cannot be left unattended by the NGO community or by international civil society as a whole.

In this connection, it is extremely important for all the organizations and individuals concerned by the rights and dignity of individuals and communities that have been violated by the global trends of racism, racial discrimination, xenophobia and related intolerance to have a clear understanding of the historical, economic and political backgrounds of the politicization of the Durban WCAR. Unlike the UN debates of the 1970s where politicization came from the South, the Durban conference has been politicized by the North. The issues of the Palestinian people, the definition of the victims, and questions of reparations were all causes for Northern resistance to dealing openly with the questions posed in this conference. For example, the North, which had accepted to oppose slavery at the 1993 Vienna Conference on Human Rights, was unwilling to face the historical question of who enslaved whom.

The politicization took the form of a denial to discuss further undesirable issues based on political grounds, rather than on legal and procedural arguments. The United States stepped out of the conference on the grounds that the Palestinians had "hijacked" the conference, ironically a week before the incident which caused their decision to go to

war against the terrorists who hijacked planes to attack the World Trade Center and the Pentagon. It is this sort of politicization that is now spreading, and assuming military and police dimensions to such an extent that the very basic civil liberties and political rights of minority groups, a large part of mankind, tends to be ignored.

All persons concerned by racism, racial discrimination, xenophobia and related intolerances cannot take a neutral position ignoring the rights and dignity of the peoples who were politically defeated in Durban. This politicization, in fact, is likely to hinder the normal functioning of UN Human Rights mechanisms. It is an untold secret that the OHCHR, who has been too openly performing its task to protect and promote human rights, may retreat to be followed by a more "diplomatic" successor appointed for purely political reasons. The absence of the United States from the Commission on Human Rights as well, a regrettable consequence of this state's performance, may become the cause of political efforts to devalue this stronghold of universal human rights.

The post-Durban age is indeed a difficult time for human rights, especially for the minority groups and indigenous peoples who are discriminated against not only economically by the neo-liberal global trends, but also politically by the militarized global hegemony. This is, therefore, an additional reason to base our activities on the message of the Durban WCAR. This message, which is politically hidden and does not appear in the official intergovernmental documents, has to be carefully read and interpreted from the NGO documents that often lack clarity but contain gems of truth put there by the victims of racism and racial discrimination. As the 1929 Leveler's Declaration of the Buraku Liberation Movement of Japan notes, "Light and warmth can be brought to the world only by those who know how dark and cold the present world is."

Durban was the first international occasion provided by the UN for these individuals and organizations to express themselves. Dalits and Burakumins, Sinti and Roma peoples and indigenous peoples, African descendants and Asian descendants, minority women and trafficked women -- all of these groups constitute a broad coalition of peoples who can and must activate the international civil society, supporting the efforts of the UN to develop an integral human rights culture in the face of opposition from the politicized global powers. Essentially, bringing light and warmth to the dark and cold neo-liberal global order. This is a long-range task, accented by the message of the Durban WCAR, and one that the NGO community concerned by racism, colonialism and reparations will have to assume in full cooperation with all the organizations and peoples concerned with the racism, racial discrimination, xenophobia and related intolerances that are prevailing now.

Chapter 2

A Report from the Office of the High Commissioner for Human Rights

Laurie Wiseberg
Former NGO coordinator for Durban Conference
Official Representative, UN Office of the High Commissioner for Human Rights

Professor Rajagopal, friends:

I bring you greetings from Mary Robinson, the United Nations High Commissioner for Human Rights. I want to begin by reading to you from her remarks to the Third Committee of the General Assembly of the United Nations in January 2002, when the report on Durban was introduced. This will give you a sense of the importance that the High Commissioner attaches to the Durban process. She began as follows: "Although the standard of non-discrimination has been established as a bedrock principle of international law, the persistence of racism, racial discrimination, xenophobia and related intolerance clearly demonstrates the need to look for new ways to address this problem with more resolve, with more humanity, and with greater efficiency. Last year, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance helped focus the international community's thinking about where actions today have been insufficient, and in what areas and in what ways we can do more to create just and fair societies, free of racial discrimination."

The High Commissioner, who was Secretary General of the Conference, pointed out that it involved nine days of intensive and frequently difficult negotiation. It went on one day after it was supposed to have ended, and even after the conference, there was a difference of views or perceptions principally concerning the placement of several paragraphs in the Durban Declaration and Program of Action that delayed the issuance of the report of the conference. "Nevertheless," continued the High Commissioner, "despite a large number of obstacles, the conference was ultimately successful in negotiating by consensus the Durban Declaration and the Program of Action."

Although the report of the conference was issued and is now before you, let me interject here and say that unfortunately the Third Committee did not adopt it by consensus. The Third Committee was asked by the United States to vote on the report. There were two votes against -- the United States and Israel, and two abstentions -- Australia and Canada. Their statements on why they refused to vote in favor of the report are available to the public. Essentially, all four governments argued that, while they are committed to the fight against racism, they had problems with how the Durban process unfolded.

Nonetheless, the High Commissioner underlined the positive aspects of the documents, noting that they address a wide range of subjects. "Common language was found on difficult issues related to slavery, the slave trade and colonialism, as well as the Middle East. Agreement was reached on the need for National Action Plans, tougher legislation, and more legal assistance to victims of racial discrimination. The documents emphasized improvement in the administration of justice and the reinforcement of national institutions to combat racial discrimination, underlining the importance of appropriate remedies and positive actions for the victims of racial discrimination."

The High Commissioner noted too that the documents proposed a wide variety of educational and awareness-raising measures, including actions to ensure quality in the fields of employment, health and the environment; underlined the need to have accurate data collection and research as a prerequisite for taking corrective measures; pointed to the need for measures to counter racism in the media and in the use of new technologies such as the Internet; and specified that a victims-oriented approach was an important tool to eliminate racial discrimination. In this context, Mrs. Robinson noted that the documents made specific reference to Africans and persons of African descent, Asians and persons of Asian descent, indigenous peoples, migrants, refugees, minorities, the Roma and others; put the gender dimension of racial discrimination on the map; and, more generally, drew attention to the question of multiple discriminations. Finally, the High Commissioner informed the Third Committee that the documents emphasized the importance of involving not only states but also a wide variety of actors, including civil society, NGOs and youth, in the implementation of a Durban commitment.

More generally, in reflecting on the conference, the High Commissioner described the documents adopted in Durban as "both historic and forward-looking," providing "a new and innovative anti-discrimination agenda," and as such constituting "an essential element of an emerging global dialogue on how to eliminate the scourge of racism from the world." Moreover, she noted: "the World Conference texts have become all the more important in the aftermath of the horrific terrorist attacks here in New York on 11 September. Their vision of a world that embraces diversity and stands for equality is an antidote to terrorism." That, in essence, is the position that OHCHR has taken very forcefully, namely, that Durban has become even more important in the post-September 11 period than it was before that tragedy.

If you read the Durban document—which is long and detailed—it is impressively good: there is an enormous amount in it that can be used in the fight against racism. Committed governments, committed NGOs, intergovernmental organizations and others can use it. The government document contains an enormous amount of promise, instrumentalities and tools to fight racism, if the commitment is there. The same is true of the NGO document: for all of the flaws that many people have pointed out, it often goes far beyond the government document in addressing the problems of victim groups, including victim groups that were not mentioned in the government document. Thus, the timing, and, in particular, the topic, of this symposium are very important. The Office of the High Commissioner is going to pay a great deal of attention to any recommendations, any suggestions, and any ideas that come out of today's meeting.

The High Commissioner has created an in-house Anti-Discrimination Unit (ADU) that functions, among many other things, to ensure that the results of Durban and the fight against racism are mainstreamed into the work of the rest of the office. Each of OHCHR's three branches is now taking on board the Durban agenda and the fight against racism. That means, for example, that the treaty bodies are being asked to look at racial discrimination -- all the treaty bodies, not just the Committee on the Elimination of Racial Discrimination (CERD); that all the Special Rapporteurs are going to be asked to look at racial discrimination, not just the Special Rapporteur on contemporary forms of racism. In the Research and the Right to Development (RRD) Branch, the Activities and Programs Branch (APB), and the Support Services Branch (SSB), the issue of racism and how to attack it has become a major item on the OHCHR's agenda.

There is, however, a real problem with respect to the Anti-Discrimination Unit (ADU) to be established. When the Durban resolution was adopted in January, it was adopted without financial implications. All financial implications were postponed for consideration by the Fifth Committee, which met yesterday in New York, and as of five o'clock yesterday no resolution containing a budget was adopted. If the Fifth Committee does not provide the budget for the ADU — a seven-person unit as currently conceived — it will have to be funded entirely from voluntary contributions. This makes it problematic because, at the moment, funding for the struggle against racism is not as forthcoming as it was in the period leading up to the World Conference, and even then it was not as forthcoming as many hoped it would be. There is a funding issue both for the ADU and for the other major mechanism that the Durban document has suggested — a body of five eminent experts, drawn from five different regions in the world, which would report annually to the General Assembly. These experts are expected to do research and work in their own region to try to find methods of advancing the Durban agenda. The funding for this panel of eminent experts is also not assured at this time. Therefore, the timing of today's meeting is very critical because it is necessary to try and give some movement and dynamism to the agenda.

On this note, one of the things I found extremely encouraging – a point which came up in discussions I had with Barbara Arnwine prior to this meeting – is that a lot has happened post-Durban in the NGO community. Much of that information has not actually been conveyed yet to the ADU in Geneva. Frankly, from my perspective, some of the most encouraging things that happened in this World Conference were the "pros" in the NGO mobilization. A lot has been said about the "cons," about the problems with the NGO mobilization in Durban, and I will not in any way play down the very serious problems that emerged: the anti-Semitism, the hatred, the intense, bitter fighting that occurred within the NGO arena. On the other hand, something else happened that I found enormously encouraging. A whole range of constituencies mobilized that had never before looked to the United Nations as an arena in which they were players.

First and foremost, the African Descendants' Caucus, now called the African and African Descendants Caucus. Barbara tells me it has been functioning at dynamo speed, expanding exponentially into a network of a several thousand people who communicate via a List Serve, with an international steering committee of about 26 members who, without funding, meet on a regular basis electronically. The Dalits are a second mobilized group. Granted, they did not get into the government document—they did get into the NGO document—but they made their issue known on the world stage in a way that it was not known before. And the experience and training that some of the young Dalits got in this World Conference promises that this issue is not going to leave the agenda. The mobilization on the world stage of the Roma signifies another new group that had never before mobilized. I must say in the context of the African descendants, for the African-Americans from the United-States, this was the first World Conference at which the civil rights movement of the United States went to the United Nations en masse. I find that a remarkable change in the scene. I think if you take a look in the document at the paragraphs that deal with the issue of reparations and colonialism, you will find a great deal there.

This was, as you know, one of the three most controversial items in the World Conference. There was the issue of the Middle East, the issue of the past, and the issue

of the victims. The issue of the past was eventually resolved in a set of 15 paragraphs, beginning with the paragraph that states "We acknowledge"—and I think that this is a major breakthrough — maybe it does not go as far as we would have liked it to go, but it is a major breakthrough —"We acknowledge that slavery and slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity, not only because of their abhorrent barbarism, but also in terms of the magnitude, organized nature, and especially the negation of the essence of the victims. And further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade, and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent, and indigenous people were victims of these acts, and continue to be victims of their consequences." There is no blanket apology. Although some governments have apologized, in some cases it was not an apology but an acknowledgment. In a sense that was the price that had to be paid to gain the acknowledgment that slavery and colonialism were abhorrent, that we are still living with those consequences today, and that reparations are necessary: not because of the past, but because of the continuing consequences.

In considering the bitter conflict that emerged in the NGO community, part of the problem may have stemmed from the fact that there were many NGOs present who were not human rights NGOs: there were development NGOs, humanitarian NGOs, and others – the NGO community was extremely large and diverse, and there were so many specific interests that it was sometimes hard to get coherence. There was, I think, a common consensus on reparations within the NGO community -- no one was against it – although there was a divide in terms of where to focus energies — on reparations or on the more classical kinds of struggles: criminal justice, access to health care, HIV/AIDS care.

What was quite pronounced was the division between some NGO constituents who were really new players on the block and who were not playing by the rules of the international human rights framework. There were many who felt — and this came out in the NGO document — that you cannot write an NGO document that is going to have influence on governments if it is not written in the language of international human rights discourse. You cannot throw out terms and concepts that are not rooted in international human rights law. That was a major divide. Another thing that should be mentioned that was quite significant in the Durban conference is that there were a very large number of GONGOs (government-organized NGOs). Particularly prominent in a number of areas were NGOs that had a specific agenda: to defend their governments. This happened in the case of reparations. That had an impact on the dynamism of certain caucuses, for example the caucus dealing with issues of slavery and caste (occupation and descent).

I want to end by focusing on paragraph 158 in the Program of Action, which talks about reparations, the focus of this meeting. It recognizes the need to develop programs for the social and economic development of these societies and the Diaspora, within the framework of a new partnership based on the spirit of solidarity and mutual respect, in the following areas:

- Debt relief
- Poverty eradication
- Building or strengthening democratic institutions

- ❖ Promoting of foreign direct investment,
- ❖ Market access
- ❖ Intensifying efforts to meet the internationally-agreed upon targets for official development assistance and transfers to developing countries
- ❖ New information and communication technologies
- ❖ Bridging the digital divide
- ❖ Agriculture and food security
- ❖ Transfer of technology
- ❖ Transparent and accountable governments,
- ❖ Investments health infrastructure in tackling HIV/AIDS, TB and malaria
- ❖ Infrastructure development
- ❖ Human resource development including capacity-building
- ❖ Education, training and cultural development
- ❖ Mutual legal assistance in the repatriation of illegally obtained and illegally transferred stashed funds in accordance with national and international instruments
- ❖ Cessation of illicit traffic in small arms and light weapons
- ❖ Restitution of art objects
- ❖ Cessation of trafficking in persons, particularly women and children
- ❖ Facilitation of welcomed return and resettlement of descendants of enslaved Africans.

That is an enormous agenda. That is what we are talking about when we are talking about reparations. It is not about an ox and an acre; it is about development today. I think that is the agenda that this group has to direct itself towards in a forward-looking dynamism, so that we do not simply re-hash the problems of Durban. There were many, and they were serious, but we have got to use this agenda and move it forward.

Chapter 3

After Durban: Race and the Criminal Justice System in the United States

Raj Purohit
Legislative Council, Lawyers Committee for Human Rights

I would like to start of by thanking Professor Rajagopal and the rest of the faculty and staff here at MIT for putting on this event and inviting the Lawyers Committee to participate. Let me quickly say a couple of words about my organization, because what we do on a day-to-day basis will influence our approach to Durban. The Lawyers Committee for Human Rights is an International Human Rights organization based in New York, Washington, DC, and San Francisco. It was formed in 1978. Our work is set up in five different program areas. We work on the issue of international justice, which over the recent years has focused on the International Criminal tribunals in the former Yugoslavia and Rwanda, the International Criminal Court, and work on the national level seeking to develop systems of justice and the rule of national law. We have a program on refugee and asylum work, including a direct representation component as well as a policy component, that tries to advance both the protections for asylum-seekers here in the US and, more broadly speaking, protections for refugees on the international, regional, and national level. We work directly to protect human rights activists in various corners of the world as their work puts them in jeopardy in government and non-government ways, and we also have programs in the areas of labor and policing in national security. On the domestic level, I would quickly mention that our work pre-September 11th was narrowly focused in looking at policing here on the state level in the United States, and I think that, as with many other Human Rights organizations, we now find ourselves involved in issues to do with the military commissions and the anti-terrorism legislation that passed last fall.

In the Conference aftermath, and even while it was going on, reporters, staff, members of congress, etcetera, would ask myself and members of my staff the question, "Was the conference a success or was it a failure?" I think that the success or failure of Durban is not something for the Lawyers Committee to say, but clearly there were many positives. Speaking from the perspective of the human rights community and the NGO community, the language on minorities and refugees was generally better than I thought it was going to be going into the meeting. Certain groups had their profiles raised and the international spotlight illuminated their problems: the Dalits and the Roma have both been mentioned. In a discussion about today's conference with Mike McClintock from Human Rights Watch, he made the point of how various groups at Durban are going to move forth together, and this was a crucial thing in its own right. Barbara will later get into some of those issues. There were obviously negatives that have been addressed: there was racism and anti-Semitism at the conference. Some of the NGOs did not necessarily approach this opportunity in a holistic fashion, and did not link their approaches as well as they might have, and some groups sought to promote their agendas over others'. Of course there were problems, but were those problems exclusively the making of the NGO community? Certainly not. Many governments did not want the conference to succeed from the outset. That was evident. Many governments sought to

discredit either NGOs from their countries or NGOs that had particularly focused on their countries, and they sought to delegitimize them. From the perspective of a US-based organization, the Bush administration was certainly not supportive of the process, and to many observers it seemed to be doing everything it could to delegitimize Durban, to belittle any progress, and to highlight its deficiencies. The US Congress was certainly culpable in the US governmental discrediting of Durban, during the process and, I think, afterwards. The Lawyer's Committee, along with other US-based NGOs, civil rights groups, and others, worked very hard to try to secure the participation of the Secretary of State at Durban, urging the Bush administration to commit at a senior level to boldly engage the issues and to try to advance the process. Clearly we did not succeed on that, and it was disappointing. To some degree I'd like to draw the line on whether Durban was a success or failure and move to the future: "Where do we go from here?" That sort of statement is in itself part of the question. Who is the "We"? The issues of reparations, racism and modern-day society at the public and governmental level, and the impact of post-colonialism on developing countries are of interest to many different groups both in the US and across the globe.

I would like to look at the question of "where do we go from here" from the perspective of a US-based group. I would submit that the number one priority for a group like the Lawyers Committee, and for other US groups, should be to focus on questions pertaining to race and the criminal justice system here in the United States. In making that remark to a colleague yesterday at the Carr Center, he advocated reparations and debt relief over those issues. It troubles me that in our interactions with the administration we somehow are creating a quid pro quo of "let's address this set of issues and push these other ones off to one side." That is not something I'm suggesting at all. There's clearly an opportunity—and I think other panelists will agree—to move on many levels at the same time. There are millions of people in this country affected by the current manifestations of racism, particularly through our criminal justice system. It is a place where there is a real need for human rights activism and human rights policy to focus on those issues.

If one had to create a list of the manifestations of racism in the criminal justice system it would be long. The application of the death penalty here in the United States, particularly on the state level; race profiling: driving while black or brown, or, in its more recent guise, flying while looking Arab-American post-September 11th, and, frankly, pre-September 11th. Voter disenfranchisement of minorities, disparate sentencing, particularly when looking at the issues of mandatory sentencing and the differences between how crack and powder cocaine sentences are applied, the extraordinarily skewed number of minorities in the prison population, and the issues of police abuse. I'd like to spend a minute or two looking on each of those and rely on various excerpts from other individuals who have a lot to bring on these issues.

On the race profiling issue, let's step back a second. In early 2000, our colleagues at the International Human Rights Law group worked to put together a group of experts from the United States to go to Geneva to brief the CERD members on a variety of issues, ranging from welfare and work, affirmative action, and focused on racial bias in the criminal justice system. Let me just read a couple of excerpts from the statement of one of the members of that group, Professor Charles Ogletree, that focuses on the issue of race profiling. Professor Ogletree focused on the American Civil Liberties Union's

recent report that 73% of motorists stopped and searched on the New Jersey turnpike in 1999 were black, even though black violators made up less than 18% of observed traffic violators. A review of police videotapes of stops by a Florida drug quad showed that black and Hispanic motorists made up 70% of the stops and 80% of vehicle searches on the Florida Turnpike. Only nine out of the more than 1000 recorded stops resulted in a traffic violation. On the issue of police violence against minorities, again to use some of Professor Ogletree's language to the CERD members: "the disproportionate use of force against people of color has been documented in a number of studies, many of which were conducted in the wake of the Rodney King beatings, to ascertain the extent of police violence in minority communities. Among the findings is that the excessive use of force has become a *standard* part of the arrest procedure, and that physical abuse by police officers is not unusual or an aberration. Studies have further shown excessive use of deadly force by police officers in pursuing both armed and unarmed black suspects. One study demonstrated that blacks were 10 times more likely than whites to be shot at by police officers, 18 times more likely to be wounded, and 5 times more likely to be killed."

On the death penalty, to steal the matter of another colleague who was at Geneva, Terrance Pitts: a couple more shocking statistics. "Of the 3,700 people currently on death row in the United states, the majority of those are people of color: African-American, Asian-American, Latino, and Native American. Almost half of the 700 individuals executed are people of color." In 1990, a major report was issued by the General Accounting Service that showed that racial disparities were a persistent and evident component in the charging, sentencing, and execution of individuals in the United States. The Department of Justice issued a report in September of 2000 that also showed great racial disparities. Federal Prosecutors had submitted 682 cases for review to the highest official in the Department of Justice for capital sentencing. 80% were people of color. 80%. The Attorney General, the highest official in the Department of Justice, approved 159 of those cases. 74% of the 159 were people of color. There have been other studies, too. Almost every state that has the death penalty in the United States has completed one study or another that shows some form of racial bias. It is a problem that, frankly, the US government is well aware of and has been for some time.

On the issue of voter disenfranchisement, I'm going to steal some of the language from Mark Narr and the Sentencing Project. I understand that Human Rights Watch and the Sentencing Project worked on an excellent report. "An estimated 3.9 million Americans, or 1 in 50 adults, have currently or permanently lost the ability to vote because of felony convictions. 1.4 million persons disenfranchised for a felony conviction are ex-offenders who have completed their criminal sentence. Another 1.5 million are on probation or parole. 1.4 million African-American men, or 13% of the black adult male population, are disenfranchised, reflecting a rate of disenfranchisement that is seven times the national average. More than 1/3 of the total American disenfranchised population is black men. One Third."

On the issue of crack and powder cocaine: the sentencing disparity that I alluded to earlier. Another colleague, Ron White, testified on behalf of the American Bar Association before the US Sentencing Commission earlier this year. He reflected on the American Bar Association's endorsement of the Commission's proposal to equalize the quantity thresholds for Crack and powder cocaine. The report accompanying that

resolution will now be a formal policy suggestion. There are two grounds for that position. First he observed that the different treatment of crack and powder cocaine offenses is clearly discriminatory to minority defendants convicted of crack offenses. The report cited a study showing that minorities are disproportionately charged in a federal court for crack-related offenses. It is a major instance of the appearance of racial injustice in the criminal justice system.

The disparate incarceration rates are in a large measure created by the mandatory policies in the skewed crack/cocaine sentencing disparity. Again, from a report I mentioned earlier: "while African-Americans constitute 13% of all monthly drug users, they represent 35% of arrests for drug possessions, 55% of convictions, and 74% of all prison sentences. The number of black women incarcerated for drug offenses in state prisons increased by 828% from 1986 to 1991." The statistics after a while become overwhelming. When you look at them as part of a package that you recognize that there are good reasons why—not good reasons, let me rephrase that—it is evident why the US administration did not want to constructively engage in the Durban process, and I think it's incumbent upon all of us based in the US to raise in a very specific and targeted way some of these problems. That has got to be a part of the activism and a rallying point as we go forth in a post-Durban context.

Chapter 4

International Law and Reparations for Colonialism

Antony Anghie
*Professor of Law, University of Utah**

This presentation consists of two sections. The first considers the question: is it possible under international law for a former colonial territory to bring a claim for reparations against a former colonial power for colonial exploitation? At the risk of simplifying considerably, I attempt to provide a brief overview of some of the legal issues that must be confronted by any such claim. The second section suggests that, in addition to the campaign for reparations as a means of addressing past wrongdoing, it is vital to understand the ways in which colonial structures have been reproduced in contemporary international relations, and continue to further the economic exploitation of the third world. These structures must be identified and reformed if the problem of colonialism is to be effectively addressed.

Some Legal Issues Relating to Reparations

Colonial exploitation was so blatant, unprincipled and extreme, involving as it did the dispossession and conquest of colonized peoples, that it seems self-evident that any system which purports to call itself law should provide a remedy for this grave wrongdoing, which resulted in immense human suffering and the massive transfer of wealth and resources from the colony to the metropolitan center. Despite this, international law, rather than providing remedies for these injustices, presents formidable obstacles to any attempt to claim reparations for colonial exploitation. This is hardly surprising, given that many of the doctrines of international law were created by colonial powers for the purpose of legitimizing their actions. One approach to the several problems posed by the question of reparations is to focus on the one major case heard by the International Court of Justice (ICJ), that involved, in essence, a claim for compensation for colonial exploitation. This case was brought by the Republic of Nauru against Australia in 1992[1]. Nauru, a small island in the Pacific, was extremely rich in phosphate deposits. At the conclusion of the first World War, Nauru, which had been a German possession, was placed in the care of Australia, New Zealand and the United Kingdom, (the 'partner governments'), which administered Nauru on behalf of the League of Nations, under the auspices of the Mandate System of the League of Nations. The broad purpose of the Mandate System was to protect non-European territories from

* My thanks to the MIT Program on Human Rights and Justice, and to Professor Balakrishnan Rajagopal in particular for inviting me to this important event which prompted me to revisit some of the themes touched upon here.

[1] Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 I.C.J. 240 (June 26) (Preliminary Objections, Judgment); for an extensive presentation of the background to the case and the legal issues it raises, see C.G. Weeramantry, Nauru: Environmental Damage Under International Trusteeship (1992); for a discussion of the case in relation to broader issues relating to colonialism, see Antony Anghie, The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case, 34(2) Harv. Int.L.J 445.

colonial exploitation by providing for their administration by an international institution. The administration of the territory was based on the principle of trusteeship: basically, then, the partner governments were given the power to administer the territory of Nauru, but only in a way which furthered the welfare and development of the people of Nauru. The principle of trusteeship prohibited the partner governments from profiting from Nauru. After the Second World War, the Mandate System was succeeded by the Trusteeship system of the United Nations, which further detailed the protections extended to the people of Nauru. Despite this, Australia, who administered the island, exploited the phosphates for their own benefit in a manner that caused massive environmental damage to the island. Nauru, having conducted a detailed inquiry into the history of the phosphate industry on the island, commenced proceedings in the International Court of Justice against Australia. Australia disputed the Court's jurisdiction to hear the case. In a decision handed down by the Court in 1992, it found that it had jurisdiction over the case, and that it would hear arguments as to the merits of Nauru's claim. Australia at this stage finally entered into negotiations with Nauru, and arrived at a settlement. As a consequence, the Court did not proceed to make what would have been a massively significant pronouncement on colonialism and international law. Nevertheless, a study of this case suggests themes that could be of relevance to other colonial situations.

Forum

It is not easy to identify a forum in which colonial claims might be plausibly advanced. The domestic courts in metropolitan countries have rejected such claims -- often relying on the doctrine of sovereign immunity for this purpose. The one court that might hear such claims, by virtue of its position as the principal judicial organ of the United Nations, is the ICJ. However, the Court may exercise jurisdiction over a state only when it has consented to such an exercise -- as was the case with Australia, which enabled Nauru to pursue its action within the Court. Consequently, the first step in any contemplated action is to examine whether the former colonial power has submitted to the jurisdiction of the Court, and the terms and conditions attached to such a submission. It is notable, for example, that while the United Kingdom has submitted to the Court's jurisdiction, it has included within that submission a limitation which prevents any member of the Commonwealth from bringing action against it in the ICJ with regard to situations of facts existing before 1969. France has withdrawn from the compulsory jurisdiction of the ICJ.

Applicable Law

The international law governing the colonial relationship was made by colonial powers and reflected their interests and concerns. Furthermore, under international law, the legality of an action must be considered according to the law applicable at the time. As a consequence, the argument will be made that, while colonial practices were abhorrent, they were legal at the time, and that, further, it is not possible to retrospectively apply contemporary human rights norms to the colonial period. The Mandate and the Trusteeship Systems were established in an attempt to depart from the old colonial international law. Nauru was fortunate, however, in that the principle of trusteeship was made explicitly applicable to Australia's administration of the island because Australia

had entered into international agreements to that effect[2]. The question is whether the principle of trusteeship could be said to be applicable to all colonial relationships, even in the absence of explicit treaty provisions. A number of jurists, ranging from Francisco de Vitoria in the 16th century, to Chief Justice Marshall in the nineteenth century, have characterized the colonial relationship as being one of trust. Thus it may be arguable that, under general international law, the colonial relationship was inherently and always a relationship of trust and that violation of this trust gives rise to responsibility under international law. Furthermore, it does not appear to be unfair to hold colonial powers to the principles which they themselves asserted in attempting to justify their governance of colonized peoples[3]. In addition, there are a number of equitable doctrines that are a part of international law, and have arguably been a part of international law over the centuries, which might also be of significance. These include the doctrine of unjust enrichment and the doctrine of abuse of rights.

Procedural and other objections

These arguments deal with the question, for example, of whether a state has standing to bring a claim and whether a claim has been properly maintained. Delay in asserting rights, any actions which might be regarded as waiving rights, may be cited as a basis for preventing the Court from exercising jurisdiction. In the *Nauru Case*, it was established that the leader of Nauru, at the time of the negotiations leading to independence, had maintained Nauru's claim by asserting that Nauru intended to pursue legal action once independent. Valuation is another major issue.

Conclusions

Formidable obstacles confront any attempt to bring action for reparations within the current system of international law as it is currently constituted. However, what is clear from the attempts to seek reparations for the Nazi use of slave labor, for example, is that appropriate legal institutions can be established if there is sufficient political will[4]. It is in the context of the ongoing political campaign, then, that some of the approaches and issues discussed here can be useful. It is remarkable how, if sufficient political will exists, entire institutions can be established very swiftly to deal with very problematic issues -- as in the case of the Yugoslavia and Rwanda Tribunals created to try individuals suspected of committing war crimes.

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[2] As a consequence, Nauru based its case on the relatively straightforward claim that the partner governments had breached treaty obligations.

[3] There is a long history of colonial administrators and statesmen asserting the principle of trusteeship, and these include arguments made by Edmund Burke at the impeachment of Warren Hastings, and statements made by Elihu Root and Woodrow Wilson regarding the United States control of the Philippines.

[4] For an overview of different campaigns aimed at seeking reparations including the issues of Nazi Persecution, Comfort Women, Native Americans and Slavery, see Roy L. Brooks (ed.), When Sorry Isn't Enough: the Controversy over Apologies and Reparations for Human Injustice (1999); and Lazar Barman, The Guilt of Nations: Restitution and Negotiating Historical Injustices (2000)

Reparations and the Present

Although the campaign for reparations has focused on past wrongdoings, it has been acknowledged that these past injustices have ongoing effects;[5] in my view, however, it is clear that the structures of colonialism which enabled the exploitation of the North by the South have been reproduced in contemporary international relations. Consequently, the campaign for reparations should resist any suggestion that colonialism is a thing of the past, and that the only issue which needs to be addressed is to devise a mechanism of compensation for past wrong doings. Rather, there needs to be a dual approach which focuses on the many different ways in which colonial relations have been perpetuated in an international system which has ostensibly exorcized itself of colonialism and, indeed, actively worked against it. Thus, for example, powerful arguments suggest that the operations of the World Bank ('the Bank') and the International Monetary Fund ('the Fund') have promoted economic reform policies which have a massively detrimental impact on the peoples subjected to those policies and which, further, effectively transfer the resources from the south to the north. The staggering debt burdening developing countries that have adopted Bank and Fund policies will prevent them from addressing the urgent social and economic needs of their people. Despite this, Article 189 of the Declaration characterizes these international institutions as being important instruments in the fight against racism and racial discrimination and urges them to engage in this fight 'within their mandates' and 'in accordance with their regular budgets and the procedures of their governing bodies.'[6] The problem is that powerful industrialized states control precisely these governing bodies, and use these institutions as a means of furthering their own interests, often furthering inequalities between the North and the South as a result. What this suggests is that neo-colonial relations have become institutionalized within the system of international law, and that it is only if the international system -- beginning with the Bank, the Fund, and the United Nations itself -- is significantly reformed that it might become possible to effectively address the ongoing practices of neo-colonialism.

Corporations such as the East India Company have played a crucial role in the colonial enterprise. It is somewhat ironic, then, that even as international law has been unreceptive to any attempts made by former colonies to advance claims for compensation for exploitation, it has developed elaborate and comprehensive mechanisms to enable corporations to claim compensation for losses they suffer while operating in developing countries. Thus, through an elaborate set of provisions included both in bilateral and multilateral treaties, corporations are provided with standing to bring action against developing country states in arbitral tribunals, such as the International Center for the Settlement of Investment Disputes operating under the auspices of the World Bank, which apply an 'international law' that is weighted in favor of the investor corporation and that constrains significantly the sovereignty of the host state. Experts in the area of investment law have been noting with concern, therefore, the emergence of new principles, such as the expansion of the concept of 'expropriation' to any action 'tantamount to an expropriation'-- which could have the effect of enabling the investor to claim compensation for any government regulation, including environmental regulation,

[5] This is suggested in Article 157 of the Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Racial Intolerance.

[6] See Article 190 of the Declaration.

that might have the effect, however indirectly, of reducing the value of the investor's assets.[7] The broad point, then, is that the law regarding compensation for alleged losses suffered by corporations has been and continues to be the subject of sustained concern for international law and institutions, that are developing ever more innovative mechanisms for expanding corporate power, even while that same international law has been indifferent, if not hostile, to initiatives directed towards claiming compensation for colonial exploitation.

Colonialism is not a phenomenon of the past; it is an integral part of the contemporary international system, and any campaign for reparations for colonialism must surely also focus on how this system reproduces colonial relations, if it is to even begin to prevent past injustices from being reproduced in a different form.

[7] These principles which have been articulated in various arbitrations, and in the case law emerging from the North American Free Trade Agreement have far-reaching consequences for developing countries. For important critical studies of the law of foreign investment, see M. Sornarajah, The Settlement of Foreign Investment Disputes (2001); M. Sornarajah, The International Law of Foreign Investment (1994); Amr Shalakany, Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neo-Liberalism 41 Harv. Int.L.J. 419

Chapter 5

Providing Reparations for Victims of Racism: South Africa's Truth and Reconciliation Commission

Penelope Andrews
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What I would like to do in my paper is to analyze the issue of reparations as articulated in South Africa's Truth and Reconciliation Commission (T.R.C.) as an appropriate response to racism. In this endeavor I would like to outline some limitations of the T.R.C. and its mechanisms, including reparations. Some of those limitations are inherent in the T.R.C. itself; structural limitations, as it were. Some fall outside the workings of the T.R.C.

Of course, the T.R.C. process must be seen in the context of the transformation in South Africa. It was part of a package of institutions and structures to move South Africa from apartheid to the new democracy. One cannot divorce the question of reconciliation from reparations.

At the outset I think it is worth noting that, although the T.R.C. provides some interesting lessons, it was first and foremost a political compromise born of a process of negotiations. It therefore had extreme limitations imposed upon it. But in many ways it also provided a range of possibilities for dealing with the most egregious aspects of apartheid and racism. The T.R.C. provided South Africans, and indeed the global community, with a formal venue (other than a court of law) within which victims could come forward and tell their stories. In this respect, the T.R.C. was purposely victim-centered. In addition, perpetrators of gross violations of human rights were forced to confront their victims and in exchange for amnesty relate all facts and events truthfully.

There were 3 overall purposes of the T.R.C.

1. Truth: to investigate human rights abuses and reveal the facts to the public.
2. Justice: to punish the perpetrators of gross human rights violations (by forcing them to come forward with all the facts).
3. Reparations: to compensate the victims for the physical and emotional harms caused by the perpetrators.

The legal vehicle for the establishment of the T.R.C. was the Promotion of National Unity and Reconciliation Act, No. 34 of 1995. The preamble to this statute recognized the need for reconciliation between the people of South Africa in order for peace and national unity to endure and for the reconstruction of society to take place. The T.R.C. is therefore a bridge from the apartheid society to the new democracy.

Two things are worth noting with respect to the T.R.C. and by implication, the issue of reparations:

1. The T.R.C. focused not just on individuals who committed gross violations of human rights. It also investigated organizations and institutions of civil society that advanced the cause of apartheid, or benefited in some way from it. So institutional hearings were held examining the media, the legal profession, the medical establishment, the religious establishment and the business community.

2. The T.R.C. investigated human rights abuses by both the apartheid government and opposition forces.

In terms of the Act there were three committees; and for the purposes of the discussion of reparations I'm going to focus on two.

1. Committee on Human Rights Violations: mandated to designate victim status to individuals for purposes of rehabilitation and reparations.
2. Committee for Amnesty: empowered to grant amnesty to individual perpetrators after "full disclosure of all relevant facts" for acts associated with political objectives thereby shielding perpetrators from criminal and civil liability.
3. Committee on Reparations: submitting a report to the South African government to inform the government on reparations.

I wish to address the issue of "victim." Who were designated with victim status under the T.R.C.? There were approximately 21,000 victim statements submitted to the T.R.C. The period chosen for the investigation of human rights violations was 1960 to 1994. This in effect excluded the whole period of colonialism and apartheid before 1960.

The question of "victim" versus "perpetrator" and "victim" versus "beneficiary" raises perplexing questions about accountability for gross violations of human rights. The decision to focus only on gross violations of human rights in fact leaves in tact and excludes a vigorous exposé of the banality of racism, which is interpreted as "normal." The link between violations, institutional practices and structural conditions is not fully explored.

The Act defines reparations as including any form of compensation, ex-gratia payment, restitution, rehabilitation or recognition.

The kinds of reparations suggested in the final report include:

- urgent interim reparations
- individual reparation grants
- symbolic reparations/legal and administrative measures (death certificates; other legal details; monuments, museums, street signs)
- community rehabilitation programs - community based services and activities
- institutional reform - legal institutional measures to prevent recurrence of human rights abuses
- President's fund to administer reparations

One of the most disturbing criticisms of reparations has been the South African government's reluctance to provide reparations and its increasing disinterest in the issue. Another is that while the perpetrators have been granted immediate freedom with amnesty, the victims have been kept waiting.

The architects of the T.R.C. mined international law and particularly international documents that the South African government has signed to guide them on reparations. The process was politically delicate. It was simultaneously backward-looking, dealing with the past as it also tried to grasp the present and the future. The T.R.C. found guidance on reparations in the following international human rights instruments:

- The Universal Declaration on Human Rights
- The International Covenant on Civil and Political Rights
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- The Inter-American Convention on Human Rights

It is ironic that the constitutional challenge to the T.R.C. was based on international law. A few prominent families brought suit to pursue their rights under international law to seek redress and compensation. They failed.

Chapter 6

Reparations from the Perspective of the African and African Descendents' Caucus

Barbara Arnwine
Executive Director, Lawyers Committee for Civil Rights

I would like to begin by thanking Professor Rajagopal, MIT, the organizers of this conference, and all of you who have come today to celebrate this occasion to talk about the post Durban situation. I would especially like to thank Adjoa Aiyetoro, who has been one of the leaders in the Reparations movement, and with whom I've been discussing the panel today. I want to talk about reparations from the perspective of the African and African Descendants' Caucus.

The African and African Descendants' Caucus met at every preparatory event that was held prior to the World Conference against Racism. This series of meetings was absolutely essential for us: they allowed us in national, regional, and international fora to organize, exchange and build a system of trust and unity for proposing and pursuing our demands.

The most critical of these regional and national meetings was the Third Session of the Preparatory Committee. Without the Third PrepCom, I doubt that we would have been successful in Durban. Another critical element that we used to build a Durban Consensus between Africans and African Descendants prior to the WCAR was the Vienna Conference, along with the Vienna Declaration that its attendees produced. That conference was a forum in which the true voice and the articulation of our demands could rise forth without any suppression or governmental intervention. The Vienna Declaration gave a nice context to our deliberations and a voice to our aspirations.

Another important formulation for building consensus was the driving unity we maintained in our efforts to place the reparations demand at the center of the conference. There were many questions about whether or not this was a timely demand, and indeed at the First Preparatory Committee meeting the Africans and African Descendants proponents were roundly criticized for making demands for reparations. A third unifying point was the placing of emphasis — and let me say this real slowly so that you can get the flavor of it — the uniting to place emphasis on the interconnectiveness of the demands of African and African Descendants. Historically, it is easy to sever those claims: it is easy to see Africans differently from country to country, it is easy to see African Descendants separately from Africans, and again divided within their national and regional context. We strove for a perception and a demand that we be addressed as one people. That was a critical conceptualization for us, and given our cultural differences, our linguistic differences – all things that had resulted from the historical and present context – it was absolutely key.

We also had to unify on the need to address three very important issues: the Transatlantic Slave Trade distinctly as itself, slavery in the Americas, and colonialism. Furthermore, these three abominable historical misdeeds had to be recognized as crimes against humanity. This was important because we were trying to contextualize the legal basis for the recognition of the need for reparations. With extreme consciousness and care, we built on the historic work of our ancestors. We constantly invoked the names of

Frederick Douglass, Nkrumah, Zumbi, Dubois, L'Ouverture, and Tubman. We educated ourselves on our particular histories and regional and national circumstances, and saw the interconnections between our current circumstances.

We worked as a unified people, but we also worked extremely hard as NGOs, not only to consolidate the African and the African descendants' NGOs, but also to form a coalition with the Africa Group, the actual formation of the nations and the voice of the African nations, especially Sub-Saharan Africa. We led the charge and worked with these groups for reparations. This required an immense amount of political education. In reality, it was not immediately clear how to merge the interests, needs, and perspectives of the African and African Descendants' NGOs with those of the governments, and with the needs of the people who are sometimes in opposition to governmental policy. The articulation of these points required constant meetings and constant discussion, so that by the Third PrepCom, the Africa Group had to rescind its first working paper and propose a new one explicitly mentioning people of African descent and recognizing their cause. Let me use one anecdote from the WCAR to illustrate how critical these interrelationships became. During the Durban Conference, the African Descendants' caucus would gather in front of the Africa Group room constantly to talk with the ministers and the various representatives, but at one point we left this post to have a private discussion amongst ourselves. A minister actually ran and grabbed us from our meeting location and said "No, no, no! You've got to get back and get in front of that door. Because the African Descendants Caucus is the backbone of the Africa Group. And if we are going to hold these demands for reparations and not be splintered, you have to be present."

In building support for reparations, we had to accomplish four important tasks throughout the WCAR process. First, we had to build cohesion within the African and African Descendants' Caucus: across languages, through incredible coalitions like Alianza, the December12th Movement, the African NGOs, NCOBRA, and others, we had to bring all those voices into one body.

Two, we had to conduct a massive educational program about the legitimacy of our demands with NGOs and nations.

Third, we had to debunk our opponents' arguments and their organized oppositional strategy: to create disunity, to disassemble our coalition, and to keep proposing that, if anything be done, that it would only be a minimalist approach. We dealt with the arguments that this was not a pragmatic demand. Dealt with the arguments that slavery, the slave trade and colonialism were not recognized crimes against humanity *at the time of their occurrence* and that the past should be past. That this is only another form of welfare demand. Dealt with these lines about "you've got to have a war crime" and all these interesting interpretations that nations were putting forth on international law. The issues about "Don't hold the West accountable, what about the Arabs?" "After all, Africans participated, so what's the issue here? " We took all of these issues frontally and disembodied them and dealt with them.

The fourth task was building coalition support. We had to really work, especially in the Third PrepCom, with the NGO community. We purposefully went to caucus after caucus, assigning envoys to go to every caucus, talk with them about our demands, and deal with the misperceptions – that reparations are just about money, and all the rest of those misperceptions out there. We also said to the European NGOs, "You have a special

obligation to carry this demand back to your nations. It cannot just be seen as an African and African Descendants' demand." We really worked with the western European NGOs, and having their support was a significant breakthrough.

What we learned in that process is that the educational task around reparations is critical. It was critical to the Durban success, such as it is, and it is critical to the future success of the Reparations Movement. One thing that we became painfully cognizant of is that, even though those of us in this room might think that we know it, we have to re-state the injury of the slave trade and colonialism. That requires truth-telling about injustices, and requires admitting to the barbarism of the slave trade. It requires constantly talking about the 20 million who were stolen from Africa, with a half of those left dead in the Atlantic Ocean. Talking about the enrichment of slaveholders and states, through uncompensated labor, sale of bodies, taxes, and all of the ways that states were complicit. Truth-telling about the depopulation of Africa, the rape of women, the destruction of culture, language and identity, the maiming and dismembering of non-compliant slaves, the dehumanization, chattel status, and the very creation within modern mankind's concepts of the "Negro." The whole creation of the "Negro;" the mythologies and the stereotypes that underpinned those beliefs. Talking about the post-slavery aftermath from nation to nation. True examination of explicit governmental complicity within constitutional documents and other laws, such as the runaway slave return acts. Talking about who were the perpetrators, and who were the victims. Looking at the exploitation of Africa, the destruction of national boundaries, the destruction of communities of interest and the genocide of its people.

Then we need to talk about the current effects of these injuries. The African Descendants basically agreed on what we saw as the current effects, from nation to nation. What we have in common. Any place where you find African Descendants we are at the bottom of the economic ladder, disproportionately. Annually, there are billions in lost revenues due to continued discrimination. We are subjected to brutal, role-shackling stereotypes, overcriminalized, undereducated or uneducated. Denied equal participation in society: politically, regarding home ownership, and so forth. Socially suffering from psychic damage: self-hatred, self-abnegation, and disunity, idolizing white ideals and remaining ignorant of our true history. Women are doubly exploited; there are role-shackling expectations of what we are capable of being. Everywhere we are subjected to white identity and cultural imperialism, infused with a sense of superiority and a sense of inferiority for African-Americans, and the bombardment of descendants with media messages of white superiority. A sense of entitlement by whites to the privileges of society. Denial of complicity, denial of the continuing consequences of racism or even of the very existence of racism.

By way of closure, let me bring up two important issues surrounding reparations. We have to understand that the reparations concept is not synonymous with terms that are traditionally used in the law, such as compensatory measures, remedies, relief, restitution, and affirmative action. Reparations is not even individual checks, although we know that right now the Social Security administration has an alert out that, because of fraud, 87,000 African descendants in the US have posted claims for reparations to the administration. We know that reparations actually are a broad, proactive, comprehensive approach to repairing and remedying injuries and placing victims in a fully restored status. Reparations must be restorative and they must be transformative, not a

fragmented, limited approach of case by case, simple program by program efforts, but rather an acknowledgement and engagement of a comprehensive enterprise to re-weave the very social and economic fabric of nations and societies, to render the result of healthy African and African Descendants who can become leaders in all socioeconomic indicators. Reparations cannot just be nation-by-nation or region-by-region. Reparations have to be international, because it is not sufficient, for example futuristically, to have a US with reparations and an imprisoned Africa.

We think that the Durban documents are critical. They give us an invaluable set of tools, and they are wonderful as a basis for having nations truly recognize both the harm that has been done and especially the current circumstances. I recommend to you that if you have not seen the Durban Document, or even if you have, that you look very hard at paragraphs 13, 14, 34 (which I call the self-determination clause), 100, 101 and 158. Paragraph 158 has been mentioned, and all I would say about 158 is that, as good as it is, it still does not talk about the restoration of land, and psychic injury. As we leave this room, we need to recognize that we have to create a multi-racial, united front for reparations. That is the international imperative. We must recognize that this requires that we have the victims of the circumstances be the leaders, that we all have to sit down and let those victims determine the parameters of what should be the content of reparations. Whites, and others who are outside the Asian, African, and indigenous communities, must be allies and engage in truth telling. We must work for new and expanded legal standards, similar to the Luxembourg agreement, outside of the usual context. We must make sure that the international demand for remedying this unjust enrichment is raised at all levels. So we look forward to working with you, and I want to thank the African and African Descendants Caucus for their incredible work to this point, and remind you that as my legendary ancestor Frederick Douglass has said, “We all know that this not an easy task, and that nations will fight us, because power will never concede anything without a demand.”

Chapter 7

On Passions, International Law, and Policy: Discourses of Entitlements in International Law and Relations

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No one would dispute that the United Nations' World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance witnessed confrontations arising from competing *worldviews* and *beliefs* among the participants. It is also predictable that the contesting parties continue to maintain divergent views of the causes of discord and of the outcome of the conference. To US and Israeli officials, representatives of the two countries that walked out of forum, the verdict is simple: the conference lost its focal point -- which to them was reconciliation -- in favor of racially-based notions of entitlements and morally dubious attacks against others. Few elsewhere hold such a dire view. Yet, there has emerged in Western capitals, post-Durban, a Western commonsense that the Durban conference was disrupted by so-called non-traditional non-governmental organizations with regrettable effects. These groups -- mostly Aborigines, Indigenous populations of the New World, descendants of slaves, Dalits, and others who were newcomers to United Nations debates -- have been accused of unbecoming conduct and emotional outbursts that diverted from 'rational' debates.

To be sure, reactions to the so-called non-traditional participants have ranged from empathy to paternalist condescension to outright hostility. From a paternalist standpoint, they were accused of disregarding United Nations diplomatic etiquettes and thus riling even their sympathizers. Harsher critics have accused the newcomers of irrationality, if not anti-humanism. This is that non-traditional NGOs acted on passion and emotion alone and in the absence of any real rational and strategic goal. From this line of criticism, we are to understand that the other participants acted rationally and that they forwarded compelling visions of post-racist and postcolonial justice.

It is hard to fault arguments that claim a priori to favor postcolonial justice through racial and regional reconciliation and/or humanitarian assistance. But a few questions are warranted. If such a deep commitment existed, why then wasn't the conference able to adjudicate among competing positions, and/or legislate any real solutions to the problems that confronted it? Were the critics of non-traditional NGOs really ready to confront the moral neglect of communities still suffering from the consequences of past and present wrongs? Could they demonstrate that they have undertaken effective legal and political steps to eradicate the inequities encrusted in their own legal and ethical systems and codes? In sum, was the Durban conference constitutively capable of tackling the questions before it?

Looking at the discursive positions of those who either walked out of the conference or threatened to do so, it becomes apparent that the criticisms of non-traditional NGOs were strategically intended to blunt the agenda of the conference which was to eradicate racial inequality in the interest of social justice, human solidarity, and moral equality of all. As used by critics of the Durban conference, the distinction

between passion and reason is a rhetorical device used historically to protect parochial interest against those who would seek to restore justice by re-framing the collective good.

Dating from the beginning of the modern era, European (and Western) traditions have used the distinction between passion and reason to establish two distinct identities in the global order: Europe, of course, was said to be endowed with *reason*. That region of the world was declared to be universalizing, progressive, redemptive, and regenerative. As such, Europe (the West) alone possessed the tools and technologies for imagining, ordering, and governing the world. In contrast, other regions of the world were diagnosed as possessed by passion. These others were proclaimed parochial, traditional, reactionary, if not degenerative. These others had to be guided, instructed, directed, and socialized into Western-derived international morality, itself esteemed to be the collective good. These binaries formed the central axes of and justifications for slavery, colonization, colonialism, and now Western aspiration to dictate the terms of international governance and related institutions.

The implementation of this distinction as a technique of power has not been as crude as it may seem. From the 17th century to the present, successive philosophical, legal, and political traditions assimilated and reformulated the technique. There were countless exceptions, doubtless. But, beginning in the 17th century, the so-called fathers of international law -- Hugo Grotius (1583-1645), Samuel Pufendorf (1632-1694), Christian Wolff (1679-1754), Emmerich de Vattel (1714-1767) among others -- secularized positions previously held by Catholic theologians -- including Francisco de Vitoria (1486-1546) and Francisco Suarez (1548-1617) -- in regard to the structures and governing rules of international relations. These authors uniformly deemed the inhabitants of the New World, Africans, and others incapable of imagining and legislating beyond their immediate confines. They asserted that only rational Europeans were capable of *generating* transferable traditions (hence customary law of state practices); *initiating* binding engagements through individuated volition (voluntary law of treaties); and partially abnegating sovereignty (through binding conventions). Finally, European publicists selected themselves as the sole 'conscience of public life' in international relations and, thus, interpreters of international law and sentiments. Hence the weight of jurisprudence and the place accorded to the opinions of self-anointed international publicists as source of law.

The idea that Western publicists were exclusively competent and authorized to apprehend the will of the universal legislator also implied that the legislator was the "West." Logically, Europe and its New World offspring emerged as moral teachers (through their civilizing missions) of the rest. From the 18th century-Enlightenment, Western ideologies justified imperialism and its derivative, modern order, through self-serving articulations of liberty and the common good. They did the same with agency and regimes of conduct discriminated among the different constituencies of the moral order for the purpose of their inclusion or exclusion in the spheres of decision-making in the international realm. Indeed, whether it be Jeremy Bentham (1748-1832) in England or Jean-Jacques Rousseau (1712-1778) in France or Immanuel Kant (1724-1804) in Germany, European philosophers generally derived their international ethical principles from local diplomacy, continent-wide balance of power, and colonial preoccupations.

It was to be expected that Enlightenment philosophers would seek to universalize their findings as truthful and authentic and/or legitimate. But 19th century rationalists

went further in redefining the institutionalization of norms as means of entrenching empires. The majority simply insisted on European institutions –including international law– as the core of international morality or universal road map. These were to be taught around the world by Europeans to non-Europeans who presumably lacked recognizable structures of authority, law, and interest. Similarly, in the inter-subjective (almost whimsical) European self-understanding, a crucial purpose of the emergent principle of international democracy, or multilateralism, acquired the feature of a certain realism according to which willful Europeans defined colonization, slavery, and colonialism as legitimate *interest*. The new realism opposed interest in utopia (or idealism), on the one hand, and passion and emotion, on the other. Attained through reason and rational processes alone, utopia (idealism) lacked real structures and, as such, was untenable. On the other hand, passion was to be discouraged if not combated because of its destabilizing effects. Devoid of interest, passion was primal and immediate expression of suspect desires.

There was nonetheless a twist. Rational actors (especially the reigning powers) were not above displays of passions (including war) and emotions (nationalism in the 19th century). It was legitimate to passionately defend one's interest, after it had been rationally defined. This is the justification for the large quantities of armaments accumulated by Western powers. These weapons of untold destructive powers are used without restraint (with nationalistic or patriotic passion) in defense of the national interest. The philosophical articulation of *interest* united *reason* and *passion* into a defensible *truth*-claim. In the reverse, where passion was found to lack interest, there was no reason or justification for its expressions. The related forms of passion were illegitimate, irrational, and/or primal. However self-consciously expressed, these latter expressions of passion were declared outside of the collective intentionality of international norms –a central supposition of international regimes.

Coming out of the nineteenth century, therefore, the boundaries of human dignity and the spheres of policy around it were defined by collective interest (or the collective good) as defined by European powers and publicists. Imperialists, colonialists, and their advocates envisaged international institutions such that the notions, human endowments and entitlements embraced by the French and the American revolutions remained the only politically defensible ones. Those espoused by the former slaves of Haiti were cleansed from the collective memory. The results are patent today. It is, after all, the only revolution that banned slavery outright. It is also the one that upheld justice universally for all. Its aspirations and resolutions were also conceived as direct challenges to some central institutions of the French and American revolutions: human beings were not to be sold, they were not to be dispossessed such that they were deprived of the capacity to feed themselves, they were not to be beaten or evicted of shelter, etc.

From a strictly moral standpoint, it is the Haitian revolution that aspired to guarantee basic human dignity. Property, after all, was a civilizational good, never inherent for human survival. On the other hand, who can imagine a person without food and shelter? Notwithstanding the Haitian revolutionaries and twentieth-century debates at the United Nations and elsewhere, Western powers have mandated political rights as universal and relegated those most basic needs to the realm of the social, not to be adjudicated but to be dispensed by charity on volition. In the 1975 Helsinki compromise, Western powers posited political access and economic privilege as human rights,

unassailable and thus subject to enforcement. In contrast, they elected the satisfaction of the basic requirements of human existence (food and shelter, for instance) as desirable but negotiable ends. Basic human dignity had been relegated thus to the realm of social rights or secondary faculties.

In sum, it may be that non-traditional NGOs were not sufficiently versed in diplomatic etiquette and that they were unduly passionate and disruptive. But what about those who either walked out of the conference or threatened to do so? Were their actions mere expressions of emotions or passions? One ought to wonder whether the pursuit of diplomatic niceties and comities is a more important value than the well-being of the vast majority of the disinherited multitudes whose representatives -- indigenous peoples, descendants of slaves, lower castes, and the like– compelled the world community to pay attention to their claims. Additionally, one ought to ask whether, in the absence of the 'ill-temper' and 'ill-manner' of non-traditional NGOs, the conference would have reached higher discursive realms from which to advance the agendas of the disinherited.

I am not advocating incivility in international debates. Quite the contrary. But, it remains in the interest of all who seek justice to passionately (dare I say emotionally) confront two complementary realities in today's international order. One is the persistence of colonial structures and *mentalités* due to unequal relations of power, moral agencies, social hierarchies, and distribution of resources. The conference had to overcome this mindset as a condition for debunking, *inter alia*, Western (liberal) ideological commonplaces such as that 1) indigenous populations volunteered their lands and resources to colonial settlers; 2) decolonization dispensed national equality; 3) legality and constitutionalism delivered justice to former slaves; and 4) the consequences of today's inequality pale before the ramifications of any attempt to find reparations for the wrongs of colonialism (and slavery!). In these regards, the conference successfully established that slavery, racism, colonialism, and other forms of discrimination continue to affect the lives of multitudes around the world. This achievement only testified to the resilience and tenacity of those whose subjectivity in the world was at stake in Durban.

The other reality that non-traditional NGOs had to confront is a longstanding disposition -- fortified by philosophical and jurisprudential traditions -- among the privileged to remove others' *interests* from the legal sphere in order to relegate them to the sphere of humanitarianism. It is only in the context of humanitarianism, generosity, and philanthropy that it would seem unbecoming and ungracious for the disinherited and dispossessed to protest their lot. For, whereas adversarial contestations are permissible in legal contestations, the beneficiaries of largess -- again, indigenous people, lower castes, descendants of slaves, and formerly colonized -- must be held to different standards: humility, modesty and resignation. Indeed, no one can argue that Western governments would have pursued a compelling agenda in Durban in the absence of the indulgences and disruptions of non-traditional NGOs. The international community would have benefited greatly from a harmonious and interdependent approach to political stability, social and economic order, and human dignity. Yet, before Durban, the moral qualities of the poor alone had not moved the rich and powerful countries -- including former slaveholding states and colonial powers -- to strive for global justice.

One must allow as a matter of generalized fairness, therefore, that it made perfect sense for non-traditional NGOs to make their claims to humanity and subjectivity through a convincing (impressive?) articulation of the pursuit of global justice as collective good,

at once universal and rational. The generalities expressed in the preamble of the final document suggest that the NGOs did accomplish this task. Having established the principle of racial equality and the end of discrimination as universal (rational) principles, NGOs were within their right to defend their implementation with passion. Indeed, only perfectly rational interests can be defended with passion. So they were!

Chapter 8

Responding to the Persistence of Racism and Racial Exclusion

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From August 31 to September 8, 2001, the United Nations held in Durban, South Africa, a World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance. This was the third such international gathering to address the persistent and gnawing problem that racism represents. Unfortunately, it can be maintained that, were it not for controversies surrounding this particular event -- notably the United States government's walkout to boycott the meeting because of language equating Zionism with racism, and references to reparations for the Transatlantic slave trade that were considered for inclusion in the Draft Declaration and Program of Action -- the Durban Conference would have taken place with minimal, or specialized, international attention. In the end, the self-fulfilling prophecy of the 'failure' of Durban was nothing more than the failure of those who refused to engage with the process and demonstrate a genuine desire to make progress on curing the disease, crime and, indeed, sin, that racism is, by confronting its past and present manifestations.

The Conference's outcome was therefore mixed. Much could have been achieved -- if only by sending a forceful, common and consensual agreement to denounce the global persistence of racism, and identify concrete ways to combat it internationally and consistently. Unfortunately, the meeting was highly contested and many relationships -- between governments, between governments and NGOs and among NGOs -- became embittered and mistrustful. Amid much that was not, it was encouraging that the plight of many communities around the world that continue to suffer racism and socioeconomic exclusion was recognized, and was heard in their own voices. Even if sometimes that dimension was looked upon paternalistically and condescendingly by some international human rights organizations, who insisted on the incompatibility of some of these groups' demands and the requirements of professional human rights legal language.

Yet the meeting was preeminently an intergovernmental one, and if little progress was achieved on agreeing formally upon a specific set of strategies and measures to deter, prevent and remedy racial discrimination, the blame lies with (some) governments. In fact, in recent years, public interest in racism has weakened surprisingly. This is unexpected, for racial discrimination has not disappeared, nor is it in the process of doing so, as recent events around the world attest. Racism is alive and well. In Europe, for instance, where right-wing extremists have been gaining ground of late. Witness the sporadic killings of African immigrants in Germany, witch-hunts against North Africans in Spain, rising anti-Semitism in France, and violence against the Indian community in Britain, to name but a few high-profile situations over the past two years. In the United States, following the September 11, 2001 attacks on New York and Washington, racial

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profiling of individuals of Arab lineage has proliferated rapidly to the point that patterns of institutional racism against Muslims are noticeable unambiguously. More importantly, the world continues to tolerate a de facto system of apartheid in Palestine.

The persistence of racism is the result of its invisibility, which in turn is the product of its trivialization. The tolerance of discrimination as a regrettable but acceptable feature of human societies undermines serious action to address the problem in a lasting and effective manner. The denial of racism and the resistance to address head on its persistence serve no purposes other than allowing it to survive. Similarly, to deny the complete and complex history of racism (best exemplified in slavery and colonialism) or to rationalize it (in effect as unavoidable human nature) is almost akin to condoning it. The very existence of inequalities along racial lines should be enough to prompt action to try to achieve equality. If ever there was a case warranting a 'zero-tolerance' approach, racial prejudice is it.

Yet among policy-makers and organizations worldwide, racism remains recalcitrant to reform and remedy. The fight against racism remains a serious challenge primarily because policies that have racially (intended or unintended) discriminatory effects are presented as if they are justified by social and economic inequality, and are not in essence *a human rights problem*. Even a country like South Africa, which successfully brought an end to apartheid, remains caught in the whirlwind of discrimination, and numerous cases of racial violence against sub-Saharan African immigrants are reported. Moreover, the current situation did not come about in a vacuum. Around the world, *historical processes* that were rooted in a structure that was hierarchical, exploitative, de-humanizing, and defended as legitimate explicitly in racial terms were in place until recently.

Some of the most powerful factors that allow racial discrimination to persist are *denial* and *silence*. Evidently, neither formal declarations of equality nor simple prohibition of racial discrimination will by themselves eradicate racism. As is the case with many human rights issues, it is the lack of implementation of existing legislation that is partly to blame for the persistence of behavior that it purports to outlaw. In addition, in many of the societies in which regulations have been passed that ban racial discrimination, the values of racial equality have not been internalized socially. Consequently, people do not mobilize readily in their defense.

Racism is also about distribution of resources. Too often, economic deprivation associates with racial discrimination. The combination of political and economic exclusion has meant that victimized groups, like the people of African descent in Brazil, have not been able or have not been permitted, to acquire the resources they need to compete on equal terms with other social groups in their societies. It is, therefore, essential to recognize the systemic and interrelated nature of discrimination and stigma, even where the law has curbed substantially but not completely this relationship, as is the case for African-Americans.

Similarly, at the international level, the economic growth and development for some that has accompanied new global economic processes has for others not only widened the economic gap but distanced them further from the possibility to effect change. In states struggling under the burden of the debt from which investors profit, programs that have served as safety nets for the marginalized are among the first to be cut, along with programs directed at addressing institutionalized discrimination and

discrimination in society as a whole. As recipients of public services, subordinated groups have less access to capital and they experience disproportionately the negative effects of the new global economy. The demand of the global economy for cheap labor in an unregulated market has increased many times over the numbers of people subjected to this discrimination. Migrants, in particular, are often used as scapegoats for real or perceived economic or social problems. This places them at further risk of discrimination, including violent attack.

Over the longer term, the fundamental causes of racism, including its roots, must be addressed directly and honestly before workable and lasting solutions are proposed. Given the dearth of comparative policy knowledge about the complex historical factors that allow the combination of poverty and racism to persist -- indeed mutate into new globalized forms -- it is crucial to properly identify the concomitant nature of this form of stigma before devising strategies to combat it. In fact, eliminating racism requires policy transformations (linked to societal maturity) that are not yet fully understood. Therefore, *overcoming racism requires addressing attitudes at all levels*. Racism is both rational and pathological. Hence, mixes of policies, such as legal redress, affirmative action, and education can be successful and must be used cumulatively in different settings. In turn, this calls for contextualization of policies. Enforcement of the law and effective punitive procedures against state authorities that condone or commit racial discrimination is necessary. Improving the record of police forces, in this regard, is essential.

Authorities must not only provide legal protection for such groups, but remedy the historical legacy of poverty by providing resources -- education, health care, employment -- that will eventually enable members of such groups to compete with others on reasonably equal terms. This is not enough: it is also necessary to deal with behavior and perceptions. In any such initiative, political parties, educational institutions, the media, trades unions, corporations and other non-governmental organizations can influence political debate and public opinion both positively and negatively, and leaders in these fora have a vital responsibility because they tend to influence the definition of the limits of what is and what is not acceptable.

Fifty years after the Holocaust, half a century of action by the different organs of the United Nations system, three to four decades of sustained and focused campaigning by NGOs around the world, and almost ten years after the trauma of ethnic cleansing in Eastern Europe and Central Africa, the disease racism survives. The scale of the problem is immense, but we must continue to confront it, and do so from a multiplicity of angles and address all the elements of racism, at all levels. We must transcend our innate sense of individual and group superiority through self-analysis. We must change the institutional racism of our societies and states, and we must address the racism implicit in the inequalities and iniquities of the global system, and the aggravating trends of privatization and globalization. Above all, we must be willing to acknowledge, to *name* these manifestations of racism, and to end the *denial* of racism.

Chapter 9

The Silence of Race and Identity in Private International Law (i.e. Trade, Economic, Commercial Law)

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It is often taken for granted that the efficiency gains of market reforms such as privatization, deregulation and corporate restructuring alongside the power and influence of western industrialized economics and powerful institutions such as the IMF and World Bank solely account for the spread of the globalizing and universalizing programs of neo-liberalism or structural adjustment.

What is often not accounted for is the way in which race and identity have been central to giving credence and legitimacy to neo-liberalism and structural adjustment.

My presentation seeks to address this shortcoming in debates about market reforms by indicating the centrality of race and identity to issues of the so-called private sphere of commercial, economic and trade matters.

In so doing, I also hope to dislodge yet another often missing link in discussions of globalization: that the politics of race and identity are only present in the public sphere of the imposition of liberal democracy, human rights and the selective use of force in humanitarian missions over the south by the north, but not in the private sphere of commercial, economic and trade matters. In essence, that the private law arena of economic, commercial and trade law is apolitical and bereft of the controversial political claims that characterize public law areas such as international law, human rights and debates regarding reparations.

My presentation is organized into four brief parts. Each part of the presentation uses a specific example to illustrate my claim regarding the presence of race and identity issues in private law areas where they are presumed to be non-existent.

Part One is a genealogical account of the erasure of issues of race and identity in the context of a late 19th century case of the House of the Lords. Part Two examines the continuation of this theme in economic restructuring programs in sub-Saharan Africa. Part Three explores how US Courts have externalized the heavy costs of risky wall street loans to developing countries as well as developing country populations. Finally, in Part Four, I examine how assumptions about the neutrality and objectivity of WTO intellectual property rules are disproportionately affecting constituencies of color, particularly in developing countries.

Part 1

In 1905, the House of Lords decided the West Rand Central Gold Mining Company v The King case. The brief facts of this case were as follows:

In October 1899, the Republic of South Africa seized over 2,617 ounces of gold from the West Rand Central Gold Mining Company for ‘safe keeping.’

Following the Anglo-Boer War, Britain conquered the Republic of South Africa and by a proclamation dated September 1, 1900, the whole of the territories of the Republic were annexed to and became part of the dominions of Queen Victoria. The

Republic of South Africa thereby ceased to exist. The West Rand Central Gold Mining Co. sued the British government seeking the return of the seized gold. The arguments advanced by the company were as follows.

That conquest or change of sovereignty by cession ought not to affect private property. In essence, that under the then prevailing international law, conquest does not destroy all private rights, the argument being that the seizure of the gold by the Republic of South Africa was a contractual obligation that the British government had assumed upon conquering the Republic. Further that the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled. Finally, that while claims to enforce treaties or agreements for two sovereign powers were acts of state which courts had no power to inquire into, and that the repudiation of liability by the government over the seized gold was not an act of state since the seizure had crystallized into contractual obligation.

The Crown rejected all these arguments seeking to distinguish between private or contractual claims against the Crown, and public claims seeking to enforce obligations under treaties. The House of Lords in agreeing with the Crown observed as follows:

"Where the King of England conquers a country it is a different consideration, (as opposed to peaceable cession) for there the conqueror by saving the lives of the people conquered gains a right and property in such people, in consequence of which he may impose upon them what laws he pleases."

In essence, the House of Lords denigrates the private property 'rights' of claims of a South African corporation by drawing distinctions between territory seized by conquest and territory seized by peaceful means. Further, the court declined to recognize international law and American court decisions that support the view that private or contractual claims survived conquest.

Conclusion on This Point

Private International law made and still does draw distinctions or exceptions to the application of rules of international law not simply because the doctrine requires it, but because colonial expediency demanded it. This case is compelling since it did not involve non-European claims. It reveals the malleable or manipulable character of legal doctrine to serve imperial expediency.

The complete silence of race or of the non-European peoples in the case also reveals how the appropriation of their resources is managed by an erasing of their title to the resources. This, then, is clearly an example of how doctrines of public and private international law not only justified appropriation of resources, but also laid the basis not only of apartheid as a racial policy, but also as a policy of social-economic exclusion. As the House of Lords observed, conquered peoples were the property, not merely subjects, of the Crown.

Part II

Economic restructuring programs in developing countries imposed by multi-lateral lenders are often depicted as even-handed legal and economic antidotes to "arbitrary and powerful individuals or institutions."[8] They are argued to be necessary to deliver fairness, transparency and even-handedness in economic management through the market

[8] World Bank, From Plan to Market/World Development Report, 1996 at 87.

as approved to through state controls. Take the example of company law reform.

The World Bank has argued that company law reform is necessary to address the perception of foreign developing countries could reform their laws to ensure the law oversaw the role of managers to protect shareholders, particularly minority shareholders.[9]

Protection of investors from insider fraud and mismanagement are therefore central goals of company law reforms. Fraud, mismanagement and insider opportunism are regarded as the result of outdated regulatory controls such as complex registration requirements. As the World Bank has argued, it is proposed, or in reality imposed, laws that would, "slowly charge norms of behavior as more and more companies adopt them to develop a good reputation for honest behavior, to emulate their peers, or simply because the laws are available and reasonable."[10]

It seems to me though, that the discourse of company law reform disguises more than it reveals - there is more beneath the rhetoric that the interests of investors in the public would best be safeguarded by the impartial convenience and neutral competence of technical experts such as lawyers, judges and economists.

The imposition of any controls on companies by African government is regarded as inescapably leading to corrupt and market distorting corporate governance - even the requirement that foreign companies in developing countries should not repatriate a part of their profits abroad is regarded as a form of market distortion notwithstanding good and sound economic reasons for this. That is, there are lasting benefits of retaining profits of foreign direct investment in the country where it is invested since it would potentially increase the productivity of the investment for that country. It is also an incentive to re-invest and disincentive to foreign investors who are more inclined to controlling and protecting their investment as it moves speculatively around the world.[11]

Conclusion on this point

What is most striking to me about company law reform is the unstated but apparent prejudicial and disparaging images of non-European economic or company governors as irremediably corrupt and that regulatory controls imposed by the state provide non-European managers opportunities for corrupt behavior. This in turn justifies the presence of western banks in developing country markets because these western banks are argued to be more likely to play by the rules of a free market economy. This is unlike banks around by non-Europeans in developing countries which are more likely to operate in accordance with the "narrow" interests of ethnicity, family connection and political expediency.[12] As Prof. Enrique Carrasis wrote of similar accounts of the East African financial crisis: "The rhetoric of pertaining Asian government officials and corporate managers as profoundly corrupt and incompetent has been so persistent that few would question the widespread reputation that Asians, Africans and others in the developing world are corrupt to the core and frequently foolish in financial matters. This all leads to the process of 'othering' whereby the West creates an image of the darker inhabitants of

[9] Id. at 90.
[10] Id. at 91
[11] Kenneth J. Vandavelde, "The Economics of Bilateral Investment Treaties," 41 Harvard International Law Journal, 469 (2000)
[12] For an extended analysis of identity bias in restructuring programs, see James Thuo Gathii, "Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism," Third World Legal Studies, 65, (1998-99)

the world, an image that helps us justify seemingly universal policies such as discrepancies in economic decision making."[13]

In essence, company law reform plays a critical role in shifting the focus on control of non-European economics from the State to the market where the preserved "expert knowledge and technocratic practices have become the key resources sustaining increasingly undemocratic forms of decision-making."[14]

Part III

My claim here is that US Courts have externalized the heavy costs of risky Wall Street loans to developing countries. The illustration comes from the debt crisis.

Developing country indebtedness has in the recent past led to several attempts to re-structure this debt with a view to reduce the debt burden on developing countries. I do not need to rehash the adverse consequences of debt in developing countries - particularly in lending legitimacy to reductions in public spending on education, health, the environment and food security so that developing countries may save money to invest in more productive spheres of the economy to enable them to be better placed to pay their debts.[15] My interest in raising this example is to illustrate how US Courts have responded to re-negotiations of unpaid debt.

In *Allied Bank International v. Banco Credits*,[16] denied the US Court of appeals for the second circuit took the unprecedented step of reversing its own prior decision.
The case involved a debt restructuring plan between certain Wall Street banks set in motion upon default on prior loans by the Costa Rican government. While the prior loan was to be repayable in US dollars, the Costa Rican government, then facing serious economic problems, suspended debt repayments in 1981 but later issued directives requiring all payments of external debt to be conditioned on express approval by the Costa Rican Central Bank. The Central Bank then declined to pay the debt on US dollars. The Costa Rican government re-negotiated and refinanced the loan with a consortium of Wall Street Banks. In its first decision in a case brought by one of the small banks in the consortium against Costa Rica, the second credit concluded that the directives of the Costa Rican government requiring authorization of payment of the debt and suspending payment in US dollars was consistent with international legal principles of comity which require respect for the decisions of sovereign governments in US courts.

The Justice Department intervened in the suit upon learning of this decision arguing that while international debt adjustment under the auspices of the International Monetary Fund, (IMF), encourages co-operative adjustment of international debt problems, the underlying obligations to repay the debt still remain. In other words, notwithstanding re-negotiation of the conditions of payment, an indebted country cannot escape the underlying obligations and a creditor may sue on that prior debt since it remains valid and enforceable. The Justice Department argued that Costa Rica's

[13] Enrique Carrasco, "Rhetoric Fuels Racism in the Crisis: The West Demeans other Economies to Justify Its Attempt to Impose its Own Policies as the Best Policies for all," Los Angeles Times, Commentary, Thursday, January 1, 1998.
[14] Frank Fischer, Technocracy and the Politics of Expertise, 1990 at 14
[15] For an extended analysis see, James Thuo Gathii, Empowering the Poor While Protecting the Rich: A Critique of Good Governance Proposals, SJD Dissertation, Harvard Law School, April 1999.
[16] 757 F.2d 516 cert

attempted unilateral restructuring of private obligations was inconsistent with the IMF's system of international cooperation and negotiation.

The 2nd Circuit Court of Appeals reversed itself - finding that the directives constituted a default of payment inconsistently with the provisions of the loan against making the loan hereby due and payable immediately. In essence, the Court gave undue deference to an executive branch a statement of policy - thereby suspending its role as a neutral arbitrator of this commercial dispute. Hence rather than applying the law as it had in its first decision, it substituted it for the policy of the US Government thereby helping out the financial institutions at the expense of the Costa Rican Government.

Conclusion

Debt restructuring plans that developing countries enter into are worked out cooperatively with lenders, often with the stamp of approval by the IMF. In fact, such successful restructuring and re-financing is often an endorsement of the economic programs of the country concerned. They signify the confidence that creditors have in the domestic policy affairs of the country in issue. By declining to uphold these re-negotiations, the 2nd Circuit endorsed the exploitative agenda of speculative Wall Street banks that prey on the precarious positions if indebted countries by trading in the fears that such countries would experience a severe drop in creditor confidence should they fail to meet creditor rights even when such rights are in violation of joint-creditor arrangements as was the case here. Since the decision endorsed banks to work outside joint-creditor arrangements, these firms compound the domestic policy problems of indebted countries by suing on the re-financed debt instead of holding out for scheduled payments from agreed upon period to agreed upon period.

As recent evidence of the impact of debt forgiveness in Uganda has shown, bringing debt under control is key to not only fighting poverty and increasing educational enrollment and facilities but some of the problems that led to the debt crisis in the first place.

That developing countries are denied mechanisms to re-adjust their indebtedness thereby opening their economies further to the greed of Wall Street results in further marginalizing people of color by denying them access to the legal options otherwise available to other creditors.

Part IV

My claim here is that assumptions of neutrality and objectivity of World Trade Organization, (WTO), intellectual property rules are disproportionately affecting constituencies of color particularly in developing countries.

The basic claim of supporters of intellectual property rights at the WTO is that a lack of "a credible patent rights regime in developing countries would do far more harm in the long run than their absence can accomplish in the short run."[17] In other words, that overriding patent rights to address public health paramedics such as HIV/AIDS will

[17] Allan O. Sykes "TRIPs, Pharmaceuticals, Developing Countries, and the Doha 'Solution," John M. Olin Law and Economics Working Paper No. 140 (2D series) The University of Chicago Law School at 25. For an alternative view, see James Thuo Gathii, "The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention of the Law of Treaties," 15 Harvard Journal of Law and Technology, 291 (2002)

reduce the returns to pharmaceutical patent holders, at least with respect to drugs that are used to treat certain diseases.

These contestable outcomes however suddenly disappear from the calculus when tragedy hits the West. Take the example of Cipro and anthrax following the terrorist attacks of September 11, 2001. The United Sates, Canada rushed to amass a stockpile of this patented drug after the buildup of the anthrax scare. The US and Canada subsidized Bayer for the stockpiling of Cipro although the US clearly has the legal authority (under its eminent domain power) to override patents.

So, why can't developing countries do the same? HIV/AIDS infections rates particularly in Southern Africa are among the highest in the world. In 1999 for example infection rates were:
35.80% of the population in Botswana
25.25% of the population in Zimbabwe
20% of the population in South Africa

By 1999 over fifteen million Africans had died of AIDS and another 25 million re living with the disease.[18] Yet, AIDS is a treatable, though incurable, disease. Drugs have more than quadrupled the median survival time from one to four years for Americans diagnosed with AIDS. Though countries such as Uganda have shown reductions in the rate of infection, the AIDS pandemic continues to wreck havoc in Africa. Just how many more Africans have to die before decisive steps are taken including those relating to patents, I have no idea.

Overall Conclusions

I hope my four examples have illustrated just how present race and identity are in private economic, commercial and trade matters. Secondly, I hope I have shown how the disproportionately the adverse distributional impact of international economic, commercial and trade governance falls on peoples of color around the world.

I am therefore sorry to report to you the sorry state of the role of law in global economic governance in estimating its reception to claims of reparations. I am afraid that the narrow and imperial legacy of international economic governance so securely guards the riches of the wealthy that conferences such as these continue to be an imperative to develop new thinking and strategies.

Yet, categories of private, commercial and international trade law are "both indispensable but inadequate in helping us to think through the experiences of political modernity in non-western nations."[19] In summary, these are the issues that will most likely confront the reparations movement within private international law. In my view, race and identity will include some of the major ways in which the defense of the rich and powerful will be safeguarded against what will invariably be regarded as distributional and therefore illegitimate claims to the extent to which they depart from

[18] It is noteworthy that there were five fatalities related to the anthrax bio-terrorist attack, for an extended analysis of the anthrax issue, see James Thuo Gathii, "Balancing Consumer and Pharmaceutical Dimensions in Addressing Bio-Terrorism: An Analysis of *re Ciprofloxacin Hydrochloride Antitrust Litigation*," forthcoming Law and Policy Journal (of the NY Bar), 2002.
[19] Dipesh Chakrabarty, Provincializing Europe (2000) 16

market norms. However, here are a few issues that claims for reparations will confront.

! The tendency within private law to individualize claims thereby isolating them from their historical, social cultural, political or economic context.

! The overwhelming probability that claims of reparations are more likely to be resolved within domestic legal as opposed to international legal regimes as has happened with regard to public international law issues such as genocide with the Hague and Arusha tribunals. Where private international law regimes exist such as the TRIPS Agreement, they heavily lean in favor of industrial interests and against public policy goals.

❖ The free market orientation of the regimes of private international law operate on assumptions that pre-empt compensating developing countries for wrongs committed against them.

❖ The assumption that sovereignty and self-determination are political rather than economic concepts and, as such, that developing countries cannot use them to illegitimately expropriate western property.

The reparations movement however represents a moral claim that supercedes these technical legal rules. To the extent that the Holocaust victims have been successful against Swiss banks for monies, gold and other valuables held by them or by their relatives notwithstanding strict banking privacy rules gives hope that moral claims can prevail over such technical rules. In addition, the bringing down of the proposed Multilateral Agreement on Investment by activists mainly through the internet, gives hope that organizing can successfully prevail against the interests of private capital.

Chapter 10

The World Conference from the Ground Up: The Activists' Role

Michael McClintock
Human Rights Watch

The march to halt caste discrimination became a multicultural conga line as it reached the grassy traffic circle below the United Nations' headquarters in Geneva. Protest organizers from the Dalit rights movement—India's so-called untouchables—were joined that sunny afternoon in May, 2001, by African human rights activists, Roma from throughout Europe, black Latin Americans, exiled Tibetans, civil rights activists from the United States, and many others. But the line of march began in India's towns and villages with grassroots organizations emerging from a community of 160 million Dalits.

The marchers that afternoon in Geneva met by the forty-foot monument to victims of the world plague of landmines, an outsize kitchen chair with one leg a shattered stump. The word Dalit means "Broken People"—in the sense of "broken but unbowed"—and the event under the "Broken Chair" monument commemorated discrimination by reason of descent, the heart of caste discrimination. The event served to bring together people in common cause—and to cast a spotlight of shame on the efforts by governments of caste-ridden societies to exclude this from the global forum.

The march was one of hundreds of meetings and events held in the two-year run-up to the third United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR). Held in Durban, South Africa from August 31 to September 8, 2001, over 3,000 nongovernmental organizations were represented at the conference itself and its NGO Forum. The many movements and many messages of the fight against racism and related intolerance were part of a process set in motion by the United Nations. Yet the process was driven by civil society and its prime movers were people who had themselves confronted racism and related intolerance in all of its forms.

A Beleaguered Consensus

The participants in the World Conference process were nominally working within a common conceptual framework: the universal standards best enunciated in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted in 1965. The convention defines "racial discrimination" broadly and concretely to include "any distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

A great failing of the conference was the inability of many participants, governmental and nongovernmental alike, to work together in the spirit of the convention, or even to uphold its basic principles. Despite important advances made in two years of preparatory meetings, the Durban conference itself was marred by a series of acrimonious disputes over Israel and Palestine; the issue of reparations for slavery and

colonialism; and other issues in which international human rights principles sometimes fell by the wayside.

Both the United States and Israel withdrew their delegations from Durban at an early stage, citing anti-Israel sentiment. Yet US government participation in the WCAR process had long been marked with scarcely veiled hostility—even while hundreds of US NGOs participated actively and enthusiastically. The US had warned NGOs and governments early in the process that the conference should not lead to any new programs to combat racism, any new legal standards, any additional funding for anti-racism efforts, or any follow-up. It warned the conference not to call for reparations for slavery and the trans-Atlantic slave trade or to adopt language specifically criticizing Israel. It was clearly uncomfortable with a spotlight being thrown upon its own record of racial injustice.

Other governments that made no threats to withdraw from the conference instead exerted inimical pressure from within, lobbying other delegations furiously to achieve the exclusion from conference documents of language deemed to impugn their own human rights records. The Indian government was perhaps the most outstanding among them, exerting its lobbying effort to keep caste discrimination out of the proceedings even within NGO fora.

The multiplicity of voices within the NGO community itself was not immune to disharmony in Durban, even though the vast majority of organizations and of the some 10,000 participants were committed to the same anti-discrimination values. While many events did emphasize broader themes, fringe meetings were often organized in a way that highlighted individual causes rather than the commonality of racism. This Balkanization of advocates around particular causes was also reflected in a disjointed final NGO document, which many NGOs did not support. A small minority of participants betrayed the values of the conference altogether, through displays of racist stereotyping, hatred, and exclusion, in particular through expressions of anti-Semitism. The US government's final hour determination to make its commitment to Israel the centerpiece of its own conference role, and related media attention, served to give oxygen to this ugly and destructive side of the WCAR.

Achievements and Disappointments

There were important achievements in the final documents of the governmental process. Attending governments did reach compromise language on the Middle East, which included specific mention of "Israel" and "the plight of Palestinian people under foreign occupation" but no specific reference to Israel's human rights practices. Compromise language was also reached on reparations, calling for governments to take "appropriate and effective measures to halt and reverse the lasting consequences" of racism, racial discrimination, xenophobia and related intolerance.

The summit called for far-reaching programs to address intolerance and discrimination against the 150 million migrants in the world, including education campaigns and measures to prevent workplace bias. It asked countries to combat intolerance against refugees, and reminded governments of the standards agreed in the 1951 U.N. Refugee Convention. It called on states also to protect the more than 30 million people displaced in their own countries, referring to the U.N. guidelines on the internally displaced.

In the area of criminal justice, the conference asked countries to monitor and ensure accountability for police misconduct and to eliminate "racial profiling." The conference called on countries to fund anti-racism efforts and public awareness campaigns in schools and the media and to promote tolerance and openness to diversity. It urged governments to collect data disaggregated by race, as a first means of identifying and then addressing discrimination in health and the provision of government services.

The conference acknowledged that slavery and the slave trade "are a crime against humanity and should always have been so," and said that states had a "moral obligation" to "take appropriate and effective measures to halt and reverse the lasting consequences of those practices." This was an historic recognition of the criminality of slavery and the moral obligation to repair its lasting damage.

In a significant step pressed by the conference women's caucus, the conference asked countries to allow women the right, on an equal basis with men, to transmit their nationality to their children and spouses, a right denied in many countries. The conference program of action also acknowledged the multiple and unique ways in which racism and sexism interacted to deny women their human rights.

Discrimination by reason of caste was excluded from the formal record of the conference at the last hurdle: paragraph 73 of the draft Final Declaration, which referred expressly to discrimination by reason of work and descent, was dropped in horse-trading as the conference closed. But the issue of caste was a constant theme of the conference, not least through public demonstrations and effective lobbying by the International Dalit Solidarity Network and by India's National Campaign on Dalit Human Rights. Caste or "work and descent" discrimination was referred to in many plenary speeches by government delegates and highlighted in media reporting on the conference. The WCAR process also set in motion unprecedented attention to caste discrimination by U.N. human rights mechanisms, not least the U.N. Sub commission on the Promotion and Protection of Human Rights. However much the WCAR process failed to meet its full potential, it proved a watershed for the Dalit movement and for the rights of "untouchables" and other so-called lower-caste communities worldwide. The WCAR gave a new dynamic to this and other grassroots movements in their own countries and served as springboard to continuing international action.

Mobilization and Coalition-Building

The WCAR process led to an unprecedented mobilization of opponents of racism from communities around the world. In taking part, activists reinforced their own community, national, and regional movements. Groups seeking to break the bonds of discrimination forged new alliances across continents with hitherto unknown partners—not least as the United States civil rights movement and Latin Americans of African descent found common cause. The international profile given to caste discrimination by this interaction was among the conference's most significant legacies. So, too, was the emergence of a coalition by which organizations representing people of African descent throughout Central and South America and the Caribbean took their concerns to the international community.

The World Conference process was highly inclusive, with the participation not just of leaders, experts, officials, and dignitaries but also of the broader membership of popular movements. The European Roma Rights Center, for instance, brought a

delegation of about fifty members of its constituent organizations. The Dalit contingent from throughout India had more than 160 activists.

In the lead-up to Durban, nongovernmental organizations organized scores of consultative meetings in many countries, giving the public real access to the potential of international action and solidarity—and drawing on the public's input in developing each organization's focus for the conference. The early consultations also generated new nongovernmental alliances, bringing together legal reform groups, advocates for migrants and refugees, women's rights activists, faith-based organizations, civil rights activists and human rights groups, veteran campaigners of the anti-apartheid movement, a wide spectrum of minority rights groups, and other grassroots activists.

In the United States, tens of thousands of activists took part in meetings and events in which the US civil rights movement was joined by broader human rights organizations, women's organizations, trade unions, and other parts of civil society in making the World Conference process its own.

Discrimination in criminal justice at home was a driving force for mobilization prior to the World Conference and a focus of efforts to influence the conference agenda. US-based human rights organizations and nearly fifty prominent civil rights activists joined in October 2000 in a Call to Action to end racial discrimination in criminal justice in the United States and to press for racism in criminal justice to be addressed at the World Conference. The presentation of the petition to United Nations High Commissioner for Human Rights Mary Robinson in October 2000 came fifty-three years to the week after human rights activist W.E.B. Du Bois had presented the NAACP's petition to the United Nations for support in the struggle to dismantle segregation and racial discrimination in the United States.

Grassroots events at the local and regional level in the United States served both to mobilize and to inform activists, buttressing awareness of domestic realities with new exposure to international standards and mechanisms for change. The process also put local activists in touch with international counterparts—and encouraged their making common cause to confront similar challenges.

Members of scores of US groups attended the many official preparatory meetings of the World Conference process, from the conferences held for each of the world regions to the formal preparatory committee meetings held in Geneva. In Durban, at the culmination of the process, the US civil rights movement was strongly represented. For example, the US Congressional Black Caucus had seven members present; representatives of a large group of organizations belonging to the Leadership Conference on Civil Rights attended; and the Black Leadership Forum Inc. sent a forty-five-member delegation.

In Latin America and the Caribbean, the World Conference process encouraged a similar mobilization of populations unwilling to be mere victims of discrimination. New coalitions emerged bringing together people of African descent from most of the Americas to share experiences and forge a common agenda.

The mobilization of people of African descent was facilitated by the growth in access to the Internet in Central and South America and the Caribbean and by a concerted effort by nongovernmental organizations with common concerns to act in concert. Intra-regional meetings brought together Afro-Latino groups from as far away as Uruguay and Honduras with Afro-Brazilian and Afro-Caribbean groups and organizations in the

United States. In a coming together of the NGO and intergovernmental worlds, the International Human Rights Law Group partnered with the Inter-American Institute for Human Rights to host a regional meeting of Afro-Latino groups in Costa Rica. Networking at the official regional and international preparatory meetings, in turn, linked Dalits together with Afro-Latinos and activists of the US civil rights movement.

The activists' role in the World Conference began two years or more before the tumultuous events of Durban began. In struggling from the ground up, activists' activities began at home and drew upon their own experiences at the grassroots. The World Conference provided a catalyst for some, a way to respond to the concern that local endeavors and limited partnerships could grow and achieve new resonance at home by tapping into the national, regional, and global fora envisioned from the start as part of the World Conference process.

Grassroots legitimacy and pragmatism was seen to have only to gain through increased networking within the larger local and national community of like-minded organizations. Participation in a broader national and international community also served to encourage information exchange and coordinated action at the local level by organizations that previously acted on their own.

An Awkward Dance of Governments and Civil Society

The formal process of the World Conference called for a series of consultative meetings in which governments and regional intergovernmental organizations were to seek the input of civil society on issues to be addressed. Nongovernmental organizations were the principal means of public participation in these preparatory meetings, although these were of vastly different make-up and composition, and indeed varying degrees of independence vis a vis their governments.

The World Conference process was a hybrid in which ownership was shared between governments and these nongovernmental actors, although significant barriers were posed to NGO participation in the formal conference process. Participation was as broad and inclusive as any past international conference, although relatively resource-rich organizations of the North were over-represented in most of the international fora. A healthy mix of volunteers and professionals represented local and national, regional and international organizations in a nongovernmental sector divided along several lines.

Many of the groups represented a particular constituency that confronts racism daily at the local, national, and international level. Some represent very specific constituencies based on people's common origins: people of African descent, Roma, Dalits, and numerous others. Participants in the WCAR process included activists from these organizations and people drawn from the vulnerable communities they represent. Most represent communities that have been deeply injured by discrimination, its deep structural roots nourishing continuing injustice.

Many organizations expressly address the problems of particular population sectors defined in more generic terms. The particular concerns of women, children, refugees and migrants, and indigenous peoples, for example, were the center of focus for many participant groups. Their "constituencies" were spread over much of the world.

Other organizations grouped activists around particular ways in which discrimination takes effect and particular safeguards and remedies. Some cross-cutting issues, like criminal justice and the protection of migrants and refugees, were of

particular concern to both human rights organizations with a broad mandate and to groups representing particular constituencies whose members were particularly vulnerable to abuse in these areas. Some participants focused on particular areas such environmental racism, health and access to health care, and the intersection of racism and gender.

Nongovernmental participants included national and international human rights organizations like Amnesty International, Human Rights Watch, the Lawyers Committee for Human Rights, and others that conduct the fight against racism as part of their broader mandates to promote and protect international human rights. Accustomed to working with NGO partners as well as with intergovernmental mechanisms, like the Committee on the Elimination of Racial Discrimination, human rights organizations put their efforts into various thematic areas in which specific remedies were required. The series of caucuses organized by participant NGOs in Durban reflected a division of emphasis—and labor—between victim-based or constituency-based groups (such as the Dalit coalition) and those focusing upon thematic work (for example, on criminal justice, reparations, or women's rights).

The broad range of groupings built around particular constituencies, issues, and remedies brought different approaches and priorities to the World Conference process. Participants also had vastly different levels of awareness of issues of racism beyond their own experience or areas of expertise. The interaction at the national and international level resulted in new coalitions of victims of racism and the human rights, women's rights, environmental rights movement. It also served to bring new, hitherto largely local actors to the international stage, and new awareness of aspects of racial discrimination, xenophobia, and racial intolerance through the press and other media.

A major part of the inter-NGO learning process was an increased awareness of the indivisibility of the economic and social consequences of racism and the violation of civil and political rights, and the need for remedies to discrimination to address the full spectrum of rights. This was paralleled to some extent in the intergovernmental process— although marked by a bitter North-South divide over reparations for the historical abuses of slavery and colonialism. This notwithstanding, racial discrimination emerged as a clear case in point of the indivisibility of human rights in many parts of the final documents. Although largely couched in the language of development assistance, a formula that might be decried as "no-fault reparations," oblique commitments to remedying past harm by pledging resources to overcome today's structural inequities were combined with a clear condemnation of historical abuse. The final document also suggests that reparations for past abuses must be driven by current needs—and recognizes that making right these lasting consequences of historical abuse are essential for the future.

Many of the groups represented in the World Conference process understandably saw an end to ongoing social and governmental racism to be dependent upon resources—compensation to allow the structural remedies required to reverse the cumulative effect of past discriminatory practices. The interaction that was central to the process also encouraged groups which had long focused on domestic legal remedies to such abuse to reassess their advocacy to take into account international standards and the international arena.

Advocates won new recognition that governments could not address the continued denial of equal opportunities in housing, education and health care and a racist criminal justice system in isolation from systemic past abuse. There was also a new awareness of the conceptual tools provided by international standards, not least CERD's requirement that public policies be discriminatory neither in purpose nor in effect—that a government may be in violation of its treaty obligations even if discriminatory intent can not be proven.

For many participants, measures to address historical racism, from slavery and aspects of colonialism to segregation and caste discrimination, were an irreplaceable step toward making right current injustices. In this regard, reparations were seen for many participants as an essential means to remedy *ongoing* injustice, redress for what is blighting society today. All of these groups face economic and social inequities that are the lasting consequences of having been denied civil and political rights on an ongoing basis with deep structural roots. The WCAR process helped take this struggle beyond the local and the national stage.

The Balance

The WCAR was a conference of lost opportunities, marred by disorganization, intolerance, and destructive great-power politics. But for the vast majority of its participants, the WCAR process was an important vehicle for work against racism at the local level and a step toward needed global action that is still to come.

The principal achievements of the World Conference process were arguably not to be found in the documents prepared in Durban, or even in the meetings and events held there as the culmination of a long preparatory process. Perhaps more importantly, the WCAR served to give many activists, from Dalits to Afro-Hondurans, a window on the international community and an opportunity to become full partners in a global rights movement. The experience of the mobilization and interaction of thousands of local NGOs in the preparatory process, at home and abroad, may itself be the WCAR's most lasting and constructive legacy—a building block for future campaigning from the ground up.

Chapter 11

World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance: The Essentiality of NGO Alliance-Building to Obtain Governmental Recognition of Historic Crimes against Humanity and Reparations

Adjoa A. Aiyetoro
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The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) offered an opportunity for the reparations movement in the United States to get the issue of reparations for African descendants in the United States squarely on the agenda of the international community. Silas Muhammad, of the Lost Found Nation of Islam, had been raising the issue before the United Nations Human Rights Commission for a number of years prior to the planning for the WCAR. Prior to the WCAR planning process, the December 12th Movement had also been advocating at the United Nations' Human Rights Commission meetings that the Commission recognize that the Transatlantic Slave Trade and slavery were crimes against humanity and the economic basis of slavery.

The racial justice campaign of the US Women's International League for Peace and Freedom (WILPF), called United for Racial Justice: Truth, Reparations, Reconciliation and Reconciliation (UFORJE), saw this opportunity, and in February 2000 asked me to represent WILPF and UFORJE in the preparatory meetings as well as the NGO Forum and Government Conference in Durban, South Africa. UFORJE was indeed correct, and through the hard work of alliance building among NGOs and collaborating with favorable government forces, the NGO documents and the government documents spoke to the issues of the Transatlantic Slave Trade, the slave trade and slavery as crimes against humanity. These documents also recognized the right to reparations for the descendants of those enslaved due to the continuing consequences of the Transatlantic Slave Trade, historic slavery as well as those who are currently subjected to slavery. Of course, the NGO Forum documents were much clearer and stronger on these issues; however, the fact that these issues were positively addressed in the government documents is a testament to power of advocacy through alliance building.

The Elements of Alliance Building

In looking at the WCAR process several elements of alliance-building became clear, as a strong alliance was built around the issues of compensatory remedies, including reparations, for victims of racism and the acknowledgment of the Transatlantic Slave Trade and slavery as crimes against humanity. These elements include clarity of the group goal; ability to withstand criticism of the group that could derail the effort; ability to articulate what the group wants to potential alliance members; willingness to listen to the responses of potential alliance members to the stated goals, even critical responses; integration of the concerns of potential alliance members; integrity in the process of working with members of the alliance and patience as the alliance develops.

UFORJE's creation was indeed an act of alliance building within WILPF. In 1995, I was asked to speak at a WILPF conference in Colorado. WILPF leadership and

members were charged up by the discussion of reparations for African Descendants in the United States and began supporting the National Coalition of Blacks for Reparations in America/s (N'COBRA) demands for reparations and passage of H.R. 40, the Reparations Study Bill introduced in Congress every year since 1989 by Congressman John Conyers. WILPF organized a Truth and Reconciliation Campaign that later became UFORJE.

Clarifying the Group Goal

At the first preparatory meeting of the WCAR in May 2000 in Geneva, Switzerland, I joined the African and African Descendants Caucus organized by the December 12th Movement, based in New York. The Caucus was primarily African Descendants representing NGOs in the United States with a few Africans and African Descendants from other parts of the world. It functioned as an alliance. In its first meetings the participants agreed to make our primary goal having the issue of compensatory remedies to victims of racism, including reparations, on the agenda of the government conference in Durban. This had already been proposed by the African Group of States, who had been charged with developing the draft agenda and themes and presenting them to the governments in this preparatory meeting. Through the experience of the December 12th Movement, we also recognized the need to push for language in the government documents that called the Transatlantic Slave Trade and Slavery crimes against humanity.

The December 12th Movement, because of its previous work within the United Nations structure, had relationships with a number of governments, particularly those in the African Group of States. This relationship was central, particularly at the first preparatory meeting, since it placed the African and African Descendants Caucus in the position of being sought by some members of the African Group of States, who desired more documentation on the issue of reparations in order to educate the member governments of the African Group as well as other government delegations. At the request of Roger Wareham of the December 12th Movement, three of us drafted a two-page document that outlined the international precedents and legal basis for reparations. This document was circulated to the African Group of States as well as other States.

Since we were clear on our position, the essentiality of having reparations on the agenda and language concerning the crimes against humanity that the Transatlantic Slave Trade and Slavery represented, we were able to remain focused throughout the preparatory process and in Durban. Clarity also helped us work effectively with governments who either supported this goal or were not committed opponents. We were also able to articulate this goal to other NGOs and NGO Caucuses and were joined by them in not only lobbying for support of the agenda and themes proposed by the African Group of States, but also in confronting the strong opposition of the United States delegation and the European Union. The withdrawal of the United States from the conference was due in large part to its inability to keep these issues out of the discussion and eventually out of the government documents. The work with other NGOs in this effort during the first preparatory meeting began a dialogue that would eventually result, by August 2002, in an alliance in support of these goals that was multiracial, spanning virtually all the NGO Caucuses at the WCAR.

Withstanding Critics

During the first preparatory meeting it became clear that the government forces opposed to compensatory measures, including reparations and the recognition that the Transatlantic Slave Trade and Slavery were crimes against humanity, were, although perhaps a minority in number, the most powerful countries in the world, many of whom were participants in the Transatlantic Slave Trade. It was clear that these governments were attempting to use this power to derail the effort to address the Transatlantic Slave Trade and the slavery attached to it. Threats of non-participation in the process began to be whispered loudly by some of these countries, most notably the United States, particularly during the regional meetings in Santiago, Chile and became louder as it was clear that the government advocates for these agenda items and themes, along with the NGO supporters, were not going away, but were becoming stronger. By the time of the regional meetings, the African and African Descendants Caucus had grown to include significant numbers of Africans and African Descendants from around the world, all of whom were supportive of these items in some way.

The NGO and government documents from Santiago spoke in support of reparations for the continuing consequences of the Transatlantic Slave Trade and Slavery. The African Group of States' regional meeting in Dakar, Senegal issued a strong document in support of reparations for Africa for the rape of Africa of its people and artifacts during the Transatlantic Slave Trade and colonialism. The United States was the most visibly enraged participant in the Transatlantic Slave Trade and chattel slavery that attempted to force a change in the language of the Dakar document by having one of its WCAR delegates, Betty King, go to Dakar and attempt to intervene to have the language modulated.

The tension created around the WCAR due to this issue of reparations for the Transatlantic Slave Trade and Slavery was seen in the NGO community through criticism of the NGO proponents. A number of NGOs urged us to back down, to not push for the issue to be placed on the agenda and discussed at the WCAR. We were accused of contributing to the likelihood that the conference would be derailed because of our fierce advocacy for these issues to be front and center. We were not swayed, indeed, we became stronger as the numbers in the African and African Descendants Caucus grew and our members participated in other Caucuses to mollify the opposition and gain support from these Caucuses.

Articulating our goals to potential supporters

In building support for our goals, we had naturally reached out to Africans and African Descendants, and through this network, we reached out to other Caucuses. The opposition to our claims, both from forces that opposed the goal and forces who were afraid that our position would derail the conference, only strengthened our resolve to continue in our work to influence the documents and get these issues squarely on the agenda and in the government and NGO documents. We recognized that the only way to strengthen our efforts was to get the official support of other Caucuses. We had been participating in the government conference by making interventions on the agenda items and procedural items that affected our advocacy for reparations and crimes against humanity. According to the rules of the government meetings, these interventions had to

be made by accredited NGOs and thus, WILPF, among others, drafted and submitted orally and in writing interventions that supported the inclusion of compensatory measures, including reparations, as agenda items for the WCAR. In the Americas Regional Meeting, although WILPF presented an intervention, the drafters and signers of the intervention included a broad alliance of African descendants from the Americas.

In the March 2002 intersessionary working group meeting we began to get formal support from other Caucuses. We began to discuss our goals with the Romas, the Indigenous Caucus, Women's Caucus, Youth Caucus, Migrants and Refugees Caucus and others. Although a number of caucuses were aware of our position and some supported it unofficially due to the influence of Africans and African descendants within these caucuses, we began to seek and obtain official support for these positions from these Caucuses and non-African and non-African descendant NGOs. In articulating our goals and obtaining the support of these Caucuses and NGOs it became clear that we had to address a number of questions, the most important of which being how were our demands related to their demands and therefore, why was it in their interest to support us and what support could we give them.

Listening to potential allies

In the March 2002 intersessionary working group meeting and the May 2002 preparatory meeting, both in Geneva, we had to practice our listening skills. A major issue that required our focused attention was our brothers and sisters from Mauritania and the Sudan who wanted us to make specific mention of slavery and the slave trade related to these countries. The issue was somewhat problematic for two reasons -- there were already United Nations documents that spoke to contemporary forms of slavery, and none that spoke to the Transatlantic Slave Trade and the slavery attendant to that, and there were some who made distinctions between what was happening in these countries and what happened pursuant to the Transatlantic Slave Trade. In our listening, we sought ways to encompass contemporary slave trades and slavery without compromising on the need for recognition of the crimes of the past.

As we spoke with other Caucuses and NGOs, we had to take a non-defensive stance and really hear the concerns they had, not only about our issues, but also about their issues. We had to express in action what the slogans spoke to, the interconnectedness of our condition as victims of racism, racial discrimination, xenophobia and related intolerance. We had to resist the tendency to compete for whom the most injured, most deserving and most maligned were. We had to express our respect for one another as we sought to build a broad alliance in support of the issues that we held dear.

It seemed that in March and May 2002, we crossed a threshold and overcame the opposition that believed we would derail the conference if we continued to push reparations. We overcame the opposition because we understood that we could not "sale out" our people for the expediency of a conference and that indeed, that conference would be meaningless to our people if the significance of their injury and the necessity of a true remedy, reparations, was abandoned by us. We were able to articulate this to many NGOs and Caucuses by showing them the relationship among our demands. This was only possible because we listened, really listened.

Integrating the concerns of alliance members

It was not enough to listen. If we wanted to build strong support we had to integrate the concerns into our interventions and other documents. We made clear in our documents and interventions that we opposed slave trade, historic and contemporary, and slavery. We defined reparations as inclusive of land and return of artifacts as well as cash payments. We articulated to our allies and in our interventions that reparations was a broad remedy, applicable to other groups. We integrated the demand that the documents address issues of the cross section of race and gender and race and sexual orientation. We saw the importance of dealing with issues of development, globalization, the environment and health. We continued to articulate the need to recognize the economic basis of slavery and the slave trade.

The work of integrating the concerns of alliance members was not simply to speak to the concerns of potential allies who did not identify with the African and African Descendants Caucus. We had to address important issues of concern to African and African Descendant NGOs and representatives of NGOs. It was only when we successfully addressed the issues of language by having interpreters at our meetings and developed a mechanism for understanding and dealing with cultural differences among Africans and African Descendants that our Caucus became truly unified.

Integrity

Woven throughout this process was the need to act with integrity, both within the African and African Descendants Caucus and as we reached out to other NGOs, Caucuses and government delegations. We had to say what we meant in clear, unequivocal language. We had to respond to our detractors directly, while at the same time without venom and mean-spiritedness. We had to speak truth to power, yet in a way that built support and did not alienate us from the process. We had to speak in support of our brothers and sisters who are victims of racism, as we lobbied for our particular issues. We had to share information and follow-through on agreements with those who joined in our demand, refusing to act in opportunistic ways; rather, seeing that our demands were inextricably linked and because our oppressions were linked.

Patience

Once we did all we could do to build the strong alliance of NGOs and Caucuses, we had to wait to see the outcome of our work. The August 2001 preparatory meeting gave us the feedback we needed. Although this meeting had fewer NGOs than others, largely due to it being planned in May 2001 when most NGOs had not budgeted for it, it was exemplified by the strength of our unity.

The United States delegates attempted to meet only with the African NGOs. They cancelled the first scheduled meeting when representatives of the African and African Descendants Caucus from the Americas came with the African NGOs. The African NGOs told them that we were one Caucus and they would only meet with them with representatives from the entire Caucus. The meeting was rescheduled and co-chaired by Barbara Arnwine, from the United States, and Aliounne Tine from Senegal.

The European NGOs Caucus, among others, issued a statement in August in support of reparations and presented the statement as an intervention in the government session during this meeting. The Human Rights Commission issued a statement in

support of reparations that we referenced in our interventions. And, in March, May and August, when Caucuses were allowed to make interventions, we had supporters from a number of the Caucuses.

Finally, at the WCAR in Durban, not only did we have overwhelming support in the inclusion of language concerning reparations and the Transatlantic Slave Trade, the slave trade generally and slavery as crimes against humanity, the NGOs and Caucuses supported these demands during the government conference. The tribute to this alliance of NGOs and Caucuses was the candlelight vigil held August 5, 2002. It was one of the largest, if not the largest, demonstrations held during the WCAR government conference. The African and African Descendants Caucus organized the demonstration and rally with the strong support of other Caucuses and NGOs. The Women's Caucus prepared the flyers and other Caucuses and NGOs spread the word and spoke at the rally. The theme of the rally was "United against Global Racism." We had decided we did not want the theme to be reparations because we wanted all Caucuses and NGOs to have a part in it. As we gathered and began our march someone began chanting "Reparations Now" and the entire demonstration took up that chant. The police stopped our progress by standing arm in arm on the edge of the street as we left the gates of the media/NGO meeting section. We were the only demonstration not allowed to march across the street to the building where the governments were meeting. We were confined to a small area and held our rally in that area. One of the organizers shouted over the chants to a police officer, "we want them to hear us." The officer shouted back, "they hear you, trust me, they hear you."

Conclusion

They did hear us – because we did not give up. We spoke truth to power, by staying true to our commitment to the reparations movements worldwide and to our ancestors, millions of whom lie at the bottom of the Atlantic Ocean. They heard us, not because the powerful countries that participated in the Slave Trade were moved to admit their crimes, apologize for them and develop reparative proposals, but because we stayed together and enlarged our circle to include Caucuses and NGOs that may not have previously embraced our claims. We showed that reparations for Africans and African Descendants is not a divisive, non-winnable claim but a unifying demand that speaks volumes not only to Africans and African Descendants but to the world community committed to ending racism, racial discrimination, xenophobia and related intolerance. We showed that we are more similar than different, and that if we work together we will all be lifted up.

Chapter 12

The Impact of Durban on the Dalit Struggle

Kathy Sreedhar
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The Durban Conference against racism in August 2001 marked a turning point for the struggle of India's Dalits, or untouchables, to assert their human, social, political, and economic rights. Not only did the conference provide a common ground where dalits could mobilize their strength and organize to make themselves visible in India and the world, but it caused many Indians to realize that they could no longer ignore the pervasive oppression that dalits have experienced for millennia. To cite only one instance: India's National Human Rights Commission, a quasi-governmental body, finally took an official stand against untouchability – a decision that has placed it in direct conflict with the government, which asserts that laws and policies have effectively resolved the untouchability question.

Another significant outcome of the Durban conference is the growing awareness by governments of other nations that hereditary and occupation-based discrimination are issues that require their attention. Unfortunately, this awareness has not yet led to substantive action. The United States in particular, as a nation that prides itself on protecting and enhancing human rights, should do more to shape policies that will assist the dalits in their struggle.

Background

The success of the dalits at Durban is all the more remarkable considering their long history of oppression. Dalits are at the very bottom of an ancient, hereditary system of discrimination that divides most of India's population into castes, with Brahmins at the top and "scheduled castes," including the dalits, at the bottom. According to traditional views, the dalits are fated to serve their upper-caste betters as servants and laborers and in other low-status, low-paying occupations. Of the approximately one-sixth of India's people who are dalits (about 160 million people), most live in rural areas and more than a million are manual scavengers, forced to clean human feces in public and private latrines.

Dalits live in society, yet are segregated from the people they are supposed to serve. They may not use the same wells, enter the same temples, or walk through the upper-caste section of the village. Despite constitutional guarantees of equal access to schooling, dalit children must sit outside the schoolroom or, in the most fortunate cases, at the back of the room; and many of them never get any schooling at all. It is not surprising that half of them (64% of the girls) do not complete primary school. Dalits suffer widespread murder, rape, arson, and other forms of violence, often inflicted with impunity. Dalit women bear the triple burden of caste, class and gender.

There has been no escape from this oppression, until very recently. The considerable number of dalits who have tried to leave the caste system by converting to other religions, such as Islam, Christianity, Buddhism, and Sikhism, are still treated as if they are members of the caste into which they were born. The long arm of untouchability

has reached even the Diaspora, in the form of separate caste-based churches and Sikh temples in the United States, United Kingdom, and elsewhere.

India's government has been willing to provide relief, through laws that mandate affirmative action and other measures for dalits, but it has been unwilling or unable to enforce laws and policies that might change the power structure that causes the oppression of the dalits. This is not surprising, considering that most of the lawyers, judges, legislators, and civil servants come from the upper castes. It means, however, that while untouchability is illegal, it is still widely practiced.

The national government has enacted laws to promote land reform and reserve legislative seats, government jobs, and student places in higher education for scheduled castes, and has developed economic and social programs to rectify previous inequities. But few dalits have the basic education to take advantage of these options, and those dalits who press the government to implement these measures often encounter a public backlash including boycotts and violence. In any case, the laws apply only to the government, not to the rapidly growing private sector.

Breaking the Psychology of Acquiescence

The struggle to break discrimination and oppression is made all the more complicated and difficult by the fact that many dalits have internalized society's valuation of them. Lacking self-esteem and believing that their inferiority is fated, they accept what others do to them, even though they may feel that it somehow unjust. However, since the emergence of the dalit struggle, more than 150 years ago, exceptional individuals have been able to stop internalizing the values of the dominant culture and begin imagining themselves as free and equal people. Some have achieved high positions in society and government, becoming models for others, in a process that gained energy around the time of Independence and has recently enjoyed resurgence.

An outstanding example of the importance of exceptional individuals in shaping the dalit movement is Martin Macwan, who directs the National Campaign for Dalit Human Rights (NCDHR), which was the lead organization of dalits at Durban. I met Martin in 1988, when he was 28 years old. He was a child laborer before being selected as a student in a Missionary school. Even then he and the few other dalit children whose fees were exempt were required to sweep the classrooms while other children were playing.

Martin attracted attention as a bright and able student, and was able to continue his education through college and become a lawyer. While working for an internationally funded Missionary NGO which was doing village development programs, he and his colleagues noticed that dalits were excluded from the projects and began to organize them. A few months later, when Martin was in another area, upper-caste assailants massacred his four colleagues. The NGO, under pressure from the Missionaries, “developed cold feet” and refused to file a case or follow up in any way.

Martin was alone, without a job or resources, devastated and furious, but more committed than ever to fighting systemic oppression. At this point he began to receive small but steady grant support from the UU Holdeen India Program, which works with the most oppressed and marginalized groups in India, including dalits, tribals (indigenous peoples), and particularly women. Martin formed his own NGO, Navsarjan (New Beginnings), and educated dalits about their legal rights, provided legal aid, filed Public

Litigation suits, and identified and trained leaders and second line cadres, especially women and youth. He raised their confidence and independence and conducted campaigns to change and implement laws and policies especially on land issues, minimum wages, drinking water, untouchability, manual scavenging, and atrocities against dalits.

Today, Navsarjan works in 2000 villages. Martin recently served as head of the NCDHR, a national effort to mobilize public support on behalf of dalits.

International recognition has come too. Human Rights Watch featured Martin and his work in *Broken People;* the television program *60 Minutes* has aired a segment on scavengers. Martin won the 2000 Robert F. Kennedy Human Rights Award.

A Process-Based Strategy

I have given this extensive background to emphasize the issues of caste oppression and discrimination and dalit efforts to address them long predate Durban. Since Durban can be seen as simply an extension of what dalits have been doing for decades, we have to ask what any global conference could have accomplished. The dalits themselves debated this and differed as to whether to use their very limited resources of money, time, and people to influence an international conference that only a few could attend and that would not directly change any Dalit's life, or to strengthen grassroots and national initiatives.

The NCDHR leaders, including Paul Divarkar, Henri Tiphagne, Ruth Manorma, and Jyothi Raj, decided to use the Durban *process* as an opportunity to strengthen both international and national initiatives, in the belief that they are related. According to this strategy, since untouchability is a global phenomenon, of which dalits are the Indian expression, it must be attacked at both levels simultaneously. My analysis of Durban looks at three aspects of process: the preparatory phase, the conference itself, and the post-conference follow-up.

Once Martin and his colleagues decided to attend the conference, they resolved to use the preparatory phase as a way of generating nationwide attention and discussion and of organizing all sectors of dalits. They created a national debate on caste discrimination and the practice of untouchability, and mobilized enormous grassroots support for dalit issues. They engaged other parts of civil society – NGOs, political parties, academics, and journalists – issuing a black paper documenting the overall situation affecting dalits and demanding specific remedies. NCDHR organized innumerable public hearings, conferences, workshops, signature campaigns (2.5 million signed a petition demanding the abolition of untouchability), a Dalit Women's Conference, and the First Global Conference on Caste and Racial Discrimination in Delhi.

NCDHR used the preparatory process, including conferences, to strengthen their advocacy skills, expose dalits to national and UN human rights mechanisms, and interact with UN and government officials, especially those from the EU. The process helped build solidarity with NGOs from other countries and especially with other oppressed groups (African Americans and the Roma), and it enabled participants to meet dalits from overseas. Immediately preceding Durban, NCDHR held a three-day preparatory conference in Hyderabad, where the delegation (most of whom had never been out of India) was informed about the Durban conference's major issues, players, and logistics. They also developed strategies for action at both the NGO and official conferences.

Such careful planning meant that the dalits were visible everywhere at the Durban conference, raising caste issues in every forum, mounting demonstrations and solidifying alliances with other oppressed groups in South Asia, Japan, and Europe and with Africans and African Americans (who became their largest supporters). They met concerned citizens and organizations from different countries of the world that were focused on exposing and fighting untouchability and caste-based discrimination. These significant breakthroughs helped blunt the disappointment felt when the conference failed to endorse the position that caste was on a par with race and other forms of discrimination and should be part of the official UN platform against discrimination.

The WCAR itself faced daunting obstacles, foremost being the indifference of major donors. In contrast to the 1995 Women's Conference in Beijing, the UN and the United States provided little funding for either the NGO or the UN conferences. Therefore it was difficult for many marginalized people to participate. The Ford Foundation did pay for more than 200 dalits to go to Durban, which was most helpful. Additionally, the dalits faced obstruction and harassment from the government of India throughout the preparatory and Durban process. The government claimed that the effort to raise caste-discrimination issues in an international forum was contrary to the nation's interests and failed to account for official policy and action on behalf of dalits. So intense was the hostility that the government actually refused visas to a number of international invitees to the Delhi conference.

The WCAR met other difficulties too. Regrettably, the United States did not send a high level delegation, and then walked out of the conference because of the Zionism, Palestinian, and reparations issues. The United States also withdrew its earlier support for dalit positions. The Palestinian domination of both the NGO and official conferences made it difficult for other liberation movements, including indigenous peoples, minorities, and women, to have space or make their voices heard. And the media paid very little attention to the conference itself, although the dalits did put the spotlight on caste discrimination and gained global visibility.

Nevertheless, Martin and his NCDHR colleagues have much to celebrate as they conduct their post-conference follow-up. They have firmly anchored themselves within both the international discussion about hereditary and occupation-based discrimination and the UN human rights system, where the dalit issue can be placed as a global concern requiring attention. They have established important links with allies around the world. For the first time, the caste issue, which had been seen purely as an Indian experience, was viewed as related to discriminatory customs and practices prevalent in South Asia (Nepal, Sri Lanka, Pakistan, and Bangladesh), Japan (the Burakumin), and in parts of Africa. This led to the formation in March 2000 of what came to be known as the International Dalit Solidarity Network, consisting of national networks of solidarity organizations and international human rights and humanitarian organizations. These include Human Rights Watch, Amnesty International, Anti Slavery International, Lutheran World Federation, Danchurch Aid, Buraku Liberation League, National Federation of Dalit Women, National Campaign on Dalit Human Rights, and the UU Holdeen India Program.

Policy Implications

Dalits are now moving into the next phase of their struggle, which will bring many new challenges, not least the need to expand their domestic support base. In January 2002, the NCDHR and the government of Madhya Pradesh held a conference in Bhopal to develop an agenda for the future of dalits and tribals in India. They issued the Bhopal Declaration, a 21-point agenda for dalits in the 21st century, emphasizing issues of land reform, labor, primary education, scavengers, women, and atrocities. For the first time, large resources were generated from donors, most notably the Ford Foundation, to promote dalit issues including a fund to strengthen dalit organizations and a National Institute for Dalit Studies.

It is important that national governments act to assist the dalits in any way possible. The United States should use its great political and economic leverage to press international agencies to alter policies to advance the dalit cause, and it should state publicly its support for the Indian campaign for dalits and the international efforts to end untouchability. Recently, Senator Edward Kennedy made a small but significant beginning by persuading the Senate to pass a bill prohibiting the use of scavenger labor in World Bank projects. Beyond such prohibitions, the US government can act positively. All directors, managers, and personnel who work on issues and projects related to India should be educated about dalit issues. Development aid to India should be channeled through a rights-based and service-oriented approach that concentrates on developing the capacity of dalits to exercise their legal rights and attain economic opportunity. There should be special emphasis on using US funding to strengthen dalit leadership at all levels through exchange and education programs. Finally, evaluations of aid programs should include an assessment of their impact on the condition of dalits. Efforts of this sort would not require much additional funding but would make a huge difference for dalits as they struggle to live as free and independent people.

RACISM, COLONIALISM AND REPARATIONS:
A POST-DURBAN DIALOGUE BETWEEN HUMAN RIGHTS ACTIVISTS AND ACADEMICS

Saturday, 16 March, 2002

MIT Program on Human Rights and Justice

Introduction: **Balakrishnan Rajagopal**

Inaugural Speech: **Phil Clay**

PANEL 1: Assessing the Durban conference – Challenges for human rights policy and activism
Kinhide Mushakoji
Laurie Wiseberg
Raj Purohit

PANEL 2: Why Reparations? Designing the moral and legal response to Racism and Colonialism
Tony Anghie
Penelope Andrews
Barbara Arnwine

PANEL 3: How to respond to racism and colonialism in international law and relations
Siba Grovogui
Mohammad-Mahmoud Ould Mohamedou
James Gathii

PANEL 4: Struggling from the ground up – stories of resistance from activists
Mike McClinntock
Adjoa Aiyetoro
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