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## BEYOND NAMING AND SHAMING: METHODOLOGICAL IMPERATIVES OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS ADVOCACY

Bonny Ibhawoh\*

“In my view, the most productive way for international human rights organizations... to address ESC rights is by building on the power of our methodology. The essence of that methodology... is not the ability to mobilize people in the streets, to engage in litigation, to press for broad national plans, or to provide technical assistance. Rather, the core of our methodology is our ability to investigate, expose, and shame.”<sup>1</sup>

Kenneth Roth, Executive Director, Human Rights Watch, 2004.

### 1. Introduction

In response to growing criticisms that they have shirked their responsibility to promote Economic, Social and Cultural (ESC) rights, international human rights Non Governmental Organisations (INGOs) have consistently stressed the difficulty of promoting ESC rights in the same way as Civil and Political (CP) rights. Three main reasons have been advanced to explain why human rights INGOs cannot be as effective advocates of ESC rights as they have been for CP rights. First, because ESC rights are ‘costly’ and have to do with the

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<sup>1</sup> Kenneth Roth, “Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organisations”, *Human Rights Quarterly* 26 (2004) 1, p. 68.

allocation of scarce resources in developing countries, INGOs as outsiders can only play a limited role. Such decisions about resource allocation must reside with local voices. Second, there are difficulties in applying the human rights movement's time-tested methodologies of investigating, exposing and shaming on issues of ESC rights. Third, there is still a lot of fuzziness over the mechanisms for enforcing ESC rights. There is no clarity around the issues of violation, violator and remedy that have been the basis of the movement's traditional methodology.

While agreeing that promoting ESC rights poses peculiar challenges to INGOs especially on matters that border on distributive justice rather than clear-cut civil and political entitlements, this article argues that there has been a lack of political will amongst INGO to seriously take on the ESC rights advocacy. The reasons for this are both ideological and methodological. INGOs need to be more inventive and eclectic in their approaches to promoting ESC rights. Rather than arguing that ESC rights are "not doable", the focus should be on fashioning new tools for the task ahead. The human rights movement needs to go beyond the old methodologies of naming and shaming. INGOs should be open to adopting new strategies and methodologies to meet the challenges of ESC rights advocacy. Focusing on the economic and social rights advocacy of Ghanaian NGOs and the emerging jurisprudence on ESC rights in South Africa, this article explores what INGOs can learn from the Third World. Countries in the South that may have achieved notoriety for human rights abuses can also become important sources of new methodologies for human rights advocacy.

## 2. The Critique

The argument that international human rights organisations have not traditionally promoted ESC rights as vigorously as they have promoted CP rights is not new. Several scholars have made the case that the human rights movement, despite its claim to moral objectivity has never been completely apolitical or non-ideological. Rather, it is driven by a patently Western liberal agenda. The role of key players like INGOs within the human rights movement is also neither non-

ideological nor post-ideological. The mantra of universal morality tends to mask their deeply political character.<sup>2</sup> The historical evidence indeed suggests that the promotion of human rights both by state and non-state actors have been frequently undermined by political biases. Throughout the Cold War period, for example, leading Western-based human rights INGOs stressed a narrow range of civil and political rights in their mandates and activities. They focused mainly on exposing civil and political rights violations in the Soviet bloc and the Third World. These CP rights were deemed "core" rights as opposed to "secondary" economic and social rights which were emphasised in communist propaganda.

This trend was a reflection of a broader Cold War trend when human rights became a battlefield of sorts, on which the Western and Eastern blocs sought to legitimise opposing political ideologies. The Cold War deeply perverted the philosophy of states toward human rights as evident in the partisan debates over human rights at the United Nations in the decades between the 1950s and the 1990s. Caught in the middle of these ideological battles were human rights INGOs whose claim to neutrality was constantly challenged, particularly because many of their activities focused disproportionately on human rights violations in the Soviet bloc. The oldest and most prestigious human rights INGOs – Amnesty International (AI), the International Commission of Jurists (ICJ), and Human Rights Watch (HRW) – were established primarily to deal with human rights in Cold War-era Europe.<sup>3</sup> Indeed, one troubling trend in the work of human rights INGOs during this period was that they were caught up in the partisan international politics of the era. The 'naming and shaming' seemed to focus quite disproportionately

<sup>2</sup> Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, Philadelphia, 2002), p. 7.

<sup>3</sup> The Helsinki Accord of 1975, a Cold War agreement aimed at guaranteeing security and cooperation in Europe, typifies the link between the tensions of Cold War political ideology and the activities of human rights INGOs. The human rights provisions in the accord became part of the grounds on which Western-based INGOs criticized authoritarian regimes in the Eastern bloc. The accord also led to the emergence of a new generation of human rights NGOs in the West – notably, Helsinki Watch, which later became Human Rights Watch.

on civil and political rights violations, on countries of the communist Eastern bloc and a familiar group of 'violators' in the South.<sup>4</sup>

Communist Eastern bloc regimes responded to INGO criticism of their human rights record by challenging the legitimacy of these organisations – accusing them of pursuing a patently ideological agenda of propagating Western capitalism. These countries touted instead their own attention to economic and social welfare of their people which they accused Western-based human rights INGOs of conveniently overlooking or underplaying.<sup>5</sup> The dominant argument is that while human rights INGOS were quick to criticise civil and political rights violations in communist Eastern bloc nations they turned a blind eye to equally condemnable economic, social and cultural rights issues in Western countries mainly for ideological reasons.

Since the end of the Cold War, major human rights INGOs such as Human Rights Watch and Amnesty International have begun to bridge the advocacy barriers in ESC rights. After several decades of resistance both organisations have recently moved to give economic and social rights more prominence in their mandates and activities. With the collapse of the Soviet Union in the late 1990s, several INGOs began to talk more about the “indivisibility” of rights. As it were, the post-Cold War period has ushered a return to the original spirit of the Universal Declaration of Human Rights (UDHR) and the expansion of mainstream human rights work to include not only civil and political rights but also ESC rights.

The extent to which human rights INGOs have embraced ESC rights in their programs and agendas have varied. Though Human Rights Watch has made a public attempt to address ESC rights, it

<sup>4</sup> David Manasian, “The Conscience of Mankind”, *The Economist*, 5 December 1998, p. 5.

<sup>5</sup> As China’s 1991 White Article on human rights states, “[i]t is a simple truth that, for any country or nation, the right to subsistence is the most important of all human rights, without which the other rights are out of the question ... [t]o eat their fill and dress warmly were the fundamental demands of the Chinese people who had long suffered cold and hunger”. See, *The Right to Subsistence – The Foremost Human Right The Chinese People Long Fight For*, Chinese Government White article on Human Rights 1991, <[www.china.org.cn/e-white/7/7-I.htm](http://www.china.org.cn/e-white/7/7-I.htm)>, 6 May 2007; Xiaorang Li, “Asian Values and the Universality of Human Rights”, *Business and Society Review* 102 (1999) 1, p. 82.

acknowledges that its expertise lies in “upholding civil and political rights” and that in addressing economic, social and cultural rights, it will focus on “arbitrary or discriminatory governmental conduct [that] lies behind an economic, social and cultural rights violation”.<sup>6</sup> By focusing its energies in this way, HRW is maintaining its emphasis on the political right of equal treatment before the state, rather than the meaningful exercise of ESC rights per se. In other words, sections of a population living in poverty would have to be living in poverty *because of* a state’s discriminatory practices (presumably on the basis of some immutable characteristic such as race, ethnicity, sex, etc.) in order for the condition to be considered a human rights violation within the scope of the organisation’s mandate (emphasis added).<sup>7</sup>

Amnesty International, for its part, has taken on economic, social and cultural rights since 2001 and focuses on the interdependence of all human rights.<sup>8</sup> However, the focus, like that of HRW, remains on discriminatory practices. In a press release announcing the 2001 mandate expansion, AI’s secretary-general, Irene Khan, stated: “from now on, we will work, not only against torture or for prisoners of conscience, but against all forms of discrimination”.<sup>9</sup> This shift to embrace the full spirit of the UDHR has not been without its critics. A recent article in *The Economist* criticizes Amnesty International for its “broader and more ambitious” mission, arguing that it made the organization “perhaps less effective overall” and implores AI to return to “classic human-rights questions,” namely CP rights which they argue make possible ESC rights through the political process.<sup>10</sup>

These recent changes by human rights INGOs have not blunted criticism of their long-standing ‘abandonment’ of ESC rights

<sup>6</sup> *Economic, Social and Cultural Rights*, Human Rights Watch, <[hrw.org/doc/?t=esc](http://hrw.org/doc/?t=esc)>, 14 June 2007.

<sup>7</sup> Natasha Sawh, *Negotiation on the Ground: Realizing Economic, Social and Cultural Rights in South Africa, Nigeria and Peru* (M.A. Thesis, McMaster University, Institute for Globalization and the Human Condition, 2007) [unpublished], p. 11.

<sup>8</sup> *Economic, Social and Cultural Rights*, Amnesty International, <[www.amnestyusa.org/esct/summary.do](http://www.amnestyusa.org/esct/summary.do)>, 4 March 2007.

<sup>9</sup> Fiona Robinson, “NGOs and the Advancement of Economic and Social Rights: Philosophical and Practical Controversies”, *International Relations* 17 (2003) 1, pp. 79-96.

<sup>10</sup> “Many Rights, Some Wrong”, *The Economist*, 24 March 2007.

advocacy. While the move towards stronger ESC rights advocacy has been welcomed by most commentators as engendering a more holistic human rights corpus, they continue to raise important questions about the ideological agenda of the human rights movement. The question posed by several scholars is: “Why Now?” Why have the “gatekeepers” of the human rights movement become more disposed to economic and social rights advocacy in the post-Cold War era? Could it be because we no longer face the ‘risk’ of communist states appropriating the economic and social rights discourse to challenge Western liberal norms? Have economic and social rights suddenly gained more prominence within the human rights movement only because it has become more politically and ideologically expedient for certain key players? Is the human rights movement driven by the ideological interests of a narrow but powerful organizational cabal? Some would suggest that factors at play here may be more than simple coincidence.<sup>11</sup> Elsewhere, I have argued that if this is indeed the case, then it calls to question all our assumptions about the normative objectivity of the international human right movement.<sup>12</sup>

Thus, even with the efforts being made towards ESC rights advocacy, the arguments persists that human rights INGOs, having neglected ESC rights advocacy in the past, continue to do too little, too late, in the promotion ESC rights.

### 3. The Defence

Most human rights INGOs readily acknowledge that they have not done as much to promote ESC rights as they have CP rights. They disagree however that this is either ideologically driven or simply a result of ‘shirking responsibility’. Perhaps the most articulate defender of the INGO position has been Kenneth Roth, long-time Executive Director of US-based Human Rights Watch. In several journal

<sup>11</sup> See for instance Mutua, *supra* note 2.

<sup>12</sup> Bonny Ibhawoh, “Human Rights INGOs, the North/South Gap and the Challenge of Normative and Empirical Learning” in D. Bell and J. Coicaud (eds.), *Ethics in Action: The Ethical Challenges of International Human Rights Nongovernmental Organizations* (Cambridge University Press, Cambridge, 2007), pp. 84-85.

articles, books contributions and even public speeches, Roth has responded rather strongly to criticism of INGOs preoccupation with CP rights and “abandonment” of ESC rights. His thoughtful and engaging arguments and rebuttals cannot all be outlined here.<sup>13</sup> It suffices to state that Roth and others have consistently stressed the difficulty of promoting ESC rights in the same way as civil and political rights – an argument that I personally think that human rights scholars have not paid enough attention to.

Roth articulates the difficulty associated with promoting ESC rights in the same way that INGOs have traditionally promoted CP rights, anchoring it on three main premises. First, because ESC rights are “costly” and have to do with the allocation of scarce resources in Third World countries, INGOs as outsiders can only play a limited role. Such decisions about resource allocation must reside with local voices. Second, there are difficulties in applying the human rights movement’s time-tested methodologies of investigating, exposing, and shaming on issues of ECR rights. Third, there is still a lot of fuzziness over the mechanisms for enforcing ECR rights. There is no clarity around the issues of violation, violator, and remedy that have been the basis of the movement’s traditional methodology.<sup>14</sup>

Roth has also expressed his frustration at scholars who criticize human rights INGOs for not doing enough to promote ESC rights but who, themselves, have little appreciation of the difficulties involved in doing so. He states:

“I must admit to finding the typical discussion of ESC rights rather sterile. I have been to countless conferences and debates in which advice is freely offered about how international human rights organisations must do more to protect ESC rights. Fair enough. Usually, the advice reduces to little more than sloganeering. People lack medical care; therefore, we should say that their right to health has been violated. People lack shelter; therefore, we should say that their right to housing has been violated. People are hungry; therefore, we should say that their right to food has been violated. Such

<sup>13</sup> See, Roth, *supra* note 1, pp. 63-73. Also see Kenneth Roth, “Defending Economic, Social, and Cultural Rights: Practical Issues Faced by an International Human Rights Organization” in D. Bell and J. Coicaud (eds.), *ibid.*, p. 181.

<sup>14</sup> Roth, *supra* note 1, p. 68.

'analysis', of course, wholly ignores such key issues as who is responsible for the impoverished state of a population, whether the government in question is taking steps to progressively realise the relevant rights, and what the remedy should be for any violation that is found. More to the point, for our purposes, it also ignores which issues can effectively be taken up by international human rights organisations that rely on shaming and public pressure and which cannot."<sup>15</sup>

As someone with some experience in the human rights INGO sector, I am sympathetic to Kenneth Roth's arguments. They are compelling. Kenneth Roth's challenge is a call for academics to go beyond bashing INGOs for not doing enough to promote ESC rights and instead, focus on helping to find real solutions that are practical and effective in promoting ESC rights. As human rights scholars we cannot afford to simply be armchair critics on these important issues. Roth and others have thrown down the gauntlet and challenged human rights scholars to go beyond criticisms and theoretical posturing and instead, proffer workable ideas for ESC rights advocacy.

Scholars and practitioners have repeatedly called on human rights NGOs to adopt a holistic conception of human rights by advocating for ESC rights as vigorously as CP rights. However, few have bothered to ask or answer the crucial question that this inevitably raises: What are the implications of realising a holistic conception of human rights for local autonomy, democracy and governance? How do we address the real challenges of using the methodology of naming and shaming on issues related with distributing often-limited resources? How useful or reasonable is it to 'name and shame' an impoverished Third World country, with a GDP less than many medium sized corporations in the West, for not providing free and universal healthcare for its citizen? Rather than demanding resource allocation, human rights INGOs have focused more on discriminatory practices in part because they recognise that states (particularly those where ESC rights might be most needed) may not have the financial resources to guarantee these rights for their citizens.<sup>16</sup>

Roth is right when he argues that the methods that human rights INGOs have traditionally employed to promote CP rights are inadequate for promoting ESC rights. The most productive way for international human rights organizations to address ESC rights, he argues is by building on the power of their methodology. The essence of that methodology is not the ability to mobilise people in the streets, to engage in litigation, to press for broad national plans, or to provide technical assistance. Rather, the core of that methodology is the ability to investigate, expose, and shame. Human rights INGOs are therefore at their most effective when they can hold governmental (or, in some cases, nongovernmental) conduct up to a disapproving public.<sup>17</sup>

A related challenge that human rights INGO face in promoting ECS rights is the fact that ESC rights issues have traditionally been confined to the discourse on 'development' rather than human rights. For many decades after the UN adoption of the UDHR, academic and policy discourses of CP and ESC rights developed largely independently of each other in spite of their obvious connections. While CP rights were clearly construed as 'human rights', ESC rights were largely subsumed under the amorphous category of 'development planning'. This dichotomy was evident at both academic and practical policy level. It would be erroneous to place the blame for this dichotomy entirely on the lopsided work of human rights INGOs. Institutionally, decades of NGO work that has divided CP rights under the rubric of human rights work and ESC rights under the rubric of development cannot be undone overnight. Even today, institutional distinctions remain between human rights INGOs such as Amnesty International and development-orientated INGOs such as Oxfam, even though both organisations clearly deal with issues of human rights and social justice. It will take some time for INGOs

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improvements in the treatment of prisoners that would involve relatively inexpensive policy changes. *Prison Conditions in South Africa*, 8 February 1994, Human Rights Watch, <[hrw.org/reports/1994/southafrica](http://hrw.org/reports/1994/southafrica)>; *Out of Sight: Super-Maximum Security Confinement in the United States*, February 2000, Human Rights Watch, <[www.hrw.org/reports/2000/supermax/](http://www.hrw.org/reports/2000/supermax/)>; and *Prison Conditions in Japan*, March 1995, Human Rights Watch, <[www.hrw.org/research/japan.html](http://www.hrw.org/research/japan.html)>.

<sup>17</sup> Roth; *supra* note 1, p. 68.

<sup>15</sup> *Ibid.*, pp. 68-69.

<sup>16</sup> For example Human Rights Watch in its work on prison conditions routinely avoids recommending large infrastructure investments. Instead, they focus on

accustomed to a doing business in a particular manner to adapt their agendas and methodologies to meet new needs. To do this, INGOs should be open to adopting new tools and methodologies to meet the challenges of ESC rights advocacy.

#### 4. ESC Rights Jurisprudence in South Africa

Few would disagree that promoting ECR rights poses peculiar challenges to INGOs, especially on matters relating to issues of distributive justice rather than clear-cut civil and political entitlements. The methods that the human rights organisations have traditionally employed to promote CP rights may indeed be inadequate for ESC rights advocacy. What this tells me, however, is not that we cannot promote ESC rights as vigorously and successfully as we have promoted CP rights. It simply tells me that we need new tools – new methodologies. Thus, rather than argue that ESC rights are ‘not doable’, the focus should be on fashioning new tools for the task at hand. Human rights organisations must look beyond traditional methodologies of advocacy. In so doing, they may need to look more to the global South.

ESC rights are best understood, negotiated and prioritised in particular political and social contexts. Countries in the South that may have achieved notoriety for human rights abuses can also be important sources of new methodologies for human rights advocacy. As others have pointed out, many organisations in the South have successfully used the methods of education and mass mobilisation to promote ESC rights.<sup>18</sup> Although Roth would argue that these are not the traditional advocacy methods of the human rights movement, the point is precisely to move beyond these so-called ‘traditional methods’ of naming and shaming.

One of the main constraints that INGOs face in promoting ESC rights is the lack of clarity as to nature and orientation of ESC rights litigation. That clarity is beginning to emerge and some of the

<sup>18</sup> See, Betty Plewes and Rieky Stuart, “The Pornography of Poverty: A Cautionary Fundraising Tale” in D. Bell and J. M. Coicaud (eds.), *Ethics in Action: The Ethical Challenges of International Human Rights Nongovernmental Organizations* (Cambridge University Press, Cambridge, 2007).

progress has come from the South. Several cases decided by the Constitutional Court in South Africa have laid the groundwork for the justiciability of ESC rights in the country and mark significant contribution to the emerging international jurisprudence on ESC rights. In such landmark cases as *Soobramoney v. Minister of Health*<sup>19</sup> and *Government of RSA v. Grootboom*, the South African Constitutional Court has tackled problematic issues of ‘distributive justice’ and provided useful directions for developing the jurisprudence on ESC rights.<sup>20</sup> The first case addressed the possibilities of legally enforcing the right to health care guaranteed in the South African Constitution, and the latter dealt with the constitutional obligations of the government of that country to ensure adequate housing for its citizens.

More recent human rights cases have expanded this emerging jurisprudence. Perhaps the most notable is *Treatment Action Campaign (TAC) v. Ministry of Health* in which the South African Constitutional Court ruled that the government had a legal obligation to extend a particular form of HIV/AIDS treatment beyond pilot “research” sites that had demonstrably reduced Mother-To-Child Transmission (MTCT) to benefit the population as a whole. The legal facts of this case have been examined in detail elsewhere.<sup>21</sup> What is

<sup>19</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)*, 27 November 1997, Constitutional Court of South Africa, Case CCT 32/97. This case dealt with the rights of a diabetic man who was denied admission into the dialysis program of a state hospital because he did not qualify for admission under the hospital priority policy. The man then applied to the Durban High Court claiming that he had a right to receive dialysis treatment on the grounds of his constitutional right to life and the provision that no one may be refused emergency medical treatment. Although the application was dismissed on technical grounds, the case demonstrated the possibilities of legally enforcing constitutionally guaranteed economic and social rights in South Africa.

<sup>20</sup> *Government of RSA and others v. Grootboom and others*, 4 October 2000, Constitutional Court of South Africa, Case CCT 11/00. This case addressed the state’s obligations under section 26 of the South African Constitution, which gives everyone the right of access to adequate housing, and section 28(1)(c), which affords children the right to shelter. The judgment addressed jurisprudential questions about the enforceability of social and economic rights.

<sup>21</sup> *Treatment Action Campaign (TAC) v. Minister of Health*, 5 July 2002, Constitutional Court of South Africa, (2002) 5 SA 721 [TAC]. See Mark Haywood, ‘Current Developments: Preventing Mother-to-Child HIV Transmission in South Africa: Background Strategies and Outcomes of the

Health advocating eating garlic and beetroot to cure AIDS.<sup>28</sup> Outraged by this position, a group of 81 leading scientists, including Robert Gallo, co-discoverer of the HIV virus, stated on a letter to Mr Mbeki: “To deny that HIV causes AIDS is farcical. To promote ineffective, immoral policies on HIV/AIDS endangers lives; to have as health minister a person who now has no international respect is an embarrassment to the South African government.” The United Nations Special Envoy for AIDS in Africa, Stephen Lewis also strongly criticized the response of the South African government, describing its policies on AIDS as “theories more worthy of a lunatic fringe than of a concerned and compassionate state”.<sup>29</sup>

Under such glaring circumstances, where the denial of basic ESC rights result more from ineptitude and negligence rather than the lack of resources, traditional advocacy methodologies of investigating, exposing, shaming and litigation may be just as affective. In all human rights work, advocates must make decisions about which cases constitute the most egregious violations of human rights. In the case considered here, for example, the South African NGO, TAC chose not to pursue litigation until a drug was found that was simple to administer, effective, and cheap. The claim here is that this case suggests that egregious violations of ESC rights – particularly where lives are at stake – can in fact be adjudicated by the legal system.<sup>30</sup>

Third, in his writings on this case and the advocacy involved, Mark Haywood, the National Secretary of the TAC, emphasizes how the expertise of a variety of actors – both locally and internationally – constitutional lawyers, physicians, medical researchers, mothers living with HIV/AIDS, health policy analysts, dissident government officials, and human rights activists, were needed to enforce the ESC rights in question. He also chronicles the parallel public education campaigns waged by TAC and the mobilisations of marches and protests at key points in the trial. In a

<sup>28</sup> *AIDS Experts Condemn SA Minister*, British Broadcasting Corporation (BBC) News, <news.bbc.co.uk/2/hi/africa/5319680.stm>, 15 September 2007.

<sup>29</sup> Sabin Russell, ‘South Africa’s AIDS Efforts Assailed in Keynote Speech’, *San Francisco Chronicle*, 19 August 2006. Retrieved 23 October 2007 from The Stephen Lewis Foundation website <www.stephenlewisfoundation.org/news\_item.cfm?news=1372>.

<sup>30</sup> Sawh, *supra* note 7, p. 19.

reflection on the decision of the Constitutional Court, G. Budlender, lead counsel for TAC, argued that the battle had already been won in the court of public opinion and that the success of the case was thanks to public pressure: “social and economic rights are only as strong as the willingness of civil society to enforce them”.<sup>31</sup> While these approaches may not be part of what Kenneth Roth might consider traditional methods of human rights advocacy, they have been successfully used to achieve important ESC rights goals in South Africa. There exists a possibility that these successes can be replicated elsewhere.

## 5. NGOs and Poverty Alleviation in Ghana

In Ghana, the advances that have been made there in ESC rights promotion have taken a different form. Both human rights and development-oriented NGOs there have drawn on the traditional human rights methodology of ‘naming and shaming’ to pursue programs aimed at promoting ESC rights. However, by advocating participation and redistribution in state economic policies and pressuring the government to live up to its declared commitment to poverty alleviation, they have been quite innovative in their use of the naming and shaming methodology.

The involvement of Non-Governmental Organizations (NGOs) in Ghana in the effort to provide social safety nets for poor and marginalized rural communities intensified during the 1980s, following the high social costs of unpopular IMF and World Bank-inspired Economic Recovery Programme (ERP), otherwise known as the Structural Adjustment Programme (SAP).<sup>32</sup> SAP conditions

<sup>31</sup> Haywood; *supra* note 21, p. 314.

<sup>32</sup> Aimed at reducing the incidence of poverty, SAPs were economic recovery programmes from the IMF which were adopted by many developing countries. SAPs emphasized the diminished role of the state in the provision of social services and encouraged market operations in the provision of these services. See J. Barry Riddell, ‘Things Fall Apart Again: Structural Adjustment Programs in Sub-Saharan Africa’ in K. P. Jameson and C. K. Wilber (eds.), *The Political Economy of Development and Underdevelopment* (McGraw Hill Inc., New York, 1996); Kwadwo Konadu-Agyemang (ed.), *IMF and World Bank Sponsored Structural Adjustment Programs in Africa: Ghana’s Experience* (Ashgate Publishing Ltd., Aldershot, U.K., 2001).



necessary to highlight here is the implication of this case for the debate over ESC rights advocacy. Beyond demonstrating the justiciability of ESC rights,<sup>22</sup> this case is interesting because it highlights the mutually beneficial roles that litigation, public education, and activism – including traditional human rights approach of ‘naming and shaming’ – can have in realising ESC rights, in this case, the right to health.<sup>23</sup>

This case is also instructive because it addresses some of the central concerns of INGOs concerning human rights advocacy on matters relating to the distribution of limited state resources. The *TAC* case had obvious budgetary implications and some legal analysts have argued that as such the judgment had regrettably blurred the separation of powers between the judiciary and the executive.<sup>24</sup> However, such an argument is rooted in a concept of human rights that is restricted to CP rights, and which fails to recognize that the realisation even of these CP rights often have significant budgetary implications.<sup>25</sup> What this case suggests is that once ESC rights are constitutionally protected, as is the case in South Africa, courts have a role to play in ensuring that they are fulfilled. As Ngwena argues, while

“a measure of self-restraint is...appropriate when courts are adjudicating over alleged infringements of rights whose remedies may have budgetary implications... it would have been an abdication of its constitutional duty if

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Treatment Action Campaign Case against the Minister of Health’, *South African Journal of Human Rights* 19 (2003), pp. 278-315.

<sup>22</sup> It should be noted that the *TAC* case is one of three cases decided by the Constitutional Court in South Africa that have laid the groundwork for the justiciability of ESC rights in the country. The focus in this article remains on the *TAC* case because, as the most recent of the three, it confirms the key legal principles outlined in the previous two and there is more extensive coverage of this case in the academic literature.

<sup>23</sup> Sawh, *supra* note 7, p. 13.

<sup>24</sup> See *e.g.*, Kevin Hopkins, ‘Shattering the Divide – When Judges go too Far’ (March 2002) *De Rebus* pp. 23-26.

<sup>25</sup> The right to due process, for example, incurs significant court costs (including appeals) and the provision of legal counsel for defendants who cannot afford it.

[it] had refrained from finding a violation of a fundamental right and requiring the government to act quickly to save life”.<sup>26</sup>

This case lends weight to arguments for greater attention being paid to ESC rights, and does so in a number of ways. First, it is significant that these landmark cases demonstrating the justiciability of ESC rights were decided in South Africa, a developing country. One of the objections to ESC rights in human rights work is that in many countries with very limited financial resources, it is impossible to make such rights a reality for all.<sup>27</sup> This case demonstrates that with the application of the key principles that guide ESC rights jurisprudence, namely the limitation of a state’s obligation by the requirement that it act to the maximum of its available resources; the leeway afforded states to realise these ESC rights ‘progressively’; and the requirement of non-discrimination in the treatment of ESC rights entitlements. These principles make justiciability not only possible, but also reasonable, in the context of differing level of state resource capacity.

Second, the case demonstrates that it is possible to prove negligence on the part of the state with respect to ESC rights and that this can be grounds for effective advocacy. For instance, the charge against the South African government is not simply that it has failed to allocate scarce state resources to fight the AIDS pandemic in that country but that it has been wilfully negligent in so doing. The government’s initial approach to the AIDS crisis tended to minimize and trivialise the problem, with President Thabo Mbeki himself openly questioning whether HIV causes AIDS and his Minister of

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<sup>26</sup> Charles Ngwena, ‘Access to antiretroviral therapy to prevent mother-to-child transmission of HIV as a socio-economic right: an application of s. 27 of the Constitution’, *Medical Law International* 6 (2002) 1, p. 20.

<sup>27</sup> Interestingly, this was also an argument advanced for the separation of rights in the two 1966 covenants: developing countries could ill afford to guarantee ESC rights, while CP rights were ‘free’. In fact, more countries have adopted the ICESCR than the ICCPR, and only two countries that have adopted the latter have not adopted the former. Asbjorn Eide et al. (ed.), *Economic, Social and Cultural Rights: A Textbook* (Kluwer Law International, The Hague, 1995), p. 23.

compelled the state to sharply reduce spending on social services thereby resulting in lack of, or severe inadequacy of basic social services such as educational facilities, primary healthcare and water, mainly in rural areas. Over the years, Ghana has implemented several poverty alleviation/reduction programmes, with the most recent being the Ghana Poverty Reduction Strategy (GPRS), financed by the IMF/World under the Heavily Indebted Poor Country initiative (HIPC).

Under these conditions, local NGOs such as Simli Aid,<sup>33</sup> Pronet-North<sup>34</sup> and Integrated Social Development Centre (ISODEC) have served mainly as social welfare safety nets, absorbing the costs of economic recovery programs, such as SAPs, mainly through external donor funds.<sup>35</sup> These NGOs have, to varying degrees, successfully configured their poverty reduction programs not only as development issues but also as ESC rights issues. Simli Aid for instance, articulates poverty as a human rights issue that should be tackled primarily from a human rights perspective.

Lately, many NGOs in Ghana have shifted their focus from direct provision of social services to raising civic awareness about poverty and educating people in their service areas to be politically active and hold the state responsible for these services.<sup>36</sup> These NGOs are now advocating for poverty to be tackled in the political and human rights realm rather than simply in the development realm. They have sought to construct poverty not simply as a development issue but also as an issue of social justice and human rights. This approach perceives poverty as a violation of people's basic rights to material needs and economic participation. It recognises the need for both economic

<sup>33</sup> A local Ghanaian NGO which receives funding from Village Aid, a UK based NGO which operates via local partners in developing countries.

<sup>34</sup> A local Ghanaian NGO which primarily works in the water sector, providing water to rural communities in Ghana and receives funding from various external sources.

<sup>35</sup> A human rights-based NGO mainly working in social policy advocacy.

<sup>36</sup> Sylvia Bawa, *Advocating Recognition and Redistribution in Poverty Alleviation Programs in Ghana: An Examination of State and NGO Programs and Policies* (M.A Thesis in Social Justice and Equity Studies, Brock University, May 2007) [unpublished].

redistribution and political self-representation as a way of addressing the multiple human rights violations associated with poverty.

If poverty is a violation of fundamental human rights of the poor, then the ability to name the violator of these rights in order to hold them accountable for such violations should be possible. Using the media as a resource, a development-oriented NGO in Ghana, the Integrated Social Development Centre (ISODEC) openly criticises government policies, indicating how such policies fall short of universal human rights standards and perhaps most significantly, how they fall short of the government's own poverty alleviation goals. Through their advocacy campaigns ISODEC has used this methodology effectively, much to the benefit of the poor. The organisation adopts a pro-active advocacy approach making effective use of the media to 'name and shame' neo-liberal policies that limits people's access to water and basic health care. Its research and advocacy revolve around the negative impacts of IMF/World Bank and government policies on the poor and marginalised.<sup>37</sup>

Although ISODEC uses the human rights framework in its advocacy work, its programs suggest recognition of the interrelationship among, and interdependence of, CP and ESC rights in its poverty alleviation work. Its media advocacy and public enlightenment campaigns indicate a strategic emphasis on deploying the language of universal human rights as a way of ensuring that the government pays attention to, and corrects certain mishaps in policy planning. For instance, ISODEC campaigned for the abolishing of user fees and succeeded in obtaining the capitation grant, where each child in basic school is provided 30,000 Ghanaian cedis (USD 4) per child. Through its advocacy campaigns, ISODEC was able to persuade the government and the IMF to reconsider a water policy which according to them would have deprived a lot of people from getting any access to water. Similarly, the organization constructs the provision of family reproductive health as a human rights issue, and within that framework advocates the provision of anti-retroviral drugs, as a right, to HIV/AIDS patients.<sup>38</sup> Overall, ISODEC has been

<sup>37</sup> *Every Child Needs a Teacher!*, 2006, ISODEC Public Agenda, <[www.isodec.org.gh/campaigns/Education/index.htm](http://www.isodec.org.gh/campaigns/Education/index.htm)>, 18 November 2006.

<sup>38</sup> *Ibid.*

successful in using human rights concepts and methodologies to advocate for the provision of basic social services. It has done this mainly by either tagging the issues it addresses primarily as rights, or emphasising the 'rights' angles of these issues.

These approaches and initiatives in ESC rights advocacy point to new directions in NGO activity in Ghana - the gradual shift of development-oriented NGOs from direct intervention to advocacy. At least in Ghana, ESC rights advocacy appears to have blurred the lines between human rights and development-oriented NGOs. As these NGOs in the South become more effective in using human rights methodology to advance their development and poverty-reduction programs, ESC rights are bound to become more prominent parts of both development and mainstream human right advocacy.

## 6. Conclusion

These important initiatives and advances in ESC rights protection and promotion in South Africa, Ghana, and elsewhere in the South, can provide useful directions for INGO work in ESC rights advocacy. Human rights INGOs must recognise that their engagement in Third World societies need not be, as one writer puts it, a one-way street of rescuers and violators or victims.<sup>39</sup> Their work need not be limited to tackling human rights violations in these societies with agendas and programs developed in head offices in London, Paris, and New York. Rather, they should recognise that these societies, too, can make important contributions to their methodology. As is evident in the case of the Ghanaian NGOs examined here, many organisations in the South have successfully used the methods of education and mass mobilisation to promote ESC rights. Other studies suggest that this is also true of other developing societies.<sup>40</sup> While these approaches may not be the conventional methodologies used by human rights INGOs, they hold the promise of making these organisations more effective advocates of ESC rights.

<sup>39</sup> See, Mutua, *supra* note 2.

<sup>40</sup> See, Plewes and Stuart, *supra* note 18.

Another approach to ESC rights advocacy is to begin to think seriously of interrelatedness and indivisibility of human rights, not only in conceptual and theoretical terms but also at the practical level of human rights protection/promotion. It is common knowledge that the deprivation of one set of rights invariably leads to the violation of the other. CP rights cannot be fully realised without the enjoyment of basic economic and social provisions. Anecdotal evidence from developing countries where impoverished rural people have been known to sell their votes to politicians for as little as a handful of rice or salt, suggests that a certain level of enjoyment of ESC rights is necessary for the fuller realisation of CP rights.

If ESC rights are construed not simply as a different category of rights but integrally linked with the realisation of civil and political rights, it becomes more feasible for human rights NGOs to deploy their tried and tested methods of naming and shaming to the field of ESC rights advocacy. The evidence from Ghanaian NGOs discussed above indicate that human rights INGOs can be effective advocates for ESC rights by treating them as integral parts of the both the universal and domestic human rights corpus. But even then, INGOs must be willing to go beyond these traditional approaches and explore other strategies for ESC rights advocacy. The ability of human rights INGOs to promote ESC rights as vigorously as they have traditionally promoted CP rights is increasingly important in a globalising world where international financial institutions and multinational corporations play increasingly dominant roles in the construction of the social and economic conditions of much of the world's population.