

# Negotiation on the Ground: Realizing Economic, Social and Cultural Rights in South Africa, Nigeria and Peru

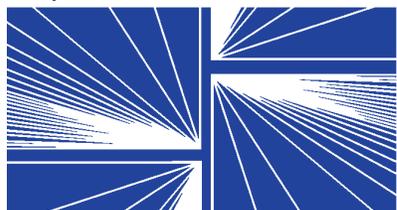
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# Negotiation on the Ground: Realizing Economic, Social and Cultural Rights in South Africa, Nigeria and Peru

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## I INTRODUCTION

*There is nothing to fear from the idea of socio-economic rights as real, enforceable, human rights on equal footing with all other human rights, and no cause for simplistic or categorical distinctions between these rights, and rights described as ‘civil and political.’ Human rights obligations require no more or less than reasonable efforts within the maximum extent that resource constraints permit, with priorities determined through inclusive democratic processes, and with an abiding concern for the situation of the most disadvantaged. -- Former UN High Commissioner for Human Rights Louise Arbour (2005)*

*We have here a story of illegitimate demands made by people with no standing to make them, a story of people so far outside the circle of who “counts” that they cannot make claims within the existing frames of claim making. They make room for themselves by staging nonexistent rights, and by way of such stagings, sometimes, new rights, powers, and visions come into being. – Bonnie Honig (2001, p.101)*

When the Universal Declaration of Human Rights (UDHR) came into force in 1948, the horrific memory of the Holocaust was fresh in the minds of the drafters. The rise of Nazism in Germany was made possible in large part by the severe economic depression the country suffered. In 1941, President Roosevelt outlined four essential freedoms he believed to be achievable worldwide within a generation, including freedom from want. In his 1944 State of the Union address, he stated a pragmatic rationale for socio-economic rights: “People who are hungry and out of a job are the stuff of which dictatorships are made” (cited in Eide 1995, p.29). In the aftermath of WWII, the importance of international standards that could protect all human beings against state oppression was clear. As a result, a group of influential states agreed upon the UDHR, which expressed a bold and comprehensive vision of human rights that included political, civil, economic, social and cultural rights. Its preamble envisions the “advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and *want*” (UDHR 1948, emphasis added).

In the years following the UDHR, human rights discourse and practice focused on political and civil rights (PCRs), at the expense of economic, social and cultural rights (ESCRs). This narrow but

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1. I am grateful to Professor Coleman for his insights and for the considerable time he spent discussing the project with me at the various stages of the writing process. Thanks are due to Professor Ibhawoh and two blind reviewers for their helpful comments. On a personal note, I am indebted to Clayton Atto, Pauline Sawh, Audrey Herrema and George Atto for their ongoing support. Any errors or omissions remain mine.

widely-adopted vision of human rights has suffered from two main kinds of critiques. The first I refer to as the post-colonial critique. It rejects human rights on the grounds that it separates meaningful development from human rights. The second I refer to as the post-modernist critique. It rejects human rights through an objection to abstract and purportedly objective universals. Broadly speaking, this paper considers the implications of embracing the original spirit of the UDHR by extending human rights discourse and practice to include not only civil and political rights but also economic, social and cultural rights. In particular, does such an expansion address the post-colonial and post-modern critiques and can it garner more broad-based support among developing countries? What are the implications of realizing a holistic conception of human rights for local autonomy, democracy and governance?

I argue that the expansion of human rights discourse and practice can mitigate these criticisms of human rights for at least two principal reasons. First, with respect to the neo-colonial argument, the integration of economic, social and cultural rights into the human rights framework rejects the separation of rights and development characteristic of the Cold War era. In so doing, it provides a strategic space in which human rights organizations can both acknowledge gains in one category of rights while advocating for greater progress in another. Furthering economic, social and cultural rights might even make development ‘better’: if the experience of structural adjustment programs of the 1980s and 1990s – which ostensibly upheld political and civil rights while destroying many economic and social rights – can be used as an example, certainly the opposite is true, namely, development stagnated (in many cases worsened) as economic and social rights were denied<sup>2</sup>.

Second, with respect to the post-modern argument, the inclusion of economic, social and cultural rights in the human rights agenda is important because in lived experience, these rights cannot be separated from political and civil rights. I am suggesting that part of the post-modernist rejection of human rights is rooted in the artificial distinction made between political and civil rights on the one hand and economic, social and cultural rights on the other. In lived experience, the denial and exercise of certain rights is often dependent upon others: access to education and literacy may be necessary for meaningful participatory democracy. Likewise, democratic participation in the political process may be necessary to achieve access to clean water. Some critics of ESCRs contend that the inclusion of these rights into mainstream human rights work ought to be limited because of the difficulties of objectively defining what constitutes their meaningful exercise. From a post-modern perspective, however, this is a strength of ESCRs: they are best understood, negotiated and prioritized in particular contexts. In other words, by expanding human rights to include economic, social and cultural rights, human rights practice and theory comes closer to Anna Tsing’s (2005) description of “engaged universals.”

Furthermore, the expansion of human rights work and scholarship to include economic, social and cultural rights could garner more broad-based support for a human rights framework in developing countries. First, such an expansion makes development a core concern of human rights, and in so doing addresses a central objection of developing countries to narrowly-defined human rights work. Secondly, and perhaps more importantly, a human rights framework emphasizes an *obligation* to ensure the progressive realization of rights, rather than conceptualizing particular steps to development as “good” or “right” so long as they are the outcome of a democratic political process. In the context of globalization and the increasing power of non-state actors (transnational corporations, but also non-governmental organizations) and the interdependence of developing states, industrialized states, and non-state actors, this obligation is not limited to a particular nation-state. Because a more inclusive human rights approach need not focus exclusively on a particular nation-

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2. See, for example, Riddell (2002) and Lewis (2005) for the impact in sub-Saharan Africa. Stiglitz (2005) for the impact of World Bank and International Monetary Fund structural adjustment policies.

state, it has the potential to mitigate the criticism that human rights practice has too often pointed the finger at the transgressions of developing country governments and has not held other actors accountable.

With respect to the final research question about the implications for autonomy and democracy, human rights analysis provides a framework for the progressive realization of rights, but the process by which these are articulated can be a democratic one that embraces local determination and prioritization of how rights should be realized. The cases considered include a strong history of activism by local communities, suggesting that connections between international human rights organizations and local ones are crucial in promoting the autonomy of individuals and communities in realizing their own rights. This also confirms the literature, described below, which emphasizes that rights are not given by the state or sovereign, but rather “taken” by individuals and groups who make these rights real through their “takings.”

Though there has been considerable expansion in the literature on ESCRs in recent years, much of it has focused on debating the merits of embracing the holistic vision of ESCRs in the work of human rights organizations<sup>3</sup> and on the philosophical questions surrounding the distinctions drawn between PCR and ESCRs<sup>4</sup>. Not enough has been written about the implications for governance and autonomy and the literature does not explicitly theorize the impact of embracing a holistic vision of human rights on the critiques outlined above. Using three case studies informed by the empirical and analytical scholarship of the negotiation of ESCRs in particular settings, this paper takes some first steps in addressing these gaps in the literature.

The paper is organized as follows. The next section provides a brief overview of the contemporary history of human rights since World War II and outlines the two major critiques of human rights work. It describes the renewed focus on expanding human rights discourse and practice to include not only political and civil rights but also economic, social and cultural rights. It also includes a discussion of the relevance of Tsing’s concept of “engaged universals” for the purposes of this paper, as well as the important contributions by Bonnie Honig and Étienne Balibar on “taking rights”.

The third section discusses three contemporary case studies. The first examines the decision by the South African constitutional court that the state had a legal obligation to extend testing of a drug to reduce mother-to-child transmission of HIV from pilot sites to the general population, suggesting that ESCRs can be advanced through the legal system. The second considers the long case of repression of ethnic minority communities in the Niger Delta, focusing on the articulation of economic, social and cultural rights by a coalition of women’s organizations opposing the exploitative practices of large oil companies in their communities. This case exemplifies the long history of advocacy for economic, social and cultural rights that predates the involvement of western-based human rights organizations and also demonstrates that local articulations of ESCRs are not limited to states: the women’s demands were directed at the corporations involved. The third case considers high rates of maternal mortality among rural Indigenous women in Peru. This case demonstrates the centrality of the PCRs of cultural minorities, including the right to self-determination, and to the meaningful realization of health rights. It further demonstrates how the involvement of experts (medical professionals) can be harnessed to determine the content of basic ESCRs, but that the realization of these rights also requires that they be considered in their particular cultural context.

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3. See Roth (2004a), Rubenstein (2004a), Roth (2004b), Rubenstein (2004b), Robinson (2004), and Economist (2007a&b)

4. See Eide et al (1995), Robertson (1998)

The choice of three quite different cases in different cultural, political and historical settings is important because it underscores one of the key contentions of this paper. While I insist on the importance of the specificities of context in each case, selecting disparate cases suggests that the claims made here about ESCRs in fact are tenable in different cultural and historical contexts. Together, the cases provide insight into the justiciability of ESCRs, the role of non-state actors, and the interdependence of all human rights.

The fourth and final section draws out some further issues raised by the cases, namely, the connection between gender and ESCRs, the notion of obligations in an international context (a key contribution that a human rights framework brings to development work), and finally, questions of multiple levels of governance, accountability and democracy and the importance not only of non-state actors and industrialized state actors, but also the linkages between non-state actors and state actors, and between northern and southern states.

## II A BRIEF HISTORY OF HUMAN RIGHTS AND ITS CRITIQUES

### *The historical separation of economic, social and cultural rights from political and civil rights*

The Universal Declaration of Human Rights (UDHR), signed under the auspices of the United Nations in 1948, was a wide-ranging document built through a consensus-building process and adopted by the General Assembly<sup>5</sup>. It was not limited to civil and political rights but also included what could be termed economic and social rights: Article 25(1) of the UDHR states that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his [sic] family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his [sic] control.” The UDHR was followed, in 1966, by two separate covenants, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provided more detail on the broad rights included in the UDHR<sup>6</sup>.

Broadly speaking, the ICCPR includes civil rights such as the right to life, right to be free from torture, cruel, inhuman or degrading treatment, from slavery or servitude, and from arbitrary arrest and detention, as well as the right to be equal before the law and to equal protection by the law. The political rights include freedom of thought, conscience and religion, freedom of expression, freedom of association and the right to join trade unions, and for citizens, the right to take part in public affairs, including the right to vote by secret ballot to elect freely chosen representatives. Importantly, the right to preserve the cultural identity of minority groups is also included in this covenant.

While PCR's emphasize individual freedoms, realizing ESCRs involves addressing deep and structural inequalities in income, health, education, and security. The ICESCR includes the right to

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5. 48 states voted to adopt the UDHR, eight (Byelorussia, Czechoslovakia, Poland, Saudi Arabia, the Ukraine, the Union of South Africa, the Soviet Union, and Yugoslavia) abstained and two (Honduras and Yemen) were absent; no state voted against the declaration (Cerna 1994). It is important to note, however, that a number of European colonies had not yet gained independence, and so did not participate in drafting the UDHR (Ibhawoh 2007, p.17)

6. Together with the subsequent conventions against torture, on the rights of the child, on the elimination of discrimination against women and on the basis of race, these documents form the core basis for human rights conceptually, legally, and in the advocacy work of local and international NGOs.

work and rights at work, the right to social security, to an adequate standard of living (food, clothing and housing), to education, and to the “highest attainable standard of physical and mental health,” as well as cultural rights to take part in, preserve and enjoy the benefits of culture and scientific progress. The right to water is also usually considered under ESCRs, though it was not included in the original covenant. The case studies considered here focus on the right to health and the right to an adequate standard of living covered under the ICESCR. They also highlight the centrality of those cultural rights covered under the ICCPR, namely, the right to preserve the cultural identity of minority groups and the right to self-determination.

While the ICESCR focuses on the progressive realization of rights, subject to a state’s resources, the ICCPR confers an obligation on states to protect these rights without qualification<sup>7</sup>. The other key difference between the two covenants relates to enforcement. There is an Optional Protocol to the ICCPR<sup>8</sup>, which allows individuals in states party to the ICCPR to have recourse to an international body (the UN’s Human Rights Committee) to claim that rights protected under the ICCPR have been violated (provided that they have exhausted domestic avenues of redress). Though limited in scope and powers of enforcement, it is worth noting that no such provisions yet exist with respect to the rights contained in the ICESCR.\*

The separation of the UDHR into two separate covenants is in large measure a product of ideological cleavages that became entrenched during the Cold War. This period was marked by a philosophical division between communist states who insisted on the primacy of social rights and equality and capitalist ones whose preoccupation with individual civil and political freedoms and liberties trumped collective claims. This separation also reflected a particular view of the state’s role in realizing human rights, namely, that violators of PCR were primarily (if not only) states. The realization of PCRs thus ‘simply’ created negative obligations on the part of the state to *refrain from* interfering in the realization of a right, while ESCRs imposed positive obligations on the part of the state to *provide* goods (often with significant budgetary implications, like social security) to its citizens. As well, many have argued that PCRs are primary rights and are the means by which ESCRs are achieved (Economist 2007a&b). In other words, democratic societies with strong PCRs could elect the representatives according to their social and economic policies, thereby providing ESCRs. The present analysis emphasizes the interdependence of both categories of rights and denies the primacy of one group of rights over another, particularly in the context of globalization. As our world becomes increasingly interconnected, we have witnessed a significant reduction in the power and sovereignty of some states vis-à-vis other states, international institutions and other actors such as transnational corporations. The mistaken reliance on PCRs through the state as the means of obtaining ESCRs is even less tenable as state power is reduced.

In work of civil society organizations, there also has been a division between human rights work, which has focused almost exclusively on PCRs until recently, and development work, which aims to address the content of ESCRs without necessarily applying a rights-based framework to the work.

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\* Author’s note: Since this paper was submitted for publication, the UN General Assembly unanimously adopted, on the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights (December 10, 2008), an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. See GA resolution A/RES/63/117 available at <http://www2.ohchr.org/english/bodies/cescr/>.

7. Recognizing differences in states’ capacity to protect, promote and fulfill rights, the ICESCR requires that state parties “take steps...to the maximum of its available resources...to [achieve] progressively the full realization of [ESCRs]...exercised without discrimination of any kind” (II.2.1&2). This differs from the obligations in the ICCPR, which require that states “undertake to respect and ensure to all individuals within its territory and subject to its jurisdiction the [PCRs]...without distinction of any kind” (II.2.1).
8. The Optional Protocol to the ICCPR is available at <http://www.ohchr.org/english/law/ccpr-one.htm>.

## Two critiques of human rights

At a recent gathering to honour her work, former UN High Commissioner for Human Rights Louise Arbour relayed the story of her arrival in Sri Lanka greeted by protestors rejecting human rights as a neo-colonial enterprise<sup>9</sup>. Human rights organizations have faced similar challenges. For example, attempts by feminist organizations to take a human rights approach to empowering women has met with resistance from some feminists in developing countries on the grounds that such approaches are Western and do not translate well into different cultural contexts (Moghadam 2005). I refer to this critique as a post-colonial one, for it rejects human rights on the grounds that HR discourse and practice is rooted in Western philosophical traditions, that the advancement of human rights has served largely to entrench the interests and legitimacy of powerful Western states at the expense of others, and that mainstream human rights work traditionally has not addressed some of the most critical (development) challenges former colonies have faced. Perhaps the most comprehensive articulation of this critique is found in the Bangkok Declaration, issued at the regional meetings preceding the 1993 Vienna Conference on Human Rights.

The Declaration called for, among other things, “respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure.”<sup>10</sup> Their justification was that while “human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”<sup>11</sup> This declaration has (rightly) been criticized as an attempt by authoritarian governments to preserve their power and justify the violation of human rights. Nevertheless, the view that Asian values emphasize “duties and discipline...[over] entitlements and rights” (Sen 1999, p.89) has gained currency beyond the rhetoric of authoritarian states.

A more careful reading of the Declaration suggests that part of the rejection of purportedly “Western” human rights doctrine is rooted not only in the ongoing history of Western imperialism but also in its selective emphasis on particular human rights – PCR’s – over others, namely, ESCR’s. Indeed, the declaration emphasizes the importance of the “interdependence and indivisibility of economic, social, cultural, civil and political rights, and the need to give equal emphasis to all categories of human rights” as well as reaffirming the right to self-determination, particularly of Indigenous peoples, and the right to development.<sup>12</sup> Furthermore, the Declaration asserted that “the main obstacles to the realization of the right to development lie at the international macroeconomic level, as reflected in the widening gap between the North and the South, the rich and the poor” and that “poverty is one of the major obstacles hindering the full enjoyment of human rights.”<sup>13</sup> What this suggests is that realizing ESCR’s (in part by redressing inequalities both within and between nations) may go some ways to address this post-colonial critique.<sup>14</sup>

9. Informal remarks at the Barrister’s Lounge, Law Society of Upper Canada, Toronto, Canada, October 17, 2008.

10. Bangkok Declaration. Retrieved July 27, 2007 from <http://www.unhchr.ch/html/menu5/wcbangk.htm>. The session was attended by the following states: Bahrain, Bangladesh, Bhutan, Brunei Darussalam, China, Cyprus, Democratic People’s Republic of Korea, Fiji, India, Indonesia, Iran (Islamic Republic of), Iraq, Japan, Kiribati, Kuwait, Lao People’s Democratic Republic, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Oman, Pakistan, Papua New Guinea, Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Syrian Arab Republic, Thailand, United Arab Emirates, and Viet Nam.

11. See supra, note 7, paragraphs 5&8.

12. See supra, note 7, paragraphs 10, 12, 13, 17

13. See supra, note 7, paragraphs 18&19.

14. This analysis does not review the extensive debate over whether a rights-based approach is necessarily a Western one imposed in non-Western contexts, and it does not undertake a thorough analysis of the

The second major critique of human rights theory and practice is rooted in a similar skepticism of universal claims advanced by post-modernists<sup>15</sup> in the 20<sup>th</sup> century. The post-modern critique is skeptical of abstract universals, in this case, universal (and inalienable) rights due to each human being by virtue of their essential nature as a human being, without regard to context.<sup>16</sup> One of the key contributions of the post-modern critique is that it draws our attention to the gaps between theory and practice, or what I have earlier referred to as ‘universal claims’ and the particularities of ‘lived experience.’ The post-modern critique thus emphasizes the specific details surrounding the realization of human rights in particular contexts.

In *Friction: An Ethnography of Global Connection*, anthropologist Anna Tsing attempts to bridge the distance between the rich particularities that ethnographic research affords with the aspiration to make universal claims. Looking at the interaction between the local process of deforestation in Kalimantan, Indonesia and the global connections of capitalism, science and politics, she argues that universals cannot be separated from the ways in which they are manifested in particular places. Her concept of friction is roughly the interaction of universals and particulars (engaged universals): she argues that “universals are effective [only] within particular historical conjunctures that give them content and force.” She reminds us that, historically, the aspiration to universals was not neutral but “deeply implicated” in the colonizing project. This analysis is particularly relevant to the politics of human rights, which some authors of the Bangkok Declaration have argued consist of little more than neo-colonial attempts by western states to conjure universal goods as cover for new attempts to undermine the sovereignty of developing states. According to this kind of analysis, the context in which human rights are exercised, defended or denied are the only way to understand these concepts.

The approach used in this paper, to understand human rights through the perspective of three quite different case studies, attempts to address this line of critique by rooting the conclusions in the particularities of the three distinct cases, following Tsing (2005). Furthermore, by understanding the cases that follow through the notion of ‘taking rights’ as the means of making rights real, the approach used in this paper aims to give content to a theory of human rights through the ways in which they are negotiated on the ground in particular contexts.

Focusing on these particular cases demonstrates the ways in which PCR and ESCR are inextricably linked. Part of what I refer to as the post-modern critique in the case of human rights is due to the theoretical division between PCR and ESCR that does not resonate with how these rights are realized in practice. As such, I argue that embracing the wholistic version of HR as enshrined in the UDHR will go a long way to addressing the post-modern critique, because such an approach to human rights theory and practice is a more accurate reflection of the ways in which rights are negotiated and realized on the ground.

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historical and philosophical antecedents of present-day human rights discourse. For this, see Pagden (2003), Bell & Bauer (1999), Donnelly (1984&1989), and Cobbah (1987). Though philosophically very interesting, there is far too much evidence of rights-based struggles in non-Western contexts (three such examples are considered in this paper) to reject such an approach outright as irrelevant outside of the West.

15. I use “post-modern” in the sense described by feminist scholars Fraser and Nicholson (1990), paraphrasing the work of post-modernists such as Jean-Francois Lyotard and Richard Rorty, who argue that “philosophy and, by extension, theory in general, can no longer function to ground politics and social criticism...[the] post-modern [conception is] one in which criticism floats free of any universalist theoretical ground. No longer anchored philosophically, the very shape or character of social criticism changes; it becomes more pragmatic, ad hoc, contextual, and local.” (p.21)
16. A thorough treatment of post-modernist thought and its implications for a theory of universal human rights is beyond the scope of this paper. I am borrowing this term to conjure the imperative post-modernists underscore of emphasizing the particularities of lived experience, not to engage in a discussion about the essential nature of human beings and the elements thereof.

Finally, using the concepts of “engaged universals” and “taking rights” in the present analysis is useful in two ways. First, looking at specific contexts in which ESCRs are negotiated by actors at various scales (individual, community, state, world) provides a better understanding of the possibilities of ESCRs in advancing human development. Second, doing so takes seriously the critique that the philosophy of human rights is an exclusively western one that does not translate well into non-western cultural contexts by demonstrating how these rights, as “engaged universals,” do in fact have resonance in non-Western contexts.

### ***Together at last? The indivisibility of all human rights***

In the present post-Cold War period, there has been a revisiting of the original spirit of the UDHR and an extension of mainstream HR work to include not only PCRs, but also ESCRs. This revisiting was exemplified in the UN’s 1993 World Conference on Human Rights, in which 171 countries participated. The Vienna Declaration and Program of Action arising from this conference emphasized that “all human rights are universal, indivisible, interdependent and interrelated.”<sup>17</sup> This expansion to include ESCRs is also evident in the work of two high-profile Western human rights non-governmental organizations, Amnesty International and Human Rights Watch, which have traditionally focused on PCRs over ESCRs.<sup>18</sup> Both organizations focus on discriminatory practices in part because of their existing expertise of focusing on the political right of equal treatment before the state and in part because they recognize that states (particularly those where ESCRs might be most needed) may not have the financial resources to guarantee these rights for their citizens.<sup>19</sup> The major research agenda recently advanced by the Center for Economic and Social Rights and the emergence of academic journals like *Health and Human Rights* provide further examples of acceptance of a more comprehensive concept of human rights in academic and policy research circles. Finally, the 2000 Human Development Report, *Human Rights and Human Development* was a significant step in using ESCRs to bridge the rights paradigm with the development paradigm.

Institutionally, decades of NGO work that has divided PCRs under the rubric of human rights work and ESCRs under the rubric of development cannot be undone overnight. The case studies examined in this paper do suggest, however, that this change is occurring and provide some responses to those who would maintain the separation between PCRs and ESCRs in theory and practice. Indeed, it is the central contention of this paper that the inclusion of ESCRs into mainstream HR discourse and practice helps to address the post-colonial and post-modernist critiques outlined above.

### ***A comment on the realization of rights***

Before proceeding with the three case studies, a comment on the realization of rights is in order. Two of the three case studies – South Africa and Nigeria – focus on the efforts of civil society in gaining rights. As such, these case studies also confirm the theoretical literature that holds that rights are not given by the state, but rather ‘taken.’ In Bonnie Honig’s description of democratic cosmopolitanism, she argues, following Rancière, that “democracy is a form of politics in which power is not received by grateful subjects but rather is taken, redistributed, reenacted, and recirculated

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17. World Conference on Human Rights: Vienna Declaration and Program of Action, UN doc. A/CONF.153/23, part I, para5. Retrieved from [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)

18. Human Rights Watch web site, retrieved March 4, 2007 from <http://hrw.org/doc/?t=esc> and Amnesty International Web Site, retrieved March 4, 2007 from <http://www.amnestyusa.org/escr/summary.do>.

19. This raises the issue of the paradox between human rights, which are supposed to be universal, and the state-based (particular) system that actually enforces them (Arendt 1951, Agamben 1996). As Arendt (1951)

by way of...popular political action” (2001, p.99). For Honig, the process of “taking rights and privileges is...a quintessentially democratic practice” (Ibid). What creates and reifies human rights, in this view, is thus the practice of acting *as though* the individuals and communities in question are entitled to those rights. In a similar vein, Balibar’s short and penetrating note, “What we owe the sans-papiers,” argues that because of the actions of undocumented workers in France to publicly demand the rights of citizenship, “we understand better what democracy is: an institution of collective debate, the conditions of which are never handed down from above. It is always necessary for the participants to fight for and win the right to speech, visibility, credibility, while running the risk of repression” (2000, p.42). Thus, in the views of these theories of democracy, what makes rights *real* is the activism inherent in publicly claiming the right to have rights. As such, this paper is interested primarily in rights that are claimed as rights, rather than analyzing which rights are formally ‘given’ by the state.

### III CASE STUDIES

#### ***i. South Africa – the right to health and access to antiretroviral treatment***

In light of the HIV/AIDS pandemic, access to retroviral medication in developing countries at generic drug prices has been the subject of considerable public debate in recent years.<sup>20</sup> This case study looks at one landmark case in South Africa, *Treatment Action Campaign (TAC) vs. Ministry of Health* in which the constitutional court ruled that the government had a legal obligation to extend treatment beyond pilot “research” sites that had demonstrably reduced mother-to-child transmission (MTCT) to benefit the population as a whole. Demonstrating the justiciability of ESCRs<sup>21</sup>, this case is also interesting because it highlights the mutually beneficial roles that litigation, public education and activism can have in realizing ESCRs, in this case, the right to health.

The constitution adopted by the South African parliament at the end of apartheid, lauded as one of the most progressive in the world, was designed to protect all of its citizens against government policies that could maintain the deep structural inequalities that are the legacy of the country’s history of apartheid. The constitution’s preamble states that South Africans “recognize the injustices of our past” and “adopt the constitution...so as to...heal the division of the past and establish a society based on democratic values, social justice and fundamental human rights.” The founding values include 1(a) “human dignity, the achievement of equality and the advancement of human rights and freedoms” and 1(b) “non-racialism and non sexism,” precursors to prohibitions on state discrimination in Section 9 of the Bill of Rights in the constitution. Borrowing expertise from the UN’s Committee on ESCRs, the Bill of Rights enshrined many ESCRs, including the right to access health care. Section 27(1) states that “everyone has the right to have access to (a) health care services, including reproductive care...” and Section 27(2) that “the state must take reasonable legislative and other measures, within its

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made clear, this resulted in large numbers of ‘stateless’ individuals not having access to basic human rights. Similarly, in a state-based system of governance, economic, social and cultural rights may be denied because particular states do not have the means to enforce them (though they may of course be denied for other reasons as well).

20. See, for example Sell (2006), Woolridge (2000), and Barnard (2002).

21. It should be noted that the TAC case is one of three cases decided by the Constitutional Court in South Africa that have laid the groundwork for the justiciability of ESCRs in the country. The focus in this paper remains on the TAC case because, as the most recent of the three, it confirms the key legal principles outlined in the previous two and there is more extensive coverage of this case in the academic literature.

available resources, to achieve the progressive realization of each of these rights.”<sup>22</sup>

In the context of developing countries with relatively more limited government budgets and relatively greater socio-economic challenges, the provisions for the progressive realization of rights *within the state's available resources* are particularly important qualifications on the state's obligations, qualifications which go a long way to making the realization of ESCRs possible. Furthermore, the prohibitions of non-discrimination can also provide a focus for human rights work: this case is one in which rights in section 9 and 27 were at issue, though the case was decided primarily based on the right to health provisions in the latter.

The right to health is particularly important in light of the prevalence and infection rates of HIV/AIDS in South Africa. According to the UNAIDS 2006 report, the estimated number of people living with HIV in South Africa, some 5.5 million, is 2.6 million *more* than in any other country in Africa. Each day, almost 1,000 South Africans die due to AIDS-related causes. There is an alarming trend of the feminization of the virus in South Africa, particularly among the younger generation. For those aged 15-24, young women have prevalence rates more than three times that of young men (14.8% vs. 4.5%). While these results are attributed to gender inequality and high levels of sexual violence against women, as well as the higher likelihood of transmission from male-to-female than from female-to-male in heterosexual intercourse<sup>23</sup>, they have obvious implications for children. According to UNICEF, some 240,000 South African children (0-14yrs) were living with HIV in 2005. The 2006 South African health department study of 33,033 women attending antenatal clinics found that 29.1% of pregnant women were HIV positive.

President Thabo Mbeki's administration has been widely criticized for its abject failure to respond to the pandemic.<sup>24</sup> At the 2000 AIDS conference in Durban, Mbeki refused to make the link between HIV and AIDS, suggesting that poverty caused AIDS, not HIV. As drug prices for anti-retroviral treatment have gone down, his administration has repeatedly blocked efforts to make the medication available to ordinary citizens, arguing that antiretrovirals were dangerous. In January 2003, Health Minister Tshabalala-Msimang publicly encouraged AIDS patients to take “garlic, lemon, olive oil, and...potatoes,” items which were “affordable to South Africans...not like things like antiretrovirals” (quoted in Powers 2003).

The first part of this case study details the facts surrounding the case; the second analyses the implications of this broadening of human rights theory and practice. While the first medical breakthroughs in reducing MTCT with AZT (azidothymidine), an antiretroviral, occurred in the mid-1990s, the result of a nevirapine trial, released in July 1999, held greater promise for reducing MTCT. Though the nevirapine treatment was not as effective as triple therapy AZT (13% risk of transmission vs. virtually 0% for triple therapy), its advantage was that it could be administered as a single dose at the onset of labour, making it much more likely to be administered effectively in an already over-stretched health care system.

Nevirapine was officially registered by South Africa's Medicines Control Council in April 2001 and the first of the 18 pilot sites (2 per province) began administering the drug in May 2001 (Ngwena

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22. South African Constitution, Retrieved July 21, 2007 from <http://www.info.gov.za/documents/constitution/1996/index.htm>.

23. See, for example, Padian et al (1991).

24. See Heywood 2003, Powers 2003, and Lewis 2006. Stephen Lewis, UN Special Envoy for HIV/AIDS in Africa made particularly scathing remarks at the 2006 AIDS conference in Toronto, where he argued that South Africa is the only country in Africa whose government is still “obtuse, dilatory and negligent about rolling out treatment...the government has a lot to atone for. I'm of the opinion that they can never achieve redemption.” (Retrieved July 27, 2007 from [http://www.kaisernetwork.org/health\\_cast/uploaded\\_files/Lewis%20Closing%20Speech.pdf](http://www.kaisernetwork.org/health_cast/uploaded_files/Lewis%20Closing%20Speech.pdf)). However, what has been obscured in the often polemical reports of

2003, p.14). According to government policy, public health services outside of the designated pilot sites were prohibited from prescribing the drug, yet South Africans who could afford private care were not similarly restricted (Ibid). Because the drug had been approved for use in South Africa, this proscription created a serious inequality in access to life-saving medicine between users of the private and public health care systems. The legacy of apartheid is also instructive here: in the words of one scholar, the private system was one of “modern medical facilities that serviced primarily the white, rich minority” while the public sector was “severely underfunded and under-resourced and serviced the poor, black majority” (Johnson 2006, p.121).

The government defended their policy on two main grounds: medical evidence and health system capacity.<sup>25</sup> First, the government doubted the drug’s safety and expressed concerns about the possibility of developing resistance to the drug. Second, the government argued that the drug would be ineffective in the absence of a more comprehensive pre- and post-natal program and that the health system thus lacked the capacity to administer the drug effectively.

With respect to the medical objections to the drug, this argument lacked credibility in light of reports from the WHO recommending nevirapine in the prevention of mother-to-child transmission (PMTCT) “without qualification” and the government’s own Medicines Control Council, which had registered the drug for use in PMTCT.<sup>26</sup> In any case, any side effects far outweighed the likely alternative for an HIV-positive baby: painful death by the age of five (Heywood 2003).

A number of key developments undermined the argument about capacity. First, one province (Western Cape) had communicated to TAC that it had planned for a 100% rollout of the drug to HIV positive women. They estimated they would reach 90% by July 2002 and 100% by 2003 (letter cited in Heywood 2003, p.292), demonstrating that extension of the program beyond the pilot sites was possible within a fairly short timeframe. Second, some hospital administrations not included in the pilot sites declared in affidavits that they had the capacity and willingness to offer the drug (Ibid, pp.292-3). A public health analyst further argued that the system had the capacity and that “the complexity of a PMTCT programme is no greater than tackling malnutrition, tuberculosis and other chronic diseases – aspects that the South African health system has committed itself to dealing with” (quoted in Ibid, p.299). As part of its argument about capacity, the government claimed that extending the coverage beyond the pilot sites was not cost-effective, despite the fact that drug manufacturers had offered the government a free supply of nevirapine for a period of five years (Bilchitz 2003, p.2). Furthermore, in estimates drawn up by provincial health departments, the full cost to roll-out the program was estimated at R250 million, just over half of the amount *underspent* in the 2000/01 intergovernmental health budget (Heywood 2003, p.297).

In December 2001, the first judgement of the High Court ordered that the policy restricting

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Mbeki’s highly questionable policies is the important link between poverty and the prevalence of HIV/AIDS. For example, increased migratory labour and separated families resulting from poverty-alleviation strategies have been shown to increase the risk of HIV (Mubangizi and Mubangizi 2005, p.278). Likewise, coping with medical bills, care, and lost income from those who are suffering from the disease often further impoverishes families (Ibid). As Craddock points out, “the incontrovertible dominance of biomedical models placing HIV front and centre have silenced Mbeki’s more insightful statements on poverty’s role in creating AIDS in the South African context” (2004, p.5).

25. For facts of the case, see Bilchitz 2003, especially p.3, Heywood 2003 and Ngwenya 2003.

26. According to a July 2003 report, “In October 2000, WHO in partnership with UNAIDS, UNICEF and UNFPA, convened a technical consultation to review all available evidence on the safety and effectiveness of short course antiretroviral drug-based interventions to reduce the risk of MTCT. The consultation concluded that all regimens which had been shown to be safe and effective in controlled clinical trials could be used in MTCT-prevention programmes. These regimens included zidovudine alone or in combination with lamivudine, as well as nevirapine.” Retrieved July 27, 2007 from <http://www.who.int/hiv/pub/mtct/en/NevirapineStatement072003.pdf>.

public doctors from prescribing nevirapine be repealed and that the government returns to court within three and a half months to submit “an effective, comprehensive, national programme to prevent or reduce MCTC” (Heywood 2003, p.301). The government subsequently appealed the decision, on the grounds of clarifying the scope and jurisdiction of executive power. In hearing the case, the constitutional court ruled unanimously that the government was in violation of sections 27(1) and 27 (2) of the constitution. It ruled that restrictions on prescribing nevirapine should be removed, and that the government should make nevirapine available and fund testing and counseling facilities and personnel to “facilitate and expedite the use of nevirapine for the purpose of reducing the risk of MTCT of HIV” (cited in Heywood 2002, p.312). Importantly, the court’s decision allowed the government to make modifications to the order “if equally appropriate or better methods of PMTCT became available” (Ngwena 2003, p.16), thereby affirming the prerogative of the executive to determine policy details.

The case had obvious budgetary implications, and some legal analysts argued that the judgement had regrettably blurred the separation of powers between the judiciary and the executive (see, for example, Hopkins 2002). However, such an argument is rooted in a concept of human rights that is restricted to political and civil rights and fails to recognize that the realization even of these rights often have significant budgetary implications.<sup>27</sup> What the nevirapine case suggests is that once ESCRs are constitutionally protected, as is the case in South Africa, courts have a role to play in ensuring that they are fulfilled. As Ngwena argues, while “a measure of self-restraint is...appropriate when courts are adjudicating over alleged infringements of rights whose remedies may have budgetary implications...it would have been an abdication of its constitutional duty if [it] had refrained from finding a violation of a fundamental right and requiring the government to act quickly to save life” (Ngwena 2003, p.20). The examples from Western Cape and some public hospitals proving budgetary and human resource capacity to administer the drug effectively beyond the pilot sites, the underspent health care budget, and the substantial medical evidence of the effectiveness of nevirapine in preventing MTCT and thus in saving lives were all critical facts in the decision that government policy was unreasonable<sup>28</sup> and in violation of ESCRs protected by the constitution.

This case lends weight to arguments for including ESCRs as basic human rights in a number of ways. First, it is significant that a landmark case demonstrating the justiciability of ESCRs occurred in a developing country.<sup>29</sup> One of the objections to ESCRs in HR work is that in many countries with

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public doctors from prescribing nevirapine be repealed and that the government returns to court within three and a half months to submit “an effective, comprehensive, national programme to prevent or reduce MCTC” (Heywood 2003, p.301). The government subsequently appealed the decision, on the grounds of clarifying the scope and jurisdiction of executive power. In hearing the case, the constitutional court ruled unanimously that the government was in violation of sections 27(1) and 27

27. The right to due process, for example, incurs significant court costs (including appeals) and the provision of legal counsel for defendants who cannot afford it.

28. For an interesting discussion of whether the court should have used the right of access to health to argue for minimum core obligations rather than the “reasonableness” standard it applied in this case, see Bilchitz (2003). At issue here is the important question of whether ESCRs are best advanced by minimum core obligations or by focusing on discriminatory practices of the state in realizing its citizens’ right to health. While the latter approach, as Roth (2004a&b) has argued, builds on the expertise of existing human rights organizations like AI and HRW, the addition of minimum core obligations offers an opportunity to bring together different players – affected citizens, community workers, medical experts, health policy analysts, human rights lawyers and activists in a democratic process to achieve consensus on the most pressing demands for the realization the right to health. This is the case of prioritizing emergency obstetric care in reducing maternal mortality rates discussed in the Peru case study below.

29. Other landmark cases involving ESCRs include the 2001 Indian Supreme Court ruling that the right to food is “an integral element of the right to life,” and Argentina’s courts “ordering the government to take reasonable and affordable measures to address a haemorrhagic fever endemic to the country” (Arbour 2005).

very limited financial resources, it is impossible to make such rights a reality for all.<sup>30</sup> This case demonstrates key principles that guide ESCRs, namely maximum available resources, progressive realization of rights, and the absence of discrimination. These principles make justiciability not only possible, but also reasonable in the context of differing state resources.

Second, the case demonstrates that it is possible to prove negligence on the part of the state with respect to ESCRs. In all human rights work, advocates must make decisions about which cases constitute the most egregious violations of human rights. In the case considered here, for example, TAC chose not to pursue litigation until a drug was found that was simple to administer, effective, and cheap and until it had been registered by the MCC. The claim here is that this case suggests that egregious violations of ESCRs – particularly where lives are at stake – can in fact be adjudicated by the legal system.

Third, in his writings on this case and the advocacy involved, Mark Heywood, National Secretary for TAC, emphasizes how the expertise of a variety of actors – both locally and internationally – constitutional lawyers, physicians, medical researchers, mothers living with HIV/AIDS, health policy analysts, dissident government officials and human rights activists were needed to enforce the ESCRs in question. He also chronicles the parallel public education campaigns waged by TAC and the mobilizations of marches and protests at key points in the trial. In a reflection on the decision of the constitutional court, G. Budlender, lead counsel for TAC, argued that the battle had already been won in the court of public opinion and that the success of the case was thanks to public pressure: “social and economic rights are only as strong as the willingness of civil society to enforce them” (quoted in Heywood 2003, p.314). This declaration by Budlender affirms the important role of civil society in “taking rights.” Despite the provisions included in South Africa’s constitution, what makes these rights real and confers real benefits on society is the capacity and willingness of civil society to demand their realization.

Fourth, the case also raises interesting issues about the negotiation and universality of rights. In her analysis of AIDS organizations, pharmaceutical companies and the state in South Africa, Krista Johnson (2006) argues that the negotiation of rights in South Africa challenges the capacity of a neoliberal-based notion of individual rights to provide socio-economic rights, which she argues may be more effectively secured through collective rights with their emphasis on equality. In this sense, TAC’s campaign to ensure provision of treatment in the public system raises important considerations about the role of the state in the provision of public goods. In particular, the realization of socio-economic rights may require a larger role for the state.

Fifth, and finally, this case presents a good example of Tsing’s (2005) engaged universals. The South African constitution contains many provisions borrowed from the ICESCR, yet it is interpreted and argued in light of South Africa’s particular history of apartheid and the discriminatory basis upon which these rights were denied to the majority black population.<sup>31</sup> What is significant here is that despite the obvious and important limitations of a state-based system of enforcement of ESCRs in the context of high levels of global inequality and globalization, which limits the supremacy and sovereignty of the state, this case demonstrates the successful realization of a basic human right through the domestic state. In short, as Pieterse has argued, this case challenges the notional that

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30. Interestingly, this was also an argument advanced for the separation of rights in the two 1996 covenants: developing countries could ill afford to guarantee ESCRs, while PCR were “free.” In fact, more countries have adopted the ICESCR than the ICCPR, and only two countries that have adopted the latter have not adopted the former (Eide 1995, p.23).

31. Ironically, this history of apartheid in some ways made *possible* the extensive progressive provisions of the constitution, in much the same way that the horrors of the Holocaust made possible the agreement of the UDHR in the first place.

social rights, as universal human rights, “are by nature ill-suited for domestic application” (2004, p.884).

## ***ii. Nigeria – right to subsistence and self-determination in the Niger Delta***

Flagrant violations of human rights by multinational oil companies and the Nigerian state in the oil-rich Niger Delta of southeastern Nigeria are well-known and well-documented (HRW 1999, Wamala 2002, Turner & Brownhill 2005, Omorodian 2004). This is particularly true since the widely-condemned public hanging of Ken Saro-Wiwa and eight others in November 1995 (Manby 1999, p.281). Saro-Wiwa, leader of the Movement for the Survival of the Ogoni People (MOSOP) was an Ogoni activist in the region who opposed the negative impacts of oil production on his people. More recently, however, what has gained attention in international news are the actions of women’s organizations in the region, which have been effective in shutting down oil production at various sites for days at a time and for making gains where male and youth-dominated agitations have not, particularly in procuring concessions from oil companies.

This case study examines the demands of multi-national corporations (MNCs) made by a coalition of twelve women’s organization in the Niger Delta in 2000. These demands amount to a series of requests for the realization of ESCRs. This case also considers the particular form the women’s resistance took in the 2002-03 period. While it raises a number of interesting issues about gender, power, development and human rights, there are a few that are particularly significant for the purposes of this paper. First, the demands are made of a non-traditional party – multinational oil corporations. Second, they are made in the context of violations of both PCR and ESCRs, suggesting their indivisibility. Third, these human rights demands are reflective of a history of Nigerian women’s activism to gain autonomy in the face of different forms of oppression.

Located in West Africa, Nigeria is the most populous country in the continent with 146 million people. It is home to more than 300 ethno-linguistic groups, dominant ones being the Yoruba in the south-west, Igbo in the south-east and Hausa-Fulani in the North (HRW 1999, p.91). A number of the country’s ethnic minorities, including the Ijaw, the Itsekiri, and the Ogoni, among others, live in the oil-rich Niger Delta. The country’s colonial history began as an important trading post for the transatlantic slave trade in the 17<sup>th</sup> century. As in much of the colonized world, resource extraction, taxes on Indigenous populations, and (particularly in British colonies) emphasizing ethnic difference as a divide and conquer strategy and co-opting local elites to ensure the viability of the colonial project all played an important role in Nigeria’s colonial history. Independence from British colonizers was officially gained in 1960.

1967 marked the beginning of the Biafran civil war, in which the Igbo-dominated southeastern part of the country attempted to secede from the Nigerian state, annexing the Niger Delta in the process. The minority communities of the region, fearing Igbo domination of their resources and livelihoods, supported the federalist cause. What is significant about the region’s colonial and post-colonial history for the purposes of this paper is that the domination of the Niger Delta region by various “external” groups has continued well into the post-colonial era. The competition for power over the region continues to be fuelled by its oil resources and the prospects of privilege and power such control over resources guarantees. As Ukege puts it, “whoever controls the oil-rich Niger Delta controls the proverbial honey pot” (2004, p.608), undermining the autonomy of local minority communities. Today, petroleum accounts for some 40% of the GDP.

Over the past 15 years, Nigerian society has been undergoing a severe economic crisis of “unprecedented dimensions” (Ikelegbe 2005, p.253). Although unemployment and poverty are rising in other parts of Nigeria, levels of frustration in the Niger Delta are particularly high “because they

exist side-by-side with abundantly endowed oil company workers” (Ibid). A 2003 IMF report found that when oil revenues per capita were US\$33 in 1965, GDP per capita stood at US\$245, a figure that remained unchanged in 2000, though oil revenues had increased tenfold on a per capita basis. The report concluded that “all the oil revenues – US\$350 billion in total – did not seem to add to the standard of living at all. Worse, however, it could actually have contributed to a decline in the standard of living” (cited in Turner and Brownhill 2005, p.174)<sup>32</sup>.

Of course, all instances of inequality do not necessarily constitute human rights violations. However, the pervasive and deep cleavages along ethnic lines between those who benefit and those who are further marginalized is indicative of the violation of the means to secure a livelihood for minority communities living alongside wealthy expatriates and Nigerian officials from more dominant ethnic groups. It is the emphasis on discrimination and on improving the lot of the most vulnerable groups that a human rights framework can provide in analyzing the impoverishment of these communities amidst the considerable wealth generated by oil extraction on their lands. Focusing on the impact on women provides another lens to assess the extent of inequality and impoverishment.

In her landmark study of gender and development, Ester Boserup (1970) argued that development practices entrenched and deepened unequal gender relations, further marginalizing women by excluding them from industrialization and technological “advances.”<sup>33</sup> The experience of women in the Niger Delta confirms her arguments. Extensive oil exploration in the Niger Delta has occasioned profound changes in the economic, social and cultural fabric of the region. Before large-scale oil production, Nigeria’s economy was dominated by agriculture, and women held primary responsibilities for subsistence crops to feed their families, as well as working as fishers and in the cultivation of cash crops, usually controlled by men, to secure cash income (Chuku 2005). However, negligent practices in the oil sector have led to numerous oil spills and considerable environmental damage in the region, depleting fish stocks and soil. Their practices have further marginalized women, whose traditional responsibilities to provide sustenance for their families has not eroded alongside the degradation of their means to secure a livelihood, a basic economic right. In her research among the Ogulagha and Gelegele communities in the Niger Delta, Omorodian (2004) documents that fishing is no longer lucrative and that non-timber forest products, a source of income primarily used by women, are also being depleted. This environmental degradation is caused by both oil spills (often either poorly cleaned up or not at all) and by gas flaring<sup>34</sup> used in oil extraction.

Furthermore, there are glaring examples of increasing gender inequalities directly caused by the practices of oil MNCs and their officials. For example, demand for sex workers by well-paid MNC employees and the lack of viable employment alternatives for young women has increased “early child marriages and trafficking in girls in terms of prostitution and as domestics to other urban cities” (Ibid, p.6, see also Ukeje 2004, p.613 and Ikelegbe 2005, pp.254-5). Some local men are hired (usually as unskilled labour without any prospect of training to become skilled) and (male) village elders often receive “standby,” a stipend for which no work is required. By contrast, women receive no such payment (Omorodian 2004, p.8), are rarely employed in the oil companies and are “excluded from the token compensation” for use rights and for spills (Ikelegbe 2005, p.254). Felicia Itsero, one

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32. This analysis is consistent with Paul Collier’s work. In a recent book on the “bottom billion” – the world’s poorest countries – Collier argues that resources are one of four key traps that have stagnated the growth of a number of the world’s poorest as well as middle-income countries, including Nigeria (2007).

33. Advances is put in quotation marks to acknowledge the extensive work of feminists like Vandana Shiva who have argued that technological advancements have actually led to underdevelopment in the global south and have eroded the ability of individuals and families to secure their livelihoods (Shiva 1995, see also Wichterich 2000, Chuku 2005).

34. Gas flaring is defined as “a process whereby crude oil is burnt off, pollutes the Delta’s rivers and streams and emits some 35 million tons of carbon dioxide and 12 million tons of methane a year, making it the world’s largest single contributor to global warming” (Wamala 2002, p.38)

of the protestors, summarized the situation:

When we go to the rivers for fishing or forest for hunting, we used to catch all sorts of fishes and bush animals. Today, the experience is sad.... [I]n our community we have girls, small girls...here every day and night running after the white men and staff of Chevron, they are doing prostitution. The story is too long and too sad...tell Chevron that we are no longer slaves, even slaves realize their condition and fight for freedom (quoted in Turner and Brownhill 2005, p.174).

Finally, as noted in the opening paragraph of this case study, oil exploration, which has severely eroded the ability of Niger Delta communities to secure a livelihood, has been advanced through the denial of political and civil rights. The murder of Ogoni activists in 1995 was not an isolated event. For example, in 1990, in anticipation of protests at Shell's facility in Umuechem, the company wrote the commissioner of police to request security protection from the paramilitary Mobile Police (MP), known in the region as the "kill-and-go" force. In response to this request the MP used teargas and gunfire to disperse the crowd on the first day, returning the next morning at 5 a.m. only to shoot "indiscriminately" into the crowd. In total, eighty unarmed protestors were killed, and some 495 homes were destroyed or badly damaged by the force (HRW 1999, p.123). Both Human Rights Watch and Amnesty International have documented the arbitrary arrests, detentions, extra-judicial killings, and excessive use of police force to intimidate local communities, suggesting once again the connection between the denial of PCRs and ESCRs. The case suggests not only that the denial of ESCRs has hindered the ability of local communities to claim their PCRs, but also that the violation of civil rights are used to maintain the denial of ESCRs through fear-mongering.

In 2000, twelve women's organization in the Niger Delta met and issued a fourteen-point decree for oil companies in the region that amounted to a demand for the realization of the full spectrum of human rights. It stated that

- (1) Oil exploration, production and all other activities be suspended with immediate effect until amenities such as pipe borne water, electricity, safe water transportation systems, functional health centres, scholarship schemes and schools are provided in the Niger Delta...
- (3) All victims of oil spillages and fire disasters be compensated and treated...
- (7) The Niger Delta women be empowered economically, in order that they may claim their right to political empowerment...
- (11) We be represented in all decision-making processes that affect us in the Niger Delta...
- (14) The only solution to peace in the Niger Delta is justice.

The first point underscores the basic ESCRs of the right to water, to access to health services and to education. The seventh highlights again the inseparability of ESCRs and PCRs for marginalized groups. Unless women gain the economic right to secure a livelihood, they cannot meaningfully realize their political rights to participate in democratic processes, demanded in the eleventh point. The third demand is rooted in the right to secure a livelihood (eroded by environmental degradation), but it is advocated in the particularities of oil MNC practices of oil spills and gas flaring in the region. The women's claim is that the right to secure a livelihood creates an obligation on the part of corporations not to violate it, and that compensation is owed when that right is, in fact, violated.

In July 2002, 600 Itsekeri women of Ugborodo occupied ChevronTexaco's Escravos terminal for ten days. Using the tactic of naked protests successfully, they negotiated 26 demands with the oil

company, including increased employment from their communities, provision of vital infrastructure, an allowance for the elderly, the establishment of income-generating schemes for women and some limited scholarships for youth (Turner&Brownhill 2005, p.172). Echoing those of the 2000 declaration by Nigerian women's groups, these demands claim the basic ESCRs of right to work, to the means of securing a livelihood, to social security (in old age) and the right to education, as well as the civil right to freedom from gender-based discrimination.

Within days of their occupation, over 1,000 women occupied six other ChevronTexaco flow stations, making similar demands (Wamala 2002). Turner and Brownhill further document how international links among civil society organizations led to an international boycott of ChevronTexaco linked to growing anti-war activism against the Iraq invasion. They argued that this producer-consumption strike, which affected both aspects of the oil giants' operations and profits, were instrumental in the women having some of their demands met. As well, the Nigerian women's tactic of naked protests spread, and "the numbers of women engaged in naked protests grew from a few thousand in the Niger Delta to several hundred thousand worldwide" (2005, p.176).

Here, the history of women's activism in Nigeria is instructive. Igbo women have a long tradition of resistance to oppression, including the well-documented Women's War of 1929 (Chuku 2005). Also referred to as the Aba Riots, some 25,000 mostly Igbo women from an area that covered 6,000 square miles mobilized in protest over a colonial census to count women (which in previous experience of counting men had led to direct colonial taxation). During women's uprisings in late colonial Nigeria, women's protests involved a number of tactics. Nudity, used as a last resort in women's activism, was deployed to "demean, shame and embarrass an offender into compliance or submission" because seeing a woman's genitals, particularly those of an elderly woman, was a kind of curse (Chuku 2005, p.208). Turner and Oshare (1994, see Ukeje 2004, p.610) also document the 1984 uprising by Urhobo women who protested naked against oil MNC Pan-Ocean to have their demands met. As such, the present-day protests are part of a long history of activism by Nigerian women.

One of the most interesting points about this case is that demands were made directly to the oil multinationals in question. As noted in chapter one, the state-based system of enforcement for the realization of human rights is limited. As Hannah Arendt (1951) pointed out, it excludes those who cannot claim citizenship in the country in which they reside. In addition, states, and more importantly, the particular state in which one lives, exercise limited sovereignty (see Strange 1996, Hansen and Stepputat 2005). Particularly in the context of globalization, the state's sovereignty is limited not only through the traditional political theory concept of the social contract between the state and its citizens, but also, and importantly, by the actions of other, sometimes more powerful, states, and by non-state actors, such as multinational corporations. Despite these limitations of a state-based system of enforcing human rights, traditional human rights work has focused primarily on the actions of states vis-à-vis their populations.

Another important lesson from this case is that it demonstrates that efforts to secure ESCRs do in fact take into account the multiple actors such as MNCs in the context of their increased power vis-à-vis states. Furthermore, their articulations are not limited to ESCRs but include PCR's as well, such as the right to representation in decision-making.

The focus on MNCs also highlights the reality of the varying power of states to enforce human rights, as well as the degree of complicity of the state in the actions of MNCs in a mutually-beneficial, if informal, relationship which mirrors the colonial history described above. While the executions of Ogoni activists and the massacre at Umuechem are among the worst, and thus clearest, violations of human rights, oil MNCs took no responsibility for the murders. According to HRW, Shell has not made any attempts to restrict the level of force used by Nigerian authorities on the corporation's behalf at Umuechem. This relationship, in which high-level government officials and some local elders receive payment from oil MNCs (money which rarely trickles down to the communities in

question) creates an interest among power-brokers to quell protests by virtually any means. In exchange for the payments made, MNCs can wash their hands of the violence committed and claim that they cannot interfere in the nation's political affairs.<sup>35</sup> In fact, Turner and Brownhill argue even further that MNCs demonstrably benefit from exacerbating civil strife, which legitimizes their claims to require additional security in the first place and drives up oil prices and profits (2005, pp.179-82). What is clear from the literature reviewed is that the state's traditional role of protecting its citizens against the vagaries of (in this case capitalist) exploitation, is in fact much more complex. The power the state does have is compromised by the interests of high-level officials and decision-makers who benefit substantially from the resource extraction in the region.

In considering questions of autonomy and governance, this case demonstrates the importance of local autonomy<sup>36</sup>, particularly of autonomy for marginalized groups. In this case it is the autonomy of ethnic minority women adversely affected by oil exploration that is at issue. But this case does not support arguments for localization, but rather what some scholars refer to as "glocalization," namely the importance of linking local struggles to broader regional, national and international organizations and networks.<sup>37</sup> In her extensive analysis of women's organizations at work in the Niger Delta, Ikelegbe classifies organizations based on their ethnic grouping, the kinds of demands made, and the geographic level at which they operate. She finds that "the most consistent and active" of the groups are the locally-based community women's organizations (2005, p.259). Although there is room for better horizontal and especially vertical links among the groups, she concludes that "there is a fair level of cooperation and joint action among CWOs in contiguous communities...despite interethnic differences and conflicts" (p.267). The excellent work done by international NGOs like HRW in collecting documentation from Nigerian groups and publicizing human rights abuse in the West is another good example of effective collaboration between local and international organizations. Furthermore, the production-consumption strikes that followed the women's protests in 2002 also demonstrate the impact that a globally well-connected local struggle against a corporate giant can have.

Another important insight from this case are the methods used by the women, which are informed by a long history of Nigerian women's resistance. In the introduction to his book, *Imperialism and Human Rights*, Bonny Ibhawoh asks "if [human rights] are truly universal, what normative contribution has Africa made (or can Africa make) to the development of the 'universal human rights' movement?" (2007, p.5). The women's articulation of and demand for the right to subsistence using tactics rooted in their own history – tactics that have since spread to numerous other countries – provides one example of the ongoing meaning construction of human rights practice. Furthermore, by claiming and gaining rights from a global corporation, rather than the state, Nigerian women are broadening human rights practice to reflect the contemporary context of reduced state power. As such, their actions provide another example of "engaged universals" where the resistance is both particular (tactics used and violator identified) and universal (claiming the right to subsistence) at once.

Finally, by considering the concessions of a non-traditional provider of ESCRs, the multinational corporation, this case study embodies the theoretical literature reviewed in §II suggesting that rights are not abstract nor given by the state, but rather are "taken" by citizens who

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35. The irony is not lost on Bronwen Manby, who points out that the same companies regularly lobby the government with respect to tax regimes and other political decisions which affect oil operations (1999, p.281).

36. It is worth noting that in using the term "local autonomy" I am not suggesting that communities be further isolated from the world, but rather that they have greater voice in determining and articulating the rights they are due and how these are negotiated in practice.

37. See, for example, Escobar (2001) and Harcourt & Escobar (2005).

constitute themselves as such through their takings. In other words, by claiming the right to subsistence and the obligation incumbent on oil MNCs to realize these rights (in light of their profits and the negative impact of their presence on the subsistence of local communities), the women in question create these rights.

### **iii. Peru: maternal mortality among rural, Indigenous women**

Despite considerable economic growth in Peru, maternal mortality rates there are among the highest in the region, driven by the exceptionally high rates of maternal death among rural, Indigenous women. Examining the high prevalence of maternal mortality among Indigenous women in Peru is particularly useful in understanding the indivisibility of all human rights, such as the relationship between health rights on the one hand and cultural rights and the rights of Indigenous communities to self-determination on the other. It also indicates the repercussions of the denial of political and civil rights under Fujimori's administration on the realization of health rights. More generally, maternal mortality is examined here because it is at the heart of advocacy work by development-focused organizations, feminist and women's organizations, and ESCR work. The first part of this case study provides relevant background on Peru's demographics and history, followed by an appraisal of maternal mortality in the country and an analysis of what this case suggests about the extension of human rights to include ESCRs.

Peru is a medium-sized country in South America on the western coast of the continent, bordered by Ecuador and Columbia to the north, Brazil and Bolivia to the east, and Chile to the south. The majority of the population lives on the coast, particularly in the city's capital, Lima, home to close to 8 million of the country's 28 million inhabitants<sup>38</sup>. Overall, Indigenous peoples living in the Andes (mostly speaking Quechua and Aymara in the southern Andes and one of a few dozen languages in the northern Andes) number some 11 million – 40% of the total population (Knudsen 2005, p.72). The majority of these communities are rural and isolated from one another and from major centres along the coast where health and other social and economic services predominate.

The country gained independence from the Spaniards in 1824. In the years following the 1948 signing of the UDHR, Peru was run by a series of successive military dictators until 1979, when multi-party elections occurred. The 1980s were characterized by the nationalization of a number of enterprises, and bouts of hyperinflation which one report measures was as high as 2.2 million percent between 1985 and 1990 (Kim et al 1999). In part due to the severe economic instability of the country, this period witnessed the rise of Shining Path (Sendero Luminoso), a guerilla movement. They, along with the state military arm charged with quelling this movement, have become well-known for the atrocious human rights violations committed against civilians, disproportionate numbers of whom were members of rural, Indigenous communities. Despite making up only 40% of the total population, 75% of those who were killed or "disappeared" spoke Quechua or another Indigenous language as their mother tongue (AI 2006, p.3)

In 1990, Alberto Fujimori, a relatively unknown populist, surprised Peru by winning the presidential election. Given the economic instability of the country and the presence of the Shining Path, his administration was able to operate in a "state of exception" (Hardt and Negri 2000). It suspended of the constitution, dissolved the national congress, and fired judges and state attorneys in April 1992 (Conaghan 2005, p.3). In her book, *Fujimori's Peru*, Conaghan (2005) goes on to describe the extensive efforts of Fujimori's administration to quell dissent in civil society, earning his regime

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38. Retrieved from [www.citypopulation.de/peru-lima.html](http://www.citypopulation.de/peru-lima.html)

the moniker “illiberal democracy” in an influential 1997 article by Fareed Zakaria in *Foreign Affairs*. Conaghan and Zakaria both point to the limited kinds of democracy that multiparty elections alone provide: in short, both argue that (liberal) democracy requires much more, including freedom of association and a free press to facilitate a vibrant and critical civil society to whose demands the state responds.

Indeed, the ability to participate meaningfully in the political process in Peru in the 1990s was sharply curtailed, and perhaps even more so for rural Indigenous women, who have typically held even less access to the political sphere than their urban counterparts. The forced sterilization of Indigenous women under Fujimori’s reign, discussed below, is one example of denying one of the most basic reproductive rights during this period. What is significant about these developments for the purposes of this paper is the extent to which the denial of civil and political rights occurred alongside the erosion of economic, social and cultural rights.

The newly elected president also agreed to subject Peru to a neo-liberal structural adjustment program (SAP) in order to quell inflation and improve the macroeconomic stability of the country.<sup>39</sup> Dubbed the ‘Washington Consensus,’ these measures had disastrous consequences across the developing world, in large part because through these measures, economic, social and cultural rights were subordinated to the dictates of neo-liberal macroeconomic policy prescriptions (see note 39 above). Peru was no exception.

For example, “Fujishock,” as the austerity measures came to be known, involved, among other things, the privatization of health care services. This meant increasing costs – if not for primary care services, then for ancillary fees such as prescriptions, sterilized equipment such as gloves and syringes, and, for rural communities in particular, the cost of transportation to access services. In 1990, public health expenditures were 15% of 1980 levels. As part of Fujimori’s neoliberal reforms, public health centres were allowed to charge fees, which accounted for as much as 20% of the Ministry of Health budget by 1999 (Ewig 2006, pp.431-2). In her research on health sector reforms in Peru during the 1990s, Christina Ewig found that “women lost out...[because] they were less likely to be able to access services in a fee-based system” (p.448).

Furthermore, the increasing income inequality in Peru under structural adjustment cannot be divorced from the impact on health care: as extreme poverty increased, so too did the need for free, basic services, but these were precisely what were being cut. For example, one study of 400 low-income households found that while rates of sickness increased 21 percent, spending on prescription medication fell by 51 percent (cited in Kim et al 1999, p.138). In general, the incidence of extreme poverty is almost three times greater among populations of Indigenous origin compared to the rest of the population (Amnesty International 2006, p.28). As noted in the previous case study, high and persistent levels of inequality in realizing ESCRs, particularly along lines of gender, race, culture, and geography (among others) are suggestive of violations of human rights. In the case of maternal mortality of rural Indigenous women in Peru, the key rights in question are the social right to health and the civil right to life.

Peru has the second-highest rate of maternal mortality in Latin America, and the rate is disproportionately higher for those who are marginalized – particularly low-income, rural, Indigenous

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39. Now widely considered an abject failure – even by some its once most ardent advocates – structural adjustment programs consisted of a series of austerity measures that typically included currency devaluation, selling off national enterprises, instituting cost-sharing for basic services in health and education, down-sizing the public sector, and making a series of reforms for the liberalization of trade and capital flows that would make the country more favourable to foreign trade and investment, reduce inflation and ostensibly allow countries to avoid defaulting on their debts, which were rising astronomically.

women.<sup>40</sup> Recently revised estimates put the rate of maternal mortality at 410 per 100,000 live births in Peru (WHO 2004). To put this revised figure in perspective, it is more than double the estimated average of 190 per 100,000 live births for Latin America and the Caribbean (LAC) (WHO 2004, p.12). Furthermore, neighbouring Ecuador, which has a lower GDP per capita (\$1,450 compared to \$2,050 in Peru) and spends a quarter of Peru's health expenditure on a per capita basis (\$26 USD versus \$100 USD in Peru), reported 78 maternal deaths per 100,000 live births (World Bank 2006, p.113, PAHO Regional Core Health Data Initiative).<sup>41</sup> A recent report stated that the lack of progress among Latin America and the Caribbean (LAC) in meeting the Millennium Development Goals (MDG) targets for maternal mortality (among others) is due to the "persistently high levels of inequality in income distribution and inequities related to place of residence, ethnicity, and gender" (ECLAC 2005). For rural Indigenous women in Peru, this means maternal mortality rates more than 11 times greater than the national average.<sup>42</sup>

Based on findings from participatory workshops with rural Indigenous women living in poverty<sup>43</sup>, Bant and Girard (2008) reported that "[w]hen asked, Indigenous women defy the preconceived notion that access to sexual and reproductive health services, prevention of violence against women, and support for greater gender equality are not priority matters for them" (p.251). The Indigenous women identified sexual rights issues and pervasive gender inequality as the key barriers to good health and well-being. Taken together, the women's seven key health concerns highlighted in the report included four directly related to maternal mortality: unwanted pregnancy, too many children, suffering during childbirth, and inadequate public-health services for women, which were deemed both gender and culturally insensitive.<sup>44</sup>

The real injustice of Peru's high rates of maternal mortality is not only that they are concentrated among rural Indigenous women with limited access to essential obstetric care, but that they have persisted despite considerable economic growth. The other countries in the region that have the highest levels of maternal mortality and the lowest levels of skilled attendants at birth are Haiti, Bolivia, Paraguay, El Salvador, Guatemala, Guyana, and Honduras. As seen in Table 1 below, Peru has the highest GDP per capita, yet Haiti – with the lowest GDP per capita of the group by far – is the only country with a statistically significant higher maternal mortality rate in the region. Neither the % of births attended by skilled personnel nor its national health expenditure alone (both about average in the group of countries with maternal mortality rates over 100 per 100,000 live births) explains the high rate of maternal mortality in Peru.

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40. Maternal mortality is a particularly difficult indicator to measure effectively, both because of the low numbers of deaths vis-à-vis the whole population, the underreporting of deaths and causes, and because different methods are used in different countries and over time (WHO 2004). However, the persistently high rates in Peru have consistently been noted by global public health officials and are generally considered a serious problem in the country's development.

41. WHO's revised 2000 estimates puts the maternal mortality ratio for Ecuador at 130.

42. Peru is divided up into 24 administrative departments. The World Bank recently reported that in Puno and Ayacucho, there were 35.7 deaths and 35.8 deaths per 1,000 women in reproductive years, compared to 3.2 in Lima (World Bank, 2006, p.120).

43. The workshops took place from 1996 to 2002 and involved roughly 700 Indigenous women from the poorest region of the Peruvian Andes and from five isolated communities in the Peruvian Amazon. They were conducted based on a participatory, self-assessment methodology developed by a long-standing Peruvian women's rights organization, Movimiento Manuela Ramos.

44. The other three priority concerns were vaginal discharge (associated with STIs and husband's infidelity), forced and early marriage, and gender-based violence, which, it could be argued, are not entirely unrelated to maternal mortality.

Table 1 – LAC countries with maternal mortality rates >100, selected indicators<sup>45</sup>

	<b>GDP per capita (PPP US\$)</b>	<b>Maternal mortality (per 100,000 live births) WHO/ PAHO<sup>46</sup></b>	<b>% of births attended by skilled personnel</b>	<b>Annual national health expenditure (% of GDP) – public</b>	<b>Annual national health expenditure (% of GDP) – private</b>
Haiti	\$1,892	680/523	24%	1.6%	4.2%
Bolivia	\$2,720	420/230	61%	4.3%	2.9%
<b>Peru</b>	<b>\$5,678</b>	<b>410/185</b>	<b>71%</b>	<b>2.1%</b>	<b>2.0%</b>
Paraguay	\$4,813	170/174	86%	2.9%	4.1%
El Salvador	\$5,041	150/173	84%	2.0%	3.8%
Guatemala	\$4,313	240/153	41%	1.4%	4.8%
Guyana	\$4,439	170/124	94%	2.1%	...
Honduras	\$2,876	110/108	62%	2.0%	2.6%

One of the advantages of a human rights framework is that through the work of individual experts and groups with a range of expertise, agreement on a set of minimum core obligations for a given socio-economic right can be determined. Based on her extensive work in advancing health rights in Peru, Alicia Yamin argues that the WHO/UNFPA/UNICEF indicators that measure access to essential obstetric care (EOC) are essential in reducing maternal mortality. Health rights scholar and activist Lynn Freedman emphasizes that “if the human right in question is the right not to die an avoidable death in pregnancy and childbirth, then the first line of appropriate measures that will move progressively toward the realization of the right is the implementation of [EOC]. *In a human rights analysis, EOC is not just one good idea among many. It is an obligation*” (quoted in Yamin 2005, p.1209, emphasis added). The democratic process that developed these indicators involved medical experts, showing the importance of a range of actors in determining the content of state obligations to progressively realize universal health rights. In the LAC region, direct obstetric causes (haemorrhage, toxemia, complications in puerperium and other direct causes) account for roughly three-quarters of maternal deaths (ECLAC 2005, p.146). Complications from unsafe abortions are reported to cause 11% of deaths, though the actual figure is likely considerably higher given underreporting (Ibid). Likewise, in terms of leading causes of maternal mortality in Peru, abortion ranks fourth – after hemorrhaging, infection and pre-eclampsia (Knudsen 2006). These statistics suggest that access to EOC would considerably improve maternal mortality in Peru. However, what is clear from the workshops with Indigenous women cited above, achieving gender equality is also central for the meaningful realization of Indigenous women’s health rights, Greater gender equality would mean that women have greater control over when and how many children they have, would not be subject to emotional and physical abuse, and would not be stigmatized for their choices, suggesting once again the interdependence of human rights.

45. Sources: GDP per capita, *Human Development Report 2006*, other data from Pan American Health Organization, Health Analysis and Information Systems Area, Regional Core Health Data Initiative; Technical Health Information System, 2005, and WHO, UNICEF and UNFPA, *Maternal Mortality in 2000: Estimates*.

46. The first figures in this column are the revised estimates from WHO; the second figures are those reported by the country and retrieved from PAHO’s database.

For rural, Indigenous women to realize their right to health, however, changes in income and gender inequality and access to EOC alone will not be sufficient. During the last years of Fujimori's rule, hundreds of women – mostly poor, rural Indigenous women – were sterilized without their consent; in purportedly giving consent, many were not provided with adequate translation services, and many others were coerced into sterilization procedures by health professionals who, under pressure from population control/family planning policies, were rewarded by meeting certain quotas of sterilized women (Knudsen 2006). There are documented cases of health professionals who withheld other forms of contraception or who provided food and money in exchange for the procedure (Knudsen 2006). A racist and sexist ideology – that Indigenous women are not capable of making the best decisions for themselves, that reproduction in Indigenous communities increases poverty, among others – reinforced and legitimized these very basic violations of human rights undertaken in Fujimori's later years. This legacy has obvious implications for the level of trust Indigenous women are willing to place in the public health care system.

Among many Indigenous communities in Peru, health care centres are known as “houses of death” because so many Indigenous women have died there in childbirth (Yamin 2005). Furthermore, most health care services are provided only in Spanish, violating the rights of Indigenous women to participate meaningfully in decisions about their own care. Indeed, there is a long history of Indigenous women's cultural practices and beliefs being disregarded in official health care settings. According to the Peruvian Ministry of Health, there are “signs of considerable mistrust of personnel in health centres and health posts, as well as of the techniques used during childbirth” (quoted in Amnesty International 2006, p.26). Here, the rights of Indigenous women to preserve their cultural and linguistic identity through the use of traditional birthing practices and conversations with medical professions in their own language are routinely violated. As a result, many Indigenous women opt out of formal health care centres altogether: roughly only one-fifth of women in rural areas (predominantly Indigenous women) gave birth in health centres (Amnesty International 2006, p.26), compared to 69% in urban sectors (ECLAC 2005, p.148). Given the positive correlation between the presence of skilled attendants at birth and reducing maternal mortality, these differences are particularly troubling. Furthermore, the discrepancy is likely even greater if rural Indigenous women are compared to urban non-Indigenous women.

Considering Peru's high rates of maternal mortality, particularly among rural, Indigenous women, raises a number of important issues about the ways in which economic, social, and cultural rights are negotiated. First, maternal mortality is a significant indicator that has long been used in development contexts. One of the UN's eight Millennium Development Goals (MDGs) is the improvement of maternal health, and the targets call for a reduction of three-quarters of the maternal mortality ratio between 1990 and 2015. At the centre of development concerns and the progressive realization of health rights, maternal mortality is a critical issue to consider in understanding the potential of expanding human rights discourse to include ESCRs like health rights. Furthermore, maternal mortality combines two basic rights – the ESC right to health, namely access to EOC, and the right to life, included under PCRs. This is yet another way that reducing maternal mortality demonstrates the indivisibility of the two categories of human rights. Finally, this case also demonstrates the centrality of sex equality rights in realizing health rights.

Second, one of the key contributions that a human rights perspective brings to development is the emphasis it places on inequality and discrimination, particularly along lines of gender, race, class, location, etc. It demands, in other words, that resources target the least well-off, a proposition that is clearly at issue in the delivery of maternal health services among Indigenous women of the Andes and Amazonia in Peru. As Yamin puts it so well, “as long as policy makers...continue to treat the fact that over half a million women and girls die each year in pregnancy and childbirth as a tragedy and not a justice issue, they will continue to die” (2005, p.1243).

Third, health care policy in Peru and the roles it has and can play in reducing maternal mortality is intimately connected to the broader adjustment and austerity measures undertaken by the Fujimori administration – in this sense, maternal mortality cannot be divorced from issues of global governance, democracy and autonomy, particularly the role of international financial institutions in shaping domestic policy. As with the role of multinational corporations in the previous case, the claim here is that with the erosion of state sovereignty under globalization, the ability of PCRs to achieve ESCRs is undermined. Taking seriously the indivisibility of human rights in lived experience is more, not less, imperative in a more interconnected world.

Fourth, cultural rights and the rights of Indigenous peoples to self-determination are key in understanding what would constitute the meaningful realization of health rights for rural Indigenous women. At issue in particular is the history of mistreatment of Indigenous women in health centres and the language barrier. For Indigenous women who speak only limited Spanish, if any, their ability to make autonomous decisions about their own care is severely restricted, if not non-existent. See Hvalkof (2004) and Gray (1997) for examples of health care models among Indigenous communities in Peru that are proving successful in realizing the right to health and reducing maternal mortality. What is particularly significant about these examples is that they incorporate a holistic understanding of human rights that links the realization of health rights to the autonomy of Indigenous communities, the right to land ownership and self-governance (self-determination).

Fifth, looking at maternal mortality in Peru highlights the intersection of health rights with other human rights, such as the right to secure the means of subsistence, the right to education, cultural rights and (sex) equality rights. Furthermore, the evidence of forced sterilizations among Indigenous women during the Fujimori administration, as well as the persistently high and inequitable levels of maternal mortality despite economic growth, are suggestive of the correlation between the denial of PCRs on the one hand and ESCRs on the other. In short, this case study provides ample evidence of the indivisibility of all human rights in lived experience.

#### **IV CONCLUSION**

Taken together, these cases suggest that ESCRs are being negotiated in particular contexts demonstrating their (a) justiciability; (b) ability to be advocated to the variety of actors increasingly important in a globalizing world, including MNCs; (c) long history in developing country contexts; (d) contribution to enhancing democracy through the public activism of taking rights and the negotiation of determining the content of those rights in participatory processes, thereby extending human rights work beyond an exclusively legalistic framework; and (e) their interdependence and inseparability from PCRs.

They address the post-colonial critique by providing the conceptual space for valuing advances in both ESCRs and PCRs, and by addressing central concerns of development for developing countries. By profiling how ESCRs are negotiated on the ground and in particular developing country contexts, each of the cases respond to the criticism that human rights are Western concepts that do not translate well into other cultural contexts. With respect to autonomy and governance, the cases show the need for multiple levels of autonomy at the individual, community, regional and state levels and for governance structures that involve multiple geographic scales. Finally, the context of globalization means that power and sovereignty are increasingly devolved from states to other actors, including international financial institutions, multinational corporations, and a handful of powerful states. As a result, the potential of political and civil rights to be the primary means for advancing economic, social and cultural rights is increasingly limited.

The power of an integrated approach to human rights work that values economic, social and cultural rights alongside political and civil rights is that it comes closer to lived experience and to the articulations of rights described in these three cases. As such, an integrated approach to human rights, which takes into account the myriad ways that human rights principles are being negotiated in different cultural contexts, is an important step in building greater acceptance of human rights in the world. The intent here is not to gloss over the considerable challenges of convincing donors to embrace a more complex and broader agenda and of extending the kinds of expertise human rights organizations marshal (e.g. to expand beyond the predominantly legally-trained human rights community to include medical experts, social and economic policy analysts, and community activists). However, to maintain the artificial division between the two groups of rights is to relegate human rights work to a narrow mandate that is simply untenable in many contexts outside of industrialized Western states. Moreover, advancing economic, social and cultural rights *as rights* changes the perspective from a question of development and political negotiation to a question of justice. As the final point in the Nigerian women's decree proclaims, "the only solution to peace in the Niger Delta is justice."

There are two additional issues these cases raise that require further investigation. First, it is striking that in each of the cases considered, women's rights and sex inequality are at issue. Intellectually, there are two possibilities – one that my own interest in gender has affected my choice of case studies; the other that ESCRs may have more relevance to improving women's day-to-day lives – by advancing women's rights – than PCR's have so far proved to be the case. I suspect that both possibilities are relevant. This is not to say that voting rights, or the right to freedom of expression, are more relevant to men than to women. But it is to suggest that, perhaps, because male norms have informed the construction of the citizen and his rights and also because in practice the historical emphasis on political prisoners of conscience by organizations like Amnesty International has meant that their efforts have helped men more than women, the advancement of PCR's to the exclusion of ESCRs may have historically benefited men more than women. This is an area in which further investigation is needed.

Second, one of the possibilities that ESCRs open up is the notion of moral obligation in international contexts. While PCR's (both in terms of the ICCPR and the advocacy work of human rights organizations) have focused on states as the primary violators of human rights, ESCRs, as the Nigerian case study in particular demonstrates, may be more amenable to attributing responsibility to non-state actors as well as to other states. Furthermore, unlike the ICCPR, the preamble to the ICESCR states that "Each State Party...undertakes to take steps, individually and through international assistance and co-operation" to realize ESCRs, thereby setting the groundwork not only for co-operation, but I would suggest moral obligation and international responsibility as well. To the extent that realizing ESCRs may well require "a commitment to social integration, solidarity and equality, including tackling the question of income distribution" (Eide 1995, p.17), ESCRs may be better positioned to take on global inequalities, a task that PCR's on their own have proved incapable of addressing. While there may still be considerable work to be done in creating institutions of global governance (as distinct from global *government*) necessary to translate international moral obligations into binding ones enforceable by sanction, it may prove crucial to the progressive realization economic, social and cultural rights throughout the world.

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**APPENDIX A - ACRONYMS**

AI	Amnesty International
AIDS	Acquired Immuno-deficiency Syndrome
ANC	African National Congress
AZT	zidithymidine
ECLAC	Economic Commission on Latin America and the Caribbean
EOC	Emergency Obstetric Care
ESCRs	Economic, Social and Cultural Rights
GDP	Gross Domestic Product
GNP	Gross National Product
HDR	Human Development Report
HIV	Human Immunodeficiency Virus
HRW	Human Rights Watch
ICCPR	International Covenant on Political and Civil Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IMF	International Monetary Fund
LAC	Latin America and the Caribbean
MCC	Medicines Control Council
MDG	Millennium Development Goals
MMR	Maternal Mortality Ratio
MNC	Multi-national Corporation
MOSOP	Movement for the Survival of the Ogoni People
MTCT	Mother-to-child transmission
NGO	Non-Governmental Organization
PAHO	Pan-American Health Organization
PCRs	Political and Civil Rights
PMTCT	Prevention of mother-to-child transmission
PPP	Purchasing Power Parity
SAP	Structural Adjustment Program
SSA	Sub-Saharan Africa
TAC	Treatment Action Campaign
UNDP	United Nations Development Program
UDHR	Universal Declaration of Human Rights
UN	United Nations
WB	World Bank
WHO	World Health Organization



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# Institute on Globalization and the Human Condition

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The Institute on Globalization and the Human Condition was created in January 1998 following the designation of globalization and the human condition as a strategic area of research by the Senate of McMaster University. Subsequently, it was approved as an official research center by the University Planning Committee. The Institute brings together a group of approximately 30 scholars from both the social sciences and humanities. Its mandate includes the following responsibilities:

- a facilitator of research and interdisciplinary discussion with the view to building an intellectual community focused on globalization issues.
- a centre for dialogue between the university and the community on globalization issues
- a promoter and administrator of new graduate programming

In January 2002, the Institute also became the host for a Major Collaborative Research Initiatives Project funded by the Social Sciences and Humanities Research Council of Canada where a group of over 40 researchers from across Canada and abroad are examining the relationships between globalization and autonomy.

## The WORKING PAPER SERIES...

circulates papers by members of the Institute as well as other faculty members and invited graduate students at McMaster University working on the theme of globalization. Scholars invited by the Institute to present lectures at McMaster will also be invited to contribute to the series.

## Objectives:

- To foster dialogue and awareness of research among scholars at McMaster and elsewhere whose work focuses upon globalization, its impact on economic, social, political and cultural relations, and the response of individuals, groups and societies to these impacts. Given the complexity of the globalization phenomenon and the diverse reactions to it, it is helpful to focus upon these issues from a variety of disciplinary perspectives.
- To assist scholars at McMaster and elsewhere to clarify and refine their research on globalization in preparation for eventual publication.

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## Negotiation on the Ground: Realizing Economics, Social and Cultural Rights in South Africa, Nigeria and Peru

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