

VI. Rights-based approaches and rights deficit

335. Ascertaining and promoting the human rights of various social groups is increasingly being viewed as key to their empowerment and to reducing their vulnerabilities. Chapter VI reviews three attempts to develop a rights-based approach with respect to the advancement of indigenous peoples, migrants and persons with a disability.

Indigenous peoples

336. Rights-based approaches concerning indigenous peoples can be clustered around three broad policy areas: those pertaining to the land rights of indigenous peoples; those related to their cultural protection and promotion; and those mitigating the adverse impacts of current laws and socio-economic priorities of mainstream societies.

337. The transfer of land rights to indigenous peoples needs effective legal and judicial frameworks and action, including the fair enforcement of laws and the proper demarcation of territories. However, the typical approach to land transfers, involving land reform programmes in which parcels of land are transferred to individual peasants under the civil law of the mainstream society, runs counter to the communal rights philosophy governing indigenous cultures. Nonetheless, granting individual land rights entails a number of advantages, both economic and practical, from a mainstream point of view: the transfer already has a well-established legal basis; the individual title facilitates credit, as land can be used as collateral; and the practice encourages individual responsibility over the property. Since the title allows for the unrestricted disposal of the land, it provides flexibility for the owner and avoids the risk of condemning individuals to a single form of ownership.

338. The granting of land rights communally is usually favoured by indigenous peoples as being more consistent with their view of land use as communal or collective. It also provides flexibility on land use, thereby leading to better management of the environment and natural resources. The main disadvantage is that the land cannot be used as collateral and inhibits indigenous peoples' access to formal credit markets. Therefore, provisions for the communal transfer of land rights should also include

special arrangements for credit access by indigenous peoples.

339. Whatever the means of transfer, it is critical to ensure that the process entails a proper and fair execution of laws. Too often, laws are simply not implemented, or their implementation is delayed through the judicial system. Those who can afford legal representation take advantage of legal loopholes or the loose interpretations of provisions. In addition, in the cases of unilateral abrogation of treaties between indigenous peoples and the States, indigenous peoples should have legal recourse within national or international law.

340. In recent years, awareness of the culture of indigenous peoples has increased and their culture has been given greater attention, nationally and internationally. Although the value of traditional medicines used by indigenous peoples is increasingly recognized, that knowledge has also led to concerns about piracy, as traditional knowledge is not protected by legal systems based on individual rights. Currently, indigenous rights to traditional medical knowledge and plants are being protected on a case-by-case basis in the courts. The issue that needs to be addressed is how collective traditional knowledge in the public domain can be protected from becoming part of the private and exclusive domain.

341. At the centre of the debate on promoting the wider use of traditional knowledge or preventing its misappropriation is the issue of how such knowledge can be effectively used to promote the development of indigenous peoples. Among indigenous peoples and environmental groups, there is opposition to the way patents are based on "discovery" without any invention, which exposes indigenous traditional knowledge to "discovery" by mainstream scientists. Among those groups, support is growing for a sui generis system that is based on "community", "collective" or "indigenous" rights to knowledge.

342. In this context, the World Trade Organization rules concerning Trade-Related Aspects of Intellectual Property Rights are perceived as restrictive to indigenous use of traditional knowledge, especially if patents and copyrights are based on or are similar to their traditional knowledge. Indigenous peoples are of the view that indigenous knowledge and cultural

heritage have evolved collectively and incrementally over generations. Consequently, no single person can claim invention or discovery of medicinal plants, seeds or other living things. It is therefore feared that the TRIPS agreement will lead to the appropriation of indigenous traditional medicinal plants and seeds as well as indigenous knowledge on health, agriculture and biodiversity conservation, eventually undermining traditional livelihoods.

343. A positive development is the support extended by the European Union to protect the genetic resources of indigenous peoples from exploitation by the biotechnology industry. The European Union proposals, to be discussed by the World Trade Organization, would require companies seeking patents to indicate the geographical origin of the natural products they are utilizing. The European Union also recommends that farmers be allowed to continue their traditional practice of saving and exchanging seeds, including those already patented.

344. States have the final responsibility for the resolution of indigenous land claims and cultural rights. Central to policies that accommodate the granting of indigenous rights are political and judicial systems and the frameworks for social and cultural justice specific to each State. It is necessary to consider the development objectives of both the State and the indigenous peoples, reconciling points of conflict. For such policies to succeed, they need to include laws protecting the rights of indigenous peoples and laws protecting them from institutional racism and discrimination.

345. ILO Convention No. 169, concerning Indigenous and Tribal Peoples in Independent Countries was adopted in 1989. It is the main international instrument dealing specifically with the human rights of indigenous peoples. Central to ILO Convention No. 169 is an approach based on respect for the specific identity of indigenous peoples and their right to participate in making decisions regarding their own destiny. However, the controversy surrounding the Convention has not abated over the years, and so far only 17 countries, of which 13 are in Latin America, have ratified it. Major differences exist concerning the absence of recognition of indigenous peoples' right to self-determination, since according to the Convention indigenous peoples would have only consultative status in policy decision-making and limited rights regarding lands and natural resources. As the Convention falls

short of their expectations, a number of indigenous peoples have called on Governments not to ratify it, and Government support is often lacking as well.

346. In this context, and in view of the repeated abuses of indigenous peoples' economic, social and cultural rights, several speakers before the second session of the Permanent Forum on Indigenous Issues, held in May 2003, stressed the importance of devising clear international guidelines on the human rights of indigenous populations. The Forum also called for the adoption, before the end of the International Decade of the World's Indigenous People (1995-2004), of the draft declaration on the rights of indigenous people. However, the fact that the draft declaration has been pending for nine years before the Commission on Human Rights serves as a reminder of the difficulty of the task ahead.

Migrants

347. Since the 1990s, many Governments have come to realize the discrepancy between the increasingly complex nature of current flows of migrants and the traditional institutional and legal frames of reference for immigration whereby each category of migrants is clearly and unequivocally identified. Such concerns have led to reassessments of international migration instruments. The existing international asylum regime defined by the 1951 Convention and its 1967 Protocol has been challenged by several Governments as no longer being relevant. Efforts by the International Labour Organization to obtain ratification of international conventions concerning migrant workers have been met with considerable opposition from a significant number of countries. Work done under the auspices of the United Nations Commission on Human Rights suggests that enforcement of migrants' human rights by national authorities has been inadequate in most parts of the world, while increasing manifestations of racism, xenophobia and other forms of discrimination and inhuman and degrading treatment against migrants have been reported.

348. The issue of discriminatory and sometimes abusive treatment of migrant workers has long been on the international agenda. Three principal instruments have been adopted that address that concern: ILO Convention No. 97 of 1949 concerning Migration for Employment; ILO Convention No. 143 of 1975 concerning Migration in Abusive Conditions and the

Promotion of Equality of Opportunity and Treatment of Migrant Workers; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990.

349. Ratification of the Conventions is limited. As of July 2003, 42 countries had ratified ILO Convention No. 97, and 18 countries had ratified ILO Convention No. 143. The International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families has been ratified by 22 countries and came into force on 1 July 2003. It is an important instrument in the broader struggle for the international protection of human rights. Few developed countries have become parties to the Conventions: 10 to ILO Convention No. 97; three to ILO Convention No. 143; and none to the 1990 Convention. In addition, the large majority of countries that have ratified ILO Convention No. 97 have excluded major provisions. Perhaps partly as a result of the limited ratification of the relevant international conventions, many States are employing a variety of cooperative approaches to migration management. Bilateral consultations and regional consultative processes in Europe, Africa, East Asia, South Asia and North and South America are addressing migration issues. In addition, the recent Berne Initiative⁷⁹ aims at sharing policy priorities and identifying long-term interests, common understandings and effective practices in the field of migration.

350. At the International Labour Conference of June 1999, ILO reviewed a study, based on communications with Governments, on the status of and prospects for its two conventions relating to migrant worker rights. The study clearly showed that while Governments seemed to agree on the broad terms of those instruments, they had clear reservations about specific provisions that pertained to the recruitment of migrant workers; social protection entitlements, which in certain cases might exceed entitlements under national legislations; rights afforded to migrants in an irregular situation; and, last and foremost, equality of opportunity and treatment between foreign workers and national workers. In addition, some of the conventions' provisions were considered outdated. For instance, those relating to equality of treatment between foreign workers and national workers no longer apply in the context of regional agreements on the freedom of

movement and equality of treatment of nationals of member States of such entities as the European Union or MERCOSUR.

351. Nevertheless, there have been some positive developments. The appearance of the United Nations Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2, annex) in 1998 was a milestone that for the first time set forth the rights of the internally displaced and the obligations of parties to conflicts with respect to the rights of those populations. In addition, in its resolution 55/25 of 15 November 2000, the General Assembly adopted the United Nations Convention against Transnational Organized Crime (Palermo Convention); the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention; and the Protocol against the Smuggling of Migrants by Land, Sea and Air, also supplementing the Convention (General Assembly resolution 55/25, annexes I-III). The two protocols (Palermo Protocols) represent a significant international attempt to combat irregular migration and protect undocumented migrants' rights by emphasizing the criminal nature of smuggling.

352. The pattern of ratification of international conventions concerning migrant workers indicates the increasing reluctance of Governments to join such international instruments. It is too early to assess whether the Palermo Protocols will face the same fate. In the interim, the lack of basic agreement on a definition of migrant workers' rights has a serious bearing on the life of migrants and their families.

353. In the absence of specifically defined and internationally agreed migrant rights, international human rights instruments provide only for the legal protection of migrants. In addition, universal, regional and national human rights instruments embrace a large number of rights that have direct relevance to migrants. However, it is rights enforcement, rather than legal standards, that is the central issue.

354. Concerns with growing problems of mistreatment, discrimination and abuse of migrants reported by Governments of sending countries as well as by non-governmental organizations concerned with human rights led the United Nations Commission on Human Rights to appoint, in 1997, a Special Rapporteur on the human rights of migrants. The Commission also established the Working Group of intergovernmental experts on the human rights of

⁷⁹ Proposed by the Government of Switzerland at its international symposium on migration (June 2001).

migrants with the mandate to gather all relevant information on the obstacles existing to the effective and full protection of the human rights of migrants and to elaborate recommendations on strengthening the promotion, protection and implementation of the human rights of migrants.

355. A major finding of the Working Group is that in many parts of the world Governments are fully aware of a worsening trend in migrants' human rights, but that they seldom report taking measures to address the issue. Consequently, those who violate the human rights of migrants frequently end up doing so with impunity. The situation reveals that enforcing the human rights of migrants is not, in the eyes of public opinion or in the views of policy makers, as strong an obligation as that of enforcing the human rights of nationals.

356. To a significant extent, this state of affairs is a reflection of both prevailing anti-immigrant feelings and the lower legal and social status ascribed to migrants by host societies. Nevertheless, part of the explanation also lies in the fact that the violation of migrants' human rights often occurs where migrants are undocumented. Granting human rights to undocumented migrants is perceived by the public authority as undermining the rights of the State to enforce legality, a particularly important issue in contexts where stopping undocumented migration dominates government agendas.

Persons with disabilities

357. The development of disability rights approaches can be traced back to the 1970s. Two major declarations on the disabled were adopted by the General Assembly during that decade. The Declaration on the Rights of Mentally Retarded Persons (resolution 2856 (XXVI) of 20 December 1971) provided a framework for protecting rights through national and international action. The Declaration stated that mentally retarded persons had, to the degree feasible, the same rights as other human beings, including the right to proper medical care and education; to economic security; to a qualified guardian, as required; to protection from exploitation; and to due process of law and proper legal safeguards against every form of abuse. The Declaration stated that, if possible, mentally retarded persons should live with their families or with

foster parents and should participate in different forms of community life.

358. By its resolution 3447 (XXX) of 9 December 1975, the General Assembly adopted the Declaration on the Rights of Disabled Persons, which encouraged national and international protection of the rights of the disabled. The Declaration recognized that disabled persons were entitled to the same political and civil rights as others, including measures necessary to enable them to become self-sufficient. It proclaimed the rights of disabled persons, including the right to education; to medical treatment; and to placement services. It further recognized their rights to economic and social security; to employment; to live with their families; to participate in social and creative activities; to be protected against all exploitation and treatment of an abusive or degrading nature; and to avail themselves of qualified legal aid.

359. Both Declarations paved the way for future comprehensive sets of principles, which would eventually seek to integrate persons with disabilities into society, including the World Programme of Action concerning Disabled Persons (adopted by the General Assembly in its resolution 37/52 of 3 December 1982) and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (General Assembly resolution 48/96 of 20 December 1993, annex).

360. By promoting the prevention of disability, rehabilitation and the equalization of opportunities for persons with disabilities, the World Programme of Action represents an original synthesis of the movement towards a human rights model with more traditional disability concerns. While not abandoning the traditional efforts regarding disability (prevention and rehabilitation), the rights-based approach (equalization of opportunities) is clearly placed on an equal par with the more traditional concerns. The World Programme of Action recognizes the applicability of the Universal Declaration of Human Rights to persons with disabilities and provides concrete measures in the area of human rights.

361. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities have made a major contribution to the emergence of international norms and standards relating to disability. The Rules, although not compulsory, offer persons with disabilities and their organizations an instrument for policy-

making and action while providing a basis for technical and economic cooperation. The Standard Rules include the Universal Declaration of Human Rights as part of their political and moral foundation. However, the Rules expand the human rights approach into areas not normally viewed as human rights concerns. Rule 2, for example, offers several provisions for States to ensure the provision of effective medical assistance to persons with disabilities.

362. In addition to the general normative and policy frameworks dealing with disability, two specific international instruments have been adopted: ILO Convention No. 159, and the Salamanca Statement and Framework for Action. ILO Convention No. 159 concerning “Vocational Rehabilitation and Employment (Disabled Persons) was adopted by the International Labour Conference in 1983 and since then has been ratified by some 73 countries. The purposes of the Convention are to ensure that appropriate vocational rehabilitation measures are made available to all categories of persons with disabilities and to promote employment opportunities for persons with disabilities in the labour market.

363. The Salamanca Statement on Principles, Policy and Practice in Special Needs Education, adopted at the World Conference on Special Needs Education organized by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in cooperation with the Government of Spain in 1994, proclaimed that every child had a fundamental right to an education. Educational systems must take diversity into account, and those with special needs must have access to regular schools with an inclusive orientation. Governments were called upon to make the improvement of education a priority and adopt as a matter of law or policy the principle of inclusive education. The guiding principle was that schools should accommodate all children with a child-centred pedagogy.

364. The fact that the Standard Rules are not binding has raised significant concerns, and the question of a special convention on the rights of persons with disabilities has been actively discussed, initially by non-governmental organizations and more recently within the framework of an ad hoc committee of the General Assembly. While the question of a special convention has generated considerable interest, fundamental questions remain as to its scope and purpose as observed in the report of the Special

Rapporteur on Disability of the Commission for Social Development.⁸⁰ In his report, the Special Rapporteur identified the following basic questions: What areas should a future convention cover? What relation should it have to existing general conventions? Should it be expressed as a set of principles, general in nature but possible to apply in a variety of national situations around the world? Should the main perspective of the future convention be based on the needs in developing countries? Should this future convention replace the Standard Rules, or should the Standard Rules and the convention complement each other?

Recommendations

365. The special status attached to the language of human rights gives a universal moral authority to social claims that would otherwise rest on a value judgement. However, the cases analysed in the present chapter suggest that the force of law arises not so much from existing provisions that obligate the States, but from the social contract on which that law is based. In the absence of such social consensus, there seems to be little hope for enforcing existing entitlements, as evidenced by the reluctance of States to join, or to enforce, a very large number of binding international instruments dealing with economic, social and cultural rights. In fact, the connection between social development in general and the International Covenant on Economic, Social and Cultural Rights remains tenuous at best and non-existent at worst.

366. The legal status of indigenous peoples and the scope of jurisdiction accorded to States under treaties between the States and indigenous peoples should be clarified.

367. Innovative legal approaches are needed, at both the national and international levels, to address the issue of indigenous land rights, including how to incorporate indigenous peoples’ communal ways of life into land rights solutions; to protect the culture of indigenous peoples; and to resolve the inconsistency between mainstream intellectual property rights and the traditional forms of collective ownership.

⁸⁰ See “Monitoring the implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities”, a note by the Secretary-General (E/CN.5/2002/4), which contains the report of the Special Representative on his third mandate, 2000-2002.

368. The Agreement on Trade-Related Aspects of Intellectual Property Rights should be amended to better protect indigenous knowledge and resources.

369. New legal frames of reference for immigration should be developed, at both the national and international levels, that take into account the complex nature and dynamics of current flows of migrants. An international consensus should be sought on the basic rights of migrants. Enforcement of the basic rights of migrants should be moved to the top of the human

rights agenda. International guidelines for the treatment of undocumented migrants should be developed.

370. The decision as to the scope and purpose of the proposed convention on the rights of persons with disabilities, particularly in respect of the relation between the convention and other general human rights instruments, should be informed by a realistic assessment of the contribution of those instruments to social development and the protection and empowerment of major social groups.