A TIME TO ACT

Implementing the **ODA ACCOUNTABILITY ACT:**
A Canadian CSO Agenda for Aid Reform

CCIC CCCI
CANADA'S COALITION TO END GLOBAL POVERTY
ENSEMBLE POUR ÉLIMINER LA PAUVRETÉ DANS LE MONDE

"Ending poverty and protecting human rights are mutually reinforcing. The ODA Accountability Act is a significant step. Nonetheless, it is just a first step. It is in the interpretation and the application of the Act that Canada must truly show its commitment to poverty reduction and human rights."

Magdalena Sepulveda, United Nations Independent Expert on Human Rights and Extreme Poverty

The Canadian Council for International Co-operation (CCIC) is a coalition of Canadian voluntary sector organizations working globally to achieve sustainable human development. CCIC seeks to end global poverty and to promote social justice and human dignity for all.

The Canadian Council for International Co-operation (CCIC) gratefully acknowledges the financial and in-kind support provided by collaborating institutions for this publication, as well as program funding from the Canadian International Development Agency (CIDA) and the International Development Research Centre (IDRC). The views expressed in this document are those of the author(s) and do not necessarily reflect the views of funders.

For additional information on CCIC:

Canadian Council for International Co-operation (CCIC)
200-450 Rideau, Ottawa, ON, K1N 5Z4
613-241-7007 • info@ccic.ca • www.ccic.ca

ISBN: 978-1-896622-63-7

A Time to Act – Implementing the ODA Accountability Act: A Canadian CSO Agenda for Aid Reform is also published in French as: Le temps d'agir – Mise en œuvre de la *Loi sur la responsabilité en matière d'aide au développement officielle* : programme d'action des organisations de la société civile canadiennes pour la réforme de l'aide

Preface

A Time to Act, by the Canadian Council for International Co-operation (CCIC) is a call to implement the Official Development Assistance (ODA) Accountability Act in order to enable reforms to Canadian aid directions and practices. In making this call, the report draws substantially on a conference on *The Future of Canadian ODA: Putting the ODA Accountability Act into Practice*, held in Gatineau, Quebec, in September 2009.

The September conference was co-organized by Amnesty International Canada, the Canadian Council for International Co-operation, The North South Institute, Rights & Democracy and the University of Ottawa's School of International Development and Global Studies. These organizations, along with notable Canadian and international experts on human rights and international cooperation, contributed substantially to the conference and to content of this report. CCIC alone is responsible for the key messages and the compilation of the contributions.

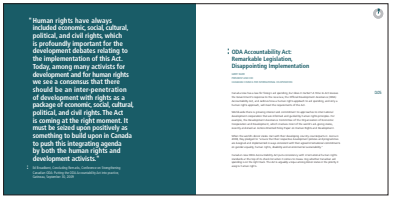
The ODA Accountability Act provides a unique opportunity for focusing Canadian ODA through a deeper appreciation of the implications of international human rights standards. The report, therefore, is not only a review of the government's implementation of the Act since June 2008, but specific proposals for future directions for Canadian aid are outlined. Implementing these proposals could substantially renew the stature of Canada as an innovative donor. A donor that is committed to deepening the effectiveness of aid by focusing on the needs and rights of people living in poverty.

BRIAN TOMLINSON
SENIOR POLICY ANALYST (AID)
CANADIAN COUNCIL FOR INTERNATIONAL CO-OPERATION

TABLE OF CONTENTS

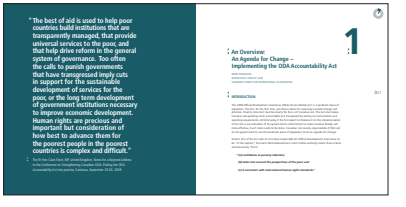
INTRODUCTION

ODA ACCOUNTABILITY ACT:
Remarkable Legislation, Disappointing Implementation
0:05 *Gerry Barr, Canadian Council for International Co-operation*



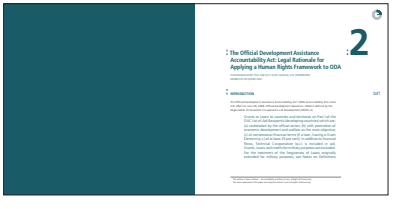
CHAPTERS

CHAPTER ONE: An Overview: An Agenda for Change – Implementing the ODA Accountability Act
0:11 *Brian Tomlinson, Canadian Council for International Co-operation*



0:02

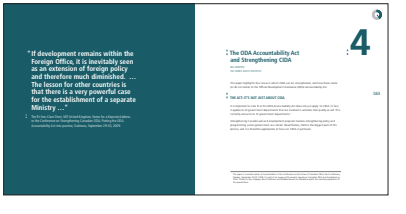
CHAPTER TWO: The Official Development Assistance Accountability Act: Legal Rationale for Applying a Human Rights Framework to ODA
0:37 *Sylvain Beauchamps, Member of the Quebec Bar*



CHAPTER THREE: A Human Rights Framework for Development Assistance
0:55 *Giorgiana Rosa, Amnesty International*

0:61 **APPLYING THE ODA ACCOUNTABILITY ACT**

CHAPTER FOUR: The ODA Accountability Act and Strengthening CIDA
0:63 *Bill Morton, The North-South Institute*



CHAPTER FIVE: Strengthening Canada's Leadership in the Promotion of Gender Equality
0:77 *Informal CSO Working Group on Women's Rights*

CHAPTER SIX: The ODA Accountability Act and the Right to Education: Implications for Canadian Aid to Education
Canadian Global Campaign for Education
0:83

CHAPTER SEVEN: Decent Work and the ODA Accountability Act
Heather Gibb The North-South Institute in collaboration with Anna Nitoslawska for the Canadian Labour Congress
0:91

CHAPTER EIGHT: Implementing the Right to Food in International Cooperation
Carole Samdup, Rights & Democracy and Paul Hagerman, Canadian Foodgrains Bank
0:97

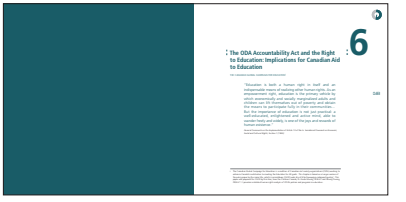
CHAPTER NINE: Canada and International Financial Institutions: Implications of the ODA Accountability Act
Fraser Reilly-King, Halifax Initiative
1:07

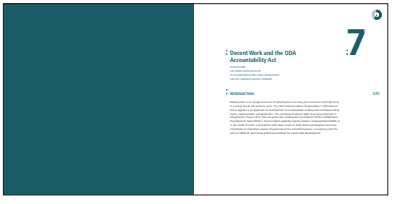
APPENDICES

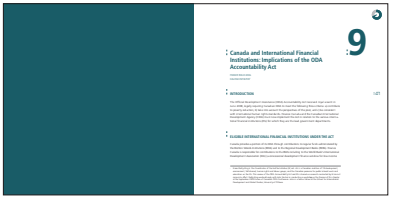
A Practical Guide for Assessing and Monitoring Human Rights in Country Programmes
Department for International Development, United Kingdom
1:20

Action-Oriented Policy Paper on Human Rights and Development
Development Assistance Committee, OECD
1:29

Applying the Right to Health in Sweden's International Cooperation
Paul Hunt
1:35







0:03

"Human rights have always included economic, social, cultural, political, and civil rights, which is profoundly important for the development debates relating to the implementation of this Act. Today, among many activists for development and for human rights we see a consensus that there should be an inter-penetration of development with rights as a package of economic, social, cultural, political, and civil rights. The Act is coming at the right moment. It must be seized upon positively as something to build upon in Canada to push this integrating agenda by both the human rights and development activists."

Ed Broadbent, Concluding Remarks, Conference on Strengthening Canadian ODA: Putting the ODA Accountability Act into practice, Gatineau, September 30, 2009

ODA Accountability Act: Remarkable Legislation, Disappointing Implementation

GERRY BARR
PRESIDENT AND CEO
CANADIAN COUNCIL FOR INTERNATIONAL CO-OPERATION

0:05

Canada now has a law for foreign aid spending, but does it matter? *A Time to Act* reviews the Government's response to the new law, the Official Development Assistance (ODA) Accountability Act, and outlines how a human rights approach to aid spending, and only a human rights approach, will meet the requirements of the Act.

World-wide there is growing interest and commitment to approaches to international development cooperation that are informed and guided by human rights principles. For example, the Development Assistance Committee of the Organization of Economic Cooperation and Development, which involves most of the world's aid-giving states, recently endorsed an Action-Oriented Policy Paper on Human Rights and Development.

When the world's donor states met with their developing country counterparts in Accra in 2008, they pledged to "ensure that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability."

Canada's new ODA Accountability Act puts consistency with international human rights standards at the top of its check list when it comes to measuring whether Canadian aid spending is on the right track. The Act is arguably unique among donor states in the priority it assigns human rights.

The Act sets out an unambiguous standard for ministers responsible for making aid decisions. Section 4(1) of the Act states that ministers may authorize aid spending only where they are "of the opinion" that each ODA disbursement meets three criteria. That it:

> ***" (a) contributes to poverty reduction;***
>
> ***(b) takes into account the perspectives of the poor; and***
>
> ***(c) is consistent with international human rights standards."***

Most Canadians may have the mistaken view that these self-evidently worthy objectives have always guided Canada's aid spending. In fact – while poverty reduction has almost always been a centre piece of the policies of the Canadian International Development Agency (CIDA) – Canadian approaches to aid spending have been informed by an ever-changing hit parade of themes, changing as frequently as the ministers who have run the agency in its forty year history. Constantly shifting priorities at the Agency have left it exhausted, unclear and unable to focus with the steadiness and reliability necessary for effective development.

The ODA Accountability Act was enacted in June 2008 and the first Government report on the implementation of the Act was provided to Parliament in September 2009. How is Canada doing when it comes to putting the law into effect? The *Report to Parliament* says things are fine but it is hard, reading the Government's report, to know why.

The Act requires "competent ministers" (there are 12 government departments involved) to provide two reports to Parliament every year. The first is a summary report of "any activity or initiative taken" under the Act, including a report of Canada's activities at the Bretton Woods institutions, like the International Monetary Fund and the World Bank. The second is a statistical report on ODA spending to be made at the end of the fiscal year.

There are really five activities provided for under the Act: spending ODA; determining that the criteria [section 4(1)] have been met with the decisions taken; consulting to help inform decisions about aid spending; calculating the amount ODA; and reporting to Parliament.

Apart from being filed in a timely way, the *Report to Parliament* for 2008-2009 failed to meet the standard set in the ODA Accountability Act. The *Report to Parliament* does address the question of whether aid spending has met the poverty criteria of the Act, though in a perfunctory way. But it fails to address whether aid spending "takes into account the perspectives of the poor," nor does it explain how spending has been "consistent with international human rights standards."

The *Report to Parliament* also fails to address the ways in which competent ministers reached their opinions that the standards for aid spending had been met – specifically consultations with other governments, international agencies and Canadian civil society organizations. Though the legislation requires competent ministers to consult and weigh the views of other aid actors, there is no description, in the *Report to Parliament*, as to whether or how this has been done. Missing too is the Government's rationale for calculating ODA under the terms of the Act [section 4 (3)].

In reviewing how CIDA and other government departments undertook programming and decided on aid spending, it is clear the lacunae in the government's *Report to Parliament* are also present in practice.

Canada's recent decision to alter its list of countries of focus is a case in point when it comes to the application of the legislation's new standards. Canada recently removed seven African countries (among the world's poorest) from its country focus list in favour of a number of more middle-income countries in the Americas and Asia. It matters greatly for countries to find their way onto the list because the list is meant to guide 80 percent of CIDA's bilateral country spending.

There is little doubt that policy decisions that drive foreign aid spending are decisions to which the standards of section 4 (1) of the Act ought to apply. However the grounds identified by the Minister for International Cooperation, Beverly Oda – for determining the countries of focus – were not grounds found in the legislation. The Minister said she used three tests in making up the new country list: she considered the prevalence of needs (in the candidate countries); existing opportunities for effective aid spending; and whether the new countries met Canada's foreign policy concerns and preoccupations.

These are interesting criteria, but they have nothing to do with ODA Accountability Act. A legal rationale of the Act, commissioned by the Canadian Council for International Co-operation and Rights & Democracy, finds that the Act's three criteria for ODA (contributes to poverty reduction; takes into account the perspectives of the poor; and is consistent with international human rights standards) should be equal in weight, interdependent, cumulative and the only criteria to be rightly applied by competent ministers when deciding on aid spending.

Similarly, Canada's decision to continue to count, as ODA, the costs of supporting eligible refugees for their first year in Canada may not meet the standards set out in the ODA Accountability Act. The Government argues that "providing resettlement to refugees contributes to poverty reduction in developing countries as refugee populations and costs associated with providing asylum are reduced." The argument that asylum costs for refugees are all borne by developing countries is faulty as those costs are often supported by the United Nations High Commissioner for Refugees. All this raises appropriate questions about the way in which Canada is calculating its ODA under the new law.

Finally, a review of CIDA's internal discussions about the application of human rights standards to its programming practices and choices suggests that CIDA has adopted a minimalist "do no harm" approach to the application of human rights standards. Discussions at CIDA's Steering Committee, set up to review the implications of the ODA Accountability Act, identify this "do no harm" approach as the focus for compliance with the Act. The Steering Committee argues that because CIDA programming addresses poverty, gender equality, governance and participation, CIDA is meeting the Act's human rights standards requirements. But for there to be real consistency with human rights standards CIDA must not only "do no harm," it must also do the right thing.

Paul Hunt – a distinguished former Special Rapporteur for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health – identified key principles to a rights-based approach to development cooperation. A human rights approach must include the "human rights obligation to respect (do no harm to rights), protect (provide redress to those whose rights are threatened) and fulfil (make positive progress in access to rights)". The passive (do no harm) part of a human-rights approach is important, but if the active components (protection and fulfillment) are left out, CIDA's programming will likely be non-compliant from the point of view of the standards set out in section 4(1) of the Act.

These are just some of the challenges that emerge from a review of the first year of Canada's implementation of the ODA Accountability Act. The Act is ground-breaking legislation. It holds out the promise of greater accountability and aid effectiveness – based on an unambiguous focus on poverty reduction, and the perspectives (and participation) of those living in poverty, and consistency with international human rights standards.

The Act is new. And it can be an important tool for CIDA and all concerned with Canada's aid program to chart a more effective and steady future for Canadian aid. Certainly, the potential of the legislation will be unfulfilled if Government programming and reporting under the Act continues to be sketchy, incomplete and non-transparent.

I hope that all who read *A Time to Act* will be encouraged by the insight of the authors assembled here, dissatisfied with the incompleteness of the implementation of the Act, and inspired by the opportunities provided by this remarkable legislation.

"The best of aid is used to help poor countries build institutions that are transparently managed, that provide universal services to the poor, and that help drive reform in the general system of governance. Too often the calls to punish governments that have transgressed imply cuts in support for the sustainable development of services for the poor, or the long term development of government institutions necessary to improve economic development. Human rights are precious and important but consideration of how best to advance them for the poorest people in the poorest countries is complex and difficult."

The Rt Hon Clare Short, MP, United Kingdom, Notes for a Keynote Address to the Conference on Strengthening Canadian ODA: Putting the ODA Accountability Act into practice, Gatineau, September 29-30, 2009

1

An Overview: An Agenda for Change – Implementing the ODA Accountability Act

BRIAN TOMLINSON
SENIOR POLICY ANALYST (AID)
CANADIAN COUNCIL FOR INTERNATIONAL CO-OPERATION

INTRODUCTION

The 2008 Official Development Assistance (ODA) Accountability Act[1] is a landmark piece of legislation. The Act, for the first time, sets three criteria for assessing Canada's foreign aid priorities. Poverty reduction must be clearly the focus of Canadian aid. The Act also makes Canada's aid spending more accountable and transparent by setting out consultation and reporting requirements. Unfortunately, if the first report to Parliament on the implementation of the Act is any indication of the government's commitment to make Canada's foreign aid more effective, much more needs to be done. Canadian civil society organizations (CSOs) call on the government to use this landmark piece of legislation to set an agenda for change.

Section 4(1) of the Act calls on ministers responsible for Official Development Assistance to be "of the opinion" that each ODA disbursement under his/her authority meets three criteria simultaneously. That it

> ***" (a) contributes to poverty reduction;***
>
> ***(b) takes into account the perspectives of the poor; and***
>
> ***(c) is consistent with international human rights standards."***

Furthermore, section 4(2) of the Act requires that the ministers "shall consult with government, international agencies and Canadian civil society organizations at least once every two years, and shall take their views and recommendations into consideration when forming an opinion described in subsection (1)" [quoted above]. The Act stipulates and sets a timeframe for a number of reports to parliament on the implementation of the Act, on the annual disbursements of Canadian ODA, and on decisions taken in International Financial Institutions.

As required by the Act, the Government of Canada tabled its first *Report to Parliament on the Government of Canada's Official Development Assistance, 2008-2009*[2], on September 30, 2009. The *Report to Parliament* documents ODA disbursements from the federal government totaling $4,858.3 million in fiscal year 2008/09 from 12 federal government departments.

While the *Report to Parliament* for 2008-2009 meets the technical reporting requirements of section 5 of the Act, it fails to fulfill the Act's spirit and the intention of parliament. In particular, the *Report to Parliament* fails to systematically document the government's accountability to the three criteria for ODA set out in section 4(1). The *Report to Parliament* does, in places, address compliance with the poverty criteria, but it does not address "taking account the perspectives of the poor", nor "consistency with international human rights standards". This is a key failing in the *Report to Parliament*. Unfortunately, this lack of consideration to the perspectives of the poor and to international human rights standards is also reflected in the government's evolving approach to the implementation of the Act.

A legal rationale of the Act, commissioned by the Canadian Council for International Co-operation (summarized in Chapter 2), found that the Act's three criteria for ODA, and only those three criteria, should be taken to be equal in weight, interdependent and cumulative. The Act stipulates that the annual *Report to Parliament* must provide "a summary of any activity or initiative taken under this Act". It must, therefore, address how the relevant Minister formed "the opinion" [section 4(1)] that ODA activities meet the three criteria, and in particular have been found to be "consistent with international human rights standards". Furthermore, activities under the Act, which should also be reported to parliament, include how the Minister took the views of aid actors into account through consultation [section 4(2)] and the rationale for the government's calculation of ODA under the terms of the Act [section 4(3)].

The ODA Accountability Act in section 4(1) establishes a robust purpose for Canadian ODA to effectively address the human rights of people living in poverty. This first Canadian CSO report, *A Time to Act*, on the government's implementation of the ODA Accountability Act focuses on the potential of this purpose and the accountability provisions of the Act to change development practice and to establish policy coherence for Canadian ODA. This overview chapter offers a Canadian CSO assessment of the government's approach to implementing the Act and makes specific recommendations for improving the implementation of the Act in the three areas of Canadian ODA purpose, ODA consultations and ODA reporting[3].

IMPLICATIONS OF THE ACT FOR CANADIAN ODA PRIORITIES AND PRACTICES

How much and even whether Canada provides foreign aid remains at the discretion of the government and its ministers. However, section 4(1) of the ODA Accountability Act limits this discretion by establishing that "ODA may be provided only if" its three criteria are met.[4] The legal rationale of the Act (Chapter Two) provides a framework for understanding the limits to discretion in ODA decision making under section 4(1):

> "…[As] the forming of section 4(1) opinions must be compliant with administrative law, such opinions must be formed exclusively based on relevant grounds, as seen [in the three criteria]. In addition the **results** produced by the exercise of discretion must not be unreasonable, and section 4(1) opinions must not be formed arbitrarily or capriciously. This relates to both the outcomes and the process of section 4(1) opinions… [emphasis in the original]" (Chapter 2, page 0:46)

Section 4(1)c clearly directs the Minister to take into account "consistency with human rights standards". Furthermore, these standards are defined in section 3 of the Act as those which are "based on the international human rights conventions to which Canada is a party and on

international customary law". While the criteria, "contributes to poverty reduction" and "takes into account the prospective of the poor", are not defined in the Act, the Canadian Council for International Co-operation has argued that "only an explicit human-rights approach (HRA) to the implementation of Canadian ODA programming will be consistent with the three tests called for by the Act".[5] The legal rationale, noted above, agrees:

> "A human-rights approach to the entirety of section 4(1) is further compelled by the fact that all three grounds listed in this provision are rooted in a human rights scheme. While this is undeniable for section 4(1)(c), it is also true of section 4(1)(a), which requires a focus on poverty reduction. Indeed, it is widely recognized that 'human rights violations are both a cause and a consequence of poverty'[6] and that poverty, per se, is a violation of human rights. Therefore, adopting an approach of ODA which focuses on the realization of human rights in and of itself contributes to poverty reduction. … In the same vein, assessing whether the perspectives of the poor are taken into account [section 4(1)b of the Act] … can efficiently and reasonably be done by adopting a rights-based approach to this issue, in particular by recognizing that the poor must be able to provide their input in the concrete allocation on the ground of ODA provided by Canada, to the maximum extent possible." (Chapter 2, page 0:47)

The legal rationale concludes that "a human-rights approach to section 4(1) opinions has the merit of addressing all relevant grounds of the ODA Accountability Act through a single analytical framework, which is anchored in rationality and reasonableness, and appears compliant with legal requirements in the exercise of discretion as per Canadian administrative law". (Chapter 2, page 0:47) Given the scope of the Act in governing disbursements by any of the 12 relevant ministers, be it CIDA, Foreign Affairs, National Defence or the RCMP, it follows that a human-rights approach should inform their decisions on ODA.

Human rights approaches and development practice have been converging during the past 20 years. All 22 official donors, including the Canada's Minister for International Cooperation, agreed in 2007 to an OECD Development Assistance Committee (DAC) consensus for a *DAC Action-Oriented Policy Paper on Human Rights and Development*. Accordingly,

> "Not only is there growing recognition of the crucial links between human rights violations, poverty, exclusion, vulnerability and conflict, there is also increasing acknowledgement of the vital role human rights play in mobilizing social change; transforming state-society relations; removing the barriers faced by the poor in accessing services; and providing the basis for the integrity of information services and justice systems needed for the emergence of dynamic market-based economies." (Appendix 2, page 1:29)

The *DAC Action-Oriented Policy Paper* sets out ten principles for donors to promote and integrate human rights in development. The first principle is to "build a shared understanding of the links between human rights obligations and development priorities through dialogue". It notes that "a shared understanding of human rights issues between donors and partner countries is essential for the durability of aid partnerships and for the predictability and effectiveness of aid". (Appendix 2, page 1:32)

In what ways do international human rights standards inform the priorities and practices of development cooperation and ODA? The *DAC Action-Oriented Policy Paper* suggests that "donors should promote fundamental human rights, equity and social inclusion, respect human rights principles in their policies and programming, identify potentially harmful practices and develop short, medium and long-term strategies for mitigating the potential for harm" (Appendix 2, page 1:34). The ten principles point to directions for "scaling-up" human rights in policy dialogue and development programming.

Paul Hunt, former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, in his report *Promotion and*

protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development (Appendix 3) identifies seven key features of human rights standards that should be applied by donors when determining approaches to and priorities in international cooperation. The key features are:

- Freedom and entitlement to core rights (while making maximum effort to progressive realization of social, economic and cultural rights);
- Equality and non-discrimination (priority to those who are marginalized and discriminated);
- Human rights obligation to respect (do no harm to rights), protect (provide redress to those whose rights are threatened) and fulfill (make positive progress in access to rights);
- Participation, including the empowerment of beneficiary populations;
- Procedural fairness, including transparency at all levels;
- Coherence and consistency (between policies and programs); and
- Monitoring and accountability, particularly to beneficiary populations.

For Alex Neve, General Secretary for Amnesty International Canada, the significance of the ODA Accountability Act is that when assessing Canadian international assistance priorities concerted attention should now be paid to the plight of marginalized and disenfranchised groups.According to Neve, the Act implies explicit human rights assessments with "a much more determined effort to gather data about the lived realities of marginalized groups in countries receiving or going to receive Canadian ODA, and intentionally designing development programs that meet those needs". The UK's Department for International Development (DfID) recently published a *How To Note on Assessing and Monitoring Human Rights in Country Programmes* (Appendix 1, page 1:20). The *How to Note* contains a detailed set of questions to guide DfID's country strategies and programs.

Human rights standards also demand a crucial role for consultation, access to information, and participation in decision making about development programs, on the part of the very individuals and communities whose rights are at stake. Development and human rights

experts look to the implementation of the Act's section 4(1)(b) for a framework for donor/recipient dialogue to ensure that Canadian development policies and strategies are informed by the views and with the participation of people living in poverty.

Giorgiana Rosa has been working on the implications of international human rights standards and international cooperation for Amnesty International. She suggests that the Act is a unique acknowledgement by Canada of the extra-territorial reach of international human rights law. Yet at the same time, she recognizes that the practical implementation of human rights standards also raises challenges:

- How can the human rights framework effectively guide Canada's choices among competing priority sectors and inform aid allocation choices?

- What tools and expertise is needed by government departments to integrate human rights principles and standards into their assistance programs at all levels?

Rosa concludes by pointing out that "human rights standards, in themselves, unnecessarily cannot provide all the answers, but they do provide a framework that places the human rights of people at the heart of choices in development cooperation...they place obligations on both donors and partners to use development assistance...for the promotion and protection of human rights". (Chapter 3, page 0:59)

United Nations agencies have perhaps gone the furthest in the practical application of human rights standards in international cooperation. They have specified several elements in a human rights approach that should orient the priorities and practices of donors:

- Assessment and analysis to identify the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers, as well as the immediate, underlying and structural causes of the non-realization of rights;

- Programs to assess the capacity of rights-holders to claim their rights, and of duty-bearers to fulfill their obligations (the UN agencies then develop strategies to build these capacities);

- Programs to monitor and evaluate outcomes and processes guided by human rights standards and norms; and

- Programming informed by the recommendations of international human rights bodies and mechanisms.

A human-rights approach to Canadian ODA is an essential for assessing overall compliance of the government with the ODA Accountability Act[7]. The Canadian Council for International Co-operation has outlined some key elements to a human-rights approach to development including:

Non-discrimination: Canadian ODA programs give priority to the needs and circumstances of the most marginalized and CIDA programs avoid actions that discriminate (e.g. user fees for basic health services).

Due diligence: Access of the most marginalized to their rights is systematically considered as the basis for Canadian ODA. Various Canadian commercial and foreign policy interests are not to be the basis for allocating ODA. Canadian ODA initiatives are designed not to undermine rights, but also to promote capacity and access to rights.

Participation of affected populations: Canadian ODA programs build the capacity of affected populations to participate in all dimensions of development affecting their lives.

Support for rights which enable participation: Canadian ODA enables access to information, promotes the right to organize, to freedom of speech and to access to development processes, institutions and mechanisms for redress (where rights have been adversely affected).

Human rights and aid effectiveness policies: Canadian ODA supports mechanisms of accountability and redress that are rooted in democratic ownership by citizens in developing countries over the policies and decisions affecting their lives. Public access to relevant and timely information on the purpose, priorities and terms of Canadian ODA allocations is essential.

THE GOVERNMENT'S APPROACH TO IMPLEMENTING THE ACT

The *Report to Parliament*, for the most part, provides only a descriptive and very partial listing of activities undertaken by the 12 departments with ODA resources. CIDA's *Departmental Performance Report, 2008-2009* has only one reference to the Act: "The vast majority of CIDA's programming [i.e. excluding programming with Russia] satisfies the eligibility requirements of the *Official Development Assistance Accountability Act*, and is therefore reported to Parliament as official development assistance."[8] Neither report to parliament has any systematic reference to how or why the responsible Minister is "of the opinion" that these activities meet the requirements of the Act.

There is much missing from the government's first *Report to Parliament* on the Act.

- What measures have ministers in the key ODA departments (CIDA, DFAIT and Finance) set in place to implement and monitor compliance with the Act?
- What procedures enable ministers to form opinions about the eligibility of potential ODA activities?
- While consultations are acknowledged in parts of this first *Report to Parliament*, what policies will guide consultations to ensure that they inform the implementation of the Act?
- How does the government intend to strengthen reporting mechanisms and improve transparency and accountability for Canadian ODA at all levels, but particularly with beneficiary populations at the country level?

The exercise of all government powers delegated by legislation is regulated by constitutional law and administrative law. The principles of administrative law condition the exercise of the government's discretion in carrying out the intention of legislation. These principles clearly apply to the basis upon which the responsible Minister forms his/her opinion as called for in section 4(1) of the Act, meets consultation and reporting requirements.

According to the CCIC-commissioned legal rationale[9], discretion must meet several administrative legal standards. Discretion must be exercised

- Within the limits established by the Act;
- In good faith, and not arbitrarily or capriciously;
- Considering **all** the relevant grounds established by the Act, but **only** these grounds;
- Reasonably, with clear justification, transparency and intelligibility within the decision-making process, within a range of possible, acceptable outcomes which are defensible;
- In such a way that it does not mechanically make the determination without analyzing the particulars of the case and the relevant criteria; and
- In a non-discriminatory manner.

The legal rationale concludes that given the relevant grounds in section 4(1), international law, including international human rights law, is relevant in the Minister exercising discretion in making decisions over ODA in a reasonable manner consistent with the Act.

Based on the limited information provided to date in its *Report to Parliament* and through access to government documents in an Access to Information request[10], it cannot easily be determined if the government's current approach to the Act meets the requirements of administrative law. On the whole, the government's approach is minimalist, seemingly meeting the most conservative legal interpretation of the Act. In relation to the three criteria, the government focuses on poverty reduction, assumes the perspectives of the poor, and at best acknowledges a narrow obligation to "do no harm" in meeting human rights standards. The government merely asserts that all its ODA programs meet these three criteria. The challenge with respect to the Act on the part of the government is seen to be one of communications. The government clearly does not see the Act as an opportunity to ensure that Canadian ODA practices are effective in addressing the rights of poor and marginalized populations.

CANADIAN INTERNATIONAL DEVELOPMENT AGENCY

The *Report to Parliament* does provide a brief overview of ODA activities disbursed through CIDA; however, there is no reference in the *Report to Parliament* to the three ODA criteria outlined in the Act. According to internal CIDA documents, CIDA has established a high-level, cross-agency ODA Accountability Act Steering Committee. Steering Committee deliberations suggest that CIDA's view is that it is enough to record that the Minister is of "the opinion" that the ODA activities meet the three criteria.[11] In the *Report to Parliament* there is no reference to how the Minister reached her opinion or to the opinion itself. Not referencing the Act and its criteria seems to be standard practice. In 2009, when the Minister for International Cooperation announced country and thematic focuses, the ODA Accountability Act was not mentioned.

CIDA recently revised its *Business Process Roadmap* to include a reference to the Act. Under the *Roadmap's* three components (Core Funding, Directive Programming and Responsive Programming) the three criteria are mentioned, but only in a *pro forma* and identical paragraph for each component. CIDA officials are directed to "use approval documents to articulate how the assistance being provided will contribute to poverty reduction, take into perspectives of the poor and be consistent with international human rights standards".[12] However, little guidance is given in the *Roadmap* for ensuring that the criteria will be met in the development and implementation of any given program activity.

The *Roadmap* lists a number of important framework, policy and guideline documents, by title, to support specific aspects of program delivery. The titles mentioned, however, are not publically available. CCIC has obtained access to two of the policy documents referred to in the *Roadmap* – the Policy on Program Based Approaches (July 2009) and CIDA's Aid Effectiveness Action Plan (September 2009). There are no references, in either document, to the implications of the Act.

CIDA's Aid Effectiveness Action Plan "translates into concrete measures all of CIDA's commitments to aid effectiveness" arising from the Paris Declaration and the 2008 Accra Agenda for Action (AAA). The Action Plan makes a passing reference to the ODA Accountability Act only as one among several reporting requirements (Action Plan, para 3.1). The Act could have been

seen as an essential legislative backdrop to some of the commitments in the Action Plan, such as decentralization of staff and authority to priority countries (Action Plan, para 2.2), its guidance on civil society programming (Action Plan, para 2.4.3), or updating consultations guidelines (Action Plan, para 2.4.5). But these implications are not noted, let alone elaborated as specific commitments to strengthen the effectiveness of Canadian ODA against its purposes set out in the Act.

The Action Plan does address several specific and important commitments made by donors and governments at Accra (such as tied aid, aid predictability, limiting program conditions and technical assistance). But it fails to even acknowledge an important commitment in the AAA to "ensure that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability" [AAA, para 13c]. Ensuring ODA consistency with international human rights standards is the guiding criteria in the ODA Accountability Act.

The Policy on Program-Based Approaches (PBAs), as an important programming modality called for in the Paris Declaration, is a welcomed addition to CIDA's set of core policies. Again there are key aspects of the policy that might be seen as consistent with the ODA Accountability Act, but the Act is not mentioned in the section on "accountability, monitoring and reporting", nor is it mentioned in the final section on "related policy instruments and publications". The policy, however, does state that CIDA will "promote engagement by civil society organizations in [policy] dialogue" relating to the development of a PBA with the recipient country in areas such as assessing needs, establishing development priorities, implementing poverty reduction strategies, gender equality, capacity building and public accountability. Such consultations, if limited to dialogue with government officials, would likely undermine the application of international human rights standards to Canadian PBAs and the requirement in the Act to take account the perspectives of the poor.

On the application of international human rights standards, the CIDA Steering Committee identifies a "do no harm approach" as the focus for compliance with the Act and asserts that CIDA programming is already consistent with these standards because CIDA programming addresses poverty, gender equality, governance and participation.[13] While the obligation to respect human rights is an essential part of international human rights standards, such an

approach is partial as it ignores important implications of protecting human rights (giving priority to human rights defenders or civil society advocates) and promoting human rights (in the practices of Canadian ODA).

Gender equality is essential to poverty reduction. CIDA must not only "do no harm", but must also actively promote the rights of women in all of its development programming. One of the three objectives of CIDA's Policy on Gender Equality is advancing the human rights of women and girls. "Strengthening Canada's International Leadership in the Promotion of Gender Equality", a CSO review of a five-year evaluation of CIDA's Policy on Gender Equality (Chapter 5) found that the "advancing the human rights of women and girls" objective had the least programming attention and the fewest documented results.[14] CSOs concluded that adherence to the ODA Accountability Act and to international human rights laws and instruments would strengthen CIDA's commitment to gender equality.

The ODA Accountability Act requires ministers to undertake, at a minimum, a consultation every two years on the implementation of the Act. The *Report to Parliament* lists a number of policy dialogue initiatives with development partners and Canadian CSOs undertaken by CIDA in 2008-2009. The CIDA Steering Committee also pointed to International Co-operation Days 2008 as an important venue for dialogue with Canadian CSOs. The *Report to Parliament*, however, does not relate the outcomes of the dialogues to the implementation of the Act, and in particular to the need to inform the Minister's opinions for section 4(1).[15]

The Steering Committee, according to its internal minutes, does recognize the need to better document consultations and suggests that CIDA investigate a number of changes in practices to "refresh some policies and revitalize consultation processes".[16] While CIDA has not engaged in discussions with stakeholders on reforming consultation processes, a CIDA consultant recently reviewed CIDA's policies and practices and the Action Plan calls for a renewed policy for consultation (Action Plan, para 2.4.5). Consultations that are not inclusive and that do not explicitly reference the Act and create opportunity to inform how the Minister for International Cooperation forms her opinion on the eligibility of ODA activities cannot meet the tests of administrative law of reasonableness, relevance and good faith.

The reporting requirements of the Act provide timeframes for a number of existing and new reports. The *Report to Parliament*, provides some useful statistical information on Canadian

ODA, by department, for 2008/09 and notes that the *Statistical Report* for that year will be published before March 31, 2010, as mandated by the Act.

The CIDA Steering Committee has worked to ensure that ODA reported by CIDA meets the criteria of the Act and is consistent with the rules set out by the OECD Development Assistance Committee (DAC). Consistency in criteria for what is considered ODA is critical for transparency and international comparability of Canadian ODA. The DAC rules for ODA, for example, do not permit reporting military aspects of peacekeeping as ODA. CIDA, however, has included this type of military spending (e.g. for Sudan) in its own annual *Statistical Report* to Parliament. But to date, CIDA clearly identifies such assistance as distinct from ODA.

Since 1994, Canada has counted as ODA and reported to the DAC financial support to eligible refugees for their first year in Canada. This support amounts to between $150 million and $200 million in ODA each year. In the *Report to Parliament*, the amount reported for 2008/09 was $92 million. No explanation was given for how the amount was determined. The government argues that "providing resettlement to refugees contributes to poverty reduction in developing countries as refugee populations, and costs associated with providing asylum, are reduced" [*Report to Parliament* page 19]. This rationale is weak, however, in relation to the three criteria of the ODA Accountability Act. The Government's argument is based on the assumption that all costs related to refugees would otherwise be born by a developing-country host for these same refugees. But some refugees come directly to Canada or are supported in other countries by the Office of the United Nations High Commissioner for Refugees. CSOs argue against counting support for refugees as ODA. Support to refugees is given in the context of Canada's refugee policies and not as a deliberate decision to contribute to international assistance. Not counting such support for refugees in Canada as ODA, however, does not imply that Canada should not fully live up to its international obligations as a country of refuge.

Along similar lines, Canada has, in previous *Statistical Reports*, included approximately $150 million for "imputed foreign student subsidies" for studies in Canada. The *Report to Parliament* lists no amount for imputed student subsidies. CSOs welcome this change. CSOs have argued that foreign student subsidies should not count as ODA as there is no identifiable direct benefit to developing-country partners making such support inconsistent with the three criteria of the ODA Accountability Act.

THE DEPARTMENT OF FINANCE

ODA disbursed through the Department of Finance in 2008/09 was directed to the World Bank's International Development Association (IDA), the soft loan/ grant window of the World Bank, to Canada's negotiated share of multilateral debt relief in the Multilateral Debt Relief Initiative, and to bilateral debt relief. Bilateral debt relief is counted as ODA, but is drawn out of non-budgetary reserves.

In the *Report to Parliament*, the Department of Finance provides a rationale for inclusion of debt relief disbursements in Canadian ODA:

> "…they contribute to poverty reduction by freeing up resources (which otherwise be used to service sovereign debt) for use towards social expenditures. Further, debt relief recipient self-directed poverty alleviation efforts must be based on their individual HIPC Poverty Reduction Strategy Paper and must demonstrate that debt-relief efforts include equity (e.g. human rights) commitments" (*Report to Parliament*, page 10).

While this is superficially accurate, CSOs challenge the degree to which Poverty Reduction Strategies Papers (PRSPs) are the result of citizen and parliamentary input and, therefore, truly "country-owned". The current method of counting debt cancellation as ODA also artificially inflates the numbers. Donors count all debt cancelled in the year that it is cancelled, but the benefits of debt cancellation to developing country governments are spread over several decades. CSOs go further and argue that debt cancellation, while essential should not be counted as ODA.

Unlike other departments, the Department of Finance has developed guidelines for the implementation of the ODA Accountability Act. These guidelines, however, are internal and not publically available.[17] The guidelines call for consultations, careful summary of the views provided and a memo to the Minister on how initiatives for funding meet the terms of the Act. Any assessments to date are not in the public realm. The first consultation explicitly

relating to the ODA Accountability Act was conducted by the Department of Finance in December 2008. While appreciating the attention the Department of Finance gave to the implications of the Act, CCIC and Halifax Initiative were critical of the format the process and the timing of this consultation (late December).

The Department of Finance also produces an annual report to parliament on Canada at the International Monetary Fund (IMF) and World Bank[18]. This report provides a good overview of Canada's priorities and representations at the Bretton Woods Institutions (BWIs). Improvements in the quality of this report, as a key departmental accountability report on the BWIs, are in part due to consultations with the Canadian CSO coalition, the Halifax Initiative. Other government departments, implicated by the ODA Accountability Act, should take note of the Department of Finance's report on the BWIs.

THE DEPARTMENT OF FOREIGN AFFAIRS

The Department of Foreign Affairs (DFAIT) reported at the end of September, 2009 that it had reviewed each of its discretionary projects to determine ODA eligibility according to the terms of the ODA Accountability Act.[19] DFAIT's primary ODA disbursements were through the Global Peace and Security Fund (GPSF) in support of conflict prevention, post-conflict peacebuilding and stabilization initiatives. According to the *Report to Parliament*, the GPSF supports activities that are "prerequisites for effective poverty reduction in countries such as Afghanistan, Haiti and Sudan" (*Report to Parliament*, page 12). In 2008/09, of $138 million in DFAIT allocations for Afghanistan, Haiti and Sudan, $106 million was counted as ODA. Other disbursements from DFAIT include assessed contributions to international organizations and services provided to CIDA abroad.

While DFAIT provides an overview of results from these investments in the *Report to Parliament*, the department provides no rationale for eligibility against the purpose of ODA as defined under section 4 (1). For example, funding for security sector development in Afghanistan "includes payment of Afghan police and correctional officer salaries", but there is no discussion of its "consistency with international human rights standards". DFAIT argues that

these resources increase the security of citizens and thereby, indirectly, allows for greater poverty reduction and protection of citizens' rights.[20] DFAIT has not undertaken any consultations related to the Act and ODA in program areas under the discretion of the Foreign Affairs Minister, although officials have informally sought input from CSOs on appropriate forms for consultation.

OTHER DEPARTMENTS

The *Report to Parliament* reported on smaller amounts of Canadian ODA for 2008/09 from a number of departments, including the Royal Canadian Mounted Police, for 16 separate missions in countries experiencing conflict. These disbursements were intended to "help create a safer and more stable environment" [*Report to Parliament*, page 20], including work with the Combined Transition Command-Afghanistan and its work with the Afghanistan Ministry of the Interior to train and equip Afghan National Police. The rationale for counting these disbursements as ODA is that "safe and stable environments" can "pave the way for long-term development and can also prevent illicit activities from spilling across borders into other countries, including Canada" [*Report to Parliament*, page 20]. Whatever the merits of this argument, no justification is provided for in the *Report to Parliament* for these activities in relation to the three tests for Canadian ODA from section 4 (1) of the ODA Accountability Act, including no discussion of how to address human rights standards in security sector work.

The Department of National Defence reported small allocations of ODA for 2008/09, similarly without a rationale against section 4 (1) of the Act, except to say that $10.7 million for the Kandahar Provincial Reconstruction Team (PRT) is considered ODA because it "is to help the democratically elected government extend its authority and ability to govern, rebuild the nation, and provide services to its citizens". The PRT also responds through quick impact projects to "the immediate needs that Afghans face in their daily lives" (*Report to Parliament*, page 22).

A FRAMEWORK FOR CANADIAN AID REFORM

The international community faces an unprecedented moment of converging global crises, including:

- An economic crisis with loss of livelihoods and deepening global poverty in Africa and other parts of the world;
- A persistent social crisis of hunger and marginalization, leaving millions without access to adequate food, primary health care or basic education;
- A crisis of environmental justice, with no North/South measures to mitigate the impacts of climate change on the poor; and
- A human rights crisis, as the rights of millions of poor people are undermined by conflict and undemocratic regimes.

The ODA Accountability Act comes at a critical moment in Canada, with increasing doubts about the relevance of current policies and future directions for Canadian international cooperation, including aid, to respond effectively to these converging crises. With its framework of internationally agreed human rights standards, and its requirements for consultation and accountability, the ODA Accountability Act gives an opportunity to Canadian policymakers and aid practitioners to put poverty reduction and human rights at the heart of international cooperation policies. The Act equally provides an opportunity to draw Canadian lessons from the challenges of applying human rights to aid practice. A robust implementation of the ODA Accountability Act could define a unique Canadian contribution to the urgently needed reform of international development architecture by donors and developing country governments in the coming years.

Understanding and applying international human rights standards to international assistance is, no doubt, complex for both government and civil society organizations. Government and CSOs need to work together to take full advantage of the ODA Accountability Act to consider reforms to strengthen Canadian ODA policies, aid practices and partner relationships. Reforming CIDA is essential, as it is the lead government agency responsible for Canadian ODA under the ODA Accountability Act.

RECOMMENDATIONS[21]

RECOMMENDATION ONE

Commit to fully articulated human rights standards as the policy framework for implementation of the ODA Accountability Act.

A human-rights approach to Canadian ODA would guarantee that each Minister has informed "opinions" about aid disbursements that meet the three inter-related criteria of section 4(1) of the Act. A "do no harm" approach to respect human rights standards is only a first step. Policies and practices in Canadian ODA must, as required by international human rights standards, fully respect, but also, protect and promote international human rights.

RECOMMENDATION TWO

Transform CIDA into a government department with a legislated mandate and the authority and human and financial resources to be the pre-eminent government institution responsible for managing and coordinating Canadian ODA, whose purpose is set out in the ODA Accountability Act.[22]

CIDA must provide leadership and coordination, with other departments responsible for ODA, on the implementation of the purposes of ODA as defined by the Act. CIDA must also ensure that implementation plans on commitments made by Canada in 2008 to the Accra Agenda for Action include: 1) deepening local ownership by strengthening the voice of CSOs and beneficiary populations in determining country priorities; 2) developing policy directions for CIDA on civil society as development actors in their own right; and 3) developing knowledge in the application of aid and development effectiveness policies to human rights principles, gender equality and sustainable development.

RECOMMENDATION THREE

Implement a rights-based approach for all Canadian development assistance programming.

A rights-based approach for Canadian ODA needs:

- **Policy Guidelines**
  The three government departments responsible for most Canadian ODA (CIDA, DFAIT, and Finance) should develop, under the direct leadership of CIDA, policy guidelines, including practical field "how-to guides" on understanding and fully integrating human rights standards into departmental programs for Canadian ODA (see Appendix 1 and 2 for excerpts from DFID's "how-to guide" and the DAC Action-Oriented Policy). Other departments responsible for delivery of ODA should be consulted in developing the guidelines and would be required to be consistent with the guidelines in their implementation of Canadian ODA. The development of these tools should also be undertaken in close consultation with Canadian and international development stakeholders, including the international human rights community.

- **CIDA's *Business Process Roadmap***
  CIDA's *Business Process Roadmap*[23], including its Core Documents listed in for Section 1.3[24] of the Business Process Roadmap should be systematically reviewed. These guiding policies must fully integrate revised CIDA practices for determining programming priorities and modalities for delivering aid, taking account of new requirements for due diligence and consultation, arising from the application of human rights standards to all CIDA programs.

- **CIDA's Country Strategies and Country Development Policy Frameworks (CDPFs)**
  CIDA's country strategies and CDPFs for the 20 priority countries for bilateral ODA should be guided by specific country analysis of conditions giving rise to social, economic and political exclusion, patterns of discrimination, and the capacities of poor and marginalized populations to realize their rights.

  CIDA's Country Strategies and CDPFs should be based on transparent consultations with relevant and diverse Canadian and country-level development actors. Special attention should be given to mechanisms for ongoing accountability to "take into account the perspective of the poor".

- **CIDA's Gender Equality Action Plan**
  The Action Plan to implement CIDA's Gender Equality Policy should fully address the weaknesses in implementing this Policy identified in CIDA's 2008 Evaluation Report on its Gender Equality Policy and in the September 2009 CSO response to the evaluation. This Action Plan should: 1) explicitly take account of the ODA Accountability Act and international human rights standards for women's rights; 2) assure the commitment of significant CIDA financial and human resources to strengthening capacities for gender equality and women's rights in all of CIDA's development priorities and programs; and 3) set out transparent mechanisms, including public consultation with CSOs and women's rights organizations, to closely monitor and be accountable for gender equality and women's rights as a central policy goal in CIDA's mandate, its programming and its policy promotion activities.

- **CIDA's Thematic Focus for Programming**
  CIDA should develop and make public multi-year action plans for its three recently announced thematic areas – increasing food security, securing the future for children and youth, and stimulating sustainable economic growth. These action plans should set out priorities and implementation strategies for each thematic area. In setting these priorities and strategies, a human rights approach consistent with the ODA Accountability Act should be used. (See for example, Chapter 6 on the application of human rights standards to CIDA's programming for basic education). CIDA should consider commissioning a study of the application of international human rights standards in its programming in basic education, primary health, and/or food security. The study could be conducted by the UN Special Rapporteur for human rights relevant to the selected thematic area (see Appendix 3 for excerpts of a report by a former Special Rapporteur on the implementation of the right to health in Sweden's international assistance to health).

- **Financing Climate Change Mitigation and Adaptation**
  CIDA, DFAIT and the Department of the Environment should ensure and document, in transparent policy statements, that Canadian financing for climate change mitigation and adaptation for developing countries is provided under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC). This financing should be additional to Canada's commitment to achieve the UN target for aid spending of 0.7% of GNI and it should be consistent with section 4(1) and 4(2) of the ODA Accountability Act.

- **Fragile States, Peace and Conflict Reduction**
  The Department of Foreign Affairs and CIDA should undertake context and conflict-specific analysis and human rights assessments in fragile states to guide appropriate selection, balance and sectors for Canadian interventions and funding. For example, support for security sector reform, particularly the financing of training and salaries for police, should be informed by ongoing human rights assessments.

  DFAIT, CIDA and the Department of National Defence should proactively emphasize the socio-economic determinants of peace and conflict reduction in the government's whole-of-government interventions and approaches to fragile states, consistent with the three criteria in the ODA Accountability Act.

- **International Financial Institutions Policies and Financing**
  The Canadian government has a clear obligation to ensure that International Financial Institutions (IFIs) policies and financing to recipient governments do not violate Canada's human rights obligations, nor undermine those of the beneficiary government. The Department of Finance should establish, within its international section responsible for Canadian representation at the World Bank and the IMF, the capacity to assess human rights implications of the policies and projects of these institutions. The Department of Finance and CIDA should jointly commission a study to examine the safeguard policies of the multilateral development banks (the World Bank and the Regional Development Banks). The Department of Finance should integrate international human rights standards into these safeguard policies.

RECOMMENDATION FOUR

Conduct consultations on the implementation of the ODA Accountability Act, consistent with section 4(2) of the Act, in a manner that encourages empowerment and participation of rights-holders in developing countries and/or their representatives.

Section 4(1) of the Act suggests that a human rights approach should also inform the implementation of the government's consultation policies with respect to the Act and the purposes of Canadian ODA. To the maximum extent possible, these consultations must proactively include engagement with affected and excluded populations.

- **Best Practice Principles for Consultations**
  - Timeliness – sufficient notice, conducted within relevant timeframes, for key decisions by the Minister.
  - Openness – equal opportunity for access and receptivity to a diversity of views, in a format that includes exchange of views.
  - Transparency – clarity of purpose and process of consultation, with dialogue and feedback to those who are consulted.
  - Informed – preparatory and follow-up documentation in relevant languages for those being consulted.
  - Iterative – consultations as ongoing processes, not one-off events.

- **Consultations focus on Implementation of the Act**
  Consultations with Canadian civil society organizations, carried out by respective departments, must focus on issues relating to the implementation of the ODA Accountability Act. Such consultations are likely to be most effective for informing the opinion of the Minister if they are focused thematically or on key issues. A number of smaller more focused, but still open, consultations during a two year period, planned with CSO input, rather than one government-directed, multi-day, open-ended consultation, are likely to be more substantive and make a positive contribution.

RECOMMENDATION FIVE

Put in place the highest standards for transparency in Canadian aid practices and full accountability in reporting on all aspects of implementation of the ODA Accountability Act.

In order to fully implement the ODA Accountability Act, transparency is essential. Without transparency, it is impossible to have accountability in the determination of ODA priorities, their implementation, and ongoing assessments of the development impacts of the ODA.

- **Comprehensive Approach to Aid Transparency**
  Under the leadership of CIDA, the government must allocate the necessary resources to enable the publishing, by all relevant departments, of timely, relevant information on policies and guidelines for ODA allocations, country and sectoral strategies and plans, and contributions to

development outcomes, including lessons learned, comprehensive statistics, and indicative plans for predictable Canadian aid flows.

- **Commit to the International Aid Transparency Initiative**
  CIDA should join the DFID-led International Aid Transparency Initiative (IATI). The Initiative sets out donor commitments to principles and practices that meet high and comparable standards in aid transparency and accountability.[25]

- **Transparency of the Rationale for an Aid Allocation under the ODA Accountability Act**
  CIDA should publish comprehensive information, provided by all relevant departments, on the rationale and evidence that major aid policies and aid allocations decisions, including CIDA bilateral projects, CIDA multilateral allocations, DFAIT projects, and Finance allocations to the IFIs, fully meet the three criteria in section 4(1) for ODA disbursements.

- **Statistical Reports on Canadian ODA**
  The annual summary report and the annual statistical report to Parliament on ODA, required by the Act, should add statistical information, consistent with accountability to a human-rights framework for Canadian ODA. This includes:

  – Clearly identified gender-specific and gender integrated programming, in relation to disbursements by multilateral organizations, country programs, and major branches of CIDA and other government departments.
  – More comprehensive information on Canadian aid disbursements to fragile states and countries in conflict as to sub-sector priorities (e.g. security sector reform), on disbursements to technical assistance (distinguishing Canadian and developing country technical assistance), and disbursements on program-based approaches (by sector, countries, partners and other donors).
  – Statistical reports that clearly distinguish Canadian international assistance that has been reported to the OECD DAC as Canadian ODA from other Canadian international assistance, in all relevant statistical tables, including by sector and country.

RECOMMENDATION SIX

Work with Canadian development stakeholders, including parliamentarians, to improve the quality of the next *Report to Parliament* for 2009/10, due in September 2010.

A multi-stakeholder working group should be established to advise CIDA on the format and content of the 2010 Report. The first *Report to Parliament* provided new and timely statistical information on Canadian ODA performance in 2008/09, much earlier than usual. Future *Reports to Parliament* would be improved if each department provided:

- An interpretation of the criteria set out in the Act in section 4(1);
- An overview of the processes that the department used (including at country level) to determine the relevance of disbursements to the ODA criteria set out in the Act;
- A summary of the application of the three criteria to key decisions affecting new ODA policies and program disbursements made in during fiscal year;
- A summary of the outcomes and departmental responses to any departmental consultation with regard to section 4(2) of the Act on the implementation of the Act; and
- An overall summary, by CIDA as the coordinator for the report, of issues in the implementation of the ODA Accountability Act to be addressed in the next year.

2

The Official Development Assistance Accountability Act: Legal Rationale for Applying a Human Rights Framework to ODA

SYLVAIN BEAUCHAMP[i] PH.D. AND D.E.S. (IUHEI, GENEVA), LL.B. (SHERBROOKE)
MEMBER OF THE QUEBEC BAR

INTRODUCTION

0:37

The Official Development Assistance Accountability Act[1] (ODA Accountability Act) came into effect on June 28, 2008. Official Development Assistance (ODA) is defined by the Organisation for Economic Co-operation and Development (OECD) as:

> Grants or Loans to countries and territories on Part I of the DAC List of Aid Recipients (developing countries) which are: (a) undertaken by the official sector; (b) with promotion of economic development and welfare as the main objective; (c) at concessional financial terms [if a loan, having a Grant Element (q.v.) of at least 25 per cent]. In addition to financial flows, Technical Co-operation (q.v.) is included in aid. Grants, Loans and credits for military purposes are excluded. For the treatment of the forgiveness of Loans originally extended for military purposes, see Notes on Definitions

[i] The author is Senior Advisor – Accountability and Rule of Law, at Rights & Democracy. The views expressed in this paper are solely the author's and not Rights & Democracy.

> and Measurement below. Transfer payments to private individuals (e.g. pensions, reparations or insurance payouts) are in general not counted.[2]

In the Canadian context, ODA is for the better part included within the International Assistance Envelope (IAE). The IAE was introduced in the 1991 Federal Budget and includes most of the government's international assistance spending, along with some activities funded by the IAE which do not meet the eligibility criteria defined by the OECD-DAC. Approximately 80% of all ODA is administered by the Canadian International Development Agency (CIDA). Based on statistical information available for 2006-2007, the greatest part of the remainder of the ODA executing organizations includes the Department of Finance (11%), the Department of Foreign Affairs and International Trade (5%), the International Development Research Center (4%), the Royal Canadian Mounted Police (0.4%), the International Center for Human Rights and Democratic Development (0.2%), Public Works and Government Services Canada (0.1%), Health Canada (0.05%), Environment Canada (0.03%), and Canadian Heritage (0.005%).

This paper briefly explores the legal boundaries within which the Government of Canada can provide ODA since the advent of the Act. Due to space limitations, this paper focuses on DFAIT and CIDA, but the concepts of the ODA Accountability Act which are analyzed apply to all departments within the Canadian government where ODA decisions are made.

1 – THE OFFICIAL DEVELOPMENT ASSISTANCE ACCOUNTABILITY ACT

While the origins of the ODA Accountability Act can be traced back to at least 1987 and the work of the then Standing Committee on External Affairs and International Trade,[3] the most proximate origin of the Act was the introduction in Parliament of Bill C-293 by John McKay on May 17, 2006. Other Bills dealing with the same topic were also introduced in 2006, but were subsequently abandoned.[4] In its assented version, the ODA Accountability Act is an apparently simple piece of legislation containing six sections. However, despite this apparent simplicity, the Act has far-reaching implications for Canadian ODA.

In order to trace the legal contours of the effects of the *ODA Accountability Act*, this paper focuses on the purpose and objects of the Act, as well as on selected requirements placed on ministers which are competent to provide ODA. Prior to delving into the very substance of the Act, a few comments must be made with respect to the context of the present paper, which is Canadian administrative law.

1.1 – ODA as the Exercise of a Discretionary Power by Certain Ministers

As the exercise of powers which were conferred upon the Government by Parliament,[5] ODA decisions fall within the realm of Canadian administrative law, in particular its rules regarding the exercise of discretionary powers.

As held by the Supreme Court in *Baker*[6]:

> [t]he concept of discretion refers to decisions where the law **does not dictate a specific outcome, or where the decision-maker is given a choice of options within imposed set of boundaries**.

Whereas discretionary powers are by nature broad, no discretion is absolute. As indicated by the Supreme Court in *Roncarelli v. Duplessis*:[7]

> [t]here is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant regardless of the nature or purpose of the statute.

In *Baker*,[8] the Supreme Court further specified that:

> […] discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but […] **considerable deference** will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. … . **However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms*** (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038). (Emphasis added)

0:40

Thus, because of the very nature of discretionary powers and the doctrine of judicial deference, Canadian administrative law does not provide extensive guidance as to how discretionary powers must, in a general fashion, be exercised. This will vary considerably based on the provisions, intent and purposes of the enabling statute. However, some measure of guidance is provided by an *a contrario* reading of the grounds upon which discretionary decisions are subject to being reviewed by Canadian courts. In this sense, those "general principles of administrative law governing the exercise of discretion" referred to by the Supreme Court in *Baker* include the principles that:

- Discretion must be exercised within the bounds of the jurisdiction conferred by the enabling statute.

- Discretion must be exercised in good faith, and not arbitrarily or capriciously.

- Discretion must be exercised in accordance with the intent and purposes of the enabling statute, and only consider relevant grounds. Not only must irrelevant grounds not be considered in the exercise of the discretion, but all relevant grounds provided by the enabling statute, or by necessary implication, must be taken into account to form the decision.

- The exercise of discretion must produce results – or outcomes – which are not unreasonable, let alone outcomes that are "so unreasonable, unfair or oppressive as to be on any fair construction an abuse of the power".[9] As held by the Supreme Court in *Dunsmuir*, "[…] reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[10] International law is useful in determining the reasonableness of the exercise of discretion.[11]

- Discretion must not be fettered "in such way that [the decision maker] mechanically or blindly makes the determination without analysing the particulars of the case and the relevant criteria".[12]

In short, the power to make decisions with respect to the "provision of assistance for developing countries" vested in the Minister of Foreign Affairs by Parliament,[13] is a discretionary power which is today governed by administrative law. The same is true for the Minister of International Cooperation's powers over ODA,[14] as well as for any other minister who is competent to make decisions with respect to ODA.

1.2 – Purpose and Objects of the *ODA Act*

As already noted, one of the main principles of administrative law is that discretionary powers must be exercised in accordance with the purpose and objects of the enabling statute. Ascertaining this is entirely a matter of statutory interpretation.

In Canada, statutory interpretation is effected by courts in accordance with the "modern approach". This approach was expressed by Driedger as follows: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[15] In the same vein, the Interpretation Act contains the following guidance:

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.[16]

In other words, interpretation contains three essential elements: text, context, and objects (purpose). This trilogy will take a different meaning for each provision of a specific Act, but it is also possible to identify more general purposes pursued by an Act in its entirety. Which of the general purpose or that ensuing from a specific provision will prevail in the overall interpretation will depend on each specific instance.

0:42

In the case of the ODA Accountability Act, any interpretation of the overarching purpose of this legislation needs to take into account section 2 of the Act. Under the heading "purpose", this section provides the following:

> **2.** (1) The purpose of this Act is to ensure that all Canadian official development assistance abroad is provided with a central focus on poverty reduction and in a manner that is consistent with Canadian values, Canadian foreign policy, the principles of the Paris Declaration on Aid Effectiveness of March 2, 2005, sustainable development and democracy promotion and that promotes international human rights standards.
>
> (2) Canadian official development assistance abroad shall be defined exclusively with regard to these values.

Purpose statements such as section 2 of the ODA Act are an important source of legislative values, and carry the authority and weight of duly enacted law. With respect to the exercise of discretionary powers, it was held by the Supreme Court that purpose statements "are not enacted in a juridical vacuum. Such clauses codify the common law duty to exercise delegated powers in strict accordance with the fundamental dictates of the enabling statute."[17] However, though being part of enacted law, purpose statements are not decisive on the exercise of discretionary powers. As explained by Sullivan:

> […] the **weight** given to a purpose statement depends on a number of considerations: **how specific and coherent the declared principles or policies are**, what directives are given by the legislature respecting their use, whether there are other indicators or legislative purpose, and so on. **Because purpose statements are merely descriptive of the legislature's goals, they are likely to carry less weight than a substantive provision**.[18] (Emphasis added)

Regarding the specific purpose statement contained in section 2 of the ODA Accountability Act, it is arguable that it should be given only a limited weight when attempting to ascertain the overall purpose of the Act. In addition to using very broad and ambiguous notions such as "Canadian values, Canadian foreign policy, […] sustainable development and democracy promotion […]" which, by nature and despite their definition in section 3 of the Act,[19] seem to lack the necessary specificity required by Professor Sullivan above, this purpose statement is eminently unclear. Mainly, is it difficult to conceive, only by reading section 2(1), how a central focus placed on poverty reduction can be consistent with so many other values that are very difficult to identify with precision (aside from human rights) and may well be conflicting with each other. To take a specific example, it is hard to conceive how the notions of "global citizenship and equity", which form part of Canadian values according to the Act, could be useful to guide the exercise of any discretionary power.

In this sense, it seems reasonable to submit that the overarching purpose of the ODA Accountability Act is to ensure that ODA is only provided by Canada when, cumulatively, it contributes to poverty reduction; takes into account the perspectives of the poor; and is consistent with international human rights standards. Under this construction, section 2(1) contains the initial goal of Parliament, whereas the operating provisions in the ODA Accountability Act – in particular section 4 – give the measure of whether this goal was actually achieved. At best, section 2(1) is a general guide in construing the other provisions of the Act. Its weight in guiding the exercise of discretionary powers contained in the ODA Accountability Act seems to be very limited, if at all present.

It is also clear that the purpose of the ODA Accountability Act is not to confer jurisdiction over ODA to certain ministers, but rather to ensure that, should ODA-related powers be exercised, they follow the Act. This is made especially clear when one considers the fact that the expression "competent minister" is defined in the Act as "the Minister of International Cooperation, the Minister of Finance, the Minister of Foreign Affairs or any other minister who **is providing** official development assistance."

0:44

1.3 – Selected Requirements on the "Competent Minister" Ensuing from the ODA Accountability Act

Given the relatively little guidance provided by administrative law regarding the exercise of discretionary powers, ascertaining with precision what the competent minister ought to do in order to implement the ODA Accountability Act is no easy endeavour. Yet, administrative law does provide some measure of guidance. This part examines the **relevant grounds** which must be examined by the competent minister in this regard, and proposes a construction of what constitutes a **reasonable** exercise of the discretion of the competent minister over the formation of ODA opinions under section 4 of the Act.

It should be pointed out that the notion of "competent minister" includes the person who is actually the Minister, as well as any individual who exercises part or totality of the discretion vested in the competent ministers by the ODA Accountability Act, as permitted by the *Carltona* principle.[20] Accordingly, the notion of "competent minister" includes anyone legally entitled to exercise a delegated discretionary power that results into the provision ODA, be it within DFAIT, CIDA, the Department of Finance, or in other places of the Canadian government.

1.3.1 – Triggering Mechanisms Contained in the ODA Act

The ODA Accountability Act contains two sets of substantive legal provisions: section 4, which concerns the actual provision of ODA and consultation, and section 5, which concerns reporting requirements for the purpose of the Act. The reporting requirements do not come into action based on the realization of specific conditions. They are, in this sense, omnipresent obligations of the relevant ministers. By contrast, section 4 applies only in circumstances where ODA is "provided". The French version uses the expression "fournie", which has exactly the same meaning.

Based on a holistic and contextual interpretation of the Act, it is plain that section 4(1) applies to all decisions by the competent minister which have a material or consequential effect on the provision of ODA, rather than solely on fund transfer decisions. Concretely, this means that the Act applies to all ODA-related questions, from CIDA priority country selection down to the actual selection of aid programs that qualify as ODA within the meaning of the Act.

In this connection, it should be noted that the competent minister is always at liberty to exercise his or her discretion in a negative manner with respect to ODA. The ODA Accountability Act does not require the government to provide ODA, that is, even when all the relevant grounds under either approach above are met.

1.3.2 – Consider Only and All Relevant Grounds

As indicated above, it is a general principle of administrative law that discretion must be exercised in accordance with the purpose and objects of the enabling statute, and only consider relevant grounds. The heart of the ODA Accountability Act is precisely to provide grounds for the exercise of discretion in terms of ODA decisions made by the competent ministers. The main issue that comes to mind in this respect is whether the criteria listed in section 4(1) of the Act are exhaustive, or whether other criteria mentioned in section 2(1) are also relevant grounds for the purpose of exercising the discretion under section 4(1).

In the view of the author, it is clear that the only relevant grounds which must be taken into account to form such an opinion are those listed in section 4(1).[21] This interpretation is warranted by three main reasons. Firstly, had the legislator wished that the criteria mentioned

in section 2(1) be taken into account in forming section 4(1) opinions, this would have been expressed clearly. Rather, section 4(1) is drafted in an exhaustive manner. Secondly, the definition of ODA as per section 3 of the Act specifies that such international assistance must meet "the requirements set out in section 4", rather than making also reference to section 2(1). Thirdly, the reporting requirements under section 4(3) of the Act are simply with respect to ODA "as defined by the Act that meets the criteria of subsections (1) and (1.1)" of section 4. The Act contains absolutely no indication that other criteria than those mentioned in section 4(1) must be taken into account for the provision of ODA. To paraphrase Professor Sullivan, this seems to be a case where a substantive provision carries more weight than a purpose statement in guiding the exercise of discretion. In fact, section 2(1) seems to have no weight a tall when it comes to the actual provision of ODA.

Accordingly, other elements mentioned in the purpose statement contained in section 2(1), such as Canadian values, Canadian foreign policy, sustainable development and democracy promotion are **not** specific or distinct relevant grounds for the exercise of ODA discretion, and must not be considered individually by the competent minister when forming section 4(1) opinions. In addition, the grounds listed in section 4(1) are of equal weight, interdependent and cumulative, irrespective of the fact that, according to section 2(1) of the Act, ODA should be provided with a central focus on poverty reduction.

0:46

1.3.3 – Applying the Reasonableness Standard: A Human Rights-Based Approach to ODA

Because, as the exercise of discretion, the forming of section 4(1) opinions must be compliant with administrative law, such opinions must be formed exclusively based on relevant grounds, as seen above. In addition, the *results* produced by the exercise of discretion must not be unreasonable, and section 4(1) opinions must not be formed arbitrarily or capriciously. This relates to both the outcomes and the process of section 4(1) opinions.

This places an obligation on the competent minister to take all adequate means available to ensure that his/her ODA decisions take into account all the grounds listed in section 4(1) in a

reasonable and rational manner. Adopting a human-rights approach (HRA) to form section 4(1) opinions would certainly be compliant with this obligation of means that competent ministers have under the Act. A human-rights approach to the entirety of section 4(1) is further compelled by the fact that all three grounds listed in this provision are rooted into a human rights scheme.

While this is undeniable for section 4(1)(c), it is also true of section 4(1)(a), which requires that ODA contributes to poverty reduction. Indeed, it is widely recognized that "human rights violations are both a cause and a consequence of poverty,"[22] and that poverty *per se* is a violation of all or several human rights. Therefore, adopting an approach of ODA which focuses on the realization of human rights in and of itself contributes to poverty reduction. The added value of adopting a rights-based approach to poverty reduction within the meaning of section 4(1)(a) of the ODA Accountability Act has been confirmed in connection with extreme poverty by the United Nation's Independent Expert on Extreme Poverty.[23]

In the same vein, assessing whether the perspectives of the poor (section 4(1)(b) of the Act) are taken into account by particular prospective ODA provisions can efficiently and reasonably be done by adopting a rights-based approach to this issue, in particular by recognizing that the poor must be able to provide their input in the concrete allocation on the ground of ODA provided by Canada, to the maximum extent possible. As put by the Office of the High Commissioner for Human Rights, "active and informed participation by the poor is not only consistent with but also demanded by the human rights-based approach, because the international human rights normative framework reaffirms the right to take part in the conduct of public affairs."[24]

In short, a human rights-based approach to section 4(1) opinions has the merit of addressing all relevant grounds of the ODA Accountability Act through a single analytical framework, which is anchored into rationality and reasonableness, and is undoubtedly compliant with legal requirements on the exercise of discretion as per Canadian administrative law. Human rights approaches have been in the international legal discourse for several decades. While there is

no universal recipe, there is a wide agreement that "[t]he following elements are necessary, specific and unique to a human rights-based approach":

(a) Assessment and analysis in order to identify the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers as well as the immediate, underlying, and structural causes of the non-realization of rights.

(b) Programs assess the capacity of rights-holders to claim their rights, and of duty-bearers to fulfil their obligations. Strategies are developed to build these capacities.

(c) Programs monitor and evaluate both outcomes and processes guided by human rights standards and principles.

(d) Programming is informed by the recommendations of international human rights bodies and mechanisms.[25]

0:48

Therefore, in forming section 4(1) opinions under the ODA Accountability Act, a persuasive construction of the human rights-based approach to ODA would require at least the following:

1. That a specific human rights-based approach to forming section 4(1) opinions be developed and adopted in a concerted manner by all competent ministers. Such a process must be designed to genuinely consider the perspectives of the poor and the views of stakeholders which were consulted pursuant to section 4(2) of the ODA Accountability Act, as discussed below.

2. That the provision of ODA be specifically designed to support the concrete implementation of international human rights standards by or of the recipients. This would require the competent minister to thoroughly analyze the human rights situation of the target groups of the potential ODA expenditure. To the greatest extent possible, the focus should be placed on areas where the discrepancy between the rights in principle and the rights in practice (or the rights deficit) is the greater.

3. That the provision of ODA does not breach international human rights standards, or is inconsistent with its principles. This can arguably require the competent minister to conduct some form of *ex ante* human rights impact assessment of any potential section 4(1) decision.

4. That the competent minister puts in place processes to ensure that ODA provided by Canada is not actually used in a manner which frustrates the purpose and objects of the Act. This implies regular and rigorous monitoring of the concrete use of ODA expenditures by the competent minister, for example in the form of *ex post* human rights impact assessments.

All these steps require a certain measure of direct input from the poor and a focus on poverty reduction resulting from a human rights approach. The exact methodology to be followed is within the competent minister's discretion, but a reasonable approach would be to draw from authoritative research in human rights-based approach programming.

1.3.4 – The Duty to Consult with Respect to ODA

0:49

Pursuant to section 4(2) of the ODA Accountability Act:

> The competent minister shall consult with governments, international agencies and Canadian civil society organizations at least once every two years, **and** shall take their views and recommendations into consideration **when forming an opinion described in subsection (1)**. (Emphasis added)

A reasonable interpretation of section 4(2) of the ODA Accountability Act indicates that its purpose is to ensure that the provision of ODA adequately addresses the perspective of the poor, as well as to "ensure that [ODA] considers the grass roots effects of aid activities on the recipient", to use the words of the Permanent Committee on External Affairs and International Trade in its 1987 report.[26] Furthermore, the fact that the duty to consult

contained in section 4(2) of the Act is specifically linked to the forming of opinions under section 4(1) indicates that the legislator placed a high importance on consultations.

This provision further indicates that the results of the consultations must enter into the process of forming opinions under section 4(1) of the Act. But section 4(2) is silent on how exactly should the competent ministers effect both the consultations and the taking into account of their results in forming opinions under section 4(1). Both matters are therefore within the discretion of the competent minister, and are accordingly governed by the general principles of administrative law as highlighted above. This notwithstanding, the Canadian case law[27] has developed certain attributes of a meaningful consultation in the context of Aboriginal rights and accommodation rights that are helpful to construe section 4(2) of the ODA Accountability Act, and arguably inform the reasonableness of the exercise of discretion in terms of consultations under section 4(2) of the Act. The following principles are especially relevant in this respect:

0:50

1. the consultation must be conducted in good faith, in order to genuinely understand the views of those consulted;

2. the consultation must be open-ended, as opposed to restricted to specific organizations;

3. the consultation must be a transparent and public process, designed and conducted to substantially take into account the views of those who are consulted;

4. in the case of ODA pursuant to section 4(2) of the Act, the views of those who were consulted must be actually considered by the competent ministers (or their delegates) when forming opinions under section 4(1) of the ODA Accountability Act;

5. there is no duty to agree.

Section 4(2) is limitative in terms of the categories of entities which must be consulted. This provision specifies that "[t]he competent minister shall consult with governments, international agencies and Canadian civil society organizations". Whereas all these groups must be consulted, determining which particular organizations which are part of those three groups are effectively consulted is a matter of discretion of the competent minister. Given the

aforecited case law and in light of the administrative law requirement that discretion must be exercised reasonably, it is arguable that consultations must be open-ended rather than closed to selected participants. Given the human rights-based approach highlighted above, consultations should also be designed to monitor the impact of ODA on human rights in target countries, *ex post* but possibly also *ex ante*.

1.3.5 – Reporting Requirements

Section 5 of the ODA Accountability Act contains a duty with respect to reporting requirements on the part of the Government. This section provides that:

> 5. (1) The Minister or the competent minister shall cause to be submitted to each House of Parliament, within six months after the termination of each fiscal year or, if that House is notthen sitting, on any of the first five days next thereafter that the House is sitting, a report containing:
>
> ***(a) the total amount spent by the Government of Canada on official development assistance in the previous fiscal year;***
>
> ***(b) a summary of any activity or initiative taken under this Act;***
>
> ***(c) a summary of the annual report submitted under the Bretton Woods and Related Agreements Act;***
>
> ***(d) a summary of any representation made by Canadian representatives with respect to priorities and policies of the Bretton Woods Institutions; and***
>
> ***(e) a summary of the Departmental Performance Report of the Canadian International Development Agency.***

While section 4 of the ODA Accountability Act constitutes its heart, section 5 is no less important since, without reporting requirements, Parliament would not be in a position to monitor the activities conducted by "competent ministers" on the basis of section 4. In this sense, section 5 is a democratic safeguard which is paramount in our country governed by the rule of law.

It is apparent from the Act that subsections 5(1)(a), (c) and (e) refer to specific documents, whereas subsections 5(1)(b) and (d) are more broadly encompassing provisions that require the Minister of International Cooperation[ii] to provide a summary of "any activity or initiative under this Act" (section 5(1)(b)) and of "any representation made" with respect to the Bretton Woods Institutions (section 5(1)(d)). The expression "any representation" contained in section 5(1)(d) straightforwardly refers to both written and oral representations. The notion of "activity contained in section 5(1)(b) deserves a few comments.

Even a brief analysis of section 5(1)(b) of the ODA Accountability Act makes it plain that this provision's purpose is to serve as a residual clause whereby the report referred to in section 5 in general would contain information about **any** activity or initiative undertaken under the Act, in order to enable Parliament to exercise its democratic monitoring over the government with respect to ODA, and eventually adopt supplementary legislative measures.

0:52

The expression "any activity" in section 5(1)(b) of the *ODA Act* refers in particular to the following activities that are expressly covered by the Act:

- Providing ODA, as required by section 2(1), section 4(1), and section 4(1.1);
- Consulting stakeholders, as required by section 4(2);
- Forming an opinion about whether the standard of section 4(1) is met;
- Taking the views of stakeholders consulted into account when forming an opinion under section 4(1), as required by section 4(2);
- Calculating ODA and considering relevant aspects, as required by section 4(3);
- Issuing a statistical report, as required by section 5(2); and
- Reporting to Parliament, as required by section 5(3).

[ii] Section 3 of the *ODA Act* defines the expression "Minister" as "the Minister of International Cooperation or any other minister designated by the Governor in Council as the Minister for the purposes of this Act.

In addition, the expression "any activity" also refers to activities that are not expressly governed by the ODA Accountability Act but that were done "under this Act" by the government of Canada, i.e. with respect to ODA at large. For example, this would include any interdepartmental collaboration, memorandum of understanding or arrangement with respect to official development assistance or with respect to any of the above-listed activities, within the entire government of Canada. The expression "initiatives" contained in section 5(1)(b) of the ODA Accountability Act makes it even clearer that such activities that are not expressly covered by the Act but relate to the subject matter covered by the Act shall be included in the annual report tabled in Parliament pursuant to section 5 of the *ODA Act*.

CONCLUSION

The ODA Accountability Act is the pinnacle of 20 years of public reflections, studies and consultations regarding ODA. While being a very simple piece of legislation, the Act carries significant implications for the provision of ODA by Canada. This short paper demonstrated several of those implications, which can be summarized as follows.

Firstly, the Act does not confer powers over ODA. Rather, it circumscribes the provision of ODA by otherwise competent ministers within certain legal boundaries, which must be analyzed in light of Canadian administrative law. Secondly, the Act does not set a legal obligation to provide ODA; it concerns only the quality of aid, not its quantity. Thirdly, the Act sets three exhaustive and cumulative criteria (or grounds) that must be taken into account when forming an opinion that ODA may be provided, and ODA may only be provided if such an opinion is formed. Fourthly, in particular in light of the centrality of human rights in the grounds listed in section 4(1) of the Act, adopting a human rights framework to providing ODA would be entirely compatible with the Canadian administrative law principle that discretionary powers must produce reasonable outcomes. Fifthly, Canadian case law contains important legal principles that are applicable to the duty to consult contained in the ODA Accountability Act.

3

A Human Rights Framework for Development Assistance

GIORGIANA ROSA
AMNESTY INTERNATIONAL[i]

The human rights obligations of states when they engage in development assistance are the focus of this paper. As well as outlining the application of the normative framework of human rights standards to development assistance, some opportunities, challenges and ways that human rights principles and standards can enhance the process and the outcomes of development assistance will be considered.

0:55

THE COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Article 2(1), of the International Covenant on ESCR states that "Each Party to the present Covenant undertakes steps, individually *and through international assistance and cooperation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." [emphasis added]

The main legal basis for a consideration of the human rights obligations of states in development assistance is found in Art. 2(1) of the International Covenant on Economic, Social and Cultural Rights (ESCR), and the body of work of the United Nations Committee on ESCR (responsible for monitoring its application by states), including the General Comments that apply to the Covenant's implementation.

---

[i] Giorgiana Rosa is the Development and Human Rights Coordinator at the International Secretariat of Amnesty International (AI), in London, and is part of the Economic Social and Cultural Rights Team. This paper is adapted from her presentation to the Conference on the Future of Canadian ODA, September 29-30, 2009, Gatineau, Quebec.

The UN Committee on ESCR has clarified that "in accordance with Article 55 and 56 of the Charter of the UN, with well-established principles of international law, and with the provisions of the Charter itself, international cooperation…for the realization of economic, social and cultural rights is an obligation of all States".[1] International human rights standards give rise to a set of obligations of states regarding development assistance, both when acting bilaterally and also when acting through multilateral institutions.

The Committee on ESCR has consistently held that the obligations of states extend to state action as part of inter-governmental organizations, including international financial institutions such as the World Bank[2], and has required that all state Parties take due account of their obligations under the Covenant when acting as members of such institutions.

The Committee's interpretation of the role of international assistance in the Covenant, and the body of work of Special Rapporteurs and independent experts on ESCR, point to the obligation of both donor states and developing countries that receive development assistance to respect, protect and fulfil the human rights in the Covenant. As such, both have mutual obligations for the protection and promotion of ESCR in the context of development assistance.

According to the Committee, states that are not able to provide at least minimum essential levels of economic, social and cultural rights – such as access to essential primary health care, essential medicines, the prevention and alleviation of hunger and essential levels of safe drinking water and of sanitation, shelter and housing for all – have an obligation to seek assistance (either financial or technical, bilateral or multilateral). For donors, this is taken to mean an obligation to facilitate the realization of ESCR wherever possible and provide assistance when in a position to do so, especially where this is necessary for the fulfillment of minimum essential levels of ESCR.

While the legal obligation to provide international financial and technical assistance remains contested, the status of an obligation to "do no harm" – to respect and protect rights in the provision of development assistance – has been consistently reaffirmed by the UN treaty bodies and independent experts and is increasingly widely accepted. As the UN Committee on the Rights of the Child has stated, "State Parties must respect and protect economic, social and cultural rights of children in all countries with no exceptions."[3] The "do no harm" approach has also been recognized by the donors coming together in the OECD Development Assistance Committee.[4]

THE OPPORTUNITIES AND CHALLENGES IN APPLYING HUMAN RIGHTS STANDARDS IN INTERNATIONAL ASSISTANCE

So how can human rights standards contribute to more effective and human rights-based development assistance? What are the opportunities and the challenges?

Human rights standards provide an invaluable legal and policy framework that should underpin both the process and the intended outcomes of development assistance. The human rights principles of non-discrimination, participation, accountability, equality, a focus on the most vulnerable and marginalized sections of the population, and adequate prioritization of essential levels of economic, social and cultural rights, provide a normative and legal framework that is shared by donors and partner countries alike – by virtue of their human rights Treaty obligations. Human rights standards should inform policy dialogue and choices, poverty reduction strategies and the identification of priorities in aid policy and practice and ensure a focus on addressing poverty and discrimination in development assistance efforts.

Human rights standards also demand that there is effective participation of affected communities (including by the most vulnerable and marginalized or their representatives) in national development plans and poverty reduction strategies and processes. These standards offer a framework for ensuring that development policies and strategies are informed by the views and participation of people living in poverty. Participation also requires transparency and access to information on the purpose, amount and terms of development assistance, and how it is used, monitored and accounted for. Such transparency is critical to increase mutual accountability for the use of aid resources, between donors and partner governments, between the latter and their people and between donors and taxpayers.

But the application of human rights standards also present challenges to donors and developing country governments. Among these we can point to several that are relevant to donors:

- How can the human rights framework effectively guide donor choices among competing priority sectors, and inform aid allocation choices, especially when donor coordination and harmonization is still problematic?

- What tools and expertise is needed among donor agencies to integrate human rights principles and standards into their assistance programs at all levels?

- How can developing country governments and donors deal with competing priorities in a context of insufficient resources and capacity and how can human rights standards underpin the relationship between donors and partner countries? Some of this thinking and practice is already happening and some donors and partner countries are already integrating human rights in their development assistance[5]. Bodies such as the OECD DAC and the Office of the High Commissioner for Human Rights are developing tools and guidance to help donors in these efforts. The Accra Agenda for Action also includes the commitment that: "Developing countries and donors will ensure that their respective development policies and programs are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability"[6].

0:58

While not framing its principles in terms of human rights obligations under international law, the DAC Action-Oriented Policy Paper on Human Rights and Development promotes a "do no harm" approach. In the paper, the DAC invites donor agencies to use 10 principles to inform the design of human rights policies and programming. Principle 8 – Do no harm – states that "Donors' actions may affect human rights outcomes in developing countries in positive and negative ways. They can inadvertently reinforce societal divisions, worsen corruption, exacerbate violent conflict, and damage fragile political coalitions if issues of faith, ethnicity and gender are not fully taken into consideration. Donors should promote fundamental human rights, equity and social inclusion, respect human rights principles in their policies and programming, identify potential harmful practices and develop short, medium and long-term strategies for mitigating the potential for harm."[7] Principle 1 goes further and states that "The link between human rights obligations and development priorities should be a regular feature of dialogue with partner governments at the political level as well as the development level. Donor countries should work with partner governments on ways to fulfil their obligations under international human rights law. Each country context will differ, and dialogue will need to take the partner government's existing obligations as its starting point."[8]

The inter-connected nature of development assistance and human rights – including economic, social and cultural rights – is increasingly being recognized. The mutually reinforcing links

between aid effectiveness and human rights are receiving increased attention, with human rights standards seen to provide a framework to strengthen current efforts to improve development results. While human rights standards, in themselves, necessarily cannot provide all the answers, they do provide a framework that places the human rights of people at the heart of choices in development cooperation. They place mutual obligations on both donors and partners to use development assistance, with focus on the marginalized and neglected, for the promotion and protection of human rights. Human rights standards provide a shared normative framework that should underpin policies and strategies for tackling poverty, discrimination and exclusion.

THE OFFICIAL DEVELOPMENT ASSISTANCE ACCOUNTABILITY ACT: GOOD FOR HUMAN RIGHTS

0:59

EXCERPTS FROM A SPEECH BY ALEX NEVE, SECRETARY GENERAL OF AMNESTY INTERNATIONAL – CANADA.

Making the link between human rights and development assistance is good for development. That is certainly the fundamental premise of the Official Development Assistance (ODA) Accountability Act. But it is also important to look at the other side of this equation: making the link between human rights and development is also very good for human rights.

It is not just good for rights in the obvious sense that development assistance in the health sector, for example, which is well grounded in a human rights framework, will boost protection of the right of access to health care. It goes far beyond those direct connections. Pursuing development assistance with full regard for human rights standards has tremendous implications for two fundamentally important human rights concepts that, to date, have remained somewhat elusive and often contested.

The first of these is the indivisible and interconnected nature of all human rights – that is don't categorize rights, don't rank some higher over others. Indivisibility is a very powerful

and important message, but it is often one that is very hard to make tangible and concrete. Pursuing a human rights approach to development may truly offer a way forward. In thinking of the human rights imperatives that must be addressed in launching a solid development initiative for a particular community, it is impossible, and now under the terms of the Act likely unlawful, not to address the full range of rights that are at stake.

Boosting the enrolment of children in primary education, for example, will involve the right to education of course, but also women's equality right, the protection of minorities, the freedom of expression, association and assembly, religious freedom, and perhaps protection for child soldiers and many others. The indivisibility of rights through this lens becomes evident in ways that often end up being disguised and overlooked in human rights advocacy. This is very important.

The second reason arises from the fundamentally important notion that the right to have your human rights protected is universal – i.e. all rights protected for all people, but also that the obligation to protect human rights is also universal – i.e. all rights protected by all governments.

This struggle to secure recognition of the principle that governments do indeed have obligations to protect human rights beyond their own borders has been so important and in so many contexts. It arises with respect to the foreign actions by government officials, by law enforcement personnel, or even by soldiers or private companies, when they go abroad.

The ODA Accountability Act is remarkable as a notable advance on this front. Its very premise is that human rights obligations do extend beyond our borders. Securing legal recognition of the extra-territorial reach of human rights obligations is not just essential to better development; it goes far in shoring-up the strength and integrity of the international human rights system in its entirety. And that is another reason why this Act is very welcome from a human rights perspective.

APPLYING THE ODA ACCOUNTABILITY ACT

" If development remains within the Foreign Office, it is inevitably seen as an extension of foreign policy and therefore much diminished. … The lesson for other countries is that there is a very powerful case for the establishment of a separate Ministry …"

: The Rt Hon Clare Short, MP, United Kingdom, Notes for a Keynote Address to the Conference on Strengthening Canadian ODA: Putting the ODA Accountability Act into practice, Gatineau, September 29-30, 2009.

4

The ODA Accountability Act and Strengthening CIDA

BILL MORTON
THE NORTH-SOUTH INSTITUTE[i]

This paper highlights four areas in which CIDA can be strengthened, and how these relate (or do not relate) to the Official Development Assistance (ODA) Accountability Act.

THE ACT: IT'S NOT JUST ABOUT CIDA

It is important to note that the ODA Accountability Act does not just apply to CIDA. In fact, it applies to all government departments that are involved in activities that qualify as aid. This currently amounts to 12 government departments.[1]

Strengthening Canada's aid and development program involves strengthening policy and programming across government as a whole. Nevertheless, CIDA is the biggest part of this picture, and it is therefore appropriate to focus on CIDA in particular.

[i] This paper is a revised version of a presentation to the Conference on the Future of Canadian ODA, held in Gatineau, Quebec, September 29-30, 2009. It is part of an ongoing NSI research agenda on Canadian ODA and strengthening CIDA. Thanks to Roy Culpeper, Brian Tomlinson and Stephen Brown for valuable insights that assisted preparation of this presentation.

THE ACT AS AN "ENTRY POINT" TO STRENGTHENING CIDA

It is also important to recognize that the Act does not relate directly to strengthening CIDA. The Act is brief, and despite its focus on poverty reduction, human rights and the perspectives of the poor, it is potentially open to broad interpretation. So it is difficult to make direct connections between the Act and some key weaknesses or issues that may be affecting CIDA, or areas that may require strengthening.

Nevertheless, the ODA Accountability Act can serve a useful purpose as an entry point for strengthening CIDA. It provides:

- An important reference point for international policy making;
- The means for CIDA to re-focus on key objectives – based on poverty reduction, human rights standards, and the perspectives of the poor – and to work with a clear purpose based on these objectives; and
- A potential "unifying force" for CIDA officials, allowing them to come together in policy and practice around the Act's principles. If handled well, this could serve as a new positive motivator for the agency and for CIDA officials.

POSITIVE ASPECTS OF THE ACT:

At the most simple level, the ODA Accountability Act provides a legislative mandate, and so it obliges the government and CIDA to comply with its three objectives for the purpose of ODA. It also introduces a new level of parliamentary oversight of CIDA's activities. It, therefore, has the potential to increase parliamentary engagement with Canada's aid program.

The Act also provides the means for parliament, and other groups – such as civil society organizations, private citizens, and the private sector – to hold government to account for Canada's aid program. This is appropriate: the government should be accountable to taxpayers for Canada's aid program. The government, however, should also be accountable to the *recipients* of Canadian aid: partner governments and organizations, as well as the citizens of

developing countries. The Act refers to taking into account the perspectives of the poor, but this does not amount to an accountability mechanism.

Other positive aspects of the Act include:

- The means for enhanced openness and transparency about CIDA and the government's aid program. This should result from the consultations that are mandated under the Act, which in turn could lead to enhanced public engagement with Canada's aid program; and

- The opportunity for the Minister and CIDA to take stronger leadership within government; for instance, through leading in the preparation of the annual report to Parliament on the Act, and coordinating other government departments' input to the report.

BUSINESS AS USUAL, OR A FORWARD-LOOKING AGENDA?

Positive aspects of the ODA Accountability Act need to be seen in context of some underlying questions and in relation to current approaches to its implementation. How does the government and CIDA see the Act? Will the Act actually change anything? Is there a danger that CIDA sees compliance with the Act as a "box-ticking" exercise? Will CIDA's response to the Act – and its reporting on it – simply involve "word-smithing" existing policy and programs so that they are seen to be in compliance?

A recently released Halifax Initiative "Issues Brief", based on documents sourced through Access to Information, helps shed some light on these questions.[2] The documents obtained through the Access to Information request show that the overall picture is not very encouraging. For CIDA, the Act seems to be primarily an exercise in compliance, rather than an opportunity for change. For instance, documents emphasize the need to communicate existing compliance, rather than to improve on compliance.

Although CIDA is still in the early stages of interpreting the Act, it appears to be adopting a "business as usual" approach, and that it views the Act as providing legislative endorsement for current policies and programs.

Alternatively, the government and CIDA could interpret the ODA Accountability Act as a forward-looking piece of legislation that provides the basis for a better, stronger aid and development program. The Act represents an obligation for CIDA. Sometimes obligations are a curse, and are an unnecessary distraction from existing agendas and objectives. In this case, however, CIDA might see the obligations in the Act – and its core principles – as creating opportunity for change that might address some key areas to strengthen CIDA as a preeminent development agency.

STRENGTHENING CIDA IN THE CONTEXT OF THE ACT: KEY ASPECTS

Strengthening CIDA in the context of the ODA Accountability Act should address four main areas of policy and institutional change.

1 – High level political support and backing

The degree of high level political support and backing for Canada's aid and development program affects CIDA's ability to advance a strong development agenda. Over at least the last decade, successive Ministers of International Cooperation have had relatively limited profile and standing within government (and consequently also with the public). CIDA has often been subject to a range of non-development priorities promoted by other departments and their ministers, in particular Foreign Affairs, Trade, Finance and Defence, whose own policies can have important development impacts, both positive and negative.

A key factor affecting CIDA's ability to advance a strong development agenda – and to argue for this against other government priorities – relates to the standing and influence of the Minister of International Cooperation within the Government and Cabinet. This also relates to the extent to which he/she provides leadership or is included in important government decision-making and policy processes. For instance, while the current Minister sits on several Cabinet Committees (including the Committee on Foreign Affairs and Security, and the Committee on Afghanistan), she is not a member of the Committee on Priorities and Planning, a key decision-making body.

In general, a strengthened CIDA therefore requires a high-ranking Minister who has a central role in policy and decision-making and who has strong backing from others within government, in particular the Prime Minister. It also requires a degree of continuity and consistency: although the current Minister of International Cooperation has been in office for two years, there has been a history of high turnover of ministers, with six over the last ten years.

This has led to frequent changes in policy and focus, as different Ministers have attempted to put their own stamp on policy.

If these two issues – the Minister's standing within government (and with the public), and continuity of office – were addressed, there would be a number of positive outcomes:

- With a higher ranking Minister in Cabinet, CIDA would be able to stand more strongly as an equal with Foreign Affairs and Trade, Finance, and other departments.

- As a result, CIDA could bring a stronger development orientation to foreign policy; it could also focus more strongly on its core purpose: uptake of the Act, the MDGs, and poverty reduction.

- A senior Minister would lead to better balance in Canadian foreign policy between necessary immediate, short term national interests (that would be primarily addressed by other government departments) and longer term development goals.

- A higher level of policy continuity and consistency would improve efficiency and effectiveness, as well as CIDA staff morale.

In this context, it is useful to briefly highlight the UK experience both in terms of the establishment of DFID as a fully independent department[3], and in terms of the UK's International Development Act.[4]

Prior to 1997, Britain's aid program was managed through the Overseas Development Administration, a functional wing of the Foreign Office. Clare Short, as the Labour Party Shadow Secretary of State for Overseas Development, held a strong conviction that there

should be a separate government department responsible for aid and development. After Labour's victory in the 1997 General Election, DFID was created as a new department, independent of the Foreign Office, with the strong backing both of the Prime Minister and the Treasurer.

Subsequently, as Secretary of State for International Development, Clare Short was both a member of Cabinet but also of several interdepartmental Ministerial Committees. Within 6 months of taking office, the government had released a White Paper on Eliminating World Poverty, which set out a government-wide position on the issue. It released a further White Paper on Poverty and Globalisation in 2000.[5]

The International Development Act was then passed in 2002. It established poverty reduction as the over-arching purpose of British aid, and importantly, it reflected changes that had *already occurred* in UK development policy and programming since 1997.

This reflects a major difference with the Canadian legislation: the UK's International Development Act confirmed reforms that had already taken place. It would be a mistake, therefore, to see the Canadian legislation as equivalent. Instead, as mentioned previously, the Canadian legislation should best be seen as *forward-looking agenda*, setting the basis for reforms that need to be put in place.

2 – Policy Leadership and Vision

There have been a number of important policy announcements under the current government:

- **Tied aid:** The immediate untying of food aid and all aid fully untied by 2012-2013.
- **Country focus:** Eighty percent of resources for bilateral country programs will be dedicated to 20 focus countries by 2010.

- **Sector focus:** CIDA's efforts will be focused on three sectors: sustainable economic growth, children and youth, and food security.[6]

- **Decentralization:** Fifteen percent of head office staff will be relocated to the country level, and will be given more responsibility and flexibility.

- **Aid quantity:** The government has maintained previous commitments to increase the quantity of aid up to the 2010/11 fiscal year.

Some of these policies have attracted criticism and have been controversial, in particular regarding country focus, and the apparent shift in emphasis from Africa to Latin America. However other policies – such as untying aid and decentralization – are widely recognized as positive, and in line with the international consensus on improving aid effectiveness.

The key issue regarding these policies since January 2006 is that they have been announced in piecemeal fashion, often as part of speeches by the current Minister or as press releases. The result is a "drip feed" system of policy announcements – rather than the articulation of an overall, coherent CIDA policy framework that sets out goals and strategies, with an underlying rationale, and connections to other policy areas within CIDA and government more broadly.

There is also no sense of how individual policy announcements made since 2008 relate to the purposes set out in the ODA Accountability Act.

In response to this, the government can demonstrate greater policy leadership and vision regarding Canada's aid and development program in two ways, both of which will strengthen CIDA:

- Through the development of a government-wide policy on Canadian aid and development; and

- Through the development of a CIDA overarching policy framework.

In terms of **government-wide policy**:

The purpose of this policy would be to set out how the government, as a whole, will address development issues across all of its international economic and foreign policy activities. The Act provides a useful framework and reference point for such a government-wide development policy exercise.

A government-wide policy would require an articulation of its position on international development, including how it intends to address poverty reduction in all of its international activities and in the context of the legislative requirement that ODA specifically must uphold human rights standards and reflecting the perspectives of the poor.

It would also mean that the government has to work through what the goal of poverty reduction means in relation to Canadian foreign policy, trade and other policy areas, and how development considerations will be taken into account and acted upon. The 1997 and 2000 UK Government White Papers, referenced above, are good examples of a government-wide approach to the development issues of the day. They are also an example of how such an approach can unify government around joint development goals.

To complement this government-wide policy, it is also important for CIDA to develop and articulate an **overarching CIDA policy framework** for its own work.

Such a policy would:

- Use the Act, with its purposes for ODA and requirements for consultation, as a starting point;
- Place emphasis on key international development goals, and on implementing aid effectiveness agreements such as the Paris Declaration and Accra Agenda for Action;
- Emphasize key areas highlighted by 2008 Accra Agenda for Action, such as policy on engagement with civil society; and

- Address issues where development cooperation will have an increasingly important role, such as in supporting climate change adaptation.

The last time CIDA attempted such a policy framework was its 2002 *Strengthening Aid Effectiveness* statement, which responded to the then emerging international consensus on aid effectiveness. This statement was a good start, but it is now outdated by events both in the Canadian political context, and by international policy processes. In particular, it has been overtaken by the Paris Declaration and Accra Agenda for Action.

As a consequence, the articulation of an overarching policy framework for CIDA is all the more urgent. CIDA needs to bring its policy up to date with international policy processes and with broader issues such as the financial and climate change crises.

A CIDA overarching policy is also important for the following reasons:

- To give CIDA a greater sense of specific direction and purpose – and to allow it to articulate what it is trying to achieve;

- To better explain the different policy announcements that have been made under the current Minister, including their underlying rationale and context; and

- So that those working in the development community in Canada, as well as Canada's partners overseas better understand what CIDA is "about".

Such a policy framework will be equally important for people working within CIDA. Clearly, there is a need for high-level political backing for Canada's aid program. At the same time, it is just as important to strengthen and empower those in CIDA who are directly responsible for programming and delivering developing results, such as CIDA officials who are managing country programs, working with multilateral institutions, or working with Canadian civil society organizations. These officials need to have a clear sense of where CIDA is heading, its goals and development philosophy – as well as how it will implement the Act.

3 – Taking leadership on aid quality

Taking leadership on aid quality means, in particular, taking forward the Paris Declaration and Accra Agenda for Action (AAA). The extent to which Canada does this is a measure of Canada's international standing, including how seriously it is willing to take a leadership role on aid effectiveness issues.

Both these international agreements are consistent with the three principles of the Act. While some aspects of the Paris Declaration seem to be quite well integrated within CIDA – for instance program-based approaches in bilateral country programs – there is less indication of uptake of commitments in the Accra Agenda for Action.[7]

There are certain areas that need ongoing scrutiny in terms of CIDA's commitment to the international aid effectiveness agenda and its impact on development outcomes:

- CIDA's ongoing commitment to program-based approaches, and to budgetary support where appropriate, as a primary means of supporting developing country ownership.

- Apparent moves towards "signature projects", for instance those undertaken in the Afghanistan program.

- The policy commitment to decentralization, including the extent to which it is actually implemented, and factors that may cause the reversal of this policy.

Given the history of policy uncertainty and change in CIDA during this decade (for instance priority countries and sectors), there is a strong need for policy certainty and continuity. There is also a need to review some important policy areas. This applies, in particular, to the current countries of focus and their criteria for selection. The Act's focus on poverty reduction, and the need to emphasize this objective against foreign policy and commercial interests, could be a good starting point for review.

4 – A plan on aid quantity past 2010

The current government has maintained previous commitments to increase aid quantity. As a result, Canada is said to be on track to double overall ODA between 2001 and 2010, and has already achieved its commitment to double aid to Africa from 2003 to 2008.

The downside, however, is that there is no plan on aid quantity past 2010. Additionally, Canada's overall performance on aid quantity is poor. Canada generally performs badly on ODA/Gross National Index (GNI) performance ratios, in comparison with many other donors and the DAC average:

- In 2008, Canada's ODA/GNI ratio was 0.32%, compared to the DAC average country effort of 0.47%. Canada ranked 16th out of 22 DAC members. The current government has yet to reiterate Canada's commitment to the UN 0.7% target, as has all previous governments since 1969.

- Of greater concern is the OECD DAC projections for 2010. Donor countries have made commitments to scaling up aid that are stronger than those of Canada. As a result, the DAC predicts that Canada will slip to 20th out of 22 DAC members, with only the US and Japan with lower ODA/GNI ratios.[8]

The ODA Accountability Act does not provide the government with any obligation to improve aid quantity. At the same time, some analysts argue there is too much focus on aid quantity, and aid quality is what really matters. Why is a plan for aid quantity important, given that a number of other aspects of strengthening CIDA need to be addressed? Some reasons include:

- A strong CIDA needs to show it is committed internationally and that it is making an important contribution on aid quantity, including in terms of ODA/GNI;

- It is difficult for CIDA staff to be motivated knowing that it close to the bottom of the pack on ODA/GNI; and

- A strong international standing on aid, including on aid quantity, will provide a more convincing foundation for building improved public support for Canada's aid program.

CONCLUSIONS

This paper has suggested four areas that would strengthen CIDA. Some of the key observations arising from these four areas are:

1. The Act provides a basis for only some aspects of the suggested four areas for strengthening CIDA. It, therefore, is an entry point. Strengthening CIDA is about much more than merely implementing the Act;

2. There is a risk that CIDA currently sees the Act as a "box ticking compliance exercise". Instead, the Act should be seen as an agenda for change, and as an opportunity to clearly define and focus the stated purpose of Canadian aid. In other words, the Act can serve as a springboard for reform;

3. Strengthening CIDA depends on high-level political support and backing. This means it probably needs a champion, as was the case in the UK with DFID. With no such champion currently on the horizon, civil society groups need to keep Canada's aid program on the political agenda, and should continue to encourage parliamentarians to engage with it; and

4. Strengthening CIDA is as much about a bottom-up as a top-down process. There is a need to re-ignite the confidence and commitment of CIDA staff. The Act's clear principles potentially represent a unifying and empowering force for CIDA officials.

This still leaves a major question as to *how* the strengthening of CIDA will actually be achieved. Who will be the main actors, where will the impetus come from, and what will it take to make this happen?

Creating a better CIDA and a better Canadian aid program is ultimately up to the responsible ministers and government officials. There is currently no shortage of advice available to them for how to carry out this difficult but vital mission. In an increasingly heated and controversial environment, this advice is coming from academics, research institutions, civil society organizations, individuals and the media.

There are, of course, limitations to this advice. Not all of it is useful, and much of it is yet to fully come to grips with the implications of the ODA Accountability Act. Nearly all of it, however, is the result of years of direct experience of the tricky business of development, combined with careful analysis and research. Nearly all of it also derives from an intense interest and concern regarding how Canada performs on the world stage and how it supports development in the world's poorest countries. An immediate, practical, and relatively cost efficient step in strengthening Canada's aid program would be make better use of this expertise and advice, which is ready and willing to support government's own efforts.

5

Strengthening Canada's Leadership in the Promotion of Gender Equality

THE CANADIAN CIVIL SOCIETY ORGANIZATION (CSO) WORKING GROUP ON WOMEN'S RIGHTS[i]

Advancing gender equality and women's rights around the world is fundamental to the development mandates of both the Canadian International Development Agency (CIDA) and Canadian civil society organizations involved in international cooperation. Gender is the most significant predictor of poverty, and gender inequality remains the most pervasive and fundamental obstacle to the eradication of poverty and the guarantee of human rights for all.

In February of 2009, CIDA published the *Executive Report of the Evaluation of CIDA's Implementation of its Policy on Gender Equality*.[1] The informal Canadian CSO Working Group on Women's Rights reviewed the CIDA Evaluation and in its report, *Strengthening Canada's International Leadership in the Promotion of Gender Equality*, provided further analysis and recommendations on the implementation of CIDA's Gender Equality policy.

The Canadian CSOs review focused on several questions: Is CIDA's Policy on Gender Equality effective? What can be learned from the evaluation? How can the implementation of CIDA's policy and its commitment to gender equality be strengthened?

An important reference point for the CSO review was the Official Development Assistance (ODA) Accountability Act and the direction it gives to CIDA to take account of human rights standards for women's rights and gender equality in all of its programming. Canada has recognized the inalienability and indivisibility of human rights, which include the rights of women and girls, by ratifying key human rights covenants including the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). Canada has also ratified

[i] This paper is an abridged executive summary of the CSO report of its analysis of the CIDA evaluation of CIDA's 1999 Policy on Gender Equality. The paper is written and endorsed by the Association québécoise des organismes de cooperation international (AQOCI), the Canadian Council for International Co-operation (CCIC), Canadian Crossroads International (CCI), Centre for International Studies and Education (CECI), CHF, CUSO-VSO, Gender and Peacebuilding Working Group (Peacebuild), Match International, Oxfam Canada, Oxfam Québec, Plan Canada, Walter and Duncan Gordon Foundation, and World University Services of Canada (WUSC). The full report is accessible at http://www.ccic.ca/_files/en/what_we_do/002_gender_cida_analysis_cso_response.pdf.

agreements such as the *United Nations Declaration on Violence against Women* and participated in key conferences such as the Fourth United Nations World Conference on Women, which generated the Beijing Platform for Action. The ODA Accountability Act, along with CIDA's Policy on Gender Equality, implies an explicit human rights approach to the implementation of both direct and indirect programming relating to gender equality.

CIDA's Policy on Gender Equality has three main goals: supporting women and girls in the realization of their full human rights; advancing women's equal participation as decision-makers; and reducing gender inequalities in access to and control over resources and benefits to development. CIDA's Policy on Gender Equality is a progressive and vital strategy for improving Canada's commitment to gender equality in its projects, programs and funding. However, while CIDA's evaluation of its Policy on Gender Equality was extensive and produced a wide array of necessary lessons, the evaluation was limited in terms of scope and failed to recognize several possible recommendations for the implementation of the policy. The Canadian CSO review draws on the content of the *Executive Report of the Evaluation of CIDA's Implementation of its Policy on Gender Equality* and makes several important observations:

- CIDA's total of Gender Equality (GE) investments (both GE-specific and GE-integrated programming) from 1998 to 2005 was $793 million or 4.7% of the $16.9 billion in CIDA-managed ODA. These investments were only 3.8% of total Canadian ODA of $21.0 billion in the same period. While there was some growth in GE total investments, the gains are less significant when inflation and exchange rates are taken into account (i.e. constant dollars).

- A two-year average trend line for GE disbursements demonstrates that GE-specific programming fell sharply from 1.85% of CIDA-managed ODA in 2000/01 to only 1.01% in 2005/06. The level of committed resources and programming for gender-specific programming is a key indicator of the degree to which CIDA is committed to the successful implementation of its gender equality policy and programming. Given the downward trend in gender equality disbursements, it is likely that there has been a decrease in the overall impact of CIDA's policy on programming and gender equality outcomes.

- The CIDA Evaluation found that gender equality outcomes were seldom realized, even when they were included in project design, unless gender equality measures were incorporated into implementation planning (in a project results framework or, at minimum, gender equality indicators). In design and planning of projects, a significant portion of CIDA investment did not have any gender analysis.

- The CIDA Evaluation makes reference to the status, capacity and important role Southern and Canadian civil society can play in CIDA's work on gender equality. While this is a significant observation, what is lacking is a subsequent acknowledgement of the vital role that women's organizations and movements play, worldwide, as key drivers of social change. There was no evidence that CIDA consistently supports the development of an enabling environment for gender equality and women's rights. Given the noted decline in GE-specific disbursements and programming for CIDA, there was diminished funding for and strengthening of capacities of Southern CSOs for gender equality.

- The tools developed by CIDA to measure gender equality results (for example their Performance Assessment Framework (PAF), tip sheets, questions to ask, sample indicators, etc.) do not appear to be widely or systematically disseminated, nor consistently used across the Agency. Specifically, in terms of measuring long-term gender equality results, one interviewee for the CIDA Evaluation noted that CIDA "doesn't have the foggiest notion" beyond anecdotal evidence.[2]

- The CIDA Evaluation shows that CIDA has focused on its third objective "to reduce gender inequalities in access to and control over the resources and benefits of development". The CSO review found that "human rights for women and girls" had the least programming attention and fewest documented results.

- The CIDA Evaluation demonstrated that CIDA is making an explicit attempt to move toward aid effectiveness through program-based approaches, however, some interviewees for the CIDA evaluation pointed out that this may potentially be at the cost of reducing gender inequality. Using multi-donor platforms and budget support creates some opportunities but may also weaken CIDA's own institutional ability to address gender equality as there is less incentive to protect gender equality investments.

Fundamentally, CIDA's 1999 Policy on Gender Equality is both sound and progressive as a framework for CIDA's long-term commitment to gender equality. While CSOs acknowledge and endorse the results and all the recommendations of the CIDA Evaluation, there are still several areas where CIDA can improve on the implementation of its Policy on Gender Equality.

In particular, CIDA's adherence to the Canadian ODA Accountability Act and its commitment to international human rights laws and instruments can only strengthen its commitment to gender equality. The Act, if fully implemented, will increase the likelihood that women will be empowered and benefit from Canadian ODA. In addition to the nine recommendations

included in the Evaluation and endorsed by CIDA, the informal Canadian CSO Working Group on Women's Rights proposes the following recommendations[ii]:

1. Reaffirm CIDA's commitment to the 1999 Policy on Gender Equality as a foundation for an Agency-wide vision and framework.

2. Develop a Gender Equality Action Plan immediately and ensure that it is transparent and publicly accessible.

3. Ensure that the focus on gender equality and the Gender Equality Action Plan explicitly takes into account the ODA Accountability Act and its three criteria for ODA.

4. Ensure that the Gender Equality Action Plan addresses ways to respect, protect and promote the human rights of women and girls.

5. Renew and regain CIDA's leadership on gender equality by repositioning gender equality as central to the Agency's mandate, programming and policy promotion, and by collaborating with like-minded donors.

6. Increase dedicated financial resources to gender equality and women's programs, with particular attention to increasing resources for gender-specific programming.

7. Devote institutional resources to several strategic areas for results in gender equality. CIDA should maintain gender equality as a cross-cutting consideration for all programs and policies. Unfortunately, when an issue is cross-cutting, and seemingly infused in all CIDA activities, often the results are invisible. CIDA should make its gender equality results explicit.

8. Designate gender equality as a stand-alone sector (like education and health), with commensurate management, staffing and financial resources.

9. Recognize and increase support for the role played by Southern women's organizations in development, in ensuring national policies and plans reinforce gender equality rights, and in holding governments to account through democratic participation – particularly in an era of aid effectiveness.

[ii] The order of the 17 recommendations in this summary has been reordered in a logical sequence, which differs from the order of recommendations in the original CSO report of its analysis. The recommendations in the latter followed from the analytical text and were not grouped together.

10. Encourage CSO partnerships in gender equality programming. CSO should also be accountable for their gender policies and programs given the crucial, but diverse, roles CSOs play as innovative agents of change and social transformation.

11. Give priority to maintaining and creating additional funds for gender equality in key priority countries.

12. Improve CIDA performance by developing gender budget lines in projects and programs, rewarding innovative gender equality programming, improving and updating gender training, implementing quality control in gender equality coding, and facilitating exchange and learning on cutting-edge gender work around the world.

13. Continue to support activities related to women's decision-making and access to resources and benefits.

14. Develop strategies (including the strengthening gender equality outcomes in program-based approaches) to address challenges for sustaining gender equality goals created by new aid modalities.

15. Ensure that all reports to Parliament fully address and disaggregate gender equality disbursements and programming in all sectors.

16. Strengthen accountability for gender equality results in funds channeled to multilateral agencies and international financial institutions.

17. Engage in consultations with multiple stakeholders for the development and monitoring of the Gender Equality Action Plan.

These seventeen follow-up recommendations would significantly improve the implementation of CIDA's Policy on Gender Equality. In order to build a shared vision for gender equality and women's rights it is critical that the voices of Southern partners, especially representatives of women's organizations and movement, are heard. Canadian CSOs want to work with CIDA to create an enabling environment where a renewed commitment to gender equality and women's rights in Canadian cooperation is at the forefront. The agenda is daunting, but the task is vital given that, around the world, the rights of women and girls continue to be violated.

6

The ODA Accountability Act and the Right to Education: Implications for Canadian Aid to Education

THE CANADIAN GLOBAL CAMPAIGN FOR EDUCATION[i]

> "Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities… But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence."
>
> *General Comments on the Implementation of Article 13 of the International Covenant on Economic, Social and Cultural Rights, Section 1 (1999)*

i The Canadian Global Campaign for Education is a coalition of Canadian civil society organizations (CSOs) working to enhance Canada's contribution to meeting the Education for All goals. This chapter is based on a longer version of the policy paper by the same title, which is accessible on CGCE's web site at http://www.cgce.ca/research-policy/ . This paper was prepared for CGCE by Kim Kerr, Save the Children Canada, Dr. Karen Mundy, OISE-UT and Nhung Truong, OISE-UT. It provides a detailed human rights analysis of CIDA's policies and programs in education.

INTRODUCTION

The Official Development Assistance (ODA) Accountability Act was passed unanimously by all parties in the House of Commons on May 29, 2008. The Act opens the way for communication and implementation of policies, programs and values concerning Canadian aid to education from a human rights standpoint. At the same time, the ODA Accountability Act provides for greater accountability in the distribution of Canadian assistance to education globally. This chapter outlines key issues in international human rights standards in education and reviews CIDA's strategies to address these standards. Finally, some potential implications for Canadian ODA to education are identified.

ODA ACCOUNTABILITY ACT

The heart of the ODA Accountability Act is found in Section 4, which states that Canadian ODA may only be provided if the competent Minister is of the opinion that it;

(a) Contributes to poverty reduction;

(b) Takes into account the perspectives of the poor; and

(c) Is consistent with international human rights standards.

While the Act does not provide any interpretation guidance for "contributes to poverty reduction" or "takes into account the perspectives of the poor", it does provide the interpretation that international human rights standards are based on international human rights covenants to which Canada is a party.

INTERNATIONAL HUMAN RIGHTS STANDARDS IN EDUCATION

Education was recognized as a fundamental human right in 1948 by the *Universal Declaration of Human Rights* (UDHR). The Declaration provides the foundational framework for the human rights goals and standards to which Canadian legislation, institutions, and society aspire. In addition to the Declaration of Human Rights (1948), the right to education is enshrined in a range of international conventions to which Canada is a state signatory, including *the International Covenant on Economic, Social and Cultural Rights* (ICESCR, 1966), the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW, 1979) and the *Convention on the Rights of the Children* (CRC, 1989).[1] The right to education has also been incorporated into various regional treaties. Many countries have also made provisions for the right to education in their national constitutions.

Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights, ratified by Canada in 1976, and the General Comments that provide a more specific understanding of the Articles, provide the most comprehensive approach to education under human rights law. The ICESCR provides for:

- The right to education which is free and compulsory at the primary level; the general availability of secondary education, and the progressive realization of free higher education and technical and professional education;
- Education which is directed to the full development of the human personality and to the strengthening of respect for human rights and freedoms;
- Education which promotes understanding among nations and ethnic, racial and religious groups;
- Education which exhibits four interrelated features: availability, accessibility, acceptability (content), and adaptability.

In addition, the ICESCR obliges State Parties to take steps to support other States Parties towards the right to education. This obligation includes providing international assistance, both economic and technical, "to the maximum of their available resources" (ICESCR, 1966, Article 2:1). It also obliges states to ensure that any international agreements a government enters into have no adverse impact on the right to education, and to ensure that their actions, as members of international organizations, including international financial institutions, take account of the right to education. This obligation is further reinforced by Article 10 of the World Declaration on Education for All (1990) and Article 24(4) of the Convention on the Rights of the Child (1989), among others.

CIDA'S CURRENT EDUCATION STRATEGY

Canada's policies and strategies for ODA to education draw heavily on the Dakar Framework for Action (2000) and the Millennium Development Goals (United Nations, 2000). However, Canada has only recently begun to use human rights standards in education to inform its international development activities.

The *Sustainable Development Strategy 2007-2009 (SDS)* of the Canadian International Development Agency (CIDA) provides the current direction for the Agency's programming in education.[2] Its four result areas are the pursuit of education for all, gender equality, strengthened action against HIV/AIDS, and improved stability and protection for children in crisis setting (CIDA, 2007, Table 5. p. 23). The SDS opens the door to a human rights approach to education programming by emphasizing common principles of a human rights-based approach, as well as principles of aid effectiveness and performance management.

However, the SDS is a strategy only, not a policy with an accountability framework for implementation. The strategy lacks the force of policy in terms of guiding programming decisions, ensuring coherence across the work of CIDA, the Department for Foreign Affairs and International Trade (DFAIT) and other ODA implementing governmental departments active in education, monitoring the impact of Canada's aid to education and ensuring that Canada's aid to education does not undermine international human rights standards in education.

IMPLICATIONS FOR CANADIAN ODA

The ODA Accountability Act is the impetus for Canada to show leadership and join a growing group of international donors in integrating human rights in their vision and programming. The following recommendations outline how Canada, and more specifically CIDA, can adopt a human-rights approach within the education sector, consistent with the passing of the Act.

RECOMMENDATION ONE

RENEW CANADA'S EDUCATION ODA POLICY TO ENSURE INTERNATIONAL HUMAN RIGHTS STANDARDS AND PRINCIPLES GUIDE CANADA'S AID TO EDUCATION.

While CIDA's *Sustainable Development Strategy 2007 – 2009* identifies a strategy for Canadian aid to education, it does not have the force of policy. The last education sector policy was developed in 2005 and was short lived. Without an education sector policy, CIDA is unable to adequately guide practice within the Agency and assess the impact of its education aid.

A new education ODA policy, referencing human rights instruments and standards, should continue to emphasize access, non-discrimination, gender equality, and good quality education. In addition it should also include the full development of the human personality, respect for human rights and cultural identity, the promotion of tolerance within and between nations, principles of freedom, peace and equality and respect for the natural environment. A new education policy should also lay out, in specific terms, the extent of Canada's obligations to support developing countries in the achievement of the right to education. A clear statement of Canada's obligations could be developed in relation to internationally agreed assessments of the current funding gaps for Education For All and the Millennium Development Goals.

RECOMMENDATION TWO

ENSURE CANADIAN AID TO EDUCATION GIVES GREATER FOCUS TO THE CONTENT AND PURPOSE OF EDUCATION.

With the 2015 deadline for the Education for All goals fast approaching, Canada needs to reevaluate its education provision in light of the need for a greater quality of education. While

CIDA's SDS and previous policies refer to quality education, in practice quality education is often considered in relation to learning outcomes in literacy and numeracy, perhaps because these are easier to measure. A human rights perspective requires a vision of quality education that encompasses a broad range of outcomes for children, including the opportunity to critically think, reflect, access information, develop skills and actively engage.

RECOMMENDATION THREE

DEVELOP PERFORMANCE INDICATORS, CONSISTENT WITH INTERNATIONAL HUMAN RIGHTS STANDARDS, TO MEASURE CANADA'S PERFORMANCE TOWARDS THE RIGHT TO EDUCATION.

The information Canada is currently able to track and report on in relation to its education ODA provides a fairly comprehensive quantitative profile of Canada's investments in the basic education sector, such as allocations by geography and level of education. Canada is less able to comment on the performance of its investment in education in a substantive way or to measure its investment against the four result areas of the strategy. Canada needs to create and develop performance indicators that are integrated into its education sector policy that ensure education programs are achieving results. In alignment with a human rights approach, these performance indicators should be linked to international human rights standards in education and be sure to measure not just the quantity of education but the quality. Lastly, these performance indicators must ensure that no international agreements Canada has entered into will have a negative impact on the right to education.

RECOMMENDATION FOUR

STRENGTHEN THE CAPACITY OF RIGHTS – HOLDERS TO CLAIM THEIR RIGHTS.

Accountability is a key principle in a human rights approach. Because rights constitute entitlements there is considerable emphasis on strengthening the capacity of states (duty-bearers) to meet their obligations to citizens. However, donors are mainly focused on the state as duty-bearer in education rather than the citizen as rights-holder, which is also reinforced by the Paris Declaration on aid effectiveness principles. These principles support country-driven (state) development, sectoral donor programs with governments and harmonized donor practices.

Trends in CIDA's investment in education shows that expenditures through bilateral and multilateral channels have risen significantly, reflecting CIDA's enhanced use of harmonized funding mechanisms in education aid. While the shift to budget support for meeting recurrent costs in education, and greater predictability of financing is welcome, this shift is necessarily focused on strengthening state capacity in meeting the right to education.

Canadian aid to education should give greater emphasis to the role of rights-holders and the civil society organizations that represent them. CIDA should build on its leadership role in exploring the role of civil society organizations and aid effectiveness by, for example, financing national civil society education funds supporting the role of civil society in education. Awareness, freedom of information, association and speech are critical for rights-holders to engage critically with the State around their obligations in education.

CONCLUSION

The ODA Accountability Act requires three tests for Canadian ODA – contributes to poverty reduction, takes into account the perspectives of the poor, and is consistent with international human rights standards. A human rights approach to Canadian ODA satisfies all three tests. Canada needs to renew its Education ODA Policy to ensure human rights principles and standards guide Canada's aid to education. Canada needs to ensure that no international agreements entered into will have a negative impact on the achievement of the right to education. Finally, Canada should be explicit in its obligation to support developing countries in the achievement of the right to education, particularly in the area of the financing of education. Education has many practical benefits including economic growth, improved family incomes, and increased health benefits, particularly for mothers and children. Good quality education has the potential to promote values of peace, tolerance and equality.

7

Decent Work and the ODA Accountability Act

HEATHER GIBB
THE NORTH-SOUTH INSTITUTE
IN COLLABORATION WITH ANNA NITOSLAWSKA
FOR THE CANADIAN LABOUR CONGRESS

INTRODUCTION

Employment is an escape route out of poverty, but not every job is one that will help those in poverty break the poverty cycle. The International Labour Organization's (ILO) Decent Work Agenda is an approach to development that emphasizes employment accompanied by rights, representation and protection. The centrality of Decent Work to poverty reduction is recognized in Target 1B on full and productive employment and Decent Work in Millennium Development Goal (MDG) 1. Decent Work explicitly targets women's empowerment (MDG 3) in the world of work. Consultation with trade unions in both donor and recipient countries constitutes an important aspect of governance for aid effectiveness, in keeping with the spirit of MDG 8: promoting global partnerships for sustainable development.

COHERENCE BETWEEN THE OFFICIAL DEVELOPMENT ASSISTANCE ACCOUNTABILITY (ODA) ACT AND DECENT WORK

The ODA Accountability Act sets out three criteria that must be met simultaneously for aid money to be "counted" as official development assistance. It must:

- Contribute to poverty reduction;
- Take into account the perspectives of the poor; and
- Be consistent with international human rights standards.

These criteria align with the principles of the ILO's Declaration on Fundamental Principles and Rights at Work (1998).[i] However, the Canadian International Development Agency (CIDA) has had limited engagement with the ILO on Decent Work, except, notably, in projects targeting child labour, and there is no account of CIDA's investments in promoting labour rights in the government's *Report to Parliament* on the ODA Accountability Act. The Decent Work Agenda directly addresses two of CIDA's priority themes: stimulating sustainable economic growth, and securing the future of children and youth. Moreover, the ILO Decent Work Country Programmes (DWCP), in place in many of CIDA's countries of focus, offer potential for donor synergies, consistent with aid effectiveness objectives for cohesion and coordination.

THE ILO DECENT WORK AGENDA AND POVERTY REDUCTION

Core labour standards are fundamental principles that protect basic human rights in the workplace. All members of the ILO are obliged, by virtue of membership, to respect and promote core labour standards, whether or not they have ratified the relevant conventions. Core labour standards aim to: (1) eliminate all forms of forced or compulsory labour, (2) effectively abolish child labour, (3) eliminate discrimination in respect to employment and occupation, and (4) ensure the freedom of association and the right to collective bargaining. The Decent Work Agenda is built on "four pillars" that are interdependent and mutually reinforcing:

- Access to productive employment and income opportunities;

[i] The Declaration was a global reaffirmation of the central role of core labour standards and Decent Work in poverty reduction strategies that came in the wake 1997 Asian financial crisis. Core labour standards are fundamental principles that protect basic human rights in the workplace.

- Rights at work, especially with respect to core labour standards;
- Systems of social protection; and
- A voice at work through social dialogue.

The four pillars speak directly to the three "tests" for Canadian ODA: promote poverty reduction, voice for marginalized people, and human rights.

Studies on the economic impact of international labour standards have generally concluded that labour standards can contribute to growth and poverty reduction, both directly through higher wages and indirectly by providing institutional mechanisms that raise the quality of growth. Both the OECD DAC and the G20 have stressed employment and Decent Work as key pathways out of the global economic crisis. At their meeting in Pittsburgh in September 2009, members of the G20 endorsed the ILO Global Jobs Pact, which emphasizes respecting fundamental principles and rights at work, promoting gender equality and encouraging voice, participation and social dialogue as critical to economic recovery and development.

TRADE UNIONS ARE DEVELOPMENT PARTNERS

Democratic trade unions are civil society organizations that contribute to defining social and economic priorities in relation to governments and the private sector. Through the collective bargaining process, trade unions work for the distribution of the benefits of development for their members. By promoting human rights at work, trade unions help to fight against poverty and to address conditions in which poverty thrives.

Although traditionally associated with the formal economy, the trade union movement is changing, in part because workers in many traditional sectors have been retrenched and are now part of the informal economy – their unions are looking for new ways to support them. New forms of labour organizations, such as the Self-Employed Women's Organization (SEWA) in India, and StreetNet, an international alliance of street venders and hawkers, have emerged to support marginalized workers claim their rights and develop new forms of labour institutions.

For many years, Canadian unions have been engaged in international development, working with an extensive network of partnerships with trade unions and labour groups in the developing countries. In Canada, through a cost-sharing program supported by CIDA, the Labour International Development Program of the Canadian Labour Congress (CLC) oversees a series of projects developed in partnership with national trade unions and labour servicing non-governmental organizations (NGOs) in the Americas, the Middle East, Africa, and Asia. In India, for example, the CLC has worked with trade unions and NGOs from Holland, Denmark, Finland, and Australia to support Indian construction unions in the brick-making sector in initiatives that remove children from work and send them to school.

Globally, the International Trade Union Confederation (ITUC), of which the CLC and the Confédération des syndicats nationaux (CSN) are members, is an umbrella labour organization that works closely with the ILO. The ITUC provides input to the OECD on trade unions and Decent Work through the Trade Union Advisory Committee (TUAC). The CLC is also active in the ITUC's Trade Union Development Cooperation Network (TUDCN) which works to boost the role of trade unions in international development and improve the coordination of trade union development cooperation activities. In the United Nations system, ITUC has argued for active labour market policies to mitigate the effects of the economic crisis, including: support for small and medium enterprises to adjust and maintain employment; focus on the most marginalized, including temporary and part-time workers, informal sector workers, and women. ITUC also participates in multi-stakeholder discussions at the UN Development Cooperation Forum.

ILO DECENT WORK COUNTRY PROGRAMMES

The ILO's Decent Work Country Programmes (DWCP) implement the ILO Social Justice Declaration and the Global Jobs Pact. The DWCPs provide a framework for consulting national governments, employers and trade unions to set priorities for ILO country-level technical cooperation. The DWCPs are an important tool in the context of the economic crisis, where agreement among the social partners on productivity, wages, economic and social policy is key for sustainability. DWCPs are closely aligned with national development strategies, including Poverty Reduction Strategies and UN Development Assistance Frameworks.

In Africa, priority policy areas targeted by DWCPs include job creation, youth employment, social security, eliminating child labour, social dialogue, and gender equality. There are DWCPs in the following CIDA countries of focus: Tanzania, Ethiopia, Mozambique and Sudan. In Asia, DWCPs are in place or under development in Afghanistan, Bangladesh, Indonesia, Pakistan and Vietnam. Program priorities include competitiveness, productivity and jobs, and creating opportunities for young people. CIDA countries of focus in the Americas that participate in DWCPs include Bolivia, Colombia, Honduras and Peru. Among programming priorities are youth employment, eliminating child labour, programs for work development, micro and small enterprises and cooperatives, and strengthening social actors.

MOVING FORWARD

In its first report to Parliament on the ODA Accountability Act, CIDA did not address basic human rights in the workplace. Yet labour standards are human rights. Labour standards address the kind of employment and the employment policies that underpin poverty reduction and sustainable economic growth. In fact, the OECD Development Assistance Committee (DAC) has identified Decent Work as critical to achieving the MDGs.[1]

Decent Work and the ILO's DWCPs directly address CIDA's obligations under the ODA Accountability Act. The DWCPs target productive employment that is key to poverty reduction and they promote participatory approaches to macro-economic policies and employment policies that include the voices of the public sector, private sector, trade unions and other civil society organizations. DWCPs build capacity in partner countries to promote human rights across a wide range of workplace issues.

At an operational level, the DWCPs provide donors with valuable country-level analysis of human rights standards at work. This analysis should be used by CIDA in developing country strategies and frameworks.

As the government moves towards compliance with the criteria set out in the ODA Accountability Act, it should use the expertise of the Canadian labour movement as a key stakeholder and partner in development in ensuring Decent Work for all.

8

Implementing the Right to Food in International Cooperation[i]

CAROLE SAMDUP
RIGHTS & DEMOCRACY
PAUL HAGERMAN
CANADIAN FOODGRAINS BANK

INTRODUCTION

Why is it important to talk about the right to food now? There has been considerable attention recently on the triple crises of food security, climate change, and global finance, in which the numbers of hungry people are increasing, contrary to the commitment of the Millennium Development Goals. Clearly, the ODA Accountability Act also sets an important context to situate ODA as part of Canada's response to these crises. The right to food speaks to an approach to these combined crises for vulnerable people. This chapter provides an introduction to the basic elements of the human rights framework and the right to food, points to how it can strengthen food security programs, and suggests some challenges and advantages of applying the right to food in practical development experience.

THE HUMAN RIGHTS FRAMEWORK

Human rights are a conceptual underpinning of a political system that assumes that the government works in the service of all people within its jurisdiction. The human rights

[i] This chapter is based upon the presentations by Carole Samdup (Rights & Democracy)and Paul Hagerman (Canadian Foodgrains Bank) and the participant discussion in the workshop on "CIDA's Support for Economic, Social and Cultural Rights: The Right to Food" in the Conference on *The Future of Canadian ODA: Putting the ODA Accountability Act into practice*, Gatineau, September 29 – 30, 2009.

framework defines the substance of the relationship between the people and the government – what is the minimum content of a government's obligations to its people and who are the agents (courts, but also human rights institutions etc.) and the means for accountability within that political system. The human rights framework establishes the minimum measure for what governments must do, for what they are responsible, and for what they are accountable.

The various elements of the human rights framework is described in the Universal Declaration of Human Rights and these have then been codified as binding legal obligations in a series of international treaties – the principal ones being the International Covenant on Civil and Policy Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These have been widely ratified by governments and therefore represent an international consensus.

All human rights are governed by a set of overarching principles which can be applied to any government policy or program as a means to measure consistency with their obligations. These principles are indivisibility of rights (rights depend upon each other), non-discrimination (requires affirmative action and special steps to ensure equality), participation (empowerment), accountability (laws, administrative process and institutions) and access to remedy (if you can't claim it, it is not a right). The United Nations Food and Agriculture Organization (FAO) developed a simple "checklist" to evaluate any type of government policy in light of these overarching principles.

WHAT IS THE HUMAN RIGHT TO FOOD?

The right to food is set out in Article 11 of the ICESCR as a necessary part of the right to an adequate standard of living. A sub-paragraph addresses the "fundamental right of everyone to be free from hunger". Article 11 goes further to affirm that State Parties shall take measures individually and through international cooperation to improve methods of production, conservation and distribution of food and to take into account the problems of food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

The right to food has been interpreted in General Comment #12 (which is a non-binding legal interpretation drafted by the UN Committee on ESCR). This is a landmark Comment because it defines three levels of state obligations – respect, protect, and fulfill. It also defined the various elements of the right to food: food must be accessible (livelihood and security of supply); food must be adequate (safe, nutritious, culturally acceptable), and stability of supply (sustainable systems of production and distribution). The right to food is not a prescription for any specific economic system, although compliance requires regulation in the public interest to ensure that the state actually meets its obligations.

APPLYING THE RIGHT TO FOOD

The FAO has also developed "voluntary guidelines" on the right to adequate food in the context of national food security. The guidelines were adopted in 2005 following negotiations by states within the FAO (see toolbox). The challenge to both states and to civil society was to apply these guidelines in practical experiences. Rights & Democracy took up this challenge (in collaboration with the FAO and the Special Rapporteur on the Right to Food) to better understand the challenges of using human rights to achieve food security at the national level. Right to food assessments were carried out in three countries (Nepal, Malawi and Haiti).

Among the lessons learned from the assessments was how to construct a methodology for national implementation of the human right to food. That methodology includes:

1. Identifying who are the hungry in the country (important to disaggregate not only by location, but by group);

2. Identifying the causes of hunger;

3. Developing strategies to address the causes in relation to the group which is hungry;

4. Allocating obligations (state as primary duty bearer but also include outside actors, such as donors or international organizations);

5. Strengthening legal, policy and institutional framework (eg. train judges in the adjudication of economic and social rights);

6. Ensuring access to recourse mechanisms (ie. legal aid for the poor); and

7. Monitoring, document and report (requires capacity building).

In the three countries where Rights & Democracy carried out right-to-food assessments, donor governments were largely unaware of the FAO guidelines on the right to food, did not program in a human rights framework or they actively discouraged a human rights approach because they wished to avoid legal accountability for potential negative impacts of their policies. This is despite the fact that most of these donor governments ratified the guidelines. Lack of donor interest in using a human rights framework for programming had an observable dampening effect on the local government's willingness to do same.

Donors did not take advantage of the human rights framework as a policy harmonization tool or framework for project monitoring. For example, the assessment teams observed a proliferation of policies (43 agricultural policies by donors for the government of Malawi for example), each with its own evaluation and monitoring procedure.

When discussing the right to food it is important to also remember that we are discussing women's rights; the majority of food producers in the world are women. As such they face particular constraints in access to resources, land, credit, markets, and legal rights. At a more general level, a critical factor in realizing the right to food is the absence of basic social protection and social security systems: many people don't have a food problem, they have an "income problem", and the people most likely to have an income problem are women. Lastly, women in communities cope continuously with various insecurities. These women and their local knowledge of systems in communities to deal with crises are often shunted aside when NGOs and governments intervene with their "outside knowledge" in dealing with emergency food insecurity situations.

CANADIAN FOODGRAINS BANK: MALAWI CASE STUDY

Canadian Foodgrains Bank (CFGB) and Rights & Democracy have been collaborating on a project in Malawi that relates very directly to the right to food. There was a serious drought and famine in Malawi in 2002. Several factors in combination contributed to this famine and a situation of dramatic food insecurity: poor weather led to a small crop of the main staple, maize; on the urging of the IMF, Malawi had sold off its strategic grain reserves prior to this drought; and local traders horded food stocks to seek high profits in the context of scarcity.

Following this experience, several civil society organizations (CSOs) came together to consider possible tools for government to strengthen food security, resist international pressure and resist market forces within the country to ensure adequate food for all Malawians. The government was already working on a national food security policy, and CSOs proposed legislation to implement the policy. The legislation includes an accountability mechanism in the form of an official complaints office.

CFGB and Rights & Democracy worked with Malawian CSOs to revise and promote the legislation. CSOs then conducted education sessions with legislators and officials and they carried out awareness programs within communities across Malawi. An important dimension of the support provided by the Canadian CSOs was to build the capacities among Malawian CSOs to monitor the right to food.

After several years, it is now expected that the legislation will be adopted in parliament during 2010. Once adopted, the important work of implementation becomes critical. The Bill has important provisions that the government must respect the right to food (refrain from activities that threaten people's access to food, such as withholding strategic food reserves at times of crisis); must protect the right to food (by ensuring that third parties do not participate in activities that threaten people's access to food); and fulfill the right to food (put in place policies and programs that promote the right to food). Moreover the Bill calls for the creation of a Food Security Authority that will undertake local research, education and advocacy on food security. This body will monitor and investigate violations to the right to food in Malawi. Though this Bill will create a framework of "rules"; the challenge will be to assure its effective implementation, not dissimilar to the challenges we face in Canada with respect to the ODA Accountability Act.

RIGHT TO FOOD IN PROGRAMMING: LESSONS AND CONSTRAINTS

Many of the situations in which the CFGB has been involved are humanitarian emergencies in which the CFGB promotes the use of the Sphere Project Guidelines that CSOs have agreed as a human rights approach to disaster response. But in implementing the Guidelines, CSOs sometimes face constraints. It is sometimes difficult to do timely assessments through consultations due to pressures to respond quickly to emergency situations. In other cases, there can be trade-offs between culturally appropriate food that may be more expensive or difficult to transport and feeding more people with cheaper available food. An important constraint is capacity development, building local NGO capacities in understanding and applying the standards in the right to food. These NGOs may face their own limits but may also work in a context where the NGO cannot apply this approach because local governments strongly resist human rights language.

The implementation of the right to food points to the importance of assessing the underlying causes of hunger and lack of access to appropriate food. When such analysis must be central to determining food security strategies, it is also a highly political process, whether it points to systemic undermining of women's rights or the discrimination against Indigenous peoples in the Andean highlands of South America. Indigenous food systems and varieties have been seriously eroded in many communities by external markets and trade liberalization, resulting in endemic malnutrition.

APPLYING THE RIGHT TO FOOD TO CIDA'S FOOD SECURITY STRATEGY

In October 2009, CIDA announced the outlines of its food security strategy as one of three thematic areas that will have priority in CIDA's future programming. Canadian CSOs have been urging the government to ensure that the right to food is central to the implementation of this thematic strategy. This requires a human rights approach that examines proposed policies and specific programs arising from the strategy in light of human rights principles (non-discrimination, participation, transparency, access to remedy / accountability). It also requires systematic analysis and consultation on who are the vulnerable food insecure groups

and on the causes of their food insecurity. CSOs have proposed that the strategy strengthen the capacities of states to meet their obligations for the right to food by, for example:

- Building the state's capacity to gather disaggregated data;
- Promoting adoption of framework legislation to protect the right to food;
- Training of judges and lawyers in adjudication of ESCR rights;
- Supporting producers and consumer groups, including women's organizations to participate in policy debates on food and agriculture;
- Empowering rights holders by seeking and valuing local knowledge of food systems and local priorities for development; and
- Strengthening capacities to bring the right to food analysis to other relevant Canadian international policy agenda including trade negotiations.

Overall, Canada's food security strategy should focus on smallholder male and female farmers, helping promote resilient agriculture systems and rural livelihoods, while taking measures to change the institutions, policies and structures that erode them. Such a focus will help ensure the right to food is a central pillar of CIDA's new thematic strategy.

CONCLUSION

When it comes to rights, the right to adequate food is about as basic as it gets. The ODA Accountability Act provides an opportunity for Canada to systematically use a human rights approach to food security. The Act can help ensure that the voices of the world's hungry are heard, that their knowledge is valued and that Canadian foreign aid spending contributes to a world without hunger.

FAO METHODOLOGICAL TOOLBOX ON THE RIGHT TO FOOD

The Toolbox is available at **www.fao.org/righttofood/publi_02_en.htm**.
It has several components:

Guide on Legislating for the Right to Food (Book 1)

The Guide on Legislating for the Right to Food provides assistance to legislators and lawyers on integrating the right to food into the different levels of the national legislation. It describes examples and different ways to protect the right to food in the constitution, provides step by step guidance on drafting a framework law and, presents a methodology for reviewing the compatibility of sectoral laws with the right to food.

Methods to Monitor the Human Right to Adequate Food (Book 2 Volume I and II)

This Guide provides methodologies for monitoring the right to adequate food. It addresses planning and monitoring food security, nutrition and poverty reduction policies and programs. It offers assistance in examining the results and impacts of policies and projects, against specific goals that have been set as desired outcomes for the enjoyment of the human right to adequate food.

Guide to Conducting a Right to Food Assessment (Book 3)

The Guide provides methodological and operational assistance for governments, civil society and other stakeholders for the assessment of the right to food situation at national level. It offers methods for the assessment of the legal, policy and institutional environment in order to understand whether a country is on track in responding to the root causes of hunger and measures to address possible gaps.

Right to Food Curriculum Outline (Book 4)

The Curriculum Outline is an important basis for education, training and advocacy on the right to food. It aims to contribute to strengthening in-country capacity to implement this human right and can be used as a reference guide in developing specific courses or complete training programs on the right to food.

Budget Work to Advance the Right to Food (Book 5)

This Guide is a valuable tool for civil society, human right defenders, interested legislators and government institutions as it explores some of the many complex ways that government budgets relate to the realization of the right to food. It provides a 10-steps guide for the process of building a right to food case, analyzing the government budget and presenting a claim.

9

Canada and International Financial Institutions: Implications of the ODA Accountability Act

FRASER REILLY-KING
HALIFAX INITIATIVE[i]

INTRODUCTION

The Official Development Assistance (ODA) Accountability Act received royal assent in June 2008, legally requiring Canadian ODA to meet the following three criteria: a) contribute to poverty reduction, b) take into account the perspectives of the poor, and c) be consistent with international human rights standards. Finance Canada and the Canadian International Development Agency (CIDA) must now implement the Act in relation to the various international financial institutions (IFIs) for which they are the lead government departments.

ELIGIBLE INTERNATIONAL FINANCIAL INSTITUTIONS UNDER THE ACT

Canada provides a portion of its ODA through contributions to regular funds administered by the Bretton Woods Institutions (BWIs) and to the Regional Development Banks (RDBs). Finance Canada is responsible for contributions to the BWIs including to the World Bank's International Development Association (IDA) (a concessional development finance window for low income

[i] Fraser Reilly-King is the Coordinator of the Halifax Initiative (HI) which is a Canadian coalition of 18 development, environment, faith-based, human rights and labour groups, and the Canadian presence for public interest work and education on the IFIs. This review of the ODA Accountability Act and IFIs is based on research conducted by HI since it came into effect. Reilly-King worked closely with John Sinclair in conducting a workshop on the themes of this chapter at the September 2009 Future of Canadian ODA Conference. John is a Senior Fellow at the School for International Development and Global Studies, University of Ottawa.

developing countries), a number of bilateral and multi-donor trust funds at the World Bank and to the International Monetary Fund's (IMF) Poverty Reduction Growth Facility (PRGF) and the Exogenous Shocks Facility. CIDA is responsible for Canada's contributions to concessional lending windows of the four Regional Development Banks (Africa Development Bank, the Asia Development Bank, the Caribbean Development Bank and the Inter-American Development Bank) and to a large number of bilateral and multi-donor trust funds and global initiatives.

Canada also pays, in capital, its quota or share in the IMF, the World Bank Group (WBG) and the Regional Development Banks. This is a non-budgetary expenditure, as it represents an asset, and as such is not drawn from Canadian ODA. Consequently the criteria in the Act, for the provision of ODA, are applicable only to those parts of the World Bank, IMF and RDBs to which Canada contributes ODA, and not to the institutions in their entirety. For example, at the World Bank Group, the Act covers the International Development Association, but not the International Finance Corporation, the International Bank for Reconstruction and Development, the Multilateral Investment Guarantee Agency and the International Centre for Settlement of Investment Disputes. Because the ODA Accountability Act does not apply to the BWIs and the RDBs in their entirety, there is potential for policy incoherence in the way that Finance Canada and CIDA approach the institutions as a whole.

FINANCE CANADA – IMPLEMENTING THE ACT[1]

Finance Canada has developed "Guidelines for Implementation [of the ODA Act]" which offer provisions for assessing compliance with the Act, for consultation and reporting, and for deeming what ODA payments are covered by the Act.

Assessing Compliance with the Act

Individual Finance officials assess how a specific initiative (e.g., multilateral debt relief vs. Haiti's debt relief) meets the ODA Accountability Act's three criteria. Following biennial consultations, the officials add notes to their assessment based on the consultation, a summary of opinions provided, Finance Canada's reaction to issues raised, any follow-up

taken, and any revisions to the assessment. The assessment is then approved by the Branch Chief, and "opinions" on how the initiative complies with the Act form part of the memo to the Minister of Finance. How Finance actually assesses whether ODA payments meet the three criteria is not known. The assessment is based on a legal opinion formulated by Justice Canada and CIDA and not publicly disclosed due to "solicitor-client" privilege.

Consultation

The Department of Finance plans to hold consultations every two years, with three to four weeks' notice prior to the consultations. The first consultation was held in December 2008. One week's notice was given, and the consultation lasted approximately four weeks. Finance Canada opted for a web-based consultation both "to help the department keep full and precise records, including the date, names of participants and the opinions provided" (vs. minutes from a meeting that would need verification by all participants), but also to ensure participation from a broader range of groups than otherwise possible in a meeting. The Department also opted for web-based formal submissions to protect itself against any potential legal challenges that could arise in the case of meetings where minutes were taken and the accuracy of their content later disputed. The Department does not intend to respond to individual submissions other than to acknowledge receipt. The Department also gave no indication that the submissions would be posted publicly.

CIDA – IMPLEMENTING THE ACT

CIDA established a high level cross-Agency ODA Accountability Act Implementing Steering Committee, chaired by the CIDA Vice-President for Policy Branch. The Steering Committee has been meeting since July 2008. As the lead agency responsible for the ODA Accountability Act, CIDA has five primary preoccupations with respect to interpreting and implementing that Act: 1) recording and supporting the ministerial opinion; 2) interpreting the three tests of the Act; 3) enhancing consultations and record keeping; 4) defining and reporting on ODA in CIDA's annual *Statistical Report on International Assistance* and 5) enhancing internal and external communications.

Assessing CIDA Compliance with the Act

With respect to interpreting the three tests of the Act, the CIDA Steering Committee noted in its minutes that "drastic changes are not envisaged". This gives the impression that CIDA is confident that it is already meeting the three tests of the Act. To meet the technical requirement of the Act, according to the minutes of the Committee, CIDA will demonstrate it is meeting the first two tests by explaining its approach to poverty reduction in high-level documents, policies and strategies ("the Minister's opinion"), by documenting the perspectives of the poor more systematically at the program and project level when it conducts site visits, through meetings with experts and consultations, and by including language in CIDA documents that reference these perspectives.

In terms of human rights, the Steering Committee asserts that CIDA programming is already consistent with international human rights standards (governance, equality between men and women, and participation are central elements of the Agency's practice). The Steering Committee has opted for a "do no harm" approach to the human rights implications of the Act, "rather than a complex integrated human rights style of development policy making", according to its recorded minutes.

Consultation

According to the cross-Agency Steering Committee, CIDA is already meeting the consultation requirements of the Act – CIDA organizes the International Co-operation Days, and consults with civil society groups, governments and partners in the South on a regular (albeit *ad hoc*) basis. Where CIDA falls short, the Steering Committee suggests, is in tracking, reporting and publicizing the consultation activities.

Given that consultations are a legal requirement, the Steering Committee minutes suggest that CIDA plans to instigate a number of changes to existing practices to "refresh some policies and revitalize consultation processes".

RECOMMENDATION ONE

The ODA Accountability Act should apply to all of the entities of the World Bank Group, the IMF, and the Regional Development Banks to which Canada allocates ODA. The Act's reporting requirements should require the government to report on how Canadian activities at the Bretton Woods Institutions have more broadly contributed to the purposes of the Act.

In the consultations required by the Act, consideration must be given to the policy incoherence created by applying the ODA criteria to just part of the Bretton Woods Institutions (BWI) and the Regional Development Banks (RDBs) versus the BWI and RDBs taken as a whole.

RECOMMENDATION TWO

Finance Canada and CIDA should conduct a review of the World Bank, IMF and RDBs to identify where the institutions fall short in terms of the Act's three criteria for ODA and, where appropriate and in consultation with NGOs and other stakeholders, identify new policy priorities for the Canadian government to guide the government's engagement with these institutions.

THE ODA ACCOUNTABILITY ACT AND ENTRY POINTS FOR INFLUENCING THE INTERNATIONAL FINANCIAL INSTITUTIONS

JOHN SINCLAIR, SENIOR FELLOW, SCHOOL FOR INTERNATIONAL DEVELOPMENT AND GLOBAL STUDIES, UNIVERSITY OF OTTAWA [ii]

Canada, as one member among other countries, has influence but not control over the policies and programs of the International Financial Institutions (IFIs). Consequently, in implementing the criteria in the ODA Accountability Act, the Minister responsible for our relationship with a given IFI must demonstrate that Canada is actively promoting policies and allocation decisions at the institution consistent with the Act. What entry points exist at the IFIs to maximize this influence?

Canada typically contributes in the range of three to six percent of the budget of the International Financial Institutions. Canada's contributions to IFIs come from disbursements from both the Department of Finance (for World Bank) and CIDA (for Regional Development Banks).

Formally, the Minister of Finance is Canada's Governor to the World Bank and the IMF and the Minister of Foreign Affairs is the Governor for the Regional Development Banks. Effective daily influence, however, comes through Canada's resident Executive Directors. An important characteristic of the governance of IFIs and their day-to-day workings is that there is very rarely a formal vote. Much of the work of country stakeholders like Canada is consensus-building.

At the World Bank, for example, Canada represents a constituency of countries which includes the Commonwealth Caribbean. Canada's Executive Director meets with fellow Directors two or three times a week to review policies, country strategies and project approvals.

Over the past decade, IFIs have been decentralizing programming authority for the World Bank to Country Directors in the developing countries. While many technical staff for a given

ii Adapted from John Sinclair's presentation on International Financial Institutions at the Conference on the Future of Canadian ODA: Putting the ODA Accountability Act into Practice, September 27 and 28, 2009.

country program still work out of Washington, there is increasingly strong local professional staff in the country office. As a result, for a bilateral donor such as Canada, the relationship between donors (i.e. the CIDA field staff) and the World Bank at the country level has become important for influencing World Bank development policies and directions.

From where does Canada's influence derive?

First, Canada contributes large sums of money upfront in periodic replenishment processes for the concessional windows of these institutions – for example $1.3 billion over three year to the World Bank's International Development Assistance (IDA) window for highly concessional loans and grants to the poorest countries.

Second, Canada's Executive Director in Washington, Manila, etc. is active on the Executive Board and is in contact with the management of these institutions.

IFIs, along with other donors, have adopted commitments in the Paris Declaration and the Accra Agenda for Action, which orient donors towards country-level ownership, albeit with many challenges for implementation.

Finally, there is a huge operational program on the ground in a given country, usually involving both the World Bank and the relevant RDBs. CIDA officials, based in these countries, can contribute and potentially influence country-level directions often long before those directions or approaches are "formalized" for review in the Executive Board. These engagements can often involve the content and priorities within a joint donor Sector Wide Program (SWAp) in different sectors such as health, or around more general budget support.

Although CIDA officials in the field can significantly influence projects and policies, Canada does not have direct control of the outcomes as it could in a strictly bilateral project.

FOLLOWING THE PRINCIPLES OF A RIGHTS-BASED FRAMEWORK

Canada, as both a member of inter-governmental human rights institutions and the International Financial Institutions, has a legal obligation to respect the full range of human rights consistent with member states' obligations under international law. As such, the policies and practices of the IFIs and Canada should not undermine the ability of governments to meet their international human rights obligations, but rather help to respect, protect and fulfill those obligations.

The ODA Accountability Act situates these international obligations, which were receiving scant attention, in Canadian law and Canada's practices at the IFIs.

The Act states that all Canadian ODA disbursements must be consistent with international human rights standards, including human rights Covenants and Conventions to which Canada is a party. Established and accepted human rights standards must guide all Canadian development policy and practice.

Only an explicit human rights-based approach can ensure that Canadian ODA spending and development policy is consistent with the government's own human rights obligations and the three tests called for by the ODA Accountability Act – namely, that ODA contributes to poverty reduction; takes into account the perspectives of the poor; and is consistent with international human rights standards.

This human rights-based framework has a number of implications for Canadian policy at the World Bank, the Regional Development Banks and the IMF.

At a minimum, departments responsible for Canadian ODA at the World Bank, IMF and RDBs should do the following:

Exercise due diligence – The provision of Canadian ODA, through the programs and policies of the IFIs, must not undermine human rights in countries where IFI programs are implemented. This implies that Canada, in its representations at the IFIs, must explicitly take into account the impacts of IFI programs on the immediate fulfillment of civil and political rights, and the progressive realization of economic, social and cultural rights. Where the Canadian government can exercise choice and direct its resources within the IFIs, these resources should strengthen, not undermine, the rights of citizens in recipient countries. For example, Canada should avoid

policies that deregulate labour standards or constrain a national government's ability to meet its people's rights to food, health, water, etc.

Give priority to the most marginalized – Canadian ODA, channeled through the IFIs, should be focused on the most marginalized and vulnerable in society, including those living in extreme poverty, women, Indigenous peoples and other excluded groups. In practice, at the IFIs, this means prioritizing the poorest and most fragile countries (inequalities between nations) and accessing the distributional impacts of IFI policies on the poorest peoples (inequalities within nations and regions).

Address the constraints in claiming rights – IFI programs should be geared towards addressing the needs of the most marginalized and vulnerable, as identified in country and citizen-generated development plans and objectives. This means building country systems to better enable governments to identify and consult with vulnerable groups, identifying the social, environmental, and economic challenges and constraints that these groups face in claiming their rights, and gearing policies and development projects to filling those gaps.

The capacity of developing country governments to collect baseline data on vulnerable people and to monitor the policy impacts and outcomes on these populations must be strengthened. Governments and IFIs must be assured that rights-holders are informed about their rights. Both Governments and IFIs should strengthen mechanisms for claiming legal protection of those rights, national mechanisms for accountability and effective remedies for redress (including non-judicial mechanisms) for those whose rights have been violated.

End policies that discriminate against individuals – While all individuals have rights, not all individuals can claim their rights because of lack of access to required resources, capacities or legal protection. IFI policies, for the past three decades, have been discriminatory. IFI policies have forced developing country governments to cut expenditures on key essential public services, such as health care, education, public transit, water, sanitation and access to fuel and electricity, to privatize many of these services, to cut subsidies and introduce user fees. Macroeconomic fiscal and monetary policies have also had unnecessarily restrictive deficit-reduction and inflation-reduction targets. Such targets prevent developing countries from growing their economies and expanding public spending. This, in turn, has disproportionately disadvantaged the poor and vulnerable groups in developing countries and has undermined the ability of country governments to meet their own human rights obligations.

Canada should use its voice in IFI governing bodies and at the country program level to make strong representations against IFI policy conditions that constrain a national government's spending on social and economic programs aimed at meeting people's rights to food, health, water, etc. or that restrict a country's choice for more expansionary, but still feasible, alternative fiscal and monetary policies.[2] Instead, Canada should favour a borrower-lender relationship based on mutually-agreed arrangements that help guarantee respect for shared obligations under international human rights law and probity in public financial management. The obligation to respect, protect and fulfill human rights is a legal obligation, not a condition of an aid transaction.

Be accountable and participatory – A commitment to respecting rights demands accountability. This necessitates institutional mechanisms that are accessible, transparent and effective, and decision-making structures that allow for the full participation of individuals and groups in making decisions that affect them. Meaningful consultation and participation guarantees people's rights to access information, to participate in the conduct of public affairs, to freedom of association and expression and to peaceful assembly. Such consultations allow citizens to express their views, make decisions, and become participants in all dimensions of development affecting their lives.

World Bank and IMF practices must guarantee national, democratic decision-making and ownership over policy-making so that stakeholders can consider the implications of various policy options. These "stakeholders" include relevant government ministries, independent economists, academics, elected officials, civil society and labor unions. In meeting the obligations of the ODA Accountability Act, the relevant ministers must demonstrate how Canada has been an advocate, in decision-making fora at the IFIs, for democratic ownership of development policies that are arrived at through open, transparent and inclusive country-led processes.

In terms of participation, the ODA Accountability Act's three tests oblige Canada to avoid, where possible, support for World Bank-funded aid projects that have not allowed for free, prior and informed decision making by communities and civil society in the affected countries. Canada should be assured that the IFIs have sought and obtained the free, prior and informed consent from Indigenous peoples before financing or supporting projects on their traditional lands.

RECOMMENDATION THREE

Canada has a clear obligation to ensure that IFI support to beneficiary governments does not violate Canada's human rights obligations, nor undermine those of the beneficiary governments. Canada should clearly articulate and advocate for this position within the IFIs.

RECOMMENDATION FOUR

Finance Canada and CIDA should commission a study to examine how human rights are integrated into policies at the World Bank and the RDBs and to identify the weaknesses in those policies.

REPORTING OF CANADIAN ACTIVITIES AT THE BRETTON WOODS INSTITUTIONS

The ODA Accountability Act requires a report to Parliament containing "[a] a summary of the annual report submitted under the Bretton Woods and Related Agreements Act; and [b] a summary of any representation made by Canadian representatives with respect to priorities and policies of the Bretton Woods Institutions".

The Act also states that "the Minister of Finance shall, in addition to preparing the report required under section 13 of the Bretton Woods and Related Agreements Act, contribute the following to the report submitted to Parliament (a) the position taken by Canada on any resolution that is adopted by the Board of Governors of the Bretton Woods Institutions; and (b) a summary of the manner in which Canada's activities under the Bretton Woods and Related Agreements Act have contributed to carrying out the purposes of this Act."

RECOMMENDATION FIVE

The summary of the BWIs report, required by the ODA Accountability Act, must contextualize Canadian activities at these institutions taking into consideration the broader framework of

both the "Purpose" of the Act (under Articles 2 and 4) and the government's strategy for the BWIs. The summary can reference the full BWI annual report for further information.

In addition to indicating the total amount spent by the government on ODA in the previous fiscal year, the government should also provide disaggregated figures for a) its ODA grant contributions to the BWIs' concessional lending windows; b) its ODA contributions to all bilateral and multi-Donor Trust Funds administered by the BWIs and the Regional Development Banks; and c) capital subscriptions paid into these respective institutions. The data should include figures from previous years to allow for comparison.

A summary of representations made – Combined, the World Bank, the IMF and RDBs have several hundred board meetings a year, with a commensurate number of representations made by Canadian representatives. A summary of the positions taken on major issues at the World Bank and the IMF, now identified in annual reports, would partially satisfy the reporting requirements of Article 5.1 (d) of the Act. However, the clause in the Act which is explicit that that "any representation" must be reported, would necessitate a mechanism to summarize positions taken by the government at the IFIs on issues not necessarily in the government's annual reports on these institutions.

RECOMMENDATION SIX

Finance Canada should summarize, in its annual report to Parliament on IFIs, positions taken by Canadian representatives at the IFIs. To meet the full requirements of Article 5.1d of the ODA Accountability Act, Finance Canada should put in place a mechanism to respond to requests for Canadian positions on issues addressed by the IMF and the World Bank Group, but that are not necessarily reported on in the respective Finance Canada annual reports for the institutions.

Summary of how Canada's activities at the BWIs meet the requirements of the ODA Accountability Act – For Finance Canada's priorities at the BWIs to be consistent with the Act, the government must rethink how its current medium-term strategy can be explicitly driven by the purpose of the Act and the principles of poverty reduction, perspectives of the poor, and international human rights standards.

APPENDICES

APPENDIX ONE

A PRACTICAL GUIDE FOR ASSESSING AND MONITORING HUMAN RIGHTS IN COUNTRY PROGRAMMES

EXTRACTED FROM: HOW TO NOTE: A DFID PRACTICE PAPER | A PRACTICAL GUIDE TO ASSESSING AND MONITORING HUMAN RIGHTS IN COUNTRY PROGRAMMES | DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, UNITED KINGDOM | SEPTEMBER 2009

WHY SHOULD DFID ASSESS AND MONITOR HUMAN RIGHTS?

… The framework and context for DFID's human rights commitments is the set of **international human rights treaties** that the UK has signed up to. Commitments under these treaties, and the Conventions that flow from them, carry an obligation to promote human rights in the UK's external relations. … DFID is required to assess and monitor human rights for compliance with the Human Rights Act and because it has made policy commitments to do so. The National Audit Office Report on Budget Support (February 2008)5 found that DFID has not been systematically monitoring partner governments' commitment to human rights and recommended that we do so. …

The tools we have should enable country offices to carry this out systematically and proportionately, and to draw on informed support from Whitehall partners to ensure our processes do not leave DFID open to criticism and even litigation under the Human Rights Act or by judicial review. The risk of this is low, especially if we can demonstrate where monitoring procedures are in place for UK actions. …

… To support the requirements of the Act, DFID has a *Human Rights Act Action Plan*. As part of this Action Plan, Directors are now required to give annual assurances that their Divisions have complied with the Human Rights Act. For country offices, **a human rights assessment** will be an important indicator that Directors are taking steps to comply with the Act. …

A human rights assessment can provide a baseline for further decisions on the choice of aid instruments (such as whether budget support is appropriate in the light of the partner government's commitment to human rights or whether particular risks need to be proactively managed), and the assessment will provide a baseline for setting benchmarks and indicators for monitoring on a regular basis. In many cases, the DFID Office will be able to draw on existing reports to make this analysis (such as the EU Human Rights Fact Sheet which covers all areas of human rights) without extensive further work. …

Where the Human Rights assessment indicates specific weaknesses in government's approach to realising rights that may inhibit the anticipated impact of DFID's country plan, further questions arise. In considering whether budget support is appropriate, assessment must be made of the risks and benefits to human rights. Will PRBS pose risks to DFID's aid being used to breach human rights? Can these risks be mitigated? What will be done if there is a breach of the partnership commitment to respect human rights? What are the benefits to human rights of using PRBS? Will it lead to greater respect, promotion and fulfillment of human rights?

A Human Rights Assessment can provide information to develop human rights benchmarks and indicators for monitoring progress on human rights for the country plan, and for specific instruments such as budget support and sector programmes. …

A Human Rights Assessment will give a better understanding of how to address human rights issues. By analysing the human rights situation in a country or particular sector, a more complete picture can be developed of those who are most vulnerable and powerless, of those who are most excluded from realising their rights and from escaping poverty. The Gender and Social Exclusion Assessment and the Gender Equality Action Plans will be part of this equation.

A human rights assessment will enable us to identify potential partners in country with whom we can best deliver poverty reduction that fulfils human rights; and it will enhance the findings of the **Country Governance Assessment** (CGA) in preparation for a new Country Plan.

PRACTICAL IMPLICATIONS FOR COUNTRY OFFICES

… **Assessing, monitoring and reporting** on human rights are a key aspect of both FCO and DFID's respective roles and are fundamental to the protection and promotion of human rights. …

Human rights are often a sensitive issue to partner governments and there may be a reluctance to discuss human rights or co-operate on making particular data available for analysis. A good starting point for discussion is the report and recommendations of the UN Human Rights Council under the new process to independently assess every country's human rights record. This is called the *Universal Periodic Review* or more often the *UPR*. As part of this process, the partner Government will have provided its own assessment of the human rights challenges it faces. If the recommendations have not been accepted, its own assessment could be the starting point for discussion. Where the UPR has not yet taken place, reports to UN human rights committees can be the starting point. …

… Countries, such as Pakistan, have been successful in setting human rights benchmarks in the Development Partnership Agreements.[i] …

…The EU produces annual **Human Rights Fact-sheets** on every country and although these do not always provide all the information a DFID office may need, they are a good basis for a Human Rights Assessment. …

Civil Society Reports by organisations such as Human Rights Watch and Amnesty International are useful sources of information and are increasingly cover the full range of human rights including health, education and a decent standard of living. Both organisations produce annual reports on a country by country basis. …

[i] The Pakistan DPA was the subject of a case study of the Report on DFID's Practice on Human Rights; www.odi.org.uk/resources/download/2586.pdf, page 14.

DOING A HUMAN RIGHTS ASSESSMENT

What needs to be assessed

- **Civil and political rights**
- **Economic, social and cultural rights**
- **Rights on paper; rights in practice**
- **Accountability. …**

… There are two forms of **accountability** related to human rights which can be described as vertical and horizontal. **Vertical accountability** refers to the degree to which the governed in any society have effective mechanisms for voicing their concerns and interests to those who govern them. It also refers to the degree to which citizens have a say in the formulation and implementation of state policy across all issues. Mechanisms for vertical accountability include periodic elections, representative institutions such as political parties and interest groups, and formal bodies such as national human rights institutions or office of the ombudsman. **Horizontal accountability** refers to the degree of independent oversight between and among branches of government, such as executive-legislative powers and relations; judicial independence; and civil-military relations. Weaknesses in mechanisms for either vertical or horizontal accountability can result in a failure to respect, protect and fulfil human rights obligations. …

… **Rights in practice** are those rights actually enjoyed and exercised by groups and individuals regardless of the formal commitment made by a government through treaties and laws and are crucial in demonstrating an implementation gap. The three main types of data available for measuring human rights in practice include **events-based data, expert judgments**, and **survey-based data**.

Events-based data chart the reported acts of violation committed against groups and individuals by state and non-state actors, and therefore address the dimensions of **respect**

and **protect** (e.g. state or private denial of healthcare on the basis of ethnic identity, or longer prison sentences for ethnic minorities). …

Data generated from **experts' judgement** establishes how often and to what degree violations occur, and then translate such judgements into quantitative scales that are designed to achieve comparison across the world over time. …

Survey-based data track individual level perceptions of rights violations and may even capture direct or indirect individual experiences of rights violations. …

Proxy measures: socio-economic and administrative statistics Aggregate indicators used by some as proxy measures of economic and social rights such as the Physical Quality of Life Index (PQLI) and the Human Development Index (HDI) are linked to the notion of fulfilling social and economic rights at the national level. …

A Human Rights Assessment at a sector level will clearly look for more specific information on the sector. However, it should also draw on the national assessment, which will provide a wider context and make the links with other human rights issues. See **Box 1**.

Box 1: Human rights assessment in health

Rights in principle indicators show that a country has ratified without any reservations the International Covenant on Economic and Social Rights 10 years ago. The indicators show that the country has put the right to health in its constitution and has developed a national framework strategy for access to healthcare for all.

Rights in practice indicators comprised of survey data show that partial privatisation of the health service has led to de facto discrimination for poor people having access to quality healthcare (i.e. cross-tabulation between income and access to a GP shows the poor have lower access).Socio Economic and Administrative data show that the number of GPs and the number of hours available to see GPs in the public sector has decreased over time. Key MDG indicators (life expectancy, infant mortality, mortality rate for major causes of mortality) show that the country will have difficulty achieving MDG 4, 5, and 6.

HUMAN RIGHTS ASSESSMENT AT THE PROGRAMME LEVEL

… Once the assessment is done, the next stage is to consider the implications for decision making, country planning and programming. This will include the consideration of the human rights risks (too great for budget support?) and the human rights opportunities (possibilities of support to make better progress on achieving human rights?). It will include the design of benchmarks and indicators to measure progress in Development Partnership Agreements, budget support and programmes.

Some questions to consider include:

- Which aspects of a human rights assessment should be addressed in the country plan? Some part of the Assessment may present opportunities for action; others may be things to watch.
- Does the Assessment raise questions of whether budget support is appropriate?
- Does the Assessment raise questions of whether new programmes should be considered? Or how existing programmes should be amended?
- How should the goal/purpose/outcomes/activities of new and existing programmes address the findings of the human rights assessment?
- What is the impact of existing programmes on human rights?
- Which new benchmarks and indicators are needed to measure progress?
- Where human rights concerns are significant, how can these be addressed in DFID programmes? Higher identified spending on human rights?

QUESTIONS FOR ASSESSING HUMAN RIGHTS

Baseline questions for assessing state commitment to human rights

1. Which international human rights instruments has the state signed and/or ratified?
2. If applicable, which regional human rights instruments has the state signed and/or ratified?
3. Has the state made any reservations to these instruments and to what degree do the reservations undermine the true object and purpose of the instruments?
4. Does the national constitution, statute code, or other legal instruments include domestic protection for human rights? If so, which human rights are included?
5. Are there significant emergency clauses that allow the state to derogate from rights protections?
6. What legal commitments has the state made to achieving the MDGs?

Questions for assessing human rights dimensions and categories

1. What kinds of effort is the state making to implement its various rights obligations?
2. Is the state effective in preventing third party violations?
3. What level of resources is being invested in the areas of health, education, welfare, and justice?
4. What benchmarks has the government set in the areas of health, education, welfare and justice?

5. What socio-economic and political reforms are being introduced that address broader rights concerns and obligations that have been undertaken by the state?

6. What are the service delivery indicators available for measuring the degree to which states meet the needs of the population across different sectors?

7. What has been the pattern in the respect for human rights over time? Is the respect for human rights improving or deteriorating?

8. What is the pattern of respect across different categories of human rights?

9. What are the differences in attitudes of different socio-demographic groups, such as ethnicity age, income, gender, etc.? What have been individual experiences with rights violations?

Processes and explanations for observed rights patterns

1. Is the state accountable for its obligation to respect, protect, and fulfil rights?

2. Do citizens have a say in the making of laws, policies, and programmes aimed at, or with an impact on respect, protection and fulfilment of human rights?

3. Are there mechanisms in place for accountability between and among the executive, legislative, and judicial branches of government?

4. Are judiciaries independent and with power to adjudicate on questions of human rights?

5. Is there a national human rights institution, ombudsman or equivalent which oversees rights protections within the country?

6. Are there mechanisms to address individual & groups claims against state & non-state institutions?

Socio-economic questions related to rights

1. How far is the right to education fulfilled? What is the level of educational attainment (primary, secondary, tertiary); what is the picture when the statistics are disaggregated?

2. How far is the right to health fulfilled? What is the level of infant mortality and longevity in the country? What are the patterns in maternal health and access to sexual and reproductive healthcare? What are the indicators for HIV/AIDS and other diseases? What is the disaggregated picture when the statistics are broken down?

3. How far is the right to food fulfilled? What is the prevalence of hunger and under-nourishment in a country and what is the disaggregated picture?

4. What are the indicators for gender equality in terms of pay structures, access to the labour market, educational opportunities, political participation and representation?

5. What are the environmental indicators, especially those that relate to social and economic rights commitments that the state has made?

6. Does the State condone/ignore discrimination in the fulfilment of these rights; for example on grounds of gender or ethnicity, social origin or other status?

7. Have these indicators improved over time? Are the trends going up or down? Are there differences in trends for different groups?

APPENDIX TWO

ACTION-ORIENTED POLICY PAPER ON HUMAN RIGHTS AND DEVELOPMENT

EXTRACTED FROM: DAC | ACTION-ORIENTED POLICY PAPER ON HUMAN RIGHTS AND DEVELOPMENT | OECD DEVELOPMENT ASSISTANCE COMMITTEE | 2007

… Many DAC members and multilateral donors are now seeking to promote human rights more comprehensively as a means to improve the quality of development co-operation. … The experience emerging from this practice, along with changes in the international development context and an agenda of ambitious reforms in the international aid system, have prompted the DAC to review links between human rights and development with a view to fostering consensus among donors on how to address human rights more strategically in development policy and practice – recognizing that there is a wide range of practice among DAC members.

This paper, approved by the Committee in February 2007, … details the DAC's position on human rights and development and highlights new challenges in promoting and protecting human rights and integrating human rights in development. …

SETTING THE STAGE

Since the mid-1990s, human rights and development have been converging. Not only is there growing recognition of the crucial links between human rights violations, poverty, exclusion, vulnerability and conflict, there is also increasing acknowledgement of the vital role human rights play in mobilizing social change; transforming state-society relations; removing the barriers faced by the poor in accessing services; and providing the basis for the integrity of information services and justice systems needed for the emergence of dynamic market-based economies. This has led to more effective promotion and protection of human rights as part of a broader governance agenda and the integration of human rights principles into development processes in a more systematic way. …

CHANGING INTERNATIONAL CONTEXT

The international context for development co-operation and human rights has changed. Globalization is driving the search for principles to address global socio-economic inequities and risks, and is increasing the interest in human rights as a tool for the empowerment of people. …

Many [official development] agencies seek to mainstream human rights as a cross-cutting issue in development assistance, beyond the direct support to human rights programmes and stand-alone projects that support human rights organisations. Human rights are being integrated into sectors such as health (including HIV-AIDS), education and sustainable livelihoods and natural resource management. Agencies have made significant progress on issues of children's rights and women's rights, linked to MDGs such as gender equality, child mortality and maternal health.

Some agencies are implementing a form of "human rights-based approach". These approaches vary, but usually feature the integration of human rights principles – such as participation, inclusion and accountability – into policies and programmes. They also draw on specific human rights standards – such as freedom of expression or assembly – to help define development objectives and focus programmatic action.

The boundaries between types of donor approaches are not watertight, however. Human rights projects, for example, can also be components of mainstreaming and human rights-based approaches. Furthermore, including human rights issues in the political dialogue with partner countries is a well-established practice which can be pursued independently from the approaches to human rights mentioned above. Political dialogue can also be used to facilitate the gradual introduction of human rights projects in partner countries.

Human rights are used strategically to inform the design of country programmes and global initiatives. They strengthen the analysis of conflict and exclusion, and help to identify and tackle the root causes of poverty and insecurity. New innovative tools support human rights analysis and assessment, and help promote culturally-sensitive approaches.

In much of this, donors are increasingly influenced by civil society organizations that are focusing their attention on human rights and by private sector actors that are assuming responsibilities in

promoting and protecting human rights. Many civil society organizations are moving away from the direct provision of services, towards supporting governments and national and local service providers to fulfil their obligations. They are also supporting people to claim their rights, thereby increasing their access to services and decision-making processes. …

NEW FOCUS AREAS

Changes to the international development context, and an agenda of ambitious reforms in the international aid system, present new challenges and opportunities for addressing human rights. Donors and partner governments alike are increasingly focused on improving aid effectiveness, including in fragile states. This opens up opportunities for protecting and promoting human rights and integrating key human rights principles – such as participation, inclusion and accountability – into development processes in a more effective way. It also presents donors with significant challenges when delivering aid in countries that are characterized by human rights abuses. …

Principles for promoting and integrating human rights into development

The DAC will further seek to foster the international consensus on how to promote and protect human rights and integrate them more systematically into development. The following principles constitute basic orientations for key areas and activities where harmonised donor action is of particular importance. Donor agencies are invited to use the principles to inform the design of human rights policies and programming. It is expected that the principles will be used as a basis for dialogue with other stakeholders, national governments and non-state partners.

1. Build a shared understanding of the links between human rights obligations and development priorities through dialogue.

The links between human rights obligations and development priorities should be a regular feature of dialogue with partner governments at the political level as well as the development level. Donor countries should work with partner governments on ways to fulfil their

obligations under international human rights law. Each country context will differ, and dialogue will need to take the partner government's existing obligations as its starting point. A shared understanding of human rights issues between donors and partner countries is essential for the durability of aid partnerships and for the predictability and effectiveness of aid.

2. Identify areas of support to partner governments on human rights.

Donors have an important role to play in supporting partner governments' actions to implement human rights obligations in practice. On the basis of shared assessments and analysis, they should seek to identify the priority areas and resources needed for partner governments to better respect, protect and fulfil human rights. Donors should encourage partner governments to build the results of these assessments into their development strategies. Donors can also help strengthen analytical capacity to identify structural causes of human rights problems, and to develop practical solutions.

3. Safeguard human rights in processes of state-building.

Safeguarding the human rights of those under its jurisdiction is one of the most essential functions of the state. It determines – in part – the level of state legitimacy in the eyes of its population. State-building includes not only the building of state capacity to deliver its core functions, but also the strengthening of state-society relations based on the rule of law and a framework of rights and responsibilities. Supporting these processes will require donors to work with a range of accountability mechanisms such as national human rights institutions, ombudsmen, courts, parliaments, civil society, media and other bodies, including more informal political platforms and arenas such as local public hearings.

4. Support the demand side of human rights.

Experience shows that support to governments needs to be complemented with support to civil society and other actors to ensure accountability and respect for human rights. Support for the "demand side" of rights will help strengthen the voice of the most vulnerable and excluded and enlarge the political space for the participation of all members of society in

exercising and defending their rights. Through alliances with civil society networks, donors can help raise awareness, and support people living in poverty to claim and enforce their rights, as part of strategies to reduce poverty and implement the Millennium Declaration.

5. Promote non-discrimination as a basis for more inclusive and stable societies.

Discrimination and exclusion are among the key causes of conflict and instability. At a minimum, states must ensure that their actions do not discriminate against particular groups, even where capacity and resources are limited. Non-discrimination and tackling inclusion provide a suitable entry point for dialogue and engagement between donors and partner governments.

6. Consider human rights in decisions on alignment and aid instruments.

It is important to take the inclusiveness of government strategies, and their responsiveness to the perspectives of different interest groups and actors in a country – including the marginalised and most vulnerable – into consideration when assessing ownership and making decisions on alignment behind government strategies. The human rights context should also inform – in part – donors' choice of aid instruments and the appropriate balance of support to state and non-state actors. A range of instruments that can help strengthen accountability, and ensure that resources reach those who have difficulty in accessing services and exercising their rights, should be considered.

7. Consider mutual reinforcement between human rights and aid effectiveness principles.

DAC members should consider human rights principles, analysis and practice in the roll-out of the Paris Declaration's partnership commitments. The Paris Declaration principles should be followed when designing and implementing human rights programmes.

8. Do no harm.

Donors' actions may affect human rights outcomes in developing countries in positive and negative ways. They can inadvertently reinforce societal divisions, worsen corruption,

exacerbate violent conflict, and damage fragile political coalitions if issues of faith, ethnicity and gender are not taken fully into consideration. Donors should promote fundamental human rights, equity and social inclusion, respect human rights principles in their policies and programming, identify potentially harmful practices and develop short, medium and long-term strategies for mitigating the potential for harm.

9. Take a harmonised and graduated approach to deteriorating human rights situations.

In responding to serious human rights situations, the focus should be on harmonised, clear signals and targeted actions that do not penalise the most vulnerable in society. Rather than reducing aid in response to human rights concerns as a first resort, donors should seek to deliver aid through a range of aid instruments and channels to continue supporting poverty reduction, and where possible, targeting their assistance to achieve progress on human rights. Establishing human rights as part of the development partnership will help enhance predictability, and provide a basis for open and transparent dialogue where needed.

10. Ensure that the scaling-up of aid is conducive to human rights.

In an era of scaled-up aid, it is important to avoid the perception that the provision of additional resources is an endorsement of poor human rights performance. Moreover, it is vital to avert the risk of negative effects on accountability and governments' willingness to tackle deep-rooted problems. Efforts to increase aid should therefore move in tandem with the strengthening of human rights institutions, accountability mechanisms and related capacities. …

APPENDIX three

APPLYING THE RIGHT TO HEALTH IN SWEDEN'S INTERNATIONAL COOPERATION

SWEDEN'S INTERNATIONAL POLICIES AND THE RIGHT TO HEALTH | EXTRACTED FROM A REPORT BY THE SPECIAL RAPPORTEUR ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH, PAUL HUNT[i] | BASED ON MISSIONS TO THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND IN WASHINGTON, D.C. (20 OCTOBER 2006) AND UGANDA (4-7 FEBRUARY 2007)

BACKGROUND

… The Government [of Sweden] agreed that the Special Rapporteur [on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt] might examine in more detail the implementation of Sweden's international policies that bear upon the right to health.

In October 2006, the Special Rapporteur visited Washington, D.C. to discuss with the Executive Directors of the Nordic Baltic countries in the World Bank and International Monetary Fund (IMF), as well as other staff, how they sought to take account of Sweden's international human rights policies in their work. In February 2007, the Special Rapporteur visited Uganda to examine how Sweden, especially the Swedish International Development Cooperation Agency (Sida), contributes to the realization of the right to the highest attainable standard of health in Uganda. The present report is based on these visits and discussions. …

[i] In 2006, Paul Hunt, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health visited Sweden to prepare a report on how the Swedish Government is implementing this fundamental human right within the territory of Sweden. In 2007, he submitted his UN report on this issue (A/HRC/4/28/Add.2). The Swedish Government then agreed that the Special Rapporteur could prepare a second report, this time on Sweden's implementation of its international policies bearing upon the right to health. This report focused on the role of Sweden's Executive Directors in the World Bank and IMF, as well as Sida's role in relation to Uganda's health sector. In short, the report provided a vehicle for exploring the human rights responsibility of international assistance and cooperation in health. A few excerpts from this 26-page report are provided with permission in this text. The full report (A/HRC/7/11/Add.2, 5 March 2008) is available at http://www.essex.ac.uk/human_rights_centre/research/rth/docs/Sida.doc

INTRODUCTION

The human rights responsibility of international assistance and cooperation in health extends to all States, both developed and developing. All States, for example, have a human rights duty to "do no harm" to their neighbours. This report, however, focuses on the human rights responsibility of international assistance and cooperation in relation to high-income countries, such as Sweden.

There is increasingly rich discussion about what international assistance and cooperation means when this phrase is used in international human rights instruments.[1] International assistance and cooperation is easier to grasp when focusing on specifics. Thus, this report looks at international assistance and cooperation in relation to one sector (health), one donor (Sweden), and one recipient country (Uganda). Its focus is practice, rather than doctrine. The report aims to give practical guidance about the application of the human rights responsibility of international assistance and cooperation in health. …

THE HUMAN RIGHTS RESPONSIBILITY OF INTERNATIONAL ASSISTANCE AND COOPERATION IN HEALTH

Crucially, international assistance and cooperation must not be narrowly understood as a duty to provide financial assistance. States must ensure their various international policies do not obstruct, but support, the realization of the right to the highest attainable standard of health in other countries. They have a responsibility to work actively towards an equitable multilateral trade, investment and financial system conducive to the reduction of poverty and the realization of human rights, including the right to the highest attainable standard of health. …

Key right to health features in international assistance and cooperation:

… International assistance and cooperation should be directed to give effect to key features of the right to the highest attainable standard of health, including the following:

(a) **Freedoms and entitlements:** Freedoms include the right to be free from discrimination. Entitlements encompass medical care and underlying determinants of health, such as safe drinking water and adequate sanitation. The right to health includes specific entitlements to maternal, child and sexual and reproductive health. … The Committee on Economic, Social and Cultural Rights confirms that donors should give particular priority to helping low-income countries realize their "core obligations" arising from the right to health;[2]

(b) **Equality and non discrimination:** These are integral to the right to the highest attainable standard of health. In their international policies, States should give particular attention to securing the right to health for disadvantaged individuals, communities and populations, such as women, ethnic minorities, indigenous peoples, persons with disabilities, the elderly, children, persons living with HIV/AIDS, sexual minorities, and those living in poverty;

(c) **Participation:** Those affected are entitled to participate in health related policymaking and implementation. Thus, in the recipient country, international assistance and cooperation in health should promote such participation, especially by those who are disadvantaged. Also, donors' policies of international assistance and cooperation in health should themselves be designed and implemented with the participation of such groups;

(d) **Monitoring and accountability:** Without monitoring and accountability, the right to health can be no more than window dressing. Accordingly, international assistance and cooperation in health should promote effective monitoring and accountability in recipient countries. Also, donors should themselves be held to account for the discharge of their human rights responsibilities of international assistance and cooperation in health (see below). ...

(e) **Obligations to respect, protect and fulfil:** … In the context of international assistance and cooperation in health, States must ensure that their actions respect the right to health in other countries. They must also, so far as possible, protect against third parties undermining the right to health in other countries. Depending on resource availability, States' obligations to fulfil the right to health include responsibilities to facilitate access to essential health facilities and services in other countries.[3] ...

(f) **Procedural fairness:** The requirements of procedural fairness extend to international assistance and cooperation. For example, donors have a responsibility not to withdraw critical right to health aid without first giving the recipient reasonable notice and opportunity to make alternative arrangements.[4]

(g) **Coherence:** The international right to health must be applied consistently and coherently across all relevant national and international policymaking processes. This includes, for example, the policies of international financial institutions, such as the World Bank and the IMF, as well as States' international development, trade and other policies that bear upon health.[5] …

THE PARIS DECLARATION ON AID EFFECTIVENESS

… The Paris Declaration has the potential to support the realization of the right to health, while in turn the right to health can support the realization of the Declaration.

However, if the Paris Declaration is to support the right to health, then this fundamental human right must help to define the processes and outcome of development. Without a concerted effort to protect and integrate the right to health in the context of national ownership, alignment and harmonization, there is a danger that the right to health will be sidelined. There is a risk that the Paris Declaration will lead to the "lowest common denominator", whereby consensus is achieved at the expense of the promotion and protection of the right to health, including particularly sensitive issues such as sexual and reproductive health rights.

All states have ratified at least one international treaty recognizing the right to health. Many also have national constitutional and other legal or policy commitments towards the right to health. The right to health therefore represents a shared commitment of donors and aid recipients. It can act as a common platform for development partnerships in contexts of national ownership, alignment and harmonization. As such, the right to health can and should be integrated into development agreements and policies.

THE CHALLENGE OF IMPLEMENTATION [BY SWEDEN]

Sweden's policies on health, development and human rights are among the best in the world and deserve applause and support. On the whole, Sweden's policies are consistent with its human rights responsibility of international assistance and cooperation in health. The challenge is to put these policies into practice.

While some of Sweden's international development commitments explicitly recognize the links between health, human rights and development, regrettably the Millennium Development Goals and the Paris Declaration do not. **The Special Rapporteur recommends that Sweden give particular attention to ensuring that its human rights policies and international human rights obligations are given central attention in the context of implementation of the Millennium Development Goals and the Paris Declaration.** ...

INTERNATIONAL ASSISTANCE AND COOPERATION IN HEALTH: SIDA'S EXPERIENCE IN UGANDA

Sida's development assistance strategy in Uganda

Sweden's *Country Strategy for Development Cooperation, Uganda: 2001 2005* remained the basis for Sida's development assistance to Uganda at the time of the Special Rapporteur's mission. The Strategy emphasizes that combating poverty in accordance with Uganda's Poverty Eradication Action Plan (PEAP) is Sweden's overall objective for development collaboration with Uganda.

Despite its commendable focus on health and human rights, the Strategy does not explicitly recognize the right to health. Human rights are not mainstreamed consistently throughout Sweden's development cooperation in Uganda, including in Sida's support to the health sector. **Sida should mainstream human rights, including the right to health, in its Uganda Country Strategy. Consideration of the key features of the right to health will help Sweden realize its human rights responsibility of international assistance and cooperation in health.** ...

An adequate understanding of human rights, including the right to health, by Sida staff in country offices such as Uganda is vital if the organization is to operationalize its excellent policies on health, human rights and development in Uganda and elsewhere. **The Special Rapporteur recommends that Sida enhance its provision of training, resources and advice on health and human rights that is available to its staff in country offices, including in Uganda.**

As far as possible, Sida should also extend training and capacity building on human rights to Ugandan health policymakers and other health development partners in Uganda. …

Sida's support to key right to health stakeholders in Uganda

Government

Significantly, none of [Sweden's] agreements [with the Government of Uganda] refer to the right to health. … **The Special Rapporteur recommends that the right to health, and other human rights, is explicitly and consistently integrated into Sida's development cooperation agreements with Uganda.**

Sector and direct budget support: Concerned by fragmented planning and delivery of aid, the Government of Uganda is keen to ensure that aid is aligned with national policies and administrative processes. With this in mind, the Government has encouraged donors to commit to budget or sectoral support, rather than project-based support. … In 2006, Sida delivered approximately one third of its development assistance by way of direct budget support, and one third by way of sectoral support to the health sector.

The provision of development assistance by way of sector or budget support means that much of Sida's development assistance to the Government is aligned to the priorities identified in Uganda's national health-related policies. In order to understand how Sida supports the right to health in Uganda, it is therefore important to understand how the right to health is promoted and protected in the context of Uganda's national health-related policies.

… The [Government of Uganda's] Health Sector Strategy Plan II (HSSPII) does not explicitly recognize the right to health, or mainstream a right to health approach. … Although the right to health is not explicitly mainstreamed throughout HSSPII, the document nevertheless includes commitments to important right to health issues, including health systems strengthening. …

In order to support the realization of the right to health in Uganda, the Special Rapporteur encourages Sida to support the Government of Uganda in its endeavours to mainstream the right to health in the HSSPII, as well as other health-related policies, such as the Poverty Eradication Action Plan (PEAP).

The Special Rapporteur also recommends that Sida endeavour to ensure that important right to health issues which are not fully captured in the Governments policies, such as sexual and reproductive health rights, are given attention in its dialogue and agreements with the Government and other actors. …

Alignment and harmonization have reportedly led to greater coordination between donors in planning and delivery of aid, and have also lessened administrative burdens on the Government of Uganda. From this point of view, the Special Rapporteur commends the efforts of donors.

The Special Rapporteur encourages Sida to ensure that the right to health informs harmonization and is not neglected in the search for common ground between donors. …

International Organizations

… **The Special Rapporteur warmly commends this important collaboration between Sida and WHO Uganda. The Special Rapporteur encourages Sweden to continue to provide strategic support to international organizations working on health and human rights in Uganda. He encourages Sida to continue to provide support to WHO in Kampala by ensuring funding for the post of a Health and Human Rights Officer.** …

Civil society organizations

Civil society organizations (CSOs) play an important role as health service providers in Uganda. In recent years, they have also become increasingly engaged in advocacy. They have engaged with the Government in formulating, implementing and monitoring key health policies, such as HSSPII and PEAP. Through their advocacy, they have enhanced awareness of human rights issues in the health sector.

The Special Rapporteur recommends that Sida support the participation of CSOs in policymaking forums and monitoring mechanisms, such as health sector working groups, Joint Review Missions and the National Health Assembly. …

During his visit, the Special Rapporteur learned that some donors, including Sida, were discussing the establishment of a basket-fund (i.e. pooled funding) for health-focused CSOs. While the details were not finalized at the time of the Special Rapporteur's visit, some CSOs were concerned that a basket-fund would jeopardize their funding. **If or when a basket-fund is established for health NGOs, this must not jeopardize Sida's support for CSOs working on right to health issues, including those committed to sensitive initiatives, such as the provision of sexual and reproductive health information for adolescents.** …

Accountability for Sweden's human rights responsibility of international assistance and cooperation in health

Accountability is a vital feature of human rights, including the right to health. In the development context, accountability has focused on recipient countries. Recipients have had to show that aid is spent as intended and with the desired outcomes. Such accountability is vitally important. However, the right to health (and other human rights) also demands the accountability of donors. Donors' accountability moves in two directions. Firstly, they are accountable to their taxpayers, usually through Parliament. Secondly, they are accountable to recipients and the international community. …

A lack of information about donors' policies and programmes, as well as a scarcity of accountability mechanisms, present significant obstacles to donors' accountability in Uganda.

The Special Rapporteur recommends that Sida prepare and distribute accessible information about its programmes in Uganda and their implementation. Pamphlets in local languages could be made publicly available, and newspapers could be invited to carry articles and notices. The Special Rapporteur also recommends that Sida work with the Government of Uganda and other development partners to enhance public access to information on national health policies and processes, such as HSSPII and the JRMs, since these initiatives are vital vehicles for donors' international assistance and cooperation in health. …

Sida should be accountable to Uganda for its initiatives that impact upon the health of the Ugandan people. The Special Rapporteur recommends that Sida, and others, actively seek practical, realistic ways to enhance accountability to the Ugandan Government, Parliament and public. For example, Sida could submit reports to a Committee of the Ugandan Parliament, as well as to the National Health Assembly. The Uganda Human Rights Commission could monitor Sida's health-related initiatives. These and other possibilities some of them signalled in the preceding paragraphs should be actively explored in close consultation with the Government of Uganda.

WORLD BANK AND THE INTERNATIONAL MONETARY FUND

… World Bank and IMF policies and programmes have sometimes a significant impact on the right to the highest attainable standard of health, in particular in low-income countries.[6] …

In 2001, the Committee on Economic, Social and Cultural Rights encouraged Sweden, as a member of international financial institutions, in particular the World Bank and IMF, to "do all it can to ensure that the policies and decisions of those Organizations are in conformity with the obligations of States parties to the Covenant, in particular the obligations contained in articles 2.1, 22 and 23 concerning international assistance and cooperation" [7].

The Special Rapporteur's meetings with the Executive Directors also provided him with an opportunity to discuss how Sweden is implementing the Committee's recommendation. …

The Special Rapporteur emphasizes that Sweden's representatives on the Boards of Governors should ensure that their votes and other activities are informed by Sweden's international human rights obligations, including its human rights responsibility of international assistance and cooperation in health. …

… Since the decisions of the Boards are based on consensus, and the positions of individual Executive Directors or the countries that they represent are normally undisclosed, it is difficult to assess Sweden's impact on the overall decisions made by the Board. **The Special Rapporteur encourages Sweden to make publicly available the views and positions taken by its Executive Directors in Executive Board discussions.** …

The Paris Declaration on Aid Effectiveness [and the World Bank]

The "managing for results" requirement under the Paris Declaration is about promoting a results-oriented approach in aid relationships. Human rights should be used to define the results to be achieved and the strategies needed to achieve them.

The Special Rapporteur encourages the Government of Sweden to ensure that its Executive Directors and Governors support the right to health in the context of [the Paris Declaration principles of] national ownership, alignment, harmonization, managing for results and mutual accountability. In other words, they should ensure that the Bank supports countries to realize their right-to-health commitments, and that Bank policies and strategies are also supportive of the right to health. …

CONCLUSION

… **Sweden does not accept that it has a legal obligation of international assistance and cooperation. While other high-income states share Sweden's view, middle-income and low income countries disagree.**

However, if there is no legal obligation underpinning the human rights responsibility of international assistance and cooperation, inescapably all international assistance

and cooperation fundamentally rests upon charity. While such a position might have been tenable in years gone by, it is unacceptable in the twenty-first century.

From the right-to-health perspective, Sweden's international policies on development, health and human rights are among the best in the world. Generally, Sweden provides very significant support for developing states. While there is scope for improvement, Sida's programmes in Uganda are broadly consistent with Sweden's human rights responsibility of international assistance and cooperation in health.

Recognition of a legal obligation underpinning its human rights responsibility of international assistance and cooperation in health would primarily serve to reinforce Sweden's existing international policies and practices. For a country with Sweden's commendable record, recognition of a legal obligation would not demand a significantly different approach. Accordingly, the Special Rapporteur encourages Sweden to play a leading role in exploring the contours, content and legal nature of the human rights responsibility of international assistance and cooperation.

CHAPTER ONE END NOTES

[1] The Act can be accessed at http://laws.justice.gc.ca/en/showdm/cs/O-2.8//20081211/en.

[2] The *Report to Parliament* can be accessed at www.acdi-cida.gc.ca/reports.

[3] The chapters in this CSO Report are adapted from papers and presentations made for a conference on *The Future of Canadian ODA: Putting the ODA Accountability Act into Practice*, held in Gatineau, Quebec, September 29-30, 2009. The Conference was organized by the Canadian Council for International Co-operation and co-sponsored by Amnesty International Canada, Rights & Democracy, the North South Institute, and the School of International Development and Global Studies at the University of Ottawa. The chapters have been adapted and included with the permission of the authors.

[4] Section 4(3) and 4(4) excludes humanitarian assistance and ODA activities undertaken by the International Development Research Centre (IDRC) from the test of 4(1).

[5] Brian Tomlinson, *International human rights Standards and Canadian ODA: Implications and issues of the Canadian ODA Accountability Act*, Canadian Council for International Co-operation, 2008, page 4, accessible at http://ccic.ca/_files/en/what_we_do/002_aid_2008-12_oda_hr_standards.pdf.

[6] Quoting the Office of the UN High Commissioner for Human Rights, *Frequently Ask Questions on a Human Rights Based Approach to Development Cooperation*, United Nations, New York and Geneva, 2006 (HR/PUB/06/8) at page 9.

[7] See an elaboration of these elements for Canadian international assistance in Tomlinson, **op. cit.** (footnote #5).

[8] Canadian International *Development Agency, Departmental Performance Report, 2008-2009*, page 2, accessible at http://www.tbs-sct.gc.ca/dpr-rmr/2008-2009/index-eng.asp?acr=1466.

[9] See the discussion of administrative law and the exercise of discretion by the Minister and her representatives in opinion, Chapter Two.

[10] See Halifax Initiative, *Official interpretations of the 'ODA Accountability Act' one year later*, Issue Brief, Revised September 2009, accessible at http://ccic.ca/_files/en/what_we_do/002_aid_2009-10_halifax_init_one_yr_later.pdf.

[11] See Halifax Initiative, **op. cit.**

[12] The paragraph adds that "Poverty reduction has been the central rationale for CIDA's assistance for many years. The Agency has also developed a variety of mechanisms for taking into account the perspectives of the poor and has endeavourered to ensure that its assistance is consistent with best practice in international human rights". (Chapter 8, Section 8.3.3.3), accessed November 30, 2009 at http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUImages/RoadMap_2009/$file/RoadMap%204.1%20December%202009%20-%20English%20PDF%20for%20Internet.pdf.

[13] See Halifax Initiative, **op.cit.**, page 5 and the presentation by CIDA official, Paul Samson, at the Future of Canadian ODA: Putting the ODA Accountability Act into Practice Conference, September 29 – 30, 2009, accessible at http://ccic.ca/what_we_do/oda_conference_audio_files_e.php.

[14] See CIDA, *Evaluation of CIDA's Implementation of it Policy on Gender Equality: Executive Summary*, April 2008 page 14, accessible at http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUImages/GenderEquality3/$file/GE%20Exec%20Report%20FINAL%2012%20nov%2008.pdf.

[15] Interestingly, the CIDA Minister held three high level consultations on CIDA's three new thematic programming pillars in August 2009. Until it was pointed out by one of the participants, the ODA Accountability Act was only a passing footnote in CIDA's power-point presentation introducing the three pillars. CSOs present referenced the human rights implication of the Act in their interventions. However, so far (December 2009), the Minister's presentation of CIDA's priorities for food security and for children and youth have had no corresponding application of the Act. The third pillar, sustainable economic growth has yet to be detailed by the Minister.

[16] Halifax Initiative, **op. cit.** page 6.

[17] See the review of Finance interpretation and action on the Act in Halifax Initiative, **op. cit.** pp 1-3.

[18] See http://www.fin.gc.ca/bretwood/bretwd08_1-eng.asp#2008 for the most recent report.

[19] See presentation by John Sloan at the Future of Canadian ODA Conference, audio recording, **op. cit.**

[20] Sloan, **ibid.**

[21] The following recommendations build upon many specific proposals and suggestions made during the September 2009 Conference on the *Future of Canadian ODA: Putting the ODA Accountability Act into Practice*. This Conference was attended by more than 160 Canadian CSO representatives, academics, media and government officials. The sponsors of this report, however, are solely responsible for the formulation of these recommendations.

[22] See an elaboration of this view in Brian Tomlinson, *Approaches to Strengthening CIDA: Creating an Effective Department for International Cooperation*, CCIC, June 2009, accessible at http://ccic.ca/_files/en/what_we_do/002_aid_2009-06_strengthening_cida.pdf and the presentation by Bill Morton, The North South Institute, at the September 2009 *Future of Canadian ODA* Conference, summarized as a chapter in this report.

[23] CIDA, *Business Process Roadmap*, **op. cit.**

[24] These include CIDA's Accountability Framework, Terms and Conditions, Due Diligence, Operational Guide to Program-Based Approaches, and Program Guidance.

[25] For more information on the goals and process of the DFID-led International Aid Transparency Initiative (IATI) see www.aidtransparency.net. The IATI aims to reach agreement among participating donors (currently numbering 19) on the scope of aid information to be put in the public realm, common standards for this information to allow comparability, and a Code of Conduct that addresses timeliness, allowing greater predictability for developing country partners, and accountability to the standards agreed in IATI.

CHAPTER TWO END NOTES

[1] S.C., 2008, c. 17.

[2] Glossary of Key Terms and Concepts: from the "Development Co-operation Report: Efforts and Policies of Members of the Development Assistance Committee", available online at http://www.oecd.org/glossary/0,2586,en_2649_33721_1965693_1_1_1_1,00.html.

[3] See ***For Whose Benefit?*** *Report of the Standing Committee on External Affairs and International Trade on Canada's Official Development Assistance Policies and Programs*, Ottawa, May 1987, Chapter 3 (pp. 23-33).

[4] See Dufresne, R. *Notes on Bill C-293: An Act respecting the provision of official development assistance abroad (Official Development Assistance Accountability Act)*, Library of Parliament, 8 October 2008, PRB 06-31E, at p. 1.

[5] Due to space limitations, this short paper cannot explore the relationship between statutory and privilege powers with respect to the conduct of foreign affairs. In the view of the author, there are solid arguments to be made that the power to regulate ODA, as a subset of the prerogative on foreign affairs, had been displaced by Parliament for a certain period of time prior to the ODA Accountability Act, and arguably since the adoption of the Department of Foreign Affairs and International Trade Act. This displacement made decisions with respect to the provision of ODA subject to the principles and rules of Canadian administrative law much prior to the passing of the ODA Accountability Act.

[6] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.), at para. 52.

[7] *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.), at p. 140. See also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.), at para. 53, as well as *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 128.

[8] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.), at para. 53.

[9] *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.).

[10] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 47. In a subsequent judgment, the Supreme Court, per Binnie J., also held that "*Dunsmuir* […] reinforces in the context of adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decision maker to the applicant, to the public and to a reviewing court. Although the *Dunsmuir* majority refers with approval to the proposition that an appropriate degree of deference "requires of the courts "not submission but a respectful attention to the reasons offered **or which could be offered** in support of a decision"" (para. 48 (emphasis added)), I do not think the reference to reasons which "could be offered" (but were not) should be taken as diluting the importance of giving proper reasons for an administrative decision, as stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43. *Baker* itself was concerned with an application on "humanitarian and compassionate grounds" for relief from a removal order." *Canada (Citizenship and Immigration) v. Khosa*, [2009] S.C.C. 12, at para. 63.

[11] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

[12] Régimbald, Guy, Canadian Administrative Law, 1st ed. Markham : LexisNexis, at p. 193.

[13] See *Department of Foreign Affairs and International Trade Act*, R.S.C., 1985, c. E-22, s. 10(2)(d).

[14] CIDA's power over ODA is regulated by variety of statutes, including the annual Appropriations Acts adopted by Parliament.

[15] Sullivan, Ruth, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Toronto: Butterworths, 2002, at p. 1.

[16] R.S.C. 1985, c. I-21, s. 12.

[17] *Canadian Assn. of Industrial, Mechanical & Allied Workers, Local 14 v. Paccar of Canada Ltd.* (1989), 62 D.L.R. (4th) 437 (S.C.C.), at p. 467.

[18] Sullivan, Ruth, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Toronto: Butterworths, 2002, at p. 303.

[19] Section 3 of the ODA Accountability Act states that "Canadian values" means, amongst others, values of global citizenship, equity and environmental sustainability."

[20] The Carltona principle was confirmed by the Supreme Court of Canada in *Harrison*, where the Court stated that "where the exercise of a discretionary power is entrusted to a Minister of the Crown, it may be presumed that the acts will be performed, not by the Minister in person, but by responsible officials in his department." (R. v. Harrison, [1976] S.C.J. No. 22, [1976] 1 S.C.R. 238, at p. 245 (S.C.C.)).

[21] Of the same view, see Dufresne, R. *Notes on Bill C-293: An Act respecting the provision of official development assistance abroad (Official Development Assistance Accountability Act)*, Library of Parliament, 8 October 2008, PRB 06-31E, at p. 5.

[22] Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, United Nations, New York and Geneva, 2006 (HR/PUB/06/8), at p. 9.

[23] *Report of the independent expert on the question of human rights and extreme poverty*, UN doc. A/63/274, 13 August 2008, at pp. 8-9.

[24] Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, Geneva, 2006, HR/PUB/06/12, at p. 14 (para. 64). The OHCHR specifies that are four stages of participation: preference revelation; policy choice, implementation, and monitoring, assessment and accountability. For the source of this human rights obligation regarding the participation into public affairs, see in particular art. 21(1) of the *Universal Declaration of Human Rights*, as well as art. 25 of the *International Covenant on Civil and Political Rights*.

[25] Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, United Nations, New York and Geneva, 2006 (HR/PUB/06/8), at p. 37 (Annex II).

[26] *For Whose Benefit? Report of the Standing Committee on External Affairs and International Trade on Canada's Official Development Assistance Policies and Programs*, Ottawa, May 1987, at p. 29.

[27] From the Supreme Court, see *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at paras. 41-42. See also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, paras. 67-67, concurring. From the Canadian Human Rights Tribunal, see in particular *Bob Brown and Canadian Human Rights Commission v. National Capital Commission and Public Works and Government Services Canada*, 2006 CHRT 26, at paras. 220-221.

CHAPTER THREE END NOTES

[1] CESCR, General Comment 3, "The nature of State parties obligations" (Art. 2, para 1 of the Covenant) at paragraph 14.

[2] See a discussion of Canadian human rights obligations and practices in its support for the World Bank and other multilateral development banks in Chapter 9 of this Report.

[3] Committee on the Rights of the Child, Day of General Discussion on "Resources for the Rights of the Child – Responsibility of States", 21 September 2007 – 5 October 2007.

[4] See Appendix Two for OECD DAC, Action-Oriented Policy Paper on Human Rights and Development.

[5] See, for example: 'Linking Human Rights and Aid Effectiveness for Better Development Results: Practical Experiences from the Health Sector', Report for the Human Rights Task Team of the OECD-DAC Network on Governance (GOVNET), May 2008, http://www.oecd.org/dataoecd/41/53/43529192.pdf.

[6] Accra Agenda for Action, 13. c).

[7] DAC Action-Oriented Policy Paper on Human Rights and Development, OECD, 2007.

[8] Ibid.

CHAPTER FOUR END NOTES

[1] The government's first report under the ODA Accountability Act, (released on September 30 2009) reports on 12 departments that disbursed ODA during the period. See www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUImages/ODAA/$file/oda-report-2008-2009.pdf.

[2] See Halifax Initiative, 2009, "Official Interpretations of the ODA Accountability Act – One Year Later", www.halifaxinitiative.info.

[3] CCIC has argued that a key issue affecting CIDA is its independence as an agency. It suggests that because CIDA operates as an agency established under a government order-in-council, it is therefore technically a subsidiary to the Department of Foreign Affairs, thus affecting its independence and standing (see CCIC, 2009, "Approaches to Strengthening CIDA: Creating an Effective Government Department for International Cooperation", www.ccic.ca/e/docs/002_aid_2009-06_strengthening_cida.pdf). However, others argue that because the Minister has sole responsibility for CIDA's budget, it is for all intents and purposes an independent government department.

[4] See Owen Barder, 2005, "Reforming Development Assistance: Lessons from the UK Experience", CGD Working Paper Number 70, and the transcript of Clare Short's presentation for the conference.

[5] DFID has since released further White Papers on the theme of Eliminating World Poverty: in 2006 ("Making Governance Work for the Poor") and in 2009 ("Building Our Common Future").

[6] Since this presentation, the Minister announced on October 16 a new Food Security Strategy: see http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/NAT-1016105724-KJX.

[7] As yet, CIDA has not announced follow up strategies to the AAA.

[8] These predictions may be affected by the global financial crisis. Since the predictions, some countries have cut their ODA budgets. Other countries (including Canada) have maintained commitments. With maintained commitment but likely lower GNI because of the crisis, we can expect Canada's ODA/GNI ratio to be higher than in previous years. Its ranking compared to other countries may also be higher than predicted.

CHAPTER FIVE END NOTES

[1] The CIDA Executive Report of the Evaluation is available at: http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUImages/GenderEquality3/$file/GE%20Exec%20Report%20FINAL%2012%20nov%2008.pdf. The CIDA Policy on Gender Equality is available at http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUImages/Policy/$file/GENDER-E-nophotos.pdf.

[2] CIDA, "Evaluation of CIDA's Implementation of its Policy on Gender Equality: Final Report", April 2008, page 73.

CHAPTER SIX END NOTES

[1] Details of articles on the right to education, provided for in these and other UN Conventions, can be found in Unesco 2007. The Right to Education: Normative Framework. Unesco, Paris.

[2] On November 20, 2009 Minister Oda announced CIDA's Children and Youth Strategy. The Strategy emphasises access to basic education particularly for girls, improved quality of education, alternative and innovative learning opportunities for youth with an emphasis on literacy and numeracy, and support to country-led national plans and priorities. The Strategy also commits to helping ensure schools are safe and free from violence and child-friendly spaces for learning. Priorities for action in this Strategy are consistent with previous strategies of CIDA. While continued support to *education is greatly welcomed*, the new strategy does not provide a definition of quality, it does not indicate how performance will be measured, does not specify Canada's obligations to support developing countries achieve free, compulsory education, nor does it have the force of policy. How this new Strategy will impact CIDA's current education programs remains to be seen.

CHAPTER SEVEN END NOTES

[1] OECD DAC, The Role of Employment and Social Protection – Making Economic Growth More Pro-Poor. Policy Statement: http://www.oecd.org/dataoecd/63/9/43514572.pdf

CHAPTER NINE END NOTES

[1] The information contained in this section was ascertained from Access to Information requests filed with Finance Canada, the Canadian International Development Agency and Foreign Affairs and International Trade Canada.

[2] See, for example, *The Macroeconomic Implications of MDG-Based Strategies in Sub-Saharan Africa*, John Weeks and Terry McKinley. Policy Research Brief # 4. October 2007. On-line at http://www.undppovertycentre. org/pub/IPCPolicyResearchBrief4.pdf and *Pro-Growth Alternatives for Monetary and Financial Policies in Sub-Saharan Africa*, Robert Pollin, Gerald Epstein and James Heintz. Policy Research Brief # 6. January 2008, on-line at http://www.undp-povertycentre.org/pub/IPCPolicyResearchBrief6.pdf.

APPENDIX THREE END NOTES

[1] See for example S. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation,* 2006; M. Salomon, *Global Responsibility for Human Rights,* 2007; M. Salomon, A. Tostensen and W. Vandenhole (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-bearers*, 2007; the work of the Special Rapporteur on the right to food e.g. E/CN.4/2005/47; and the work of the Working Group on the Right to Development e.g. A/HRC/4/WG.2/2.

[2] General Comment No. 14, para. 45.

[3] General Comment No. 14, para. 39.

[4] See press release of 22 June 2006, "UN health rights expert criticizes donors for failing to fulfil the humanitarian responsibilities in the Occupied Palestinian Territories". Also see UNDP, *Human Development Report 2005: International Cooperation at a Crossroads.*

[5] See E/CN.4/2004/49/Add.1, para. 9, and Commission on Human Rights resolution 2004/27, para. 6.

[6] For further discussion, see R. Hammonds and G. Ooms, "World Bank Policies and the Obligation of its Members to Respect, Protect, and Fulfil the Right to Health", *Health and Human Rights,* 2004, p. 46.

[7] Concluding observations on Sweden (E/C.12/1/Add.70, para. 24).