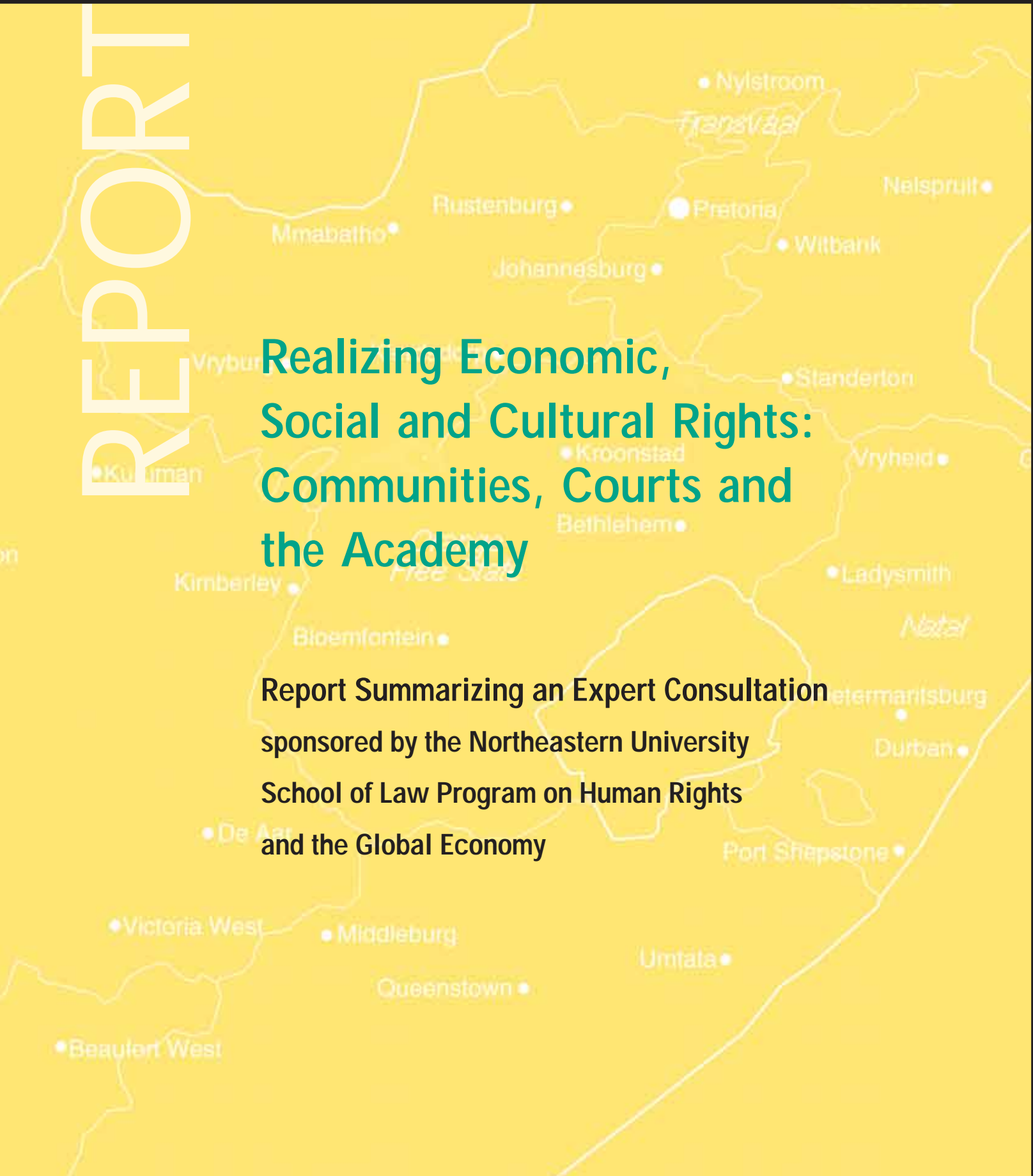


JUNE 16-17, 2005

REPORT

Realizing Economic, Social and Cultural Rights: Communities, Courts and the Academy

Report Summarizing an Expert Consultation
sponsored by the Northeastern University
School of Law Program on Human Rights
and the Global Economy



**REALIZING ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMUNITIES, COURTS
AND THE ACADEMY**

**Report Summarizing an Expert Consultation sponsored by the Northeastern University
School of Law Program on Human Rights and the Global Economy**

June 16-17, 2005
Program on Human Rights and the Global Economy
Northeastern University School of Law
400 Huntington Avenue
Boston, Massachusetts 02115

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TABLE OF CONTENTS

Foreword, Hope Lewis	i
Acknowledgments	vii
Selected Materials from June 16 Symposium	
Message for Freedom Charter Day, Hon. Nelson Mandela	2
Keynote Address: Human Rights and the South African Freedom Charter: Law, Justice, and Political Movements, Hon. Pius Langa	4
Fifty Years of the Freedom Charter, Margaret A. Burnham	11
Symposium Program	16
Selected Materials from June 16-17 Expert Consultation	
Dean's Welcome, Emily Spieler	18
Dinner Address: Please Pass the <i>Ubuntu</i> , Penelope Andrews	20
Opening Remarks, Angela E.V. King	25
Plenary Session: Judges on Justiciability (with Hon. Pius Langa and Hon. Margot Botsford) Summary Report, Karl E. Klare, Monica C. Elkinton, and Maria P. Muti	30
Working Group A: Public Health and the Human Rights Framework Framing the Relationship between Human Rights and Public Health, Wendy Parmet and Brook K. Baker	37
Summary Report, Megan Bremer, Wendy Parmet, and Brook K. Baker	43
Working Group B: ESC Rights in the United States Framing Materials, Martha Davis and Cathy Albisa	50
Summary Report, Martha Davis and Cathy Albisa	59
Working Group C: Human Rights Law and the Challenges of Contemporary Development Framing Memorandum, Dan Danielsen and Rashmi Dyal-Chand	61
How Corporations Govern: Taking Corporate Power Seriously in International Regulation and Governance, Dan Danielsen	63
Summary Report, Dan Danielsen, Rashmi Dyal-Chand, Jessica Jones, and Siddhartha Mukherjee	76
Roundtable: Building and Sustaining Northeastern's Program on Human Rights and the Global Economy Framing Materials: E-Mail to Participants, James Rowan and Margaret Y.K. Woo	78
Summary Report, James Rowan, Margaret Y.K. Woo, and Maria P. Muti	79
Appendix	
Students, Alumni, and the Program on Human Rights and the Global Economy, Hope Lewis	84
Consultation Program	86
Biographical Information on Participants	89

Foreword

By
Hope Lewis

This report documents a groundbreaking expert consultation-- "Realizing Economic, Social, and Cultural Rights: Communities, Courts and the Academy"-- held at Northeastern University School of Law in Boston, Massachusetts, on June 16-17, 2005. A project of the law school's new Program on Human Rights and the Global Economy (PHRGE), the consultation provided a forum for discussion and planning for future work on economic, social, and cultural rights (ESC rights) and on the human rights implications of globalization.

The Program on Human Rights and the Global Economy promotes the realization of human rights and social justice internationally and domestically through legal education, scholarship, and community-based collaborative work. We chose to focus primarily on ESC rights and globalization, not because we see those concerns as separate from civil and political rights, but because socio-economic issues are too often on the "back burner"—even in the international human rights movement.

The consultation formally launched the law school's Program. However, Northeastern's engagement with human rights scholarship and advocacy is not new. The Program grew out of the law school community's longstanding commitment to social justice and human rights in the form of student "co-ops" (co-operative legal education in practice settings), classroom teaching, advocacy, scholarship, student activism, community partnerships, and human rights lecture series. This history reflects our institutional commitment to the integration of litigation strategies, theory, community organizing, and classroom teaching as essential tools in the promotion of human rights and social justice. Northeastern has already made in-roads in the implementation and understanding of ESC rights and the impact of globalization on human rights in general. The Program seeks to enhance our existing efforts and aims to break new ground in the law school classroom and beyond. Among the human rights-related issues on which members of our faculty have focused are the rights of the poor, racially-subordinated groups, and women, public health, educational access, immigration and asylum advocacy, community organizing, labor, development, and the environment.

The leading jurists, academics, practitioners, and activists who participated in this initial meeting are committed to teaching, research, advocacy, and organizing on a variety of issues related to ESC rights. The participants were an interdisciplinary group, drawn from human rights, public health, economic, development, and legal fields. However, because this was an initial effort, this group could only be partially representative of the growing numbers in the U.S. and internationally who have enhanced understanding and practice in ESC Rights or human rights and globalization. As it grows, the Program will hold a series of issue-targeted meetings and institutes that we hope will include both those who participated in the initial consultation as well as others who could not attend.

The consultation addressed the broad theme of making ESC rights a reality—whether through grassroots education and activism, judicial decision-making, legislative efforts, administrative or executive policy, theoretical analysis of the consequences of practical application, or the integration of ESC rights education in law school classrooms. The consultation addressed crucial questions: Should ESC rights be justiciable in domestic courts? If so, what can be learned from the experience of jurists and

advocates outside the U.S. who have adjudicated such rights? How can we generate the political will necessary to translate the lofty norms of international legal texts into practical supports that change peoples' lives for the better? Can the international human rights framework support or renew existing public health, anti-poverty, or anti-discrimination litigation, legislative, policy, or organizing strategies? What roles should law schools play in supporting such efforts?

The widely-recognized jurisprudence of the South African Constitutional Court interpreting the socio-economic rights provisions of its post-apartheid constitution served as an excellent starting point for this discussion. The consultation at Northeastern was held in conjunction with the previous day's "Symposium: Human Rights and the South African Freedom Charter: Law, Justice, and Political Movements". The symposium was co-sponsored by the Northeastern University School of Law Program on Human Rights and the Global Economy (PHRGE), South Africa Partners (a Boston-based non-governmental organization working on social justice in South Africa) and the Charles Hamilton Houston Institute on Race and Justice at Harvard Law School. Among the organizers were two highly-respected civil rights lawyers and human rights advocates--Harvard Law Professor Charles Ogletree and Professor Margaret A. Burnham, a member the Working Group on Human Rights that helped organize Northeastern's PHRGE.

The Program's sponsorship of the Freedom Charter symposium was a natural outgrowth of the historical and deep commitment of Northeastern's law faculty and students to the anti-apartheid, HIV/AIDs prevention and treatment, and gender justice movements in South Africa. It was both an honor and deeply inspiring to host the first official visit of South Africa's new Chief Justice, Pius Langa, who was also joined by such honored jurists as Justice Zakeria Yacoob of the Constitutional Court, and Judge Dennis Davis of the High Court of South Africa (Western Cape). Socio-economic justice was a continuing theme raised by most speakers, panelists, and audience members at the symposium. We have reproduced Chief Justice Langa's moving keynote speech below, as well as Professor Burnham's piece on the fiftieth anniversary of the Freedom Charter. That document recognized the importance of economic, social, and cultural rights decades before the post-apartheid South African constitution and has influenced both political and legal movements in that country and outside it. The list of speakers included internationally-recognized jurists, academics, politicians, and diplomats, including Justice Zakeria Yacoob of the South African Constitutional Court, Chief Justice Margaret Marshall of the Massachusetts Supreme Judicial Court, Ms. Jeannette Ndhlovu, Consul-General of South Africa for Los Angeles, Professor Cheryl Harris of UCLA School of Law, Professor Makau Mutua of SUNY/Buffalo School of Law, and Mr. Bill Fletcher, President of TransAfrica. The webcast of the symposium is available at : http://www.law.harvard.edu/students/saturday_school/video_archive.shtml

The symposium was followed by a welcome dinner for the participants in the expert consultation hosted by Northeastern law Dean Emily Spieler. Professor Penelope Andrews, Professor of Law at CUNY School of Law and Ariel F. Sallows Professor of Human Rights Law at the University of Saskatchewan School of Law, delivered the dinner address. She examined the significance of *ubuntu*—an important philosophical conception of human responsibility and care toward others and towards the self—that has had an important impact on South African society, politics, and jurisprudence. She challenged us to consider whether *ubuntu* can inform social justice efforts in the U.S. and other non-African societies.

After the opportunity for informal discussion provided by the dinner, the participants

gathered at Northeastern University School of Law the next day for the formal opening of the consultation on “Realizing Economic, Social and Cultural Rights: Communities, Courts and the Academy”. Consultation participants had been provided with “framing materials” such as questions for discussion, hypothetical problems, relevant case law, or articles chosen by facilitators in advance of the meeting. Through the law school’s generosity, each invited consultation participant was also provided with a complimentary copy of the new human rights textbook, HUMAN RIGHTS AND THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (Jeanne Woods & Hope Lewis, eds.), which seeks to further legal education on ESC rights and globalization.

The meeting began with a plenary session open to all invited participants, Northeastern students, faculty, and staff, and members of the public. Dean Spieler and I welcomed the crowd and made introductory remarks. Angela E.V. King, the former United Nations Assistant Secretary-General and Special Adviser on Gender Issues and the Advancement of Women, set the international context of the meeting. Among other things, she elaborated the important work being done by the UN Committee on Economic, Social, and Cultural Rights, the (then upcoming) UN Summit Meeting to assess progress on the Millennium Development Goals (held in September, 2005, as this report went to press), and the need to promote and protect the rights and status of women and girls in meeting the challenges of poverty and violent conflict. Her talk highlighted the significance of UN efforts to reduce poverty and promote human rights as inextricably linked to other aspects of UN reform and progress.

“Judges on Justiciability: Economic, Social, and Cultural Rights in the Courtroom,” involved a lively and insightful dialogue between Chief Justice Langa and Massachusetts Superior Court Judge Margot Botsford (an alumna of Northeastern University School of Law). Chief Justice Langa discussed the Constitutional Court’s influential jurisprudence on socio-economic rights, while Judge Botsford raised issues facing U.S. state court judges seeking to interpret domestic standards on educational access and quality. Professor Karl Klare, himself a leading scholar and activist on critical legal studies and labor law, introduced and moderated the discussion, which stimulated us to think about the possibilities and pitfalls of ESC rights analysis in courtroom settings. Despite the time limitations resulting from our ambitious agenda, audience members made insightful comments on the proceedings and raised thoughtful questions.

The consultant participants then broke into small interest group sessions on three broad themes: public health and human rights, ESC rights strategies in the United States, human rights and development. These broad topics were chosen from among many possibilities because they echoed areas of work or interest already being explored by a significant number of faculty members (some had formed “interest groups” that met regularly to discuss these issues). Our hope was to begin a long-term discussion on ESC rights and the implications of globalization by building on existing work. We hoped that participants would identify priority areas of concern and need for scholarly or other attention, share and discuss relevant experiences and strategies, and suggest ways that the legal academy (including the PHRGE) could or should assist in such efforts.

“Working Group A: Public Health and the Human Rights Framework”, was facilitated by Professor Wendy Parmet, a leading constitutional scholar and public health advocate and co-editor of ETHICAL HEALTH CARE (with Patricia Illingworth) and Professor Brook K. Baker, a leading clinician, scholar, and activist who has worked extensively with South African and international movements advocating for the prevention and accessible treatment for

HIV/AIDS. Participants in the working group primarily included academics and directors of major public health and human rights centers in the Boston area. We had invited and hoped to have greater participation by health and human rights activists as well, but most were unable to attend due to scheduling conflicts. We hope that future discussions in this area will allow for their participation. As you will see from the summary report below, however, the participants raised very substantive and practical issues for further discussion and possible collaboration. The manageable size of the gathering and public health interest and expertise reflected among the group's members allowed the participants to begin a relatively in-depth discussion.

Professor Martha Davis, author of *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973*, and a member of the Working Group on Human Rights that organized the PHRGE, worked with Cathy Albisa, the Executive Director of the National Economic, Social, and Cultural Rights Initiative, to facilitate "Working Group B: Economic, Social, and Cultural Rights in the U.S.: New Lawyering Strategies". As the aftermath of Hurricane Katrina in the Gulf Coast of the United States has demonstrated, poverty, racial discrimination, and official neglect raise important human rights and humanitarian concerns within the United States as well as internationally. Participants in this working group included leading practitioners and academics in the fields of labor law, immigration and asylum law, poverty law, and grassroots community organizing. While time constraints (a continuing theme) limited discussion, participants were challenged to explore and encourage growing activism and interest in human rights litigation and what could be learned from the jurisprudence of other countries, use of regional and international complaints mechanisms, NGO "shadow reporting" strategies, and community-based human rights education strategies.

"Working Group C: Human Rights and the Challenges of Development," attracted the largest group of participants. Professor Dan Danielsen, whose work focuses on international business law, corporate governance, and critical and postmodern legal theory, and Professor Rashmi Dyal-Chand, whose work explores community economic development as well as gendered approaches to international economic development, facilitated the discussion. Participants included economists, practicing lawyers, organizers, and academics from human rights, environmental, business law, African Studies, and other disciplines. Despite the time limitations, the discussion was quite lively and engaged, including brief contributions from most of those present. The conversation focused on a hypothetical problem on environmental standards as they impact the activities of transnational corporations. Participants also explored whether and how ESC rights were implicated.

The luncheon address allowed participants to learn from a practical illustration of how one NGO grapples with human rights and the "global economy". Sharon Hom, a former CUNY Law School professor and now Executive Director of Human Rights in China (HRIC), delivered the address after being introduced by Professor Margaret Y.K. Woo, an expert on China and co-editor of *EAST ASIAN LAW--UNIVERSAL NORMS AND LOCAL CULTURES*. Providing an overview of civil, political, economic, social, and cultural rights concerns in China, Ms. Hom also demonstrated HRIC's approaches to using the internet as a human rights tool. The organization also works to influence the World Trade Organization and international financial institutions to reveal the links between international economic law and policy and human rights.

Our very full day closed with a plenary roundtable on "Building and Sustaining

Northeastern's Program on Human Rights and the Global Economy". The roundtable was facilitated by Professor James Rowan, Director of our Clinical Programs and Associate Dean for Experiential & Community-based Education and Research, and Professor Margaret Y.K. Woo, an influential scholar on China, Comparative Law, and Civil Procedure. The roundtable stimulated a free-flowing and energetic discussion of practical ideas on moving the Program forward. All participants were invited to this session; despite the late hour on a Friday afternoon, many who did not otherwise have scheduling conflicts attended and gave generously of their time and expertise. Among those in attendance were directors and former directors of human rights programs at other law schools, practicing lawyers, alumni, faculty, and students. Our hope is that the Program will continue to build on the strengths of the Northeastern law school community and that it will work collaboratively with other groups and institutions committed to human rights and social justice.

The Appendix includes a brief, but important, note on the involvement of Northeastern law students and alumni in the creation of the PHRGE as well as biographical information on the participants who attended all or part of the consultation.

The PHRGE, consultation, and report would not have been possible without the early and sustained support of Dean Spieler, the volunteer Working Groups on human rights and the broader Human Rights Interest Group, our students, Pat Voorhies, who worked as Administrative Coordinator for the symposium and the consultation, and an incredibly dedicated team of administrative and support staff. Most are mentioned by name in the Acknowledgments; any oversight is unintentional. We appreciate each one of you.

This report is intentionally informal in style, with references remaining in the format used by the contributors. Our hope is to share the insights and issues surveyed here in a manner that will be readable and accessible to a wide audience. Many people contributed to this Report, and I thank each of them for making it a reality. We regret any errors or omissions; please bring them to my attention at h.lewis@neu.edu. We look forward to your comments, feedback, and participation in future Program events and projects!

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**SELECTED MATERIALS
FROM
JUNE 16, 2005 SYMPOSIUM**

NELSON MANDELA FOUNDATION

Living the Legacy

MESSAGE FOR FREEDOM CHARTER DAY

BOSTON
16 JUNE 2005

Margaret Burnham, Chief Justice Marshall, and distinguished guests:

Please accept my apologies for not being able to be with you in person today. Be assured, however, that I am with you in spirit.

It gives me a measure of satisfaction to know that my absence has a counterweight in the presence of Chief Justice Pius Langa of South Africa's Constitutional Court, and his colleague Justice Zakeria Yacoob. They and their institution symbolise at once the fruits of the Freedom Charter and the making of a post-apartheid future for South Africa. As I have argued before, the Freedom Charter captured the hopes and dreams of the people and acted as a blueprint for the liberation struggle and the future of the nation.

The judiciary which we inherited in 1994 bore a deep and resilient apartheid imprint. While much work remains to be done, we can be proud of the strides which have been made since then. We can be proud of our Constitutional Court. It exemplifies the Charter's call for all to be equal before the law, and its demand that the courts be representative of all the people. Individuals, communities and organisations throughout the land know that they can seek redress from this highest court in the land without fear or favour. Indeed, on more than one occasion this fiercely independent body has ruled against our own government, which in each case has respected that ruling.

We can be proud of our Constitution, a founding document which draws heavily on the principles enunciated in the Freedom Charter.

We are speaking, then, of two founding documents.

Although initiated by the African National Congress and its allies, the process leading to the Congress of the People and the adoption of the Charter embraced a wide reach of South Africa's political spectrum at the time. Activists collected tens of thousands of demands from people through street meetings, door-to-door visits, factory and area meetings. The Charter was founded in the people.

Not surprisingly, the apartheid state regarded the Charter as anathema. It was declared illegal, and anyone found in possession of it was committing a criminal offence. Nevertheless, it remained the central policy document of the African National Congress and an inspiration to the masses through four decades of struggle. In our preparations for the first democratic election in 1994, we built a platform founded on the principles of the Charter. Our victory then was also a victory for the Charter, and a victory for all of those who had fought for its principles over the years.

Of course, our work is not yet done. The Charter is still calling us to expand our freedom. It is gratifying that we face this challenge with the support of our friends around the world. We value

the goodwill, encouragement and assistance offered us by many friends in the United States.

It remains for me to wish you a stimulating and successful symposium.

I thank you.

NR Mandela

NR Mandela

Editor's Note: Chief Justice Langa delivered the moving keynote address for the Symposium on the South African Freedom Charter. He linked the Charter to contemporary concerns, including the economic, social, and cultural rights of the South African people.

HUMAN RIGHTS AND THE SOUTH AFRICAN *FREEDOM CHARTER*: LAW, JUSTICE AND POLITICAL MOVEMENTS

By

The Honorable Pius Langa
Harvard Law School, June 16, 2005

*** It is a privilege to join you as you commemorate the 50th Anniversary of the South African *Freedom Charter* and an honour to address you on this important occasion. I would like to congratulate the initiators and organisers of this event. As a South African I am deeply touched by the fact that our friends abroad continue to think about us as we go through a different phase of our process of building a non-racial democracy.

Fifty years ago about 3000 visionary men and women from diverse racial, class, education, religious and ethnic backgrounds dared to dream of a democratic South Africa founded on equality, non-racialism and a better life for all. Having deemed themselves the 'Congress of the People' these men and women gathered in a dusty playground at a place called Kliptown near Soweto to articulate the dream of a South Africa they wanted. The resulting *Freedom Charter* was based on demands collected from millions of South Africans from diverse racial backgrounds.

The *Freedom Charter* presented a bold vision of a new South Africa where all women and men, from all walks of life would participate in the governance of a South Africa where each person's dignity and worth were respected regardless of race, sex or class and where all would enjoy equality before the law and equal life chances. Commenting on the *Freedom Charter*, a year later, Nelson Mandela, who was to become first president of a democratic South Africa, after spending 27 years in political incarceration, said?

"For the first time in the history of our country the democratic forces irrespective of race, ideological conviction, party affiliation or religious belief have renounced and discarded racialism in all its ramifications, clearly defined their aims and objects and united in a common programme of action."

The fact that the political, economic and social reality in South Africa at the time was the direct opposite of the South Africa envisaged in the document did not discourage its drafters. Even the fact that some of them were beneficiaries of apartheid while others were its victims did not stop them from uniting on a common objective. The *Freedom Charter* was born during the height of apartheid and the political repression of those who opposed it. When it was written, there was in fact no realistic hope of dramatic changes towards democracy taking place soon. It was accordingly a true statement of principle and ideals, the encapsulation of a dream.

Do you remember someone else, a few years later...miles away, saying these words "I have a dream"? (Martin Luther King)

The National Party, which have taken over the reign of white minority government

power, were engaged in perfecting the architecture of apartheid, a system that was the direct antithesis of the dream of freedom, equality and human dignity.

An education act had been introduced to institutionalise inferior education for black people (Africans). The *Mixed Marriages Act* (1949), *Group Areas Act* (1980) *Population Registration Act* (1950) and *Separate Amenities Act* (1953) all designed to consolidate racial segregation in all areas of life, and control the lives of black people from the cradle to the grave. Job reservation ensured that the black person could not gatecrash into jobs which would offer relief from economic subjugation. A myriad of laws were enacted, such as the *Suppression of Communism Act* (1950), *Internal Security Act* (1950) and the *Public Safety Act* (1953), to deal with those who dared to challenge the grand apartheid design. The police were rampant and merciless as they went about their core activity, to crush opposition to apartheid. A newspaper, the Rand Daily Mail, which was later forced to close down, captured the mood when it reported, two days after the *Freedom Charter* Congress as follows:

“About 200 armed European and Native Police and a squad of men from the special branch surrounded the open-air meeting of about 3, 000 delegates at Kliptown near Johannesburg yesterday, searched everyone present, took their names and addresses and took possession of papers and banners....An organiser said that more than 150 delegates from other provinces had been held up on the road to Johannesburg by members of the Special Branch, who had refused to allow them to continue on their way”.

This was comparatively mild treatment. The selfsame police forces were later at Sharpeville, to massacre 69 protesters. The carnage continued in many townships of South Africa. Nearly 40 years later, on the 16th of June 1976, the selfsame police force was to mow down young school children in Soweto, and other parts of South Africa, children who had nothing in their hands but stones to defend themselves, nothing in their hearts, but a dream – that one day they would get a decent education.

Like the police, the courts constituted a crucial cog in the enforcement of both the segregationist apartheid laws and the repressive laws that sought to suppress resistance. Since apartheid was anchored in the law, the courts became one of its pillars.

The judiciary claimed that it had no choices open to them but to play their part in the oppression because Parliament was supreme. It has been observed that:

“Authoritative research on particularly judgments of the South African Appellate Division from 1910 to 1980 indicates that the judiciary handed down executive judgements in cases where the choices existed to make libertarian decisions which would protect human rights”

Despite the grim reality surrounding them, the drafters of the *Freedom Charter* stepped out in faith not only to proclaim that a better South Africa was possible but to specify what that South Africa would look like. An article in *Sechaba* June 1976 says:

“It was no longer good enough to know only that we were against apartheid, race discrimination, poverty and oppression. This was the enemy and we all had seen its face for ourselves, and learnt to oppose it relentlessly. This was what we were against. But what were we for?”

Freedom in our lifetime? What was this freedom? What was its shape and colour, and what would it be like to live in?"

Taking a positive approach was an important step in the struggle: the *Freedom Charter* no longer focused on what was bad about apartheid; but made a positive statement about what kind of society it DID want to build. It was in essence not a rejection of the negative society but an embracing of the ideals that would govern a positive society.

Forty years later (1994), South Africa woke up to a new Constitution, the Interim Constitution. It was no accident that the ideals captured in the *Freedom Charter* found their way into it and 3 years later, into the final Constitution. Unsurprisingly, these ideals include the commitment to the rule of law, democratic values, equality and human dignity and freedom as well as the recognition and protection of fundamental human rights. No distinction is made in both documents between socio-economic rights and civil and political rights. Although it is a legal document, the Constitution, following the example of the *Freedom Charter*, adopted language that is simple and clear, so as to constitute a document by the people for the people. The vision in both the constitution and the *Freedom Charter* is the same. The preamble of the Constitution states that

"...South Africa belongs to all who live in it..."

The *Freedom Charter* states:

"We the people of South Africa, declare for all our country and the world to know: that South Africa belongs to all who live in it, black and white and that no government can justly claim authority unless it is based in the will of all the people".

There is no doubt that the ideals that gave birth to the *Freedom Charter* are the same that now form the cornerstone of our new Constitution.

We see in both documents the emphasis on equality as a value and a right. After all, the essence of the liberation struggle was the rejection of discrimination and the pursuit of equality. The society envisaged by our Constitution is one that strives for the achievement of equality, both as a value and as a substantive right.

In its articulation of equality, the Constitution recognises the reality that even though unjust laws may have been taken off the statute books, the systemic inequalities caused by the legacies of apartheid are still with us. Thus the emphasis is on entrenching substantive and not merely formal equality, which can have the effect of further entrenching the inequities of the past. Thus the achievement of equality involves the implementation of measures to assist the advancement of persons or categories of persons that were severely disadvantaged in the past.

Our Constitution not only proscribes race discrimination. It recognises that there are other forms of hurtful unfair differentiation and exclusion, not least of which is with regard to gender. The *Freedom Charter* has also recognised this: note how it refers to "men and women" and "black and white" instead of just "people".

The importance attached to race and gender equality, among others, is highlighted in the Constitution which speaks of non-racialism and non-sexism as founding values of our nation. The theme of equality is dominant in the *Freedom Charter*. "All shall be equal before the law" is repeated in the Bill of Rights. "All shall enjoy equal human rights" is reflected in section 9

of the Constitution as guaranteeing the right to “equal protection and benefit of the law”.

We come from a society where rights could be taken away at the whim of an unrepresentative Parliament. This was in fact done, in respect of both civil and political rights as well as socio-economic rights. The *Freedom Charter* does not make a distinction between these rights; the insistence is that ALL of them must be available to ALL of the people. Our Constitution recognises these fundamental rights and also does not make a distinction as to the need for their observance, fulfilment and protection. With regard to those rights which rely on massive provision of resources, the state is required to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of these rights.

What does the *Freedom Charter* say about these rights? It speaks of “work and security”, of the “doors of learning and culture” being opened; of the eradication of “adult illiteracy”. It speaks of the provision of “houses, security and comfort”; the eradication of poverty, the replacement of slums with proper housing, the provision of proper transport, roads, lighting, playing fields, crèches and social centres. Utopian? I have a dream...What is described here is a standard of life that is taken for granted-- that is taken for granted in the suburbs. The *Freedom Charter* is saying the black townships must enjoy all this: and this is the dream that we are challenged to ensure comes true.

It is a dream that is amazing, seen against the bleak and oppressive context in which the *Freedom Charter* was drafted. Out of the darkness that covered our oppressed people then, it is astounding that there could emerge such hope, such faith, and a spirit of forbearance, and such beautiful ideals for a future South Africa. Ten years down the line, these ideals still challenge us. They are still a long way from being fulfilled. But there is no doubt that the Constitution envisages the same type of society.

Its Preamble states:

“We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”

So, where are we today, 50 years later? How far have we managed to advance the human rights as envisaged in the *Freedom Charter* and the Constitution?

We have gone a long way, but we have certainly not gone far enough in making a visible difference in the lives of the majority of our people. For instance at a recent meeting that I attended, a meeting of the landless and homeless people, I was struck by the reality of the challenge of continuing and extreme poverty amongst many South Africans.

Unlike the multicultural and class inclusive Kliptown gathering, these people were mostly black and poor. Fifty years after the *Freedom Charter's* vision of a life where “*all the land would*

be re-divided amongst those who work it to banish hunger and famine" and 10 years into the constitutional promise to *"improve the quality of life for every citizen freeing the potential of each person"*, I was still surrounded by so many people living in such dire circumstances.

I had brought a prepared speech that extolled the successes of my court, the Constitutional Court, in giving meaning to the fundamental human rights, especially with regard to social and economic rights. But how could I read my speech to these people who were yet to experience the benefits of a society which guarantees a better life for all?

Could I ask these people to celebrate our success as a court in highlighting the right to dignity, when they were still living in hunger, poverty and destitution? Could I proudly talk about the courageous role my court was playing in contributing to the equal enjoyment of the social and economic rights, as promised by our Constitution?

The significance of this experience is not that I believe we have failed to protect or fulfil human rights. I believe that the fact that I was there as a representative of the highest court in our land and I intended to meet and discuss my work with these people, was testimony to change. Furthermore the fact that we could all gather without fear of being arrested, or detained without trial, or tortured, or having our names and photographs go into some secret dossier of troublemakers and terrorists was illustrative of the advances we have made.

On the legal front, virtually all discriminatory laws have been scrapped from the statute books. In addition, equality laws have been introduced which not only prohibit discrimination but also prescribe positive measures to address inherited systemic racial, gender and disability-related inequalities.

There is also no question that progressive as our Constitution undoubtedly is, it could not miraculously wipe out the legacy of centuries of exclusion and deprivation of black people. As Patricia Williams tells us, North America is still battling to address the effects of slavery. We have just completed our first ten years of freedom and democracy. The debate in South Africa is not really about ideals and principles. It is about the pace of change and whether enough is being done quickly enough.

And what should the judicial arm of government in a constitutional democracy be doing to drive the transformation process that is to bridge the gap between the constitutional idealism and the social reality? In a constitutional democracy, the judiciary is regarded as guardians of the Constitution. This means that in reviewing the acts or laws of government for constitutional compliance, occasionally there are orders to stop, reverse or compel action by the other arms of the state.

The doctrine of separation of powers leaves us with a situation where there are always questions regarding just how far are we to go as the judiciary in reviewing the actions of the elected components of government. As has been the case in other parts of the world, this question has elicited different answers from different quarters in South Africa. There have been those who have nudged the courts to adopt a more judicial activist approach in their constitutional review of government action. Others, particularly the other arms of the state, have called for judicial restraint in deference to those who carry the mandate of the electorate.

Of course, as courts we only deal with matters that arise in cases brought to us and this may limit our contribution to social justice.

Ideally every judgment should be informed by a question as to whether or not it is likely to bring us closer to the constitutional vision. But we need to have a common understanding of both the constitutional vision and the prevailing social reality. These are some of the matters that we hope to address through judicial education and enhanced interface with the communities we serve.

In conclusion, there is no doubt in my mind that the *Freedom Charter* and accordingly the liberation struggle, have contributed immensely to the societal vision that underpins South Africa's post apartheid constitutional democracy. Because of its ideals, South Africa is a vastly different country from what it was then. There is a vast reservoir of hope. The rights of people are protected and we are now living in one of the most admired democracies on earth. Many, among the country's leadership, continue to be inspired, perhaps subliminally, by the *Freedom Charter's* concrete depiction of what it would ideally take to restore the human dignity of all our people.

In March 1995, President Thabo Mbeki, then Deputy President, said:

"If the Congress of the People in 1955 marked the maturity of conception of the design of our future society, April 27th 1994 called upon us to hone our skills in the act of bricklaying".

So, we are building and, thanks to the ideals in the *Freedom Charter*, the Constitution gives us the implements to facilitate our task and to tackle the vast challenges that still face our society.

Which brings me back to my meeting with the landless and the homeless. This dishevelled and emaciated man came to the podium immediately after I had finished speaking. In a croaking voice, and gesturing with his emaciated arms for effect, he said:

[“Food for Good” by Zwelethemba Twalo]

i need my liberty from this poverty
too much brutality in this cruel society
i can't feel good
i don't have food

Still i can't spread rumours
for food or favours
none live on bread alone
but on every word from Zion
once i've my food and patience
i can strike the balance
between material and spiritual needs
Once i've bread i can listen to words

i need my liberty from this poverty
too much brutality in this cruel society
i can't feel good
i don't have food

you know, when i eat
i'm nice and sweet
when not empty not thirsty
i'm cool not nasty
but when i'm hungry
then i get to angry
my anger comes from hunger

i need my liberty from this poverty
too much brutality in this cruel society
i can't feel good
i don't have food

some steal and kill
for a plate or meal
some cheat and divorce
for money, clothes and rice
some tell a big or small lie
for either pizza and pie
Some murder a man for a woman

i need my liberty from this poverty
too much brutality in this cruel society
i can't feel good

I obviously could not read my prepared speech to these people. That is not what they wanted. What would have been relevant to them, and to thousands of others in South Africa, was to give them their "liberty from this poverty"; to give them food. That, ladies and gentlemen is what the *Freedom Charter* was about. That is the challenge of the *Freedom Charter* to all of us today. ****

Editor's Note: Professor Burnham set the legal and political context for the Symposium on the South African Freedom Charter held in conjunction with the Expert Consultation and co-sponsored by Northeastern University School of Law Program on Human Rights and the Global Economy, the Harvard Law School Charles Hamilton Houston Institute for Race and Justice, and South Africa Partners, a Boston-based NGO.

FIFTY YEARS OF THE SOUTH AFRICAN FREEDOM CHARTER

By

Margaret A. Burnham

Harvard Law School, June 16, 2005

June 26, 2005 marks the fiftieth anniversary of the adoption of the South African Freedom Charter, the dramatic history of which holds illuminating lessons about the relationship between hortatory political documents and social movements. The Freedom Charter remains one of the world's most remarkable documents. It was wholly produced by a mass popular movement, driven underground by the apartheid state, and ultimately it became the inspirational source for the historic constitutional dispensation of 1994-1996, which has itself enlivened post-Cold War transnational constitutionalism and guided it toward critical distributive purposes. The Charter inscribed on the South African struggle three central unifying principles: first, that South Africa "belongs to all who live in it," regardless of race; second, that self-governance is a universal human right; and third, that the wealth of the country is for the collective benefit.

The idea to convene a multiracial national assembly of the opponents of the apartheid regime to adopt a Freedom Charter is attributed to ANC leader Z.K. Matthews, who suggested it at an ANC annual meeting in August 1953. Shortly after that ANC gathering, the South African Indian Congress, the South African Colored People's Organization, and the South African Congress of Democrats joined the call for a national congress.

A period of organizing unprecedented in intensity and scope led up to the Congress of the People in Kliptown, near Johannesburg, on June 25-26, 1955. Thousands of volunteers spread across the country to confer with the South African people on what they wished to see in a Freedom Charter. Aimed at legitimizing the Charter as a genuinely democratic product, this lead-up campaign served a number of political purposes. First, as close collaborators in the grass roots campaign, the members of the four convening organizations gained confidence working across racial lines, and these multiracial experiences would become significant as the ANC sharpened its position on the racial questions facing the movement. Second, the rural areas, long neglected by the urban-based organizations, became an important focus of the campaign and hence a critical constituency in the resistance movement. Third, a truly national movement would emerge from the canvassing. ANC strength in the Transvaal, for example, was balanced by the Indian Congress's base in Natal. Finally, the national canvas for the Freedom Charter brought to the forefront cadre and tactics that helped to consolidate two other newly constituted national organizations, the Federation of South African Women, which was formed in 1954 and the South African Congress of Trade Unions, which was launched in March 1955.

On June 25, 1955, nearly 3,000 South Africans, delegates from political groups, township neighborhoods, labor organizations, worksites, and rural communities convened in Kliptown. The Congress was the first popular multiracial assembly on this scale in the history of South Africa. The gathering was at once a breathtaking embrace of the culture of liberation and

a profound expression of the movement's commitment to engage the masses in political activity. What was being incubated at Kliptown was South Africa's unique culture of liberation, which would, in time, become its international emblem and most famous export. Here was an opportunity to move beyond the reactive campaigns against the pass laws and forced removals. The delegates had come to recast the South African story and to affirm their democratic and human rights.

Alarmed by the sheer numbers and the racial unity of Kliptown, the state's response was swift and brutal. Police broke up the convention and seized its documents. A year and a half later, 156 of the leaders of the Congress movement were arrested and charged under the infamous anti-communism law of 1950 and with the capital offense of high treason. Before the ink was dry on the Freedom Charter, it was condemned by the state as a treasonous document and a formula for a proletariat dictatorship. It became the smoking gun in the Treason Trial and, in 1961, the Charter was driven underground along with the ANC.

Although never officially censored, the Government effectively interred the Charter by offering it in criminal prosecutions as proof of forbidden ideas. Characterizing the Charter during the Treason Trial as evidence of a communist conspiracy put those in possession of the document on notice of its illicit nature and of the Government's violently repressive intent, especially given the Government's hysterical fear of communism. The Government lost the Treason Trial in March 1961. However, the ANC and its leaders were banned in the same year, and the penalty for furthering the goals of a banned organization was up to 10 years' imprisonment.

The Freedom Charter's text is both comprehensive, in seeking to address the concerns that emerged from the volunteers' canvas, and visionary, in conceiving an ideal society as one that is prosperous, free, and equal. Just as in the Bill of Rights Americans sought to shield themselves from soldiers quartering in their homes, so South Africans strove to safeguard themselves from pass laws, forced cattle culling, and banning orders. With its emphasis on the fundamental rights of political participation, equality of treatment, and due process, the Charter's language echoes the human rights declarations of the time. It presents as a seamless whole positive and negative rights, seeking to identify all of the features that should characterize the relations between citizens and their government. Its language is both broadly aspirational – "no one shall go hungry" – and directive – "a preventive health scheme shall be run by the state." It envisions a proactive, supportive state that provides specific remedies for past harms – "help[ing] the peasants with implements, seed, tractors, and dams to save the soil,"- and creates equal opportunities – education that is "free, compulsory, universal, and equal." It acknowledges the special needs of women - calling for paid maternity leave, special health care, and crèches - and recognizes their right to equal pay for equal work. At a time of heightened world tensions and an accelerating arms race, it calls for international peace, non-intervention, and decolonization. In a world still stunned by the Holocaust, the Charter labels hate speech a crime and calls for protection of language and ethnic rights.

The core human rights ideals that the Charter endorses were, by 1955, codified in the UN Human Rights Declaration and various regional instruments. Those clauses of the Charter that called for racial equality and for civil and political rights long denied the African population conveyed that the ANC's program was fully consistent with universal norms. In this respect, the Charter resembled the Bills of Rights that were standard fare in the West. Had the Charter stopped there, however, it could have potentially lost important support from the socialist world. But the Charter reached far beyond the classic rights formulations to address the severe material deprivation that was part and parcel of economic disempowerment in South Africa.

Calling for radical redistribution of national resources, the Charter demanded restored rights to land, minerals, and industrial capital – the material basis of a more decent, more egalitarian society. An essential unity emerges in the Charter that was nowhere else achieved in the political instruments of the 1950s. The Charter avoids the traditional dichotomy between civil and political rights on the one hand, and economic, social and cultural rights on the other, and this, perhaps above all, is what has made it possible for the Charter to stand the test of time.

The Charter's unique approach reflected equipoise in the movement itself over the contest between the two dominant ideologies of the period, and it also spoke to the touchy politics of nonalignment. This wise formulation served the ANC well as it pleaded its case in the international arena. The West was assured that there would be no communist dictatorship without elections. The socialist world found that the Charter's wealth and land redistribution clauses expressed the commitment to far-reaching economic change. Moreover, the rights rhetoric of the document was an endorsement of the universal appeal and relevance of the human rights paradigm at a time when the colonized territories of Africa were searching for governance models that were modern, progressive, and culturally sensitive. If the modern human rights movement began with the UN Declaration, then the Freedom Charter was an early, innovative contribution to the discourse, a refutation of the claim that human rights was the special child of the West, and an affirmation of a uniquely African, holistic vision of rights.

Another salutary result bears mention in considering the Charter's unified approach to human rights. Inclusion of the clauses addressing economic equity meant that debate within the movement would continue on the question of what economic structures were best suited to the needs of a new South Africa. Because these provisions were included in the Charter and received a public airing at the Treason Trial, political space to address socialist concepts, such as nationalized industries, was preserved. The ambiguous language of the Charter - "the national wealth . . . shall be restored to the people," and "the mineral wealth . . . the banks and monopoly industry shall be transferred to the ownership of the people as a whole" – left room for polemics on the "when" and "how" of wealth redistribution. Conversely, if these ideas had not appeared in the Charter, they could have lost legitimacy in the public discourse and in political organizing. This would have made it far easier within the organizations to banish socialist perspectives, and these ideas would not have gained currency on Robben Island and in the guerrilla camps of Umkhonto we Sizwe as the movement imagined and planned its future.

Despite the historic unity across race and political lines achieved at Kliptown in 1955, the Freedom Charter proved to be a source of a bitter division within the liberation movement of the 1950s. From the beginning of the decade, the Africanists, who enjoyed strong support in the ANC Youth League, had opposed what they perceived as communist influences in the movement. They argued that the Freedom Charter represented the ascendancy of Marxist ideas alien to the history and true calling of the ANC. They saw the hand of communists in the provisions of the Charter calling for nationalized industry. Moreover, the nonracial commitment of the Charter violated what they saw as the central tenet of the movement - that the country belonged not to "all who live in it," but to the descendants of its original African inhabitants. They called for "Africa for the Africans." They thought the ANC leadership was too enamored of the blandishments that came with white support, and that they were not committed to nurturing a self-reliant, indigenous culture of liberation that drew from African practices and heroes.

Writing in June 1956, Nelson Mandela sought to shed light on, and perhaps settle, the controversy. He rejected the view that the Freedom Charter was an endorsement of socialism.

“[While] the Charter proclaims democratic changes of a far-reaching nature,” he wrote, “it is by no means a blueprint for a socialist state but a program for the unification of various classes and groupings among the people on a democratic basis.” Furthermore, he wrote, “[while] [i]t is true that in demanding the nationalization of the banks, the gold mines, and the land, the Charter strikes a fatal blow at the financial and gold-mining monopolies and farming interests ... such a step is imperative because the realization of the Charter is inconceivable ... unless and until these monopolies are smashed and the national wealth of the country turned over to the people.” However, efforts to locate common ground with the Africanists were not successful. In 1959, the Africanists, led by Robert Sobowkwe, split from the ANC to form the Pan African Congress.

The police killings in Sharpeville in 1960 ushered in a period of devastating loss and despair for the organized resistance. The ANC had only just begun to mobilize long-neglected constituencies in the rural areas and factories when its cadre were driven into exile, killed, and forced underground. It took twenty years after Sharpeville before the Charter recovered its standing as the preeminent expression of human rights in South Africa, and as the remarkable creation of the unprecedented mobilization of the 1950s. In 1981, a Charter Movement united nearly 100 organizations behind the Freedom Charter. With the formation of the United Democratic Front in 1983 and the Congress of South African Trade Unions in 1985, charterist ideas and methods of organizing reenergized the movement. Mass demonstrations returned, although this time more sharply defined by additional interest groups such as labor, church and neighborhood affiliations. When, in 1985, the Charter’s 30th Anniversary was commemorated, UDF General Secretary Popo Molefe would remark on the authoritative role of the manifesto: “[The Freedom Charter is] not the vision of any one individual or group of individuals or any one organization or group of organizations. It emerged . . . from the dreams and ideas of ordinary people. It is authoritative because of this birth . . . and because it continues to reflect the demands of all classes of oppressed and democratic South Africa.”

As the ANC engaged in a military campaign against the regime, the Freedom Charter survived underground, where the military cadre of MK and the exiled community worked and lived, and in prison, where much of the 1960s leadership politicized younger men. In an effort to impose order and discipline within this domain, the ANC established internal mechanisms of accountability, including a code of conduct and a juridical apparatus. The guiding document for this internal system of justice was the Freedom Charter. Moreover, the Charter served as an effective recruiting tool for the imprisoned ANC leadership as it sought to address the growing popular appeal of militant black nationalism in the 1980s. Some Black Consciousness activists who were incarcerated on Robben Island, like Patrick Lekota and Murphy Morobe, were persuaded by Nelson Mandela and others to adopt the ANC’s program as articulated in the Charter.

The Freedom Charter experience – the Charterist movement, the Congress of the People, and the Freedom Charter itself – was the framework within which the movement evolved from its African liberationist origins to armed struggle to constitutional governance. The Charter, a midpoint between the formation of the ANC in 1912 and the election of Mandela in 1994, was a key referent from which one could trace the ideological reorientation of the ANC movement from 1912 to 1955 and from 1955 to 1990. The Charter movement of the 1950s provided a model of decisionmaking that was broadly inclusive, favoring mass participation over representation by elites. The provisions of the Charter provided a starting point, shaping both the substantive debate within the ANC over constitutional matters, and the debate between the opposing parties.

While the Charter represented an historical moment with its own imperatives, the ideological focus of the movement shifted in the 1990s as the unforgiving realities of coalition governance and the harsh disciplines of neo-liberal globalization imposed new constraints. Ultimately, the ANC would discard the Charter's call for fundamental economic restructuring and land redistribution. The Constitution reflects a compromise on this central principle of the Charter, a bargain that broke the stalemate as the parties struggled over the basic terms of the new government. On the one hand, the white minority sought to retain its hold on economic power and to prevent the political submergence of whites through a minority veto and a consociational state. These proposals were effectively defeated with the adoption of universal suffrage in a unitary state as envisioned by the Charter. However, on the other side of the bargain, the Freedom Charter's call for aggressive redistributive measures was also scrapped.

The Constitution leaves in place the massive inequities that put South Africa in a class with Brazil as the two most unequal countries in their economic group in the world today. But it should also be said that although the constitutional dispensation does not mandate the wholesale economic overhaul that many contend would be required to redress past wrongs and eliminate the deep racial fissures, it does recognize socioeconomic rights and call on the state to promote their progressive realization. This textual commitment, partial though it may be, has led the South African Constitutional Court to become the vanguard in the current worldwide debate over the justiciability of socioeconomic rights. The Court's enormous contribution to this key question in contemporary constitutionalism is in no small measure attributable to the Freedom Charter experience.

Fifty years after its creation, the Freedom Charter remains one of the modern world's most important political documents, living on in the South African constitution, and in the global movement to realize the full range of democratic and economic rights adopted at Kliptown. Time will tell whether the South African Constitution will similarly catalyze movements for social justice, as the new South Africa addresses the daunting challenge of governing a population still scarred by apartheid and defined by its infamous and enduring divisions.

**HUMAN RIGHTS AND THE
SOUTH AFRICAN FREEDOM CHARTER:
LAW, JUSTICE AND POLITICAL MOVEMENTS**

**A SYMPOSIUM COMMEMORATING THE 50TH ANNIVERSARY
OF THE FREEDOM CHARTER**

JUNE 16, 2005

**HARVARD LAW SCHOOL
AUSTIN HALL**

- 9:00 a.m. CONTINENTAL BREAKFAST AND REGISTRATION
- 9:30 a.m. WELCOME
- MUSICAL SELECTION
Teboho Moeno, "in memory of fellow June 16th comrades."
- 10: 15 a.m. KEYNOTE ADDRESS
Chief Justice Pius Langa, Constitutional Court of South Africa
- REMARKS
Makau Mutua, Professor, University of Buffalo School of Law
- FILM
Isitwalande: The Story of the South African Freedom Charter
- 12:00 Noon LUNCH
- 2:00 p.m. REMARKS
Chief Justice Margaret Marshall, Supreme Judicial Court of Massachusetts
- ROUNDTABLE: The Freedom Charter and the International Movement Against
Apartheid
- Charles Ogletree, Professor, Harvard Law School
Jeannette Ndhlovu, Consul-General of the Republic of South Africa in Los
Angeles
Bill Fletcher, President, TransAfrica
Cheryl Harris, Professor, UCLA School of Law
- 4:00 REMARKS
Margaret Burnham, Professor, Northeastern University School of Law
- CLOSING ADDRESS
Justice Zakeria Yacoob, Constitutional Court of South Africa
- 5:00 p.m. RECEPTION

SELECTED MATERIALS
FROM
JUNE 16-17, 2005 EXPERT CONSULTATION

Editor's Note: Dean Spieler opened the Expert Consultation on "Realizing Economic, Social, and Cultural Rights: Communities, Courts, and the Academy" by welcoming participants and setting the context for the law school's launch of its new Program on Human Rights and the Global Economy. The Consultation was made possible through the generous support of Dean Spieler and the law school community.

SEQ CHAPTER 1 Welcome to the Inaugural Event of the Northeastern University School of Law Program on Human Rights and the Global Economy, "Realizing Economic, Social, and Cultural Rights: Communities, Courts, and the Academy."

The world is changing. Global economic, technological and political upheaval hastens the dissolution of borders and challenges us to think differently about human rights in all contexts, both within the United States and internationally. While concerns about political oppression continue unabated, human rights activists everywhere are increasingly focused on the appropriate role of the state in addressing basic human needs and large disparities.

Northeastern University School of Law has a long history of training lawyers in the deployment of law for the public good, no matter what their practice setting. We are deeply committed to understanding and expanding the use of the law as a tool for social justice. We see the evolution of economic, social and cultural (ESC) rights as pivotal in the continuing fight for human well-being.

We are also committed to the integration of litigation strategies, theory, community organizing, and classroom teaching as essential tools. Our unique educational program combines legal theory and practice with a focus on social justice. In addition to studying in courses and clinics, Northeastern students spend four 11 week quarters working full-time in practice settings. Many of these students learn human rights law first-hand in leading NGO and governmental agencies, both here and abroad.

Faculty members at Northeastern have a shared commitment to progressive advocacy that augments their scholarship and teaching. As scholars, teachers, and activists, they work on issues relevant to ESC rights, including labor and migration, poverty and social welfare, education, public health and environment, and the rights of women and people of color. Two years ago, members of the faculty – two-thirds of the entire faculty – began an internal conversation about the role this School of Law should play in evolving human rights jurisprudence.

This program is an outgrowth of that discussion.

Reflecting the long involvement and interest of members of the Northeastern faculty in South Africa's constitutional evolution, Northeastern School of Law is delighted to co-sponsor the 50th anniversary program Human Rights and the South African Freedom Charter on Thursday, June 16. The theme of this program is the significance of the Freedom Charter for today's constitutional jurisprudence on ESC rights.

Today, June 17, we gather in a public forum to discuss the justiciability of economic, social and cultural rights with two leading jurists. The remainder of the day will be spent in a consultation between members of the Northeastern community and judges, lawyers, academics and activists in which we will explore current developments in the justiciability and

implementation of these rights. The program will conclude with a roundtable session on “Building a Sustainable Human Rights Program” that will solicit your ideas on strategies to enhance Northeastern University School of Law’s efforts to further legal education, scholarship, and advocacy in this field.

We look forward to working with you as we continue to train new lawyers prepared to address the challenges of a changing global economy.

Editor's Note: Professor Andrews spoke at the Welcome Dinner hosted by Northeastern University School of Law Dean Emily Spieler. Professor Andrews' talk served as the transition between the Symposium on the South African Freedom Charter and the Expert Consultation on Economic, Social, and Cultural Rights. She focused on "ubuntu", an important concept that has had a significant influence on South African jurisprudence and social movements.

PLEASE PASS THE UBUNTU

By

Penelope Andrews

Northeastern University School of Law, June 16, 2005

*** [Before tomorrow's workshops I'd like to share some] reflections based on my observation of ten years of South African democracy and how the possibilities generated by South Africa's transition may be translated into other contexts in Africa.

Let me commence *** by reading two short paragraphs from THE LADIES NO. 1 DETECTIVE AGENCY. I want you to picture a place called Mafeking in South Africa – near the Botswana border.

She knew the railway station slightly. It was a place that she enjoyed visiting, as it reminded her of the old Africa, the days of uncomfortable companionship on crowded trains, of slow journeys across great plains, of the sugarcane you used to eat to while away the time, and of the pith of the cane you used to spit out of the wide windows. Here you could still see it – or a part of it – here, where the trains that came up from the Cape pulled slowly past the platform on their journey up through Botswana to Bulawayo; here, where the Indian stores beside the railways buildings still sold cheap blankets and men's hats with a garish feather tucked into the band.

Mma. Ramotse did not want Africa to change. She did not want her people to become like everybody else, soulless, selfish, forgetful of what it means to be an African, or, worse still, ashamed of Africa. She would not be anything but an African, never, even if somebody came up to her and said: "here is a pill, the very latest things. Take it and it will make you into an American". She would say no. Never. No thank you.

(THE LADIES NO.1 DETECTIVE AGENCY, Alexander McCall Smith (1998) 215)

Like so many of my friends here in the USA and in Australia, I've become enthralled with the Ladies No. 1 Detective Agency novel series. Its storyline is quintessentially African - I've been struck by the simplicity of Mma Ramotse's observations in this first novel of the series. And I contemplate her observation constantly as dismal news from Africa unfolds with regularity in the American media. One is relayed a constant litany of reports of regional and local conflicts, of the human deprivations, the brutalities, the diseases. And of course, all of these disasters do occur and they will continue. These human and natural disasters have contributed, at least in this country, to a sense of Africa as a continent that has lost its bearings, outside this much heralded, connected, age of globalization. It is like the ghost of Kurtz in Conrad's HEART

OF DARKNESS continues to haunt what is perceived as the Dark Continent.

And yet, one of the most remarkable modern historical events of our time, indeed of any time, emanated from Africa over the past 15 years, namely, the political transition in South Africa and the election of that country's first democratic government. Of course the event grabbed the attention of the global media, and President Nelson Mandela's vast wisdom and good grace has provided a comforting narrative and consoling backdrop to the events as they unfolded. South Africa's political transition really was a gift to all humankind; some have referred to it as a "miracle". And much has been written and said about it as well as about the processes of the Truth and Reconciliation Commission, the Bill of Rights and its interpretation by the Constitutional Court. Most of the commentary is laudatory although some have expressed justifiable criticism.

Since the constitutional democracy was established, South Africa's expansive Bill of Rights and its interpretation by the Constitutional Court has generated a rights jurisprudence that serves as a model for newly democratized societies, and I would argue, even for the older constitutional democracies like the USA. South Africa has contributed to the constitutionalization of international law in a very significant way. Particularly in regard to the inclusion of socio-economic rights in the Constitution, the new South African state, however imperfectly, signals to the world that freedom from want, hunger and deprivation is as important as the freedom from suppression, fear or ignorance.

***I see a very powerful message in that miracle; one that, from my perspective, bears directly on the West's relationship to the tragic events that are unfolding on the African continent.

What occurred, and is occurring in South Africa in that peaceful transition after centuries of colonialism and decades of the most rigid forms of apartheid, occurred during a period where conflicts raged and ravaged -- in the Balkans, in the Middle East, Northern Ireland, and elsewhere in the world, including other parts of Africa. But in South Africa, the transition was not only largely peaceful, it was made with a penetratingly clear commitment [by] the new government [not only to] protect its people, [but also] to further their economic development and to exercising control within its borders, as any government should. Successive ANC governments since 1994, most marked by the inaugural Mandela government, have also expressed in words and actions, albeit imperfectly and unevenly, a deep and penetrating commitment of a different sort -- a commitment to promote dialogue amongst its peoples, to work towards the search for truth and truth's healing powers, and to seek the possibility for reconciliation and even forgiveness amongst the peoples.

At its core, the transition allowed millions of people who had been brutalized and oppressed in the most egregious manner, to create a pact for a non-racial democratic future with their former oppressors and abusers, and those who benefited from the apartheid system.

That was and is a hugely powerful statement in this world, even as an aspiration and even if you cannot expect to fully reach the goal. And that message is very deeply a part of the South Africa I know and love.

In South Africa we have a word – *ubuntu* – loosely translated it means “human-ness”. The Constitutional Court, when it outlawed the death penalty in one of its first cases [see *S. v. Makwanyane* 1995 (3) SA 391 (CC)], provided some definition of *ubuntu*. Justice Mokgoro spoke about *ubuntu* as “enveloping the key values of group solidarity, compassion, respect,

human dignity. In its fundamental sense, it denotes humanity and morality". The late Justice Mahomed noted that: "the need for *ubuntu* expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women".

The Constitutional Court, when it deliberates, does so in the spirit of *ubuntu*. Yes – there are legal theories being developed, there is an equality jurisprudence in the making that eschews mere formal equality in favor of a substantive version, contextualized within South Africa's economic, social, political and cultural realities. But the spirit of *ubuntu* influences how and what the judges decide. And in some cases they center *ubuntu* – as they did in the Makwanyane case--that outlawed the death penalty. And sometimes *ubuntu* is just in the air as when the Constitutional Court ordered the government to provide anti-retroviral drugs to HIV-positive pregnant women [see Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC)].

And *ubuntu* underpins the marvelous decision of Chief Justice Langa when he struggles with the conflict between an indigenous law of inheritance (that discriminates against women) and the constitutional imperative of equality [see Bhe and Others v The Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa, 2005 (1) SA 580 (CC)].

In sum, the mostly peaceful transition, the drafting of the interim and final constitutions and the work of the Truth and Reconciliation Commission was filled with the spirit of *ubuntu*. In the West, and particularly in the USA, when important things happen, there is the search for the personal hero. In this case it was Nelson Mandela. And he was indeed a hero. But *** the event was and is [unquestionably] South African. ***That miracle was and is *** being carried out by a people – by the South African people. Indeed, Nelson Mandela *** expresses the South African spirit; he would be the first to say that everything that has transpired and continues there is from the people -- in the spirit of *ubuntu*.

Now I do not want to romanticize the transition in South Africa ***. You all know about the troublesome crime rates, the violence against women, the devastating AIDS epidemic and the unrelenting poverty. And you are all aware of the sometimes inept approach by the government to remedy some of the problems. You are also aware that political opportunism and corruption constantly threatens to derail the democratic project.

But despite these difficulties, it is clear that the South African state has been and will continue to be an engine of development. Despite its purposive mistakes and errors of omission, successive ANC governments have been committed to overcoming the legacy of deprivation, discrimination and subordination. Continue to govern guided by the principle that the test of democracy in South Africa will be whether the basic needs and aspirations of the majority black population have been addressed.

And while I despair at all the missed opportunities, the inability to act decisively when necessary, particularly around the HIV/AIDS epidemic, the shortcomings, indeed, the tragedies of South Africa, I marvel at this remarkable expression of *ubuntu*.

In this, my other home in the USA, while I marvel at the technological advances, the vigour of cities like Boston and New York, the infectious optimism of Americans, the amazing generosity of many Americans, the sheer affluence, I sometimes feel a deep longing for the spirit of *ubuntu*.

Why this longing? When we throw even a cursory glance over many parts of Africa today, what we see is indescribable suffering. In Darfur we have and continue to witness levels of human carnage that overwhelm the mind. In the Eastern Congo today, there is no place on the planet where patterns of sexual violence and rape have been more thoroughly documented. In Northern Uganda, for the last two decades, the Lord's Resistance Army has unleashed a campaign of terror against the population, but particularly [against] children who have been deprived of everything. If you read the Convention on the Rights of the Child, every section of that document has been violated—smashed—in Northern Uganda. For huge parts of the African continent, fear and vulnerability are the national currencies.

The fact that the international community has collectively [done] so little is confounding. Why is there such a disconnect between, on the one hand, the reality of South Africa's miracle, and, on the other, the sense of condemnation or despair that routinely greets reports of events coming from Africa – a collective shrug of the shoulders, as it were?

***In the face of this inspirational transformation that resulted in one of the most enlightened constitutions of the late 20th century – why is the American media not able to move beyond the negativity? Why has all this optimism not translated into instinctive and direct symbolic and substantive support, not just for South Africa, but for the continent, and indeed for poor countries everywhere? This is puzzling considering that the global community and Americans in particular, fought hard to end apartheid. It was a struggle that captured the imagination of all who thought that it was possible to overcome evil by the sheer insatiable appetite for justice. Why then today, when the President of the most powerful nation on the globe calls the atrocities in Darfur genocide, that statement is taken as action and no further steps seem necessary?

When I think about the time that I first came to this country in the early 1980s to pursue graduate work, apartheid appeared to be at the epicenter of American politics. This country was gripped by the passions of the anti-apartheid movement and the sanctions lobby. I encountered a truly global USA – a place in which the Presidency of Ronald Reagan and the Congress and Senate were to take its cue from ordinary Americans organizing in schools, universities, trade unions, churches, cultural and sports centers. I [grew to] love this country and what I perceived as a yearning for justice in the society. In those days South Africa allowed us to believe in moral absolutes. The policy of apartheid was clearly, indisputably, evil. Not just wrong-headed, or a mistake, or bad policy, but evil. Unmitigated evil. At a time when post-modernism swirled like wild bushfires around universities, with its contextualism and relativism, one could cling to the certainty of apartheid's evil with relief. Here was a system, a practice that no one could defend or justify.

What happened? Why has the victory in South Africa not translated in goodwill for the continent of Africa? How can we move beyond the negativity when we survey the continent? Why do we here in the USA tolerate what goes on in Darfur? Or in Northern Uganda? Or in the Congo?

In terms of the Sisyphean challenges facing Africa today, what should the West do and how should the West approach this task? Increasingly, the approach taken in all the projects of poverty amelioration involves a corporatist, managerial model and language, where technical terms like outcomes, projections and indicators are conscripted in the name of efficiency and accountability. And the terms are applied in the same way as debt forgiveness and the various democracy and development projects in Africa. Don't misunderstand me. I am not advocating a fuzzy charity without accountability. It is a tragic fact that poverty in Africa, at least partially, results from a combination of official larceny, indeed in some places, institutionalized

kleptocracy, and tragic-comic ineptitude.

But this corporatist technical approach often sanitizes what is after all our human obligation to relieve suffering – and a sanitized acknowledgement that poor people are entitled to the resources and the future that we take for granted – an entitlement that stems from *ubuntu* – our common humanity.

With regard to the first question: What should the West do? The United Nations Millennium Development Program with its neatly articulated set of goals including the eradication of poverty and the attainment of gender equality, promises a monumental push, at least in theory, to eradicating poverty. The second, only recently announced, seems more promising.

Much has been made about the recent developments regarding the debt forgiveness program for several countries in Africa. Thanks to the efforts of Bono and Bob Geldof and a few other notable celebrities, as well as millions of Europeans and hundreds of thousands of Americans – and a British Prime Minister who may actually have a moral center - the world's wealthiest countries agreed to write off more than \$40 billion of impoverished nations' debts in a drive to free Africa from hunger and disease. British finance minister Gordon Brown told a news conference that the debt of 18 mainly African countries to multinational lenders would be canceled immediately. More nations would qualify in the months and years to come. Of course this is only the first step and the Commission for Africa has demanded debt cancellation, doubling of aid, and trade justice. But there is room for cautious optimism. Why should the West do this?

One could say that the West should do it because it will lead to greater stability in the world, and to say that would make great sense. Or, one could say that the West should do it because it would reduced the number of failed states, believed to be breeding grounds for terrorists - and that would be plausible. One could say that the West should act so much more than it has, in recognition of its role in imperialism and colonialism and oppression over hundreds of years; and those arguments would be sound. But I am not saying any of these things. I am simply expressing a hope that whatever is done and given to countries in Africa by the West, could be more in the spirit of *ubuntu* – like what South Africa has brought and continues to bring to the world. ****

Editor's Note: Former UN Assistant Secretary-General Angela E.V. King opened the Expert Consultation by setting the international context. She surveyed current United Nations efforts to promote economic, social, and cultural human rights of women, men, and children, and related national and international commitments to reduce poverty as part of the Millennium Development Goals. The Program on Human Rights and the Global Economy will work at both domestic and international levels to promote socio-economic and other forms of social justice.

OPENING REMARKS

By

Angela E.V. King

Northeastern University School of Law, June 17th, 2005

It is a real pleasure and honor to be here today among so many distinguished jurists, scholars and guests, to share in the launching of Northeastern University's new program on economic, social and cultural rights****.

Globally, human rights activists and promoters have traditionally drawn inspiration from the 1945 Charter of the United Nations and the 1948 Universal Declaration on Human Rights. Today, South Africa's example of the peaceful, non-racial, democratic election in 1994 and two subsequent elections (1999, 2005), and continued stability in government have also provided a source of inspiration to many of today's human rights activists.

Member States of the United Nations over the years have sought to craft and adopt a broad spectrum of rights into internationally binding norms and treaties. Because of political and related considerations during the Cold War it would take nearly two decades after the adoption of the Universal Declaration for the adoption in 1966 of the two International Covenants on Political and Civil Rights and on Economic, Social and Cultural Rights. A further decade would pass before they entered into force.

The collapse of the Soviet Union and the end of the Cold War in the early 1990s provided an opportunity to move away from hardened political positions and a focus by the developed countries primarily on political and civil rights, and by the developing world, on economic and social rights, to take *all* human rights seriously. Meanwhile at the UN, the 1993 Vienna World Conference on Human Rights stressed that both civil and political rights and economic, social and cultural rights are equally important and that their realization is indivisible and interdependent. In addition, the Secretary-General's initiative, singling out human rights as a cross-cutting issue in his reform packages of 1997 and 2002, also provided further impetus to this trend. It is worth noting that in carrying out his mandate, Mary Robinson, during her term as High Commissioner of Human Rights, 1997-2002, also achieved considerable headway in obtaining the recognition and implementation of the rights-based approach as essential to sustainable development by key bodies of the UN family working at country level (e.g. UNICEF [the United Nations Children's Educational Fund], the International Labour Organization (ILO) and the United Nations Development Programme (UNDP)).

With regard to the two Covenants, the debate has focused around which is the more binding and important. It has been argued that the civil and political rights are more important as they are justiciable while economic, social and cultural rights are mere unrealizable aspirations.

That there has been a recognizable shift in approach affirming the importance of economic, social and cultural rights as a means of achieving development has come about through public pressure from civil society, and the work of the UN treaty bodies, in particular the Committees on Human Rights and on Economic, Social and Cultural Rights. National jurisprudence and analyses of the impact of globalization have also made the shift possible.

At its fifth session in 1990, the [Committee on Economic, Social, and Cultural Rights], commenting on States parties' obligations, decided that while the International Covenant on Economic, Social and Cultural Rights [(ICESCR)] ***“provides for progressive realization and acknowledges constraints due to limits of available resources, it also imposes various obligations which are of immediate effect.”*** Reflecting the realities of the real world, it interprets the concept of “progressive realization” as recognizing that the full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. This is quite different from some provisions of the [International] Covenant on Civil and Political Rights [(ICCPR)] where there is an immediate obligation to “respect and ensure all of the relevant rights.” The Committee goes on to argue that for a State party to be able to attribute its failure to meet its minimum core obligations. It must demonstrate that ***“every effort has been made to use all resources that are at its disposition...to satisfy, as a matter of priority, those minimum obligations.”*** The Committee also stresses that legislation is by no means the only way to implement the Covenant. It is up to States parties to find “all appropriate means”. This is expanded somewhat by Kenneth Roth in the recent debate with Leonard Rubenstein (*Human Rights Quarterly, vol. 26, No. 4 (November 2004)*). Roth cites other means such as public mobilization, standard setting, litigation, technical assistance and capacity building for non-governmental organizations to better lobby for economic, social and cultural rights.

The Committee on Economic, Social and Cultural Rights has also been developing an approach to assisting States parties to strengthen the fulfillment of their obligations. In its General Comment No. 16 on Article 3 –“The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights” (May 2005)--the Committee cites specific examples [of States parties obligations]. These include the rights to gain a living by working, to enjoy just and favorable conditions of work, to join trade unions, to social security including social insurance and equal access to social services, to education and to health. Above all the Committee, while recognizing that States have a margin of discretion due to limited resources and other factors, emphasizes that these strategies should build around at least six areas:

A systematic identification of policies, programs and activities to eliminate discrimination;
Frequent reviews of existing legislation to ensure that discrimination is eliminated;
The adoption of temporary special measures or affirmative action at least until de facto equality has been reached (similar to Article 4(i) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW));
Ensuring that individuals participate in decision-making as an integral component of policies, programs and activities;
Establishment of effective mechanisms, e.g. national human rights institutions, courts, tribunals, ombudspersons etc.; and
Identification of appropriate indicators and benchmarks to effectively monitor and measure implementation and statistics disaggregated accordingly.

Now, if we are serious about implementing economic, social and cultural rights ***, we cannot ignore widespread and growing discrimination against half the world's population, its women and girls. Their systematic marginalization has decidedly impeded growth and

development. Here are some startling statistics which are reflected in at least four of the Millennium Development Goals (MDGs), of which I will speak later:

Deaths from maternal mortality (between 500,000 and 600,000 annually, have not changed in 30 years (Stephen Lewis)

Between 10% and 69% women around the world reported being subject to some form of violence (WHO)

700,000 persons mostly women and young girls are trafficked each year across international borders (IOM)

In the US, a single mother would have to work 31,476 hours at the current minimum wage (\$US 5.15hr) to earn what a Member of Congress makes in a year(Bill Moyers)

There are only eight women heads of state/government, including three hereditary queens; five women Prime Ministers; and 15.9% women in Parliament (IPU);

Of the 191 Member States of the UN only 12 have women heading missions as Permanent Representatives;

58% of women and girls in Southern Africa are infected by HIV/AIDS and the incidence of the disease among young black women in the USA exceeds any other group;

Thousands of women and girls have been systematically raped as a tool of war in Darfur, Congo (DRC), Bosnia and elsewhere;

Half of the world's child soldiers are girls forced to be fighters, marriage partners or camp helpers.

In many countries some of the most insidious forms of discrimination stem from the predominance of customary and traditional norms. Many violations arising from gender discrimination and gender-based violence curtail women from participating fully in the economic, social and cultural life of their communities with grave implications on the rate of development itself. The ESCR Committee thus acknowledges the obligation of States to protect through the elimination of prejudices, customary and all other practices to perpetuate the notion of inferiority or superiority of either of the sexes and stereotyped roles for men and women. In other words no form of cultural relativism favoring a lower status or deprivation of basic rights for women can be tolerated.

The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been called the women's Bill of Rights and has been reflected in many constitutions in the world. CEDAW recognizes equally, civic and political and economic, social and cultural rights. Without the regular monitoring of the CEDAW Committee of each of the 180 State parties every four years, and without the public mobilization, and "naming and shaming" that Ken Roth advocates, Kuwaiti women would probably still not have the vote, Turkey would not have a law on honor killings, Senegal would not have a law against female genital mutilation, Egypt would not allow divorce actions brought by women and Spain and other countries may not have adopted laws against domestic violence. In other countries Family Codes would not have been expanded and amended (Morocco) or laws on property rights for women passed (Rwanda, Tanzania, Zambia), or quotas and proportional representation protocols introduced to ensure that women have seats in Parliament, (Uganda, Jordan, South Africa)

National jurisprudence has also assisted to move the trend along. I will mention two cases from South Africa. Both of which establish the right of the courts not to intervene in the executive function but to ask whether a government has a policy for achieving particular rights, even in the longer term. The first is the **Grootboom** case of 1999 [*Republic of South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC)] where the right to housing was established for settlers

and the second the case of the HIV/AIDS *** Treatment Action Campaign [*Minister of Health v. Treatment Action Campaign*, 2002 (10) BCLR 1033 (CC)] where the court ruled that the government had no policy on treatment in place, hence a violation of the right to health and had to act without delay to provide drugs to prevent mother to child transmission. In other words governments have to prove that they have made their best efforts to provide for the achievement of these rights. You will later hear of these cases in more detail from Chief Justice Pius Langa.

Looking from a more global perspective, one of the most significant gatherings in the UN's history was the Millennium Summit held in September 2000 at which the entire membership of the United Nations including 149 heads of state and government, declared the broad policy goals of the UN in the Millennium Declaration. The Summit culminated a decade of conferences proclaiming goals on sustainable and social development and poverty reduction, women's equality, human rights, food security, housing, and disarmament, to name only a few. The Declaration was the embodiment of these collective goals and aspirations. Implicit in the Declaration was the link between development, peace and human rights.

Following the Summit, it was felt that if the UN and individual governments were to monitor progress effectively, the aspirations needed to be quantifiable and more precise. What emerged was a set of eight goals, called the Millennium Development Goals. Eighteen targets and 48 indicators were drawn up by the secretariats of the UN, OECD, the World Bank and IMF.

The goals had 2015 as a target date. I have included some of the key benchmarks for all eight goals:

- Halving the proportion of people living below \$US1 a day between 1990 and 2015;
- Ensuring universal primary education and its completion;
- Promoting gender equality through for example eliminating gender disparity in primary and secondary education by 2005 and to all levels by 2015;
- Reducing child mortality by two-thirds;
- Reducing maternal mortality by three-quarters;
- Halting the HIV/AIDS pandemic and beginning to reverse the spread by 2015;
- Ensuring environmental sustainability for example by halving by 2015 the proportion of people without access to safe drinking water and sanitation; and
- Developing global partnership for development with governments, and others on issues such as Official Development Assistance (ODA), market access and debt cancellation/relief.

Realizing that the goals had to be achieved at country level, all the country level experts from the UN system: UNDP, UNICEF, World Food Program (WFP), ILO, and World Health Organization (WHO), collaborated with the Office of the High Commissioner for Human Rights to work out a viable system of translating the rights based-approach into development action. Guidelines were prepared. By 2003, the impact of the rights-based approach to development showed some successes. Country teams from Bosnia and Morocco reported establishing capacity building in human rights among the general population. In Guatemala, a database and indicators were developed. And Tanzania developed a sophisticated poverty monitoring system tracking changes in the level and nature of poverty to increase the effectiveness of poverty reduction measures. In addition, Governments with the UN system complied through its Country Poverty Reduction Strategy Papers and Millennium Reports all of which had to have a rights-based and a gender-based dimension. [This is] a promising start, but there is still a far way to go before [the MDGs] are fully realized.

Five years after the Summit, the General Assembly will meet this coming September [, 2005] to commemorate its Sixtieth Anniversary. Highlights on its agenda include reviewing progress in meeting the Summit's MDGs, many of which appear to be far from meeting the targets. The progress report should be out on the UN's website this week ["PROGRESS TOWARDS THE MDGs, 1990-2005," available at http://unstats.un.org/unsd/mi/mi_coverfinal.htm]. A further report, "IN LARGER FREEDOM," [available at: <http://www.un.org/largerfreedom/>] dealing with fundamental UN structural and cultural reform to improve responsiveness to dire need and crisis situations and to ensure the highest quality and accountability in its work will also be discussed. A group under the leadership of Assembly President Jean Ping of Gabon, has just prepared a draft outcome document for discussion during this and next month for final adoption by the Summit. [Initial Draft Outcome Document available at http://www.globalpolicy.org/msummit/millenni/draft_outcome.pdf; Follow-up Summit documents available at: <http://www.globalpolicy.org/msummit/millenni/undocindex.htm>].

I am pleased to report that not only does the latter draft stress that the proposed new Human Rights Council "shall fulfil its responsibility on the basis of the principle that ***all human rights are universal, indivisible, interdependent, and interrelated, and must be treated in a fair and equal manner,***" but it also uses words that I think should be perhaps the most significant and hopeful paragraph in terms of this Symposium and the direction in which the UN has moved, I quote:

"We acknowledge that our nations and peoples will not enjoy development without security, nor would they enjoy security in the absence of development, and they would not enjoy either without respect for human rights.

Let us all *** press your congresswomen and men to ensure that whoever leads the US delegation will maintain these words and not allow dilution.

In closing, I can affirm that this debate will be as provocative and vibrant as yesterday's Symposium and will enrich our understanding of the essential nature of economic, social and cultural rights of women and men irrespective of *** [the] level of development in their communities. You have a critical role to play to ensure that the new program's vision of human rights and development will accommodate the aspirations of all peoples and the challenge to harness globalization to enhance living conditions---not diminish them. It should also provide a powerful enough human rights framework to embrace the full dimensions of the lives of all human beings, whether in terms of protection from physical or mental harm, freedom from fear and want or participation in decision-making. This all-encompassing vision [of] respect for human rights must permeate the international legal framework, *** every legal system, *** what you teach and learn here, and the lives of every woman, man, youth and child. I believe the outcome of your work will inform the United Nations decisions.

*** My very best wishes for a successful outcome of today's discussions and a wonderful program to come. Its future is in your hands.

Editor's Note: The following summarizes the plenary session of the Expert Consultation. Chief Justice of South Africa Pius Langa, Judge Margot Botsford of the Massachusetts Superior Court, Professor Karl Klare, and participants discussed the roles of judges and courts in implementing economic, social, and cultural rights. The dialogue explored the opportunities and limitations in comparative context, using specific decisions on educational disparities, access to health care, and housing for the poor as illustrations. Professor Klare, a leading critical legal theorist, began the discussion by raising important questions about the "justiciability" of ESC rights.

**PLENARY SESSION SUMMARY:
JUDGES ON JUSTICIABILITY: ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN THE
COURTROOM**

By

Karl E. Klare

Northeastern University School of Law, June 17, 2005

Introduction

The goal of the plenary session was to launch a substantive conversation on a cluster of cutting-edge issues in human rights law and human rights theory. We undertook to do this both for its own, intrinsic importance, and because we want to develop a model of collaborative work by academics, judges and advocates in the production of knowledge. We aspire that the Northeastern Program on Human Rights & the Global Economy will become a center for work of this type.

The panel consisted of two distinguished guests: the Hon. Pius Nkondo Langa, Chief Justice of South Africa and of the Constitutional Court of South Africa, and the Hon. Margot Botsford, Associate Justice, Massachusetts Superior Court. It was chaired by Professor Karl Klare, Northeastern University School of Law.

Pius Nkondo Langa

*** Justice Langa's judicial philosophy celebrates the African concept of *ubuntu*—an ethos of caring, interdependence and community based on a foundational concern for the dignity and infinite worth of all humans. For example, in *Makwanyane*, Justice Langa wrote that the Constitution creates a framework for all South Africans "in which a new culture must take root and develop[.]" He described "[t]he ethos of the new culture" by reference to the concept of *ubuntu*, which connotes "a culture which places some emphasis on communality and on the interdependence of the members of a community [which] recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. [*Ubuntu*] also entails the converse The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, [the ethos of *ubuntu*] regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all[.]"

Justice Langa provided a pithy yet profound formulation of South Africa's constitutional project in the *Hyundai Motor Distributors* case:

" . . . [T]he process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a

society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.”

Margot Botsford

Margot Botsford is an Associate Justice of the Massachusetts Superior Court. She is a magna cum laude and Phi Beta Kappa graduate of Barnard College and received her law degree from Northeastern University in 1973. She clerked for Justice Francis J. Quirico of the Massachusetts Supreme Judicial Court. Prior to judicial appointment, she practiced extensively as an assistant district attorney, assistant attorney general and as a private attorney. She has a long-standing commitment to legal education and continuing legal education. She has a wide range of professional memberships and activities; has served on important judicial committees, including years of service on the Massachusetts Commission on Judicial Conduct; and is a member of the Northeastern University Board of Trustees and formerly a member of its Board of Overseers.

Ground Rules

To encourage candid discussion and tentative exploration of cutting-edge issues, we adopted as a ground rule that all statements made during the consultation were “off-the-record” and not quotable outside the consultation. Of course, individual participants are not only free, but encouraged, to develop the ideas with an eye toward eventual publication (securing permissions to quote from other participants as appropriate). Accordingly, the following overview—written by Professor Klare—is submitted in lieu of a detailed account of how the conversation proceeded.

Substantive Focus of the Plenary Session: Judicial Enforcement of Social, Economic & Cultural Rights (SECR):

Can jurists and lawyers who are oriented to social justice and the spirit of ubuntu create 21st-century legal theories and legal technologies which will enable courts meaningfully to enforce social, economic and cultural rights while at the same time respecting, facilitating and enriching democratic and representative political processes? That is, can we reinvent the conception of separation-of-powers?

A paradox of modern constitutional theory is that, on the one hand, enforcement of human rights by an independent, typically unelected, judiciary is essential to democracy in contemporary understanding; yet, on the other hand, such judicial enforcement potentially threatens representative, political processes. To put it another way, a central problem of constitutional theory in 21st century is how to combine a generous, rights-based regime with policy-making by elected representatives. Most modern democracies maintain a strong commitment to legislative supremacy and therefore judicial deference, even with respect to enforcement of human rights, with several, well-known exceptions:

- representation-reinforcing judicial action may be necessary to remedy exclusions from or breakdowns of the representative political process (“representational failure”);
- courts must act to protect discrete insular minorities (although in South Africa, the oppressed group was the vast majority of population);
- counter-majoritarian action may be needed, as appropriate, in order to protect foundational human rights.

Traditionalists argue that so-called “second generation rights” (social, economic and cultural rights) have distinct properties from the “first generation rights” (e.g., the right to vote, freedom of expression, dignity, equality) which render SECR presumptively unsuitable for judicial enforcement. Thus, it is argued:

1. SECR impose positive or affirmative duties upon government (e.g., to provide health-care) rather than merely negative duties (refrain from interference with freedom of expression);
2. SECR are substantive, not merely formal, entitlements; accordingly, realization of SECR is acutely resource-dependent and resource-constrained;
3. SECR intrinsically involve questions of distribution, which judges are ill-equipped to decide in a principled manner; and
4. SECR potentially delegitimize the rule of law in democratizing societies, particularly in so-called “developing countries,” because they make promises upon which governments, and surely courts, cannot deliver.

There are two major branches of objection to SECR. First, courts lack the competence necessary for appropriate enforcement of SECR—because enforcement involves decisions requiring technical expertise which courts do not possess and/or because enforcement turns on inherently political, and therefore, inherently *non-judicial*, choices (the appropriate distribution of wealth and power). Second, many thoughtful observers—across the ideological spectrum—argue that the entrenchment of a robust regime of SECR runs counter to the most basic idea of modern, representative democracy; viz., that public policy should be made in majoritarian processes by representatives chosen through universal suffrage.

Of course, there are many standard counter arguments to these critiques of SECR. For example, it is often pointed out that traditional, first generation rights often raise resource-sensitive questions; that meaningful enjoyment of first generation rights requires basic socio-economic well-being; that ostensibly representative legislative and regulatory processes are often “captured” or stymied by powerful, self-serving interests, and so on. These debates become particularly salient and contentious at historic moments when new constitutions are entrenched, and the question arises *whether* SECR should be included. Many examples come to mind, such as the social-democratic turn in post-World War II Europe, post-communist transition in Eastern Europe, adoption of the Canadian Charter of Rights and Freedoms and, of course, democratic transition in South Africa.

Our plenary session did not rehearse the debate about whether SECR should be included in constitutions. We took as a starting point that democratic societies may take the decision, as South Africans did in 1996, to include an extensive regime of SECRs in their Constitution. And we also took for granted that contemporary jurists are able to “discover” rights that are every bit like SECR in substance, if not name, within traditional, first-generation constitutions. A classic example is the decision of the Massachusetts Supreme Judicial Court that the Commonwealth of Massachusetts has a judicially enforceable duty under its constitution “to provide education in the public schools for [all] children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live.” In short, our conversation assumed that SECR are here to stay.

The question then becomes, can jurists and lawyers who are oriented to social justice and the spirit of ubuntu create new, 21st-century legal theories and legal technologies that will enable courts meaningfully to enforce SECR while at the same time being sensitive to, respecting, facilitating and enriching representative political processes? Traditional separation-of-powers thinking admits of only two possibilities—either courts defer to legislative supremacy or they usurp the legislative function. Jurists skeptical about or hostile to SECR conjure up the following scenario:

Plaintiff comes to court saying, “The Constitution grants me a right to X (food, medical treatment, a house). At present, through no fault of my own, I do not have X—I am malnourished; I need an emergency medical procedure; I am homeless. Therefore, the court must order the government to provide me with X (give me food; provide me the medical procedure; build me a house).”

If the court grants plaintiff’s request, it is meddling in complicated social policy and resource-allocation questions about which it knows little or nothing. Effectively, it is drafting or re-drafting the national budget, tasks quintessentially suited for the “political” branches. On the other hand, if the court denies plaintiff’s request, SECR are no more than empty promises.

The challenge we face is whether we can cut the Gordian knot and conceive, refine and implement a range of intermediate options, approaches that will establish on-going processes of coordination, collaboration and reiterative dialogue and between the courts and the “political” branches of government?

The plenary session began a conversation about these questions, drawing particularly upon the South African experience and the rich story of the *Hancock* litigation in which Judge Botsford played a central role. Questions pursued during the plenary session included the following:

1. *What approaches lie between “judicial deference to” and “judicial usurpation of the legislative function”?* What are their respective strengths and weaknesses? Some approaches suggested include:

a. “negative” protection of SECR—because the debate surrounding judicial enforcement of SECR emphasizes so-called affirmative duties of government, it is easy to forget that courts also have an important role to play in ensuring that government refrains from improper invasion of SECR. For example, in the *Treatment Action Campaign* case, the Constitutional Court considered a claim that the South African Government effectively *prevented* public-sector doctors from prescribing nevirapine.

b. progressive realization—courts would require government to fulfill an obligation to move deliberately, expeditiously, effectively and in good faith toward realization of SECR. A subsidiary question concerns the standard courts should use in enforcing this obligation—“reasonableness” (“proportionality” or “middle-level scrutiny,” in US parlance)? or mere “rationality” (minimal scrutiny, in US parlance)?

c. action-forcing remedies—courts would require government to come forward with a reasonable plan to implement SECR, which must be reasonably and non-discriminatorily applied.

d. minimum core content—in addition to requiring reasonable, legislative steps toward realizing SECR, courts would require government to devote sufficient resources to provide minimally acceptable levels of housing, health care, etc. Thus far, the Constitutional Court has been uncomfortable with this approach, but many “softer” (less judicially intrusive) variations can be conceived:

- instead of specifying minimal content or minimal funding levels, courts would require government itself to address certain needs. For example, in the *Grootboom* right-to-housing case, the Constitutional Court imposed a specific requirement upon government in addition to the general obligation to take reasonable steps, namely, that, whatever else they do, the authorities must address the case of the most severely and immediately deprived.
- Judge Botsford’s brilliant judgment in *Hancock* suggests further approaches; viz.,
 - that courts would require government to develop quantitative benchmarks of progress toward the realization of SECR (such as objective measures of basic capabilities reflecting an adequate level of education, or health care, or shelter) and then to adhere to their own benchmarks;
 - that courts would require government to equalize social spending by region or target population;
 - that courts would require government to determine the institutional capacities and fiscal costs required to meet the specified targets and benchmarks and to develop fiscal plans to move toward adequate levels of capacity-acquisition and then to fulfill those plans (that is, actually to spend the money projected by government to be needed to meet its own targets). In other words, while refraining from telling government how much to spend, courts would order government to have reasonable models of its own regarding how much should be spent to achieve various SECR-goals and then to follow its own models.

e. time-delayed remedies and structural injunctions (interdicts).

f. courts act as facilitators of deliberative democracy—in lieu of ordering substantive compliance, courts would order and supervise the implementation of certain processes. For example, courts could mandate transparency, participation in policy-making by stakeholders, and the development of best-practices (compare: the EU’s “open method of coordination”).

g. courts award constitutional damages as a way of externalizing social conflicts from the parties onto the public, thereby giving government an incentive to act. An outstanding, if implicit, example of this approach is provided by the remedy in the recent *Modderklip* eviction case, namely, the land-occupiers were permitted to stay until access to alternative accommodation is provided them, and in the meanwhile, the government must pay the owner rent for the occupied land in the form of constitutional damages.

2. *Can courts truly enforce compliance, where government is recalcitrant or complacent? Or is the courts’ role primarily to set a moral example and to provide forums in which civil*

society can contest government policy?

3. *What is the role of litigants and civil society? Can we enlarge the conception of “separation of powers” to include, not only the courts, executive and legislature, but also, the parties and civil society? What is the role of the “transgressor” in the elaboration of the rule of law (e.g., civil disobedience in the US; the land-occupation in *Modderklip*)?*

4. *How can advocates and jurists navigate the growing attacks on the legitimacy and independence of courts? Examples of the latter include the widespread, but ill-informed, condemnation of “activist judges” in the US, an “activist” being, apparently, any judge with whom one disagrees. In South Africa, some proposed measures to address the transformation of the judiciary have been suggested by at least some observers to threaten judicial independence. Is there a paradox here? On the one hand, developing a sophisticated jurisprudence of SECR for the 21st century necessarily means abandoning the pristine fiction that courts are neutral and apolitical; yet, on the other hand, acknowledging that legal decisions have political consequences and implicitly turn on political assumptions may corrode the legitimacy and independence of courts.*

5. *Can/should courts seek to expand SECRs in common law/customary law decisions (as distinct from Bill of Rights decisions)? In this regard, s 39(2) of the South African Constitution bears careful scrutiny. Can redistribution be accomplished by a change in society’s background rules (as distinct from accomplishing redistribution through the method of progressive taxation and government spending)?*

Conclusion

The plenary session concluded with extensive commentary by and questions from the audience, which included many distinguished judges, advocates and academics as well as students and members of the general public.

Editor's Note: The following paper, distributed in advance to participants in Working Group A: Public Health and the Human Rights Framework, framed initial issues for discussion. Northeastern law school faculty, students, and institutes have engaged in a variety of public health related legal strategies through our JD/MPH Program (with Tufts University School of Medicine), the Public Health Advocacy Institute, the Tobacco Control Resource Center and Tobacco Control Litigation Project, as well as activism and scholarship on affordable access to HIV/AIDS treatments.. What are the relationships between "right to health" and other human rights approaches in addressing public health needs?

FRAMING THE RELATIONSHIPS BETWEEN HUMAN RIGHTS AND PUBLIC HEALTH

By

Wendy Parmet and Brook K. Baker

The relationship between health and human rights can be understood in at least four different ways, the first three of which have been extensively discussed and the fourth is only beginning to be explored. To organize the Human Rights/Public Health Working Group discussion, we propose using two current dilemmas concerning HIV/AIDS treatment programming as a basis for developing and assessing the fourth formulation. We hope that Working Group participants bring to our meeting your preliminary thoughts and reactions to the fourth formulation as well as their thoughts regarding future directions for human rights/public health scholarship, practice, and activism.

Public health and human rights paradigms are parallel systems both of which primarily make demands on state power, some affirmative and some negative. They ask governments, locally, nationally, and internationally, to reconfigure individual and collective well-being. In analyzing the relationship between existing human rights and public health paradigms, four, different formulations stand out, although there are, of course, many other possible permutations:

Human rights and public health can be viewed as in tension. Under this formulation, human rights, especially dignity-based and autonomy-based rights, are seen as conflicting with and/or limiting government initiated public health measures that involve coercion, compulsion, or restriction. Because this formulation emphasizes the conflict between human rights and the interests of public health, it leads to discussions of how to balance or weigh the interests of the individual against those of the public.

Respect for human rights is a prerequisite or necessary ingredient for achievement of public health goals. This formulation denies a fundamental tension between public health and human rights and sees the two instead as complementary. This is the proposition so famously articulated by Jonathan Mann.

Human rights create and include a right to health that can be seen as spanning all the way from a right to medical care for ill individuals to provision of the constituents of mental, physical, and social well-being. In this formulation, human rights provide a claim for both individual health care and public health activities, including chronic and infectious disease control, sanitation, and environmental/occupational safety.

4. Public health provides a population-based perspective that can alter or refine our understanding of human rights, including a right to health. From this "public health

perspective,” public health does not clash (as in number 1) with human rights but it does shape our appreciation of human rights, leading us to see them as less individualistic and more focused on populations and their health status.

Many different actors have helped to create the four formulations. For example, the World Health Organization and many other public health providers have played an important role in attempting to harmonize the disciplines of medicine, public health, and human rights. In the rights arena, the World Health Organization (WHO) emphasizes the indivisibility and interdependence of health-related rights and has expanded the formal content of the right to health beyond its focus in the International Covenant on Economic, Social, and Cultural Rights on physical and mental well-being to include social well-being as well. Programmatically, the WHO brings a human rights focus to its melding of medical and public health strategies aimed at: (1) reducing excess morbidity, mortality, and disability, especially for poor and marginalized populations; (2) developing affordable, accessible health systems that are responsive to legitimate health needs; (3) promoting healthy lifestyles and reducing risks to human health arising from environmental, economic, occupational, social, and behavioral causes; and (4) developing health care policy making capacity and promoting health sensitive policies in other arenas.

Human rights practitioners and activists tend to think less about the academic issues outlined above than about making health-related demands for social justice. For them, the key formulation is number 2. They want to use human rights texts to help to support demands on governments and on corporations, international financial institutions, and other social entities. They also want to know if the texts can help uproot embedded social practices, cultural norms, as well as systems that create the gradients of disease. Activists ask questions and demand responses: can we have resources, can we have political commitment and leadership, can we regulate and control private interests, and can institutions and governments change policies and practice that impede equal access to the determinants of healthy living and to the prevention, treatment, and care of disease? Human rights activists are also concerned about building a rights-enhancing community, where empowered individuals and empowered collectives express social solidarity by acting together to enhance communal well-being. Finally, they emphasize community involvement of affected populations in the development and delivery of social support systems for community-based education, prevention, treatment, and care.

The varying frameworks for considering the relationship between human rights and public health and the difference between academic and activist perspectives can and frequently do create confusion in our discussions and analysis. Nonetheless, the academics among us must continue to advance our understanding of the power and resonance between the human rights and public health disciplines and remain connected with how our theories illuminate, distort, and/or positively influence practices on the ground. Conversely, the activists among us need to work harder to operationalize improved understandings into strategically sophisticated campaigns that advance our collective quest to realize good health on a global scale.

To help the Working Group participants think about the different ways that human rights and public health intersect as well as useful future directions for scholarship, service, and activism, we have decided to outline two dilemmas for discussion during our hour and a half together. Both dilemmas concern, most directly, the HIV pandemic. But each raises a host of issues that we believe reach beyond HIV. As you read and as we discuss each dilemma we hope you can focus on and consider the following questions:

Does the fourth formulation add to or alter our analysis of the dilemma?

Does the dilemma provide content to the claim made by the fourth formulation, e.g., does the dilemma demonstrate how a public health perspective can alter our understanding of human rights? If so, how would that content apply to other public health scenarios, including those that do not concern infectious diseases?

What lessons does the application of the fourth formulation to the dilemma hold for activists? Practitioners? Scholars? The public at large?

HUMAN RIGHTS/PUBLIC HEALTH DILEMMAS ARISING IN THE HIV/AIDS PANDEMIC

Dilemma 1. HIV Treatment Scale-up and Expanding Health Care Capacity.

Enormous but still insufficient resources are finally becoming available for treatment scale-up of HIV in many developing countries. AIDS activists had argued for years that resource-poor countries had existing capacity for rapid scale-up of HIV treatment and that donors and providers should collaborate for the rapid utilization of that capacity. Such utilization would require extensive training, the development of simplified treatment protocols, cheaper medicines, and the enhancement of drug procurement and distribution systems, but it would also prevent millions of unnecessary deaths. WHO ultimately agreed and in December of 2003 formally launched its 3-by-5 (3 million in treatment by the end of 2005) initiative.

Despite the availability of underutilized capacity for treatment, existing capacity was still woefully inadequate to provide treatment and care to the majority of people currently living with AIDS and even less adequate for the tens of millions who would need anti-retroviral (ARV) therapy over the next ten years. Thus, activists demanded that donors and countries invest in health care capacity, particularly in human resources for health. Given brain drain, high prevalence of infection in the health care cadre, poor and dangerous working conditions, and demoralizing exposure to death and dying, it is hard to figure out how to sustain existing health care capacity let alone expand it for the future.

One of the key issues in capacity building, however, is whether to site AIDS treatment services in disease specific programs or whether to increase AIDS treatment capacity across the entire spectrum of health care services. The debate about the virtues of vertical and horizontal programming has a long history and strident adherents in both camps. Vertical programs tend to be more efficient and to provide a higher standard of care. However, they also tend to be donor-controlled, focused in private and NGO sectors, and in the context of HIV/AIDS they often result in internal migration by health care workers to better resourced AIDS programs. In addition, they have often lacked sustainability and instead have dissipated national commitment and capacity to own and tackle a compelling health care need. Horizontal programs, on the other hand, are said to increase health care capacity across the board, particularly in the public sector, and to do so on a more sustainable basis. Hence expanded HIV/AIDS capacity would translate into expanded infectious disease and chronic care capacity for a broad spectrum of health needs. Despite these potential benefits of horizontal programming, the reality on the ground is often said to be one of bureaucratic incompetence, corruption, and lethargy. And the standard of care in the public sector is often abysmal, for multiple reasons including structural adjustment programs that place spending caps on investments in health care infrastructure, hiring, and pay rates for health care workers.

A different take on the question of building health care capacity focuses less on issues of vertical programming versus broad-scale public sector programming and looks instead on who provides care. One camp emphasizes the importance of expertise and strongly recommends

expanding the pipeline and improving training for AIDS specialists, especially at the higher professional levels. This camp emphasizes the complexity of AIDS treatment and the desirability of one standard of care – not a high standard in the Global North and a low one in the Global South. The other camp argues that AIDS treatment can be demystified, that simplified treatment protocols can be developed, and that front-line treatment cannot only move down the chain of authority to nursing-level professionals, but that the system for providing treatment care and support must be constructed at the community level, utilizing community health workers. The community-based care camp argues that these community health workers, mostly female and many providing care work already, should be trained, paid, and supported in a strong referral system.

A third important issue relating to treatment scale-up and capacity building is geographic and demographic. Some health policy makers urge a focus on enhancing and expanding existing capacity where it currently exists, mostly in urban areas. Paradoxically, this is where elites, members of the formal economy, and generally better off populations live (though there are many exceptions in peri-urban and informal settlement areas). Other policy makers, ethicists, and human rights activists stress the importance of preferentially expanding capacity for the most vulnerable and most disadvantaged and most underserved populations, which are frequently rural. These proponents would trade off some efficiency for more equity.

Both forms of providing treatment scale-up, vertical and horizontal, both staffing decisions, and both siting decisions raise troubling questions about AIDS exceptionalism and about the plethora of other unmet health needs in poor countries and poor communities. Does marshalling money and capacity for AIDS divert scarce resources from other worthy health-related goals like maternal and child health? Or is AIDS the engine on a new health care train – is it the wedge that cracks open increased prioritization of health rights in general?

We wonder whether a human rights and public health analysis can help us figure out how to proceed in scaling up AIDS treatment capacity. Does the fourth formulation of the interrelationship between human rights and public health add any insight to the discussion?

Dilemma 2. HIV Treatment Adherence.

Arguments about treatment adherence and conflicting proposals about how to enhance it have long been debated in connection with HIV. Andrew Natsios, USAID administrator, famously argued in 2001 that Africans were too poorly educated to take AIDS medicines, in part because treatment regimes were complicated and Africans allegedly couldn't tell time. Cooler heads have argued more cogently that high level adherence to ARV treatment regimens ($\geq 95\%$) is critical to reducing the speed and prevalence of drug-resistance within highly infected communities. The ability to use simplified and standardized treatment protocols, to train staff in predicate skills, to avoid the onslaught of high-cost resistance testing, and to delay procurement of dramatically more expensive second-line therapies all depend on the efforts to improve adherence to the highest possible levels.

As WHO has shown, treatment adherence is problematic, even in highly educated populations where adherence for all chronic diseases is only 50%. Adherence is reported to be somewhat better with respect to ARV therapy, but only 33% of patients adhere at the 95% level. Proposals to improve adherence in the West have focused on social supports, simplified protocols, regular contact with medical providers skilled in exploring compliance issues, and even technological fixes, e.g., radio transmitters in pill caps.

Adherence in developing countries is complicated by numerous factors including: populations' lack of education in science and health, a lack of experience in medical treatment, belief systems about traditional medicine that often conflict with a medical view of health, inadequate drug supplies and unaffordability. These factors, and many others, produced skepticism about the prospects for adherence to ARV therapy and have led to various experiments with enhancing adherence.

One proposal, championed by Partners-In-Health, has been to apply DOTS (directly observed therapy), developed for the treatment of tuberculosis, to the treatment of HIV/AIDS. In rural Haiti and now in Rwanda, PIH pays accompagnateurs (community health workers) to travel from patient to patient daily to observe them take their medicine. The social support embodied in this system and the immediate opportunities for discussing adherence are said to dramatically improve adherence rates, which are reported to be much higher than in the U.S. Moreover, employment of community health workers, many of whom are HIV-positive, provides new employment opportunities and social status in impoverished communities, especially for women.

Another proposal, advanced by MSF (Doctors Without Borders) and the Treatment Action Campaign in South Africa, is to require a prospective patient to identify a family member or friend to act as a treatment supporter. In addition, there are outreach efforts by treatment literacy and treatment preparedness workers to educate the broader community about HIV prevention and treatment, including treatment protocols and side-effects and the importance of treatment adherence. In addition, patients receiving treatment are encouraged to join treatment support groups where they can regularly meet others taking ARV therapy and they are encouraged further to be open about their HIV and treatment status to begin to reduce stigmatization. Like PIH, MSF reports remarkably high degrees of treatment adherence (admittedly during the relatively short time that treatment has become available).

A third set of proposals focuses less on direct patient-centered interventions and instead on the material circumstances that affects adherence. This approach focuses on sound procurement and supply system and back-up supplies to prevent stock-outs. In addition, advocates of this approach propose reducing out-of-pocket expenses for AIDS therapies, challenging the prevalence of user-fees and other cost-recovery mechanisms and calling for free care. Finally, they focus on simplifying and improving treatment regimens by reducing dosing frequency and number of pills and preventing and treating side effects. In this regard, they particularly champion the availability of therapeutically appropriate fixed-dose combinations that can be taken only once or twice a day.

Human rights principles have reduced efforts to coerce medical dosing yet adherence analysts have resisted relying on patient education and autonomous choice only. Do the combined disciplines of human rights and public health give us any greater insight into how to prioritize and choose between adherence efforts, particularly those proposed by PIH and MSF? Does the fourth option give us any additional traction in this analysis?

FUTURE DIRECTIONS

In further preparation for the upcoming Working Group and to assist NU School of Law in its efforts to define a useful role for its proposed Institute on Human Rights and the Global Economy, participants are encouraged to address the questions posed above before our meeting, and if possible, to send us your responses so that we can share them with the group. In addition, participants should feel free to bring materials to the Consultation as we will have a table available for display items and distribution of articles, etc. Finally, we hope you may assist

us by also considering the following questions:

What are some of the gaps in current academic programs that focus on economic, social and cultural rights globally, particularly in the health/public health arena?

What opportunities are there for Northeastern to collaborate with others in advancing the human rights and public health agenda?

SUMMARY REPORT:
WORKING GROUP A ON PUBLIC HEALTH AND THE HUMAN RIGHTS FRAMEWORK
Northeastern University School of Law, June 17, 2005

Facilitators: Professor Brook Baker and Professor Wendy Parmet

Reporter: Ms. Megan Bremer

Participants: Professor Richard Daynard, Professor John Flym, Professor James Thuo Gathi, Professor Erika George, Dr. Michael Grodin, Professor Stephen Marks, Professor Jean McGuire, Professor Gerard Quinn. (Although Dr. Victor Sidel could not attend the session, he reviewed the draft summary at our request.—Ed.)

INTRODUCTION

Northeastern University School of Law hosted a [Working Group on] health and human rights on June 17, 2005 as part of a two day Consultation to launch its Program on Human Rights and the Global Economy. The participants were professionals in the fields of public health, law, and medicine. The purpose of the discussion was to continue a long-standing dialogue among public health and human rights scholars and activists in order to identify additional areas of resonance and to identify existing gaps in analysis and policy that might be addressed by the law school's new Program.

In advance of the Roundtable, the facilitators drafted a short background paper, *Framing the Relationships between Human Rights and Public Health*. In addition to outlining the more common constructions of the relationship as one of tension, of complementary [status, or] of near total congruence, the paper also asked whether a public health or population perspective might not reshape the more individualistic framework of the human rights paradigm into one more focused on communal needs and group wellbeing. To try to make the discussions more concrete and to reduce the risks of merely retracing stale arguments, the paper also presented two human rights/public health dilemmas arising in the response to the HIV/AIDS pandemic: the first involving the tension between HIV-specific treatment scale-up in developing countries versus broader expansion of general health care capacity and the second involving community-based models and health-care worker based models of promoting HIV treatment adherence.

The roundtable commenced with a discussion of who should be at the metaphorical table to discuss the intersections between public health and human rights, in order to collaborate on new strategies to advance the mutual goals of both disciplines. While there is no definitive answer to this question, the participants reached a consensus that the current players guiding these discussions globally are not representative of all the stakeholders and the pool of people must be expanded. The second question was whether the framework of human rights with its focus on the individual can be transformed by the overlay of a public health framework. It was apparent to most participants that the population-based perspective of public health need not be in conflict with the individual-focused perspective of the human rights approach, though there was less agreement whether a public health perspective might actually add substantive content to a more communal view of the right to health. Some thought that the two perspectives were, in their broadest versions, virtually indistinguishable because they share the same long term goal of realizing the right to determinants of health for all people and focus their strategies on vulnerable populations.

Although the participants did not focus significantly on the proposed HIV/AIDS programming dilemmas, the participants did briefly identify and talk about several debates within health rights practice: vertical versus horizontal programs, lack of infrastructures and capacity to sustain programs, methods of prioritization of resources and initiatives, and a lack of reflectivity from donor organizations. Finally, the participants discussed the role of law as a tool to garner solidarity and facilitate implementation by obligating politicians and governments to act. The participants identified various strategies that could work together to hasten the realization of health and human rights.

PARTICIPATORY AGENDA SETTING

In acknowledging the process by which a new program is created, participants addressed the issue of who should be invited to help set the agenda for discussions of health and human rights. (A) The fact that the health and human rights roundtable was held at the same time as the roundtable on economic development highlighted a common frustration that the issues of health and human rights are too narrowly examined. Development issues are inextricably linked to health issues and must be included in any discussion of health and human rights. (B) It is difficult to even identify the gaps in theoretical research and implementation without having a more inclusive community of people from multiple disciplines. (C) Boston is a Mecca of the medical profession and yet the area ranks poorly in infant mortality relative to the wealth of knowledge and resources that flow through the area. How can public health models address the inequities in our own society that allow such poor health status in a rich nation? Part of the problem is that there is a fragmented set of initiatives addressing problems in this country. (B) It is important to keep extending the question of what disciplines and which players are not at the table.

(D) There are many centers in Boston that are already dealing with the issues of health and human rights. (A) Physicians for Human Rights, the Francois Bagnoud Xavier Center, Global Lawyers and Physicians, Oxfam, Amnesty International, and some of this country's leading medical centers are a few of the groups engaging in this work right here in Boston. (D) It is crucial that the new institute at Northeastern University School of Law collaborates, rather than competes, with existing organizations. The working group at Northeastern should invite representatives of these organizations to help set Northeastern's agenda by identifying areas of work that have yet to be undertaken and possible areas of work that would complement and support ongoing initiatives.

A few examples of potential partnerships between Northeastern School of Law, Harvard School of Public Health and Boston University's School of Public Health were discussed. One such possibility is to combine expertise in the international and domestic arenas to tackle a global health issue, like access to health care, more comprehensively in various contexts. (A) Northeastern has a stronger commitment to domestic issues while the focus at Harvard's Francois Xavier Bagnoud Center is more international. Indeed, the Francois Xavier Bagnoud Center attaches equal importance to gaps in equality domestically, but their work is almost exclusively in other countries. The two centers could work together to address a particular issue in both the domestic and international context. (D) Boston University would be a natural partner for such collaboration since they have worked to address economic, social, and cultural rights both internationally and locally in the greater Boston area. (A) Since Northeastern, Harvard, and Boston University all have joint programs for law and public health (JD/MPH), there might be opportunities for collaborations between the faculty and students in these programs though there might be some undesirable competition as well.

COMPATIBILITY OF THE HUMAN RIGHTS APPROACH WITH THE PUBLIC HEALTH APPROACH

(A) It is no longer accepted to say that public health's population-based perspective on medical issues, like its statistical analysis of trends, is in conflict or produces tensions with an individual-based model of a human rights approach to health. The first model requires a health system to achieve health for an entire population. The human rights approach echoes this demand. Human rights are applicable to everyone, not just individuals. Public health professionals deal with individuals who do not have access to healthcare on a population-basis because the high numbers of individuals requires a population-based perspective. However, this perspective does not diminish the importance of the individual who seeks access to health care. Thus, these two models shape one another but, indeed, the human rights approach is less individualistic than it is perceived to be at first glance. The realization of the right to health is not framed in law as individualistic. Even the advisory committees to relevant conventions and articles focus on vulnerable populations. The discourse has moved beyond this dichotomy because the realization of the right to health is a collective right. Looking at Jonathan Mann's visual mapping of the relationship between health and human rights, his arrows from rights to health illustrate that violations of rights have clear consequences on health. At the same time, health policies can violate human rights, as evidenced by the early treatment models for HIV. The fourth scenario presented to us today appeals to the compatibility of both the public health and human rights models but still assumes excessive individualism in the human rights model. The assumption is untenable given the obligation of the state to deal with health at a population level.

HEALTH ISSUES THAT INTERSECT WITH QUESTIONS OF HUMAN RIGHTS

[Despite] time constraints ****, the participants raised a few issues to illustrate the ways in which professionals from [the fields of public health and human rights] can combine strategies to more effectively implement solutions.

The debate over vertical or horizontal health initiatives extends beyond resource allocation to the fulfillment or violation of human rights. (E) HIV is readily recognized as both a health issue and a human rights issue. Raising the capacity for anti-retroviral drugs (ARV) delivery is grounded in a population-based perspective. One of the questions is whether to employ vertical programs or focus on system-wide capacity. (B) There seems to be a greater preference for vertical programs when program developers are only focusing on the speed of delivery while (A) the participation assumption and capacity of the community might justify horizontal-type programs. Even with horizontal programs, it is important not to sacrifice principles. (B) Does a population perspective from public health help to resolve the tension between vertical versus horizontal system?

(B) A recent evaluation of the ARV roll-out in the Eastern Cape Province illustrates the impact of program design on the rights of individuals. The mother to child transmission (MTCT) vertical program showed an expected positive effect but by the twelfth month all of the positive effects were eradicated. This was attributed to changes in feeding practices. At first, the changes were attributed to the stigma associated with using formula instead of breastfeeding. Upon further review, the changes were actually the result of formula stock outs. The MCTC program invested in single sites without sustainable connections to those sites. Consequently when the single employee engaged with the program left, or other gaps in the initiative appeared, communication regarding the need for supplementary supplies failed. By informing mothers of the risk of breast feeding while failing to provide the formula, the program arguably

violated the human rights of the women involved in the program. (F) An important question posed for further thought is whether a human rights approach favors vertical programs. (B) But the debate does not end there. The issue is not simply vertical versus horizontal because neither model has yet to close the gap in health care delivery. There are other factors at play that raise serious questions beyond programmatic issues.

The above example of stock outs also raises the issue of sustainability within a weak infrastructure. The concern is that donor-driven programs are not sustainable unless initiatives to expand capacity and strengthen infrastructures coincide with aid delivery. An anecdote from Kenya was related to the group in order to illustrate the consequences of a system which lacks the capacity to deliver adequate care to its population:

H was driving with his wife and family in Kenya. They were driving in the foothills of Mount Kenya when they had an accident and rolled three times in their car. He and his family sought treatment at a local health center but could not even get proper cleaning for their wounds. The clinic lacked the basics essentials including running water and Detol (antiseptic). It was midday and there was not enough staff. There simply was no infrastructure to deliver proper health care. A basic infrastructure for even the most simple public health needs is absent even in Kenya, which is not one of the least developed countries.

H added one more dimension to the problem: regimes which have failed to improve infrastructure - these regimes and the lack of adequate infrastructures pose challenges not just for accessing drugs but to accessing even the most basic of health care needs. Currently, there is a struggle in the Kenyan Parliament over the state's obligations versus the increase in public expenditures. The battle in Parliament extends beyond the legislative quagmire of Intellectual Property to an ongoing debate over spending. Without the political will to allocate funding towards rebuilding the infrastructure, no amount of donor driven programs will solve the ultimate problems of health care delivery in Kenya.

(E) The dilemma is riddled with the programmatic issues of the right to health. For example, critics have questioned the sustainability of the President's Emergency Plan for AIDS Relief (PEPFAR). What happens when donors change conditions or agendas? Absent investment in infrastructures, including the training of human resources, local governments and communities will be unable to carry on the work initiated by donors. The United States' Congress, led by Senator Frist, created initiatives for volunteer corps to assist in the delivery of health care. There are several things missing from this initiative which fails to address the problem that countries lack the capacity to own and deliver their own health care. The politics in the US, driven by the short term focus of the US foreign policy, are deeply problematic in terms of sustainability, especially with volunteers who disappear after a short time.

(E) There may be a role for the law via the legislature, but the programs are already happening. There is a need to be responsive to what is happening now, particularly, because even the best laid plans do not unfold exactly as predicted. Foresight never matches the plan on the ground. (B) Even with ongoing evaluations of programs, revisions are infrequent and unhurried. Perhaps the problem is that there is a profound lack of reflectivity in the health arena. Ongoing evaluations and revisions are difficult in a field that turns on fast funding. However, the effects of time constraints are exacerbated by a culture of acquiescence. A key factor is the US government's posture that discourages reflection on the role of US staff abroad.

The reluctance to question the decisions made throughout the processes of designing

and implementing health initiatives is particularly troubling when programs are evaluated through the human rights approach. From the very earliest decisions where issues and needs are prioritized and resources are allocated accordingly, the choices impact human rights. (G) Questions as to whether a program maximizes utility across the board or whether quality adjusted life years should be used as a criterion for prioritizing spending must be raised and dealt in the context of both health and human rights. (H) For example, the United States' prioritization of anthrax raises questions in light of the United States's response to HIV. Why was the response seemingly greater for a low risk situation that affected very few people while the response to HIV, a global epidemic, has been sporadic at best? It is absolutely both a health and a human rights issue.

LAW AS A TOOL FOR PUBLIC HEALTH INITIATIVES

(A) The United States lacks a culture of solidarity. This lack colors the way the citizens perceive the right to health. The US government refuses to recognize the right to health as a human right. In part, this is because the government feels that it cannot afford to establish social ills, including health, as [matters of] human rights. [This refusal] stems from the inculcation via legal education of a right as an entitlement. But that is not the international understanding of the right to health. Globally, the right is defined by the progressive realization not an immediate entitlement. The US must change its thinking or continue to fall prey to entitlement scare tactics. (I) It seems that people are more likely to be categorized as freeloaders than rights holders in the US. Conversely, the culture in the European Union recognizes a real connection between civil and political rights and economic, social, and cultural rights. For example, there are collective not individual mechanisms for complaints regarding economic, social, and cultural rights.

(F) It is a cultural understanding of rights that extends beyond the meaning rooted in formal legal education. The colloquial understandings of legal structures and rights are particularly narrow in the US, and as such, are disabling. (A) Without getting into linguistic issues, globally, human rights and protection of human rights is seen as the role of the government. It is empowering and mobilizing. But in the United States, human rights, as well as the government, are viewed with great suspicion. Education is crucial in order to transform the culture by empowering the people. It is possible to educate people by working with them rather than merely instructing them. In this context, when the right to health is discussed, it is mobilizing. This is transformative pedagogy.

(I) Can the law be used to put political solidarity in place? There is always a programmatic dimension to the realization of health but there is also a political dimension. There are three examples from the European Union that illustrate the interdependence of law and politics in the push towards the realization of rights. There is a huge battle in the UN drafting convention on disability that is currently fixated on the question of measures. States cannot agree on how to measure disability because these measures will be used to enforce states' obligations to provide services for people living with disabilities. There is always a discrete and insular community at the crux of standard-setting. In many cases it is not a cost issue but a delivery issue. For example, the French government was slow to establish programs for autism that meet the regulatory standards. When a claim was brought against the government and the finding ordered the government to speed up the implementation of improved programs, the French government said, "Thank you." People within the government supported the implementation of the programs, but were blocked from acting. Thus, the law created a scapegoat that freed politicians from the quagmire of catering to conflicting special interests. Sometimes law is the only force that seems capable of moving a government to

action. European NGOs, the majority of whom receive funding from the government, who advocate for particular policies are sometimes hesitant to challenge governments. This was the case in Greece regarding the violation of the Roma minority's rights to housing. A recent decision against the Greek government highlights the issue that if you cannot directly reach vulnerable populations, there are creative indirect approaches available in the context of public health and human rights. The challenge lies in the disconnect between international and domestic law. Since the process of national constitutional change is inevitably slow, it is crucial to tackle the issue without waiting for revisions of domestic law.

There is a lack of consensus on the affirmative role of law. (B) There is also the problem of a cultural framework. Where you sit is where you stand. Cheryl Harris's statements at the July 16th seminar commemorating the 50th anniversary of the Freedom Charter were reiterated as a reminder that people must be self-conscious in the work that they do. To this extent, the participants at the roundtable examined some of the strategies employed to realize the right to health.

(E) The Treatment Action Campaign (TAC) case [Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC)], was framed around access to medicine at a particular moment. Yet there is a larger government obligation to develop a program. Thus, the TAC case also presents itself as a human rights case [implicating] the right of the mother and the child to access essential medicines. Would a population perspective on the part of the plaintiffs have resulted in a better roll out? (B) But at the time they were arguing for the right to a drug not a right to a system because that was what was the most justiciable. (F) There is a need for law to work at the periphery but there should be something more that drives the remedies. One of the constraints of seeking remedies through litigation is that one must wait for a justiciable case. Given what we learn from hindsight, how does an advocate reformulate the next case?

(I) Institutions and programs have a life of their own. Abstract rights cannot be controlling in the actual delivery of rights because rights are relative and because programs confront unexpected difficulties and constraints. (E) The right to access to Nevirapine to prevent mother-to-child transmission was not rolled out quickly or effectively because community structures and social support were not in place. There is a need for community education to create the popular support for vital public health measures. Perhaps we need to look towards a population perspective in terms of creating social supports, systems, and placements for programming to advance the right to health.

(H) It is important to be open to different strategies. For example, in Kenya there is the rhetoric of neo-liberalism versus human rights. Recently, people used anti-corruption rhetoric to effectively force the courts to listen. Institutions may not respond to one strategy but may be open to another. For example, informed consent issues just opened up a whole new terrain for public health activists in Kenya.

(A) There are really two levels at play - the precedential level and the regulatory level. Policy-making at the regulatory level may result in a more human rights sensitive approach. (B) Yet the effects of the legal cases in the late 1980s which forced regulatory changes at the FDA were mixed. The push towards expedited access of lifesaving drugs produced less than optimal drugs on the market. New HIV/AIDS drugs that were being developed were reaching the market too slowly. Mortality measures were being used as the end markers which demanded faster access for drugs that could slow the increase of AIDS-related deaths. However, the impact of these decisions within the legal field and the changes at the FDA had a greater impact beyond

HIV. Nonetheless, initiatives can move forward even with inevitable flaws, but those flaws need to be addressed by revising policies and programmatic initiatives.

(A) Critics of rights frameworks from both an economic and a public health perspective argue that one right need not be sacrificed for another but rights are more flexible in their application depending on the context. For example, consider the progressive realization of rights or, more concretely, consider the extent to which one must protect the privacy of a patient; some people would draw the line higher than public health practitioners may draw the line if the need for privacy in some manner conflicts with a public health need. However, this is not to say that the right to privacy would be sacrificed absolutely. In this sense, there is a degree of flexibility. Decisions must be made to uphold the essence of a right without trading off rights. The human rights framework guides the drafting of legislation. Jonathan Mann's optimization demonstrates a careful balancing of right, for example we accept certain limits on the freedom of movement in order to secure other rights. (1) The effects will depend on the vehicle of rights delivery.

CONCLUSION

The issues underlying the realization of the right to health are interdisciplinary. Thus, the strategies to advance this right should also be interdisciplinary. Beginning with the response to HIV/AIDS, public health advocates and human rights activists began to use both the law and grassroots education to force changes in the delivery of health care to vulnerable populations. As these two fields pursue their shared goals, there are many ways in which they can collaborate and reframe the debate to be more inclusive. The [Working Group Consultation on Public Health] hosted by Northeastern University School of Law is just one example of the many dialogues being held between these two fields. The participants started the discussion by questioning which stakeholders were absent from the table. It is a question that arises from the desire to be more expansive and creative in addressing the right to health. The discussion ended with a review of some of the strategies employed in the field, particularly in the legal field and particularly in the context of access to treatment for people living with HIV/AIDS. This is where Northeastern University School of Law's new Program on Human Rights and the Global Economy will try to steer the conversation - to seek more creative ways to draw upon many perspectives and strengths in the wider community already engaged in the struggle for the delivery of health care and the preconditions of good health to those whose human rights and public health rights have yet to be realized.

Editor's Note: "Working Group B: Economic, Social, and Cultural Rights in the U.S.: New Lawyering Strategies" focused on efforts to build a human rights culture in the United States. An early participant in the development of important international human rights instruments such as those in the International Bill of Rights, the United States has attempted to limit the applicability of international human rights treaties internally. There is, however, a growing movement among activists and lawyers urging the U.S. to ratify those human rights instruments that remain unratified, to promote implementation of those that have been ratified, and to pursue other human rights strategies at the local, state, and national levels. In the months following this gathering, the aftermath of Hurricane Katrina on the Gulf Coast of the United States further revealed the importance of fulfilling human rights norms on the domestic level. The Working Group participants, a diverse group of immigration and asylum lawyers, labor lawyers, grassroots activists, and legal academics, had a lively and collaborative discussion on a range of issues and strategies; the Program will work to build this network as part of its work on furthering respect for ESC rights in the U.S. We believe that such efforts must take place in the law school classroom, in courtrooms, and among the communities that are most vulnerable to the violation of human rights.

The following materials include framing materials sent to participants in advance of the conference and a summary of the session.

**FRAMING MATERIALS:
WORKING GROUP B: ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN THE U.S.**

Facilitators: Martha Davis and Cathy Albisa

Reporters: Ms. Elizabeth Farry and Ms. Joanna Golding

Participants: Ms. Dimple Abichandani, Esq., Professor Lance Compa, Hon. Dennis Davis, Ms. Jennie Green, Esq., Ms. Rebecca Johnson, Professor Daniel Kanstroom, Ms. Nancy Kelly, Esq., Professor Karl Klare, Mr. Brendan O'Neil, Ms. Judy Scott, Esq., Dean Emily Spieler, Professor Lucy Williams. Other students and members of the community who were not identified also attended.

We are very much looking forward to a lively discussion on June 17. To start things off, we have posted some relevant readings and preliminary questions. We hope that you'll have the time to look at these (particularly the questions) before the workshop. A brief digest of the readings is set out below. We hope this is helpful. The cases, in particular, are quite long, so the digests may provide some shortcuts as you review them. *** If you have any readings or questions that you would like to add to the mix, please let us know.

Martha Davis and Cathy Albisa, co-facilitators

~~**Digest of Readings for Workshop B: Economic, Social and Cultural Rights in the United States: New Lawyering Strategies**~~

~~Overview:~~

~~**Larry Cox and Dorothy Thomas, *Introduction, CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN THE UNITED STATES (Ford Foundation 2004)***~~. This excerpt provides some historical context for human rights activism in the US. It anticipates and responds to questions about the efficacy of such advocacy, relying on the experiences of human rights organizers and activists. It also references recent work on human rights in the US by Ford Foundation grantees.

(Editor's Note: The full text of the Ford Foundation's CLOSE TO HOME Report is available at http://www.fordfound.org/publications/recent_articles/close_to_home.cfm)

~~**Litigation/National and State Constitutions:**~~

~~**Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Rationality Review*, 112 HARV. L. REV. 1131 (1999)**~~. In recent years, federal courts have resoundingly rejected constitutional claims for a right to welfare. Many state courts rely on federal standards of review in their state constitutional decisionmaking without considering whether the institutional concerns play out differently in the state context. In this Article, Professor Hershkoff questions the premises of federal rationality review as applied to the adjudication of claims to welfare assistance under state constitution poverty clauses. Federal rationality review, she argues, rests on doubts concerning democratic legitimacy, federalism, and separation of powers that are not completely apposite to state common law courts interpreting state constitutional positive rights. When a state constitution mandates the government provision of social services such as welfare, the relevant judicial question should be whether the challenged law achieves, or is at least likely to achieve, the constitutionally prescribed end, and not, as federal rationality review would have it, whether the law is within the bounds of state legislative power. Answering concerns that enforcement of positive rights is beyond the institutional competence of state common law courts, Professor Hershkoff proposes an alternative standard to federal rationality review for state court interpretation of state constitutional welfare rights that is consequential in focus and consistent with the provisional nature of state court decisionmaking. Interestingly for our purposes, Professor Hershkoff's proposal is in many respects parallel to the expectations of "progressive realization" of economic, social and cultural rights under international human rights norms.=

(Editor's Note: Article not reproduced here. Available through online legal databases or from HARVARD LAW REVIEW.)

~~**Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5)**~~

~~**SA 721 (CC):**~~ The South African Constitutional Court addressed the government refusal to provide a specific medication, nevirapine, that prevents mother to child transmission of the HIV virus. The government had prohibited the provision of the medication in the public health system except at a limited number of test sites. The medication had been proven safe and effective, it was available in the private sector, and resources were not an issue as the South African government would be receiving free supplies of the medication for at least five years.

The government took the position that while acquiring the medication did not involve costs, proper administration required adequate counseling and other support services. The complainants responded that while the ideal situation included the broader support system, lives could be saved even without it and thus it was irrational to preclude its use. The complainants further argued that it should be left to the discretion of the physicians in the public health sector

as to whether the circumstances of an individual case merited the use of the medication.

The Court identified the duty of the state in this case in the following terms:

“The state must respect, protect, promote and fulfill the rights in the Bill of Rights. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

The Court then identified the relevant language in the Constitution’s Bill of Rights:

Everyone has the right to have access to . . . health care services, including reproductive health care; and ... The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of ... th[is] right[].

The Court then addressed its constitutional role with regards to the right to economic and social rights:

The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.

Relying on precedent that gave additional content to the “reasonableness” standard for evaluating whether the government is meeting its obligation to progressively implement economic and social rights, the Court also stated that:

To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.

A programme for the realisation of socio-economic rights must “be balanced and flexible and make appropriate provision for attention to . . . crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.

[S]o far as socio-economic rights are concerned the State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the Executive. These policies and programmes must be reasonable both in their conception and their implementation.

The formulation of a programme is only the first stage in meeting the State’s obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State’s obligations.

Finally, the Court also noted that: “there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right.”

Using these standards, the Court found that because nevirapine was safe and would definitely save a significant number of lives even without ideal conditions present, precluding the use of the medication was unreasonable and therefore unconstitutional. The Court also found that at the point that the case reached appeal the national program to prevent transmission had changed and was better developed than when the case was first initiated, but nonetheless the government must:

make provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary for the use of nevirapine to reduce the risk of mother-to-child transmission of HIV.

Take reasonable measures to extend the testing and counseling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

The Court finally stated that: “[t]he orders made ... do not preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV.”

Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429, 2002 SCC 84 (CanLII):

The Canadian Supreme Court addressed a challenge to a welfare statute that differentiated between people under and over 30 years of age. People under 30 received drastically reduced benefits unless they participated in work and training programs. The Canadian Supreme Court found this was not unconstitutional under a test requiring an assessment of whether: 1) there is a pre-existing disadvantaged (the Court concluded that people under 30 are not stigmatized or suffer disadvantage as a groups); 2) the means are reasonable in light of the goals (the Court concluded that remedial training and education were reasonable means to achieve self-sufficiency and social security for this age group); and 3) the impact of the scheme undermined human dignity or failed to recognize those affected a fully participating members of society (the Court concluded that work training and education affirmed such dignity and participation).

Non-Litigation/Advocacy Approaches:

Letter to Santiago A. Cantón, Executive Secretary, Inter-American Commission on Human Rights (2005):

In this letter, dated March 2, 2005, a number of major human rights organizations (including Human Rights Watch Oxfam America, Human Rights First, the Center for Constitutional Rights and the National Economic and Social Rights Initiative and the US Human Rights Network) call on the inter-American Commission on Human Rights to investigate U.S. labor abuses in Florida. In particular, the groups ask the Commission to pressure the United States to pursue affirmative measures to prevent corporate abuses, rather than after-the-fact remedies once the abuses are committed.

(Editor's Note: Letter reproduced below.)

Executive Summary: BLOOD, SWEAT AND FEAR: HUMAN RIGHTS ABUSES IN U.S. POULTRY PLANTS, Jan. 2005:

This recent Human Rights Watch Report chronicles human rights abuses in the United States poultry industry. Like other recent HRW reports focused on the U.S., it applies human rights standards directly to practices of U.S. industry and government.

Interestingly, a few days after the report was released, the U.S. General Accounting Office issued a report that covered much of the same ground, with many of the same findings.

(Editor's Note: Full text of HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: HUMAN RIGHTS ABUSES IN U.S. POULTRY PLANTS, available at <http://hrw.org/reports/2005/usa0105/>).

Preliminary Questions for Workshop B Participants:

Justiciability in a Comparative Context:

What relevance do the South African cases on economic, social and cultural (ESC) rights have for US advocates? What relevance do Canadian cases have for US advocates? Are there legal theories or lawyering strategies used in these countries that can be translated for use in the US? And what are the strengths and weaknesses of each approach, i.e., progressive implementation vs. equal protection, in the US context?

Can US courts ever be reassured that they have the authority to adjudicate ESC rights, and that if they adjudicate such rights, their authority will not be undermined through other branches' non-compliance?

American exceptionalism:

Is the notion of American exceptionalism an element of US culture? Can lawyering strategies address the cultural aspects of this apparently deep-seated orientation?

Subnational advocacy:

In light of federal obstacles (e.g., negative Supreme Court precedent, hostile executive) what are the opportunities and pitfalls of working for implementation of ESC rights on the state and local levels? How does federal recalcitrance influence state level approaches? How could state level advocacy influence federal policies?

Northeastern Law School's Niche

What leadership role could Northeastern Law School's Program on Human Rights and the Global Economy play in promoting the justiciability and implementation of ESC rights in the US? Does our unique co-op system create any special opportunities?

**Letter to Santiago A. Cantón, Executive Secretary, Inter-American
Commission on Human Rights**

March 2, 2005

Santiago A. Cantón, Esq.
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
1889 F Street, N.W.
Washington, D.C. 20006, United States

Dear Mr. Cantón:

The undersigned organizations submit this letter amicus regarding the question of corporate and government responsibility for the poor human rights conditions of agricultural workers in Florida. The human rights of Florida's farm workers are under serious threat because of:

Forced labor and slavery: More than 1,000 agricultural workers in Florida have been subjected to forced labor and slavery. United States has criminally prosecuted these crimes under federal laws in six successful cases over the past seven years, resulting in the sentencing of individuals to prison terms as lengthy as fifteen years. Despite these welcome efforts at enforcement, ongoing investigations by the U.S. Department of Justice indicate that agricultural workers in Florida continue to work under slavery and forced labor conditions. ¹

Poor working conditions and lack of access to health care: Approximately 83 percent of agricultural workers nationally have no health care coverage. Most also work excessive hours, suffer increased injuries due to the physically demanding nature of their work, and are routinely exposed to dangerous toxins. ²

Low wages: The wages of agricultural workers in Florida are insufficient to guarantee the preservation of health and well-being. Agricultural workers in Florida earn from U.S. \$2,500 to U.S. \$7,500 on average per year, depending on a number of factors including immigration status. Even if a worker picks tomatoes (a common crop in Florida) at the standard pace during a 12 hour day, he or she would harvest daily at least over 1 _ tons and earn U.S. \$50 per day, which amounts to an annual full time salary of U.S. \$8,000. The poverty line in the United States for 2004 was defined by the U.S. Department of Health and Human Services as U.S. \$9,310 for a single-person household. Therefore, such wages are far from sufficient for workers to access decent housing and other necessities. ³

The United States government should fulfill its responsibilities to protect agricultural workers in Florida from human rights violations and take steps to prevent further violations. The private sector, in particular the corporate sector, should comply with the law as well as recognize its role in ensuring that the human rights of its workers are respected. The U.N. Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, which remain under study and are not binding, but do represent evolving standards within international law, state:

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote,

secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law.
Id. at para. ⁴

In 2002 a federal court presiding over the Florida slavery cases pointed to the unique capacity of corporations to protect human rights. Judge Moore of the U.S. Southern District Court of Florida, referring to corporate actors, stated that “there are others at another level in this system of fruit-picking, at a higher level, that to some extent are complicit in one way or another in how these activities occur.” ⁵ The concentration of buying power among a small number of corporate purchasers of agricultural products in Florida makes them uniquely positioned to use their influence to demand greater respect for farm workers’ rights and improved working conditions for farm workers in that state. The Coalition of Immokalee Workers (CIW) has called on them to do so.

While purchasing corporations are well-positioned to influence the human rights situation in the agricultural sector in Florida, the obligation to respect and ensure rights primarily resides with the U.S. government. Currently, the U.S. government has a discriminatory scheme for labor protection that excludes farm workers from the National Labor Relations Act, denying them protection for exercising their right to organize and form unions. Similarly, unlike most workers, farm workers are not guaranteed overtime pay under the Fair Labor Standards Act (FLSA). Moreover, even existing minimum wage and workplace safety protections, found respectively in the FLSA and the Occupational Safety and Health Act (OSHA), are severely under-enforced, contributing to the poor working conditions in Florida’s agricultural sector.

While the United States has rightly pursued prosecutions for forced labor and slavery, it also must take action to prevent such violations. Prevention requires addressing discrimination and ensuring basic economic and social rights. It also requires allowing agricultural workers who have suffered human rights violations to switch employers without facing immigration consequences and the development of legislative and other mechanisms for ensuring corporations are held accountable (ideally both growers and purchasers) if they knowingly profit from severe human rights abuses such as slavery and forced labor. ⁶

As an important first step to address this situation, we call on the Commission to investigate these conditions among agricultural workers in Florida through site visits and further reporting. Secondly, we urge the Commission to ask the government of the United States to consider measures such as eliminating discrimination against farm workers in existing labor laws, granting workers who face serious abuses in their workplaces the opportunity to switch employers without immigration repercussions, and holding corporate purchasers accountable for knowingly purchasing products that were produced under conditions amounting to one of the most egregious human rights violations—slavery and forced labor.

We thank the Commission for addressing this serious human rights situation in the United States.

Amnesty International

Center for Constitutional Rights
Global Rights
Human Rights First
Human Rights Watch
National Economic and Social Rights Initiative
Oxfam, America
RFK Memorial Center on Human Rights
U.S. Human Rights Network

[1]See LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE, [hereinafter Oxfam Report] Oxfam America, March 2004, p.10. Slavery and forced labor are clearly prohibited by human rights law. The American Declaration on the Rights and Duties of Man [hereinafter American Declaration], which is not binding on the United States, Article XXV states that “[n]o person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.” Labor and forced slavery are also prohibited by a wide range of international human rights instruments applicable to the U.S. including the International Covenant on Civil and Political Rights, U.N. Res. 2200A (XXI), entered into force March 23, 1976 and ratified by the U.S. on June 8, 1992; and the Declaration on Fundamental Principles and Rights at Work, para. 2(b), International Labour Organization (1998).

[2]See OXFAM REPORT, pp. 13-16. The right to health and to safe work conditions are protected by Article XI of the American Declaration, which states that “every person has the right to the preservation of his health through ... medical care, to the extent permitted by public and community resources” and by Article XIV that states that “every person has the right to work under proper conditions.”

[3]See OXFAM REPORT, pp. 2, 18, 21-22. Art. 14 of the American Declaration guarantees the right of every person who works “to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.”

[4]The U.N. Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

[5]United States v. Ramos, No. 01-14019-CR-Moore, Sentencing Hearing, Tr. at 33 (S.D. Fla. Nov. 20, 2002).

[6]International and regional human rights treaties require governments to respect and ensure human rights. See, e.g. International Covenant on Civil and Political Rights, article 2. The obligation to “ensure” has been interpreted to require prevention and punishment of private interference with protected rights. See Velasquez Rodriguez Case, Inter-Am. Ct. H.R. 35, Ser. C, No. 4, OAS/Ser.L/V/III.19, doc. 13 (1988); X & Y v. The Netherlands, Series A. No. 91, Application No. 8978/80 Eur. Ct. J. 8 EHRR 235 (1986) (State must provide remedies for private sexual assault of a mentally disabled person.).

**SUMMARY REPORT:
WORKING GROUP B: ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN THE UNITED
STATES: NEW LAWYERING STRATEGIES**

By
Martha Davis and Cathy Albisa

This working group focused on three key issues that arise in advocacy employing human rights concepts in the United States: (1) justiciability; (2) American exceptionalism; and (3) the role of subnational governments. In the course of exploring these issues in some detail with the experts attending the workshop, we also elicited specific ideas that will inform the development of Northeastern's program in this area.

We began with a broad discussion of justiciability – including a query about how to respond to skeptics who question the relevance of ESC rights jurisprudence to the U.S. experience. Our initial conversation focused on impact litigation. As a strategic matter, there are strong arguments in favor of continuing to raise ESC rights in courts even when judges are on record as being uninterested or even hostile. The South African experience does not provide a complete analogue here; to a large extent, South African decisions in the ESC area are textually driven, and there is no comparable text in the U.S. constitution. However, the constitutional text is not the only factor informing these paradigmatic ESC rights decisions. As one participant (a judge) noted, “judges are influenced by what is presented to them,” and that presentation can be shaped by lawyers who creatively raise ESC rights. And there are already a few bright spots in the U.S.: a Supreme Court majority has accepted the utility of international and comparative precedents, and litigation under the Alien Tort Statute has had the effect of implementing some international human rights standards domestically.

At the same time, several participants bemoaned the state of the judiciary, and cautioned that efforts to expand ESC rights might result in a backlash. For example, one participant suggested that pressing ESC rights in this political climate might dilute important efforts to counter attacks on so-called first generation rights such as due process or freedom of speech. Nevertheless, he cautioned against viewing these rights as competing and urged that we seek ways to clarify that ESC rights and political/civil rights actually converge.

One participant described the illuminating model of how international law has been incorporated into U.S. political asylum law. From the initial legislation, which was explicitly based on international conventions, interpretations of the domestic law have continued to be influenced by other countries' approaches. This model has so far not extended to subnational governments, however, despite the fact that immigration issues are increasingly taken up at the local level. This federalism wrinkle has forced immigration lawyers to think creatively about how to translate international precedents for state and local governments.

As one participant noted, the key to progressive realization of ESC rights on both the federal and state levels may be to shift the focus from individual judges to broader efforts to organize social movements or educate legislators. Such efforts are particularly important because so many social policies are heavily influenced by multinational corporations, which may be beyond the scope of any single case or jurisdiction.

Human rights paradigms may provide fertile ground for organizing people to claim their rights. However, there are many challenges. One that was pointed out by both an organizer and a legal services lawyer is the fact that many people have an exaggerated view of the civil rights movements' success. For example, they may believe that under U.S. law there is already

an established “right to work” or a “right to live.” Perhaps if there were a more general understanding of the limitations of current U.S. law, it would lay the groundwork for a more vibrant human rights movement in this country. Similarly, as the civil rights movement recedes from memory, its lessons exercise less influence over the judiciary. South African jurisprudence clearly benefits from the memory of the recent civil rights movement; in the U.S., such memories are less vivid and less influential. Thus, in more than one way, a new human rights movement is a critical component of moving ahead successfully in the courts.

In light of this state of affairs, the group then examined what Northeastern’s role might be in promoting a human rights culture in the U.S. Public education and judicial education were major themes, with several participants suggesting that these are areas that Northeastern should particularly explore. As one participant noted, educational efforts directed at the judiciary are necessary to create a bridge between the legal strategies to incorporate human rights paradigms into domestic law and the political movement for human rights. One of the judges in attendance also pointed out the importance of giving judges space to talk “off the record” regarding controversial issues and to re-examine their fundamental assumptions. Such gatherings have been very effective in South Africa and there are domestic models as well. Universities have a special role to play in providing such safe spaces, facilitating hard conversations and encouraging self-reflection.

Finally, one participant zeroed in on the uniqueness of Northeastern’s co-op [co-operative legal education] program to suggest that our students might serve as human rights resources nationwide and internationally as they fan out for their co-op placements. Because of the co-op program combined with the depth of the human rights training available through our course offerings and faculty, Northeastern has the unique ability to provide international and comparative law expertise and human rights analyses – particularly in the area of ESC rights -- to dozens of advocacy groups and law firms each year. Over time, this could have a tremendous impact on the bar’s readiness to incorporate human rights norms into advocacy approaches.

Editor's Note: The following materials were distributed in advance to participants in Working Group C: Human Rights Law and the Challenges of Contemporary Development. The Program on Human Rights and the Global Economy understands "development" and "human rights" to raise important related issues. How should the increasing significance of non-state actors such as transnational corporations influence international human rights or other social justice norms? To what degree is transnational corporate decision-making influenced by such norms, and how? Can, or should, human rights strategies inform development law and policy? To what extent are "development" and "human rights" goals inextricably linked? Are they in intractable tension?

**FRAMING MATERIALS:
WORKING GROUP C
HUMAN RIGHTS LAW AND THE CHALLENGES OF CONTEMPORARY DEVELOPMENT**

By
Dan Danielsen and Rashmi Dyal-Chand

In the working group session on "Human Rights Law and the Challenges of Contemporary Development" we plan to explore the intersection between economic, social and cultural (ESC) rights and development efforts, as well as the interaction and trade-offs between ESC rights strategies and other legal strategies.

To focus our conversation, we will begin by asking for reactions to the hypothetical and list of questions below. In addition, to further stimulate your thinking, we have attached a short excerpt from a forthcoming article by Dan Danielsen that deals with some of the themes raised by the hypothetical and questions. You need not prepare a statement in response to these materials. We look forward to what we hope will be a free-flowing and open discussion.

Please bring along copies of your own articles or materials describing your organization and its work to share with others at the Consultation.

Hypothetical and Questions for Discussion

A joint Senate and House of Representatives committee of the US Congress has been tasked with considering the advisability of a proposed federal statute that would make all federal environmental regulations applicable to the operations of US corporations abroad, including their foreign subsidiaries. The committee has asked our working group to provide consultation on the advisability of the proposed statute. The committee has recognized that the proposed statute may raise issues under international law regarding the jurisdictional authority of the US to take such regulatory action but it has asked the working group not to address these jurisdictional issues.

Discussion Questions

1. Could the proposed statute increase global environmental protection without slowing the progress of global development or disabling US multinationals as an engine of global growth? What about the competitive pressures on US firms from multinationals from other jurisdictions not subject to the statute? How should we think about the costs and benefits of such a "go it alone" regulatory strategy by the US?
2. What about the problem of sovereignty? Should we worry? Might such a move enhance the

regulatory options of developing countries by reducing regulatory competition or strengthening their capacity to set a floor for environmental regulation? What research would be needed to make the case for (or against) such legislation?

3. Would the presence (or absence) of economic, social and cultural rights (ESC) in a developing country's domestic constitution, laws, or rhetoric make that country more or less receptive to the proposed statute or other types of global welfare regulation by the US through national legislation?

4. Would the proposed statute square with the norms and goals of international human rights, including ESC rights, in respect of environment and development? Do human rights generally, or ESC rights more specifically, offer a better way to proceed?

5. Would it be realistic to think of this legislation as a meaningful response to international criticism of the Bush administration's rejection of the Kyoto Protocol to the U.N. Framework Convention on Climate Change by addressing global environmental welfare from outside the Kyoto framework? Assuming both international human rights and the proposed statute might be understood to entail interventions into the sovereignty of developing nations and the autonomy of multinational corporations, is the imposition of a human rights regime more acceptable than the extra-territorial application of US environmental laws?

6. Based upon your experience, what do you think the development effects of the proposed statute might be? Would it be good for development? What, if any, do you see as its upsides? What potential risks does it entail?

7. Are there other better regulatory means to accomplish the development and environmental purposes of the proposed statute? What about self-regulation, such as codes of corporate conduct? What about multilateral efforts such as the Rio/Kyoto regime, the WTO or UN or OECD efforts at corporate regulation? What about national or even more localized or indigenous efforts? Some combination?

8. Are the environmental and development issues at which the proposed statute is aimed best addressed with a single global model? Different models for the developed and the developing world? A range of particular models? If so, which model(s) is/are preferable for what contexts?

9. What constituencies should be consulted in order to make an informed decision about the questions raised by the proposed statute and what mechanisms or fora might be used to enable participation by those constituencies? What organizations or constituencies would be most likely to actually get involved either in support or opposition?

Editor's Note: The following forthcoming article, along with a Framing Memorandum, was circulated to participants in the Working Group on Human Rights Law and the Challenges of Development as a means of stimulating discussion. It is well understood that transnational corporate behavior in a global economy implicates human rights. Human rights advocates and other social activists therefore often seek to influence the legal regulations and public institutions to aid in curbing corporate activity perceived to be negative. But what are the implications of internal corporate governance and "private" corporate strategies and decisions?

HOW CORPORATIONS GOVERN: TAKING CORPORATE POWER SERIOUSLY IN TRANSNATIONAL REGULATION AND GOVERNANCE*

By
Dan Danielsen**

It would seem to be a relatively uncontroversial claim among scholars, activists, and policymakers that corporations are significant contributors to the shape and content of national and transnational regulation and that their contributions have significant effects on social welfare. Yet, despite this general consensus, scholars have focused little attention on explicating the precise mechanisms through which corporations contribute to transnational regulation and governance or the extent to which the social welfare effects of regulation and policy may be attributable to corporate activity.

In this Article, I suggest the broad contours of a methodology for beginning to think about the question, "How do corporations govern in the transnational arena?" In so doing, I explore how scholarly attention to the role of corporations in transnational regulation and governance can contribute to the development of a richer understanding of the functioning and effects of the existing transnational governance regime. At the same time, through an analysis of some examples drawn from twelve years of practice as a transnational business lawyer, I suggest how an understanding of transnational governance, enriched through a focus on corporate activity and decisionmaking, can expose new sites for political contestation and new strategies for intervention by regulators, policymakers, and activists seeking to harness and shape corporate power for the public good.

I. HOW CORPORATIONS GOVERN

To understand the role of corporations in transnational governance, one must start with a picture of the transnational regulatory regime. Transnational business regulation has long been understood as a complex matrix of overlapping local, national, regional, and international legal regimes. The content of these regimes is the product of a dynamic interaction between the applicable legal rules and the actions, both required and discretionary, of regulators and corporate actors. For example, the transnational regime for antitrust can be seen as the cumulation of national and regional legal rules given content by the exercise or non-exercise of territorial and extra-territorial jurisdiction by regulatory authorities and corporate competitors and of the behavior of corporate actors in relation to the activities of the regulatory authorities and competitors. In the transnational context, these actions and reactions, assertions of jurisdiction, failures or refusals to assert jurisdiction, and uncertainties about the scope of jurisdiction combine to produce moments of both clarity and doubt about the content of legal rules as well as numerous gaps and conflicts among and between the rules, regulators, and corporate actors.

Who makes the rules, fills the gaps, and resolves the conflicts and ambiguities in this complex transnational regulatory arena? What is the role of corporate actors in this drama?

To explore these questions, we need a rough typology of specific modes through which corporate actors create and shape regulatory regimes. Sometimes corporations contribute through interpretations of or reactions to a legal rule scheme. Sometimes they supply rules where none exist. Sometimes they shape the rule scheme through direct political or economic pressure on regulators. Sometimes they shape it by evading the rule scheme and doing business elsewhere. Sometimes, to satisfy other business purposes, they adopt more stringent practices than the applicable rules require. Sometimes they act on their own to get a market edge or exploit an opportunity. Sometimes they act in groups to create a harmonized regulatory environment or to prevent regulation. These diverse forms of corporate actions and decisions are related to both the applicable legal rules and the acts and decisions of regulators, but they are not wholly determined by them. When corporations create or shape the content, interpretation, efficacy, or enforcement of legal regimes and, in so doing, produce effects on social welfare similar to the effects resulting from rulemaking and enforcement by governments, corporate actors are engaged in governance.

II. THE CORPORATION AS REGULATOR

A hypothetical may help to make this typology more concrete. Imagine that a corporation, World Corp., has decided to build a new manufacturing plant in a developing country called Xambia. For a variety of reasons--perhaps lack of resources or to attract foreign investment--the Xambian government has not yet passed any regulations regarding the disposal of wastewater from manufacturing plants. Under the domestic law of Zutopia, the state where World Corp. is incorporated, the wastewater from the new plant would be deemed toxic and require special processing for disposal if the plant were there. However, Zutopian courts have not yet interpreted this regulatory regime to apply to the foreign operations of Zutopian companies.

How might the standards for wastewater disposal be set under such circumstances? One possibility is by way of action (or inaction) by the board of World Corp. Another might be through action (or inaction) by the governments of Xambia or Zutopia. A common way of understanding this type of situation would be to treat the actions or inactions of the governments as "governance" or "regulatory" and the actions or inactions of World Corp. as "private" or "reactive." Yet this description does not do justice to the dynamic interconnectedness of each move and countermove by state and corporate actors. In fact, it becomes quite difficult in the transnational context to discern when the corporate actor or the regulator is "acting" or "reacting" and, thus, which is responsible for any particular regulatory outcome. Once we begin to loosen our customary view that states "act" and corporations "react," it becomes equally difficult to attribute responsibility for the social welfare effects of the regulation to any given actor.

To flesh this out, let us focus first on the board of directors of World Corp. In deciding what level of processing to give to wastewater from World Corp.'s new plant, the board of directors would need to assess numerous factors, including the benefits versus the costs of adopting less stringent wastewater treatment processes than would be required had the plant been located in Zutopia. In making this assessment, World Corp.'s board would need to consider, among other things, the likelihood of Xambia adopting regulation raising treatment standards for wastewater after the plant was built, World Corp.'s ability to influence the content and/or the enforcement of any such regulation, the chances of liability in Xambia from other legal regimes (e.g., the tort system, employment law, rescission of the plant's license to

operate) or non-legal regimes (e.g., public protest, bad publicity, consumer revolt) in the event the disposal of untreated wastewater causes harm, and the risk that the environmental law of Zutopia would be interpreted to apply extraterritorially to operations in Xambia.

An attempt by the government of Xambia to regulate wastewater treatment standards might be met with one of several responses by World Corp. Applying the typology of corporate decisions and actions described above, World Corp. might: (i) acquiesce in the legal standard; (ii) seek to create or exploit ambiguity in the standard; (iii) seek to influence the content of the standard or the likelihood of its enforcement; (iv) choose a higher standard than is required for efficiency or convenience reasons; (v) ignore the standard because enforcement is weak or the consequences of non-compliance are small; or (vi) threaten to build its plant in another developing country with less stringent standards. These actual or anticipated actions by World Corp. and other corporate actors to regulation by Xambia may, in turn, produce a response by Xambia. If corporations choose not to invest in Xambia due to its regulatory scheme or if the government of Xambia believes that they will not, Xambia might change the scheme to be more amenable to (perceived or imagined) corporate demands. If corporations are voluntarily choosing higher standards than those required under current law, Xambia might raise its regulatory standards or it might rely on the corporate ordering process to do the job. Other developing nations competing with Xambia for foreign investment might alter their regulatory schemes in light of action taken in Xambia.

A similar story might be told to the extent that Zutopia, the state of incorporation of World Corp., sought to regulate the foreign operations of Zutopian corporations through the extraterritorial application of its environmental, tort, or corporate rules.

However World Corp.'s board weighs the risks and benefits of particular wastewater treatment schemes, in the absence of clearly applicable legal rules, the treatment standards for wastewater in respect of World Corp.'s new plant will be established by a decision of World Corp.'s board. To the extent that regulators in Xambia and Zutopia acquiesce in or do not react to the standards selected, one could reasonably say the wastewater rule in Xambia is established by the decisions of World Corp., together with the decisions of other similarly situated corporate actors conducting manufacturing operations in Xambia.

Even if regulators in Xambia or Zutopia do seek to establish legal standards, for all practical purposes the ability of Xambia or Zutopia to regulate will be, in part, contingent on negotiations with and the decisions of corporations like World Corp. Whether the state actors and corporate actors are sitting in a room negotiating or dealing through a more informal dance of reciprocal signaling and expectations, it would seem odd to treat the regulatory result as anything other than a joint product.

It goes without saying that the effects of these regulatory decisions, whether taken by World Corp., Xambia, or Zutopia, will extend to workers, neighbors, farmers, local flora and fauna, and perhaps neighboring countries to the extent the wastewater disposal affects shared water resources. In conditions of globalization, any attempt at regulation is just one move and not an endgame. Actions, reactions, and inactions by all players in the system must be taken into account to get an accurate picture of the regime itself. Under such circumstances, if the decisions of corporate actors are indistinguishable from the decisions of state actors in terms of regulatory and social welfare effects, then treating one as "private activity" and the other as "regulatory" or "governance" activity will likely lead to more than ideological confusion. Such counterfactual characterizations may well result in significant misunderstandings about the way the transnational regulatory regime actually functions and in consequent mistakes in

policymaking.

Making this point more broadly, the transnational legal order can only really be understood if we examine the ways in which “private” corporate action (or inaction) and “public” regulatory action (or inaction) interact to create and transform a transnational governance regime. Looking at the legal rules alone only gives us a part of the story. To get a fuller picture of global governance, we must begin to map the decisions of corporate actors as these actors actually function in and contribute to the matrix of legal rules, administrative practices, regulatory uncertainty, and jurisdictional overlap that comprise the transnational regulatory arena. Indeed, mapping the cumulative effects of these decisions may be as significant to understanding the functioning transnational regulatory regime as mapping the legal rules themselves.

Saying that corporate actors participate in transnational regulation and global governance does not imply that they constitute a singular global phenomenon. Like governments and quasi-governmental institutions, corporate actors are diverse. Sometimes corporations are large and sometimes they are small. They may be owned by many investors, by one, or by a few. Their securities may be publicly traded or privately held. They may operate in one industry or in several. They may conduct business in only one jurisdiction, in a few, or in many. Sometimes they are aggressive as to business risk and sometimes they are risk averse. Some focus on short-term gain and others on long-term value. Their operations may be flexible and mobile or fixed and geographically contained.

Intuitively, it seems reasonable to expect that the decisions of corporations would be influenced by their ownership and decisionmaking structures and business orientations. For example, a company working in a single industry or whose business is contingent on operating in a particular geographic location might take a longer term perspective with respect to engagement with regulators or maintaining the goodwill of local interests than a company with more diverse operations or more mobility. Small companies in emerging industries might prefer regulatory uncertainty to a clear, comprehensive regulatory regime that may function as a barrier to entry due to compliance costs or the influence of favored larger players. Corporate managers in privately held companies, who are generally subject to less stringent requirements for public disclosure of decisionmaking processes, might feel more freedom to take certain kinds of decisions or actions than managers in publicly traded companies who are subject to more rigorous disclosure requirements.

In other words, corporations with different types of ownership and decisionmaking structures and business orientations may well take different types of decisions as they pursue their business purposes. If we care about the governance effects of corporate power, we will need to better understand the variables that influence how that power is exercised both at the level of corporate behavior and at the level of corporate decisionmaking.

To summarize, it seems reasonable to expect that a corporation’s ownership structure, decisionmaking structure, and business orientation will each be a function of its business objectives as they interact with the regulatory regimes under which the corporation is formed and managed and to which its decisions and actions are subject. The next step would be to map with much more particularity how this relationship works, in terms of its rules, structures, orientations, and effects.

To give some sense of how this type of analysis might be helpful to regulators, policymakers, and advocates, I will share some examples drawn from my experience as a

transnational corporate attorney. Specifically, I will focus on two trans-boundary regulatory issues that arose when I was general counsel to an interactive media company based in Luxembourg, which I will call for our purposes, Interactive Media. To flesh out the complexity of the regulatory issues presented for Interactive Media, I will briefly describe the company and its business. I will then analyze the examples through the framework developed in this Article.

III. Interactive Media

Interactive Media may well have been the world's first truly interactive media company. Its "product" was a bundle of services including Internet access, streaming video of television quality, and digital television embedded in fully interactive web pages. Customers could receive the company's service either on their home computer or on their television through a special set-top box. Using a combination of satellite technology and ordinary telephone lines, Interactive Media delivered its service to consumers across Europe from the United Kingdom and Portugal to Russia and the Republics of the former Soviet Union.

When I joined Interactive Media as its general counsel, it employed about ten people. The company had just completed its first significant financing, raising approximately \$35 million. In the two years that followed, the company grew to about 150 employees and raised an additional \$70 million in debt and equity financing. With the bulk of the capital going to technology development and satellite license fees, funds for operations were quite limited.

Though a small company, Interactive Media had some significant technological advantages. Among them were the company's methods for embedding streaming video in an interactive web format and for delivering very large data files like music, films, novels, video, and software via satellite in perfect digital quality. Using satellite technology also enabled Interactive Media to avoid the enormous time and expense required by the company's competitors to connect homes across Europe one by one using fiber optic or television cable. Interactive Media's investment bankers estimated that the company's technological advantages put it ahead of all of its market competitors by three to five years.

With this background, we can turn to an analysis of the transnational regulatory problems the company faced.

Online Customer Contracts

The first regulatory problem involved determining what law governed Interactive Media's standard online customer contracts. The company's product was distributed to consumers in three ways--through online registration, through sales by satellite television distributors, and through point-of-purchase sales at retail shops. All of these modes of purchase and sale required the subscribing customer to enter into an online contract to activate the service. Several factors made determining the legal framework that governed these contracts difficult.

The first issue was the geographic reach of Interactive Media's product. Interactive Media's satellite signal could be received in twenty-seven countries, and its website could be accessed from anywhere in the world via the Internet. As there was no way to know technologically where a customer was actually located, either when entering into an online contract or receiving the service, the contract and consumer protection laws of at least twenty-seven countries were potentially implicated in the sale of the company's service. In addition, the information costs of discerning and analyzing the applicable law and regulatory policy in all these jurisdictions were prohibitively high. While the European Union (representing a subset of

the total number of countries in the company's potential market) had some regulation regarding unfair contract terms and distance selling contracts, the basic contract and consumer protection law of the European Union's member states were not harmonized.

It might have been possible to solve the governing law problem for the company's online customer contract by drafting an enforceable choice of law provision. However, there was considerable variation in national choice of law rules, particularly when consumer protection issues were involved. Thus, discerning the choice of law rules and crafting a provision that would be reliably enforced in most or all jurisdictions were as complex as determining the applicable contract and consumer protection law itself.

In the end, the terms of Interactive Media's online customer contract were derived from the applicable laws of its most important target markets--Germany, Belgium, France, and the Netherlands. Not all of these countries had rules governing the enforceability of an online contract or the mechanisms for amending the contract's terms after the parties entered into it. Some did have consumer protection statutes mandating terms to be implied into or imposed on consumer form contracts--terms such as opportunities to cancel, warranties that could not be disclaimed, and limits on permissible liability disclaimers. In addition, some strengthened the penalties for noncompliance with compulsory contract terms using provisions for refund rights and/or statutory damages.

Ultimately, Interactive Media's online customer contract was prepared using the most consumer-friendly rules in its key markets. For example, the contract contained an absolute right of cancellation for seven days as required by German law in all the jurisdictions where the company operated. The legal risk assessment here was that most other jurisdictions would have less stringent consumer protection provisions than the ones the company provided. If it turned out that a particular jurisdiction did have a more stringent rule, the company hoped that severe penalties would be unlikely if it had made a good faith effort to comply with the most consumer-friendly rules in important sister jurisdictions.

This example illustrates how corporate actors such as Interactive Media contribute to the transnational regulatory regime. It also suggests how a focus on the role of corporate actors in the regulatory process illuminates important considerations that scholars, advocates, and policymakers might otherwise miss through a more traditional focus on public regulators and legal rules.

First, Interactive Media's approach to its online customer contracts suggests that corporations engaged in transnational business activity strategize about which rules to follow among the range of potentially applicable rules. Scholars and policymakers seeking to better understand the dynamics of transnational regulation will need to expand their analyses beyond a focus on determining which national or supranational rules might be applicable to particular business conduct to exploring which rules corporations actually follow and why. Under what circumstances will a particular sort of company with a particular type of business objectives internationalize uniform business practices designed to comply with the high regulatory requirements of one or more markets into markets with lower regulatory requirements? When will they choose to adjust their business practices on a country-by-country basis to take advantage of national variation in regulatory requirements?

Second, the customer contracts example also suggests that when corporations are subject to multiple unclear rules in multiple jurisdictions, they may seek to develop rules of their own. The result can be a kind of international "private" private law. If this practice turns out to

be pervasive in the transnational business context, and I suspect it is, it might be the case that some of the most important rules governing transnational economic activity are written in *international standard form contracts, business plans and internal corporate governance documents* as well as in national consumer protection, environmental, health, and worker safety laws. Scholars, advocates, and policymakers will need to look to corporations and corporate activity in addition to public regulators and the rules on the books if they are to get an accurate picture of the effects of transnational business on social welfare.

Third, while corporate action sometimes encourages a regulatory “race to the bottom,” sometimes the rules drafted by corporate actors offer protections that exceed those available through national or transnational law. In the case of Interactive Media’s online customer contracts, private rulemaking resulted in a kind of “race to the top”—or at least upward. Interactive Media’s customers got very consumer-friendly contract rights, including a seven-day cancellation right, even when their national law did not require it. By contrast, a move to transnational harmonized regulation may have made things worse for consumers. In the unlikely event that some or all of the twenty-seven jurisdictions in Interactive Media’s market came together to regulate online contracts and consumer protection, it seems quite possible that highest-level standards from Germany and France would not have survived the harmonization process. Although Interactive Media might have preferred harmonized rules in this circumstance, many of its customers were arguably better off with a system of disaggregated national regulation and ordering through corporate action than they would have been under their own national regimes or under a harmonized regulatory regime.

If corporate ordering is an important component of transnational regulation, then it would seem crucial for activists and policymakers to understand the circumstances under which corporate ordering might enhance, rather than detract from, the achievement of their policy goals. One possible strategy that might merit further investigation emerges from the customer contracts example. The contract and consumer protection regimes of Interactive Media’s key markets turned out to be very important to its decisionmaking with respect to the terms of its customer contracts. If, as seems likely, corporations frequently place importance on regulation in key markets when devising international business strategy, it might make sense in circumstances where corporations are likely to adopt uniform transnational standards to focus activism and policy attention on enhancing the applicable standards in key markets like the United States or Germany and use corporate ordering to “internationalize” those standards rather than seeking to alter the rules in countries with lower standards on a jurisdiction by jurisdiction basis or through a supranational harmonization process. Of course, to do so would require a sophisticated understanding of corporate strategy and decisionmaking processes by policymakers and activists to ensure that the desired policy goals would likely result.

Although corporate ordering may sometimes produce social welfare benefits, there may still be some downsides to corporate ordering as opposed to regulating through public governance institutions. When rules are established through corporate decisionmaking rather than more public legislative processes, some interests may be substantially less likely to influence the regulatory process. For example, Interactive Media never consulted with consumers when devising the legal terms of its online form contracts for customers, though, over time, its customers’ views might have been evidenced by their willingness to buy the company’s service. Nor were the regulatory interests of countries other than Interactive Media’s key markets fully taken into account. It is possible, for example, that some jurisdictions had legislatively determined that low consumer protection standards and a “buyer beware” approach were in the long-term interest of their citizens. By imposing higher standards through customer contracts, this policy might arguably have been undermined. These examples suggest that the

corporate ordering scheme that produced Interactive Media's high consumer protection standards may nevertheless be deficient from the perspective of democratic or interest group participation because it offered little opportunity for stakeholder input in the standards setting process.

The customer contracts example suggests one way that corporations participate in transnational regulation and governance--through strategizing about which rules to follow and creating their own rules to avoid conflicts with differing national rule schemes. A second Interactive Media experience suggests some quite different corporate ordering strategies and some ways in which policymakers and activists might work with those corporate strategies to achieve regulatory and policy goals.

IV. WAS INTERACTIVE MEDIA A TELEVISION BROADCASTER?

Interactive Media was a new kind of company, offering a new kind of service. It did not fit neatly into existing regulatory categories. A "make or break" question for the company was whether it would be regulated as a television broadcaster. Every jurisdiction in which it operated regulated and licensed broadcast television. Television broadcasters in Europe typically began as national monopolies, subject to numerous regulations regarding licensing, advertising, and programming content.

If Interactive Media was regulated as a television broadcaster it would have faced innumerable business and financial challenges. For instance, Interactive Media's service offered television programming with television advertising embedded in web pages that also carried the advertising of its online sponsors. Since one of the most highly regulated aspects of broadcast television was the relationship between advertising and programming, conflicts in this area would have been inevitable. This problem was exacerbated because Interactive Media offered its multimedia service in twenty-seven jurisdictions, each with slightly different regulatory schemes. Unlike the situation involving customer contracts, no "pick the high standard" solution was plausible in this case.

A second problem involved broadcast licenses. Even if Interactive Media could have obtained broadcast licenses from national regulators over the objection of large national broadcasters, the licensing requirements and fees in each jurisdiction were beyond the company's financial reach.

The applicability of the broadcast regulations to new media services like Interactive Media's was unclear. The applicable national statutes typically purported to regulate "the broadcast of television signals." In some ways, Interactive Media resembled a broadcaster. For example, the company produced and distributed its own programming content. It also distributed programming produced by other broadcasters for reception in a web environment on home computers and televisions, and customers subscribing to the company's service could "watch TV" received from the company's satellite signals.

There were, however, some significant differences between Interactive Media's service and traditional television broadcasting. In order to deliver its service in an interactive web-based format, Interactive Media was required to re-encode broadcast television signals digitally into data signals. Thus, although Interactive Media's service looked like "TV in a web page," it was actually, technically speaking, streaming data. This distinguished the company from satellite and cable television providers that frequently encrypted the television signals they carried but

did not transform them from television to data format. The service was also received differently from broadcast television in that only paying subscribers could receive the company's service. In this sense, Interactive Media was analogous to satellite and cable networks, which regulators frequently treated as distributing or re-broadcasting the television signals of already licensed broadcasters, and therefore not required to obtain an independent broadcast license. In addition, from the perspective of regulatory policy, broadcast to the general public might be thought to raise different regulatory issues than services provided to self-selected consumers who chose and paid for the programming content delivered.

At the same time, the regulatory situation for multimedia companies streaming data signals was evolving. For example, the United Kingdom had begun to hint in some administrative decisions that streaming data would likely be treated as "television" subject to the broadcast regulations, although no other national regulator had spoken on the matter. The European Union, which had passed some European broadcast regulations, had left open the treatment of streaming data to permit more fact-finding as new technology markets and services like Interactive Media's evolved.

In this situation, the company pursued a strategy quite different from the one used with respect to online customer contracts. It did not sell its service in the United Kingdom, which looked as though it might apply its broadcast regulations to streaming data providers, and it interpreted the relevant national regulations in other jurisdictions not to require a broadcast license. The company's strategic plan was to exploit the current regulatory uncertainty and build its business as quickly possible. The hope was that by the time the regulatory situation began to be clarified, the company would have the resources and customer clout to participate meaningfully in the regulatory process and, if necessary, pay any applicable license fees. The company also anticipated that the regulatory status of streaming data providers would evolve jurisdiction by jurisdiction rather than at the European level. Interactive Media preferred incremental national changes to a European-wide solution that, it feared, might have regulated new media companies like Interactive Media out of existence.

What can be gleaned from this example? Again, we see multiple legal regimes and a corporation strategizing about how to comply with them. But, in this case, corporate ordering produced a movement away from regulation in the sense that Interactive Media interpreted the broadcast licensing regulations not to apply to them. Again, important actors and significant interests were not involved in the corporate decisionmaking process--new data services were able to avoid the strict television and advertising regulation that parent and consumer groups had fought for years to get enacted. But, on closer examination, the story seems more than just a matter of "business interests" escaping "public interests."

Rather, as in most regulatory policy struggles, this case involved multiple interests on each side. For example, the "public interest" was anything but uniform--the parent groups supporting television licensing and advertising regulation were opposed by other consumer groups seeking access to new technologies and entertainment formats. "Business interests" were no more uniform--new technology companies, like Interactive Media, sought exemption from the burdens and expense of television regulation and licensing, and broadcasters sought to slow the development of a competitive new media industry through broad application of licensing requirements. It is important to note that these were not only differences of regulatory policy. They also went to the structure and sources of regulation. Growing new media companies like Interactive Media preferred regulatory uncertainty to clear rules and national regulation to a harmonized European standard that might well have functioned as a barrier to entry or a significant impediment to the development of a pan-European new media

industry. By contrast, large broadcast companies sought clear national and E.U. regulation that would require licensing of new media companies, believing that their significant political access and clout would ensure a favorable regulatory outcome.

Thus, had national regulators addressed these issues affirmatively, they would have been forced to choose between the interests of at least two industries and between competing visions of the consumer interest. European regulators did not avoid taking sides by not acting. By leaving the regulatory situation unclear, they facilitated the growth of new technology businesses at the expense, perhaps, of national television interests and supported consumers favoring more freedom of choice for media entertainment to the detriment of those favoring more state control over programming content and advertising. It is hard to avoid concluding in this case that both national and E.U. regulation and policy with respect to streaming data was the product of the exploitation by new media companies like Interactive Media of a restrictive interpretation of the existing broadcast regulations and the acquiescence in that exploitation by national and E.U. regulators.

This conclusion points to another. Where corporate actors set regulatory policy through strategic corporate behavior, the background rules that influence their bargaining power relative to other market actors may have a significant impact on the regulatory regime that results. It was the vagueness of the definition of “television broadcasting” that set the terms for Interactive Media’s relations with national broadcasters. Under these circumstances, one might say that the balance between different consumer and business interests was established by the ability of companies like Interactive Media to make their restrictive interpretation of the broadcast definition stick.

This example suggests another possible strategy for using corporate behavior and corporate ordering to shape transnational regulation and policy. While it is sometimes the case that regulatory policy is thwarted when corporations avoid or evade rules, the broadcast example suggests that in some circumstances, regulators might achieve desired policy results by conscious strategies to facilitate such “evasion” or “avoidance” when it strengthens business activity in desired policy directions. The development of the new media industry and technologically innovative media products and services in Europe was in no small measure assisted by regulators not revising or expanding the existing definition of broadcast television and not creating new rules to address streaming data. Whether this particular example reflects a conscious strategy or an unintended omission on the part of regulators, it certainly demonstrates how, with the right understanding of strategy and goals of affected business interests, regulators might combine rulemaking action or inaction with anticipated corporate activity to bring about desired policy outcomes.

V. CONCLUSION

The World Corp. and Interactive Media examples suggest a number of ways in which corporate action produces significant transnational regulatory and social welfare effects.

The World Corp. example suggested how even the development of a national rule on the treatment of manufacturing waste emerges out of a complex dynamic process of real and imagined moves and countermoves between public governance institutions and corporate actors. This view of transnational regulation and governance challenges a more traditional one that sees passive (private) corporate institutions as governed by and reacting to regulation created by active (public) national and supranational regulators. If both “public” and “private” institutions are governing and governed by a regulatory regime of their joint production, then

accountability for the social welfare effects of regulatory outcomes should not fall exclusively on “public” regulators and the actions and decisions of “private” corporate actors should not be exempt from public participation, review, and political contestation.

In the Interactive Media examples, we saw some ways in which transnational corporations govern through their decisions and actions and some strategies for how regulators might shape or harness corporate ordering processes to achieve regulatory and policy aims. In the example of online contracts, we saw that knowing the consumer protection rules contained in customer contracts might be as important as the statutes on the books if we are to understand the consumer protection regime as it functions on the ground. We also saw that corporate ordering sometimes produced higher standards than public legislative processes and that, in some circumstances, regulators could work with corporate ordering to bring high standards to jurisdictions with low standards. In the broadcasting example, we saw that corporate actors sometimes regulate by interpreting or avoiding potentially applicable rules to suit their business purposes. We also saw that sometimes regulators regulate through inaction instead of action. Through a narrow interpretation of existing rules or a refusal to create new ones, regulators might consciously direct corporate activity in desired policy directions by facilitating corporate actors whose activities they support to exploit the gaps or ambiguities in the rules.

Perhaps most importantly, in all of these examples, we saw that the decisions and actions of corporations have social consequences largely indistinguishable from those created by public regulators, but that corporate decisionmaking was largely insulated from public participation, engagement, or scrutiny. Generally, policymakers and activists seeking to influence “public” governance institutions focus on the mechanisms by which these institutions are themselves governed assuming that the internal authority structures, decisionmaking processes, and deliberative procedures within these institutions can have a significant impact on the policy outcomes they produce. If corporations are significant institutions in the transnational governance regime, then policymakers and activists will need to find ways to affect the decisionmaking of these corporate institutions to shape their incentives, bargaining power, and business strategies, and to make their internal decisionmaking processes more visible and open to political contestation.

The legal regime that is addressed most directly to the structure and decisionmaking of corporations is corporate law. While the particulars of corporate law vary from jurisdiction to jurisdiction, it is generally concerned with the creation, operation, rights, duties, and liabilities of corporations, as well as the rules, structures, and practices that organize decisionmaking and power within corporations. Corporate governance is generally understood to be about the relationship between shareholders and managers within an individual firm and the allocation of power, rights, duties, and rules of decision to manage that relationship. But situating this regime of corporate law and governance within the broader context of the transnational regulatory regime and global governance gives it a new significance.

If corporate decisions are significant in shaping the transnational regulatory regime, then the internal governance mechanisms and strategic decisionmaking processes for corporate actors should be of interest, not only to investors and managers, but to any constituency affected by corporate power. For example, participation by labor representatives on the boards of German corporations may affect the sorts of decisions they make in respect of wage rates or worker safety wherever those corporations do business. Corporate directors subject to a regime of permissive fiduciary duty rules with respect to business judgment may be less concerned about decisions that benefit the corporation but involve a low risk of highly adverse

social welfare consequences (say setting low safety standards or environmental standards in a foreign plant) than directors subject to higher fiduciary standards and scrutiny of business decisionmaking. From these examples, one can see that understanding how corporations are governed becomes important, not only for persons trying to shape corporate activity domestically, but also for all those trying to affect the global governance regime itself.

In this Article, I have suggested that beginning to answer the question--“How do corporations govern transnationally?”--will require significant scholarly attention to three distinct areas. First, we need to better understand the specific mechanisms through which corporations create and shape transnational regulation and policy. Second, we need to better understand how differences between corporations--such as size, industry, risk profile, mobility, resources, long-term or short-term business orientation, and political clout--influence corporate behavior and participation in transnational regulatory and policy processes. Finally, we need to explore how differences in corporate governance mechanisms--such as internal governance structures, deliberative processes, fiduciary obligations, liability rules, and ownership structures--affect the decisions corporations make and the actions they take as regulatory institutions in the global governance arena. In this context, we might find that corporate law functions not unlike a constitution in a public governance context--shaping behavior not only within corporations, but also in the complex regulatory regime through which we are governed globally.

**SUMMARY REPORT:
WORKING GROUP C
HUMAN RIGHTS LAW AND THE CHALLENGES OF CONTEMPORARY DEVELOPMENT**
Northeastern University School of Law, June 17, 2005

Facilitators: Professor Dan Danielsen and Professor Rashmi Dyal-Chand

Reporters: Ms. Jessica Jones and Mr. Siddhartha Mukherjee

Participants: Professor Adeno Addis, Professor Libby Adler, Ms. Judith Baker, Professor Lee Breckenridge, Professor Margaret Burnham, Ms. Daria Caliguire, Professor James Cavallaro, Professor Cheryl Harris, Ms. Jaribu Hill, Esq., Professor David Kennedy, Mr. Paul Kennedy, Former UN Asst. Secretary-General Angela King, Professor Hope Lewis, South African Consul-General Jeanette Ndhlovu, Advocate Michael Osborne, Esq., Professor Kwamina Panford, Associate Dean James Rowan, Mr. Harvey Salgo, Esq., Professor Dan Schaffer, Sister Jayne Simon, Professor Barbara Stark, Dr. Stephen Steinlight, Professor Stephen Subrin, Professor Jeanne Woods. Students and members of the community whose names were not provided were also in attendance.

This working group sought to explore opportunities and conflicts between economic development and human rights approaches to improving social welfare in the developing world. The vehicle for discussion was a hypothetical piece of legislation that proposed to make the worldwide operations of U.S. transnational corporations (TNCs) and their foreign subsidiaries subject to U.S. federal environmental regulation. Our hope was to identify the merits of and concerns with the legislation, as well as possible alternatives, including human rights and economic, social and cultural (ESC) rights approaches, in order to explore the strengths and boundaries of various regulatory mechanisms for addressing environmental degradation in the developing world. Through this discussion, we also sought to articulate ways that academic institutions like our own might contribute to debate and policy planning in the human rights and development context. Respected economists, development experts, human rights activists and academics contributed to this discussion [see biographical information on participants in Appendix].

We began by voicing concerns about the hypothetical legislation. Enforcement mechanisms and feasibility, both economic and political, were initial concerns. The legislation might also raise costs for local economies by, for example, raising the cost of building and operating utilities and manufacturing facilities. In this way, the proposed statute might hinder the development of necessary infrastructure in developing countries. Also, nationalism and resentment of U.S. imperialism might hinder the success of the legislation. Another concern was that the legislation might prevent individual U.S. corporations from competing with non-U.S. companies who would not be subject to the statute. One participant raised the alternative of enacting legislation that would apply to any corporation doing business in the U.S. Many of the human rights activists stressed the invasive nature of such legislation, and emphasized the role of local activists in host countries, who, more than anyone, understood the local political context. It was thus suggested that regulation of TNCs might be a task better suited to an international institution instead of the U.S. government, especially when considering the close relationship

between corporations and the state. Indeed, one participant reminded the group of the existence of an international convention on the activities of TNCs; the proposed U.S. statute might clash with it, whereas multilateral efforts might be more harmonious.

The group then considered the merits of the proposed statute, not the least of which was that it might actually improve environmental quality worldwide. In addition, this type of legislation could have the effect of encouraging local governments to address environmental concerns, and it might provide them with a vocabulary with which to participate in policy-making, an opportunity to sustain such an environmental policy and effect lasting change. The legislation could be viewed as a pilot project that could establish a position for further activism, and give local authorities a foundation upon which to regulate corporations, both domestic and foreign. In addition, the ability of the U.S. government to impose real costs upon TNCs might actually make the U.S. legislature the ideal body to act, perhaps in a way that is even more effective than could be accomplished by an international entity. In response to another concern, that of anti-competition, it was also suggested that the legislation might spur a race to the top as opposed to a race to the bottom. One could anticipate that responsive governments would want to encourage regulated corporations to do business within their country.

After discussing the strengths and weaknesses of the proposed statute, the group considered possible alternatives and complementary strategies to such legislation. Self-regulation, ESC rights, local (including initiatives by U.S. states and by host countries) and multilateral approaches were all discussed. One participant suggested that a similar debate has taken place in the realm of taxation, and that the strategies used there might be a model for this effort. Another suggested U.S. and international laws on bribery as a potential model. If the environment were truly viewed as a public good, it was noted that the creation of an international fund might relieve developing nations from bearing the sole burden of this expense. However, the establishment of such a fund would require the international community to place a premium on the environment, and on each nation's role in protecting it. Also, the development of a norm of international law would help to make egregious violations impermissible. A creative source of revenue could also result from marketing entitlements to pollute, thereby redistributing global pollution and perhaps shifting it away from the developing nations in order to meet environmental standards. There was some concern that this might blur a necessary distinction between property and human rights, or reinforce ideas that development happens in the global north and charity in the global south. The group recognized and wrestled with the fact that the hypothetical statute implicitly dichotomizes ESC rights and environmental regulation; one of the important questions for future discussions is whether this is inevitable.

Lastly, we discussed the role of academic institutions with regard to the interplay of economic development and human rights. One member of the group noted the absence of such interdisciplinary discussion outside of academia, and emphasized the importance of initiatives such as this one in sustaining such discussions. Bringing together leaders of nations, corporate CEOs, and heads of the World Bank and the International Monetary Fund, would allow the fruits of such scholarly discussion to reach those who were in position to actually implement change. Through the coordinated effort of academics and grass-roots organizations, we could engender a voice substantial enough to represent those whose concern for development and human rights are indeed one and the same.

Editor's Note: The following was circulated by facilitators Professor Jim Rowan and Professor Margaret Woo to all Consultation participants in advance of the Roundtable Session. The Program on Human Rights and the Global Economy grew out of a long history of advocacy, scholarship, and activism by the law school's students, faculty, administrators, staff and alumnae. We hoped that this gathering would stimulate discussion on the roles of such law school programs, additional ideas for future work, strategies and structures that have proven effective, and opportunities for collaboration. As we hoped, many Consultation participants attended the Roundtable and gave generously of their time and expertise.

**FRAMING MATERIALS:
E-MAIL TO PARTICIPANTS FRAMING DISCUSSION QUESTIONS FOR ROUNDTABLE**

Dear All:

We are delighted that you will be able to join us on June 17th and look forward to a fruitful discussion of economic, social and cultural rights both in the United States and abroad. This session will also launch expanded efforts at Northeastern University School of Law to provide support to organizations and individuals seeking to expand and apply human rights in a variety of contexts. We need your help to focus our efforts where we can be most effective.

Some of you have agreed to come to the roundtable discussion on how we can be most helpful. We hope that those of you who have agreed to attend that roundtable will give thought to the following questions about content, methodology and synergy.

We would also appreciate ideas from those of you attending other parts of the meeting and encourage you to tell us your thoughts either electronically or by direct communication with one of the Northeastern facilitators who will be conducting the day's sessions.

1. What subject areas need the most attention at present? What subject matter in the human rights area remains uncovered?
2. How can an academic center on human rights be most useful to your organization? What methodology is most useful? Web-based posting of information? Research projects? Student interns?
3. Who should be "at the table"? What other organizations? What other sectors?

Thanks very much,
Jim and Margaret

Editor's Note: At the close of the Consultation, participants shared their perspectives on the Program on future work by the Human Rights and the Global Economy. Our hope was to learn from the experiences and perceived priorities of the participants who included NUSL and other legal academics, law students, alumnae, several directors of law school human rights programs, practicing lawyers, judges, and community activists. The following chart and list of comments summarizes the discussion.

**SUMMARY REPORT:
ROUNDTABLE:
BUILDING AND SUSTAINING NORTHEASTERN'S PROGRAM ON HUMAN RIGHTS AND
THE GLOBAL ECONOMY**

Northeastern University School of Law, June 17, 2005

Facilitators: Associate Dean James Rowan and Professor Margaret Y.K. Woo

Reporter: Ms. Maria P. Muti

Participants: All consultation participants and reporters were invited to this session. Among the identified attendees were Ms. Dimple Abichandani, Esq., Professor Penelope Andrews, Professor Brook Baker, Professor James Cavallaro, Professor Lance Compa, Professor Martha Davis, Professor Dan Danielsen, Professor John Flym, Ms. Jaribu Hill, Esq., Ms. Rebecca Johnson, Professor Daniel Kanstroom, Ms. Nancy Kelly, Esq., Mr. Michael Osborne, Esq., Professor Gerard Quinn, Mr. Harvey Salgo, Esq., and Mr. John Wilshire-Carrera, Esq.

Introduction

The Roundtable was intended to solicit input and advice on Northeastern's newly launched Program on Human Rights and the Global Economy, as well as observations on the role of law school human rights programs in general. To begin the discussion, facilitators raised three practical questions:

1. What should NUSL do (solicitation of ideas)?
2. How should it do it (e.g., amicus briefs, web-based resource building)?
3. And with whom (i.e., what linkages are appropriate to push the agenda forward on a national scale given modest resources)?

Summary of Responses

WHAT HOW WITH WHOM -National/international issues
-Policy/Regulatory
-Corporate regulation and liability
-Reparation – e.g. SEC filings,

WHAT -Monthly lecture series
-Clinics
-Reading groups/international visitors
-Internships

HOW -Students
-Alumnae
-Grassroots NGOs
-Existing programs at other law schools

WITH WHOM government liability
-Identify themes of interest at NUSL
-Document human rights violations
-Community based human rights education
-Education of state court judges and international judges/state bar
-“Smaller” questions, more local programs.
-Support ongoing social movements
-Tackle the “democratic” argument as resistance to ESCR
 -Policy/regulatory
-national/international
co-op placement
-NUSL’s LCD program
-Courses
-Web – web casting, databases
-Interdisciplinary work – what is “common”?
-Community space
 -State legislatures, courts, and the bar
-Academics from multiple disciplines

Responses and Discussion (individual participants are identified by letter only)

(A) stated that based on the reaction at the symposium, there is a lot of energy and interest in doing human rights work. He would like to see more of what’s going on, for example, have monthly presentation on specific topics

(B) asked two questions: What is in place at NUSL to build on? Secondly, is NUSL focusing nationally only? Facilitator *Margaret Woo* responded that NUSL is not just focusing nationally, but will focus internationally as well. The program will build on faculty interest and projects, and the tremendous interest in the student body. They plan to coordinate these in a way most useful to human rights.

(C) suggested that the program should build on the co-op program.

(D) discussed outplacement potential.

Facilitator *James Rowan* described the work of NUSL clinics. He noted that the clinics work primarily with local communities with the exception of the public health clinic, which works both internationally and nationally. NUSL has classic clinics: Domestic Violence, Poverty and Criminal. All clinics attempt to work with community organizations; those organizations are increasingly interested in an international aspect to their work.

(E) commented on what a New York area law school does with limited resources. 1) They organized a South Africa reading group where they invite visiting South Africans to present. 2) They arrange summer internships at human rights/public interest organizations in Australia, South Africa, Botswana, Rwanda Tribunal, etc. A single faculty member, (B), does the placements for students.

((F) compared the human rights clinic at his school. He stated that NUSL has an advantage in being able to put combine human rights with a policy angle. NUSL has an advantage in being able to host conversations that don’t happen in other human rights programs. NUSL has the capacity to have gross-issue and gross-tactic conversations.

(G) argued that the program should pursue U.S. and Chinese advocacy strategies with regard

to the corporate responsibility of US tobacco companies for their activities in China. He discussed South African reparations litigation investigating to what extent corporations were aware that their activities were supporting the apartheid regime. He suggested researching how these companies perceived the political risk of investing in South Africa. He also made other suggestions including the possibility of prosecuting Germany for genocide in Namibia and prosecuting the UK for genocide in Kenya. Empirical research is needed.

(H)) said that NUSL needs more specificity on the issues people are interested in to determine how to build the program.

Facilitator *James Rowan* outlined the areas of interest at NUSL so far: Public Health, Development, ESC rights in the US. NUSL may seek to expand and refine work in those areas.

(I)) noted the need for accessible education and outreach in immigrant communities and in communities where ESC rights are at issue. They need community based HR education.

((J) discussed the accountability of multinational corporations. From a labor perspective, they could find interesting co-operative legal placements (“co-ops”). For example, a co-op could involve running an ad campaign against the “Wal-martification” of the economy. Since Wal-mart is worldwide, that naturally has international implications.

(K) suggested that NUSL’s program should provide technical assistance for lawyers doing work domestically and who want to use international standards. Perhaps NUSL can have the Law, Culture, and Difference (LCD) program available to experiment with different human rights strategies or perhaps reach out to alumnae for consultation.

(L) discussed training of lawyers as an important need. She also suggested ‘know your rights’ clinics in communities. The school could develop fact sheets on ESC rights for toolkits at the ‘know your rights’ trainings. NUSL could also develop courses on ESC rights. They could also have exchange programs for other students to take courses here.

(M)) suggested using the web to make connections.

(N) discussed multidisciplinary work and the benefits of listing the strengths of faculty to see commonalities between their work, have conversations etc. The NUSL program should also focus on students and how to prepare them for this work.

(O)) emphasized the education of state judges. She argued that state judges are the most promising sector for promoting ESC rights.

(P) argued that the Program should focus on smaller questions rather than larger issues. NUSL should work on local and specific problems within the current framework.

(Q) noted that documentation of human rights violations serves a useful educational function

(R) suggested that the NUSL program should create a space for people to start having discussions and involve people from the community.

(S) urged us to acknowledge that most significant human rights advances have not been because of lawyers or scholarly papers. Social movements advance the agenda; we should focus on partnerships in which we are not the experts but providers of helpful tools instead. He also argued that corporate power is the missing piece in human rights. Global corporate power should be a key theme of our work.

(T) believed that the NUSL program should look at obstacles to ESC rights, and that the biggest obstacle is the democratic argument against legitimization of ESC rights. He argued that it would be valuable to do a comparative constitutional law analysis on remedies. The disconnect between international law and national law is another obstacle. There is no point in talking about international law if it has not had an impact on the domestic legal process. There are huge opportunities through co-ops for networking and reporting.

(U) discussed the importance of educating the state bar. He suggested a seminar for practitioners of employment law, poverty law and health law.

(V) suggested that students work with lawyers to assist clients, for example writing memos to the immigration agencies and judges on immigration and asylum matters. The NUSL program

could also look at the relationship between clinics, law firms and NGOs.

APPENDIX

STUDENTS, ALUMNI, AND THE PROGRAM ON HUMAN RIGHTS AND THE GLOBAL ECONOMY

By
Hope Lewis

As noted in the Acknowledgments and elsewhere in this Report, Northeastern law students contributed to both the Symposium and Expert Consultation by staffing the registration tables, acting as guides for our out-of-town participants, as reporters for the Working Groups and plenary sessions, and as participants. A significant number of those who participated in the Consultation were also alumni of the law school.

Interest in international human rights among Northeastern's law students and alumni has been an important stimulus for our work in this area, including the organization of the Program on Human Rights and the Global Economy. Student organizations such as the International Law Society, the Anti-War Society, the Northeastern University Radical Front, the National Lawyer's Guild, the Black Law Students Association, the Latino/a Law Students Association, the Asian-American and Pacific-American Law Students Association, and individual students have, through the years, taken classes in human rights and in international and comparative law, sponsored human rights speakers, participated in human rights co-ops and post-graduate work, and advocated for the creation of a human rights program at the law school. Our students (and faculty and administrators) have participated in the NGO Forum for the UN Fourth World Conference on Women in Beijing, China, and the NGO Forum for the UN World Conference Against Racism, Xenophobia, and Other Forms of Intolerance in Durban, South Africa. Our alumnae have worked as immigration and asylum lawyers, human rights monitors in post-conflict societies, workers' rights advocates, lawyers implementing regional and international human rights mechanisms, and at least one directs a human rights clinical program.

The Program on Human Rights and the Global Economy will work to support our students' growing commitment to human rights in a number of ways. 1) We will work with the Directors and staff of the law school's Co-op Office and its Alumni and Career Services Office to build opportunities for student work with human rights organizations or other legal institutions engaged in human rights work. 2) We will support student participation in human rights-related coursework and involvement with related faculty projects, institutes, or clinical work, including Program-sponsored projects. 3) We plan to sponsor student research projects in support of partner organizations working on human rights (e.g., our Law, Culture, and Difference community partners). 4) We will work to build an interactive network of alumni working in human rights that can mentor students and work collaboratively with the Program in other ways.

The following hypothetical was distributed to students in a law school human rights seminar. Reactions were uniformly positive to the creation of a new Program, although students expressed a diverse range of ideas on Program direction. Many were intrigued by the Program's focus on ESC rights, but hoped that there would be a place for attention to civil and political rights issues. Most felt that the creation of new human rights-related co-ops and the wider dissemination of information on them through the law school's new international law co-op website and other means would be important. Others suggested that community-based education on human rights (including the use of the internet and public media) might be important future projects. Some expressed interest in the publication of a newsletter or on-line publication on human rights. Some suggested additional integration of human rights issues in "domestic" coursework or programs such as Law, Culture, and Difference (LCD--the law school's innovative first-year required course that includes a partnership component with community organizations). Finally, some wanted to see additional opportunities for students to

meet with human rights lawyers and activists. There was interest in almost every part of the world, but there was some targeted interest among those present on human rights issues affecting South Africa, Europe, Latin America, and the U.S.

Handout: Hypothetical on Northeastern's Program on Human Rights and the Global Economy

For many years Northeastern Law School has contributed to the promotion and fulfillment of international human rights law both in the U.S. and internationally. Students and alumni have worked on co-op or in full-time positions with human rights NGOs, immigration and asylum organizations, the United Nations, courts, and other human-rights related organizations around the world. Faculty have taught courses, produced scholarship, and worked on projects using the human rights lens to examine issues such as poverty, workers' rights, gender rights, migration, and access to HIV/AIDS treatments. The school has also sponsored an annual distinguished lecture series devoted to human rights issues.

At the urging of students and interested faculty over the years, faculty and administrators began to consider whether and how to organize a formal human rights program at NUSL. The Dean formed an "interest group" for faculty discussion on the issue. Members of that group believed that a focus on the implementation of economic, social, and cultural rights (such as the right to health or the right to housing) and the impact of globalization on all human rights, would make a uniquely important contribution to these emerging issues in international human rights law. With the support of the Dean, the group also decided to begin the organizational process by hosting a symposium on the South African Freedom Charter and an "expert consultation" on the implementation of economic, social, and cultural rights. The consultation would bring together judges, lawyers, and activists already working on ESC rights issues to share their ideas on priority areas for further research and current developments in the field.

The school has created a webpage for the new "Program on Human Rights and the Global Economy" (see attached), and there is already broad interest among faculty, students, and alumni; the Program is in the process of seeking outside funding.

You have been asked to form a "focus group" (2 or 3 students) to discuss the new Program and to make recommendations on priorities that should be considered as it gets off the ground. How can the new Program most effectively address students' educational goals and needs (e.g., co-op, curriculum, LCD community projects, scholarship opportunities, internal organization, etc.)? What substantive issues and geographic areas (or specific countries) should be prioritized in early years, given its limited budget and human resources? Why?

PROGRAM

**Consultation—Realizing Economic, Social, and Cultural Rights: Communities, Courts,
and the Academy
Northeastern University School of Law
Thursday- Friday
June 16-June 17, 2005**

Thursday, June 16, 2005

Symposium: “Human Rights and the South African Freedom Charter: Law, Justice and Political Movements”, Harvard Law School

Co-sponsors: Northeastern Program on Human Rights and the Global Economy,
South Africa Partners, and Charles Hamilton Houston Institute for Race and
Justice.

6:45-9:30—Welcome Dinner for Consultation Participants

--Brasserie Jo's (private room), Colonnade Hotel, 120 Huntington Avenue, Boston (617)
425-3240

Welcome and Introduction of Dinner Speaker—Emily Spieler,

Dean & Edwin W. Hadley Professor of Law,
Northeastern University School of Law

Dinner Speaker—Penelope Andrews,

Professor of Law, CUNY School of Law
& Ariel F. Sallows Professor of Human Rights Law,
University of Saskatchewan School of Law

Friday, June 17, 2005

“Realizing Economic, Social, and Cultural Rights: Communities, Courts, and the Academy”

Northeastern University School of Law

**8:15-9:00—Registration and Continental Breakfast
—The Commons**

**9:00-11:00—Opening Plenary (Open to the Public)
—Room 97**

Welcoming Remarks—Emily Spieler,

Dean and Edwin W. Hadley Professor of Law,
Northeastern University School of Law

Introduction—Hope Lewis,

Professor of Law, Northeastern University School of Law

Opening Remarks—The Honorable Angela King,

Former Assistant Secretary-General
& Special Adviser on Gender Issues and the Advancement of Women,
United Nations

**“Judges on Justiciability:
Economic, Social, and Cultural Rights in the Courts”**

Moderator/Discussant—Karl E. Klare,

George J. & Kathleen Waters Matthews Distinguished University Professor,
Northeastern University School of Law,

The Honorable Pius Langa,

Chief Justice, Constitutional Court of South Africa

The Honorable Margot Botsford,

Associate Judge, Suffolk County Superior Court, Massachusetts

11:15-12:45—Concurrent Working Groups (Registered Participants)

Working Group A: “Public Health and the Human Rights Framework”

—Brown Lounge (near registration tables)

Facilitators:

Brook Baker, Professor of Law,
Northeastern University School of Law

Wendy Parmet, George J. & Kathleen Waters Matthews Distinguished University Professor,
Northeastern University School of Law

**Working Group B: “Economic, Social, and Cultural Rights in the United States: New
Lawyering Strategies”**

—Moot Courtroom (front of building, across from elevator)

Facilitators:

Ms. Cathy Albisa, Esq., Executive Director,
National Economic, Social, and Cultural Rights Initiative

Martha Davis, Associate Professor of Law,
Northeastern University School of Law;

**Working Group C: “Human Rights Law and the Challenges of Contemporary
Development”**

—Room 205 (2nd floor of Knowles)

Facilitators:

Dan Danielsen, Associate Professor of Law,
Northeastern University School of Law;

Rashmi Dyal-Chand, Associate Professor of Law,
Northeastern University School of Law

1:15-2:15 Luncheon

—Snell Library, Room 90 (guides will direct you to this building)

Introduction of Luncheon Speaker—Margaret Y.K. Woo,
Professor of Law, Northeastern University School of Law

Luncheon Speaker—Sharon Hom, Executive Director,
Human Rights in China

2:45-4 Roundtable (Open to all)

—Room 94 (law school building, beside Room 97)

“Building and Sustaining Northeastern’s Program on Human Rights and the Global Economy”

Facilitators:

James Rowan, Associate Dean for Experiential & Community-based Education and Research
& Professor of Law,

Northeastern University School of Law

Margaret Y.K. Woo, Professor of Law,

Northeastern University School of Law

4-5:30 Closing Reception

—The Commons

BIOGRAPHICAL INFORMATION ON PARTICIPANTS

Dimple Abichandani is a staff attorney with the Unemployed Workers Project at South Brooklyn Legal Services, where she represents low-income clients on a range of employment and public benefits matters. She is a current fellow in the CORO 2005 New American Leaders fellowship program for immigrant rights advocates. While a law student at Northeastern University School of Law, Dimple attended the World Conference on Racism in Durban, South Africa, as a delegate from the Women's Institute for Leadership Development for Human Rights. Prior to attending law school, Dimple was the first Director of the Teen Health Initiative, a reproductive justice project at the New York Civil Liberties Union. She holds a B.A. in English Literature from the University of Texas at Austin, and a J.D. from Northeastern School of Law.

Adeno Addis is William Ray Forrester Professor of Public and Constitutional Law at Tulane Law School. He received his B.A. and LL.B. (Honours) from Macquarie University (Australia), and an LL.M. and a J.S.D. from Yale. He has published extensively in the areas of American constitutional law, communications law, human rights, and jurisprudence.

Libby Adler, Associate Professor of Law, teaches Constitutional Law, Administrative Law, and Sexuality, Gender and the Law at Northeastern University School of Law. Prior to joining the permanent faculty, she served as a visiting professor in 1999-2000 and as a part-time lecturer in 1998-1999, while also a visiting researcher and graduate fellow at Harvard Law School. For three years, Professor Adler practiced as a policy attorney for the Massachusetts child support enforcement agency, drafting legislation and regulations. Her scholarship focuses on sexuality, gender, family and children and draws heavily from queer and critical theory. In addition, she has written about contemporary legal issues arising out of Nazism and taught a course on the Nazi labor program while a visiting professor at the University of Frankfurt.

Catherine Albisa is the Executive Director of the National Economic and Social Rights Initiative, and an attorney specializing in the implementation of human rights standards in the United States. She is the former director of the Human Rights in the US program at the Center for Economic and Social Rights. She was also the Associate Director of the Human Rights Institute at Columbia Law School, and co-directed the International Women's Human Rights Law Clinic at CUNY Law School. Ms. Albisa also litigated constitutional challenges to laws restricting reproductive rights while a staff attorney at the Center for Reproductive Rights and the American Civil Liberties Union. Ms. Albisa is a graduate of Columbia Law School and clerked for the Honorable Mitchell H. Cohen in the District of New Jersey.

Penelope E. Andrews, a Professor of Law at The City University of New York School of Law (CUNY), is the 2005 Ariel F. Sallows Professor of Human Rights Law at the University of Saskatchewan in Canada. At CUNY she teaches courses in Torts, International Law, International Human Rights Law, and Comparative Perspectives on Race and the Law. She earned her B.A. and LL. B. degrees from the University of Natal in Durban, South Africa, and an LL.M. from Columbia Law School. She was the Chamberlain Fellow in Legislation at Columbia Law School, and has worked at the Legal Resources Center in Johannesburg and the NAACP Legal Defense Fund in New York. She was on the faculty of the Department of Law at La Trobe University in Melbourne, Australia and has taught at the University of Maryland School of Law, the University of Natal, the University of Aberdeen (Scotland), the University of Amsterdam and the University of Potsdam (Germany). She has written extensively on constitutional and human rights issues in the South African, Australian and global contexts, with particular emphasis on the rights of women and people of color. During 2002 she was the Stoneman Professor of Law

and Democracy at Albany Law School and the Parsons Visitor at the University of Sydney, Australia. She serves on the Board of Directors of the Welfare Law Center in New York, the Friends of the Constitutional Court of South Africa, the Law and Society Association and the Columbia Law School Association. She is the contributing editor of THE POST-APARTHEID CONSTITUTIONS: REFLECTIONS ON SOUTH AFRICA'S BASIC LAW. Her current writing project is entitled: FROM CAPE TOWN TO KABUL: RETHINKING WOMEN'S HUMAN RIGHTS LAW.

Deborah E. Anker, Jeremiah Smith Jr. Lecturer on law at Harvard Law School, has been teaching, practicing, and writing about immigration and refugee law for over 20 years. She currently serves as Director of the Harvard Law School Immigration and Refugee Clinical Program (with a clinic at Greater Boston Legal Services, in Boston, Massachusetts), where she works collaboratively with the Harvard Human Rights Program and teaches clinical courses in asylum and refugee law. In 1994, Ms. Anker and her colleagues received the Founders Award of the American Immigration Lawyers Association for the work of their Women Refugees Project. The Project drafted the historic U.S. Gender Asylum guidelines, spearheading the development of gender asylum law in the United States, and greatly advancing its development internationally. Most recently, Ms. Anker and her colleagues organized a major amicus curiae briefing effort in a case before the Attorney General involving family and gender violence as a basis for claiming asylum protection in the United States. The Department of Homeland Security has now adopted the position of the Women Refugees Project's U.S. Gender Asylum Guidelines in that case. Ms. Anker also has conducted groundbreaking empirical studies of asylum processes, and helped develop training programs for government asylum adjudicators. The project has engaged in human rights education and litigation as well on behalf of women refugees. The WRP participated as a certified NGO at the Fourth World Conference on Women in Beijing in September of 1995, where it successfully advocated for the inclusion of a number of important protections for women refugees in the final Platform for Action. Ms. Anker was named by the National Law Journal as one of the 20 leading immigration lawyers in the United States. She also has received the immigration bar's Edith Lowenstein Award for outstanding contributions to the field. Ms. Anker has litigated refugee cases at all administrative levels, in the federal courts and as amicus curiae in the U.S. Supreme Court. She has written extensively on the subject of asylum law and is the author of the leading national treatise, Law of Asylum in the United States, now in its third edition.

Brook Baker, Professor of Law, teaches at Northeastern University School of Law, and has taught and consulted extensively in South African law schools and law school clinics since 1997, particularly on issues of multiculturalism, human rights and HIV/AIDS. Professor Baker is a core member and policy advisor for Health GAP (Global Access Project), an activist organization seeking worldwide access to HIV/AIDS treatment. In addition to focusing on trade and intellectual property issues affecting affordability of medicines, Professor Baker lobbies for full funding of multilateral and bilateral initiatives, debt relief and elimination of public sector spending caps and user fees. Recently, he has consulted with the Association of Southeast Asian Nations, the UN Millennium Development Goals Project and the UK Department for International Development. He writes law review articles and activist position papers in multiple forums on access to treatment issues.

The **Honorable Margot Botsford** is Associate Justice of Suffolk County Superior Court of Massachusetts. She received her BA from Barnard College and her JD from Northeastern University. She was a Law Clerk for the Honorable Francis J. Quirico, SJC – from 1973 -1974. She was an Associate at Hill & Barlow, Boston from 1974 -1975 and Assistant Attorney General from 1975 -1979. She then served as Partner, Rosenfeld, Botsford & Krokidas, Boston from 1979 -1983. Prior to her role as Associate Justice, she was an Assistant District Attorney, Chief

Appeals Bureau, Middlesex County, from 1983 -1989. She is a member of the Commission on Judicial Conduct and the SJC Committee to Study the Code of Judicial Conduct.

Lee Breckenridge, Professor of Law, specializes in environmental and natural resources law at Northeastern University School of Law. She began her career as an attorney with the Environmental Protection Agency in Washington, DC, where she worked on some of the agency's initial regulatory efforts to implement the Clean Water Act, the Safe Drinking Water Act and the Surface Mining Control and Reclamation Act. Professor Breckenridge continued her environmental work as an assistant attorney general with the state of Tennessee and the commonwealth of Massachusetts. She served as a law clerk for Judge Gilbert S. Merritt on the US Court of Appeals for the Sixth Circuit in 1977-1978. Before joining the faculty of the School of Law, Professor Breckenridge was chief of the Environmental Protection Division for the Massachusetts Attorney General's Office, where she was engaged in a wide range of litigation to enforce the requirements of federal and state air and water pollution statutes, hazardous waste management requirements, and wetlands and tidelands protection laws.

Margaret Burnham, Associate Professor of Law at Northeastern University School of Law, began her career at the NAACP Legal Defense and Educational Fund, litigating school desegregation cases. In 1978, she was appointed an associate justice of the Boston Municipal Court, and in 1989 returned to law practice as a founding partner of Boston's first law firm headed by African-American women. She has held fellowships at Harvard's DuBois Institute and Radcliffe's Bunting Institute. In 1992, former South African president Nelson Mandela asked Professor Burnham to serve on an international commission that investigated human rights violations committed by the African National Congress. That commission was a precursor to the Truth and Reconciliation Commission established after the 1994 election in South Africa. Professor Burnham's fields of expertise include civil rights, human rights and employment. She has held teaching appointments at the Massachusetts Institute of Technology, Boston College Law School and Brandeis University.

Daria Caliguire is the Director of the International Network for Economic, Social and Cultural Rights (ESCR-Net), a coalition of groups from around the world that work on advancing ESC rights through advocacy, research and training, collective action and information exchange. ESCR-Net was launched in 2003 and Ms. Caliguire worked with the network beginning in 2002. From 1997-2001, she worked at the Ford Foundation in various positions, including her last position as a Special Projects Manager for the Peace and Social Justice Program. From 1993-1997, Ms. Caliguire lived and worked in South Africa on governance and development issues for several NGOs, including Idasa. She holds a Masters in Public Policy from the Kennedy School of Government, Harvard University.

James Cavallaro is Clinical Director, Human Rights Program; and lecturer on law at Harvard Law School. He holds a BA from Harvard College, 1984; and a J.D. from Boalt Hall (Order of the Coif, California Law Review). His legal experience includes: Clerk, Hon. Dolores K. Sloviter, Chief Judge of the United States Court of Appeals for the Third Circuit (1993-1994); Brazil Office Director, Human Rights Watch, 1994-1999; Director, founder, Global Justice Center, (Brazilian human rights NGO) (1999-2002). His recent publications include: Unpopular Discourse: How Rising Criminality Challenges Human Rights Defense in Transitional Societies, 18 Harv. Hum. Rts. J. 139 (2005) (with M. Mohamedou); Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas, 56 Hastings L. J. 217 (December 2004) (with E. Schaffer); Crime, Public Order and Human Rights (November 2003, International Council on Human Rights Policy, Geneva); Toward Fair Play: A Decade of

Transformation and Resistance in International Human Rights Advocacy in Brazil, 3 U. Chi. J. Int'l. L. 481 (2002).

Lance Compa is a Senior Lecturer at Cornell University's School of Industrial and Labor Relations in Ithaca, New York, where he teaches U.S. labor law and international labor rights. Before joining the Cornell faculty in 1997, Compa was the first Director of Labor Law and Economic Research at the Secretariat of the North American Commission for Labor Cooperation. Prior to his 1995 appointment to the NAFTA labor commission, Compa taught labor law, employment law, and international labor rights as a Visiting Lecturer at Yale Law School and the Yale School of Management. He also practiced international labor law for unions and human rights organizations in Washington, D.C. Compa has written widely on trade unions, international labor rights, and other topics for a variety of law reviews and journals of general interest. He is the author of the 2000 Human Rights Watch report *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (republished by Cornell University Press in August 2004 with a new introduction and conclusion). His most recent publication is a new Human Rights Watch report titled *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants*, which was released in January 2005. Compa is a 1969 graduate of Fordham University and a 1973 graduate of Yale Law School. He also undertook studies abroad at the *Institut d'Etudes Politiques* in Paris, France (1967-1968) and at the *Universidad de Chile* in Santiago, Chile (1972-1973).

Dan Danielsen, Associate Professor of Law, is an experienced lawyer and scholar with dual interests in legal academia and the world of legal practice. He teaches International Business Regulation; International Law; Corporations; Conflict of Laws; and Law and Economic Development at Northeastern University School of Law. Professor Danielsen's current research focuses on the role of corporate actors in transnational regulation and governance. His work seeks to identify regulatory strategies at various local, national, transnational and institutional levels to shape and harness corporate power to improve social welfare and increase economic development around the globe. Prior to joining the faculty, Professor Danielsen was executive vice president and general counsel of Europe Online Networks S.A., a pioneer in the provision of broadband Internet and interactive multimedia services to consumers across Europe. Previously, he was a partner at Foley, Hoag & Eliot in Boston, where his practice focused on the representation of US and European public and privately held business with respect to corporate finance, mergers and acquisitions, strategic partnerships and joint ventures, content and technology licensing and corporate strategy. He is the coauthor of *AFTER IDENTITY: A READER IN LAW AND CULTURE* (Routledge Press, 1994) and has written a number of law review articles.

The Honorable Dennis Davis is currently Judge of the High Court and Judge President of the Competition Appeal Court, South Africa. He is an Honorable Professor of law at University of Cape Town (UCT) where he teaches Constitutional Law and Tax Law. Previously, Judge Davis was Professor of Law at UCT and the University of Witwatersrand where he was Director of the Centre for Applied Legal Studies. There, he and a number of colleagues were involved with the negotiations leading to the new constitution. His latest book is – *SOUTH AFRICA CONSTITUTIONAL LAW; THE BILL OF RIGHTS* (2005) (with Halton Cheadle and Nicholas Haysom).

Martha Davis, Associate Professor of Law, teaches Women and the Law; Immigration; Employment Discrimination; and Professional Responsibility at Northeastern University School of Law. Prior to joining the law faculty in 2002, she was vice president and legal director for the NOW Legal Defense and Education Fund. She has also served as a fellow at the Bunting Institute and as the inaugural Kate Stoneman Visiting Professor of Law and Democracy at

Albany Law School. In 2003, she received a Soros Reproductive Rights Fellowship; her project focused on the potential for subnational activism using international human rights norms. Professor Davis has written widely on women's rights and poverty and human rights. Her book, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT*, received the Reginald Heber Smith Award for distinguished scholarship on the subject of equal access to justice, and was also honored by the American Bar Association in its annual Silver Gavel competition. Professor Davis sits on the boards of directors of the Welfare Law Center and the Workers Rights Law Center.

Richard Daynard, Associate Dean for Academic Affairs and Professor of Law, teaches at Northeastern University School of Law. He writes and teaches in the areas of product liability, consumer protection and administrative law. He is at the forefront of efforts to hold the tobacco industry accountable for tobacco-induced death, disease and disability, and is the chair of the [Tobacco Products Liability Project](#), president of the [Tobacco Control Resource Center](#) and editor-in-chief of the *Tobacco Products Litigation Reporter*. Professor Daynard has written more than 50 articles, lectured about tobacco litigation in 30 countries, and has chaired 20 national and international conferences on the subject. Among many honors, he has recently been honored by the American Lung Association, the American Cancer Society and the Middlesex Bar Association. He is the principal investigator in contracts from the National Cancer Institute, the Massachusetts Department of Public Health and the Robert Wood Johnson Foundation. Professor Daynard helped develop the concurrent degree program in Law, Policy and Society, and teaches the introductory seminar in the field. Professor Daynard, who helped found the [Public Health Advocacy Institute](#) (a collaboration between Northeastern University Law School and the School of Medicine at Tufts University) is heading a PHAI project to determine whether insights learned in tobacco litigation can be applied to the obesity epidemic.

Melinda Drew, Senior Academic Specialist, and Director, Academic Success Program at Northeastern University School of Law, is also a registered nurse. She directed substance abuse treatment programs before attending law school. Following graduation, she practiced civil rights, consumer, housing and personal injury law in a general practice litigation firm and then worked as a solo practitioner doing civil appellate work. Prior to returning to Northeastern, Professor Drew was an assistant professor at Elms College. She has published articles on legal issues in nursing, serves on the editorial board of the *Journal of Nursing Law* and is the coauthor of a text on legal issues for allied health professionals. Professor Drew directs the law school's Academic Success Program, coordinates the provision of disability services in the law school, and teaches in the first-year Legal Practice Program as well as in the upper level. As part of her pro bono work, Professor Drew serves as a volunteer arbitrator for both the Commonwealth of Massachusetts Office of Consumer Affairs and Business Regulation and the Massachusetts Bar Association's Fee Arbitration Board, and serves as a case conferencer for the Boston Bar Association/ Boston Municipal Court Alternative Dispute Resolution program. A long-time member of the National Lawyers Guild, Professor Drew trains law students to deliver street law clinics to community groups.

Rashmi Dyal-Chand, Associate Professor teaches Modern Real Estate Development, Intellectual Property and Property at Northeastern University School of Law. Prior to joining the law school faculty in 2002, she served as an associate general counsel of The Community Builders, Inc., a nonprofit affordable housing developer, where she provided legal representation on all aspects of complex real estate and housing development transactions. Following law school, she served as a law clerk to the Hon. Warren J. Ferguson of the US Court of Appeals for the Ninth Circuit, was a Public Interest Fellow at the law firm of Hall & Associates in Los Angeles and practiced in the business department of the Boston law firm of Foley Hoag,

where she specialized in transactions involving intellectual property licensing and transfer. Professor Dyal-Chand's research examines market-oriented strategies for achieving economic self-sufficiency, with a focus on community economic development. Her recent critique of microcredit programs for the poor is forthcoming in the *Stanford Journal of International Law*.

John Flym is a Professor of Law at Northeastern University School of Law. He teaches Professional Responsibility and Advanced Criminal Procedure, and directs the Criminal Advocacy Clinic. His recent teaching has focused on the areas of criminal law and advocacy, criminal procedure and doctrine, litigation and the legal profession. He participates in several professional organizations concerned with the development of legal theory and practice.

James Thuo Gathii is an Associate Professor of Law at Albany Law School NY where he teaches International Law, International Trade and International Business Transactions, International Organizational Law and Business Organizations. He is a graduate of the Faculty of Law of the University of Nairobi, Kenya and the Harvard Law School. His research is in the areas of public international law, international economic and trade law as well as intellectual property law particularly as they relate to the third world. His articles have been published in the Michigan, Florida, Rutgers and Osgoode Law Reviews; the Harvard, George Washington, Georgia and Florida International Law Journals; and the European and Leiden Journals of International Law and Transnational Law and Contemporary Problems.

Dr. Jordan Gebre-Medhin is an Associate Professor of African-American Studies at Northeastern University. Among many other accomplishments, he was instrumental in peace negotiations in the Horn of Africa.

Erika George is an Associate Professor of Law at the University of Utah's S.J. Quinney College of Law where she teaches international human rights and humanitarian law, constitutional law, and civil procedure. Before joining the law faculty Professor George, practiced corporate litigation with firms in Chicago and New York. She left private practice to join Human Rights Watch. She served on the organization's staff from 1999 to 2001 conducting investigations of human rights abuses and monitoring compliance by state and non-state actors with international human rights law. As a research fellow for the organization Professor George authored, *Scared at School: Sexual Violence Against Girls in South African Schools* based on her research conducted among schoolgirls in KwaZulu-Natal, Gauteng, and the Western Cape. The book documents how sexual violence and harassment against girls in South African schools impedes their access to education in violation of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the U.N. Convention on the Elimination of All Forms of Discrimination Against Women and the U.N. Convention on the Rights of the Child. Professor George previously worked on women's health and human rights issues associated with HIV/AIDS in India. Professor George participated in the 1995 U.N. World Conference on Women NGO forum in Beijing. She served as HRW's NGO liaison at the 2001 World Conference Against Racism in Durban, South Africa and the U.N. preparatory meetings in Geneva, Switzerland. Professor George conducts advocacy and outreach projects, she is also a frequent lecturer and writer on issues of women's human rights and international human rights. Professor George graduated from Harvard Law School. She completed a M.A. in International Relations and earned her B.A. in Politics Economics Rhetoric and Law with honors both from University of Chicago.

Jennie Green, Senior Staff Attorney at the Center for Constitutional Rights, specializes in international human rights legal actions, primarily lawsuits in U.S. courts against human rights violators. Recent cases include one against John Ashcroft and other U.S. government officials

responsible for the post 9/11 arbitrary detention by the Immigration and Naturalization Service of thousands of non-citizens. Other successful cases have included those against Unocal, Royal Dutch/Shell, former Bosnian Serb leader Radovan Karadzic, former Chinese Premier Li Peng, former Guatemalan Minister of Defense Hector Gramajo, Indonesian generals Johnny Lumintang and Sintong Panjaitan, Ethiopian police official Kelbessa Negewo, and former Haitian dictator Prosper Avril. She has also worked on international human rights claims in international fora such as the International Tribunals for the former Yugoslavia and Rwanda, the United Nations Commission on Human Rights, and the Inter-American human rights system. From 1992-1995, Jennie was the Administrative Director at the Harvard Law School Human Rights Program. She has worked for a wide range of nongovernmental human rights organizations, including Amnesty International, and currently serves on the advisory boards of numerous other organizations.

Michael A. Grodin, M.D. has been a member of the Boston University faculty for over 26 years and has held appointments and taught Bioethics and Human Rights within the Schools of Public Health, Medicine, Management and the College of Arts and Sciences. He is the recipient of the Norman A. Scotch Award for Excellence in Teaching at the School of Public Health. Dr. Grodin is the Clinical Medical Ethicist for the Boston Medical Center and has served on numerous national and international panels and commissions focusing on medical and research ethics and human rights. He is the Co-Founder of Global Lawyers and Physicians and has received a national Humanism in Medicine Award for “compassion and empathy in the delivery of care to patients and their families” and a citation from the United State Holocaust Memorial Museum for “profound contributions- through original and creative research – to the cause of Holocaust education and remembrance.” He is the Co-Director of the Boston Center for Refugee Health and Human Rights, a Professor of Psychiatry and an elected member of the American Psychoanalytic Association. He is the author of over 150 articles and the editor or co-editor of 5 books in the fields of bioethics, health and human rights. Dr. Grodin brings his extensive real world clinical experience into all his teaching, research and advocacy.

James Hackney, Professor of Law, teaches in the areas of torts, corporate finance, corporations, critical race theory, and law and economics at Northeastern University School of Law. Prior to joining the Northeastern faculty, Professor Hackney was an associate with the Los Angeles law firm of Irell & Manella. He was book review and comment editor of the *Yale Law Journal* during law school. His research focuses on intellectual history, torts, law and economics, and critical race theory.

Cheryl Harris is Professor of Law at UCLA Law School where she has taught since 1998. She teaches Constitutional Law, Civil Rights, Employment Discrimination and Critical Race Theory. Professor Harris began her teaching career at Chicago-Kent College of Law in 1990, after more than a decade in practice that included criminal appellate and trial work and municipal government representation as a senior attorney for the city of Chicago. As the National Co-Chair for the National Conference of Black Lawyers for several years, she developed expertise in international human rights, particularly concerning South Africa. Professor Harris was a key organizer of several major conferences both in South Africa and in the United States that helped establish a dialogue between U.S. legal scholars and South African lawyers during the development of South Africa's first democratic constitution in 1994. She is the author of leading works in Critical Race Theory including the highly influential *Whiteness as Property* (*Harv. L. Rev.*). Her work has also taken up the relationship among race, gender and property and most recently has focused on race, equality and the Constitution through the re-examination of *Plessy v. Ferguson* and *Grutter v. Bollinger*. In 2002 Professor Harris received a fellowship from the Mellon Foundation to co-host a semester long interdisciplinary working group and conference

series on "Redress in Social Thought, Law and Literature," at the University of California Humanities Research Institute. She is a member of the Advisory Board of the Bunche Center for African-American Studies and is part of the Executive Council of the American Studies Association. Professor Harris is the recipient of the ACLU Foundation of Southern California 2005 Distinguished Professor Award for Civil Rights Education.

Jaribu Hill is a civil and human rights attorney and Executive Director of the Mississippi Workers' Center for Human Rights. She has also worked with Amnesty International in Oxford, Mississippi as a Soros Justice Fellow, focusing on issues affecting juveniles and inmates with mental retardation on death row. She is a former Skadden Fellow. While in law school, she was awarded the Thurgood Marshall fellowship, and served as an Ella Baker intern with the Center for Constitutional Rights. Ms. Hill was Northeastern University School of Law's 2005 Valerie Gordon Human Rights Lecturer. For more than fifteen years she was the lead singer with the renowned singing duo "Serious Bizness," and continues to sing and compose, frequently bringing the worlds of legal activist and cultural artist together in presentations throughout the United States and the world.

The **Honorable Geraldine Hines** began her legal career as a staff attorney with the Massachusetts Law Reform Institute in 1971 after graduating from University of Wisconsin Law School. She later served as a public defender with the Roxbury Defenders, before entering the private practice of law in 1982. She has been an Adjunct Professor of Law at Northeastern Law School since 1980. She has also served on the Judicial Nominating Council and the Steering Committee of the Lawyers Committee for Civil Rights Under Law. In 2002, Hines was appointed to the Superior Court of Massachusetts.

Sharon K. Hom is executive director of Human Rights in China (HRIC), and professor of law emerita, City University of New York School of Law. She received her B.A. from Sarah Lawrence College, and her J.D. from New York University School of Law where she was also a Root-Tilden Scholar. Professor Hom was a scholar-in-residence at the Rockefeller Foundation's Bellagio Center in Italy (summer 2000) working on a civil rights and international human rights project. She was a Fulbright Scholar in China (1986–88); served on the U.S.-China Committee on Legal Education Exchange with China (CLEEC) (1988-98); and has over 14 years of experience in U.S.-China law training and legal exchange initiatives. She has participated in numerous NGO, corporate, multilateral and bilateral consultations, and workshops, including serving as a judge for the Global Tribunal on Violence Against Women, convened for the Fourth World Conference on Women and the NGO Forum 95; participating as an independent expert at the WSIS International Symposium on the Information Society and Human Dignity (2003); representing the FIDH and HRIC at the EU-China Dialogue Seminars (2003, 2004); and presenting on Corporate Social Responsibility in China issues. She sits on the advisory board of Human Rights Watch/Asia, and on the Committees on Asian Affairs (1998-present) and International Human Rights (2003-present) of the Bar Association of the City of New York. Her research and publications focus on Chinese legal reforms, trade, technology, and international human rights. Her book publications include a co-authored interdisciplinary text and workbook, CONTRACTING LAW (1996, 2000), a co-edited ENGLISH-CHINESE LEXICON OF WOMEN AND LAW (YINGHAN FUNU YU FALU CIHUI SHIYI) (UNESCO, 1995), and an edited volume, CHINESE WOMEN TRAVERSING DIASPORA: MEMOIRS, ESSAYS, AND POETRY (1999).

Mr. Wylton James (bio not available at time of printing)

Rebecca Johnson is a founder and the lead organizer of Cooperative Economics for Women, a Boston-based nonprofit organization that helps low-income immigrant and refugee women

create and manage cooperative business enterprises. She previously served as co-director of Women for Economic Justice and has provided training and technical assistance for community organizing, economic literacy and economic development initiatives throughout the Northeast and Ohio.

Daniel Kanstroom is the Director of the Boston College Law School International Human Rights Program and Clinical Professor of Law. He teaches Immigration and Refugee Law, International Human Rights Law, and Administrative Law. Professor Kanstroom was the founder and is also the current director of the Boston College Immigration and Asylum clinic in which students represent indigent noncitizens and asylum-seekers. Together with his students, he has won several high-profile immigration and asylum cases and has provided counsel for hundreds of clients over more than a decade. He and his students have also written amicus briefs for the U.S. Supreme Court, organized innumerable public presentations in schools, churches, community centers, courts and prisons, and have advised many community groups. Professor Kanstroom has published widely in the fields of U.S. immigration law, criminal law, and European citizenship and asylum law. His work has appeared in such venues as the Harvard Law Review, the Yale Journal of International Law, the Georgetown Immigration Law Journal, and the French Gazette du Palais. He is currently completing a book entitled, "GOOD-BYE ROSALITA: A SOCIAL AND LEGAL HISTORY OF DEPORTATION." Professor Kanstroom has long served on the Board of the Directors of the PAIR Project, was rapporteur for the American Branch of the Refugee Law Section of the International Law Association and currently co-chairs a national immigration committee of the American Bar Association.

Nancy Kelly is a clinical supervisor at The Harvard Law School Immigration and Refugee Clinic and Managing Director at Greater Boston Legal Services Women Refugee Project. Before that she was a visiting fellow at the Human Rights Program at Harvard, a consultant to the Massachusetts Law Reform Institute, and a law clerk at the Massachusetts Superior Court. Ms. Kelly has published articles on discrimination against women in the immigration process.

David Kennedy is the Manley O. Hudson Professor of Law at Harvard Law School, and Director of the European Law Research Center. He teaches international law, international economic policy, European law, legal theory, and law and development. He has practiced law with various international institutions, including the United Nations High Commissioner for Refugees and the Commission of the European Union, and with the private firm of Cleary, Gottlieb, Steen and Hamilton in Brussels. He is the author of various articles on international law and legal theory, and founder of the New Approaches to International Law project.

Paul Kennedy (bio unavailable at time of printing)

The Honorable Angela E. V. King, from Jamaica, served as United Nations Special Adviser on Gender Issues and Advancement of Women from 1997-2004. In this capacity she supervised the UN's programme for the advancement of women and their human rights and chaired the Inter-Agency Network on Women and Gender Equality (IANWGE) comprising 60 agencies and entities of the UN system primarily to promote the integration of gender perspectives in all aspects of the UN's work. She has had a long and active record in promoting the advancement of women both globally and within the Organization. She was a founding member of the Group on Equal Rights for Women in the Secretariat and chaired the High-level Steering Committee on Improving the Status of Women. She also directed the work of the Focal Point for Women in the Secretariat where she found candidates, encouraged senior staff to hire and promote more women and investigated and formulated policies to address sexual harassment and to apply special measures for women until parity was reached. Ms King joined the UN Secretariat in

1966 from the Permanent Mission of Jamaica where she was one of the first women diplomats posted there after Jamaica joined the UN. She worked on human rights and social development issues. Some of her former UN positions included Director of Recruitment, Deputy to the Head of Human Resources Development and Chief of the Central Evaluation Unit. She attended three international conferences on women, Mexico (1975), Copenhagen (1980) and Beijing (1995) She was responsible for organizing and directing the Special Session of the General Assembly to assess the impact of the Beijing conference, "Beijing+5, Gender Equality, Development and Peace for the Twenty-first Century", held in New York in 2000. From 1992-1994, Ms King was assigned as Chief of Mission of the UN Observer Mission in South Africa (UNOMSA), focusing on preventive diplomacy through the resumption of constitutional negotiations, the reduction of violence and the peaceful holding of democratic, non-racial elections in 1994. In 1997, she led the mission on the situation of women to Afghanistan. Ms King's diplomacy and advocacy with the Security Council, in collaboration with UN entities and with non-governmental organizations, led to the adoption of the Council's landmark resolution 1325 (2000), Women, Peace and Security which for the first time acknowledged women's role in peace building and peace making. Ms King has a BA (HONS) History from the University of the West Indies, an MA in Educational Sociology and Administration from the University of London and further doctoral studies at New York University. She has written and published a number of articles on various aspects of the situation of women and on the peace process in South Africa. In November 1999 Ms King received an Honorary Doctor of Laws degree from the University of the West Indies... The Government of Jamaica conferred the Commander of Jamaica award in 2001.

Karl Klare is a Professor of Law at Northeastern University School of law, where he focuses on labor and employment law and legal theory, fields in which he has written and lectured extensively. In 1993, he was named Matthews Distinguished University Professor, one of Northeastern's highest honors. He has been a visiting professor at the universities of British Columbia, Michigan and Toronto and has held a senior Fulbright chair at the European University Institute in Florence, Italy. During the 1960s, Professor Klare participated in the civil rights, anti-war and student movements. His activism and writing now focus on workplace issues and human rights. In recent years, he has worked on numerous projects with lawyers in South Africa. He is co-secretary of the International Network on Transformative Employment and Labor Law (INTELL).

The Honorable Pius Nkondo Langa was born in the Eastern Transvaal, South Africa on 25 March 1939, matriculated in 1960 through private study and obtained his Bachelor of Law (B Juris) in 1973 and the Bachelor of Laws degree (LLB) in 1976 through the University of South Africa. After working at a shirt factory in 1960, Justice Langa then found employment with the Department of Justice as an interpreter/messenger. He went on through various levels and eventually served as prosecutor and magistrate respectively. He resigned from the department in 1977 and later that year was admitted as an Advocate of the Supreme Court of South Africa. As an Advocate, his work involved both civil and criminal matters with a predominance of political trials. He appeared in most of the more significant political trials, mostly in KwaZulu Natal, the Eastern Cape Province and Cape Town. His practice reflected the struggle against the apartheid dispensation and his clientele thus included the underprivileged, various civic bodies, trade unions and people charged under the security legislation and with activities designed to hasten the end of the apartheid system and to bring about a democratic South Africa. During this time, Justice Langa served on the boards and as trustee of various institutions and organization, such as the Community Legal Services Unit, Centre for Applied Legal Studies, United Democratic Front and the Convention for a Democratic South Africa, to name a few. He was also appointed as a Commissioner of the Human Rights Commission (later

to be known as the Human Rights Committee) for several years. In this capacity; he attended, participated in and organized conferences, workshops and seminars on human rights issues, in South Africa and in a number of other countries. Justice Langa also became an executive member of the Democratic Lawyers Association, and later became a founder member of the National Association of Democratic Lawyers (NADEL) and served as its President until 1994. In 1998 he was appointed Chairman of the Langa Commission to probe the Lesotho elections on behalf of the Southern African Development and Economic Community. Two years later, in 2000 he was appointed the Commonwealth's Special Envoy to assist the Fiji Islands' return to democracy. He has also participated in the work of constitutional review commissions in Sri Lanka, Zimbabwe, Rwanda and Tanzania and has been involved as a participant in conferences and workshops in many countries. He has served as Distinguished Visiting Professor at the Southern Methodist University, Texas and holds a number of honorary degrees. He was appointed as a Justice of the Constitutional Court of South Africa in October 1994 and became the Deputy President of the Court in 1997. In 2001 he was appointed as the Deputy Chief Justice of South Africa and has now, with effect from 1 June 2005, assumed office as South Africa's new Chief Justice of the Constitutional Court.

Hope Lewis is Professor of Law at Northeastern University School of Law, where she teaches International Law, Human Rights and the Global Economy, and related courses. She also taught Corporations and Securities Regulation for more than 10 years. Professor Lewis is co-editor of [*HUMAN RIGHTS AND THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL, AND CULTURAL DIMENSIONS*](#) (with Jeanne Woods) (Transnational Publishers, 2005), the first US textbook to focus primarily on economic, social and cultural rights and the impact of globalization on human rights in general. As chair of the faculty Human Rights Interest Group, she helped organize the Program on Human Rights and the Global Economy. Her articles on human rights, culture, and identity appear in several human rights textbooks as well as in leading legal journals. Professor Lewis received the 2001 Haywood Burns-Shanara Gilbert Award for her teaching, scholarship and human rights activism; she has been a Harvard Law School Visiting Scholar and a Fellow of the Dubois Institute for Afro-American Studies. Prior to joining the law faculty, Professor Lewis practiced as an attorney-adviser in the Office of Chief Counsel of the US Securities & Exchange Commission. She was a Women's Law and Public Policy Fellow and Harvard Fellow in Public Interest Law at TransAfrica Forum, an NGO that focuses on US foreign policy toward Africa and the Caribbean. Professor Lewis has worked with such organizations as the Battered Mothers' Testimony Project: A Human Rights Report on Child Custody and Domestic Violence in Massachusetts, the Human Rights Advisory Group, Global Tribunal on Accountability for Women's Human Rights, NGO Forum, UN Fourth World Conference on Women, the Boston Women's Fund, Cooperative Economics for Women, and the TransAfrica Forum Scholars Advisory Council. Professor Lewis received her J.D. from Harvard Law School and is a 1983 graduate of Harvard and Radcliffe Colleges.

Stephen Marks is François-Xavier Bagnoud Professor of Health and Human Rights at Harvard School of Public Health, where he focuses on international law, international politics, international organizations, human rights and economic development, peace, and conflict studies. Professor Marks's current interests include integrating human rights into sustainable human development. He has been a consultant to the United Nations Development Program on this topic and is principal investigator for a major grant by the Government of the Netherlands on the right to development with the aim to introduce human rights concepts into development planning and implementation at the national and international levels. He is preparing several publications on human rights and development and is co-authoring a book with Dr. Sengupta on the right to development. He has just published an article on "The Right to Development: Between Rhetoric and Reality" in the *Harvard Human Rights Journal*. Research interests also

involve international efforts to limit human genetic manipulation, focusing on human reproductive cloning and germline gene therapy. This study explores the human rights implications of these techniques and the assumptions of opposing attitudes on this question. His work in this area has appeared in the *Chicago Journal of International Law* and in the journal *Health and Human Rights*. He has published on sanctions regimes in the *American Journal of Public Health*, and on the relation between bioethics and human rights, including in the third edition of the *Encyclopedia of Bioethics*. He has just completed a study on creating a human rights culture in Cambodia for a book on "universalism and local knowledge in human rights." He has also published on priority areas of health and human rights and on impunity for mass atrocities, specifically the cases of the Khmer Rouge in Cambodia and Hissène Habré in Chad. As a consultant to UNESCO, he produced a study of that organizations human rights strategy. He prepared a study on mental health and human rights for the council of Europe and is working on another on human rights and tobacco control. As part of a joint project with the American Public Health Association, he has edited and contributed to a book entitled HEALTH AND HUMAN RIGHTS: THE EDUCATIONAL CHALLENGE. He is also one of four editors of an anthology called *Perspectives on Health and Human Rights*.

The Honorable Margaret H. Marshall is Chief Justice of the Supreme Judicial Court of Massachusetts. A native of South Africa, she graduated from Witwatersrand University in Johannesburg in 1966. In 1966, she was elected as President of the National Union of South African Students, and served in that capacity until 1968, when she came to the United States to pursue her graduate studies. She received a master's degree from Harvard University, and her J.D. from Yale Law School. Chief Justice Marshall was an associate, and later a partner, in the Boston law firm of Csaplar & Bok, and was a partner in the Boston law firm of Choate, Hall & Stewart. Before her appointment to the Supreme Judicial Court, she was Vice President and General Counsel of Harvard University. First appointed as an Associate Justice of the Supreme Judicial Court in November, 1996, she was named as Chief Justice in September, 1999, by Governor Paul Cellucci, and began her term on October 14, 1999, following her confirmation by the Governor's Council. Chief Justice Marshall is the second woman to serve on the Supreme Judicial Court in its more than 300-year history, and the first woman to serve as Chief Justice.

Dr. Jean McGuire has been in the field of public health for over 25 years. She has a diverse range of experiences in local, state, and federal public health planning, service development, resource allocation, and monitoring; surveillance and other public health data collection development, management, and evaluation; clinical and allied health service delivery management; health policy analysis; and health-related lobbying at state and national levels. She has worked in the non-profit, proprietary, and public sector with extensive responsibilities for personnel, infrastructure, and program development. A major component of both her salaried and consultant activities has included facilitation of challenging ethical, policy, and resource decision-making processes for governmental and non-governmental health organizations. Although HIV/AIDS has been a primary focus of many of her responsibilities over the course of the last decade, she has consistently also worked in the arenas of primary care delivery and reimbursement; STD prevention, diagnosis and treatment; substance abuse treatment; mental health service delivery and reimbursement; and disability related health and anti-discrimination efforts. Her work has mostly addressed domestic health concerns in the US. However, she has been involved in international HIV/AIDS policy and resource concerns since 1988 and, since 2000, has led the MA-South Africa Health Task Force efforts focused on the Eastern Cape Province in South Africa. Her work there has been broadly focused on the governmental public health system development, including the arena of HIV/AIDS. She has just returned from site visits there that focused on the system related barriers to antiretroviral management, including clinic-level capacity concerns associated with data collection and

management. In this role, in her capacity as the state HIV/AIDS Director in Massachusetts, and in her role on the CDC HIV/AIDS Advisory Committee, Dr. McGuire has been involved in a number of consultations with CDC GAP and actively stays in touch with the CDC South Africa office regarding the developments in the Eastern Cape Province.

Makau Mutua is Professor of Law and Director of the Human Rights Center at The State University of New York at Buffalo School of Law where he teaches international human rights, international business transactions, and international law. He has been a Visiting Professor at Harvard Law School, the University of Iowa College of Law, and the University of Puerto Rico School of Law. He is also co-director of the Program on International and Comparative Legal Studies of the UB Baldy Center for Law & Social Policy. Professor Mutua was educated at the University of Nairobi, the University of Dar-es-Salaam, and at Harvard Law School, where he obtained a Doctorate of Juridical Science in 1987. He was Co-Chair of the 2000 Annual Meeting of the American Society of International Law. Professor Mutua is the author of *Human Rights: A Political and Cultural Critique* (2002). He has written numerous scholarly articles exploring topical subjects in international law, human rights, and religion. These include "The Ideology of Human Rights," "Hope and Despair for a New South Africa: the Limits of Rights Discourse," "The Banjul Charter and the African Cultural Fingerprint: an Evaluation of the Language of Duties," and "Why Redraw the Map of Africa: a Moral and Legal Inquiry". He has written human rights reports for the United Nations and leading NGOs. He has authored dozens of articles for popular publications such as the *New York Times* and the *Washington Post*. Previously, Professor Mutua was the Associate Director at the Harvard Law School Human Rights Program. He was also the Director of the Africa Project at the Lawyers Committee for Human Rights. He serves as the Chairman of the Kenya Human Rights Commission and sits on the boards of several international organizations and academic journals. He has conducted numerous human rights, diplomatic, and rule of law missions to countries in Africa, Latin America, and Europe. He has spoken at public fora in many parts of the world, including Japan, Brazil, France, and Ethiopia.

The Honorable Jeanette Ndhlovu was born in Johannesburg, South Africa. She started and completed both her primary and secondary education in South Africa. After spending a year and a half at the University of Zululand, she left South Africa. She came to the United States in 1977 to help strengthen the anti-apartheid student movement and also to pursue her education. She enrolled at the University of Missouri where she attained a Bachelor of Arts degree in Political Science in 1983. She later completed a degree in Public Administration at the University of Missouri-Columbia. Ms. Ndhlovu joined the Observer Mission of the African National Congress (ANC) to the United Nations in 1987 until her departure from the U.S. in 1994. While with the United Nations Observer Mission, she received a Master of Arts degree from New York University in Counseling Psychology. During her student years in the United States, she was engaged in anti-apartheid campaigns at colleges and universities. She also addressed church, civic, labor and elected officials throughout the United States. In 1994 she left the United States for South Africa where she served on the Management team of the Independent Electoral Commission. In September 2000 Ms. Ndhlovu was appointed Deputy Permanent Representative to the United Nations. She also serves on the Bureau of the World Summit for Sustainable Development as an ex-officio member. She was appointed as Consul-General of the Republic of South Africa in Los Angeles as of October 2004.

Charles Ogletree, the Harvard Law School Jesse Climenko Professor of Law and Founding and Executive Director of the Charles Hamilton Houston Institute for Race and Justice, is a prominent legal theorist who has made an international reputation by taking a hard look at complex issues of law and by working to secure the rights guaranteed by the Constitution for

everyone equally under the law. He has examined these issues not only in the classroom, on the Internet and in the pages of prestigious law journals, but also in the everyday world of the public defender in the courtroom and in public television forums where these issues can be dramatically revealed. Professor Ogletree's most recent book, co-authored with Professor Deborah Rhode of Stanford University, *BROWN AT 50: THE UNFINISHED LEGACY*, commemorates the 50th anniversary of *Brown v. Board of Education* and was published by the American Bar Association in August 2004. His historical memoir, *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION* (<http://www.alldeliberatespeed.com/>), was published by W.W. Norton & Company in April 2004. *ALL DELIBERATE SPEED* has received enthusiastically favorable reviews from many distinguished scholars, including Skip Gates, David Levering Lewis, Alan Dershowitz, John Hope Franklin, and Anita Hill. He is the co-author of the award-winning book, *BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES*, and he frequently contributes to many journals and law reviews. He has written chapters in several books, including *If You Buy the Hat, He Will Come*, in *FAITH OF OUR FATHERS: AFRICAN AMERICAN MEN REFLECT ON FATHERHOOD* and *The Tireless Warrior for Racial Justice*, which appears in *REASON & PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE*. *Privileges and Immunities for Basketball Stars and Other Sport Heroes?* appears in *BASKETBALL JONES*, published in 2000. In addition, his commentaries on a broad range of timely and important issues have appeared in the editorial pages of the *New York Times*, the *Los Angeles Times*, and the *Boston Globe*, among other national newspapers. His commentary on how to make Black America better was published in the 2001 compilation, *LIFT EVERY VOICE AND SING*. Professor Ogletree has also contributed a chapter entitled *THE REHNQUIST REVOLUTION IN CRIMINAL PROCEDURE*, which appears in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT*, published in 2002. He also serves as the Co-Chair of the Reparations Coordinating Committee, a group of lawyers and other experts researching a lawsuit based upon a claim of reparations for descendants of African slaves, along with Randall Robinson, author of *THE DEBT: WHAT AMERICA OWES TO BLACKS*. He holds honorary doctorates of law from North Carolina Central University, New England School of Law, Tougaloo College, Amherst College, Wilberforce University, and the University of Miami School of Law. In 2003, he was selected by *Savoy Magazine* as one of the *100 Most Influential Blacks in America* and by *Black Enterprise Magazine*, along with Thurgood Marshall, A. Leon Higginbotham, Jr., and Constance Baker Motley, as one of the legal legends among America's top black lawyers. In 2002, he received the National Bar Association's prestigious Equal Justice Award. In 2001, he joined a list of distinguished jurists, including former Supreme Court Justices Thurgood Marshall and William Brennan, and civil rights lawyers Elaine Jones and Oliver Hill, when he received the prestigious Charles Hamilton Houston Medallion of Merit from the Washington Bar Association. Professor Ogletree earned an M.A. and B.A. (with distinction) in Political Science from Stanford University, where he was Phi Beta Kappa. He also holds a J.D. from Harvard Law School where he served as Special Projects Editor of the *Harvard Civil Rights - Civil Liberties Law Review*.

Michael Osborne is an advocate in Cape Town, South Africa, where he specializes in Constitutional and Administrative Law. In the course of his South African practice, he has appeared before the Constitutional Court of South Africa. Mr. Osborne also represents plaintiffs in the South African Apartheid Litigation, now on appeal to the Second Circuit Court of Appeals. He teaches occasionally at the University of Cape Town law school, and has previously lectured in law at the University of Chicago and at the University of the Witwatersrand, in Johannesburg. He is presently teaching a course in International Human Rights at the Graduate Program in International Affairs, at the New School, in New York City. He has been an attorney at the firm of Davis Polk and Wardwell. In 1996, Mr. Osborne served as a clerk on the Constitutional Court of South Africa. Mr. Osborne was educated at the University of the Witwatersrand and at the

University of Notre Dame, and has published in Constitutional Law.

Dr. Kwamina Panford has served on the faculty of the Department of African-American Studies Department at Northeastern since 1989 and was appointed chair of the department in 2002. Soon after his arrival, he established the Model Organization of African Unity, now known as the Model African Union (Model AU), and for over ten years has selected and trained students through this program to prepare for simulations of International/African Affairs in Washington, D.C. As chair of African-American Studies, he co-organized an International Educational Workshop on Africa which brought to campus African ambassadors, academics, and high-ranking policy makers and their US counterparts. His interests include the roles of international Organizations, especially The AU, ILO, World Bank and IMF and UN in Third World countries focusing on Africa. In connection with genocide, he is interested in the history of apparently the first to occur, the German annihilation of indigenous people in Namibia and recently, the concept of the "Responsibility to Protect."

Wendy Parmet, George J. and Kathleen Waters Matthews Distinguished University Professor, is an expert on health, disability and public health law. She directs the law school's JD/MPH program with Tufts University School of Medicine and is a cofounder of the new [Public Health Advocacy Institute](#). She teaches Constitutional Law, Public Health Law, Health Law, Bioethics, Disability Law and Federal Courts, and has published articles on discrimination and health law as well as AIDS law. In 1998, Professor Parmet acted as co-counsel in *Bragdon v. Abbott*, the first AIDS/HIV case to come before the US Supreme Court under the Americans with Disabilities Act. Professor Parmet's client, Sidney Abbott, had been refused treatment by her dentist when she revealed her HIV-positive status, although she was asymptomatic. The high court said that because Abbott was infected with HIV, she was entitled to the protections of the Americans with Disabilities Act. Formerly an associate with the Boston firm of Hill & Barlow, Professor Parmet clerked with Chief Judge Levin H. Campbell of the US Court of Appeals for the First Circuit. She is a member of the board of directors of Health Law Advocates, and is on the editorial board of the *Journal of Law, Medicine and Ethics*.

Gerard Quinn is Vice President of the European Committee of Social Rights (Strasbourg) which is a treaty-monitoring body within the Council of Europe that oversees the implementation of the European Social Charter. This instrument is the leading European regional instrument on economic, social and cultural rights. He was formerly Director of the European Commission (EU) Network of Disability Discrimination Legal Experts (Brussels) and is currently co-Director of an EU Network on Discrimination law across all grounds (age, race, disability, etc). He is Head of the delegation of Rehabilitation International (RI) to the United Nations ad hoc committee drafting a treaty on the rights of persons with disabilities. He is a member of the Irish Human Rights Commission where he helps directs projects on economic, social and cultural rights as well as disability rights. He helped draft the Limburg Principles for the interpretation of the UN Covenant on Economic, Social and Cultural Rights and his latest major piece of research was published by the Office of the UN High Commissioner for Human Rights (Geneva) in 2002 and '*The Current Use and Future Potential of UN Human Rights Instruments in the Context of Disability*'. He is a former director of research at the Irish Government's Law Reform Commission and currently holds a chair in law at the National University of Ireland (Galway) where he founded a Research Unit on Disability Law and Policy in 2002. Mr. Quinn was Northeastern University School of Law's 2004 Valerie Gordon Human Rights Lecturer. He is a graduate of the National University of Ireland and Harvard Law School.

Jim Rowan, Associate Dean for Experiential & Community-based Education and Research and Professor of Law at Northeastern University School of Law, is an expert at representing poor

people and their organizations. He has taught courses in Welfare Law, Poverty Law and Practice, Trial Practice, Lawyering Process, Professional Responsibility and an advanced course in Criminal Procedure. Professor Rowan heads the Poverty Law and Practice Clinic and supervises all of the clinical programs. His specific interests include community legal education, economic development and grassroots organizing. He works collaboratively with a range of legal services and private practitioners on these issues.

Harvey Salgo, Principal of La Capra Associates in Boston, is an economist and attorney with extensive experience in electric industry restructuring and regulation. His work (from 1992-2001) includes assisting in the India effort (supported by the World Bank) to restructure (and privatize certain functions of) the power sector in India; he has worked on similar issues in Pakistan. He has prepared for the World Bank an energy strategy for Montenegro (2002) and has reviewed and participated in the development of a new energy law (2002-03). He has also drafted a power sector reform law in Zimbabwe (along with local counsel) and has prepared detailed comments on the evolving law in Vietnam and China. More recently, he prepared a financial plan for the Government of Ukraine to restore creditworthiness to the country's energy sector. Among his experiences, Mr. Salgo was formerly an Assistant Professor of Economics at the University of Vermont (1969-74), an economist/attorney at the Massachusetts Department of Public Utilities (1977-79), and an attorney and consultant in private practice with the firm of Salgo and Lee (1979-87). As an attorney, Mr. Salgo represented numerous clients and has extensive regulatory litigation experience.

Sara Sayess is Associate Dean for Administration and Planning at Northeastern University School of Law.

Dan Schaffer is a Professor of Law at Northeastern University School of Law where he teaches in the areas of income taxation and nonprofit organizations. His research in recent years has been on tax law as it relates to health care policy.

Judy Scott is General Counsel to the Service Employees International Union. For over 30 years, Judy Scott has held key labor law positions in a wide range of unions in both the private and public sectors, having served as in-house legal counsel to the United Auto Workers, AFSCME, United Mine Workers, and Teamsters (as its General Counsel). Her career has included Big Three auto talks, the 1989 historic United Mine Worker victory at Pittston Coal Company, extensive internal union governance and arbitration matters, and most recently, innovative organizing pacts within the private healthcare industry. In 2002, Ms. Scott was selected to give the prestigious Henry Kaiser lecture at Georgetown University School of Law. In addition, Ms. Scott has given special attention to issues affecting women workers, beginning with her work on the implementation of the Pregnancy Discrimination Act amendment in 1979 auto negotiations. For many years, she has served on the Board of the National Partnership for Women and Families. She was the legislative representative for the former Industrial Union Department of the AFL-CIO, advocating on Capitol Hill for labor, civil rights and social justice issues. Ms. Scott also is co-author of the widely used book, ORGANIZING AND THE LAW. During the Clinton years, she served as a Presidential appointee on the Advisory Committee to the Pension Benefit Guaranty Corporation. Ms. Scott graduated from Wellesley College (BA) in 1971 and holds a law degree from Northeastern University School of Law (JD, 1974)

Victor W. Sidel, M.D., is a graduate of Princeton University and of Harvard Medical School. After training in internal medicine at Peter Brent Brigham Hospital and at the National Heart Institute in Bethesda, he headed the Community Medicine Unit at the Massachusetts General Hospital and studied epidemiology and biostatistics at the Harvard School of Public Health, the

Centers for Disease Control and the London School of Hygiene and Tropical Medicine. He moved to the Bronx in 1969 to chair the Department of Social Medicine at Montefiore Medical Center and the Albert Einstein College of Medicine and was appointed Distinguished University Professor of Social Medicine in 1984. He is also Adjunct Professor of Public Health at Weill Medical College of Cornell University. Dr. Sidel has served as president of the American Public Health Association and of the Public Health Association of New York City. He has also been a member of the Board of Directors of Physicians for a National Health Program. Since 1974 he has been chair of the Institutional Review Board for Protection of Human Subjects at Montefiore and has lectured and published on topics in medical ethics. Dr. Sidel was one of the founders of Physicians for Social Responsibility (PSR) and of the International Physicians for the Prevention of Nuclear War (IPPNW), the recipient of the 1985 Nobel Prize for Peace. He has spoken and published widely on the economic, social, environmental and health consequences of the arms race, on the risks posed by the proliferation of nuclear, chemical and biological weapons and on the diversion of resources and the curtailment of human rights entailed in responses to the threat of bioterrorism. Dr. Sidel is co-editor with Dr. Barry Levy of *WAR AND PUBLIC HEALTH*, of *TERRORISM AND PUBLIC HEALTH*, and of *SOCIAL INJUSTICE AND PUBLIC HEALTH*, all published by Oxford University Press. Dr. Sidel was the honorary Cleveringa Professor of Medicine and Human Rights at Leiden University in the Netherlands in 1998-1999.

Emily Spieler is Dean of Northeastern University School of Law, and a leading authority on employment law and social insurance systems. Prior to joining the Northeastern community, she served as the Hale J. and Roscoe P. Posten Professor of Law at West Virginia University College of Law, after holding a variety of senior positions in the public sector, including service as commissioner of West Virginia's Workers' Compensation Fund, as the state's first deputy attorney general for civil rights, and as a member of the state Human Rights Commission. In the 1970s, Dean Spieler practiced law in Boston, specializing in the legal problems of women workers. She was an early member of the Women's Law Collective, a feminist legal practice based in Cambridge, and also served as special assistant attorney general for the Massachusetts Department of Public Health's Lead Poisoning Prevention Division. Dean Spieler has received a wide variety of honors and awards, including a 2001 Fulbright award, and the West Virginia Martin Luther King Jr. Advocacy of Justice Award. She has served as a member of committees of the National Academies of Sciences, the National Academy of Social Insurance, the US Department of Energy and the National Institute for Occupational Safety and Health.

Barbara Stark received a B.A. from Cornell, cum laude, a J.D. from NYU, and an LL.M. from Columbia. She has published more than 40 chapters and articles in the California and UCLA law reviews and the Yale, Stanford, Virginia, Vanderbilt and Michigan journals of international law, among others, and her book, "International Family Law: An Introduction" is being published by Ashgate. Professor Stark has made more than 50 invited presentations at law schools and professional meetings throughout the world. She has taught and written about human rights for fifteen years, and is particularly interested in economic rights. In April 2004, she gave the Blaine Sloan Lecture at Pace University School of Law on "Women, Globalization and Law," and in 2003-2004 she was a Distinguished Visiting Professor of International Law at New England School of Law in Boston. In 2003 she was the College of Law Faculty Scholar at the University of Tennessee and she has been a Fulbright Senior Specialist since 2002. She has served on the Executive Council of the American Society of International Law, and she currently serves on the Executive Committee of the AALS Sections of International Law and Family Law. She is Chair of the Family Law Committee of the International Law Association, American Branch.

Henry Steiner is Director, Human Rights Program and Jeremiah Smith, Jr. Professor of Law at Harvard Law School. He is the founder and director of the Human Rights Program, and for many

years chair and co-chair of the University Committee on Human Rights Studies. He has published articles on a wide range of human rights issues and has lectured on the subject in over 20 countries. His most recent book is STEINER AND ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (2D. ED. 2000). He is also chair of the Board of Directors of the University of the Middle East Project.

Stephen Steinlight is an authority on contemporary slavery, human rights, civil rights, immigration policy, First Amendment issues, Islam and Islamism, social policy, conflict-resolution, inter-religious and inter-ethnic relations, and an analyst of political and cultural trends in America. Dr. Steinlight is Executive Director of the American-Anti Slavery Group (AASG) based in Boston, the only human rights organization in the United States whose focus is slavery in the contemporary world. Prior to joining AASG, Dr. Steinlight was president for the Center for Immigration and National Security which focuses on the nexus between America's broken immigration system, both de jure and de facto, and rising threats to national security. Director of National Affairs (domestic U.S. policy) at the American Jewish Committee (AJC) for eight years, his many articles, among them the recent "High Noon to Midnight: Why Current Immigration Policy Dooms American Jewry," speeches and interviews have generated significant controversy among policy analysts. Now a Fellow of the Center for Immigration Studies, he is a member of the Action Group that advises the Congressional Caucus on Immigration Reform. Formerly editor of *South Asia: In Review* of the US Institute for Strategic Study of South Asia where he is also a Fellow, he has also been involved in the work of the IbnKhaldún Society of independent Muslim intellectuals, one of the chief counterweights in the Muslim intellectual world to the forces of Islamism. He has played an important role as a bridge between Western intellectuals and Freethinking Islamic intellectuals. Dr. Steinlight was part of a team of experts on civil society, inter-religious relations, Islam, and conflict-resolution sent to Macedonia by the U.S. Institute for Peace and the Soros Open Society Institute to avert a return to civil war between the country's Orthodox Christian majority and Muslim minority, seek better protections for Muslim rights in that country's constitution, and help lay the foundations for the transparent, violence-free elections held some months later. Dr. Steinlight was a professor of Victorian Studies for 20 years before leaving academia and entering the NGO/not-for-profit world. He was Director of Education at the US Holocaust Memorial Council and Vice President of the National Conference of Christians and Jews (NCCJ) before assuming the senior position in American domestic public policy at the American Jewish Committee. He helped create "Remember the Children" exhibition at US Holocaust Memorial Museum, and at NCCJ he conducted the largest survey of inter-group attitudes ever undertaken in the US, "Taking America's Pulse." At AJC he founded the critically-acclaimed *Commonquest: The Magazine of Black-Jewish Relations* and with the noted Muslim scholar Khalid Durán, he co-authored a study of Islam *Children of Abraham*, a work that led the authors to receive fatwas from extremist Islamist mullahs while receiving encomiums from HRH Prince El Hassan bin Talal of Jordan, a lineal descendant of the Prophet Mohammed, as well as leading Muslim, Christian and Jewish religious scholars. He has often been a guest on the BBC TV's "News Night," the Voice of America, radio talk shows, and is frequently quoted in news outlets and policy journals. He was a board member of the Leadership Conference on Civil Rights and the National Immigration Forum. Stephen Steinlight is a Phi Beta Kappa graduate of Columbia College, Columbia University. A recipient of Columbia College's Alumni Merit Award, he was also a Woodrow Wilson Fellow and recipient of the Kellett Fellowship to Cambridge University. He was a Marshall Scholar at the University of Sussex where he received his Ph.D. Among many academic honors and fellowships, he was a Fellow of the National Endowment for the Humanities and is a Fellow of Timothy Dwight College, Yale University. His most recent book, *Fractious Nation: Unity and Division in Contemporary American Life*, is published by the University of California Press-Berkeley.

Steve Subrin, Professor of Law, joined the Northeastern University faculty in 1970. Prior to teaching, Professor Subrin practiced civil litigation and labor law for seven years with the Boston firm of Burns & Levinson, where he became a partner in 1966. He has published extensively on civil procedure, with an emphasis on procedure reform, and the historical background of the Federal Rules of Civil Procedure. Professor Subrin has taught Civil Procedure, Evidence, Complex Litigation, Alternative Dispute Resolution, Federal Courts and The Legal Imagination. He was reporter to the Massachusetts Supreme Judicial Court Standing Advisory Committee on Rules of Civil Procedure for 12 years and was consultant to the reporter on the Local Rules Project of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Professor Subrin is coauthor of a seminal casebook, *CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT*. With Professor Margaret Y.K. Woo, he has written a text about American civil procedure for the Chinese legal community, published in Chinese. Professor Subrin has taught Civil Procedure at Harvard Law School and Renmin University in Beijing, China, and Complex Litigation at Yale Law School.

Gregory R. Wagner, M.D., is a Visiting Professor, Harvard School of Public Health, and Senior Advisor to the Director of the U.S. National Institute for Occupational Safety and Health (NIOSH). Until recently, he served as Director of the NIOSH Division of Respiratory Disease Studies. He currently serves as national Chair of the Steps to a Healthier US Workforce Symposium and Initiative, exploring the benefits of integrating traditional workplace health protection programs with efforts at health promotion. Dr Wagner works closely with the World Health Organization (WHO) and International Labour Organization (ILO) in international efforts to combat occupational lung disease. He has represented the U.S. on a variety of expert committees of the WHO and ILO, including those responsible for updating the ILO listing of occupational diseases, recommending approaches to medical screening and surveillance of workers, and revising the system for classifying radiographs for pneumoconiosis. Dr. Wagner has also served on American Thoracic Society committees developing policy statements on silicosis, on the adverse health effects of air pollution, and on the diagnosis of non-malignant disease from asbestos exposure; and on federal advisory committees for the Departments of Energy and Justice on issues related to beryllium disease prevention and compensation for uranium miners. A graduate of Harvard College and Albert Einstein College of Medicine, Dr. Wagner has both taught and practiced internal and occupational medicine, and is board certified in both fields. His current professional work focuses on optimizing the health of people who work and the role of government in the prevention of disease.

Lucy Williams is Professor of Law at Northeastern University School of Law. Prior to joining the Northeastern faculty in 1991, Professor Williams was an attorney specializing in employment and governmental benefits for 12 years with the Massachusetts Law Reform Institute. She has written and lectured extensively on poverty and social welfare law, is the author of numerous pieces of legislation enacted by both the Illinois and Massachusetts legislatures regarding children, public assistance and housing, and has litigated many poverty law class actions. Professor Williams teaches in the area of social welfare law, and has written articles for publications including the *Yale Law Journal* and *Politics and Society*. In 1994, she was appointed by President Clinton to the Advisory Council on Unemployment Compensation. In 1994-1995, she was honored by the school as the Public Interest Distinguished Professor.

John Willshire Carrera is a clinical supervisor at the Harvard Law School Immigration and Refugee Clinic and co-founder of the Refugee Law Center in Boston.

Margaret Woo is Professor of Law at Northeastern University School of Law. She teaches Civil Procedure, Administrative Law and Comparative Law. In 1997, she was named the law school's Distinguished Professor of Public Policy. She was formerly a fellow at the Bunting Institute of

Radcliffe College and is presently an associate in research at the East Asian Legal Studies Center of Harvard Law School and the Fairbank Center of Harvard College. She is the recipient of grants from many organizations, including the National Science Foundation, the Ford Foundation and Northeastern. Professor Woo has published and spoken widely on China's legal reforms. She is the co-editor of *EAST ASIAN LAW - UNIVERSAL NORMS AND LOCAL CULTURES* (Cruzon/Routledge Publishers, 2003), a collection of interdisciplinary studies on the competing tensions of global/local forces on East Asian identities and legal systems. She is also the co-author of *AMERICAN CIVIL LITIGATION* (Aspen Publishers, forthcoming), which places American civil procedure in historical, empirical and sociological context. At present, Professor Woo is working on a joint study with a group of legal scholars from Tsinghua University and Peking University in Beijing, China. This study has collected empirical data from the Chinese courts and is the first systematic analysis of current Chinese legal reforms. As part of this work, Professor Woo is co-authoring an article, "Civil Justice in China," with Professor Wang Yaxin, Tsinghua University, Beijing, China. The article analyzes initial data collected from three different intermediate courts in China, each representing a different stage of legal reform.

Jeanne M. Woods, Henry F. Bonura, Jr., Distinguished Professor of Law, teaches public international law, human rights, and constitutional law at Loyola University School of Law (New Orleans). She has spoken widely and published numerous articles on these subjects. Professor Woods was Legislative Counsel with the National Office of the American Civil Liberties Union in Washington, D.C. from 1989-1993. She began teaching at Loyola in 1993. She is co-author of a groundbreaking new human rights casebook focusing on economic, social, and cultural rights, *HUMAN RIGHTS AND THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL, AND CULTURAL DIMENSIONS* (with Hope Lewis) (Transnational Publishers, 2005).

Professor of Law & Faculty Director, Program on Human Rights and the Global Economy, Northeastern University School of Law.

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Professor of Law, City University of New York (CUNY) School of Law & Ariel F. Sallows Professor of Human Rights Law, University of Saskatchewan School of Law. Copyright © 2005; Penelope Andrews. All Rights Reserved. Used by permission.

Former United Nations Assistant Secretary-General & Special Adviser Responsible for Gender Affairs and Advancement of Women. Text used by permission.

Reporters for this session were Monica C. Elkinton and Maria P. Muti.

George J. and Katherine Waters Matthews Distinguished University Professor, Northeastern University School of Law.

See additional biographical information in Appendix—Ed.

State v. Makwanyane, 1995 (6) DCLR 665 (CC) (the death penalty is unconstitutional).

Id. at para. 221.

Id. at paras. 223-224.

Investigating Directorate: Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd, 2000 (10) BCLR 1079 (CC), at para. 21.

McDuffy v. Secretary of the Executive Office of Education, 415 Mass. 545, 621, 615 N.E.2d 516, 555 (1993).

In *Soobramoney v. Minister of Health, KwaZulu-Natal*, 1997 (12) BCLR 1696 (CC), Mr. Soobramoney sought to be provided with renal dialysis.

See *Hancock v. Driscoll*, 2004 Mass. Super. LEXIS 118 (2004) (concerning enforcement of the rights announced in *McDuffy*, supra note 5).

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Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC).

President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd, 2005 (—) BCLR (—) (CC). Section 39(2) provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

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See Appendix for biographical information on participants. –Ed.

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Used by permission. Ideas for this Article were developed in connection with several academic presentations, including a panel presentation at the Wisconsin/Harvard Workshop on International Economic Law and Transnational Regulation at the University of Wisconsin Law School in November 2004, a presentation to the Byse Workshop on Transnational Identity, Governance and Law at Harvard Law School in November 2004, a lecture at the University of Sydney, Faculty of Law in June 2004, a panel presentation at the International Law and Its Others conference of The Melbourne Legal Theory Workshop, University of Melbourne, Faculty of Law in June 2004 and the Rethinking Strategy and Ideology: Progressive Lawyering, Globalization and Markets conference at Northeastern University School of Law in November 2003. I am grateful to all the participants in these workshops and events for their helpful comments and support. I am particularly grateful to David Kennedy for his encouragement and invaluable comments on prior drafts.

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In this Article, I focus on businesses operating in some manifestation of the corporate form. I do not mean to suggest by this focus that other forms of business entities are not important to transnational regulation and governance or that some of the analysis in this Article might not also be applicable to other forms of business entities.

One notable exception is JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000).

See *id.*; PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956); HENRY STEINER ET AL., *TRANSNATIONAL BUSINESS PROBLEMS* (4th ed. 1994).

In a real world context, World Corp. would likely conduct its operations in Xambia through a subsidiary, perhaps incorporated in Xambia. While this additional corporate actor would add another layer of complexity to the analysis, I do not believe it would significantly change the regulatory dynamics between World Corp., Xambia, and Zutopia. Thus, I have simplified the example to better focus attention on the dynamic interactions between corporate actors and regulators.

While these examples are drawn from real events, both the name of the company and the facts have been altered to protect confidentiality and to sharpen the issues raised.

Had compliance with the highest level of regulatory standards been too expensive or impracticable for Interactive Media, it would have preferred harmonized rules only if the rules were not harmonized at the highest levels and if the costs of compliance with the lower-level harmonized rules were less than the costs of having a standard contract for low-standard jurisdictions and special contracts for the jurisdictions with the higher standards. From these examples it should be clear that, contrary to the commonly asserted maxim, business does not always prefer harmonized rules to regulatory difference.

Cf. MARK J. ROE, *POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT* 21 – 28, 71 - 72 (2003).

Prepared by Professors Dan Danielsen and Rashmi Dyal-Chand, with the assistance of Jessica Jones and Siddhartha Mukherjee.

See Appendix for biographical information on participants.—Ed.

Prepared by James Rowan, Associate Dean for Experiential and Community-based Education and Research & Professor of Law, Northeastern University School of Law, Margaret Y.K. Woo, Professor of Law, Northeastern University School of Law, and Ms. Maria P. Muti.

Prepared by Professor Hope Lewis, Northeastern University School of Law, for the Seminar: *International Human Rights: Race, Gender, Culture* (Summer 2005).



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