INFORMAL OBSTACLES TO ACCESSING HUMAN RIGHTS

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1. Around the world, large numbers of people are not able to enjoy their human rights. Millions live in countries in which, although human rights are recognised in constitutions and national laws, access to rights is barred, restricted or rendered very problematic by formal as well as informal obstacles. This paper will focus only on the informal obstacles to accessing human rights. Informal obstacles will mean any factors other than substantive or procedural legal barriers preventing the free and full exercise of one's human rights. It will also suggest some possible strategies that would improve access to rights.

2. In general, when rights are off limits to those who are entitled to them, it is because they either are not claimed or are claimed but not powerfully enough to overcome forces of resistance. Human rights, in essence, are not 'granted' or 'handed down' by governments. They are entitlements of anyone who is human and solely because of being human. Governments and other authorities do not 'create' and 'give' rights to people, but are bound to recognise and ensure the fundamental rights that are inherent in all human beings.

3. The question addressed in this paper is: Given the above assumption, why are people unable to enjoy effectively what they have as inalienable 'part' of their own human nature? What stands in the way, other than the existing legal (formal) obstacles? I would suggest to consider the informal obstacles to accessing human rights by dividing them into four interrelated categories: (i) political situations and legal cultures; (ii) attitudes and ideologies regarding weak/excluded groups; (iii) statuses of disadvantage; (iv) social practices.

POLITICAL SITUATIONS AND LEGAL CULTURES

4. The obstacles related to this category leave no members of society unaffected, at least potentially.

War and violent conflict

5. The informal barriers to accessing rights in situations of war and violent conflict are too obvious to be a subject of discussion here. At present, people in all continents on the planet, in places like Chechnya, Congo, or Columbia, where violence in the context of military action, guerrilla operations, civic unrest, etc. is the daily reality, are subjected to severe human rights violations for which they can obtain no remedy. For example, more than two million Colombians have been forced to leave their homes because of armed conflict over the past decade. To date the conflict between the Colombian armed forces, left wing guerrilla groups and right-wing paramilitary groups has created what the UN has described as 'the biggest humanitarian crisis in the Western hemisphere'. In 2002, the fragile cease-fire agreement finally collapsed throwing the country back into a cycle of violent conflict. Between 2001-2002 nearly 300,000 people were forced from their homes. This past year saw some of the most brutal displacements since 1998 with 10,000 people forced from their homes in Magdalena in January and February 2002. One million children have been displaced over the past five years.

6. Zimbabwe, which was until the mid-1990s considered as one of the politically stable countries in Africa, has since seen both its economy and political stability shattered. At the heart of the conflict are the violent invasions of mostly white-owned farms by war veterans and their supporters. These attacks, in which people have been terrorised and some killed, properties destroyed, and thousands of Zimbabweans put out of work, have been perpetrated with the support, direct or tacit, of Robert Mugabe's Government. Approximately one million people comprising farm workers and their families have been forced to leave their homes in recent years.

Situations of real or perceived heightened security risk

7. The September 11, 2001 terrorist attacks brought security concerns to the centre of national politics in many countries, and inspired debates on the danger of compromising human rights in the name of national security. The obstacles to accessing rights in this type of situations have been described – and experienced profusely, and a whole new discourse has emerged, to which the ICHRP made a significant contribution. The discourse is of course reminiscent of numerous previous situations around the world, when 'terrorism' has been a *kampfbegriff*, meaning for some political actors the opposite of what it means for others, and grouping them in opposing political camps, such as was the case in Turkey on the question 'Is the Kurdish Workers Party (PKK) a terrorist organisation?'

Political persecution

8. One informal obstacle to accessing human rights, perhaps the most widespread and difficult to overcome, is <u>repression</u>. In a climate of fear created by persecution of people who seek to enforce their own or others' rights, little can be expected in terms of access to legal rights, even if/when no formal obstacles exist. When people seeking justice are killed, arrested, tortured, prosecuted, or intimidated, formal laws become irrelevant. A brutal home search and arrest can take place with or without a duly issued prosecutorial warrant, whereby the difference is immaterial. Like in the case of violent conflict, everybody's relationship to their own rights is affected in such a society, if not by physical obstruction experienced by the dissidents then by a debilitating sense of fear and insecurity. Yet it is specifically the political dissidents that have the most difficult time in the pursuit of their rights. The combination of political dissidence with membership in an otherwise weak group, such as an ethnic, religious or language minority, refugee, prisoner, or poor community, further compounds the access to human rights.

9. For example, in a new report published in December 2002, Amnesty International details 13 cases of Bolivian human rights defenders who have been victimised 'because of their legitimate human rights work'. These include activists, lawyers, members of the clergy and personnel of the Ombudsperson's Office working on a range of issues including impunity for past human rights violations, land-related disputes and indigenous rights.

Lacking or weak legal culture

10. Weak legal and human rights culture is an obstacle for the access to rights that affects everyone's access to rights in societies suffering from various forms of democratic deficit. But in such societies, the excluded and disadvantaged groups sustain a double harm in their access to their own human rights, due to specific factors related to their status and the baggage of prejudices wearing down on it. How do we diagnose a weak legal culture, even where the legislation pertaining to human rights is not objectionable? Here are some sure symptoms:

11. In weak legal cultures, one observes an overall <u>inefficiency of institutions</u> – local as well as national, which have the statutory responsibility to provide services related to the exercise of legally protected rights.

12. In such cultures, human rights are perceived and spoken of in the public sphere as <u>dependent on other values</u>, such as national security, public order, etc. Leaders typically say, "We recognise human rights and observe our international obligations, we guarantee rights to the extent they do not hamper economic development, and promote our specific national culture, we respect freedom of the media, but not at the expense of blah blah blah…".

13. <u>Emphasis on duties</u> as pre-condition for the enjoyment of rights is also a frequent symptom of a legal rights cultural deficit. The logic in this case is, "If people do not fulfil their duty X, they cannot claim their right Y." Such was also the communist approach to rights: rights were seen as conditioned on the fulfilment of corresponding duties. The respective chapters in the communist constitutions were usefully titled "Rights and Duties of the Citizen". One often hears that the high drop out rate of Roma in Europe from primary school is due to the fact that Romani parents do not fulfil their parental duties. Hence, the over-representation of Romani children institutionalised without parental consent: a phenomenon that reflects the societal racist perception of Roma as incompetent parents. Absent in this case is the ability and/or willingness to understand rights as entitlements, not dependent on past, present or future behaviour of the subject.

14. This weakness of a human rights culture is felt in the overwhelmingly <u>paternalistic, social care approaches</u> to issues of disadvantaged groups, in which members of these groups are seen as passive recipients of help, rather than subjects of rights. In Italy, for example, there exist numerous charities that are spending public funds to provide social work services to Roma in the insane world of the 'nomadic camps'.

15. When rights culture is weak, there is a tendency, even in developed societies that generally have a good record of respect for civil and political rights, to avoid presenting <u>social and economic problems</u> as having anything to do with human rights. For example, both governmental officials and Roma from Eastern Europe until recently were conceptualising issues related to the school failure of Romani children as a part of a socio-economic weakness and as rooted in a specific ethnic culture, rather than as a result of denied access to equal educational opportunity and vicious practices of racial segregation. In this case, the governments and the activists alike had an excuse for not dealing with race discrimination in the sphere of education as an urgent issue. The government's obligation was reduced to slowly improving the material conditions, depending on

the availability of resources. This situation changed in the last three or four years as a result of strategic and vigorous human rights advocacy.

16. We know that we are in a weak legal culture when it is difficult or impossible to have a legal discussion with low ranking bureaucrats. As is well known, <u>unclear laws or laws formulated in broad language</u> leave much of the decision-making regarding access to rights to the discretion of administrative officials. In a strong legal culture in which the courts are held in high esteem and the judiciary is independent, this broadness may be favourable to the advancement of human rights through judicial interpretation. Administrators in a strong legal culture always remember that someone else, in court, may review their decisions. But as a general rule, the more administrative officials are prejudiced, biased, resentful, lacking political will etc., the more they would be likely to abuse the broadness of legal norms to disfavour those whom they do not want to serve properly. This is why it is recommended that in countries where prejudice and intolerance are historically entrenched, laws related to human rights and their implementation should be formulated in detailed and exact terms, leaving little to the discretion of officials. Otherwise, administrators speak and act with impunity, as the ultimate representatives of the law.

17. The replacement of the rule of law by the rule of people is a systemic problem: it inevitably affects to some degree not only the official sphere but civil society as well. The weakness of the legal discourse impacts on <u>lawyers and human rights NGOs</u>. If one looks deeper into their work of protecting rights, it turns out that much of this work consists in 'telephone law', mediation, and methods of persuasion that do not fall entirely in the sphere of legal argument. The justification given by human rights activists is that the specificity of the place imposes rules of the game that are different from those in an ideal rule of law world; and that observing these rules is the only way to protect the interests of the client. Advocates prefer not to confront official bad faith or incompetence on the legal playing field but to appeal to humanity, common sense, convenience, etc.

18. In a weak legal culture, the average person is not prepared to go to a great length in the exercise or protection of his/her human rights, due to a generalised mistrust in the legal system. Factors that contribute to such mistrust are the lack of human rights education, the alienation of the citizenry from the political sphere, the entrenched inefficiency of the law enforcement institutions, high rates of crime, corruption, perceived length of legal proceedings, fetishisation of the bureaucracy and resulting fear to engage with it, etc. Fear should be stressed in this context as arguably the root cause of all these attitudes and expectations.

ATTITUDES AND IDEOLOGIES REGARDING WEAK/EXCLUDED GROUPS

19. Prejudiced attitudes, such as racism, xenophobia and other forms of intolerance against certain categories of people, exist to some degree in all societies. Prejudiced attitudes may be relatively isolated, but they often form a part of complex, more or less fixed ideologies - sets of socially constructed and politically functional ideas of whole societies, classes, cultures, etc., underlying social practices and institutions. Racism is one of the most widespread prejudiced ideologies that impair access to human rights for millions of people around the world. "Racism is viewed not only as a matter of individual prejudice and everyday practice, but as a phenomenon that is deeply embedded in language and perception. Racism is a ubiquitous and inescapable feature of modern society, and despite official rhetoric to the contrary, race is always present even in the most neutral and innocent terms. Concepts such as 'justice', 'truth', and 'reason' are open to questions that reveal their complicity with power. This extraordinary pervasiveness of unconscious racism is often ignored by the legal system."[1]

20. There exists a large body of literature on research and measurement of racist prejudice, in the wake of the classic study by Theodor Adorno and others, *The Authoritarian Personality* (1950), identifying and measuring ethnocentrism, anti-Semitism, fascizoid attitudes, and susceptibility to anti-democratic propaganda in the United States [2]. I believe that this study remains relevant to the understanding of the social psychology of prejudice today, and deserves to be re-discovered by the anti-racist movement.

Social constructions justifying human rights violations

21. Although I am trying to isolate, inside the sphere of the informal obstacles to accessing rights, phenomena of the mind from phenomena in the realm of reality, I should mention that attitudes and ideologies regardless of their metaphysical status do not remain limited in the realm of mind - they reach out to constitute social, political and cultural realities. Elements of prejudice combine into more or less stable stereotypes, which in turn may develop into ideological constructs justifying social practices. Thus, practices and institutions embody mental constructions, while mental constructions are affected by the feedback coming from the development of practices and institutions. While this dialectic cannot be analysed at more length in this paper, it should at least be noted that social constructions expressing bias and power relations stand in the way in most cases when members of vulnerable groups are denied rights. Social constructions expressing bias play the role of ideologies, in the sense of apologetic rationalisations, or justifications of existing practices, including those that have the purpose or effect of violating human rights.

22. Ideology should not be understood in the sense of deception but of cognitive bias operating at the noological rather than psychological level. Ideological concepts are forms of interpretation and justification of the status quo, in the disguise of normative values setting the direction of development. Ideologies may be former utopias, which have 'come to power', and therefore are not any longer tools of social change. They have turned into tools of preserving the essential definitions of the status quo.

23. One example of a racist ideological construction is the recasting of race difference as mental disability. An illustration of an abusive practice built around such a construction is the *de facto* racial segregation of Roma children in the schooling systems of the Czech Republic, Hungary, Slovakia and other countries, by sending them to so-called 'special schools' for the mentally handicapped. The policy is built on the underlying stereotype that Roma are inferior, and that "Romani children are not ready for normal school." The result has been a denial of equal educational opportunity for thousands of Romani children. The evidence collected by the European Roma Rights center shows that, in the city of Ostrava, for example, a Romani child is over 27 times more likely than non-Romani children to be enrolled in a 'special school'. Although Roma represent fewer than 5% of all primary school-age students in Ostrava, they constitute around 50% of the special school student body. Nationwide, as the Czech government itself concedes, approximately 75% of Romani children attend special schools, and more than half of all special school students are Roma. This extraordinary racial disparity constitutes what the United Nations Committee on Elimination of Racial Discrimination has condemned in 1998 as '*de facto* racial segregation' in the field of education, which is inconsistent with the Czech government's obligations under international law.

24. Among the profound discoveries of modern social psychology is the structural similarity of intolerant, anti-democratic, racist, etc. mindsets, as well as the similarities in hate patterns, regardless of who exactly the despised groups are. Studies of prejudice have identified stable modes of thinking, which, once they are present in the individual, are easily transferable to other objects grasped by the illiberal mind. Prejudice rests on generalisation: "Of course there are

exceptions, but most X are Y." While the logical inevitability of incomplete induction is the epistemological basis of prejudice and is a morally neutral cognitive precondition, moral assumptions also participate in the formation of the illiberal mind. An illustration is the pattern of retribution: "People ultimately get what they deserve." This thought easily blends into blaming the victims: "The X must have done something wrong, if not the current generation then previous ones; otherwise they would not have ended up in such misery/in prison/in hospital/on the street, etc." X can stand for pariah communities such as the Dalits in India or the Roma in Europe, criminal defendants, people with HIV/AIDS, refugees, migrant workers, homosexuals, the poor, etc. A further typical pattern is the personal disclaimer, e.g. "Some of my best friends are Roma/blacks/Jews". Actually, the above statements with a view to Jews were included in the questionnaires of Adorno's 1950 inquiry into prejudice, and produced clear clustering in the answers of high scorers and low scorers. The normalisation shrug, illustrated by the statement "That's just what it is like in places like that" is perhaps the most typical but also most discouraging pragmatic dimention of the complacent illiberal mind. There is no more moral indignation, and even simple curiosity is eclipsed.

Denial

25. Among the ideological phenomena that serve to justify human rights violations, of special interest is so called denial. The existence of human rights violations and their underlying attitudes are widely denied across cultures, with varying degrees of disguise. Acknowledgement of both is a prerequisite to improving access to rights.

26. Much of Stanley Cohen's discussion of denial of human rights violations in his 1995 *Denial and Acknowledgement* [3] is highly relevant here. Cohen analysed denial in the sense of "how people react to the suffering of others." The discourse on denial includes analyses of (i) how people remain blind to the suffering of victims of human rights violations, (ii) how people fail to acknowledge the existence of attitudes in themselves or society which make violations possible and lasting, and (iii) how people seem to remain indifferent to the existence of practices and institutions that perpetuate violations.

27. Of special interest in this regard is also the denial of racism is a reaction to the post-World War II sanction of racism as a socially unacceptable opinion [4]. In my view, racism's presence is denied more vehemently in those cultures, which, following WWII, have done more to limit racism and related intolerance. Denial is a manifestation of a certain level of accomplishment in implementing a human rights and anti-racism agenda in a society. The more progress a society has made in denouncing racism as a social and political evil, the more vehemently is its continued existence denied. Ironically, the denial of racism is a product of the progress of the struggle against it. In Western democratic societies, for example, most people who share racist opinions and act accordingly, would deny that they are racist — because racism is officially and culturally condemned, while tolerance, racial equality and human rights are dominant ideological values. Thus, at present racism is rarely a self-description; increasingly, and under the influence of Western democracies and the international anti-racism movement, it is becoming mostly a label applying to groups or individuals as perceived by others. Although explicitly racist groups and parties exist, the larger part of today's racists, who view people of certain ethnic background with contempt or hostility, at the same time oppose being described as 'racists'. Austria's Freedom Party experienced a dramatic rise in popularity following a change of leadership in the mid-1980s, which brought the demagogic, charismatic Jörg Haider to its head and with him a newly invigorated populist, anti-foreigner language, together with renewed belittling of Austria's complicity in the racist crimes of the Third Reich. Nevertheless, most of the party members and supporters deny its racist character.

28. Considering bias against disadvantaged groups from the point of view of denial reveals the paradigmatic limitations of the Enlightenment, educationalist approach to social change. The discussion of denial dissipates any illusion that knowledge alone is sufficient as a motive of action to stop human rights violations, whether at the individual or collective level. Even if people clearly know the facts of abuse, they do not take prompt or adequate action. Why? The problematic of denial seeks the answer in the direction of justifications and rationalisations of the social, political and cultural status quo. Moreover, the concept of denial problematises the concept of knowledge as such, showing that the options "They knew" and "They did not know" are neither simple nor exhaustive. In laying out the phenomenology of present-day human rights abuses, we thus find ourselves describing a broad range of phenomena of denial.

29. As Stanley Cohen suggested, we can differentiate between various types of denial. For example, with respect to the truth-value awareness of the subject/s, there can be (i) denial in good faith, when the subject honestly thinks s/he is telling the truth; (ii) denial as outright lying, when the truth about abusive treatment is clearly known but denied, as in deliberate deception at the individual level and disinformation, manipulation, or cover-up at the political level; and (iii) all other cases of 'partly' knowing, when the denying subject is in neither of the above mental states. Needless to say, the most challenging case, both in theory and in practice, is the third case: several philosophical and social science schools of thought have addressed the experience of 'knowing without knowing that one knows', the lack of the Kantian 'transcendental apperception', or self-consciousness accompanying the mental possession of the 'object'. The psychoanalytic metaphor of the sub-conscious, the phenomenological theories of perception as constitution of the object, and the existential idea of the self are all possible frameworks for discussing the transcendental possibility of denial.

30. The psychoanalytical tradition, which apparently is the one that has had the strongest impact on the Western public, insists that denial — in our case, denial of the existence or meaning of human rights abuse — is a kind of unconscious defence mechanism for coping with disturbing mental contents. This approach however has its limitations, due to the assumptions that make the very concept of denial possible.

31. One such assumption is that if people were not handicapped by the blinders of survival and well-being, they would have seen the 'denied' as 'existing' (state of mind, cultural stereotype, event, etc.). Along these lines, any person in principle should be able to grasp the simple truth that people belonging in different racial or ethnic groups are equal in their dignity and rights. The fact that they 'deny' this is explained as a mechanism of avoiding suffering if the 'truth' presents itself clearly in one's mind, accompanied by the contradicting empirical reality. But the problem here is with the basic philosophical assumption that people, unhindered by anything, should see the 'truth' of each state of affairs; specifically, that they should see the basic human rights principles as a clear and universal reality. In most cultures throughout history, however, 'truths' about human life and society are not 'unveiled' but rather 'grown' or 'developed'.

32. Secondly, a further problem is presented by the assumption that people suffer when they see other people's suffering. The definition of denial as developed by Cohen and others is based on the universal validity of human rights and on the understanding of human nature as emotionally responsive to the suffering of others. It ignores or deliberately brackets the possibility that, for example, people's deepest and basic emotions are not altruistic, but organically and inherently consistent with their own 'interest'[5]. Thus, not noticing abusive facts or practices may be due not to the attempt to avoid suffering that would accompany acknowledgement, but to a more holistic reaction in the direction of one's own life interests. Could it be that the psychoanalytic perspective endows us with more humanity than we really carry? Could it be that our idealised humanity is only a normative, moral idea, rather than a psychological and social reality? While these are philosophic speculations, and therefore can lead to morally undesirable results, I would

like to emphasise that all theoretic options should be kept open, as a matter of research principle. The trial of these hypotheses might depend on revealing the mechanisms of shaming, which is key to human rights campaigning, especially at the social and political level.

33. Cohen's distinction between literal, interpretative and implicatory denial of human rights violations is also highly relevant to the question of accessing one's human rights. Literal denial is widespread as a governmental reaction to human rights reports, and is expressed in such statements as: "Your reports are exaggerated; your position is alarmist, sensationalist, harmful; we work on issues constructively while your way of exposing things is destructive, etc." Interpretative denial is at work when the facts are not disputed, but their interpretation disguises their nature. Example: "This police action was not a punitive expedition as human rights advocates called it; it was a legitimate arrest of suspects; it is true that force was used, but police acted in self-defence, etc." Implicatory denial is the toughest challenge. In this case, the subject — individual or collective — inserts a shield of rationalisations between the interpreted facts and the moral responsibility they suggest. Acknowledging the facts of racist abuse, e.g. the beating of street children by police, the passer-by can say, "This is a horrible violation of human rights, but it has nothing to do with me, especially since I am in a hurry right now to catch a plane. I can't correct all the world's evils." Implicatory denial — since both the facts and their interpretation as human rights abuse are acknowledged, and only the implications are denied — is the daily reality of most people. As Cohen himself notes, <u>"the problem is not to explain how people "deny" — but how anyone ever pays any attention"</u>.

34. A further useful set of distinctions in Cohen is that of individual denial, official denial (sponsored by the state) and cultural denial. The latter is again the most serious challenge in addressing the issue of denial: society members, without being told what to think, share a consensus about what can be publicly acknowledged. For example, there is a broad consensus in EU countries that tightening of immigration controls is good and therefore cannot be in violation of basic rights. Similarly, in the aftermath of the NATO bombing of Yugoslavia, the way in which the destruction of the Kosovo Roma was presented in the mainstream media was a case of wholesale cultural denial. Rather than presenting the process as ethnic cleansing, the media stressed the 'understandable' aspect of revenge resorted to by Kosovo Albanians due to Roma alleged complicity with the Serbs of Milosevic.

Acknowledgement

35. The discussion of denial of racism should be accompanied (and limited!) by a discussion of acknowledgement. To become aware of existing denial and to acknowledge the presence of racism may become the beginning of a transformation, at a personal as well as political and cultural level. Acknowledgement may lead to reduction of racist attitudes and to anti-racist action. But it may also lead to acceptance. This second option is so disturbing that it deserves a few comments.

36. It is possible that racist prejudice is clearly present in a social or political actor; that it is not denied or masked in any way; and that the actor admits and accepts it. Rather than denial, acceptance would now be our challenge. Acceptance is more dangerous to the public interest than the various phenomena of denial. With denial in place in a society, anti-racist culture has covered part of the way to racial justice, insofar as denial can be subsequently resolved in a more or less painful catharsis of acknowledgement, which is the first step to practical work to eliminate racism. But consider a different case, in which the subject suggests that s/he is simply not good enough and/or strong enough to deal with her or his racist bias: 'Racism is definitely a shame; and I/we have absolutely no excuse not to address it promptly and adequately. Yet, life is hard. We, people, are fallible, and we would better accept ourselves as such. No one is perfect, and we

do not live in a perfect world. That I think perhaps racist thoughts should not make me feel guilty.' This position of full acknowledgement, combined with an acceptance of one's being partly evil or weak is rare in democratic societies. But it is not implausible to expect that it would resurface in certain political contexts. Even in western democracies, it may flourish on the soil of the popular 'feel-good' culture, which makes a virtue out of acceptance of oneself.

37. While this possibility reveals an essential limitation of the struggle against racist denial, and invites analysis of the not always benign practical and political implications of 'acknowledgement', it also highlights the strength of another concept, that of racial discrimination. While racism is a vast, wide, and vague notion, engaging both the realms of mind and reality, and while its phenomenology is quite Protean, 'racial discrimination' has been defined in a more clear way, and has been given a legal value, notably in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

38. Unlike racism as such, racial discrimination is understood in human rights law as a violation of human rights; the right to be free from discrimination on the basis of race or ethnicity is characterised by the universality, inalienability, as well as the democratic nature, of fundamental rights. By concluding the treaty on eliminating racial discrimination (ICERD), the states signatories have in effect made it possible for practical accomplishments in reducing racism to overtake public opinion if the latter is moving at lower speeds. The concept of racial discrimination takes the issue of racism beyond its dependence on acknowledgement. It turns out that societies as well as persons will not learn to be mentally free from racist bias, before having made practical steps to eliminate racial discrimination. The best textbook of anti-racism is perhaps the lived experience of the effects of enforcement of anti-discrimination law and policies.

39. The above applies equally to the acknowledgement of illiberal attitudes and abusive practices targeting disadvantaged groups not only in the context of racism, but also sexism, xenophobia and other forms of intolerance. Access to rights for the members of disadvantaged groups cannot be guaranteed by consciousness raising and public education projects, however helpful these may be. Vigorous implementation of rights already on the books is the only guarantee as well as the strongest factor of consciousness raising and public education. To put this in stark terms, I would prefer to invest in one significant court victory in a high profile human rights case than in three workshops on the same issue. (Needless to say, this would only work if we have favourable conditions; if not we must patiently sharpen the methodological knife of training before it can cut.)

Attitudes of members of disadvantaged groups

40. Attitudes and ideologies that impede access to rights characterise not only mainstream society, but members of disadvantaged groups as well. These are internal, subjective obstacles that affect their ability or willingness to engage with official institutions or make use of resources and opportunities that are technically available to them. Self-denial elements resulting from internalised oppression lead to low self-esteem that blocks the subject's energy needed to overcome external obstacles. Low-self esteem meets with the subject's justified mistrust of mainstream institutions – a reflection of societal exclusion and discrimination. Self-isolation resulting from alienation from official institutions is apparently counterproductive as it has a paralysing effect on the mobilising potential of the victims. These negative attitudes are exacerbated by poverty, illiteracy, or other impediment. The lack of inspiring positive examples of people who have successfully gained access to their own rights is also a very significant hurdle to an activist state of mind.

STATUS AS SOURCE OF EXCLUSION FROM RIGHTS

41. <u>Poverty</u> is probably the most obvious of the major obstacles to access to one's rights. The legal rights, which the average western citizen has long been taking for granted, do not seem to apply to the earth's impoverished masses. For example, in the developing countries, millions of people don't have property rights, not to mention property. These millions have only very limited and arbitrary access to their other basic rights, which can be destroyed by anyone with a gun or a governmental title.

42. Despite the fact that the US is the wealthiest country on the planet, 12 per cent of the US population live in poverty and millions of people are homeless. Homelessness has been made criminal in at least fifty cities in the country, thus turning informal obstacles to accessing human rights into formal ones. Homeless people are targeted with discriminatory practices aimed at removing them from public areas and visible spaces. They can be arrested for having nowhere to live. The poor are obstructed in accessing most of their rights. Take, for example, access to the right to health care. Private insurers rarely offer health insurance to poor people, since their health is usually worse than that of wealthier people and they cannot afford to pay high premiums.

43. In societies where litigation tends to be too expensive and beyond the reach of most victims, the poor are effectively denied access to their rights in cases of abuse. Legal aid for the poor should therefore be very high on the agenda of human rights groups.

44. Globalisation has brought economic volatility to many parts of the world. Deregulation, privatisation and dismantling of welfare provisions have led to widening inequalities in many countries. In large parts of the world, corruption has increased. Personal, political and social insecurity has remained high. One consequence of the new forms of poverty and insecurity has been an escalation in human rights abuse. The new human rights challenges arising from globalisation have stimulated human rights organisations such as Amnesty International to take on new areas of work, related to the rights of the poor. The value of the human rights approach is that it is informed by a sense of urgency. Poverty, hunger and homelessness are not inevitable - the world has the resources to overcome them if the political will can be generated.

45. <u>Illiteracy and insufficient education</u> are among the main reasons why so many people are unable to claim or make use of rights they have, even when these are not explicitly abused or denied and even when institutions and procedures exist that protect formally those rights. In December 2002 UNICEF launched a campaign to boost education for girls in 25 poor countries, mainly in sub-Saharan Africa and Asia. The agency estimates that about 120 million children worldwide never go to school - 50 million of them in Africa -and that the majority are girls.

46. Poverty and illiteracy are often complicated by factors such as residence in remote areas and lack of personal documents. Indigenous groups are also more exposed to multiple obstacles in trying to access their rights. For example, there is an endemic housing crisis in Guatemala that is compounded by the profound poverty of the country. But the indigenous population, who make up the country's poorest group, suffer disproportionately from the housing shortage.

47. <u>Refugees</u> – Refugees, migrants and to some degree foreigners have been most victimised by racism working at the deeper levels of social psychology [6]. In the case of refugees, at least until recently, the justification by the European Union and other Western countries of increasingly restrictive asylum laws and policies presented itself in seemingly race-neutral provisions. The Western political class has balked at the idea of a free movement of labour and has increasingly been trying to restrict the movement of people across borders. At face value, the current policy of increased obstacles to immigration created by the West is race neutral, and its justification may

sound legitimate from the point of view of protecting domestic labour, national security, national culture, etc. However, this policy operates on the foundation of deeper lying racist presumptions, and is applied in racist ways.

48. The latter becomes evident in the case of seekers of political asylum who come from countries with civil and political unrest, in which whole ethnic groups are denied their basic rights. These people, even though they may also be simultaneously victims of extreme poverty caused by bad governance, are often genuine victims of persecution in the sense of the 1951 Geneva Convention relating to the status of refugees. But if their numbers are perceived as significant by Western authorities, they are rejected, either by being categorised as just 'economic migrants', or on other grounds. The disturbing question in this regard is: Why is a citizen of Western Europe more anxious about her compatriots' welfare benefits and cultural identity, than about the threats to life and physical safety of foreign nationals?

49. The very frame of reference of our responsibility (the community, the nation) that shapes our opinions is fraught with assumptions of racist superiority. Most people take for granted that we should contribute chiefly to our own community (family, town, tribe, nation, etc.) even though we would admit that outsiders have suffered more severe violations of human rights than members of our own community. The priority list of the Western majority's concerns is thus not the same as the priority list that would have been generated, if the sole basis of judgement was humanitarian and related to the seriousness of human rights violations. There is hardly an escape from the conclusion that the discrepancy of the two priority lists, the *realpolitik* one concerned with domestic prosperity, and the one that Western publics ought to have developed if human rights and humanitarian concerns mattered more, is possible exactly because racism interferes with judgement.

50. Although the 1999 Tampere European Council committed the European Union to an asylum policy based on the 1951 Geneva Convention, there are sure indications that, on a number of fronts, the European Union is today a key actor in the erosion of the right to seek asylum. For example, on October 15, 2002, the Justice and Home Affairs Council of the EU issued a declaration stating that from the day of signature of accession treaties the ten central and eastern European states due to join the EU in January 2004 will be considered safe countries of origin and that applications for asylum from nationals from those countries will be considered as manifestly unfounded. The erosion of asylum rights is evident here: countries sign a regional quasi-treaty to effectively abdicate from compliance with an international treaty of a higher order, the Geneva Convention pertaining to the Status of Refugees. Refugee rights experts believe that insofar as 'safe country of origin' lists focus on states to the detriment of individuals, the 'safe country of origin' approach is inconsistent with the Geneva Convention.

Ethnic, religious or linguistic minority membership

51. Members of ethnic, religious and linguistic minorities are frequently disadvantaged in accessing their rights, as compared to the majority population. While violent conflict has been a human rights buster for most Columbians, for example, Afro-Colombians are affected disproportionately by human rights violations such as internal displacement: they constitute 26 per cent of the population but make up the majority of the displaced communities. Disadvantage in access to right is observed across the whole spectrum of rights, including civil and political, as well as social, economic and cultural. Voting rights are often threatened.

52. The London-based Kurdish Human Rights Project, a prominent international Kurdish rights group, has accused Turkish security forces of intimidating Kurdish candidates and voters in the November 3, 2002 parliamentary elections. According to these charges, the Turkish army and

state authorities in the southeastern region committed a variety of abuses in the run-up to the voting in order to discourage a bigger turnout by Kurdish voters.

53. In Latvia, approximately 40 percent of the population is made up of native Russian speakers. However, after the restoration of the country's independence in 1991, Latvian became the only official language, while Russian acquired the status of a foreign language overnight. All communications with official institutions are conducted in Latvian alone, and policies of strict language control take care of enforcement of the language proficiency requirements. At the same time, the government provides no administrative or legal aid to those who have no sufficient command of Latvian.

54. <u>Disability</u> – Disability is an obstacle to accessing rights for the 600 million disabled people around the world, or 10 percent of the world's population. Two thirds of these disabled people live in the world's developing countries and are likely to live in poverty as well. Disability needs to be brought into the development mainstream through a dynamic alliance of the UN system, governments, agencies such as the World Bank, nongovernmental organisations, the private sector and other groups worldwide.

SOCIAL PRACTICES AFFECTING THE WEAK GROUPS

Discrimination and the intangible factors

55. The definition of racial discrimination, provided by Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, can serve as the model for defining discrimination on other bases. According to this view, discrimination is any distinction, exclusion, restriction or preference, on a prohibited basis, which has the purpose or effect to impair one's access to or exercise of fundamental rights. Discrimination can be formal, i.e. prescribed by law, or informal, i.e. a practice or policy not envisaged by law. The latter can be direct or indirect. Indirect discrimination is in place when, while a practice or policy is neutral on its face with regard to gender, race, ethnicity, religion, language, national or social origin, political opinion, sexual orientation, disability, age, etc., it generates an inequality or disadvantage in the exercise of rights. Indirect discrimination is defined without regard to the purpose of the policy or practice and may be unintentional. It is explicitly prohibited in a limited number of countries, and this prohibition is usually limited with regard to the scope of the bases of discrimination, or the scope of the spheres of social life when it can occur.

56. Indirect discrimination is a relatively new legal concept and case law on it is still scarce. Currently the member states as well as the candidates for the European Union are in a process of internalising the concept of indirect discrimination on the basis of race and ethnicity, in compliance with European Council Directive 2000/43 of June 29, 2000. Thus, what is at present an enormous field of informal discrimination on a variety of bases and in a variety of spheres of social life, may in the future pass into the scope of formal and prohibited discrimination.

57. Examples of indirect discrimination on the basis of ethnicity can be found in the treatment of Roma in the sphere of education. As noted above, in a number of Central European countries, many Roma study in special schools or classes for the mentally retarded where the official curricula are based on inferior academic standards. The 'special schools' with overrepresentation of Roma are typical and better described in the Czech Republic, Hungary, and Slovakia, but can be found in a number of other countries as well. The testing procedure for special schools is not racially neutral. A non-Romani teacher in a remedial special school in Budapest stated to ERRC on November 18, 2002: "Romani children are usually enrolled in remedial special school without seeing the normal school. The transfer, in fact, is often based on the single opinion from the 30

minutes long examination of the expert committee. Non-Romani children usually get two or three chances and have already failed the second or third year of the school several times when they are transferred to a remedial special school. Many Roma are placed there immediately."

58. Unlike the sub-standard special schools to which a disproportionate number of Romani children are sent, the 'normal' segregated schools, in which Roma are either over-represented or constitute the only ethnic group educated there, follow the same mandatory national curricula and in theory should apply the same standards of academic achievement. But the proven fact is that they provide worse education due to less qualified and less motivated teacher body, crowded classrooms, worse material basis and racist prejudice as regards the Roma attitudes to education. Roma pupils are usually blamed for this situation, because of their alleged low interest in school.

59. Equality before the law may well be on the books, but in societies in which there live historically disadvantaged groups, how formal equality is interpreted is of utmost significance for accessing one's rights. Disadvantaged minority members may be seen as equal before the law, and entitled to equal protection of their rights. But equality is very limited if it is abstract and formal, without regard to the content of rights. In perhaps the most important constitutional case in 20th century US jurisprudence, the 1954 Brown v the Board of Education, the Supreme Court ruled that being separate but equal is unequal because of the presence of intangible factors that can affect the dignity of the person despite physical equality. "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does…To separate…[children]…from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

60. Racial segregation was found to be inherently bad, having negative and pernicious effects on dignity. It became illegal in the US and in the course of the following decade, was the target of consistent desegregation policies. In order for the equal treatment clauses in the law to make a difference for minorities that have been perceived in negative ways or stigmatised, it is necessary to account for these intangible factors that are part of the dominant culture and generate feelings of humiliation and emotional distress. When making sense of equality, we need to be guided by the concept of dignity, one of the central values of the human rights culture.

Coercion

61. As in the case of ongoing coercive sterilisations of Romani women in Slovakia, where intangible factors combine to create an atmosphere where the abuse of consent is rampant (story to be added).

High levels of crime

62. South Africa exemplifies the correlation between high levels of crime and impaired access to human rights. South Africa has a strong and progressive Bill of Rights and is in many ways ahead of established liberal democracies in its political will to respect human rights. However, the country continues to be featured by Amnesty International reports as an abuser with a particularly bad human rights record in the areas of police torture and ill-treatment, and unjustified use of lethal force during pre-trail investigation of crime. Unfortunately, the levels of violent crime have been very high since the country's first democratic election in 1994. This has led many people to think that providing more rights to criminal suspects or accused persons has

contributed to a rise of the crime level. This perception in turn has legitimised the police taking the law into their own hands.

Corruption

63. In a society where corruption is the only game in town, the individual's access to his or her rights is sabotaged by the following dilemma: participate in the chain of corruption or remain empty-handed when trying to affirm one's rights. Gaining access to one's rights through corrupt means is possible at first glance, but understood properly, such access is in fact unreal. Rights that one has to buy illegally are not entitlements but commodities. Buying a commodity that one didn't have is the opposite of enjoying something that one already has; and human rights by their very nature are supposed to be the only thing one possesses by birth even if she possesses nothing else.

64. In Russia, Ukraine and other countries, minority victims of police brutality sometimes accept a deal whereby they would be offered a certain amount of money or equivalent goods or services in exchange for not filing complaints. The motivation to accept such deals is further reinforced by the victim's fear that, should a complaint be filed, there may be retaliation. Moreover, the judiciary is itself so corrupt that one might think nothing would be gained without bribes paid lawyers, apart from regular fees. All strategies developed to combat corruption should be regarded as simultaneously improving the chances for human rights enforcement.

Economic interests

65. It would be naïve not to recognise the potential conflict between the pursuit of profit and the protection of human rights. Recognising the close link between economic interest and access to human rights, many human rights NGOs began to target in its advocacy work the corporate world. Amnesty International for example promoted a set of human rights principles for companies, which cover issues such as security arrangements, community consultation, labour rights and fair working conditions, as well as non-discrimination. AI attended the launch of the Global Sullivan Principles and of the Global Compact, an initiative of the UN Secretary General aimed at injecting universal values into the working of global markets. At present, AI campaigns to see these principles implemented as minimum standards. For example, the proposed Multilateral Agreement on Investment (MAI) would restrict states' ability to regulate the conduct of multinational corporations. It would limit the capacity of states to enforce certain human rights, while not imposing any binding obligations on multinational corporations to protect such rights. A broad coalition of NGOs, trade unions and political parties lobbied against the MAI and as a result it was not adopted.

Unavailability of legal aid

66. Countries should have clear obligations to provide legal aid in criminal cases when the interests of justice so require and in civil cases when access to a court is at stake. In December 2002, the Columbia University's Public Interest Law Initiative released ten country reports assessing the laws and practices relating to access to legal aid in the ten EU accession states of Central and Eastern Europe. The reports find that these countries still fail to provide adequate guarantees to the right to legal aid and highlights a number of remaining problems. For example, availability of legal aid is usually guaranteed only for a narrow category of criminal cases when legal counsel is mandatory. [7]

ENDNOTES

[1] Vago, Steven (2000), *Law and Society,* Sixth edition, Prentice Hall, Upper Saddle River, New Jersey, p.68. On forms of 'modern', 'everyday', 'symbolic', or 'new' racism, see Barker, M. (1981), *The New Racism,* London: Junction Books; Dovidio, J.F. and Gaertner, S.L. (eds.) (1986), *Prejudice, Discrimination, and Racism,* Orlando, FL: Academic press; Essed, P.J.M. (1991), *Understanding Everyday Racism: An Interdisciplinary Theory,* Newbury Park, CA: Sage.

[2] Adorno, T. W., Else Frenkel-Brunswick, Daniel J. Levinson, R. Nevitt Sanford (1950). *The Authoritarian Personality. Studies in Prejudice.* New York: W. W. Norton & Co., Inc.

[3] Cohen, Stanley (1995), *Denial and Acknowledgement: The Impact of Information about Human Rights Violations,* Jerusalem: The Hebrew University.

[4] See e.g. Van Dijk, T. A., (1992) "Discourse and the Denial of Racism", *Discourse and Society*, 3   (1): pp.87-118; Petrova, Dimitrina (2001), "Racial Discrimination and the Rights of Minority Cultures", In: Sandra Fredman (ed.) *Discrimination and Human Rights.* Oxford University Press.

[5] Adam Smith had written in "The Wealth of Nations" (1776): "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest…"

[6] On refugees and migration generally, see e.g. Biko Agozino (ed.) (2000), *Theoretical and Methodological Issues in Migration Research.* Ashgate, Aldershot. Bayesfsky, Anne and Joan Fitzpatrick (eds.) (2000), *Human Rights and Forced Displacement.* The Hague, Boston, London: Martinus Nijhoff.

[7] The full text of these reports, as well as a comparative report, is available at: http://www.pili.org/library/access/country_reports.html