The *International Yearbook of Regional Human Rights - Master's Programmes* 2006 brings together eight dissertations - two of the best dissertations written by students registered during 2006 on the world's four most prominent Master's degree programmes in human rights. These programmes are the European Master's, based in Venice; the African Master's, based in Pretoria; the South East European Master's, based in Sarajevo and Bologna; and the Mediterranean Master's, based in Malta.

The *Yearbook* covers a wide range of themes, including gender issues, access to health care, cultural diversity and the link between international trade and human rights. A first volume of the *Yearbook* appeared in 2001.

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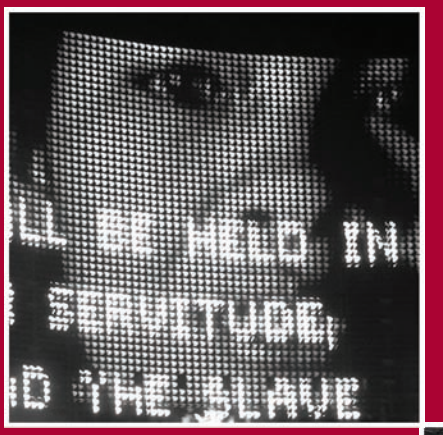
International Yearbook of Regional Human Rights
Master's Programmes 2006



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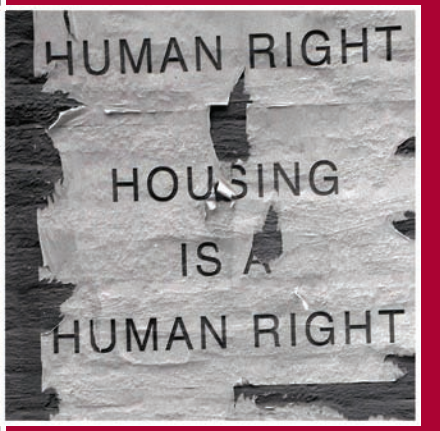

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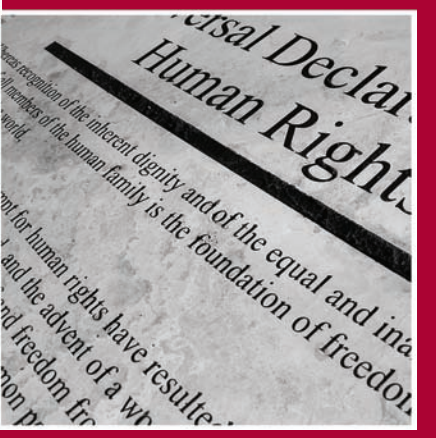

INTERNATIONAL YEARBOOK OF REGIONAL HUMAN RIGHTS MASTER'S PROGRAMMES 2006

2008

International yearbook of regional human rights Master's programmes 2006

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MEDITERRANEAN MASTER'S PROGRAMME IN HUMAN RIGHTS AND DEMOCRATISATION

Introduction

The emergence of regional Master's degree programmes on human rights is a recent, but significant phenomenon in the world of human rights. Up to 2006 — the year covered by this volume — four programmes have been established, mainly with the support of the European Commission: one for Europe, in Venice; one for Africa, in Pretoria; one for Eastern Europe, in Sarajevo; and one for the Mediterranean countries, in Malta.

Some of these programmes are interdisciplinary Master's programmes, aimed at students from a variety of backgrounds, while others are LLM programmes, aimed specifically at law students. They also differ in other respects, such as the number of students accepted. What the programmes have in common is that they are all post-graduate courses, presented jointly by a number of universities in the region. They are aimed primarily at bringing together students from the regions where they are based for a year of advanced training in human rights. They deal with global human rights issues, but have a special focus on local human rights issues. All the courses are full-time. In most cases students spend one term together at one of the partners before the group is split up and students are placed for the second semester at the other participating institutions. On the academic level they involve formal teaching, as well as the writing of a dissertation, and on the practical level exposure to human rights issues by means of activities such as on-site visits, attendance of court cases and attachments to human rights organisations. As such, these courses provide an ideal opportunity to ensure high quality education and relevant exposure, as well as the creation of networks of human rights practitioners, activists and teachers.

This *Yearbook* contains a short description of each programme and two of the dissertations produced in each of the four programmes mentioned, during the year under review, as selected by the organisers of these programmes. It should be noted that, while grammatical and linguistic changes have been made where necessary, the style used in the different programmes, for example in respect of references to sources, has been left largely unchanged. Headings have been made consistent.

Description of programmes

EUROPEAN MASTER'S DEGREE IN HUMAN RIGHTS AND DEMOCRATISATION (E.MA)

The success of the European Master's Degree in Human Rights and Democratisation (E.MA) has given rise to the development of additional regional human rights master's programmes funded by the European Union. Being generally modelled on E.MA, the regional master's programmes have many core features in common and there is considerable synergic co-operation between them, including exchange of staff and students, joint publications and conferences. Such networking and co-operation is strongly encouraged by the European Union, which at the same time recognises that 'overall academic coherence is to be ensured by the E.MA based in Venice, which inspired the Regional Masters Programmes'.

Beyond the realisation of academic objectives, an integral function of the Regional Masters is the creation of cross cultural networks which foster a spirit of understanding and mutual respect and strengthen co-operation in areas of political tension and conflict. It is hoped that the multiplier effect of these aspects will contribute to an enduring peace and respect for human rights in the regions in which they are present.

1 About EIUC

The **European Inter-University Centre for Human Rights and Democratisation (EIUC)** was established in Venice on 15 September 2002 with the aim of providing an institutional foundation and autonomous management to the European Master's Programme in Human Rights and Democratisation (E.MA) and in order to enable the member universities to jointly develop a range of additional human rights activities. Identified in the *Regulation (EC) No. 1889/2006 of The European Parliament and of the Council on establishing a financing instrument for the promotion of democracy and human rights worldwide* as recipient of EU operational funding in the financial perspective 2007-2013, EIUC is founded on a commitment to the realisation of the values enshrined in the European Union Charter of Fundamental Rights and to contribute to a shared global understanding of human rights and democracy.

As of 2007, EIUC is composed by 36 of the 41 European universities participating in the European Master's Programme in Human Rights and Democratisation, launched in July 1997.

As a an interdisciplinary European centre for education, training and research activities in European policy areas related to the promotion of human rights and democracy, the principal activities of EIUC are:

- to ensure the continuation of the European Master's Degree in Human Rights and Democratisation,
- to ensure the management of the E.MA Internship Programme and EU-UN Fellowship Programme,
- to initiate other training and research activities in the field of human rights and democratisation.

Given the extensive involvement of academics and experts at the highest levels from all 27 EU member states as well as leading experts and representatives from the EU institutions and other intergovernmental organisations, EIUC is uniquely positioned to pool and mobilise European expertise in the area of human rights and democratisation. The mission of the Centre is to foster a community of scholars, researchers and professionals with problem-solving capacities and creativity to improve democracy promotion and human rights implementation worldwide. In shaping competences and capacities, EIUC advances innovative models for programmes and projects that bridge theory and practice and are significant for determining human rights and democratisation policies in an enlarged Europe, for providing assistance to neighbouring countries, and for promoting the rule of law, democratic principles and good governance through overseas development cooperation.

2 E.MA

As an example of European inter-university co-operation, the European Master's Programme in Human Rights and Democratisation (E.MA) is organised through the joint efforts of the following participating universities: Åbo Akademi University (Finland), Adam Mickiewicz University in co-operation with the Poznan Human Rights Centre (Poland), Aristotle University of Thessaloniki (Greece), Masaryk University of Brno (Czech Republic), University of Bucharest (Romania), Ca' Foscari University of Venice (Italy), Catholic University Leuven (Belgium), University of Coimbra (Portugal), Comenius University of Bratislava (Slovakia), University of Copenhagen (Denmark), University of Cyprus (Cyprus), University of Deusto, Bilbao (Spain), National University of Ireland, Dublin - University College Dublin (Ireland), University of Hamburg (Germany), University of Helsinki (Finland), National University of Ireland, Galway (Ireland), University of Graz (Austria), Eötvös Lóránd University, Budapest (Hungary), University of Latvia (Latvia), Université Libre de Bruxelles (Belgium), New University of Lisbon (Portugal), University of Ljubljana (Slovenia), Lund University (Sweden), Université du

Luxembourg (Luxembourg), Maastricht University (Netherlands), University of Malta (Malta), Université de Montpellier (France), University of Nottingham (United Kingdom), University of Padua (Italy), Panteion University, Athens (Greece), Queen's University of Belfast (United Kingdom), Université Robert Schuman, Strasbourg (France), Ruhr-University Bochum (Germany), University of Seville (Spain), Sofia University (Bulgaria), University of Southern Denmark in co-operation with the Danish Institute for Human Rights (Denmark), University of Tartu (Estonia), Uppsala University (Sweden), Utrecht University (Netherlands), University of Vienna (Austria), Vilnius University (Lithuania), University of Bucharest (Romania) and University of Sofia (Bulgaria).

The European Master's Programme in Human Rights and Democratisation (E.MA) is an intensive one-year academic programme to educate professionals in the field of human rights and democratisation and to provide its graduates with practical work experience. It is a multidisciplinary programme that reflects the indivisible links between human rights, democracy, peace and development. The programme offers an action and policy-oriented approach to learning about international relations, law, philosophy, history, anthropology, political science and sociology. Students have the opportunity to meet and be taught by leading academics, experts and representatives of international organisations (including European Union representatives) while studying in a multi-cultural environment.

The academic year of the European Master's Programme in Human Rights and Democratisation is divided into two semesters: the first semester (September to January) in Venice — Lido and the second (February to July) at an E.MA participating university situated in the Member States of the European Union. This second part of the programme is conceived as a European exchange, and students are expected to undertake their second semester research in a country other than their own.

While being taught during the first semester in law, philosophy, history, political science and anthropology by leading lecturers and experts, students receive substantial training for working in the field as academics or as professional staff in inter-governmental, governmental, and non-governmental organisations. In this respect the programme emphasises the importance of operational skill-building.

The E.MA first semester curriculum consists of a core programme, which in the current academic year is made up of 4 thematic sections (the first stream) aimed at the plenary group of students, and a series of second stream activities consisting of optional units devised for smaller groups.

First stream courses are organised in thematic sections as indicated below (subject to modification):

- TS1: Institutions, mechanisms and human rights standards;
- TS2: Humanities and democratisation;
- TS3: Human rights and security;
- TS4: Globalisation and human rights.

The second stream consists of different components such as rolling seminars based on law, philosophy and international relations; some semester-long special projects involving students in activity learning with a collective product or event; and a series of classes that foster and deepen the knowledge of different aspects of human rights, which are cross-cutting to all the thematic sections.

During the second semester students relocate to one of the participating universities to follow courses in an area of specialisation of their own choice and to undertake personal supervised research finalised by the writing of a Master's thesis. Second semester courses at the hosting universities are designed in order to offer the students specialised education on subjects related to their research projects and theses, and are either organised so as to integrate students in courses already running at the hosting universities or in the form of specific ad hoc courses or seminars dedicated to the Masters students. Up to 5 students can be hosted by each participating university.

E.MA students, upon completion of all course's components, are expected to gain both academic and practical skills: on the one hand, the ability to conduct independent and interdisciplinary academic research in relation to human rights and democratisation issues; on the other hand, skills which are relevant to human rights practitioners such as reporting, fact-finding, and monitoring.

The natural academic complement to the institution of EIUC, in compliance with the 'Bologna Principles' on harmonisation of post-graduate education at European level, was the establishment of a European Joint Degree in Human Rights and Democratisation to be jointly conferred by the EIUC/E.MA Universities having ratified the Joint Degree Agreement. With the Joint Degree the E.MA further enhances its academic integration and innovative spirit in line with the Bologna process.

Having obtained the E.MA degree, the majority of graduates are likely to find job opportunities with human rights organisations (both governmental and non-governmental, international and national) which could involve them in field missions (electoral observation, human rights monitoring, international cooperation projects) or as officials taking care of the activities carried out at their headquarters. In a number of cases graduates are involved in human rights-related activities by their home Ministries of Foreign Affairs, or are seconded by them to participate in international institutions

activities (eg JPO programmes). In many cases, access to these institutions starts with an internship period. Some graduates pursue further academic studies and research. EIUC itself has been facilitating the entry of its graduates in the human rights job market through two successful internship programmes: the E.MA Internship Programme and the EU-UN Fellowship Programme.

The more than 800 graduates of the European Master's Degree in Human Rights and Democratisation represent a European pool of highly qualified and motivated young human rights experts working either in European governmental, inter-governmental and non-governmental human rights institutions or being sent, on behalf of the EU or other organisations, to work in the field.

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LLM IN HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA

General description of the programme

The Centre for Human Rights at the Faculty of Law, University of Pretoria, is one of the most active organisations involved in human rights education in Africa. In December 2006, its programmes received the highest recognition in the world, the UNESCO Prize for Human Rights Education. The Centre became the first recipient of this Prize in Sub-Saharan Africa. The award recognises the Centre's role and participation in the construction of a democratic South Africa, and its contribution to realising a culture of human rights in Africa as a whole.

The Centre is an academic department of the Faculty of Law, as such it presents a one year full-time Master of Laws (LLM) degree in Human Rights and Democratisation in Africa. The LLM Programme is one of the Centre's flagship programmes and it is presented in partnership with seven other universities representing all the sub-regions of Africa: Addis Ababa University (Ethiopia), American University in Cairo (Egypt), Catholic University of Central Africa (Cameroon), Universidade Eduardo Mondlane (Mozambique), University of Ghana, Makerere University (Uganda) and the University of the Western Cape.

The programme has three broad objectives, which are as follows:

Its first aim is to train human rights experts who can be employed in government ministries, other national, international and regional bodies concerned with human rights and democracy in Africa. These individuals would help to ensure effectiveness of these bodies, through imparting of professionalism and operational competence. Through the transfer of technical skills and strengthening the capacity of these organisations it is envisaged that there will be an improvement in the protection and promotion of human rights and democratisation in Africa.

Secondly, the programme is aimed at expansion of collaboration among African universities. This collaboration would result in a network of lawyers and academics that are specialised in the field of human rights and democracy. Through the programme, there would be promotion of research and teaching which addresses the particular needs of Africa. Some of these needs include conflict prevention; democratic transition; strengthening of civil society, institutional building and the rule of law. The programme is also aimed at developing and strengthening links between civil society, governmental bodies and international organisations.

A third objective of the programme is to help develop the relationship between the African Masters and the other regional Masters programmes whose outputs are included in this publication.

Every year thirty students are selected from over 400 applications, allowing the Centre to choose students with academic excellence and experience in human rights activism. Being a master of laws programme, admission is open only to students who already hold an undergraduate degree in law. Since its inception in 2000, the students have been drawn from countries in all the sub-regions and major language groups of Africa. They are also drawn from a variety of backgrounds including the civil service (ministries of justice and foreign affairs), the judiciary, civil society, police, legal practitioners, academia and some recent graduates.

In the course curriculum, theory is complemented with practice. Lecturers on the programme are experts in their field, and are brought in to teach very specific topics from their area of expertise. Students spend the first semester (6 months) at the University of Pretoria, where they do intensive coursework, develop their research proposal for their dissertations and undertake study visits to Rwanda, Sierra Leone and Somaliland. During this semester, students complete the following academic modules:

- Module 1: Methodology of human rights research, education and advocacy
- Module 2: Democratisation in Africa
- Module 3: International and comparative human rights
- Module 4: Human rights in Africa
- Module 5: Introduction to the South African legal system and Bill of Rights
- Module 6: Human rights in the field (Field trip)

At the end of the first semester, the class is divided into seven groups, each of which spends the next five months at one of the partner universities where they complete the following two modules and/or an internship:

- Module 7: Accredited courses
- Module 8: Dissertation

A substantial part of the course is dedicated to the use of the Internet in research on human rights law and democratisation. The medium of instruction is English, of which students must have a good working knowledge in order to follow lectures and participate fully in class discussions and practical exercises. Advanced English is provided for students from non-English speaking countries and French is taught to students from English speaking countries. In instances where students are fluent in both English and French, they are required to do a basics course in Portuguese, which is one of the official languages of the AU.

Graduation takes place on 10 December (International Human Rights Day), at the University of Pretoria, during a specially organised ceremony. Former President Nelson Mandela has lent his name to the prize for the best student on the programme.

Academic achievement is the most important criterion for admission, but prior experience and demonstrated commitment to human rights and democratisation are also important criteria. Most students are unable to cover their own costs, although they are all required to make some contribution. The Centre for Human Rights raises funding to cover tuition, accommodation, books and travel expenses.

Upon successful completion of the course, some of the students on the programme get the opportunity of serving internships with organisations related to human rights or democratisation. These internships are organised by and funded by donor support to the Centre for Human Rights. Some of the prominent organisations where students have been interns include the following:

- African Union Commission, Addis Ababa, Ethiopia
- African Commission on Human and Peoples' Rights, Banjul, The Gambia
- International Criminal Court, The Hague, The Netherlands
- Office of the United Nations High Commissioner for Human Rights, Geneva, Switzerland
- International Criminal Tribunal for Rwanda, Arusha, Tanzania
- European Court of Human Rights, Strasbourg, France
- International Criminal Tribunal for the former Yugoslavia, The Hague, Netherlands

The LLM programme is one of the most successful higher education programmes in human rights and democratisation that is offered in the world. To attain this status, much work has gone into planning, securing funding, selecting students, training these students and further helping the students in advancing their careers in the field of human rights and democratisation in Africa.

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MASTER'S DEGREE IN DEMOCRACY AND HUMAN RIGHTS IN SOUTH EAST EUROPE (ERMA)

1 General description of the programme

The MA in Democracy and Human Rights in South East Europe (ERMA) was established in 2000 through the joint efforts of 11 participating universities and research centres, co-ordinated by the Center for Interdisciplinary Postgraduate Studies at the University of Sarajevo, Bosnia and Herzegovina, with the co-operation of the University of Bologna, Italy, through its Centre for East, Central and Balkan Europe. The programme is co-financed by the European Commission and is currently in its seventh year of existence. Lectures are structured and lecturers are selected to strongly emphasise a regional approach in the framework of the European integration process.

The ERMA is an educational activity intended for students that would combine practical experience in human rights issues with further academic study. After recognising that human rights go across the disciplines of study, as political science, law, sociology, philosophy and social sciences in general, the Programme has adopted an interdisciplinary approach.

The MA Programme promotes development and realisation of young generation of officials for state management, inter-governmental and non-governmental organisations, for universities and think tanks in Albania, Bosnia & Herzegovina, Croatia, Macedonia, Serbia, Montenegro and UN Administered Kosovo as well as in the countries belonging to the EU, the rest of Europe, and worldwide. The structure of the lectures, the access to internships and the Faculty are defined in order to emphasise among the participants a shared consciousness that the democratic development and human rights promotion, protection and implementation in the region depend on plurality of factors. Most of the relevant issues in the SEE stability, democracy, and development are mutually correlated and influence each other. Thus, a common regional effort in achieving them will have more chance for success in a context of inclusive policies and in the framework of a rapid European Union integration process.

For the full course of study, the programme awards a total of 120 ECTS and it can be taken only as a full time study.

In the first term, from October to June, students are taught together in Sarajevo by lecturers and tutors from participating universities, member of the International Network of Europe and the Balkans and experts from IGOs and NGOs. The language of instruction is English and attendance is compulsory. The academic programme is structured into five clusters. In addition there is a mid-term exam,

which takes place in the last week of the first term. In the second term, during summer, students take up six-week assessed internships at selected IGOs, NGOs and universities in the region. At that point students will have finished their theoretical education and will be prepared for real-life experience and for applying their knowledge in practice. Under Article 8c of the Programme's Statute, the internship placement will be in a country different to the country of citizenship of the student, decision aiming to promote diversity and different culture experience, believe to be a necessary prerequisite for experts aiming to work in the field of human rights and wrongs.

During the third term of the programme, in autumn, students live and study in Italy where they prepare their Master's theses. They attend specific seminars and meet the students and lecturers from the Interdisciplinary Master in East European Researches and Studies, co-ordinated by the Centre for East, Central and Balkan Europe.

The final examination, which is an oral defence of the thesis, takes place in Sarajevo, Bosnia and Herzegovina at the end of October followed by the graduation ceremony. The successful students receive the Master's Degree in Democracy and Human Rights in South-East Europe, issued jointly by the University of Bologna (Faculty of Political Sciences at Forli) and the University of Sarajevo.

The programme is organised on the basis of the following educational clusters:

- Philosophy of Human Rights;
- Democracy;
- Nationalism, Ethnicity and Religion;
- Social, Economic and Cultural Rights; and
- Mechanisms for Human Rights Protection.

Some of the organisations hosting the ERMA students as interns:

1. Albanian Human Rights Group, Tirana
2. Albanian Center for Human Rights, Tirana
3. Human Rights Center, Sarajevo, Bosnia and Herzegovina
4. Helsinki Committee for Human Rights in Bosnia and Herzegovina, Sarajevo
5. Constitutional court of Bosnia and Herzegovina, Sarajevo
6. Bosnia and Herzegovina Office of the Registry, War Crimes Chamber, Sarajevo
7. International Commission on Missing Persons, Sarajevo, Bosnia and Herzegovina
8. UNHCR, Tuzla office, Bosnia and Herzegovina
9. Transparency International, Sofia, Bulgaria

10. International Center for Minority Studies and Intercultural Relations, Sofia, Bulgaria
11. Center for Women's Studies and Politics, Sofia, Bulgaria
12. Croatian Helsinki Committee, Zagreb
13. Women's Infoteka, Zagreb, Croatia
14. Be Active, Be Emancipated B.a.B.e. - Women's Human Rights Group, Zagreb, Croatia
15. Human Rights Center, Zagreb, Croatia
16. Euro-Balkan Institute, Skopje, Macedonia
17. Macedonian Center for International Cooperation, Skopje
18. Helsinki Committee for Human Rights in Republic of Macedonia, Skopje
19. FORUM - Center for Strategic Research and Documentation, Skopje, Macedonia
20. Belgrade Center for Human Rights, Serbia
21. Forum for Ethnic Relations, Belgrade, Serbia
22. Humanitarian Law Center, Belgrade, Serbia
23. Helsinki Committee, Belgrade, Serbia
24. Center for Peace and Democracy Development, Belgrade, Serbia
25. Youth Initiative for Human Rights Montenegro, Podgorica
26. Center for Civic Education, Podgorica, Montenegro
27. Peace Institute, Ljubljana, Slovenia
28. Ombudsperson Institution in Kosovo, Prishtina
29. Human Rights Center of the University of Prishtina, UN administered Kosovo
30. Kosovan Nansen Dialogue, Mitrovica

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MEDITERRANEAN MASTER'S PROGRAMME IN HUMAN RIGHTS AND DEMOCRATISATION

1 General description of the programme

The Mediterranean Master's Programme was started in May 2000 by the Faculty of Law and the Foundation for International Studies of the University of Malta and a number of universities and human rights institutes from Europe and from Southern Mediterranean states. The partnership has now increased to 18 and includes:

- University of Catania, University San Pio V (Italy);
- University of Istanbul (Turkey);
- Universidad Complutense de Madrid (Spain);
- University of Cyprus (Cyprus);
- Universite d'Alger (Algeria);
- University of Jordan (Jordan);
- University of Bethlehem (Palestine);
- Institut de Droit Europeen des Droits de l'Homme UMR-CNRS (Montpellier, France);
- Tel Aviv University (Israel);
- Centre de Documentation, d'Information et de Formation en Droits de l'Homme (Morocco);
- Netherlands Institute of Human Rights (SIM) (Holland);
- Raoul Wallenberg Institute, Lund University (Sweden);
- L'Institute Arabe des Droits de l'Homme (Tunisia);
- Cairo Institute of Human Rights (CIHRS) (Egypt;
- Danish Institute of Human Rights (Denmark);
- University of Ghent (Belgium);
- The Irish Centre for Human Rights (Ireland); and
- University of Malta (Malta).

The aim of the Mediterranean Master's programme is to provide interdisciplinary training in human rights and democratisation in a Mediterranean context in the expectation that, on their return to their homeland, students will help inculcate a human rights culture in their countries. The European Commission provides funding for scholarships to students from Southern Mediterranean countries; however, students from other countries are also welcomed, on a non-scholarship basis.

The course is open to all persons in possession of a Bachelor's degree in either law, the social sciences, the political sciences, international relations or the humanities, with at least a Second Class Honours and preferably with some experience in a field related to the area of human rights.

Although the course is interdisciplinary, the core contents are legal based, and for those candidates not in possession of a law degree, a short introduction course in the principles of public international law is prescribed. The language of instruction is English.

The course is split over two semesters. The first semester is the taught course and is held in Malta. During this period the students are given a complete and structured overview of human rights and democratisation issues. Students follow lectures in five study areas and attend regular tutorials and seminars. The study areas are:

- Human Rights and Mediterranean Cultures;
- The International Legal Framework of Human Rights;
- The Politics of Human Rights and Democratisation;
- Systems of Implementation of Human Rights; and
- Human Rights in the Mediterranean: Building Bridges.

Lectures are given by leading specialists in the areas of Mediterranean culture and relations, human rights law and practice and political science. Lecturers come from the University of Malta, the partner institutions, international organisations, the diplomatic community and NGOs active in the field of human rights such as UNHCR, UNWRA, UNESCO and COHRE.

Each student is assigned a personal tutor. Tutors form an integral part of the programme's infrastructure by providing the necessary assistance, support and mentoring to the students during the semester. Students meet their tutors at least once a week.

Students are regularly assessed through written assignments, participation in group and radio discussion programmes, participation in simulation exercises, presentation in class of their own research to fellow students, and end-of-semester examinations.

2 Activities

The students come from diverse backgrounds, principally legal and political studies, business management, diplomatic studies, media and literary studies. One of the students in the first course was a prison director, whilst another was a probation officer. Several were practising lawyers or teachers.

The highlight of the course is a six-day tour during which the students visit major European institutions engaged in the promotion or protection of human rights. The students have visited the European Commission and the European Parliament, the International Court of Justice, UNESCO headquarters, the European Court of Human Rights, the Council of Europe and the International Tribunal for the former

Yugoslavia. At all these venues the students were addressed by senior officials and attended hearings at the Court.

Students spend the second semester at a partner institution to carry out research on a human rights/democratisation topic of their choice on which they are expected to write a 25 000 word dissertation.

The partner institutions provide tutors to supervise and guide the students in their research. The students undertook their research in Morocco, Turkey, Italy, the United Kingdom, Spain, France, Switzerland, the Netherlands, Sweden, Poland and Malta. In addition to the resident tutor at the place of research, the students also have access to a tutor in Malta with whom they can communicate via email. During this semester, students are expected to obtain first hand experience of human rights in action through an internship with an NGO.

The Course Management team is made up of Prof Ian Refalo, Academic Dean; Mr Leslie Agius, Project Manager; Dr Therese Cachia, Academic Co-ordinator; and Ms Cynthia Amato, Project Secretary.

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Missing men, waking women: A gender perspective on organised armed violence in Brazil

Nora Holzmann

Abstract

Organised armed violence perpetrated by drug trafficking gangs, police forces and private death squads, affects and threatens the security, health and lives of Brazilians on a daily basis. It causes a high rate of fatalities, primarily among the urban poor and over 90 percent of those who die are men. This thesis deals with a generally neglected dimension of organised armed violence, the gender dimension. The underlying hypothesis is that Brazil's problem of organised armed violence can only be adequately explained, tackled and solved if a gender perspective is included in its examination.

The text delivers a gender-based analysis on three different levels: On the level of the perpetrators, the construction of violent masculinities as one of the driving-forces behind drug-gang violence is explored. On the level of the 'hidden' victims, the indirect and often concealed effects that organised armed violence has on women are highlighted. And on the level of the counteracting agents, gender-specific reactions to and initiatives against the problem of violence are analysed. The thesis illustrates that gender is indeed a factor which needs to be taken into account in order to comprehensively remedy and prevent organised armed violence.

Introduction

Violence, in all its various manifestations, constitutes a major problem and challenge for human rights across the world. Whether interpersonal, as in domestic violence, or collective, as in wars, violence represents a serious threat to the security, health and lives of people in a variety of contexts.

Violence is not gender-blind. While, for instance, more men are impacted by gang-related violence, generally it is women who face gender-based violence such as domestic or sexual abuse. As a consequence, gender analyses of the phenomenon of violence normally focus on violence perpetrated by men against women, which is — with varying intensity — present in practically every cultural context and aggravates during times of crisis and conflict. This focus on violence against women is indeed highly justified, not least because gender-based acts of violence amount to the gravest violations of women's rights. At the same time, however, the aspect of gender is usually neglected in relation to other forms of violence, which are by and large male-on-male, as women commit violent acts much less frequently. It appears that, due to the fact that violence which does not fall under the conventional 'gender-based' definition is exerted mainly among men, most experts and researchers see no need to examine it from a gender perspective.

This is also the case with the phenomenon of organised armed violence. This term describes a situation that contains elements of both organised crime and civil war and produces extraordinarily high rates of homicide. There are many states in the world, whose urban centres, or at least parts of them, are controlled by organised armed violence; these countries — among them Jamaica, South Africa and the United States — are *inter alia* marked by large social inequality, strong gang culture and easy access to firearms. An outstanding example among the countries plagued by this extreme form of urban violence is Brazil. The residents of Brazil's urban low income areas like Rio de Janeiro's *favelas* [1] are caught up in a brutal warfare among rival drug factions, police forces and private death squads, which causes the loss of thousands of lives each month. The fatality numbers even supersede those of many armed conflicts. While, for instance, the war in former Yugoslavia caused between 2 000 and 5 000 conflict-related deaths in the period from 1998 - 2000, 7 465 people died during the same time from firearms in the city of Rio de Janeiro alone.[2]

More than 90 percent of the Brazilians who are killed in organised armed violence are men, many of them young men under the age of 25. Similarly, the perpetrators are, in the large majority, male. One would assume that this obvious gender distinction would be impetus enough for experts to acknowledge the gender aspect of the problem. However, the abundant literature that exists on what is probably the most highly discussed topic in the Brazilian public generally does not take note of the gender dimension of organised armed violence. There are a few authors, though, who have focused on specific sides of the violence problem by approaching them on the basis of gender roles. One is Gary T Barker, chief executive of a Rio-based Non-Governmental Organisation (NGO) who has done research on the issue of masculinities and its relation to the drug gang involvement of young men. Social scientist Rita de Cássia Santos Freitas, on the other hand, delivered some detailed analyses of one of the mothers' associations active against violence and impunity. Nevertheless, thus far no comprehensive gender-based examination of Brazil's violence problem, which would deal with the gender dimensions of its causes and effects as well as the reactions to it, has yet been made. This is exactly what I intend to do within the scope of this thesis, my hypothesis being that Brazil's problem of organised armed violence, including its various direct and indirect effects, can only be adequately explained, tackled and solved if a gender perspective is included in its analysis. I will argue that there is a connection between

1 The term *favela* is commonly used in Brazil to describe poor urban neighbourhoods or shantytowns.

2 L Dowdney *Children of the Drug Trade. A case study of children in organised armed violence in Rio de Janeiro* (2005) 115.

gender roles and organised armed violence with regards to both its causes and effects, and I will examine what may be achieved by gendered reactions and initiatives against this violence. At the same time, it will become obvious how male-dominated armed violence contributes to the perpetuation of an oppressive gender-system.

The categories of sex and gender are heavily debated and even doubted among feminists. I am well aware of the problems emerging from a dualistic distinction between men and masculinities on the one hand and women and femininities on the other hand. Still, this distinction provides the practical basis of my analysis, as it constitutes, at the same time, the ideological foundation upon which Brazil's social reality is built.

Before focusing on the gender aspects of organised armed violence in Brazil, a general understanding of the problem is required. In the first part of the text I will, therefore, begin by giving a broad overview of the situation, through introducing the different armed actors and outlining the relation between violence and factors such as social inequality, democratic consolidation and human rights. In the second part, I will deal with the question of violence and gender from a theoretical perspective, by investigating why violent conduct is predominantly a male feature and why femininity is usually associated with peacefulness. At that point I will argue that the social construction of violent masculinities is one of the main causes for men's use of violence. Furthermore, I will outline the long-neglected gender-specific effects of war on women as well as their contribution in the peace process, suggesting parallels to the situation of organised armed violence.

Finally, in the third and main part, I will approach the issue of organised armed violence in Brazil from a gender perspective. In order to provide a complete and well-structured analysis I will distinguish between three levels. First, I will look at the level of the perpetrators, focusing on the causes of the escalating violence and on the ways it is rooted in or otherwise connected with rigidly defined gender roles. The high death toll among men is the most visible and widely discussed outcome of violence in Brazil. This is why, on the second level, I decided to concentrate on women, whom I call 'hidden' victims, and the gender-specific or indirect effects that organised armed violence has on them. On the third level, I will deal with the gendered reactions of those impacted by violence and with the initiatives that women in particular undertake in the face of male-on-male violence.

This will lead me to the conclusion that there is clear evidence for the need to apply a gender perspective on organised armed violence in Brazil. This conclusion is, *inter alia,* based on the following main findings: level one — violent versions of masculinity are a major fuel of violence, especially in the context of gang culture; level two — due

to their position in the gender system, women are subjected to a range of indirect harmful effects of armed violence, which are generally overlooked; and level three — gender roles and their ascribed qualities and responsibilities can be a major factor in counteracting violence. This means that, currently, women are likely to contribute in specific ways to a culture of peace, but it also means that a breaking-up of gender roles would most probably result in more men engaging in anti-violence activism.

The impact of a gender perspective on effectively remedying and preventing organised armed violence and its diverse effects will become more obvious in the course of this argumentation. My reasoning and conclusions are not based on field research, but instead on the review of the general literature on gender on the one hand and violence in Brazil on the other as well as on the study of a large selection of newspaper articles and web resources. An interview that I conducted with Rita de Cássia Santos Freitas also proved to be very helpful. My own experience of having worked in an NGO in a Brazilian city adds the necessary understanding of the cultural context and the challenges of everyday-life. Still, detailed field research on the topic — as proposed in the annex to this text — would, in my belief, constitute a logical continuation of this work and may, as I hope, be an important contribution in the fight against both gender inequality and organised armed violence.

PART I: BETWEEN CRIME AND CIVIL WAR: URBAN AND POLICE VIOLENCE IN BRAZIL

1 'Só sei que a guerra começou':[3] The state of 'undeclared war'

If you are on a city bus in Rio de Janeiro and a tire explodes, you can immediately tell the tourists from the locals; while the former turn around to see what happened, the latter throw themselves onto the ground, assuming that a gun has gone off. This scene captures very well the climate of fear in which Brazilians spend daily life in the urban centres of their country. The reason for this fear is the extremely high level of armed violence in Brazil; ten thousand people are killed each year as a consequence of both the drug faction dispute on the one hand and of the (alleged) fight against crime by police and security forces on the other.

[3] 'I only know that the war has started' (Rapper MV Bill in 'Declaração de guerra', 2002).

To apply the definition given by the World Health Organization (WHO), the amount of both community violence[4] and collective violence[5] is so large that many experts, as well as the media, have begun to associate the current situation with war. An indication of this is the military-style language used by both the media and the security forces themselves when referring to territorial disputes between drug factions or police interventions in them: the police are 'invading' the hill and 'occupying' the *favelas*.[6] A National Security Force (*Força Nacional de Segurança*) is being trained explicitly for 'combat' in urban areas.[7]

As the historian Luís Mir, author of the book 'Guerra Civil – Estado e Trauma', (2005) points out:[8]

> Sem o desarmamento e a desmilitarização de grupos dentro e fora do Estado haverá o risco de o conflito ser permanente ou de a guerra civil ser aceita como necessidade de sobrevivência do Estado.[9]

Indeed, the exercise of armed urban violence, described by Mir as civil war, instead of being contained, has become epidemic. It has been gaining a permanent character, with the death toll, its most extreme indicator, constantly on the rise.

1.1 Facts and figures

For a country officially uninvolved in any armed conflict, Brazil presents an alarmingly high rate of homicides, especially among the young population. Between December 1987 and November 2001, for instance, 3 937 adolescents were killed by gunfire in the municipality of Rio alone. In the same period, 467 teenagers died from firearms in the conflict between Israel and Palestine.[10] According to a study published by UNESCO[11] involving research on 67 countries, Brazil is fifth in place concerning the number of young people violently killed.[12] For many reasons, the data on mortality rates and causes are

4 'Violence between individuals who are unrelated, and who may or may not know each other, generally taking place outside home.' WHO *World report on health and violence* (2002) 6.

5 '[This category] suggests possible motives for violence committed by larger groups of individuals or by states' WHO (n 4 above) 3.

6 'A polícia invadiu o morro' *O Globo* newspaper 13 March 2005, 'Cerca de 700 policiais ocuparam três favelas na zona norte do Rio' *O Globo* newspaper 9 March 2005.

7 *O Globo* newspaper 9 May 2005

8 Mir in M Monteiro *'Guerra Civil - estado e Trauma' conta as raízes históricas da violência no Brasil* 14 February 2005.

9 Without the disarmament and demilitarisation of groups within and outside the state, there will be the risk that the conflict might be permanent or that the civil war might be accepted as a necessity for the survival of the state.

10 Dowdney n 2 above.

11 UESCO *Mapa da Violência IV: Os jovens do Brasil. Juventude, Violência e Cidadania* (2004).

12 *Época* magazine 7 June 2004.

not very reliable, including, (among others), the manipulation of criminal data for political purposes as well as a lack of standardisation.[13] Therefore, it can be assumed that the authentic numbers are substantially higher than those officially circulating. Concerning homicide, these are, nevertheless, already considerably high. In its 'World Report on Violence and Health' (2002) the WHO registered 37 076 murders in Brazil for the year 1995, which equals a rate of 23 per 100 000 inhabitants. This number has climbed up to 47 899 or to a rate of 27.8 in 2001.[14] In some Brazilian states this rate was almost double, with for instance 50.5 homicides per 100 000 inhabitants in Rio de Janeiro.[15]

The overwhelming percentage of these homicides is committed with firearms, namely 68 percent in the year 2000.[16] Indeed, Brazilians are heavily armed; more than 17 million firearms exist in the country with more than half of them used illegally.[17] According to data collected in 1999, among under-20-year-olds 29 percent know someone who was shot with a firearm and 14 percent know somebody who has already killed someone.[18]

Perhaps even more alarming than the numbers mentioned thus far is the rate of homicides committed by the security forces of the state themselves. Of course, due to frequent manipulations, getting exact and trustworthy data on this matter is a near impossible venture. Many killings occur when police officers are off-duty or working at a second job, in some cases as private security guards or even as members of death squads. In 2003, for instance, 1 195 civilian deaths resulting from police operations were registered in Rio de Janeiro.[19] However, if the so-called 'resistance followed by death' as well as part of the number of disappeared persons are added, the death toll reaches 10 219, or 68.6 per 100 000 inhabitants.[20] A report presented by various NGOs and based on the collection of newspaper articles showed that in the whole country 13 917 people had been killed by police officers or death squads in 1999 alone.[21] This record of violations of the right to life is clearly the most shocking cost of armed urban violence in Brazil, which, of course, has a number of other consequences for individuals and society. It also shows that the situation in urban Brazil has transcended traditional definitions of

13 MFT Peres *Firearm-related violence in Brazil – Country Report* (2004) 23.
14 J Lemgruber *Violência, omissão e insegurança pública: o pão nosso de cada dia* (2004) 2.
15 Lemgruber (n 14 above) 6.
16 As above.
17 *Redação Desarme* 18 March 2005. The numbers cited in this article are taken from a study, at that point unpublished, named 'Brasil: as armas e as vítimas' by the Institute for Religious Studies (ISER).
18 Peres (n 13 above) 31.
19 Justiça Global *Rio Report: Police Violence and Public Insecurity* (2004) 17.
20 Lemgruber (n 14 above) 10.
21 S Kalili *O relatório da vergonha nacional* (not dated).

organised crime, yet, at the same time, cannot be classified as war in the proper sense either.

1.2 Organised armed violence — introducing a new concept

In his pioneering study on children involved in drug trafficking in the city of Rio de Janeiro, Luke Dowdney[22] presents a new term to describe the problem Rio is facing: organised armed violence. With this he refers to the armed disputes between drug factions, which, although sometimes involving the state, do not consider it a 'deliberate object of attack'[23] as it would be in a situation of war. According to Dowdney, for various reasons the concept of organised crime cannot appropriately define the situation either. On the one hand, he mentions the sheer scale of the phenomenon, the extremely high levels of violence and the very large number of deaths.[24] On the other hand, he points out a number of specific qualities, such as the precise structure of the drug factions on the local level, the fact that they are economically motivated, their territorial character or the control they have over the *favela* communities.[25] On the whole, Dowdney defines 'organised armed violence' as follows:[26]

> An intermittent armed conflict situation that involves over 1 000 deaths of combatants and civilians in a one-year period as the result of organised or semi-organised armed non-state groups with no political, religious, ethnic or ideological motivation, that are territorially defined and hold effective control over the communities which they dominate, utilise small arms and paramilitary organisation at the local level primarily for illicit economic gain, focus on children and adolescents as armed combatants and may confront the state through the use of armed violence if their economic advancement is threatened, yet have no intention of replacing state government or attacking government apparatus for political or territorial advantage.

Dowdney's study has triggered a research project on children and youth in organised armed violence in ten different countries, including Jamaica, Nigeria, the United States and the Philippines, with results to be presented in 2005.[27] For this purpose, a broader definition of the concept, applicable to different contexts, is being used. The above characterisation, though, very accurately describes the situation in Rio de Janeiro.[28]

22 Dowdney n 2 above.
23 Dowdney (n 2 above) 192.
24 Dowdney (n 2 above) 195.
25 Dowdney (n 2 above) 191.
26 Dowdney (n 2 above) 200.
27 See http://www.coav.org.br.
28 It must be noted that, as the territory or political unit it refers to is not identified, the given number of over 1 000 deaths per year does not constitute a precise benchmark.

However, within the framework of this text, I will use the term 'organised armed violence' in a much wider sense than that proposed by Dowdney. I will include in it the (often disproportionate) violence carried out by police and state security forces as well as by death squads and private security guards. In her case study on a *favela* in Rio de Janeiro, Donna M Goldstein shows very well how blurry the distinctions between bandits, police and so-called police-bandits actually are:[29]

> All three categories were used interchangeably [...], suggesting that the players had become hybridized to such an extent that nobody was certain who were bandits, who were police, or who were both.

It is a fact that a large proportion of security forces, generally motivated by economic gain, is involved in either corruption or death squad activities or collaboration with drugs dealers, and the extent to which many of them employ extra-legal violence is enormous. Undoubtedly, these forces can also be seen as part of the scenario of organised armed violence that currently rules the urban centres of Brazil.

2 On the rise: The armed actors of urban Brazil

Latin America, following the end of the rule of dictators, has witnessed a proliferation of armed actors, many of whom, such as guerrilla movements, criminal organisations or extra-legal extensions of formal state security forces, are illegitimate.[30] However, as mentioned above, differences between the various actors are not always that obvious or clear-cut. Koonings and Kruijt point out that:

> ... most analytical distinctions become unfocused or confused when day-to-day situations bring about a systematic interaction between the armed actors involved, particularly in local configurations.[31]

Still, it is certainly useful to distinguish between the different groups of actors, if only for the fact that, for instance, police forces can exert violence on individuals vested with powers given to them by the state authority. In addition, their acts generally go unpunished even if the violence has been extra-legal. Whereas aggressions related to drug trafficking constitute criminal offences, unlawful violence by state security forces can amount to state terror, and represents the failure of the state to respect the most basic of human rights.

29 DM Goldstein *Laughter out of Place. Race, Class, Violence, and Sexuality in a Rio Shantytown* (2003) 188.

30 K Koonings & D Kruijt (eds) *Armed Actors. Organised Violence and State Failure in Latin America* (2004) 9ff.

31 Koonings & Kruijt (n 30 above) 11.

2.1. Drug traffickers

There is a steadily growing number of *favelas* in Brazil's urban centres. In Rio, for instance, the quantity has risen to over 500 in the year 2000, with about 20 percent of the municipality's inhabitants living in them.[32] Among the largest are *Rocinha*, *Jacarezinho* and *Complexo do Alemão*, which are all vibrant communities and home to many of Rio's working class. Yet at the same time, these names are associated with the bitter warfare between rival drug gangs and the no less brutal police interventions.

Practically every *favela*, or *comunidade*[33] as it is often referred to by its residents, is controlled by a drug faction, the two most well-known being the *Comando Vermelho*[34] and the *Terceiro Comando*.[35] The drugs trade in Rio, on the rise since the start of large-scale cocaine traffic through the country at the beginning of the 1980s,[36] shows, as Alba Zaluar, a renowned sociologist researching the topic, puts it, 'an efficient horizontal structure by which a shantytown that runs out of drugs or guns immediately gets them from allied shantytowns'.[37] The person who controls the drug selling points of a *favela*, the *bocas de fumo,*[38] can be said to be the *dono do morro,* the owner of the 'hill', highest in the hierarchy. It is worth noting that the age of the majority of those involved in drug trafficking is very low, with children as young as seven, in some cases, taking part in it.[39]

The reasons many of the young *favela* residents feel drawn to the drug trade are manifold: in a society that does not provide them with a chance for social mobility, drug trafficking offers a survival strategy[40] or, according to Zaluar, an opportunity for a 'perverse integration'.[41] It guarantees large amounts of money and permits a lifestyle otherwise impossible to achieve, although at a high cost, as shown by the statement of an ex-drug dealer:[42]

> Está vendo dinheiro, está andando bonitão. No fundo, se botar a cabeça para funcionar, vai ver que aquilo ali não serve para ele. Vai começar a ver que não tem mais liberdade para andar no asfalto tranquilo, vai começar a perder noite de sono, vai ter que viver fugindo da polícia e

32 http://www.favelatemmemoria.com.br (accessed 12 May 2005).
33 Community.
34 Red Command.
35 Third Command.
36 A Zaluar *Urban violence and drug warfare in Brazil* in Koonings & Kruijt (n 30 above) 147.
37 As above.
38 Literally: points of smoke.
39 M Monteiro *Study shows that children as young as seven are taking part in Rio drug trade* 7 March 2005.
40 NB Oliveira *Protestos ou Vandalismo? Revoltas urbanas no Rio de Janeiro na perspectiva da imprensa carioca (1999-2002)* (2004) 23.
41 Zaluar (n 36 above) 140.
42 In *Viva Favela* 12 January 2005.

> andar sempre com uma arma na mão. No início ninguém pensa nessas coisas, só depois é que a gente vê. Mas aí não dá mais para voltar atrás.[43]

This dangerous life, full of armed disputes with other gangs or the police, regularly results in an early death. In the world of drug traffickers, violence becomes ordinary business, and killings out of revenge[44] or as a punishment for behaviour that deviates from established rules, are frequent.

Naturally, this war-like situation does not leave the vast majority of the *favela* residents, uninvolved in drug trafficking, unaffected. All too often during times of invasion by rival factions or when police curfews are imposed, innocent bystanders are killed by stray bullets. Residents also have to follow clear rules of conduct, in some *favelas* even needing the permission of the drug chief to invite guests.[45] Nevertheless, the relationship between the *favela* population and the drug gang in charge is an ambiguous one; due to the neglect of the state in fulfilling its functions in these impoverished parts of the cities, drug chiefs are often seen as protectors, providing basic services and establishing an alternative (if somewhat distorted) justice system.[46] Drug chiefs remain, regardless of the individual attitudes of the residents, important local figures and many, especially among the young, admire them as home-grown heroes.[47] Thus, despite the danger and humiliation they bring into the communities, drug traffickers are often perceived as 'closer' than law enforcement officers, for indeed, sometimes they are neighbours or childhood friends.[48] The well-known Brazilian rapper MV Bill sums it up like this:

> Não sou a favor da polícia nem a favor do tráfico e na favela tem os dois. Só que o pessoal do tráfico entende minha posição.[49]

43 He sees the money, he is walking around well-dressed and good-looking. Deep down, if he starts to think, he will see that it's of no use. He will start to see that he has no more freedom to walk around in the city [the term *asfalto* refers to the non-*favela* parts of a town], he will lose his good night's sleep, he will have to live on the run from the police and always walk around with a gun in his hand. In the beginning, nobody thinks of those things, it's only afterwards that you see it. But then it's too late to turn back.

44 Goldstein (n 29 above) 189f.

45 'Sob as leis do tráfico' *Época* magazine 315 May 2004.

46 Goldstein (n 29 above) 190-201.

47 Goldstein (n 29 above) 181.

48 Oliveira (n 40 above) 36.

49 I'm not in favour of the police nor am I in favour of the trafficking and in the *favela* we have both. But the guys from the trafficking understand my position. MV Bill quoted by Oliveira (n 40 above) 3.

2.2 Police forces

> Our group is on the street, and if there must be armed conflict, then so be it. If someone must die because of it, then let him or her die. We are going in.[50]

This statement by the Secretary of Public Security of Rio de Janeiro expresses very well the zero-tolerance policy towards crime that many state officials, as well as large parts of the Brazilian population, advocate. In this 'society of fear'[51] the exertion of intense violence, and even the killing of (supposed) criminals is condoned by an alarmingly high number of people. This public sentiment as well as other factors, including the *de facto* impunity of police officers as a result of shortcomings in the judiciary system,[52] leads to the striking reality that, for instance, Rio police are responsible for more killings than all the police forces of the United States[53] taken together.[54] The disturbingly high number of police killings has received the attention of the United Nations, which, in 2003, sent Asma Jahangir, then special rapporteur on extrajudicial, arbitrary and summary executions, on a mission to Brazil. The report states that 'the special rapporteur was overwhelmed with information of human rights violations perpetrated by security forces, in particular the military police, in total impunity'.[55] Especially revealing and shocking was the fact that two of the witnesses who had been interviewed by the special rapporteur were killed shortly afterwards.[56] The following incident is only one among many recorded by NGOs such as *Justiça Global* with the help of witness reports:[57]

> On the night of January 6, 2004, the youths W, D, G, M, age 13, J, C, P, J, age 16, Flávio Moraes de Andrade, age 19, E, M, A, age 17, and José Manoel da Silva, age 26, were gathered playing a game of dominoes near a grocery store in the Parque da Alegria complex, located in the neighbourhood of Caju in Rio de Janeiro, when two military police officers arrived suddenly and opened fire leaving the youths helpless and

50 Rio State Secretary of Public Security Josias Quintal, in *O Globo* newspaper 27 February 2003, quoted by *Justiça Global* (n 19 above) 16.

51 Koonings & Kruijt (n 30 above) 7.

52 According to the NGO *Justiça Global*, the military justice system (it is the military police that is in charge of day to day policing) is one of the causes for the impunity enjoyed: *'Only the trial of cases involving exceptional homicides currently fall under the responsibility of civilian courts. [...] Meanwhile, the initial police inquiry remains in the hands of the police, as well as the decision to classify the crime an 'exceptional homicide'*. Justiça Global *Human Rights in Brazil 2003* (2004) 42.

53 The United States already has a rate of police killings much higher than any other developed country in the world. Lemgruber (n 14 above) 7.

54 Lemgruber (n 14 above) 7.

55 United Nations *Civil and Political Rights, including the question of Disappearances and Summary Executions. Extrajudicial, summary or arbitrary executions* (2004) 2.

56 United Nations (n 55 above) 4.

57 Justiça Global *Human Rights in Brazil 2003* (2004) 34.

> with no time to respond. According to information provided by family members, witnesses claim that the youngsters tried to identify themselves. [...] On the morning of January 7th, three of the five bodies were found in a swamp behind the garage of a bus agency [...] Without regard for the pain and suffering of the families, one police officer remarked, 'One less pig for us to arrest'.

This appalling, but by no means exceptional, event shows that military police do obviously kill not solely as a means of defence or in situations of armed confrontation. On the contrary, many of them carry out targeted executions, whether as a sort of revenge for a dead colleague or as a paid assignment.

2.3 Death squads

For quite a long time, the international public has been aware of death squad activity in Brazil, which, nevertheless, has remained uncurbed to this day. The most infamous incident in this regard is probably the *Candelária* massacre of 1993, in which seven children and adolescents living on the street were killed while sleeping in front of the *Candelária* church in the centre of Rio de Janeiro. Street children are one of the targets of death squads, whose job normally is to eliminate 'undesired' elements, such as criminals or human rights activists. Death squads are also referred to in the UN report:[58]

> Witnesses met by the Special Rapporteur gave horrifying accounts of groups of armed men in civilian clothes, operating under hoods, using sophisticated rifles and carrying out random killings of innocent civilians. Dead bodies are found mutilated, with heads severed, ears and organs cut off while corpses are left to rot.

The report emphasises the link that many of these death squads have with the law enforcement agencies[59] and gives the striking example of *Scuderie Detetive Le Cocq* (SDLC), a death-squad-like association with thousands of members, most of them police officers, known for many years to act in the State of *Espírito Santo* and, despite ongoing investigations, is still in existence.[60]

Little has changed since the visit of the UN Special Rapporteur. On 31 March 2005 a massacre occurred in Rio de Janeiro that caused an outcry in the whole country: within two hours and in an extension of 15 kilometres 30 people were shot randomly in the *Baixada Fluminense*, a poor area in Rio. Among them were, for instance, two teenagers, who were at that moment playing flipper in a bar.[61] The incident caused an immediate reaction by the Federal Government

58 United Nations (n 55 above) 13.
59 As above.
60 United Nations (n 55 above) 14.
61 'Oito policiais são indiciados por suspeita de envolvimento na chacina' *O Globo* newspaper 9 April 2005.

and it seems that investigations are being carried out thoroughly, which is a rather rare case. Everything points to the involvement in the massacre of eight or more members of the military police.[62] This again proves that the distinctions between the different actors operating in the realm of organised armed violence have become blurred, and that ordinary citizens may find themselves threatened from various sides.

3 Below the surface: Causes and effects of this violence

3.1 Social inequality, poverty and racism

> As favelas se tornaram campos de concentração. Ali não existe saúde, não tem educação, só um cerco bélico e militar. Se sair, leva tiro. Não por acaso, as vítimas da violência são os mesmos desde sempre na história do Brasil: os pobres, os negros, os segregados.[63]

How historian Luís Mir metaphorically describes the spatial segregation in accordance with the social order might seem a bit drastic, however, it is a fact that Brazilian society is one of the most unequal on the globe; the World Development Index (2002) shows that, with 60.7 percent, Brazil has the fourth highest gini index in the world — an indicator for social inequality calculated on the basis of income share — surpassed only by Sierra Leone, the Central African Republic and Swaziland.[64]

This asymmetrical income distribution within the country also points to the racial inequality that indeed exists in Brazil, despite the apparent merging of 'colours' and its image of being a 'racial democracy'. In 1999, for instance, 26.2 percent of 'black' and 30.4 percent of 'mulatto' families had to live with half the minimum salary as compared to 12.7 percent of 'white' families.[65] Contrary to the perception of many apprehensive middle and upper class Brazilians, it is in fact the poor, often black population that is most affected by the high levels of daily violence, as shown by the example of Rio de Janeiro. While the homicide rate in the *Zona Sul*, the area where the wealthiest part of the population lives, varies between 4.7 and 10 per

62 As above.
63 The *favelas* have become concentration camps. There is no health care, no education, only a warlike, military fence. If you leave, you get shot. It is no coincidence that the victims of violence are the same as always in Brazilian history: the poor, the black, the segregated. Mir in Moneiro (n 8 above).
64 http://www.infoplease.com/ipa/A0908770.html (accessed 13 May 2005).
65 http://www.igbe.gov.br/home/presidencia/noticias/0404sintese.shtm (accessed 13 May 2005).

100 000, it rises to a striking 84 per 100 000 in *favela* or suburban districts such as *Acari* or *Santa Cruz*.[66]

Not only the victims of ordinary crime, but also that of police brutality are, for the most part, poor, 'black' and *favela* residents. Many police officers believe that they are able to tell a criminal from an ordinary worker just by looking.[67] In fact, prejudices, often involving 'race', very frequently build the sole basis for those judgments.[68] These biased attitudes also become evident in the data collected in 2004 by the research institute *Datafolha* in the area of São Paulo. It shows that 91 percent of young 'black' men between 16 and 25 have already been stopped and searched by the police, as compared to 46 percent of the general population.[69] Although the *favelas* and their peripheries are indeed the epicentres of organised crime and armed violence[70] — due very much to a lack of state services[71] —, the percentage of residents actually engaged in criminal activity is extremely small, and, according to security experts, sometimes does not exceed one percent.[72] Still, the view that criminality can be identified with poverty is widespread in Brazil. Cecília Coimbra, expert on urban violence, speaks of the myth of the dangerous classes[73] and states:[74] 'Antes [durante a ditadura], o grande perseguido era o opositor politico, hoje é a pobreza'. According to *Justiça Global*, as a result of a wrongly conducted discourse on public security, an actual criminalisation of poverty is taking place:

> The distinction between *citizen* and *criminal* is transmuted in public opinion to a distinction between *citizen* and *favela resident*, setting up the two sides of the 'war'.[75] [...] The association between poverty and violence is the greatest justification for the extermination policy that has been practiced for years in the state's urban areas.[76]

The growing number of studies that point to a false association between urban poverty and violent crime[77] may be able to counteract this currently dominant perception. Some authors have arrived at the

66 Lemgruber (n 14 above) 4.
67 Oliveira (n 40 above) 25.
68 Lemgruber in *Época* magazine 300 February 2004.
69 http://www1.folha.uol.com.br/folha/datafolha/po/segurança_12022004.shtml (accessed 15 March 2005).
70 Oliveira (n 40 above) 23.
71 Justiça Global (n 19 above) 20.
72 Dowdney (n 2 above) 51.
73 Cecília Coimbra 'Operação Rio: O Mito das Classes Perigosas – Um Estudo sobre a Violência Urbana, a Mídia Impressa e os Discursos de Segurança Pública' [Operation Rio: The Myth of the Dangerous Classes — A Study on Urban Violence, the Print Media and Discourses of Public Security] (2001).
74 Coimbra in C Ribeiro *Estado: maior violador dos direitos humanos* 16 December 2001.
75 Justiça Global (n 19 above) 13.
76 Justiça Global (n 19 above) 19.
77 M Misse *Cidadania e Criminalização no Brasil: o problema da contabilidade oficial do crime* (1997) 2.

conclusion that the degree of urbanisation is a much more important factor than either income or inequality.[78] Zaluar is probably right when she says that 'a combination of accelerated urbanization and persistent poverty'[79] is responsible for the growing presence of organised crime in urban poor communities. Yet the common response to this problem, which consists of employing harsh security measures and the toleration of brutality by state police, aggravates the spiral of violence, contributing to the victimisation of already marginalised parts of Brazilian society.

3.2 Democratic consolidation and state failure

Brazil experienced a transition from military rule in 1985 and since then has been a presidential parliamentary democracy. Around the same time a rise in social violence set in, whose paradoxical coexistence with the democratic order led Koonings and Kruijt to name the prevalent Latin American system of governance 'democracies-cum-violence'.[80] Remnants of the authoritarian past, such as parts of the legislation or 'traditional' conduct of the military police, are most likely among the reasons for the occurring extra-legal violence. It does not, however, explain the growing phenomenon of 'new violence'[81] with its varied dimensions, which, according to Koonings and Kruijt, marks Latin American societies, including Brazil, today:[82]

> As a result of this 'new violence' [...] one of the most noteworthy characteristics of contemporary Latin American societies is the de facto coexistence of formal constitutionalism, (electoral) democracy and an often vibrant civil society on the one hand, and the use of force to stake out power domains or pursue economic or political interests on the other hand.

The proliferation of armed violence, frequently perpetrated by state-related actors, threatens the state's permanent monopoly of legitimate force. This can lead to voids in governance that hamper the democratic consolidation of the state or, in the worst case, can induce its collapse.[83] Brazil's democracy has not collapsed, at least not yet, but what we find is indeed partial state failure. It is in this context that Goldstein refers to Guillermo O'Donell (1993) who, in order to describe the realities of democratic consolidation in countries such as Brazil, developed a geographically oriented concept

78 Lemgruber (n 14 above) 5.
79 Zaluar (n 36 above) 140.
80 Koonings & Kruijt (n 30 above) 15.
81 Koonings & Kuijt (n 30 above) 6.
82 As above.
83 Koonings & Kuijt (n 30 above) 7.

of democracy, distinguishing 'blue', 'green' and 'brown' zones.[84] The residents of the 'brown zones' only enjoy, in the words of O'Donell, a 'low-intensity citizenship'[85] with an almost non-existing state presence. Goldstein applies this concept to the *favelas* of Rio de Janeiro:[86]

> It is these brown zones [...] that not only lack a workable rule of law and trustworthy police but also lack a state capable of providing a fair minimum wage, decent employment, good-faith health care, and all the other amenities enjoyed by the middle and elite classes in Brazil and in other advanced industrialized nations.

As a consequence of the state's absence, drug gangs take control over many of these neighbourhoods, and form a parallel power structure[87] or, in the opinion of others,[88] a parallel state.

As long as the two 'nations' within Brazilian society[89] do not merge into one, there is a two-fold risk for the consolidation of democracy in the country. On the one hand, violence among the socially excluded population denied citizenship-rights will grow, partly out of frustration. On the other hand, as a reaction, public support for extra-legal violence and authoritarian methods will increase, with some even becoming nostalgic about the military dictatorship.[90]

3 Defending the enemy: Public (in)security and human rights

> Infelizmente não há lugar seguro, qualquer lugar que ando, tenho muito medo mas infelizmente não tenho como evitar certos lugares, pois não há neste estado segurança. Eu teria que ficar dentro de casa para me sentir segura, mas mesmo assim posso ser atingida por uma bala perdida.[91]

84 'He denotes 'blue' zones as areas that have a high degree of state presence [...]; 'green' zones as those with a high degree of territorial penetration and a lower presence of the state in functional and class terms'. Goldstein (n 29 above) 198.
85 Goldstein (n 29 above) 198 f.
86 Goldstein (n 29 above) 200 f.
87 Dowdney (n 2 above) 193.
88 For instance Leeds (1996) referred to by Goldstein (n 29 above) 209.
89 Mir in *Época* magazine 340 November 2004.
90 On the question — 'What are the places in Rio that you avoid because of fear of violence?' — one of the readers of 'Globo online' posted: 'Hoje em dia não trem mais essa de lugar perigoso, todos são! [...] Deveriam colocar o exército nas ruas, nas favelas, e voltar à época militar que vivíamos bem mais tranquilos do que hoje'. [Today there is no such thing as a dangerous place, all are! They should put the army on the streets, in the favelas, and go back to the time of military rule, because back then we used to live a lot more peacefully than today.] 'Mônica' in *O Globo* newspaper 10 March 2005.
91 Unfortunately, there is no safe place, whatever place I go to I feel very afraid, but unfortunately there is no way I can avoid certain places, because there is no security in this state. I would have to stay home to feel safe, but even so I can be hit by a stray bullet. 'ione quinhoes' in *O Globo* newspaper 10 March 2005.

The question concerning safety in Rio de Janeiro put to its readers by the online version of the newspaper *O Globo* provoked many answers similar to the one above. It seems that a large part of Rio's population, especially in the middle and upper class, are actually terrified and live in a climate of constant fear of violence. Calls for the reintroduction of the death penalty and for harsh law-and-order policies grow louder and helpless politicians like the vice-governor of Rio de Janeiro, Luiz Paulo Conde, have made ridiculous suggestions such as the building of a wall around the *Rocinha favela*, after violence exploded there in April 2004.[92]

Indeed, in urban Brazil, those who can afford it withdraw to closed condominiums under surveillance of private security guards. In her pioneering study 'City of Walls: Crime, Segregation, and Citizenship in São Paulo' (2000), the anthropologist Teresa Caldeira describes the increase of the so-called gated communities, also very common in the United States, and their effects on society. The concomitant privatisation of security and the death-squad activities of certain brutal vigilante groups are only some of the problems human rights defenders face in light of rising crime rates and growing fear. As the International Council on Human Rights Policy observes in its study titled 'Crime, Public Order and Human Rights', public outrage about rising crime also results in an '*increased* hostility toward those seen as coddling dangerous criminals'.[93] In Brazil, this becomes terribly visible in the death threats that human rights activists, such as the researchers of the NGO *Justiça Global,* regularly receive[94] or, even worse, in the killings of judges who stand up against impunity.[95]

Human rights and public security are no contradiction; in fact, they depend on each other. Only a state that respects, protects and fulfils human rights can guarantee public security, and only a citizen who lives in a safe environment can enjoy his or her human rights to the full extent. This interdependence seems to have been acknowledged by the current federal government under Luís Ignácio 'Lula' da Silva; his National Plan For Public Safety adopted by the Ministry of Justice consists of a combination of social and security policies, and involves, *inter alia,* a particular emphasis on human rights in police training[96] and an array of measures against impunity.[97] But good ideas and intentions are not everything; their realisation depends fundamentally on the partly reluctant state

92 *Época* magazine 309 April 2004.
93 International Council on Human Rights Policy *Crime, Public Order and Human Right* (2003) 5.
94 Kalili (n 21 above).
95 United Nations (n 55 above) 11.
96 United Nations (n 55 above) 19.
97 Justiça Global (n 57 above) 43.

governments and is hampered by the resistance of police institutions and their strong lobby in state legislatures.[98]

However, despite these recent moves in the right direction, the problem of urban violence, state terror and public (in)security is too huge, complex and enduring to have a fast and easy solution. It can only be overcome if it is examined from a range of angles and tackled through various approaches. A gender perspective on the issue, although currently neglected, offers — as we will see — a significant contribution to understanding, combating and preventing organised armed violence and its diverse effects.

PART II: VIOLENT MEN, PEACEFUL WOMEN?

1 Perpetrators and victims

When looking at gender-disaggregated numbers concerning armed violence in Brazil, one might conclude that it is an almost exclusively 'male problem'. Between 1980 and 1988, 91 percent of the homicide victims were men and only nine percent were women.[99] Among the young population, age 15 to 24, the difference becomes even more drastic, with 93 percent of those murdered in 2000 being male and merely seven percent female.[100] In fact, although the proportions vary, more men die a violent death than women everywhere in the world,[101] and a considerable number of them are caused by firearms. At the same time, however, the overwhelming number of perpetrators of violent acts are male and, as Amnesty International (AI) states, 'the vast majority of those who make, sell, buy, own, use or misuse small arms are men'.[102]

First of all, as Robert W Connell remarks, men almost have a monopoly on the legitimate use of violence:[103]

> The 30 million members of the world's armed forces today are overwhelmingly men. In many countries all soldiers are men; and even in those countries that admit women to the military, commanders are almost exclusively men. Men also dominate other branches of enforcement, both in the public sector as police officers and prison guards, and in the private sector as security guards.

98 As above.
99 Peres (n 13 above) 19.
100 Peres (n 13 above) 21.
101 WHO (n 4 above).
102 AI *et al The impact of guns on women's lives* (2005) 2.
103 RW Connell 'Arms and the man: using new research on masculinity to understand violence and promote peace in the contemporary world' in I Breines *et al* (eds) *Male roles, masculinities and violence. A culture of peace perspective* (2000) 21.

It goes without saying that the predominance of men is not restricted solely to state-sanctioned violence. Men are more likely to be violent on the interpersonal level as well. Connell cites data according to which, in the United States (1993) and in Australia (1992/93) men were responsible for more than 90 percent of the committed homicides.[104] In addition, domestic violence is exerted to a large extent by men on their female partners.[105] Last but not least, men prevail in 'warlike conduct',[106] such as in body-contact sports like boxing and football or in dangerous driving, which leads to four young men being killed on the road for every young woman.[107]

Despite the strikingly 'male character' of violence and war, women cannot be simply reduced to the role of victims of aggression. Many women actually do actively take part in armed conflicts, several serve as soldiers or in the police and some are terrorists or murderers. Also, there is evidence that domestic violence exerted by women on their children or husbands is not as rare as one might think.[108] However, violent behaviour by women remains an exception, whereas male violent conduct in certain contexts (such as in gang or military culture), has become the norm.

As we have seen above, men not only predominate among the perpetrators of violence, but also among the victims of (armed) violence.[109] Still, if one considers the fact that women are rarely the ones who commit violent acts, they suffer disproportionately, both directly and indirectly, from violence, particularly armed violence.[110] Moreover, in addition to running the same risks as men, women are also potentially subjected to gender-based violence, such as sexual harassment, rape, genital mutilation or forced pregnancy. Violence, thus, is clearly not gender-blind. As Liz Kelly points out, 'the use of violence — interpersonal, state-sanctioned and insurgent — remains a primarily masculine preserve'.[111] Women are sometimes perpetrators, but more often they are victims of aggressive acts and in many cases, they are advocates against violent behaviour. In order to understand and combat violence, it is important to find possible reasons and explanations for this gendered reality.

104 As above.
105 Connell (n 103 above) 22.
106 As above.
107 As above.
108 N Lourenço *Violência Contra as Mulheres* (1997) 17.
109 An explanation for this might be found, *inter alia,* in the common distinction between a male-related public sphere and a female-related private sphere. Men are more susceptible to violence exercised by other men in the public space, while women run a higher risk of being attacked in their homes, usually by their male partners. (E Blay 'Assassinadas e não assassinas' 2000 11 *Journal da USP* 8).
110 AI *et al* (n 102 above) 2.
111 L Kelly 'Wars Against Women: Sexual Violence, Sexual Politics and the Militarised State' in S Jacobs *et al* (eds) *States of Conflict: Gender, Violence and Resistance* (2000) 46.

2 Gender roles and violence – Looking for explanations

2.1 Gender vs sex; equality vs difference

The distinction, rooted in constructionist gender theory, between 'sex' on the one hand and 'gender' on the other, has nowadays become commonplace in the social sciences. Using the definitions given by the WHO,[112] 'sex' refers to the biological and physiological characteristics that define men and women, whereas 'gender' refers to the socially constructed roles, behaviours, activities, and attributes that a society considers appropriate for men and women. Noeleen Heyzer extends this description by stressing that 'gender' also implies 'the power relationships that perpetuate these roles'.[113] Mary Maynard refers to Judith Butler when she points out that gender cannot simply be reduced to the binary opposition of men and women, an assumption that bases itself on a heterosexual world-view.[114] Moreover, historic constructionists such as Denise Riley discard the idea that even 'women' exist in any stable form:[115]

> 'women' is historically, discursively constructed, and always relatively to other categories which themselves change; 'women' is a volatile collectivity in which female persons can be very differently positioned, so that the apparent continuity of the subject of 'women' isn't to be relied on.

Gender, therefore, encompasses a variety of possible socially constructed and, to a certain degree, unstable identities and roles, whose relation to the biological sex is contested among feminists, but which are clearly rooted in the particular cultural context.[116]

The women's rights movement has been divided for a long time when it comes to the question of how to tackle the uneven power relations between men and women. The main controversy evolves around equality vs difference approach. While liberal feminists deny intrinsic differences between men and women, cultural feminists celebrate existing distinctive qualities and features.[117] According to

[112] http://www.who.int/gender/whatisgender/en/ (accessed 5 May 2005).
[113] N Heyzer *Gender, Peace and Disarmament* (2003) 5.
[114] M Maynard 'Women's Studies' in P Essed *et al* (eds) *A Companion to gender studies* (2005) 34.
[115] D Riley '*Am I That Name?' Feminism and the Category of 'Women' in History* (1998) 1f.
[116] For the purpose of this thesis, however, I will focus on socially constructed masculinities and femininities, thus retaining a certain dualism. This is because, although the dichotomy between male and female gender and even between male and female sex has been rejected by constructionist and deconstructionist gender theorists (J Squires *Gender in Political Theory* 2004 54-79), social reality in Brazil is based on the assumption of this binary opposition.
[117] RJ Cook 'Women's International Human Rights Law: The way forward' in RJ Cook (ed) *Human rights of women: National and international perspectives* (1994) 5.

Lucy Sargisson, in liberal feminism 'equality (or sameness) of characteristic is the grounding for arguments of equality (or sameness) of treatment and opportunity'.[118] The obvious problem with this assumption is that deviating from the masculine norm is apparently seen as something undesirable. Equality is structured around the male comparator,[119] an underlying supposition, also very common in law, which contributes to overlooking the systemic nature of discrimination.[120] Challenging the equality paradigm, advocates of the difference approach stress the importance of values either associated with femininity or inherently feminine. By doing so, they run the risk of reinforcing and institutionalising stereotypes of women's behaviour, qualities and characteristics.

Both positions demonstrate a clear logic, but each has its shortcomings. This has led Nancy Fraser to the conclusion that 'neither equality nor difference [...] is a workable conception of gender equality'.[121] Sargisson[122] locates the problem in the binary opposition of these two paradigms, which only allows for a choice between equality and difference.[123] The most desirable position is probably a combination of the concepts of equality and difference and the promotion of an equal society in which there is room for different versions of masculinity, femininity and alternative gender identities — without structural power imbalances among or between them.

2.2 Men are from Mars, women are from Venus — essentialising gender

In every society in the world, people are categorised according to their sex and gender, which generally entails the attribution of certain specific characteristics and qualities to men on the one hand and women on the other. Common gender-based stereotypes in our society are well-known: Men are said to be rational, competitive and aggressive, while women allegedly tend to be emotional, timid and pacifist. Gender differences are thus essentialised, presupposing 'the existence of fixed characteristics, given attributes, and ahistorical functions'.[124] Explanations for the predominance of male violence

[118] L Sargisson *Contemporary Feminist Utopianism: The equality/difference dilemma* (not dated)
[119] Cook (n 117 above) 11.
[120] Cook (n 117 above) 5.
[121] N Fraser quoted in JS Tucker *Morality or equality? Maternal thinking and the social agenda* (2003) 8.
[122] Sargisson (n 118 above).
[123] The debate on equality vs difference was largely undermined by the growth of identity politics and deconstructionist theories, which are concerned with corporeality in a non-dualistic manner (J Squires *Gender in Political Theory* 2004 132-139).
[124] Grosz quoted by JC Wesselius *Gender Identity without Gender Prescriptions: Dealing with Essentialism and Constructionism in Feminist Politics* (not dated) 2.

often draw upon biological essentialism, and indeed, there is a widespread belief that it is simply in the nature of men to behave violently. The 'male hormone' testosterone is often regarded the main biological culprit when explaining male aggression. Connell, however, by referring to cross-cultural studies on masculinities, defies this thesis and emphasises that testosterone levels can very well be a result of social relations.[125]

Nevertheless, despite the understandable reluctance on the part of social scientists and feminists, biological explanations for men's violence cannot be easily dismissed and, to some extent, do not lack a certain logic. Psychologist David P Barash, for instance, points to aggressive male behaviour found throughout almost the entire animal world, which is rooted in male-to-male competition for access to females in order to maximise reproductive success. Female violence among human and other species, he argues, is rare and, with few exceptions, generally takes a defensive form. He concludes:[126]

> That the ratio of male-male to female-female violence remains remarkably unvarying from place to place argues for its biological underpinnings and parallels the male-male competition seen in other species.

Indeed, it is a fact that violence is perpetrated to an overwhelming amount by men, independent of the cultural context — whether in the United States, Rwanda, Cambodia or the Middle East — and throughout the various periods of history. Still, it also remains a fact that the majority of men are not violent, which at the same time renders the idea of an essentialised aggressiveness inherent to all men less plausible. As Connell points out:[127]

> Almost all soldiers are men, but most men are not soldiers. Though most killers are men, most men never kill or even commit assault. Though an appalling number of men do rape, most men do not.[128] It is a fact of great importance, both theoretically and practically, that there are many non-violent men in the world.

While being a man is, among other things, generally associated with violent behaviour, women are commonly said to be more peaceful and conciliatory by nature. Explanations for this essentialist view principally revolve around the biological reality and social construction of motherhood. Proponents of the so-called maternalist position see an intrinsic link between women, motherhood and non-violence.[129] According to the position, their biologically assigned role

[125] Connell (n 103 above) 22.
[126] DP Barash *Evolution, males and violence* (2002) 6.
[127] Conell (n 103 above) 22.
[128] This assumption has to be doubted, though, especially when applied to certain cultural contexts.
[129] S Jacobs *et al* 'Introduction: States of Conflict' in S Jacobs *et al* (eds) *States of Conflict: Gender, Violence and Resistance* (2000) 13.

and actual or potential experience of becoming and being mothers leads women to be more caring, nurturing and compassionate.[130] Indeed, women's roles and responsibilities as mothers, as we will see, have triggered various female-led initiatives for peace, disarmament and non-violence. But there are also assumptions that, with social constraints removed, women would be actually just as violent as men.[131] In her study on women and peace in Northern Ireland, Ruth Jacobson for instance concludes:[132]

> The history of the Northern Ireland conflict does not produce convincing evidence of a categorical preference for 'peace-making' among women as mothers. On the contrary, their positions have ranged from irredentism, through a general 'politics of avoidance' and an absolute commitment to non-violence, even at personal risk.

Essentialist views on gender roles carry with them the problem of cementing existing stereotypes and turning them into virtual 'gender prescriptions'.[133] This also implies the acceptance of major injustices and problems of society such as women's oppression and it considers male violence as given and unalterable. Whatever the reason may be that men behave more violently than women, reality shows that violent conduct is not (anymore) a biological necessity and, thus, susceptible to change.

2.3 'Boys will be boys' — violent masculinities

Instead of getting involved in the debate on biological differences, we should focus on socially constructed masculinities. As research shows, this is where we find the main causes and answers to gendered violence.[134] A varied range of masculine and feminine identities[135] exists in every society, generally with one masculinity and femininity being the dominant or 'hegemonic' one.[136] This array of gender concepts, as Judy El-Bushra points out, is intimately linked to the specific cultural context, the interplay of different historical factors

130 JS Tucker *Morality or equality? Maternal thinking and the social agenda* (2003) 2.
131 Jacobs *et al* (n 129 above) 13.
132 R. Jacobson 'Women and Peace in Northern Ireland: A Complicated Relationship' in S Jacobs *et al* (eds) *States of conflict: Gender, violence and resistance* (2000) 195.
133 JC Wesselius *Gender identity without gender prescriptions: Dealing with essentialism and constructionism in feminist politics* (not dated).
134 Connell (n 103 above) 23.
135 This does not mean that there cannot be gender identities that do not fit in either of the two categories. It is a fact, however, that at least in our society the social environment hardly provides for gender definitions that do not somehow involve ideas of masculinity and femininity.
136 Connell (n 103 above) 24.

and partly derives 'from communal perceptions of appropriate behaviour'.[137]

What definition of masculinity is prevalent in a given society has, in fact, a remarkable impact on its inclination to violence. A number of studies by anthropologists such as Joanna Overing illustrate this fact:[138]

> In the Amazon jungle, the extremely violent Shavante define manhood as 'sexual bellicosity', a state both superior and opposed to femininity, while their peaceful neighbouring Piaroas define manhood and womanhood as the ability to cooperate tranquilly with others in daily life.

Surveys in Nordic countries[139] similarly show that, among men, non-violent and gender-egalitarian attitudes normally go together.

However, in many contexts, such as in conflict or post-conflict situations, the hegemonic form of male identity[140] consists in a violent or militarised masculinity, closely associated with being tough, armed and individualistic.[141] As male identities are generally complex, dynamic and contradictory, violent masculinity, according to Henry Myrttinen, 'also involves the suppression of alternative, competing masculinities not only in others but in oneself as well'.[142] The existing relations of hierarchy and exclusion among different masculinities and the consequential conflict between alternative identities are also seen as an important factor in explaining male-on-male violence.[143] At the same time, the heterogeneity and dynamic character of masculinities implies the possibility of questioning, contesting and displacing them, which constitutes a valuable finding for peace education.[144]

> One needs to work with the alternative unarmed, non-violent concepts of masculinity [...] already existing in the society in question, further developing and opening possibilities for these and empowering them, thus laying the groundwork for a sustainable peace.

Fostering non-violent, constructive (instead of destructive) models of masculinity might indeed be of tremendous importance in tackling

137 J El-Bushra 'Transforming Conflict: Some Thoughts on a Gendered Understanding of Conflict Processes' in S Jacobs *et al* (eds) *States of conflict: Gender, violence and resistance* (2000) 80.

138 M Kimmel 'Reducing men's violence: the personal meets the political' in I Breines *et al Male roles, masculinities and violence. A culture of peace perspective* (2000) 245.

139 ØG Holter 'Masculinities in context: on peace issues and patriarchal orders' in I Breines er al. *Male roles, masculinities and violence. A culture of peace perpective* (2000) 161ff.

140 According to Connell, the hegemonic form does not actually need to be the most common form (n 103 above, 24).

141 H Myrttinen *Disarming masculinities* (2003) 42.

142 As above.

143 El-Bushra (n 137 above) 80f.

144 Myrttinen (n 141 above) 144.

male-on-male and male-on-female violence. Still, El-Bushra's concern in this regard is worth mentioning; 'turning some 'bad' men into 'good' men',[145] she remarks, may help to reduce violence, but does not necessarily involve changing the power asymmetry between men and women. Therefore, a reshaping of masculinities must also clearly enable the co-existence of various gender identities on an equal basis.

2.4 'Peace is not simply the absence of war' — peaceful femininities

Male aggressors, brutalisers and killers get comparatively little notice by the media, whereas their female counterparts make the headlines and sometimes even achieve a kind of fame. This is due to the fact that the prevalent form of femininity in our society regards womanhood as being peaceful, caring and fearful, and transgressions from this image are widely seen as unnatural and shocking. Similarly, the dichotomy between war/violence on the one hand and peace/non-violence on the other, is, as Liz Kelly points out, commonly associated with the opposition between the active, heroic, masculine and the quiet, mundane, feminine.[146]

Reality, however, does show that women, too, can be very brutal — for instance against their own children — and sometimes actively encourage violent behaviour of men.[147] Nevertheless, it remains a fact that, in general, women, in comparison with men, refrain to a much larger extent from using violence. Moreover, numerous women and women's groups vigorously engage in activities promoting peace, disarmament and non-violence.[148]

As mentioned above[149] the 'gendered response' to violence is frequently explained by the biologically assigned function of motherhood. Leaving aside the question whether maternity really carries with it 'natural' qualities, it is certainly true that the related concept of femininity determines specific social roles and responsibilities. These, of course, vary in different societies, depending on what degree hegemonic femininity is defined through motherhood or general care responsibilities. In examining women's participation in grassroots movements, Lynn Stephen refers to Temma Kaplan's theory of 'female consciousness':[150]

145 El-Bushra (n 137 above) 82.
146 Kelly (n 111 above) 48.
147 AI *et al* (n 102 above) 3.
148 See Part II, 3.2.
149 Part II, 2.2.
150 L Stephen *Women and social movements in Latin America. Power from below* (1997) 10.

> When women who have internalized their designated roles as domestic providers and caretakers are unable to carry out their duties, they will be moved to take action in order to fulfil their social roles as females.

Kaplan uses this paradigm to explain the rise of mothers' groups in search of their disappeared children such as the *Madres de la Plaza de Mayo*.[151]

Women are usually assigned the role of caregivers in a society, whether for the sick, the elderly or the children. The so-called care-approach to violence establishes a link between non-violence and care and promotes an increase of men's care experiences as a preventive barrier against violence.[152]

Women's roles as caring mothers, wives or daughters are clearly one reason for the commitment of many in demanding peace, justice and disarmament. Another motive, frequently brought up in feminist analyses, is the link women perceive between peace or non-violence and gender equality. Consequently, women's fight against violence, a realm dominated by men, coincides with their struggle against gender-based discrimination and abuse:[153]

> Women's organisations have often argued that peace is more than just the absence of war. They have sketched out a continuum of violence, linking violations of human rights, violence against women and structural violence in economic disparities to the violence seen during wars.

While women who act against war or political violence on the grounds of traditional gender roles could be said to be defending so-called practical gender-interests, those who stand up for peace in order to contest female subordination might be associated with advocating strategic gender-interests.[154]

As Stephen emphasises, these only seem to be opposing types of demands,[155] as, *inter alia,* the example of maternal activism shows. Mothers, who base their claims for peace or justice on rights connected to traditional gender roles, are at the same time invading the public sphere, hence challenging the public-private dichotomy, which is part of gender-based discrimination.[156] Thus, the female struggle against violence can, even unconsciously and unintentionally, contribute to gender equality.

[151] Stephen (n 150 above) 11.
[152] Holter (n 139 above) 76ff.
[153] United Nations *et al Women's advocacy for peace and disarmament. Briefing note 2* (2001) 2.
[154] This distinction was made by Molyneux. ''Practical gender interests' [are] interests that emerge from an acceptance of cultural gender roles, including female subordination and the assertion of rights based on those roles. [On the contrary] 'strategic gender interests' [...] are derived deductively and focus on strategic objectives to overcome women's subordination'. Stephen (n 150 above) 11.
[155] Stephen (n 150 above) 11.
[156] See Part III, 3.3.

3 Women and war: The importance of a gender perspective

3.1 The impact of armed conflict on women

> This is my rifle / This is my gun / One is for killing / The other for fun.[157]

This US/UK military song very well expresses the sort of militarised, violent masculinity prevalent in situations of armed conflict. The parallel drawn between the brutal act of killing a person and the presumably — in this context — not less violent act of sexually possessing a woman sheds a light on the patriarchal and sexist behaviour in militarised societies, which, during times of conflict, generally culminates in excessive gender-based violence against women.

Feminist analysts see a continuum between the intensified gender-based violence in times of war and the 'regular' violence committed against women in times of peace. In this context Kelly quotes a comment by Staja Zajovic:[158]

> The hate of women, the oldest hate of all, is the hate of the Other. Violence against women becomes completely justified, especially when hate of the other permeates all spheres of life, becoming even part of state ideology.

The impact of war on women and girls has received increasing attention over the last decade and the United Nations, due to pressure from women's organisations, has begun to pay more attention to the issue. The General Assembly had, in fact, passed a Declaration on the Protection of Women and Children in Emergency and Armed Conflict in 1974,[159] but, besides being very vague, the document was obviously grounded in the belief that women and children are simply the most 'vulnerable' and 'defenceless' among the civilian population. Gender-based violence or equal rights in conflict resolution were not addressed at all.

At the Fourth World Conference on Women in Beijing in 1995, a large part of the discussions was devoted to the question of women and armed conflict, a topic that also received considerable attention within the subsequent Beijing Declaration and the Platform for Action.[160] In the year 2000, growing awareness of the particular

[157] Military song quoted by Kelly (n 111 above) 50.
[158] Zajovic quoted by Kelly (n 111 above) 55.
[159] General Assembly resolution 3318 (XXIX), 14 December 1974.
[160] Instraw *Women and Armed Conflict: New Challenges. Beijing at 10: Putting Policy into Practice* (not dated).

abuses suffered by women during conflict resulted in the adoption of UN Security Council resolution 1325 on women, peace and security,[161] a document that is highly significant in many ways.[162] *Inter alia*, the resolution induced a study carried out by the UN Secretary General on 'Women, Peace and Security'.[163] As far as the impact of armed conflict on women and girls is concerned, this report emphasises that cultures of violence and discrimination against females, which exist in practically every society, are exacerbated in times of conflict, and that women and children constitute the primary victims of contemporary wars. As compared to male civilians, women run additional risks:[164]

> During conflict, women and girls are vulnerable to all forms of violence, in particular sexual violence and exploitation, including torture, rape, mass rape, forced pregnancy, sexual slavery, enforced prostitution and trafficking. These acts of violence have a political and symbolic significance and are often endorsed at the highest levels of leadership.

These crimes have also been addressed by the international legal framework: In the statutes of both the International Criminal Tribunal for Rwanda and that for the former Yugoslavia, as well as in the Rome Statute of the International Criminal Court, many acts of gender-based violence fall within the definition of war crimes or crimes against humanity.[165]

The consequences of armed violence on women and on gender relations are manifold. Due to the absence of 'heads of the family', women and girls, who are often very young, are forced to assume primary responsibility for the security and sustenance of their families.[166] Frequently, they are later brutalised by their returning men, who, being themselves traumatised, attempt to 're-assert' their masculinity through domestic violence.[167] In addition, the proliferation of small arms, during and after conflicts, significantly increases the risks for women's well-being.[168] Furthermore,[169] women, who make up the majority of the world's farmers and gatherers of food, are frequently exposed to the danger from landmines.[170]

The gender-specific impact of armed conflict, with its various dimensions, has been widely acknowledged and documented. For a

161 Security Council resolution 1325 (2000), 31 October 2000.
162 See Part II, 3.2.
163 United Nations *Women, Peace and Security* (2002).
164 United Nations Security Council *Report of the Secretary-General on women, peace and security* (2002) 1f.
165 United Nations Security Council (n 164 above) 3.
166 United Nations Security Council (n 164 above) 2.
167 Kelly (n 111 above) 53.
168 AI *et al* (n 102 above).
169 Heyzer (n 113 above) 7.
170 This is just to mention a few of the gendered effects of armed conflict, which cannot be analysed at full length here.

long time, however, the role of women in this context has been reduced to that of victim, thus neglecting their agency both during and after armed conflict.

3.2 From victims to agents in the peace process

> Women are half of every community ... Are they, therefore, not also half of every solution?[171]

Although many women organise themselves, often on an informal level, in order to promote peace, reconciliation and justice, they are generally excluded from official peace negotiations and peace building activities. Frequently, their marginalisation stems from the fact that they had already been denied participation in decision-making during the pre-conflict period. Moreover, there is the traditional view that only those who take up arms should be involved in peace negotiations.[172] Apart from the fact that many women actually do take part in armed combat or are otherwise actively involved,[173] the reasons why it is necessary to include them in the peace process are obvious. First of all, as we have seen above, due to their exposure to gender-based abuse, the experiences and suffering of women, both during and after wartime, usually differ widely from those of men. Their perception and definition of 'security' is a different one[174] which needs to be addressed adequately. Furthermore, as a result of the specific gender roles in a given society, which normally encompass the assumption of certain responsibilities, such as family care as a 'typical' woman's responsibility, women often have different priorities and concerns that need to be taken into consideration in the peace process.[175] Finally, peace processes and negotiations provide the opportunity to transform state institutions, societal structures and gender relationships[176] and can, thus, be the gateway to a more gender-equitable society.

171 Dr Theo-Bem Gurirab, Namibia's Minister of Foreign Affairs and UN Security Council President, speaking when UN Resolution 1325 was passed, quoted by AI & Oxfam International *Shattered Lives. The case for tough international arms control* (2003) 45.

172 UNIFEM *Issue Brief on Peace Processes* (not dated) 5.

173 'Women and girls often support combatants by assuming responsibility for such tasks as cooking, acting as couriers, carrying supplies — both voluntarily and forced'. United Nations, Department for Disarmament Affairs *Gender Perspectives on Small Arms. Briefing Note 3* (2001) 1.

174 United Nations, Department for Disarmament Affairs *Gender Perspectives on Small Arms. Briefing Note 3* (2001) 1.

175 However, this argument, although widely agreed upon, is based on a rather essentialised view of gender and can easily contribute to perpetuating gender roles and hierarchies.

176 UNIFEM (n 172 above) 5.

For a long time, throughout the world, women's movements and organisations have mobilised in support for peace. During World War I nearly 1 200 women from various countries formed the Women's International League for Peace and Freedom (WILPF), still existing today. In the 1980s a global Women's Peace Movement spread across the US, Canada, Europe and Australia[177] and women's groups in African countries such as Burundi, the Democratic Republic of Congo and Somalia have been actively involved in peace and reconciliation efforts.[178]

With Resolution 1325 the United Nations acknowledges for the first time what Heyzer calls, 'the enormous potential contribution of women as stakeholders of peace, disarmament and conflict prevention'.[179] The document triggered extensive debate and study, not only on the protection of women against gender-based violence during conflict, but especially on the need to promote their agency in all stages of conflict management:[180]

> The groundbreaking nature of Resolution 1325 lies in the repeated message throughout that the role of women should increase, at all decision-making levels, in the prevention, management, and resolution of conflict and in peace processes.

Indeed, gender mainstreaming has gained weight on the UN agenda and many efforts have been made in order to increase the number of women among UN personal in peacekeeping operations and humanitarian missions. A gender perspective has been integrated into activities such as reconstruction, rehabilitation and disarmament.[181]

However, arguments for the effective participation of women are often based on essentialised perceptions of femininity. The presence of women in peacekeeping, for instance, is said to make male peacekeepers more 'civilised', reflective and responsible.[182] Also, the often simplistic reliance on quotas cannot guarantee a gender perspective in decision-making processes.[183] Merely 'adding women and stirring' does not have an effect on the structures that create gender inequalities. In addition, it totalises femininity, as if biological womanhood were enough to bring out the varied experiences and goals among women. Still, the fact that international organisations, NGOs and experts have acknowledged the gender-specific effects of armed conflict and that they have recognised the utmost necessity to

177 United Nations, Department of Disarmament Affairs *Women's Advocacy for Peace and Disarmament. Briefing Note 2* (2001) 1.
178 UNIFEM (n 172 above) 8ff.
179 Heyzer (n 113 above) 5.
180 AI & Oxfam International *Shattered Lives. The case for tough international arms control* (2003) 46.
181 Heyzer (n 113 above) 9ff.
182 Heyzer (n 113 above) 12.
183 UNIFEM (n 172 above) 6.

include 'female' perspectives in the peace process, is, in spite of all shortcomings, an extremely valuable step forward.

A similar point of view, however, is still missing throughout most of the debates on the issue of armed violence occurring in times of peace. As we will see later in detail, this type of violence also has a very clear gender dimension. Despite the obvious differences between war and 'everyday' violence, the latter, too, cannot be tackled fully unless gender aspects — prevailing concepts of masculinity, effects on gender relations or women's possible contribution to a culture of peace — are taken into account.

PART III: GENDER AND ORGANISED ARMED VIOLENCE IN BRAZIL

'Em briga de marido e mulher ninguém mete a colher':[184] Gender relations in Brazil

Throughout the past few decades and especially after its transition to democracy, Brazil has been making significant advances in addressing gender issues and reducing the gender gap. An analysis by the World Bank[185] acknowledges three major achievements in the area of gender relations: First, there has been a massive increase in women's access to and use of contraceptives, which has let the fertility rate drop sharply. Second, in what has become a common trend in Europe and the Americas, women's education levels have increased to the extent that they are now superseding men's.[186] And third, women's participation in the labour market has increased steadily, with the wage gap declining.[187] Yet, each of these advancements has its downside. Whereas women's use of contraceptives has risen, its use among males is minimal, which poses a significant risk of spreading HIV/AIDS or other sexually transmitted diseases. Also, women's increasing education levels do not necessarily result in better wages. Very often, women are employed in low-paid, unqualified jobs under conditions that offer little financial security and stability. Furthermore, Brazil has one of the widest gender wage gaps in Latin America and the Caribbean, with women earning only 66

184 Brazilian proverb, translates roughly as: Fights between husband and wife are nobody's business.

185 World Bank *Brazil Gender Review. Issues and Recommendations* (2002).

186 World Bank data from 1996 show that at that point men had an average of 5.7 years of formal education, whereas women had 6.0 years. In the same year, the IBGE (*Instituto Brasileiro de Geografia e Estatística*) observed an illiteracy rate of 7.9 percent among young men aged 15 - 19, compared to 4 percent among women the same age (GT Barker *Dying to be Men. Youth, Masculinity and Social Exclusion* 2005 87).

187 World Bank (n 185 above) vii.

percent of what men do, and the disparity actually increases with more years of education.[188] As a result, the poorest households are often those headed by women who are single-mothers,[189] which are numerous, especially among *favela* dwellers.

Brazil ratified the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in 1984 and the Optional Protocol to it in 2002. It signed and ratified (1995) the Inter-American Convention to prevent, punish and eliminate violence against women, which has become known as the Convention of *Belém do Pará*. The Brazilian law and justice system, which once legitimised and even praised violence against women as 'normal' and 'natural', considering wife murders to be so-called crimes of passion,[190] has been gradually changing and today criminalises all acts of violence against women.[191] Especially the creation of the world's first women's police stations (*Delegacias de Polícia de Defesa da Mulher*) in 1985[192] can be seen as a clear sign of the will to combat violence against women.

However, the gap between legal and factual reality remains wide. Domestic violence, sexual and physical assault on the street and sexual harassment in the workplace are still widespread and experience a rather high degree of acceptance. Research conducted by the Federal Senate showed that 17 percent of the 815 women questioned had suffered some kind of domestic violence;[193] in 66 percent of these cases the perpetrators were the respective husbands or partners. Only 38 percent of the victims went to a police station in order to report the incident.[194] In addition, when reported, only a fraction of the violent acts committed against women ever lead to trial or conviction. For example, of the 3 883 rapes registered in 2002 in the State of São Paulo, 49.3 percent were not even investigated.[195]

Men's violence against women generally helps to preserve an oppressive relationship and expresses deeply entrenched ideas of gender roles. In her study on violence and masculinity in northeast Brazil, Sarah Hautzinger concludes that, despite the criminalisation of violence against women and slightly changing perspectives on gender

188 World Bank (n 185 above) viii.

189 N Laurie 'Family and Household in Latin America' in P Essed *et al* (eds) *A companion to gender studies* (2005) 383.

190 CM Santos *Women´s Police Stations. Gender, Violence and Justice in São Paulo, Brazil* (2005) 5.

191 In June 2004 Law 10.886 was approved; it establishes a prison sentence of 6 months up to 1 year for those who practice domestic violence against women (Senado Federal, Subsecretaria de Pesquisa e Opinião Pública *Violência Doméstica contra a Mulher* 2005).

192 Santos (n 190 above) 15.

193 It should be noted that domestic violence as well as sexual abuse are generally underreported; the numbers are thus likely to be even higher.

194 Senado Federal, Subsecretaria de Pesquisa e Opinião Pública *Violência Doméstica contra a Mulher* 2005.

195 '50.7% dos estupros nem são investigados' *Folha de São Paulo* newspaper 24 November 2003.

roles, men still do not recognise autonomous female subjecthood.[196] In focus group interviews[197] older men defended violence against adulterous women as necessary in order to defend their own honour.[198] Discussions with younger men also gave evidence of Brazilian *machismo*:[199]

> Women's efforts to escape from men's dominance were understood as, 'Now the woman wants to dominate,' and that 'The woman wants to be more than the man.' This, in turn, was held as a violation of a seemingly natural order that passed 'from generation to generation'. [...] the men opined that deep down women neither wanted, nor were really capable of, dominance over *or* equality with men: 'She herself won't allow it' for a man not to take the lead, one man said.

Fixed traditional gender roles that privilege men are still very common in Brazilian society, particularly among the lower classes. It is no surprise, therefore, that more than 80 percent of the women questioned in the study by the Federal Senate think that women do not receive the same treatment as men in the country, mentioning the family and the workplace as the places where women are the least respected.[200] Nonetheless, many women do not question their prescribed gender roles and perceive disliked male behaviour, such as infidelity or even violent conduct, as perfectly normal and natural.[201]

As we have seen, violent male behaviour is not directed solely against women as part of a systematic oppressive relationship; it also affects, to a large part, other men. In 1995, the homicide rate among Brazilian men amounted to 42.5 per 100 000, compared to a rate of 4.1 per 100 000 among women.[202] Because of the high mortality rate due to external causes, especially among young men, the 2000 census proved that there were almost 200 000 fewer men than women in the age range 15 to 29 in Brazil. There are predictions[203] that in 2050 the country will have six million fewer men than women, mostly due to violence.[204]

> In India and in other parts of South Asia, the bias in favour of boys means that millions of girls are missing — they were never born or died early because of selective abortion and female infanticide. In parts of Latin America, young men are missing because they died in violence and

196 S Hautzinger *The Crowing of the Rooster: Violence and masculinity in North East Brazil* (2001).
197 Hautzinger (n 196 above) 7.
198 It is worth pointing out that Hautzinger classifies male violence in this context — matrifocal Afro-Bahian families and increasing participation of women in the labour market — as 'contestatory' violence, 'wherein violence is symptomatic of changing gender roles and/or power struggles between 'contestants'' (Hautzinger, n 196 above, 6).
199 Hautzinger (n 196 above) 15.
200 Senado Federal, Subsecretaria de Pesquisa e Opinião Pública (n 194 above).
201 Goldstein (n 29 above) 238.
202 WHO (n 4 above).
203 GT Barker *Dying to be men. Youth, masculinity and social exclusion* (2005) 1.
204 As above.

traffic accidents: Victims, too, of rigid ways of defining what it means to be men and women.

This shows that urban violence, or organised armed violence, is a heavily gendered phenomenon. It is perpetrated predominantly by men, affects mostly men, but also women — often in indirect, gender-specific ways — and it causes different reactions, many of them gender-related.

In the following I will deal with the problem of organised armed violence from a gender perspective. The analysis will be done on three levels: the level of the perpetrators, the level of the 'hidden' victims and the level of the counteracting agents. This distinction may, of course, at times be problematic, as there is no clear-cut dividing line between the categories, and individuals can be at the same time perpetrators and victims or victims and agents. Being aware of this, I still consider it the best approach, because it allows the most comprehensive and structured examination of the phenomenon.

1 Perpetrators

1.1 Drug trafficking and gender

The reasons for the increase of organised crime and armed violence in poor urban areas of Brazil are certainly manifold. Tremendous social inequality, marginalisation and the very slight chances of social mobility for deprived adolescents are, without doubt, a decisive fuel to the drug trafficking business. In addition, Alba Zaluar points to impunity and institutional failure from the judiciary as factors responsible for the growth of violent crime.[205] Further, the proliferation of arms throughout the country as well as the *de facto* absence of the state in poor areas such as Rio's *favelas* facilitates the creation and maintenance of a drug business infrastructure. But there is no question that the issue of gender roles also has an enormous influence, in whether or not an individual becomes involved in a drug gang.

1.1.1 Sujeito homem:[206] Dying to be men

I: What are the best things about your work?
T: Women, money and shooting the enemy.[207]

[205] Zaluar (n 36 above) 145.
[206] A common expression that translates roughly as 'real man'. It is not only linked to the leaders of drugs trafficking, but also entails values such as honour and courage, and it is used in opposition to *menino* [boy] (Oliveira, n 40 above, 31f).
[207] Answer of a 17-year-old drug trafficker, quoted by Dowdney (n 2 above) 133.

In the eyes of many boys and young men, the drug dealers of their community appear to have everything: money, respect and plenty of beautiful women. They seem to embody the ideals of manliness and virility. Especially in the context of poor urban areas such as Rio de Janeiro's *favelas*, the variety of accepted masculinities is rather limited and still very much rooted in traditional gender roles. To become a 'real man' generally includes getting a job, which is seen as a precondition for receiving respect from society, and being able to found a family. In his extensive field work on youth and masculinity within deprived communities of Brazil, the United States, Jamaica and Nigeria, Gary T Barker identifies the conflict between 2 versions of manhood — the violent 'gang member' and the conventional 'working man' version — to be the central identity struggle for young men in these settings.[208] Barker defines the reality of racism, classism and social exclusion — the denial of access to jobs, status, respect and goods — as a major reason why so many young Brazilian men, in their search of an identity, opt for a violent version of masculinity by involving themselves in drug trafficking gangs.[209]

According to Goldstein, gang membership and urban violence can be seen as part of male oppositional culture, which attracts more and more frustrated, disillusioned and angry young men:[210]

> Because members of this generation have so little hope of social mobility in mainstream culture, the gang leaders often become their folk heroes and more realistic role models. The gang leaders become significant in the young men's search to redefine their place in the world — one apart from the denigrating, deference-demanding positions that have typically been accessible to them.

Due to the fact that many boys in Brazilian *favelas* have been socialised in a setting in which violent gang culture is continuously present, they tend to see 'this social construction and management of masculinity [as] a natural component of social interaction'.[211] Barker concludes from his research that participation in gangs can be linked with a specific version of masculinity characterised by the use of armed violence in order to achieve a goal, discriminative attitudes towards and violence against women and an exaggerated sense of male honour, which must be defended by violent means.[212] The necessity for the defence of honour goes so far that men are not only killed in conflicts with rival drug factions or the police, but also die for acts that threaten the pride or status of their colleagues.[213]

[208] Barke (n 203 above) 10.
[209] Barker (n 203 above) 27.
[210] Goldstein (n 29 above) 99.
[211] Zaluar (n 36 above) 149.
[212] Barker (n 203 above) 71.
[213] Zaluar (n 36 above) 148.

Zaluar observes a strong presence of a 'masculine warrior ethos'[214] within Brazil's drug faction culture. By showing off arms and demonstrating cruelty, thereby imposing fear on others, these men try to acquire admiration and respect. This, again,[215] constitutes part of the phenomenon of so-called hypermasculinity.[216] At the same time, it is very likely that this violent version of manhood simply represents an extreme or exaggerated form of a masculinity that is already hegemonic in low-income areas such as *favelas*. This implies certain 'macho qualities',[217] such as strength, courage and powers of self-assertion, as well as men's supposed superiority to women and the legitimacy of the use of violence against them:[218]

> In the case of Rio de Janeiro, to be a *bandido* — a member of the *comandos* — is to be in many ways a standard-bearer of the most visible and fear-inspiring version of what it means to be a man.

What Zaluar calls the masculine warrior-ethos is also clearly visible in *favela* youth culture, which is often heavily marked by the particular drug faction dominating the area. For instance, where the *Comando Vermelho*[219] rules, the surfing clothes label Cyclone has become very popular, due to the fact that its brand logo is similar to the command's abbreviation CV.[220] Also, it has become common to use the word '*vermelhou'*, literally meaning 'she/he/it became red', when referring to something good.[221]

'Faction sub-culture'[222] and the open promotion and glorification of drug trafficking, including its ethos of masculinity, have a steady presence in *favelas* with gang activity. It culminates in the lyrics of certain songs performed during funk parties, the so-called *bailes funk*, which constitute practically the only night-time entertainment for *favela* youth and are usually financed by the drug bosses. Funk lyrics have a generally sexist tendency and some have been strongly criticised for promoting violence against women.[223] In addition, the

214 Zaluar (n 36 above) 149.
215 Zaluar in ''Hipermasculinidade' leva jovem ao mundo do crime' *Folha de São Paulo* newspaper 12 July 2004.
216 Hypermasculinity can be defined as 'an exaggeration of stereotypically male beliefs and behaviours through an emphasis on virility, strength and aggression' (http://en.mimi.hu/sexuality/hypermasculinity.html, accessed 3 June 2005).
217 'The 'macho' qualities recognised by certain cultures for defending one's family are the same that are required for being a successful drugs trader' (G Britto & KS Nair *Introduction: Culture and Drugs* in UNESCO & UNDOC *Globalisation, Drugs and Criminalisation. Final Research Report on Brazil, China and Mexico, Part 3*, 2002 3).
218 Barker (n 203 above) 71.
219 Red Command.
220 'Sob as leis do tráfico' *Época* magazine 315 May 2004.
221 Dowdney (n 2 above) 134.
222 As above.
223 In 2001, the popular song 'Uma Tapinha não dói' [A little slap doesn't hurt] by MC Naldinho caused a heavy debate on this issue (C Meirelles & V Propato *A explosão do funk — continuação* 28 February 2001).

lyrics of *funk de apologia*[224] (*ibid*) — also referred to as *funk proibidão*, because of its official ban — encourage the use of violence and explicitly pay homage to important traffickers and their strength in battle. Despite its official prohibition, MC Mr Castra's much-heard song 'Cachorro' is an example of this:[225]

> Cachorro (PM)/Se quer ganhar um dindin (dinheiro)/Vende o X-9 (delator) pra mim/O patrão (chefe do tráfico) tava preso, mas mandou avisar/que a sua sentença nós vamos executar/É com bala de HK (fuzil).[226]

Although gang culture promoting violent manhood can be very influential in low-income areas of Brazil, there are numerous young men who do not want to become engaged in drug trafficking and adhere to other, sometimes less accepted, concepts of masculinity. Distancing themselves from gang activity can be quite a challenge at times. Zaluar also points out that young men who are not involved in a *comando* are still expected to help in case of an attack by a rival faction.[227] Hence, for some young men, gang presence can mean a nuisance rather than a seduction. Goldstein mentions, for instance, the case of a young army servant named Roberto, who, when being home in the *favela* for visits, would hardly leave his shack in order to avoid contact with gang members.[228] There are many young men who, like Roberto, try hard not to be seen, so as not to attract the attention of drug traffickers or the police. According to Barker, this strategy has a psychological impact:[229]

> Part of avoiding gangs is also about avoiding eye contact, pretending you do not see, looking down at the ground and keeping quiet. [...] All of these survival tactics are psychologically wearing and not very useful for succeeding in other realms, such as the workplace or the school. When you have spent much of your childhood trying *not* to be seen, it is difficult to come into the spotlight and express yourself.

In his research, carried out in violence-ridden communities, Barker explicitly focuses on what he calls the 'voices of resistance'[230] — young men who grow up under the same circumstances as others, but generally question the use of violence and are able to see through the gender matrix. They are proof that the notion of masculinity, despite the significant predominance of some forms, can be contested,

224 Dowdney (n 2 above) 134.
225 http://www.dicionariompb.com.br/detalheasp?nome=MC+Mr%2E+Castra&tabela, accessed 3 June 2005.
226 Cop, if you want to earn some money / sell the traitor to me / the boss is in jail, but he ordered to announce / that it is we who will execute his punishment / with a gun bullet.
227 A Zaluar 'Violence in Rio de Janeiro: Styles of Leisure, Drug Use and Trafficking' in UNESCO & UNDOC *Globalisation, Drugs and Criminalisation. Final Research Report on Brazil, China and Mexico, Part 3* (2002) 48.
228 Goldstein (n 29 above) 180.
229 Barker (n 203 above) 78.
230 Barker (n 203 above) 155.

reconstructed or even newly created. Based on this knowledge, Barker's NGO *Instituto Promundo,*[231] together with three other Latin American NGOs, developed the initiative *Projeto H*,[232] designed to support young men in questioning traditional norms related to masculinity.[233] Extensive evaluations have proven the success of the project, which has led to actual changes in perceptions of gender roles among a large part of the participants.[234]

In his work, Barker does not question the notion of certain 'masculine values' altogether; he is mainly interested in searching for and disseminating strategies on how to achieve manhood through non-violent, gender-equitable means. This does not necessarily tackle the structural imbalance of power between men and women. Still, considering the persistence of culturally prescribed gender roles and the degree of its internalisation by both men and women, initiatives like *Projeto H* are very positive and necessary indeed, and an important step into the right direction.

The construction of masculinities and its relation to — not only gender-based — violence certainly deserves a lot more attention than it currently gets from governmental institutions and other organisations. But, in order to adequately address the question of male identities it is also essential to take into account the ways in which these different models of manhood are viewed by women and girls.

1.1.2 'As garotas não gostam dos bonzinhos':[235] Girls/women and their relations to male gang members

> There are lots of hard workers out there without a woman, but gangsters, they have a lot, a lot of women.[236]

One of the advantages that most young men see in joining a drug faction is that it significantly increases their popularity among and access to women. The 'heroes' and 'warriors' of the poor communities obviously seem very appealing to many girls and young women, who openly admit their attraction for the 'bad guy'.[237] In an interview by Barker, João, a young man identifying himself with a different notion of masculinity, sees money as the main reason for this

231 See http://www.promundo.com.br.
232 'Program H — Engaging Young Men in the Promotion of Health and Gender Equity'.
233 Among other things, the program includes a curriculum (a manual series and an educational video) as well as a lifestyle social marketing campaign (Barker, n 203 above, 164).
234 Barker (n 203 above) 164ff.
235 Girls don't like nice guys (17-year-old student and *favela* resident Brahilha Rosa Souza Alencar in G Netto *Arma de sedução* 18 June 2004).
236 19-year-old *favela* resident João in Barker (n 203 above) 32.
237 Barker (n 203 above) 32.

appeal. While a worker would hardly be able to support his family, a *bandido* could easily afford all kinds of consumer goods for his wife or girlfriend.[238] Another explanation is the higher status within the community that women achieve through their relationship with a drug dealer. 43-year-old Neuza Maria do Nascimento, one of four *favela* women questioned by an NGO on the topic, puts it the following way:[239]

> É o seguinte: quando a menina consegue virar namorada de um cara do movimento, ela passa a ter o poder que ele tem dentro da comunidade. É como se ela mudasse de classe social [...]. Quanto mais alto ele é na escala deles lá, mais poder ela tem.[240]

Consistent with the traditional gender role pattern, the social status of these women is defined through that of their male partners. Neuza and the other women, however, are reluctant to accept these sudden and, as they perceive them, unjustified shifts in power, which according to them, many girls and women abuse.

Although money and status are important factors for the attractiveness to women of gang members, they are certainly not the only ones. Several girls, as 17-year-old Brahilha admits,[241] feel drawn to the violent version of masculinity that the drugs dealers represent: 'A gente se sente fascinada, olha assim e pensa: 'Ai, que lindo, ele deve ser forte e corajoso'. [...] O cara fica mais homem, mais macho, mais tudo'.[242] The idealisation of the gang members' male identity as the ultimate expression of masculinity does not stop at the *favela* gates. More and more middle-class girls from Rio's wealthier *Zona Sul* have relationships with *bandidos*, whose acquaintance they make on the beach or during a *baile funk*.[243] Power and weapons seem to turn the gangsters into virtual warrior-heroes, says 23-year-old Soraia.[244] 'Acho uma combinação perigosa, mas tanto as meninas do asfalto, como as do próprio morro, se sentem atraídas e protegidas'.[245]

Owning a gun is, in this context, associated with conventional notions of masculinity, which assign the role of defender and protector to men. The extent to which many women have internalised these prescribed gender roles becomes obvious in the commonly used

238 Barker (n 203 above) 33.
239 Neuza Maria do Nascimento in G Netto *Arma de sedução* 18 June 2004.
240 It's like this: When a girl manages to become the girlfriend of a guy from the 'movement' [the drug trafficking gang], she gets the power that he has within the community. It's as if she had switched her social class [...]. The higher up he is in the hierarchy over there, the more power she has.
241 BRS Alencar in G Netto *Arma de sedução* 18 June 2004.
242 We feel fascinated, we look and think: 'Wow, how nice, he must be strong and brave'. The guy becomes more of a man, more *macho*, more everything.
243 AC Lima & C Ramalho *Conto de fadas às avessas* 17 May 2005.
244 As above.
245 I think it's a dangerous combination, but both the girls from the *asfalto* [non-*favela* part of the city] as well as the ones from the hill [*favela*] itself, feel attracted and protected.

expression 'Maria AK-47', which describes women who are attracted to men due to the guns they carry.[246] However, women's perception of guns as symbols of power and protection contradicts with reality insofar as these weapons can easily be directed against them. The authority given these men by their guns at the same time maintains the subordination of women,[247] who, for most male drugs dealers, simply represent objects to conquer. According to Zaluar, women are just one more element of contention in the struggle between men:[248]

> Young men say they go into crime to show off for women and conquer them. However, under this emblem of the *femme fatale*, womanhood is reduced to a prop for a young man's prestige in the neighbourhood: to go to a dance surrounded by women, with money in your pocket, to make everyone greet you, admire you, envy you. Even here, femininity is just one more factor in the competition between men.

Holding these notions of femininity and masculinity it is natural for a gang member to have more than one woman at a time. 'Eles escolhem uma menina de fé e têm várias outras, que são obrigadas a se sujeitar e até ser amiga das rivais',[249] says 21-year-old Íris,[250] who lives in a *favela* in Rio. *Bandidos* usually demand absolute loyalty from their women, even when they are imprisoned, and violating this can sometimes have deadly consequences. The question arises why, despite the highly oppressive character of these male-female relationships, so many girls and women feel attracted to gang members, and, thus, reinforce a traditional, violent and harmful version of masculinity. And we have to ask ourselves what perceptions of their own femininity lie behind this attraction. These issues need to be thoroughly studied in order to tackle the problem of violent male identities in the context of organised armed violence.[251]

1.1.3 Women and girls in the drug business

In line with the male warrior ethos that surrounds drug trafficking in general and armed gang violence in particular, these activities constitute a domain which is essentially male. Girls and young women in low-income settings — consistent with culturally prescribed gender roles — are more prone to assert their womanhood and femininity

246 AI *et al Guns and Policing. Control Arms Campaign* (2004) 47.
247 As above.
248 A Zaluar 'Violence related to Illegal Drugs, Easy Money and Justice in Brazil: 1980-1995' in UNESCO & UNDOC *Globalisation, Drugs and Criminalisation. Final Research Report on Brazil, China and Mexico, Part I* (2002) 150f.
249 They choose a 'girl of trust' and have various others, who are obliged to submit to them and even to be friends with the rivals.
250 In Lima & Ramalho (n 243 above).
251 In 2004, the NGO *Instituto Promundo* started with *Projeto M*, a project for empowering young women in Rio's *favelas* (see http://www.promundo.com.br). From the information obtainable so far there is no evidence whether it also deals with the issues mentioned.

through, often very early, child-bearing and the taking-over of care-giving tasks. Yet, indeed there are girls and women who are directly or indirectly involved in drug factions; assumptions to the extent and nature of their participation, however, vary considerably. On the one hand, Barker states that:

> young women [...] are more likely to be indirectly involved as girlfriends of gang members, or in the administration or accounting of drug sales than in actual trafficking and carrying of weapons.[252]

On the other hand, former Brazilian judge Denise Frossard claims that, apart from the fact that women are hardly the perpetrators of violent crimes, drug traffic can be said to be feminine. According to her, the main tasks carried out by women have to do with drug sales or transportation.[253] In fact, as Zaluar discovered during her field work in Rio's Copacabana, there are several women, including prostitutes, shop attendants and manicurists, who engage in drug-selling in addition to, or through their regular job.[254] This activity generally does not entail the use of violence. The same goes for the wives and girlfriends of drug dealers; the jobs they are often expected to carry out in support of their partners are usually limited to the hiding and carrying of both drugs and guns.[255]

Even though it is certainly true that some girls and women are pressured or forced by their male partners to get involved in drug trafficking in one way or the other, the stereotype of women as victims does not hold when one considers the increasing degree of their involvement. A study on adolescents and urban criminality in São Paulo reveals that the participation of girls aged 12 - 18 in the drug business has risen from 0.7 percent in 1988 to 27.1 percent in 2000.[256] Also, the number of girls interned in São Paulos's *Febem* (*Fundação Estadual do Bem-Estar do Menor*[257]) due to their criminal behaviour, shows a dramatic increase of 106.4 percent between 2001 and 2004. And while only 11.8 percent of the offences committed by boys are linked to drug trafficking, it is, in fact, the cause for 19.7 percent of the girls' internments.[258] In their statements, a tendency towards a more violent behaviour of girls in drug trafficking becomes observable, which expresses a shift in gender roles also within this context:[259]

252 Barker (n 203 above) 172.
253 A Filho & E Lobato '*Sou um cadáver caro*' (not dated).
254 Zaluar (n 227 above) 43.
255 J Galeria *Survival of the fittest?* (not dated).
256 http://www.adolec.br/bvs/adolec/P/news/2000/08/0104/educacao/001.htm (accessed 1 June 2005).
257 State Foundation for the Well-Being of Minors.
258 'Dobra número de meninas na Febem' *Folha de São Paulo* newspaper 21 March 2004.
259 As above.

> [As] internas da Febem não culparam outras pessoas pelos crimes pelos quais foram presas e narraram episódios que em nada lembram meninas indefesas. Participaram de decisões, davam ordens, portavam armas em assaltos, cobravam dívidas de tráfico de droga e até fizeram questão de matar desafetos.[260]

According to girls participating in the violence-prevention project coordinated by the NGO *Viva Rio*, women are generally 'considered 'too wild and too emotional' by the upper ranks in the organised armed groups to handle weapons' (Galeria nd).[261] But exceptions do exist, as in the community of those girls in which the *gerente da boca* — the sales point manager, an armed and powerful function — is a woman.

The motives of women who, despite all the opposition they certainly encounter in the 'hypermasculine' setting of the drug factions, engage in drug trafficking and armed violence are, in many ways, similar to those of men, and are rooted in the reality of social exclusion and the desire to gain access to consumer goods.[262] The increasing readiness of girls and women to participate in the drug trade can be regarded as a sort of female emancipation, although badly channelled. Just as women have entered the paid job market, they might now occupy a growing space in the area of organised armed violence. Unfortunately, the reasons, circumstances and the extent of voluntary and forced female involvement in drug trafficking and gang violence have not yet been thoroughly documented. Several questions need to be asked in this context: Was it only the barriers of social and gender roles that kept women from being active in this realm? What notions of femininity are developed by girls and young women who engage in such activities? And what can be done in order to counteract this distorted form of emancipation?

1.2 Police and gender

1.2.1 Women in a masculinised institution

Very similar to the exercise of unlawful armed violence, the use of legitimate violence once was, and to a large extent still is, a male monopoly. Not only do men comprise the overwhelming majority of military personnel and police officers worldwide in absolute numbers, it is safe to say that the institutions themselves are strongly masculinised:[263]

260 The (female) interns of *Febem* did not blame anybody else for the crimes they had been arrested for, and told episodes that do not remind one at all of defenceless girls. They had taken part in decision-making, given orders, carried guns in robberies, collected debts and even insisted on killing enemies.
261 Galeria (n 255 above).
262 *Folha de São Paulo* newspaper (n 258 above).
263 Connell (n 103 above) 23.

> The organisational culture of armies, for instance, is heavily gendered. Recent social research inside armed forces in Germany [...] and the United States [...] reveals an energetic effort to produce a narrowly defined hegemonic masculinity.

Nevertheless, women gradually find their way into these male-dominated spheres. As Leonarda Musumeci and Barbara Musumeci Soares conclude from their quantitative analyses, the presence of women in Brazil's military police force[264] is quite recent; it was mainly at the beginning of the 1980s that women started to enter the police in larger numbers.[265] They also stress the lack of consistent planning or affirmative action in the area of gender, visible, *inter alia,* in the fact that gender is missing as a variable in most police databases.[266] In those cases where information is obtainable, the female proportion among military police officers on average lies around seven percent,[267] with women almost exclusively occupying lower ranks. Apart from a few exceptions, women have not yet managed to achieve higher positions within the institution — due both to their relatively younger ages as well as the gender-based discrimination they suffer. Consequently, their influence on policies and decision-making remains rather limited.[268] However, there is a steady increase of women's participation in the police, and they will progressively climb up the 'career ladder'. It is thus worth considering what impact this growing female presence may have on such a masculinised institution, especially with regard to the violently conducted 'fight against crime', which has resulted in so many extra-legal killings.

1.2.2 More policewomen = less violence?

The original calculation behind the integration of women into the police force had to do with the idea that women would be more suitable than men to deal with certain issues such as abandoned children or female delinquents.[269] Later, deliberations started to go into different directions and women's entrance into the police began to be viewed as a possible driving force for more professional police work.[270] Through the incorporation of 'feminine' values and qualities, according to this reasoning, police focus in public security issues

264 The military police is a uniformed force in charge of day-to-day policing that patrols the street, may arrest suspects etc, while the civil police exercise the functions of criminal police (United Nations, n 55 above, 7).
265 L Musumeci & BM Soares 'Polícia e gênero: Presença Feminina nas PMs Brasileiras' (2004) 4/2 *Boletim segurança e cidadania* 1.
266 Musumeci & Soares (n 265 above) 1f.
267 Musumeci & Soares (n 265 above) 3,
268 Musumeci & Soares (n 265 above) 14.
269 Musumeci & Soares (n 265 above) 1.
270 ME Calazans *Polícia Ostensiva e Gênero* (2005).

would shift towards more cautious and preventive strategies,[271] and its image among the population would become more humane. Despite the fact that many women do have a different approach to the use of force, because of their culturally defined gender roles, this line of reasoning relies on heavily essentialised images of gender.[272]

Judith Hicks Stiehm advocates the presence of women in police and military forces as a measure to reduce violence. Her arguments, however, differ from the ones presented above insofar as she acknowledges the existence of socially constructed masculinities and their relation to masculinised institutions:[273]

> My proposal is [...] to end men's monopoly on the legitimate use of force. This would break the link between gender identity (i.e. masculinity) and the use of force. If one could no longer 'prove' oneself as a man by soldiering or policing, it would, I believe, reduce the overall use of force. To do this would require establishing the right as well as the responsibility of women to serve as police, as soldiers, as peacekeepers. It would mean making these important jobs neither male nor female.

Stiehm may indeed have a point with her suggestion; if these institutions no longer constituted spaces for the assertion of a certain kind of maleness, this might reduce the excessive use of force. But under the given circumstances — such as impunity, lack of education or precarious employment conditions — the mere existence of institutions in which the use of violence is condoned by the state, entails the risk of abuse by its officials, irrespective of gender.

Moreover, for a possible 'demasculinisation' of armies and police forces to be effective, it would require the integration of women on a very large scale. Otherwise, as the case of the military police in the Brazilian state of Minas Gerais shows, women are more likely to be forced to adapt a masculine role in order to be treated as equal:[274]

> A mulher, ao se inserir nesta instituição, enfrentou uma situação paradoxal, pois a Polícia Militar de Minas Gerais objetava humanizar a instituição, introduzindo características do universo simbólico feminino como [...] a empatia, a capacidade de escuta, a atenção à linguagem não verbal, a cooperação e liderança não autoritária. Entretanto,

271 As above.

272 A parallel rationale can be found, as we have seen, in the context of conflict resolution, peace-keeping and peace-building. The biological sex alone is taken as a guarantee for what is perceived to be a 'feminine' perspective (see Part II, 3.2.).

273 JH Stiehm 'Neither male nor female: neither victim nor executioner' in I Breines *et al* (eds) *Male roles, masculinities and violence. A culture of peace perspective* (2000) 224.

274 LFR Moraes *Implicações do Gênero na Qualidade de Vida e Estresse no Trabalho da Polícia Militar do Estado de Minas Gerais* (not dated).

> manteve sua estrutura androcêntrica e autoritária, baseada no estereótipo e na representação social da masculinidade.[275]

According to psychologist Márcia Esteves de Calazans women are obliged, if they want to be accepted within the military police, to incorporate the 'warrior ethos' of violence and virility, and can, thus, achieve a form of 'subordinate masculinity'.[276] Although there are no reliable data available, it seems that policewomen, on average, when confronted with particular situations, probably make use of (extra-legal) force just as often as policemen do. Reports of female police officers killing *bandidos* are not uncommon,[277] and some police death squads also rely on the participation of women. Even when it comes to gender-based violence, policewomen do not necessarily exhibit different behaviour from their male counterparts, as Cecília MacDowell Santos observes in her study on Brazil's women's police stations. The assumption of the responsible government officials that female police officers would 'naturally' be more sensitive to female victims, proved to be incorrect. To a large extent, 'policewomen's interests and identities have been shaped by [...] the masculinist culture of their concrete institutional base — the police'.[278]

At its current state, women's integration within the police forces cannot be said to have contributed to less violent strategies or to less violent behaviour of the police in the context of organised armed violence, for two main reasons: First, public policies and concepts that push towards increased female participation within the area of the legitimate use of force usually rely on essentialised concepts of femininity, identifying biological sex with certain 'female' values and qualities; second, reality shows that institutions such as the police are deeply marked by a hegemonic masculinity to which women normally must adjust in order to earn the respect of their male colleagues.

2 'Hidden' victims

Many researchers, public policy makers and experts that deal with the phenomenon of organised armed violence in urban Brazil do not take note of its gendered nature. Those few who actually do acknowledge its gender dimension often tend to concentrate on the issue of masculinities — a logical approach considering the fact that the

[275] Women, while integrating into this institution, were faced with a paradoxical situation, because the military police of Minas Gerais had the objective of humanising the institution by introducing qualities of the female symbolic universe such as [...] empathy, the capacity to listen, the attention to non-verbal language, cooperation and non-authoritarian leadership. At the same time, it maintained its androcentric and authoritarian structure, based on the stereotype and social representation of masculinity.

[276] Calazans (n 270 above).

[277] Justiça Global (n 19 above) 21.

[278] Santos (n 190 above) 80.

overwhelming proportion of perpetrators and homicide victims are male. Yet, they fail to take into account the fact that women have particular experiences of organised armed violence;[279] in accordance with culturally prescribed gender roles, they frequently suffer in gender-specific ways. Similar to men, although clearly in much smaller numbers, women regularly die in armed violence, whether during direct confrontations between rival drug factions, shoot-outs with the police, or by being hit by a stray bullet. But in addition to running these risks, women also face a number of other direct and indirect repercussions of urban violence which men are less likely to experience, or at least not in the same way.

The comparatively rare cases in which interpersonal violence directly involves members of Brazil's middle or upper class are usually given special emphasis by the news media. Also, the enormously high death toll among marginalised youths causes regular outcries in the general public. However, the less obvious and more concealed difficulties and dangers that deprived women face within violent settings receive very little attention. Often, it is these women who represent the 'hidden' victims of organised armed violence.

2.1 Equal but different: Revenge killings and sexual abuse

The impact of organised armed violence on women's well-being is multiple; as we will see later, it influences various spheres of their lives and, among other things, increases intimate partner violence and raises psychological pressure on women who try to conform to their prescribed roles. Obviously, women as well as men — even if uninvolved in gang activities — can become not only accidental, but also deliberate targets of physical violence exerted by drug factions or police forces. Men, especially those young and 'black', commonly encounter prejudiced attitudes because of their presumed connections with the *comandos*[280] and are, thus, regularly victimised by police forces or gangs from rival areas.[281] In contrast to this, women normally meet fewer prejudices due to their minor involvement in gang-related violence. However, they often happen to be victimised for a different reason: their relationship to real or alleged *bandidos*. It is a widespread feature of settings marked mostly by male-on-male violence, such as wars or dictatorships, that the suffering of women is exploited for specific purposes:[282]

[279] I am referring here to women who live in low-income settings and who are confronted with gang-related and police violence on a day-to-day basis.

[280] Barker (n 203 above) 48.

[281] Every now and then, men get killed simply due to cases of mistaken identity. S Kalili *O relatório da vergonha nacional* (not dated).

[282] AI *Mulheres e Direitos Humanos* (1995) 139.

> As mulheres são frequentemente detidas, torturadas, mantidas como reféns ou por vezes mesmo mortas porque parentes seus ou pessoas a quem estão associadas, estão ligadas a grupos políticos da oposição, ou são procuradas pelas autoridades.[283]

In addition, the objectification of women within the hypermasculine gang culture[284] reinforces their role as 'playthings' in factional conflicts. According to Zaluar, in a war between the gang leaders Manoel Galinha and Zé Pequeno, which lasted for several years, numerous women died, including young women, girls, and even pregnant women, many of whom were targeted for death.[285]

The common practice of revenge killings in order to achieve 'justice', which involves drug traffickers, police and death squads alike, can take on highly absurd and gruesome dimensions and is frequently directed against female (and male) family members of the primary target, as shown in this occurrence reported by a Portuguese newspaper:[286]

> Sete pessoas mortas por causa de uma bicicleta: A polícia brasileira deteve na quarta-feira três suspeitos de pertencerem a um esquadrão de morte que assassinou a mãe, a irmã e os irmãos de um alegado ladrão de bicicleta que valia menos de 100 euros.[287]

Moreover, it is quite likely, although currently undocumented, that some women caught up in this state of 'undeclared war' become the victims of sexual violence perpetrated by armed actors. Standing up and speaking out against sexual abuse, which for many already carries its own stigma, is probably even harder for women when they consider the tremendous power that armed male authorities hold, no matter whether they are extra-legal (drug factions) or legal (police forces).

While conducting her research on women's police stations, Santos observed an incident in which a young woman demanded the reporting of a case of police violence against her and was driven off by the police clerk in charge.[288] In Santos' view, 'the silencing of police violence is in large part due to policewomen's interests in protecting the legitimacy of their institutional base'.[289] Although the mistreatment this young woman had suffered had not been sexual,

283 Women are frequently detained, tortured, held hostage or sometimes even killed because their relatives or persons whom they are associated with are linked to political opposition groups or are sought by the authorities.

284 As a drug dealer interviewed by Zaluar points out: 'Pushers have always got an eye on other men's goods, even their women. They'll kill just to get another man's woman' (quoted in Zaluar, n 248 above, 150).

285 Zaluar (n 248 above) 150.

286 'O Massacre. Sete pessoas mortas por causa de uma bicicleta' *O Público* newspaper 25 February 2005.

287 Seven people dead because of a bicycle: On Wednesday, Brazilian police arrested three suspects for belonging to a death squad that had murdered the mother, the sister and the brothers of an alleged thief of a bicycle worth less than 100 euros.

288 Santos (n 190 above) 132 ff.

289 As above.

the police clerk's reluctance to register it indicates the difficulties women are likely to encounter when they want to defend themselves against abuse by state authorities.

Sexual violence against women, an omnipresent expression of gender-based oppression, tends to escalate in contexts where the hegemonic masculinity is a violent or militarised one, such as in times of war.[290] Consequently, it can be assumed that it also constitutes an element in organised armed violence, representing a form of silenced and gendered suffering. Without doubt, a carefully conducted research on this issue would be of paramount importance.

2.2 Safer through weapons? The impact of small arms on women's lives

While male-dominated societies often justify small arms possession through the alleged need to protect vulnerable women, women actually face greater danger of violence when their families and communities are armed.[291]

Gang members, police officers, private security guards — Brazilians, or more precisely Brazilian men, are heavily armed: 15.5 million arms are owned for private use alone, more than half of which are illegal.[292] In Brazil, as in many cultures, guns have become a marker of masculinity,[293] which is reflected in the advertising and entertainment industries, where they are found almost always in the hands of males. Myrttinen stresses the symbolic importance of small arms in societies saturated with guns and violence, such as the United States or Brazil:[294]

> Young males in pro-gun societies might be given real [...] weapons such as air rifles by their parents or they might buy an illegal handgun on the streets — a step which can be seen as a rite of passage from boyhood to manhood, conjuring up, consciously or not, images of a purported golden past of hunter/warrior males.

The presence of guns, which are in their vast majority bought, owned, used and misused by men, disproportionately affects women.[295] Of course, as most of the actors of armed violence are male, it is also men who are most frequently the casualties of gun violence.[296] Still, the easy availability and widespread possession of weapons generally

290 See Part II, 3.1.
291 Barbara Frey, UN Special Rapporteur on the prevention of human rights violations committed with small arms and light weapons (quoted by AI *et al*, n 102 above, 2).
292 Redação Desarme *Brasil tem mais de 8 milhões de armas ilegais* 18 March 2005.
293 Heyzer (n 113 above) 8.
294 Myrttinen (n 141 above) 38.
295 AI *et al* (n 102 above) 2.
296 'In Rio de Janeiro, Brazil, young men are 24 times more likely than women to be killed by firearms' (AI & Oxfam International, n 180 above, 26).

facilitates and exacerbates the use of violence against women, whether in war and post-war situations or in 'peaceful' societies.

Especially with regard to domestic violence, the correlation between gun ownership and aggression has been extensively proven. Research conducted in the United States showed, for instance, that having a gun at home increased the risk of domestic homicide by 272 percent for women.[297] Furthermore, the mere possession of a weapon by partners or other male family members can be a decisive factor in exerting psychological, physical and sexual violence on women, because 'the presence of a firearm, with its threat of lethality, reduces a woman's capacity for resistance'.[298] Guns also aggravate gender-based violence in public places, such as sexual assault or gang rape, as the example of South Africa shows.[299]

Women in the *favelas* and other low-income areas of Brazil normally live in highly armed environments, with most of the guns in the hands of men, and face a reality marked by violent masculinities and a rather high degree of gender discrimination. Many men either own guns for 'professional' reasons, as 'working equipment' in the drug trafficking business, or for the purpose of (alleged) self-defence. It can be assumed that, as a result, violence against women, which in these settings is largely considered legitimate, takes on even more serious dimensions. Notably, gun-supported aggression and abuse is not limited to intimate partner violence; also mothers, aunts or other older family members might have their authority or even their lives threatened by angry male gun users.[300]

Despite the fact that the law entitles them to carry a weapon, guns in the hands of male police officers can also pose particular risks to women in the domestic sphere.[301] In an interview with Santos, Brazilian female police investigator Ivete Ramos expressed her concern in this regard: 'Nowadays we are [...] witnessing violence perpetrated by civil [and military] police officers against their wives. This is a serious problem'.[302]

There is undeniable evidence of a connection between organised armed violence and (domestic) violence against women, two issues that are normally addressed separately. In order to find effective violence-prevention strategies, this relation would certainly need to be further examined and clarified.

297 AI & Oxfam International (n 180 above) 10f.
298 AI & Oxfam International (n 180 above) 12.
299 AI & Oxfam International (n 180 above) 28.
300 Goldstein (n 29 above) 173.
301 AI & Oxfam International (n 180 above) 22.
302 I Ramos quoted by Santos (n 190 above) 135.

2.3 'The community has its own laws':[303] Women's rights in the alternative justice system

In violence-ridden communities such as *favelas,* people are frequently subjected to a system of law and order distinct from the state's jurisdiction. With effective state institutions being absent, it is generally the local drug trafficking gangs that provide an alternative system of rules and punishments which upholds social order.[304] A study conducted in the 1970s by Boaventura de Souza Santos on a *favela* with the fictive name of *Pasárgada* shows that the reality of legal pluralism has a long history in these deprived communities. One of its roots lies in the understanding of its residents that the *favela* had been created through the illegal occupation of land and that, therefore, police and judiciary constitute 'natural enemies'.[305] Still today, *favela* residents have little reason to trust in and rely on state institutions,[306] and the terror of organised armed violence has created an even greater chasm between the marginalised population and the law enforcement officers.

The definition of crime varies according to the setting, and what amounts to a crime from a legal perspective does not necessarily coincide with one's personal perception:[307]

> In general working class people have a moral view of crime, that is to say, crime for them is not strictly a juridical matter. [...] Bandits themselves share the moral view of crime, distinct from the Brazilian Penal Code that sometimes does not follow the same ranking and evaluation of crimes endorsed by the poor.

The drug gangs' settlement of 'daily injustices' ranges from gun control to theft to sexual abuse and rape, often involving brute force and harsh physical punishment.[308] Residents, who, in the absence of an effective alternative, are mostly willing to accept this system of justice,[309] but are, however, exposed to a certain lack of continuity and predictability, as the leadership regularly changes.[310] Still, some rules remain very similar throughout different 'managements' and localities,[311] and a number of them directly affect women. Women's rights, hardly a common term in the vocabulary of drug trafficking culture, are addressed through these alternative justice systems mainly in terms of punishing sexual and physical violence against women.

303 *Favela* resident quoted by Dowdney (n 2 above) 63.
304 Dowdney (n 2 above) 63; Goldstein (n 29 above) 200.
305 BS Santos *Notas sobre a história jurídico-social de Pasárgada* (not dated).
306 See Part I.
307 A Zaluar *Traffick Networks in Rio* (2001) 4.
308 Goldstein (n 29 above) 190 ff.
309 Goldstein (n 29 above) 196f.
310 Goldstein (n 29 above) 190.
311 Dowdney (n 2 above) 64.

The most serious and repulsive crime in the eyes of *bandidos* is rape.[312] 'When there's a rape ... the rapist dies, that's it ...'.[313] In Rio's *favela Baixa do Sapatero* rape is punished with torture and death in front of the residents.[314] In fact, dismembering or burning rapists alive has become common practice among drug factions.[315] Also severely penalised, often by execution, is the sexual abuse of children. Goldstein relates a case in which a man had been sexually abusing his two stepdaughters; he received a relatively mild punishment compared to common standards:[316]

> When word of this abuse reached the local gang, gang members went to his home and severely beat him, eventually expelling him from the favela and finally threatening him with death if he returned. In the community there was a general consensus supporting the gang's action.

According to Dowdney,[317] wife beating, too, is usually forbidden in *favelas* ruled by drug factions.[318] An example from Rio's *Baixa do Sapatero* seems to confirm this:[319]

> Um homem que bate na sua mulher corre o risco de ser surrado/ castigado de uma maneira humilhante pelos traficantes do local. Na maioria dos casos, o marido que leva uma coça dos traficantes acaba internado no hospital por alguns dias e pode ficar com seqüelas.[320]

It is a common pattern in male-dominated societies, that rape and sexual abuse of women by men who are not 'entitled' to them cause fierce responses by the women's 'rightful owners'.

But the high degree to which ruling gang members appear to interfere in the 'private' matters of residents in order to defend women against violence by their husbands or fathers is indeed surprising, even more so when considering the widespread legitimacy of the use of violence against women in these settings. This perception of justice contrasts rather sharply with the general views of 'right' and 'wrong' that many male gang members have in relation to masculine and feminine conduct. A statement of Pedro Paulo, a *Comando Vermelho* member that Goldstein came across in her study, illustrates their sexist attitudes:[321]

312 Zaluar (n 307 above) 4.
313 *Favela* resident quoted by Dowdney (n 2 above) 66.
314 AP Kaly & YB Mello *Os Jovens em Territórios Ocupados no Rio de Janeiro* (2002) 8.
315 Dowdney (n 2 above) 66.
316 Goldstein (n 29 above) 191.
317 Dowdney (n 2 above) 64f.
318 'If a woman says, 'my husband beat me', he [the trafficker] will go there and beat him' (*favela* resident quoted by Dowdney, n 2 above, 65).
319 Kaly & Mello (n 314 above) 8.
320 A man who beats his woman runs the risk of being beaten/punished in a humiliating way by the local traffickers. In the majority of the cases, the husband, who gets a 'good hiding' by the dealers, ends up in hospital for a few days and might suffer from after-effects.
321 Goldstein (n 39 above) 140.

> 'She killed my child. Now, I am going to have to kill her'. [...] Pedro Paulo connected his own personal position on abortion to his sense that Red Command, as a group sharing a set of core values, promoted his particular sense of right and wrong. Pedro Paulo told us he hated abortion and equally despised women who were not monogamous.

Both women and men in these low-income communities are generally expected to fulfil their prescribed gender roles, which are rooted in a system heavily marked by violent masculinities. Therefore, the question has to be raised, in what way is alternative justice applied when women infringe upon these gendered rules? May a man beat up his girlfriend who has had an abortion? Is a husband allowed to batter his adulterous wife? Might he even be permitted to rape her, in case she refuses to fulfil her 'sexual obligations'?

The drugs traffickers' system of justice may often guarantee at least a minimum of protection to women; it has to be heavily doubted, however, that women in these settings are really in a position to enforce all the rights to which they should be entitled. Moreover, the authority of the drug factions can make it difficult or impossible for women to turn to the state institutions (who are actually responsible), because this could mean bringing the 'enemy', the police, into the community.[322] What all this clearly shows is that the situation of women's rights in Brazil obviously requires evaluation from (at least) two different angles, taking into account both the laws of the State and the laws of the drug traffic.

2.4 'Female' responsibilities in the face of organised armed violence

The idea of gender roles usually implies a set of gender-specific responsibilities to be carried out by men on the one hand and women on the other. In Brazilian society, and especially among the poor population, women's prescribed tasks are still closely linked to child education and the well-being of the family in general. The phenomenon of single-mother households is widespread[323] and in some low-income areas the presence of the father in the family unit might even be the exception.[324] In addition, women's care-giving activities within a community are not likely to be limited to their own children; whenever friends or relatives die or see themselves unable to care for their son or daughter, a common process of what Claudia Fonseca has termed 'child circulation'[325] will set in. The child is passed from one household to another, with sisters, (female) neighbours or grandmothers alternately taking on the responsibility.

322 Dowdney (n 2 above) 63.
323 M Neri *Perfil das Mães Brasileiras* (2005)
324 Barker (n 203 above) 53.
325 Goldstein (n 29 above) 154.

On top of these child-raising and family-related tasks that women are expected to carry out, they are normally also engaged in paid work and some even take on additional community responsibilities, which doubles or triples their burden.[326] A situation like Glória's for instance, which Goldstein[327] describes in her study, is, therefore, quite common for *favela* women. Single-mother Glória is employed as a full-time domestic worker in one of Rio's wealthier neighbourhoods, and in her home she takes care of several children and teenagers, some of whom are not her own.

These challenging conditions, under which many women live in accordance with their prescribed gender roles, are clearly aggravated by the reality of day-to-day violence, drug trafficking and social exclusion. Losing their children to the 'street' is, as Goldstein emphasises, one of the greatest worries that women in these settings have:[328]

> Being in the street can signify a number of scenarios, including actually living in the street, getting into trouble in the street with either gangs or police, or even being subjected to one of the state's institutions. [...] impoverished mothers in the favelas deeply fear that some of their children will find the street more attractive than their crowded, destitute and sometimes contentious households.

Mothers like Glória[329] (*ibid*: 137ff.), who helplessly watch while one or more of their children opt for a life as a *bandido*, experience a great sense of failure, loss and disappointment. It usually also heightens their preoccupation with the other children, who are not (yet) involved in gang activities. With the fathers in many cases being absent and themselves working long shifts away from home in order to guarantee the family's survival, mothers normally cannot give their children the attention they would like to. Additionally, the lack of authority due to their gender often leaves women with a feeling of powerlessness, as psychologist Lídia de Jesus points out:[330]

> When a mother [...] works all day, her son often spends time on his own, doing what he wants. [...] Sometimes, at 15, he is bigger than his mother. And without another masculine figure at home, he begins to talk back.

Moreover, women cannot rely on the support or stability of state institutions in the area of child care and education. Apart from the fact that the state infrastructure is little developed in these neighbourhoods, its functioning is also restricted due to the ongoing

326 Laurie (n 189 above) 384.
327 n 29 above.
328 Goldstein (n 29 above) 150.
329 Goldstein (n 29 above) 137 ff.
330 Lídia de Jesus, quoted in Viva Favela *I want them to arrest my son* 25 February 2005.

'armed conflicts', which may, for instance, force schools to close for an undetermined amount of time.[331]

Furthermore, organised armed violence may even prevent the state from investing in social policies that would effectively ease the burdens that women carry. The costs caused by violence in Brazil, including different sectors such as health and security, are estimated to add up to 84 billion dollars annually, that is 10.5 percent of the GDP.[332] This, of course, affects the entire population, but is likely to have an even greater impact on women, as the example of Trinidad and Tobago, where armed violence is on the rise, illustrates:[333]

> Women are called upon to manage and correct the fallout from this increase in gun violence [...]. The state re-directs money from the social sector to the security sector [...]. There is an increase in state expenditure on the security services and greater demands made of NGOs, which comprise mainly women, to provide social services.

Culturally prescribed gender norms make women feel primarily responsible for the well-being of their family, their children and, in many cases, their community.[334] The risks and consequences of organised armed violence, as well as the government responses to it, seem to further intensify gender-specific expectations concerning women's roles and obligations and their struggle to fulfil them.

2.5 A wound that does not heal:[335] The effects of killings on those who stay behind

> Mexe em tudo. Quando mata um, mata a família toda.[336]

331 'Drug trafficking war leaves more than 4.500 students without classes and shops close in the West of the city: Confrontations between the quadrilha of Celsinho from Vila Vintem against bandits from Comando Vermelho in Santa Cruz, close 10 schools and force police to close three roads in order to protect students and pedestrians' (*O Dia* newspaper 2 October 2002, quoted by Dowdney, n 2 above, 110).

332 T Kahn *Os custos da violência: quanto se gasta ou deixa de ganhar por causa do crime no Estado de São Paulo* (1999).

333 F Mutota *The Gender and Social Implications of the Illegal Use of Small Arms in Trinidad and Tobago* (2003) 6.

334 'Patriarchal ideologies hold women responsible for articulating kinship, friendship, and community networks, and organizing family survival strategies'. SE Alvarez *Engendering Democracy in Brazil. Women´s Movements in Transition Politic* (1990) 44.

335 'Uma dor que não passa. Uma ferida que não sara. Um espaço que jamais será preechido' [A pain that does not go away. A wound that does not heal. A space that will never be filled]. Helena Guerra, President of *Grupo das Lágrimas*, an association that supports relatives of violence victims, http://www.grupodaslagrimas.com.br (accessed 9 May 2005).

336 It changes everything. When one gets killed, the whole family gets killed. Euristéia de Azevedo, mother of a murdered son, quoted in Desarme *Da dor à ação: o impacto para as famílias das mortes causadas pela violência armada* 2 March 2005.

The traumatic experience of losing a relative, partner or close friend to organised armed violence is something that many Brazilians experience. Those losses have major consequences on the lives of these 'indirect' victims, who have only recently been acknowledged as such by researchers and public policy makers. Police and gang violence primarily cause male fatalities; those who die are, to a large extent, husbands, fathers, sons or brothers, and those who are left behind are mainly wives, daughters, mothers or sisters. There are even cases as horrifying as that of a mother, interviewed by MV Bill and Celso Athayde, whose 15 children all died within a period of three years.[337]

Moreover, the gender system prevailing in Brazilian society allows women — rather than men — to mourn, to weep, and to express their pain.[338] In fact, they are even expected to (visibly) show their grief in the case of the death of a family member. This might also be another reason why women disproportionately suffer from the loss of relatives.[339] A recent and not yet published study by Gláucio Soares on this issue[340] shows that an overwhelming proportion of the bereaved suffers from psychological problems or diseases such as post-traumatic stress syndrome or depression.[341] Their suffering is exacerbated by the fact that many of these 'indirect' victims are forced to see the culprits go unpunished or even have to live with them in the same community:[342]

> Em favelas, temos exemplos de parentes que se encontravam com os assassinos. Eles não estavam encapuzados, nem nada, e se sentiam muito seguros. Em outros casos, o encontro era com um policial militar que achacava todo mundo, matava e estava lá.[343]

In addition to the psychological effects, which usually last for many years, relatives and friends of a person who died through organised armed violence often have to endure a sort of stigmatisation by the community or the news media. Instead of being able to fall back on a functioning justice system that would deal with the murders, they frequently have to witness how their murdered relatives and friends are criminalised, even if they had not been involved in criminal

337 MV Bill in LM Soares *et al Cabeça de Porco* (2005) 35.
338 RCS Freitas 'Famílias e Violência: Reflexões sobre as Mães de Acari' (2002) 13/2 *Psicologia USP* 14.
339 This is not to say that there are no men suffering from the loss of a loved one through armed violence. Nevertheless, women's suffering often acquires a different dimension. More on this in Part III, 3.3.
340 'Vítimas Ocultas da Violência no Município do Rio de Janeiro' (The interviews were conducted in the year 2004).
341 G Soares in T Aguiar *Pesquisa aponta falta de políticas públicas para vítimas indiretas da violência* 11 March 2005.
342 As above.
343 In *favelas* we have examples of relatives who were meeting the murderers again. They were not wearing hoods, nothing, and were feeling very safe. In other cases, the meeting was with a military police officer, who was molesting everybody, killing people, and who was still there.

activities at all. In cases of police violence, the families especially suffer:[344]

> As famílias enfrentam [...] o preconceito que recai em quem é morto por policial, um preconceito que, de tão arraigado, é quase um dito popular que diz: se foi morto, algo fez[345](Kalili nd).

On top of the feelings of bereavement, pain and, possibly, guilt that the families of homicide victims have to cope with, they are sometimes also confronted with the loss of their main 'breadwinner' and primary caretaker.[346] In such circumstances, it is normally women who assume those roles and whose time of grievance has to be cut short due to the necessity of economic survival. Soares recounts a case in which the older sisters of a family that had lost its supporter were forced to quit school in order to support their relatives. Another story similarly shows the financial pressure on women in these situations:[347]

> A viúva de uma vítima de violência se casou outra vez por questões econômicas. Ela foi muito franca a respeito, dizendo: 'Meus filhos estavam sem comer, eu casei para dar de comida [sic] aos meus filhos'.[348]

The consequences of violent urban homicides for the victims' families and friends are serious, and they have psychological, social and economic dimensions. A large proportion of these 'indirect' victims of male-on-male violence are women, most of whom had already been living under precarious conditions before. Gradually, however, their suffering is being noticed by the public, not least because many of them engage in activism, fortified by the grief for their loved ones.[349]

3 Counteracting agents

There is a large range of actors in Brazil engaged in one way or another in putting an end to organised armed violence, the motivations of whom vary. Some are stimulated by personal experiences, perceptions and feelings such as fear, loss or a sense of injustice; for others it might simply be part of their profession as experts or government officials. Similar to the incentives, the viewpoints and approaches differ. Some take a public security, and

344 Kalili *O relatório da vergonha nacional* (not dated).
345 The families are faced with prejudice that falls on those who were killed by a police officer, a prejudice that, firmly entrenched, is almost a popular saying: If he was killed, he must have done something.
346 Also if a household has other sources of income, the missing financial contribution of the homicide victim is usually felt and needs to be compensated for.
347 Soares in Aguiar (n 341 above).
348 The widow of a victim of violence married again for economic reasons. She was very frank about it, saying: 'My children had nothing to eat, I got married to give my children something to eat'.
349 See Part III, 3.3.

others a health perspective; some view criminal drug traffickers as the core of the problem, others believe it is police impunity and corruption.

It still remains a rather rare perspective, however, to see gender as a factor in either explaining or counteracting the problem of organised armed violence. The initiatives which explicitly address its consequences in gender-specific ways are very limited, yet they do exist. An example are the projects set up by community leader Marli Medeiros in a poor neighbourhood in Porto Alegre;[350] among other things she created a garbage recycling venture, which allowed women — through a fixed income — to free themselves from the power of the drug dealers who were ruling the district.[351] In fact, the gender dimension is present in various reactions to and actions against organised armed violence. A gender pattern can be found, for instance, in the strategies of young people in violence-ridden communities when it comes to facing the issue. Furthermore, some NGOs, as well as other actors, have tried to point out the importance of women (focusing on their roles as wives, girlfriends or mothers) in putting an end to armed violence. Finally, many women themselves are taking up agency in combating different aspects of organised armed violence, and particularly its impunity, and very often they base their justifications and claims on traditionally prescribed gender roles.[352]

3.1 Men and women: How they deal with the problem of violence

Girls and boys who grow up in violence-ridden communities are confronted with gender-specific expectations and face gender-specific risks. Thus, they generally also develop gender-specific strategies in coping with or counteracting organised armed violence. As we have seen,[353] young men who opt against a life as a *bandido* may encounter certain difficulties when they try to live up to their choice: on the one hand, they are likely to experience, more or less severe pressure from their peers or other men, who are involved in drug trafficking, to join them. On the other hand, they often meet prejudiced attitudes from various groups in society, even within their

350 M Kruel *O beija-flor Marli* February 2002.

351 Marli Medeiros, when describing the situation before the start of her various projects, points out: 'Tínhamos que obedecer ao toque de recolher, e as mulheres eram as maiores vítimas da situação, pois serviam como mão de obra para o tráfico' [We had to comply with the curfew, and the women were the greatest victims of the situation, because they used to serve as the work force for the drug traffic] (in Kruel, n 350 above).

352 The following analysis includes selected examples of gendered responses to organised armed violence; it should not be seen as exhaustive.

353 Part III, 1.1.1.

own community, who are used to equating poor, 'black' boys and young men with drug dealers.[354]

In his research, Barker discovered that one of the key factors for young men to be able to cope with the reality of social exclusion and everyday violence is to have a male peer group that strengthens a non-violent and non-*comando* identity.[355] He observed one of these groups more closely:[356]

> For many young people in *favelas*, forming a *bonde* or a gang — violent, non-violent or somewhere in between — can be an effective way to protect oneself both within the *favela* and during outings in the prejudiced world outside the *favela*. [...] This group of young men was an anti-gang gang. They used the language of the more violent *bondes* but in fact sought to protect themselves by posturing like a gang to stay out of gang-related and *comando*-related violence.

Such alternative peer groups that foster different, perhaps unconventional, masculinities enable young men to stay out of or even speak out against gang violence and violent versions of manhood.

Girls and young women normally find themselves in situations different from those of boys and young men. They are less directly involved in organised armed violence, yet still they experience its effects. In addition, they might be confronted with the participation of their male family members or partners in gang violence, which is often accompanied by feelings of powerlessness and disillusionment. Goldstein found out that many women who feel the need to withdraw from a reality marked by male violence and marginalisation do so through joining one of the Pentecostal churches,[357] which are numerous in Brazil's low-income areas.[358] Notably, 69 percent of its members are women,[359] a fact that many authors explain by the churches' ability to deal with problems that the Catholic church traditionally has considered to be private, such as domestic violence.[360]

Women's plentiful conversions to Pentecostalism and other evangelic religions, which go hand in hand with their subjection to strict guidelines concerning moral conduct,[361] can be viewed,

354 Barker (n 203 above) 46ff.
355 Barker (n 203 above) 56.
356 Barker (n 203 above) 56 f.
357 Even though Brazil is still a highly Catholic country, evangelic religions are on the rise, especially among the poor. In 2000, 15.4 percent of the Brazilian population were evangelic, and 68 percent of these belonged to a Pentecostal church. MS Machado & CL Nacif *A Representação Politico-territorial dos Pentecostais no Rio de Janeiro: Reflexões Preliminares* (2004).
358 Goldstein (n 29 above) 215ff.
359 Goldstein (n 29 above) 217.
360 Goldstein (n 29 above) 220.
361 These churches normally prohibit drinking, prescribe special clothing (long white skirts) and advocate honest work (Goldstein, n 29 above, 219).

according to Goldstein, as a 'gendered form of oppositional culture'.[362]

> Religious belonging offers to women the bodily discipline — the clothing and the bearing — that suggests that they are 'out of the game'. [...] It is one concrete way — one of the very few — in which one can still be poor (and dark-skinned) and be saying and fortifying through clothing a definitive message: this person is far from the world of drugs, crime, violence, and trouble — in the church's language, closer to God. The effect of this protective camouflage is to shield the wearers from the form of violence that affect them, sometimes as a result of being the mothers, sisters, and lovers of men in trouble.[363]

Of course, displaying one's religious affiliation offers the same advantages to men, and many of them convert for exactly these reasons, but it still appears to be a distinctively female way of avoiding or opposing a violent and male-dominated environment.

There are certainly other gender-specific ways, beside the ones above-mentioned, in which boys, girls, men and women deal with the problem of organised armed violence. These gendered strategies and their potential influence on gender relations ought to be investigated in greater detail.

3.2 'Choose gun-free! It's your gun or me':[364] Gender-based disarmament initiatives

The escalating circulation and possession of small arms is one of the major factors contributing to the high levels of organised armed violence in Brazil's cities. This has been widely acknowledged, even by the Brazilian government, which in 2003 passed the so-called Statute of Disarmament.[365] Among other things, the Statute prohibits civilians from carrying firearms and severely raises the penalties for firearm-related offences. Another main point is the ban of the arms trade in the country, which still has to be approved by a popular referendum, which is expected to be held in October 2005.[366]

Even though a tightened legislation on the issue of firearms is certainly a step into the right direction, it is by no means sufficient, considering how deeply gun culture is entrenched in many parts of Brazil. Not only laws, but also attitudes need to change in order to achieve an effective disarmament. Mark Edwards, a British community activist working with gang members, puts it this way: 'You

362 Goldstein (n 29 above) 219.
363 Goldstein (n 29 above) 223.
364 NGO *Viva Rio*'s campaign slogan 'Arma não! Ela ou eu', freely translated in AI *et al* (n 102 above) 3.
365 Law 10,826/03 of December 2003.
366 'Senado brasileiro marca referendo de armas para 2 de outubro de 2005' *O Globo* newspaper 17 May 2004.

can't arrest a culture, you can't lock up a mindset. You need to get rid of that mindset from society'.[367] As we have seen,[368] the possession of small arms is intimately linked with gender roles. Small arms are extensively viewed as a symbol of masculinity, attributing the function of the 'strong protector' to men. Consequently, disarming men can, at the same time, mean challenging deep issues of gender identity.[369]

Also in the Brazilian context, gun violence has a male face; it is by and large men who kill and are killed with firearms. But women, too, are affected — by the loss of male relatives or friends or by the presence of guns in situations of domestic violence. In 2001, the NGO *Viva Rio*[370] launched the first campaign directly addressing women and girls and their role in male gun ownership, named 'Arma não! Ela ou eu'.[371] With slogans[372] like 'Quem ama desarma'[373] or 'Homem bom é homem vivo'[374] the campaign tried to 'de-masculinise' guns, stressing the role of women as essential protagonists in opposing male gun culture. According to the NGO's coordinator Rubem César Fernandes, women should use their powers in order to convince men to give up their weapons:[375]

> A mulher tem o poder de dizer: 'Na minha casa, não entra arma' ou 'se você estiver armado, não saio contigo'. Os homens matam e morrem mais. A mulher não pode simplesmente cruzar os braços.[376]

If armed violence is a male disease, the cure, according to the reasoning behind the campaign, has to be female (*ibid*).[377] Women, many of whom worry about their boyfriends, husbands, brothers and sons, are regarded as powerful agents in raising men's awareness concerning the dangers of firearms.[378] It was also in 2001 that *Viva Rio*, together with the Cultural Group Afro Reggae and the hip-hop artist MV Bill, initiated the campaign 'Mãe, desarme seu filho',[379] this time targeting specifically mothers and their urge to protect their children.[380]

367 M Edwards, quoted in AI *et al* (n 102 above) 30.
368 Part III, 1.1.
369 AI *et al* (n 102 above) 18.
370 http://www.vivario.org.br.
371 Literally translated this means: No Gun! Her or me.
372 http://www.wbrasil.com.br/wcampanhas/campanhas.asp?id=293 (accessed 15 June 2005).
373 Who loves, disarms.
374 A good man is a man who's alive.
375 C Fernandes in Correioweb *Segurança Pública: Desarme seu companheiro* 14 May 2001.
376 A woman has the power to say: 'No gun comes into my house' or 'if you are armed, I won't go out with you'. Men kill and die more. Women cannot simply sit back and watch.
377 C Fernandes in Correioweb (n 375 above).
378 J Galeria & J Sullivan *Arma não! Ela ou eu* 19 Septmeber 2001.
379 Mother, disarm your son.
380 http://www.vivafavela.com.br/desarme/acoes/maedesarme.htm (accessed 14 June 2005).

> Para Rangel Bandeira, coordenador da área de desarmamento do Viva Rio, as mães estão no alvo da campanha porque são mais sensíveis aos problemas da violência. Na análise do sociólogo, são elas que mais sofrem com a perda dos maridos e filhos.[381]

Such steps, which aim at specifically involving women in the fight against organised armed violence, are generally positive and can be very rewarding. It is particularly constructive to encourage women, together with men, to look through the gender matrix and question the symbolic meanings of firearms and the underlying gender roles in society. Moreover, it is a fact that women, especially in their roles as mothers, wives or girlfriends, can have a sometimes decisive influence on male decisions and behaviour. *Favela*-resident Brahilha Rosa Souza Alencar points out that most *bandidos* who decide to give up their criminal life do so due to the pressure or with the support of a woman they are close to.[382] Social scientist Rita de Cássia Santos Freitas emphasises the impact that mothers have on their children or sons:[383]

> Existem estudos que apontam o modo como a imagem da mãe atua como um 'freio' para os seus filhos (mesmo aqueles envolvidos em narcotráfico). Este freio atua também junto aos policiais.[384]

There is no doubt that quite a number of women undertake individual efforts to stop male violence and these efforts certainly should be endorsed by and encouraged through campaigns and collective initiatives. In doing so, however, one should avoid drawing on stereotypes or reinforcing gender roles that have been proven harmful or disadvantageous to women. It might, for instance, be effective to call on mothers to put an end to the violent conduct of their children, but at the same time this implies assigning certain responsibilities singular to their role as mothers — responsibilities that, it would imply, neither fathers nor the state possess. In general, reproducing clichés of 'bad boys' and 'good girls' will transform neither gender inequalities nor male violent behaviour in the long term.

Although supporting women in openly questioning violent masculinities, including guns, is a tightrope walk, it constitutes an important and rewarding task and can be an efficient instrument in combating violence.

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381 For Rangel Bandeira, coordinator of the disarmament area of *Viva Rio*, the mothers are targeted by the campaign, because they are the ones most sensitive towards the problems of violence. According to the sociologist's analysis, it is they who suffer the most, by losing husbands and sons. (D Góes *Paz no Morro: Arma, nem de brincadeira* 4 January 2001.

382 BRS Alencar quoted in Netto (n 241 above).

383 In Portuguese, the word *filhos* can either mean children (sons and daughters) or only sons.

384 There are studies that point to the way in which the image of the mother serves as a 'rein' for her children/sons (even those involved in drug traffic). This rein also has an effect on police officers. (RCS Freitas, Personal interview, May 2005).

3.3 From pain to action: Mothers' associations

> A gente tem que se unir [...] para falar ... Quem sabe um dia as autoridades escutem, né? Quanto mais mãe falando um dia alguém tem que ouvir, um dia alguém tem que ouvir.[385]

Relatives and friends of homicide victims are among the most vehement opponents of violence in general and police violence and impunity in particular. They organise themselves in reunions, manifestations and initiatives. This 'movement' depends on the especially strong presence of mothers, and over the years several mothers' associations formed by mothers who lost their sons (or sometimes daughters) to organised armed violence, and who mostly saw these crimes go unpunished, have emerged across the country.

The first of these mothers' associations — or at least the first which attracted the attention of the general public — were the *Mães de Acari* (Mothers of *Acari*).[386] After the police-induced disappearance in July 1990 of three young women and eight young men — the *Onze de Acari* [Eleven of *Acari*] — most of their mothers, who were giving comfort to each other and sharing their grief, joined together with the initial objective of discovering the bodies of their children.[387] Today, a number of such associations exist in different parts of Brazil — such as the *Mães do Caju* [Mothers of *Caju*[388]],[389] the *Mães do Rio* [Mothers of Rio] or the *Grupo das Lágrimas*[390] [Group of Tears]. Mostly, their members are not united by any single incident, as was the case with the *Mães de Acari*, but on the basis of their comparable experiences. As such, they are not only trying to resolve their personal cases by investigating and putting pressure on police and judiciary, as does for instance the *Grupo das Lágrimas*, they are also engaged in promoting public policy and legislative measures. The *Mães do Rio* for example, who today consist of more than 300 mothers with similar histories,[391] are highly active in pushing for the approval of law 3.503 of 2004,[392] which, *inter alia*, foresees the creation of a national assistance fund for victims of violent crimes.[393]

[385] We have to unite [...] in order to speak up ... Who knows, maybe one day the authorities will listen, won't they? With more and more mothers speaking up, somebody has to listen one day, somebody has to listen one day. Elisabeth Medina Paulino, member of *Mães do Rio* [Mothers of Rio], quoted in 'Mães do Rio' 2 May 2005.

[386] *Acari* is the name of a *favela* in Rio de Janeiro.

[387] Freitas (n 338 above).

[388] *Caju* is the name of a *favela* in Rio de Janeiro.

[389] 'Vida bruta, vida breve' *O Globo* newspaper 4 July 2004.

[390] http://www.grupodaslagrimas.com.br.

[391] Desarme *Da dor à ação: o impacto para as famílias das mortes causadas pela violência armada* 2 March 2005.

[392] A Braga *Mulheres entregam a Lula carta pedindo apoio para fundo contra violência* 21 June 2004.

[393] *Fundo Nacional de Assistência às Vítimas de Crimes Violentos (Funav)*.

One might wonder why there are so few fathers involved in this kind of activism. Is it really true, like the *Mães de Acari* think,[394] that they suffer in a different, less intense way from the loss of their children?[395] Freitas, who extensively studied the case of Acari, explains the absence of the fathers in the following way:[396]

> Há o fato (verdadeiro) de muitos pais biológicos não estarem vivendo com essas mulheres (e filhos). [...] Por outro lado, a socialização de homens e mulheres faz com que estas sejam muito mais atentas para a esfera do cuidar. Entendo que com essas mães, o desafio de cuidar, de maternar os filhos se amplia, ao se incluir no universo materno também o cuidado e a busca desses filhos desaparecidos. As cobranças sobre as mulheres são maiores (e não só da sociedade, mas delas próprias).[397]

There are obvious parallels between Brazil's mothers' associations and the activism of mothers that has emerged during the times of dictatorships all over Latin America, the most famous certainly being the *Madres de la Plaza de Mayo* in Argentina. In their now almost 30 years of activism, they have become a symbol of transforming maternal suffering into a collective strategy, with their personal experiences serving both as motivation and as justification for their fight.[398] A similar 'politicisation of motherhood', with motherhood, not citizenship, providing the principal 'mobilizational reference', is emphasised by Alvarez[399] in her analysis of urban social movements during times of authoritarian rule in Brazil:[400]

> As the 'wives, mothers, and nurturers' of family and community, women are the principal architects of the domestic survival strategies of the popular classes. [...] Poor and working-class women have [...] mobilized as women within their class to defend their 'rights' as wives and mothers, rights which dominant ideologies of gender assured them in theory, but which dominant authoritarian political and economic institutions increasingly denied them in practice.[401]

394 Freitas (n 338 above) 13f..

395 Indeed, they are likely to grieve in different ways, due to their prescribed gender roles (see Part III, 2.5.).

396 RCS Freitas, Personal interview, May 2005.

397 It is a (true) fact that many biological fathers are or were not living with these women (and children). [...] On the other hand, the socialisation of men and women makes the latter much more attentive to the area of care. I believe that in the case of these mothers, the challenge of caring, of mothering is extended, to the point that the care and the search for these disappeared children also becomes part of their maternal universe. The demands on the women are greater (not only from society, but from themselves).

398 ME Burchianti 'Building Bridges of Memory: The Mothers of the Plaza de Mayo and the Cultural Politics of Maternal Memories' (2004) 15/2 *History and Anthropology.*

399 SE Alvarez *Engendering Democracy in Brazil. Women´s Movements in Transition Politics* (1990) 50.

400 Alvarez (n 399 above) 55f..

401 Similar maternal activism can be found today as a reaction to neoliberalism and its effects. Also the *Madres de la Plaza de Mayo* are nowadays dealing with questions of economic inequality. One of them, Tati, puts it this way: 'The military dictatorship perpetrated a genocide. Today there is a new genocide, an economic genocide' (in Burchianti, n 398 above, 145).

Also in today's Brazil, dominant ideologies of gender roles make motherhood a powerful political foundation for challenging the state, as mothers both embody moral authority and represent the ultimate expression of profound love and suffering. Consequently, it can be assumed that the activism of mothers is met with a special sort of acceptance, respect or solidarity from the public, and, therefore, generally also has a greater impact.[402] Unfortunately, their ascribed moral authority does not necessarily mean that mothers are shielded from harassment and hostility. This is illustrated by the case of Edméia, one of the *Mães de Acari*, who was killed in 1993 after having testified in trial about police involvement in the disappearance of their children.[403]

As Tucker points out, 'the power of mother love still delivers substantial political clout'.[404] The idea, as argued by care theorists such as Gilligan, that the 'maternal mode of caring'[405] should be extended to public interactions and institutions and would, thus, create a more moral polity, is closely connected to the perceptions of motherhood hegemonic in Brazilian society. The image of mothers invading public places in search of their children or in search of justice is widely identified with the invasion of the personal, the emotional, the caring and peace-loving, that is, the distinctively 'female' entering into the 'male' public sphere.[406] As Freitas convincingly argues, the representation of these mothers' associations by the Brazilian media and the ways they are perceived by the public are deeply rooted in traditional images of gender roles in general and the mother figure in particular:[407]

> Mesmo mostrando imagens de mulheres nos espaços públicos, nas ruas, passeatas, lugares onde até pouco tempo atrás essas figuras pareceriam 'fora de lugar'; ainda assim, mesmo fora da casa, a 'missão' imposta à mulher continua sendo a de organizar, ordenando a desordem, com carinho, com paz. Mostram uma revolta 'dentro de uma certa ordem'.[408]

402 The quick reaction of state institutions — for instance by immediately guaranteeing financial support to the victims' families ('Oito policiais são indiciados por suspeita de envolvimento na chacina' *O Globo* newspaper 9 Apil 2005) — in the recent massacre in Rio's *Baixada Fluminense* (see Part I, 2.3.) may be seen as a sign of the capacity of these groups (Freitas, n 396 above).

403 AI (n 282 above) 91.

404 Tucker (n 130 above) 3.

405 J Squires *Gender in Political Theory* (2004) 156.

406 A more than obvious essentialisation of femininity comes to light when journalists and other commentators stress the 'natural' power of mother love that can defeat war and violence. Marcelo Barros, a Benedictine monk, writes: 'Não haverá bomba atômica que resista ao poder deste grande amor!' [There will not be any nuclear bomb that could resist the power of this great love!] (M Barros *Quando as mães conquistaram a paz* 12 May 2004).

407 Freitas (n 338 above) 15.

408 Even showing images of women in public spaces, on the streets, in protest marches, places where, until a short while ago, these figures would have seemed 'out of place'; nevertheless, even outside home, the 'mission' imposed on women remains to be that of organising, of putting in order the disorder, with affection, with peace. They show a revolt 'within a certain order'.

What could be termed as 'motherist' or maternalist thinking[409] is also part of the self-understanding which most of the mothers have who engage in activism. The *Mães de Acari*, for instance, regard a dichotomy between male and female values and the gendered attribution of specific roles and responsibilities as something natural and perfectly normal, which they, it seems, do not question.[410] Thus, it would appear that maternal activism as performed by Brazilian mothers' associations, does in fact contribute to reinforcing gender roles and inequalities by defining women primarily (or exclusively) through their role as mothers. Moreover, this motherhood is framed in a certain way, implying that a 'true' mother is care-driven, child-centric[411] and self-sacrificing.

Indeed, it is this traditional view of motherhood that serves as an impetus for these women to become active in the fight against violence and impunity. However, this does not necessarily mean that their engagement cannot have an emancipatory or feminist dimension at the same time; even though many women may set out for different reasons, their activism is likely to change both their own perception of femininity and the gender relations they are a part of. Frequently, their transformed role has an effect on their private lives: the two most active women of the *Mães de Acari*, for instance, both separated from their husbands, both because they no longer lived up to their partners' expectations (in terms of attention and care), and also because their partners were afraid of the possible consequences of their activism.[412]

Similarly, the women of the Salvadoran women's group CO-MADRES[413] were faced with reluctance on part of their husbands, who often perceived their activism as taking time away from their doing domestic chores and child-rearing.[414] Partly due to this fact, many of these women began to question their oppressive gender roles, and, gradually, the women's discourse and their perceptions of gender amplified.

> In many ways, the women of CO-MADRES retained some of their original and varied ideas about motherhood and added to them, incorporating ideas of women's rights within a discourse on human rights (*ibid*: 55).

Comparable developments occurred among the *Madres de la Plaza de Mayo*. Most mothers describe their involvement in the movement as 'a transformative process of 'rebirth' in which they gained political

409 See Part II, 2.2.
410 Freitas (n 338 above) 6.
411 Tucker (n 130 above) 3.
412 Freitas (n 396 above).
413 Committee of Mothers and Relatives of the Political Prisoners, Disappeared and Assassinated of El Salvador 'Monseñor Romero', founded in 1977 to denounce the atrocities of the Salvadoran government and military (Stephen, n 150 above, 37).
414 Stephen (n 150 above) 48.

consciousness',[415] which, one can assume, includes an awareness of gender relations. Also the fight of the *Mães de Acari* and the other Brazilian mothers' associations has, according to Freitas,[416] gained a political character — in the sense that these women are now fighting so that their experiences do not repeat themselves with other children and mothers. In terms of emancipation, however, the formation of Brazil's mothers' groups and their activism remain, as Freitas notes,[417] quite contradictory: 'Elas possuem práticas altamente revolucionárias por um lado, convivendo com práticas tradicionais de outro. Talvez a 'grandeza delas seja exatamente essa'.[418]

Transformations are not homogeneous, they are not linear and they occur both on the individual and the collective level. Mothers' activism undoubtedly does allow for emancipation, but it does not guarantee it. It enables at the same time accommodation and resistance to so-called traditional gender roles, and can combine practical and strategic gender-interests.[419]

On account of the vast scope of Brazil's violence problem, mothers' activism is almost certainly on the rise in the country. It will be interesting to see what long-term effects it has on gender relations and the concept of motherhood — both for the activists themselves and for the society as a whole.

The phenomenon of mothers' associations appears to confirm the hypothesis that *Viva Rio* put forward in the context of their gender-based disarmament campaigns:[420] if armed violence is indeed a male 'disease', the cure must be female. Given the prevalent system of gender roles in Brazilian society, it is certainly true that women — especially as mothers, but also as wives or girlfriends — are more prone than men to play a pacifying role; this is most likely due to the functions assigned to them as carers and 'nurturers'. There is, however, no reason to believe that an ethic of care or a 'contextual morality' is something essentially female opposed to a 'male' ethic of justice.[421] Joan Tronto for instance, argues that an ethic of care might be common to all marginalised groups, with women as one of them.[422]

If gender roles are transformed and if responsibilities for care are taken over by men, this is likely to influence men's attitudes towards

415 Burchianti (n 398 above) 142.
416 Freitas (n 396 above).
417 As above.
418 They have highly revolutionary practices on the one hand, yet live with traditional practices on the other. Maybe this is exactly where their 'greatness' lies.
419 See Part II, 2.2.
420 See Part III, 3.2.
421 Squires (n 405 above) 141ff.
422 Squires (n 405 above) 145f.

violence.[423] This is confirmed by the fact that more and more Brazilian middle-class fathers, who increasingly engage in caretaking, become active in movements against violence.[424] This changing of gender roles and the growing importance of 'father love' might help to create empathy and solidarity among fathers from different social classes, something that, to a certain degree, exists already among mothers.[425] After all, values such as compassion, care and solidarity are neither male nor female — but essentially human. If the problem of organised armed violence is to be solved, these values need to have priority and need to be fostered within whatever social construction of gender.

CONCLUSION

Organised armed violence, which comprises violence related to drug trafficking as well as police violence, affects and threatens the lives of Brazilians on a daily basis. Its main victims are the residents of urban low-income areas, who are at the same time subjected to a structural form of violence marked by social exclusion and marginalisation.

Gender is an important, yet generally neglected factor in adequately explaining, remedying and preventing this sort of violence. Socially and culturally prescribed gender roles have an impact on the causes and the effects of and the reactions to organised armed violence.

Violence, in all its manifestations, is a predominantly male phenomenon, and, in the Brazilian context, the overwhelming proportion of the perpetrators of violence are men. Yet, violent conduct is far from being an unalterable characteristic of 'male nature'; it is, instead, intimately linked up with the social construction of violent masculinities. This becomes evident when looking at the young men of Brazil's low-income areas and the attraction that a violent, 'gang-member' version of manhood holds for them. Drug faction sub-culture is heavily marked by a hypermasculine 'warrior ethos', and in the eyes of many men seems to provide the ideal arena to assert their maleness.

The form of masculinity hegemonic in drug gangs also includes discriminative and violent behaviour towards women, but, contradictorily enough, many girls and women are drawn to gang members precisely because of their male identity, which they see as an ultimate expression of maleness. By their affirmative reaction,

423 Holter (n 139 above) 76f.
424 Freitas (n 396 above).
425 As above.

women reinforce this violent and oppressive version of masculinity, which is harmful both to them in particular and to society in general. Although drug faction violence remains primarily a male domain, there are more and more girls and women getting involved in it. While most of them still occupy subaltern positions in the hierarchy, there are also women who take on leading functions. Their growing engagement can be regarded as a badly channelled, distorted form of emancipation.

Not only drug trafficking, but also police violence usually has a male face. In line with the worldwide pattern, state-sanctioned violence in Brazil is exerted predominantly by men; it is estimated that among the country's military police, only around 7 percent are women, the majority of whom occupy lower ranks. Still, the presence of women in this heavily masculinised institution is on the rise. This does not, however, reduce its gendered character, because these women are generally forced to adjust their reasoning and behaviour to the hegemonic form of masculinity. Hence, so far no evidence has been found that the presence of policewomen has decreased the (extra-legal) use of force.

Especially among the residents of Brazil's lower income areas, fixed traditional gender roles that privilege men are still very common, and violence against women is met with a rather high degree of acceptance. This gender system is also the reason why organised armed violence victimises women in different ways than it does men. Women are killed to a much lesser extent in armed confrontations, but they suffer a number of other, 'hidden', consequences that are frequently overlooked. As sexual violence against women usually tends to escalate in times of crisis and conflict, it is very likely, albeit currently undocumented, that Brazilian women also become victims of sexual abuse by the armed actors who participate in this 'undeclared war'. What is certain, is that the widespread presence of guns in Brazil's households facilitates and exacerbates the use of sexual and physical violence against women by their partners or other male family members.

Moreover, when defending themselves against male violence, women who live in areas ruled by a drug faction are dependent on the local drug dealers' judgments and actions, as they are the ones who maintain an alternative justice system in the absence of state institutions.

In addition to the risks that women run by spending their lives in a setting marked by male-dominated police and gang violence, they are also confronted with intensified expectations and challenges concerning their roles as mothers and caretakers. Finally, many women suffer — mainly psychologically, but often also financially — from the loss of male relatives killed by organised armed violence.

Such incidents usually affect women more than men, both in quantitative and qualitative terms.

In accordance with the gender-specific features of the causes and effects of organised armed violence, a gender dimension can also be found in the reactions to and actions against it. An example of gender-related strategies in dealing with the problem of violence is men's formation of alternative peer groups, on the one hand, and women's conversion to Pentecostal and evangelic churches on the other. Women's assigned roles as caretakers and 'nurturers' and their potential and actual pacifying function in the context of male violence have been acknowledged by NGOs, which have launched a number of gender-based disarmament campaigns.

How seriously women themselves take their motherly caring tasks becomes obvious in the fervent activism of some mothers whose children were murdered and who have now taken up the fight against organised armed violence and impunity. While their engagement is based on traditional definitions of motherhood, they are at the same time invading the 'male' public spaces; thus, their activism simultaneously provides room for both the accommodation and the challenging of the prevalent gender structures. However, this demonstrated 'ethic of care' is not and need not be something essentially female; with the transformation of gender roles and the concomitant 'de-feminisation' of qualities such as care and empathy, men, too, are more likely to take on non-violent attitudes and pacifying roles.

Taken as a whole, the phenomenon of organised armed violence reflects and perpetuates an unequal system of gender roles that, in this case, proves also to be harmful to men. To disrupt this gender system and to foster alternative, non-violent, non-oppressive versions of masculinity, and of gender identity in general, in which values such as compassion, solidarity and care are paramount, will be one significant step towards a less violent society.

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Re-embodying the human: Narrative de/reconstructions of the subject of human rights

Sophie Oliver

Abstract

This thesis considers the significance of personal or individual narratives in opposition to and resistance of oppressive processes of dehumanisation, both in contributing to the restitution of the human dignity and agency of victims, and, in a more general sense, for the de/reconstruction of the subject of Human Rights. The argument is developed not only through an analysis of personal narratives of dehumanisation – that of Holocaust survivors, torture victims and survivors of genocidal rape – but also by an interrogation of contemporary theory and of, in particular, so-called postmodern feminist theory. For these feminists, the body emerges as central to the re-scripting of the feminine, by which oppressive misogynistic narratives of woman are resisted. I hope to demonstrate that the same methods of (conceptual) resistance may be used in the context of serious dehumanising human rights abuses, with the effect of suggesting a thinking of the human that, being based upon a shared fragile or abject corporeality, is inclusive and universal. This vision of universality, endowed as it is with embodied specificity, need not be in conflict with the 'postmodern' condition, and can thus serve to aid the legitimisation of human rights in an otherwise increasingly hostile philosophical context.

Preliminary remarks

Paul Ricoeur speaks of the 'prefigured knowledge' or understanding of the world that each individual brings to any narrative and to any life experience. The mode of understanding by which this thesis introduces itself to the doctrine of human rights is at once deeply embedded in the conceptual and inspired by memories of real human suffering witnessed first and second hand. It represents, therefore, an effort to combine academic, conceptual interests and practical, personal concerns and thus asks fundamental questions about very particular human experience. The emphasis here should be upon the interrogative nature of the task: the aim is not to find conclusive answers, but rather to take a first step into waters which, while they may overflow the pages presented here, nonetheless merit this modest and preliminary exploration.

Special acknowledgement must be made to Professor René Foqué, of the Katholieke Universiteit Leuven, and to Dr Martin Crowley, of Queen's College, Cambridge, whose inspiring work on the Irreducible Humanity of *L'Espèce Humaine* planted the seed for the thoughts and ideas here developed.

1 Introduction

If this is a man
Primo Levi

> You who live safe
> In your warm houses,
> You who find, returning in the evening,
> Hot food and friendly faces:
> Consider if this is a man
> Who works in the mud
> Who does not know peace
> Who fights for a scrap of bread
> Who dies because of a yes or a no.
> Consider if this is a woman,
> Without hair and without name
> With no more strength to remember,
> Her eyes empty and her womb cold
> Like a frog in winter.
> Meditate that this came about:
> I commend these words to you.
> Carve them in your hearts
> At home, in the street,
> Going to bed, rising,
> Repeat them to your children,
> Or may your house fall apart,
> May illness impede you,
> May your children turn their faces from you.

1.1 I'm not human anymore: Considering dehumanisation

> I'm not human anymore. I have no name and even less soul. I'm a thing, not even a dog that gets stroked or a goat that gets protected and then eaten with gusto. I'm a vagina. I'm a hole.[1]
>
> Don't you understand what they've done to me? I'm a body that's decomposing, an ugly thing I don't want you to see.[2]

These words, spoken by Gentille, female survivor of the 1994 Rwandan genocide and the protagonist in Gil Courtemanche's novel *A Sunday by the Pool in Kigali*,[3] narrate what is, for most of us, an unspeakable, unimaginable condition: the loss of humanity. The idea that a person can become something less or other than human is not one that will be easily entertained by the majority of people, for whom the implications of such a state of being remain mercifully obscure. What does it mean to be *dehumanised*? On a personal level,

1 G Courtemanche *A Sunday by the pool in Kigali* (2003) 244.
2 Courtemanche (n 1 above) 257.
3 While fictionalised to a certain extent in the novel, Gentille was a real-life victim of the genocide. See Courtemanche (n 1 above) preface.

we might endeavour to explain, dehumanisation implies a loss of self-worth so devastating that a person no longer believes him or herself to be of the same value as other human beings. The person will no longer be perceived by others as an equal, but dealt with as one would treat an object unworthy or incapable of participating on an equal footing in any type of normal human interaction. On a legal level, dehumanisation could imply that the person be denied the rights accorded to all human beings, that he or she be, as philosopher Giorgio Agamben has phrased it, *homo sacer* – one who can be killed with impunity, because his life counts for nothing.[4] Having explained this we will no doubt face incomprehension and disbelief – surely this is not possible in *our* day and age? The human rights activist will raise his voice to declare the universality of the rights of men. Yet the linguistic exclusivity of this last turn of phrase already warns of potential inconsistencies in Western law and society's treatment of human beings. As the 1948 Universal Declaration implies, the principle of universality is fundamental to the discourse of human rights; yet the conceptual and historical trajectory of this discourse indicates, as victims such as Gentille can so tragically testify, that human rights are, in practice, far from universally respected. Indeed, the rather obscure concept of Roman law revived by Agamben is of very recent relevance for cultural theorist Slavoj Žižek, who sees the status of prisoners at Guantanamo Bay (effectively, he claims, that of the 'living dead') as perfectly aligned with the apparently benign concept of *homo sacer*.[5] The young girl speaking in the opening citation also feels that she is beyond, or below, the category of the human. But what, we may ask, has led her to such a sad conclusion? *How* and by what process does such dehumanisation occur? The answer to this question depends very much upon our understanding of what it means to be 'human' – an understanding that will be the focus of interrogation in this thesis. At this introductory stage, however, we may seek initial clarification in a brief reading of Gentille's personal narrative of dehumanisation, as presented in Courtemanche's novel.

From very early on in *A Sunday by the pool in Kigali*, Courtemanche places Gentille at the centre of a seductive love-story, portraying her as a woman of exceptional beauty and emotional intelligence. The contrast between Gentille in the early chapters and the Gentille of this extract from the final chapter of the novel, which takes place after the end of the genocide, is striking. If the aim of those who beat, raped, disfigured, tortured and humiliated Gentille was to *dehumanise* her – to reduce her, a woman, to the status of an object, to something *less than human* – then it would seem that, at

4 G Agamben *Homo Sacer: sovereign power and bare life (*1998) 71–115.
5 Slavoj Žižek *What Rumsfeld doesn't know that he knows about Abu Ghraib* www.inthesetimes.com/site/main/article/what_rumsfeld_doesnt_know_that_he_knows_about_abu_ghraib/ (accessed 20 February 2005)

least in their victim's eyes, they have succeeded. So what is the nature of the humanity that has been lost? For Gentille the loss of humanity occurred in the loss of identity and spirit. *I have no name and even less soul*. It occurred in the loss of agency and recognition. *I'm a thing, not even a dog that gets stroked*. It was in the loss of physical health, strength and beauty. *I'm a body that's decomposing*. In addition to all this, another vital loss is suffered by Gentille – that of the ability to narrate her own experience, to narrate her own body. One discerns an alarming dislocation of voice within her words. Gentille's voice has been silenced: rather than tell her own story, she recites the narrative imposed upon her body by the authors of the crime to which she has fallen victim. Her 'non-humanity' is constructed upon the signifying structures of the perpetrator, whereby the signifier 'Tutsi' is replaced with the term 'cockroach' and the body of the female victim is no more than a broken object to be abused and mutilated. In this very personal, victim's view, loss of identity, recognition, autonomy and voice are key factors in bringing about a diminishment of self-worth, and can be identified as four core effects of the dehumanisation process: reduced to nothing more than a fragile, decaying body, Gentille feels that she is no longer human. What, we may ask, does this imply for our understanding of what 'human' means, and consequentially, for our understanding of *human* rights? Could one conclude that Gentille, no longer 'human,' is no longer the subject of human rights, with all the associated freedoms and protections? In search of answers to these questions, let us now briefly consider the process within the framework a conceptual reading of human rights.

1.2 Moral and legal dimensions of the human in human rights

I want to show that the question with a juridical form 'Who is the subject of rights?' is not to be distinguished in the final analysis from the question with a moral form 'Who is the subject worthy of esteem or respect?'[6]

The intertwining of the moral with the legal is nowhere more apparent than in the debate concerning the nature of the subject of human rights, and when we consider what dehumanisation might mean for human rights we must necessarily address both moral and legal perspectives on the issue. It is between these two poles – the moral and the legal – that Western philosophy has come to position the subject of human rights; defined as a rational, autonomous, free and thinking being, engaged in relationships of mutual, legal and interpersonal, recognition with other human beings. Immanuel Kant provides the most obvious and extensive moral foundations to this

6 P Ricoeur 'Who is the subject of rights?' *The Just* (2000).

philosophy. Emerging against the background of natural rights theory, according to which human beings possess an innate natural quality that distinguishes them in value from other creatures and objects in the world, and enlightenment theory, that emphasised man's capacity for reason as the source of his special status, the Kantian subject is constructed upon the notion of rational autonomy. Autonomy, as the capacity to follow rational will, is opposed to heteronomy, which implies that an individual's acts are guided not by autonomous rational will but by external or internal (bodily or emotional) forces or drives. For Kant, then, dehumanisation may mean denying an individual the possibility or capability to exercise his or her free will; by restricting that individual's control over his or her thoughts, speech and actions. This failure to respect another human being as rational and autonomous corresponds to the reification of that person, an undertaking that Kant opposes in his Categorical Imperative, which states that one should:

> Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.[7]

For Costas Douzinas, Kant's Categorical Imperative and notion of autonomy as self-legislation 'provided the philosophical and moral basis for the ascendancy of rights and the public recognition of individual desire.'[8] Douzinas' reference to public recognition points to the legal dimension of human rights, which can be very well summarised by turning to the work of Hannah Arendt.

In her famous study *The origins of totalitarianism*, Arendt points to an essential paradox of human rights: supposedly anterior to all political arrangement and independent of citizenship or nationality, stemming as they do from man's natural or innate qualities and status, they are nonetheless denied to those human beings that are not members of a political community. To be a human being is not enough to be the subject of human rights. In Arendt's words, 'it seems that a man who is no more than a man has lost the very qualities which make it possible for other people to treat him as a fellow-man.'[9] As an illustration of this paradox Arendt refers to the situation of the *apatrides*: denaturalised and stateless, the *apatrides* of the post-war era were effectively rightless and thus pose a challenge to the theory of human rights:[10]

> The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships —

7 I Kant cited in F R Tesón, *A philosophy of international law* (1998) 4.
8 C Douzinas *The end of human rights* (2000) 195.
9 H Arendt *The origins of totalitarianism* (1986) 300.
10 Arendt (n 9 above) 299.

> except that they were still human. The world found nothing sacred in the abstract nakedness of being human.

Denied legal status and nationality, the stateless person is in a position similar to that of Agamben's *homo sacer*. Yet if the life of the *homo sacer* is worthless it is by no means inconsequential. On the contrary, the very existence of the *apatride* exposes a fault line in the theory of human rights, namely the fictional nature of a sacred humanity that precedes and exceeds collective society. Arendt explains how Nazi policies of denationalisation were effectively acts of dehumanisation – by virtue of their statelessness the *apatrides* were rejected not only by the Nazis, but by Europe and the international community as well.[11]

Those whom the persecutor had singled out as scum of the earth – Jews, Trotskyites, etc – actually were received as scum of the earth everywhere; those whom persecution had called undesirable became the *indésirables* of Europe.

Arendt asserts that the subject of 'natural,' 'individual' and 'apolitical' human rights is an abstraction, but also stresses the ability of man to make real these abstract rights by establishing a polity or 'common world' of human artifice. To be the subject of human rights requires the individual to be recognised, politically and legally, within a nation, or other type of artificial human community, in other words, within 'the public realm'. The lack of such recognition constitutes, for Arendt, a significant aspect of the denial of an individual's humanity.

Gentille's narrative of dehumanisation can be positioned in relation to the conceptual framework presented by Kant and Arendt. The loss of identity and autonomy that she describes recalls Kant's conditions for human dignity – as a victim of rape, overpowered by her aggressors, Gentille was no longer in control of her actions, and her body was treated by the perpetrators of the genocide as the means to the end of destroying her ethnic group physically and psychologically. Inherent in this process was the perpetrator's failure or refusal to recognise Gentille as an independent, autonomous agent. Now, as a survivor, Gentille shows little more, if any, autonomy; her will and self-image are determined by the suffering of her decomposing body and her words are those of her aggressors. In this sense she is neither recognised nor recognises herself as an autonomous, rational being worthy of rights. Denied this recognition, and in this way excluded from the public realm, she is effectively and conceptually dehumanised.

[11] Arendt (n 9 above) 269.

1.3 The Cartesian subject: A means to an end.

Gentille's story recalls countless other narratives of dehumanisation in which, as we shall see, victims are all too often reduced, through acts of physical and discursive or symbolic violence, to the status of objectified and abject bodies emptied of 'human' subjectivity. Akin to the 'decomposing body' of Gentille, these victims are present only in their corporeal fragility and abjection – in pain, in excretion, in blood, in decay, in death. The overwhelming presence of the body in these narratives suggests the highly intimate nature of processes of dehumanisation and points to the reification of the victim as only the first of two main stages in the dehumanisation process. The *reified* victim, a means to an end and reduced to a status of corporeality, is further dismantled through the *fragmentation* of the body, the second stage of dehumanisation. Gentille is nothing more than a 'vagina', a 'hole'. The *génocidaires* have not only made her into an object, they have also violated her sense of integrity, and this image of her decomposing, falling apart body mirrors that of her fragmented subjectivity. The simultaneity of this fragmentation presents a challenge to the traditional dualist notions of the human, most famously articulated by Descartes, whereby the subject is understood to be a thinking substance whose embodiment is of little or no relevance for personal identity:[12]

> From that I knew that I was a substance the whole essence or nature of which is to think, and that for its existence has no need of place, nor does it depend on any material thing; so that this 'me' ... is entirely distinct from body ... and even if body were not, the soul would not cease to be.

Descartes introduced into Western thought the now pervasive idea that human subjectivity is autonomous from the human body, rendering acceptable the instrumentalisation of that body. To continue along the path of this Cartesian logic of the subject, which separates in terms of 'being' and 'having' the self and the body respectively, opens wide the door to the dehumanisation of human beings. Attracta Ingram touches upon the dynamics of this problem in her critique of the doctrine of self-ownership, which, as she points out, 'embraces the most important claim of slavery: that people can be the object of private property rules.'[13] If my body can be seen as a piece of 'property' – a 'having' quite separate from my 'being' – then there is no ethical or anthropological reason to limit the use that I or others can make of it. A Cartesian rejection of the flesh as a superfluous dimension of the self allows for the individual's alienation from his or her own body, and, moreover, it permits the repudiation of one who is perceived to have lost everything *but* his or her body or

12 R Descartes cited in P J Markie *Descartes gambit* (1986) 20.
13 A Ingram *A political theory of rights* (1994) 38.

who is disproportionately dependent on and influenced by his or her corporeal status. Cartesian ontology, which infiltrates most traditional Western conceptions of subjectivity (including to a certain degree that of Kant, which WT Bluhm describes as displaying a certain 'collateral Cartesianism')[14] is, as Sidonie Smith has noted, characterised by:

> [the] banishment of the body and its desires to the borders of consciousness ... [encouraging] the process whereby others whose bodies are characterised as culturally 'grotesque' become more fully body.[15]

Gentille's body can certainly be characterised as culturally 'grotesque' – mutilated, diseased and decomposing, it has come to define, for Gentille, her very 'self'. Almost entirely 'body', she is marginalised by Western, Cartesian ontology as less than rational, less than autonomous, less than worthy of recognition – in short, as less than human. This, we might say, is a situation that she should be used to: as a woman, Gentille has long occupied the inferior, marginalised position to which the 'feminine' – already perceived to be 'disproportionately' embodied – has been relegated.

1.4 Positioning the woman in human rights

Woman is perhaps the most recognisable and long-running victim of the Cartesian-born repudiation of the body, and the effects of this are directly felt as far as her legal subjectivity is concerned. The female body, as the screen upon which oppressive and marginalising narratives of Woman have been projected, is essential to the construction of the so-called 'phallic feminine'. Fetishised, maternalised, eroticised or medicalised, Woman's body has come, in many ways, to determine her subjectivity in a way which is ultimately beyond her control. The 'feminine' has been defined as the corporeal, the sentient, and the emotive in a series of binary oppositions whereby man is the rational universal human subject pitted against the 'other' of feminine embodiment. For French novelist Marie Cardinal, along with many other feminist theorists, Western notions of the 'feminine' are largely if not totally constructed from narratives of Woman as written by men:[16]

14 B WT Bluhm 'Political Theory and Ethics' in D Weisman (ed) *René Descartes: discourse on method and meditations on first philosophy* (1996) 320.

15 S Smith *Subjectivity, identity and the body: women's autobiographical practices in the 20th century* (1993) 7.

16 M Cardinal *La médée d'Euripide* (1987) 51-2. 'For three thousand years, the dreams and symbols of the (male) historian's imaginary have invaded the reality of women. Sometimes goddesses, sometimes mothers, sometimes warriors, sometimes witches, sometimes slaves, sometimes mummys ... it depends upon the needs of a political and economic system that we do not choose.' (All translations from French my own).

> Depuis trois milles ans, les rêves et les symboles de l'imaginaire des historiens a envahi la réalité des femmes ... Tantôt déesses, tantôt mères, tantôt guerrières, tantôt sorcières, tantôt esclaves, tantôt mamans ... Cela dépend des nécessités d'une politique et d'une économie que nous ne choisissons pas.

The 'dreams and symbols' of the masculine imaginary have created a female subject knotted out of various limiting and contradictory narratives which simultaneously represent the female body as object of contemplation, desire, and maternity, necessarily conforming to set ideals of feminine beauty and behaviour, and as the site of sin and temptation — a mysterious being whose excesses threaten the stable and rational existence of men. In thrall to her body and her affections, Woman remains 'naturally' less rational than man.[17] According to Judith Butler, embodied female otherness is precisely what allows man to regard himself — the universal 'self' — as a stable, thinking being, liberated from the inconsistencies of the flesh:[18]

> By defining women as 'other', men are able through the shortcut of definition to dispose of their bodies, to make themselves other than bodies — a symbol potentially of human decay and transience.

Corporeal female otherness has for a long time served as a justification for the marginalisation of women from public life, placing them in a position of inferiority with relation to the universal male subject:[19]

> Woman's mode, conceived as more natural and less fully human and mature because speechless, inarticulate, unanalytical, unreflective, disqualifies her from public life.

Evidence of this marginalisation in specifically legal discourse exists from as far back as the writing of the Napoleonic codes, if not before. As Xavier Martin documents, Napoleon worked very much from the basis of a Cartesian ontology when writing the codes, defining reason as '*froide et clairvoyante*' as opposed to '*le sentiment aveugle et impétueux*'. Woman, with her '*faiblesse*' and her '*dangereuse sensibilité*', was, for Napoleon, too much a slave to sentiment and corporeality to be a full legal subject.[20] It is certainly not inconceivable that remnants of this attitude will have filtered through into current legal discourse, including that of human rights.

17 Smith (n 15 above) 13.
18 Smith paraphrases Butler (n 15 above) 11.
19 Smith (n 15 above) 15.
20 X Martin 'Nature humain et code napoléon' in *Droit: revue française de théorie juridique* (1983) 117-128.

Psychoanalytic theory adds another dimension to this discussion, with contemporary gender theorists frequently referring to the work of Sigmund Freud or Jacques Lacan in their analysis of social structures. For Lacan, the female position is unavoidably muted: forced into the Symbolic Order[21] – whose codes and language make up human society, and are in many ways institutionalised by the added coercion of legal discourse – Woman must sacrifice something of herself in order to exist. She does not and cannot exist within the Symbolic Order except as the performance of the phallic feminine (the eroticised, maternalised, corporeal other). In agreeing to this performance, however, she commits a suicidal act of *méconnaissance* by which Woman ceases to exist. This process reduces her to silence, since the Woman behind the mask cannot be represented in the language of the Symbolic.[22]

Gentille's voiceless words, spoken both as a victim and as a woman, illustrate the relevance of the embodied and mute female position that Lacan describes to questions of dehumanisation and human subjectivity. The two positions simultaneously occupied by Gentille – that of Woman and that of victim – are conceptually similarly located as the site of silenced embodied otherness. As we investigate processes of dehumanisation and potential resistances to these, we will come to understand better the significance that this female (and feminist) position can have for our understanding of human subjectivity and, therefore, of human rights.

1.5 Personal narrative: Ethical, conceptual and practical considerations

The female position may also be of relevance when we consider the role of personal narrative in relation (and resistance) to processes of dehumanisation. By examining the struggle of women to gain recognition and equality, and by looking at feminist forms of

[21] In Lacanian theory, the Symbolic Order is understood as 'the social world of linguistic communication, intersubjective relations, knowledge of ideological conventions, and the acceptance of the law.' The symbolic is made possible because of our acceptance of 'those laws and restrictions that control both your desire and the rules of communication, by which you are able to enter into a community of others.' See http://www.cla.purdue.edu/academic/engl/theory/psychoanalysis/definitions/symbolicorder.html. Where the terms 'Symbolic' and 'Order' are capitalised, I refer specifically to their psychoanalytical meaning. I have also used the terms 'symbolic' and 'order' in a more general sense.

[22] Lacan explains sexual difference according to the subject's relationship to the phallus. While man 'has' the symbolic phallus, to the extent that 'il n'est pas sans l'avoir', Woman does not have it, she is lacking. In order to conceal her Lack, Woman must reject an essential part of her femininity and 'become' the phallic feminine through an artifice or masquerade in which she performs an ideal of femininity so as to attract the desire of the masculine subject (who has the phallus she desires). See Lacan *Le Séminaire, Livre 4: La relation d'objet* (1956-7), Paris, Seuil, 1994 and Elizabeth Wright, *Lacan and Postfeminism*, Cambridge, Icon, 2000.

resistance, which have, in many cases, been concerned with narratives of the female body, we may suggest the potential for narrative to serve as a form of resistance to dehumanisation processes that are in turn enacted upon the body of the victim of gross human rights violations such as rape, torture and genocide. The public narration of such acts, even by the victim or survivor of the crime, is unsettling and, at times, ethically ambiguous. Courtemanche's novel forces us to confront not only the notion of dehumanisation; what it involves, how it is or is not possible, the implications of its processes both for the individual victim and for humanity in general, but also the ways in which we – bystander, observer, reader – should react to narratives of the process. A close reading of different personal narratives of dehumanisation could help to answer some of the questions posed by Gentille's story, and in turn suggest what these answers may mean for the discourse of human rights. The female, or rather feminist, position may help to suggest ways in which personal narrative can and has been used to thwart and deny dehumanising intent. French feminists such as Hélène Cixous, Julia Kristeva and Luce Irigaray have built upon psychoanalytic and postmodern theory to suggest the possibilities of a feminist resistance to oppressive grand narratives of femininity.[23] Rather than calling for a rejection of the encoded female body that has, in line with Cartesian repudiation of the corporeal, for centuries been the site of woman's marginalisation, these feminists encourage and enact a re-scripting of this body and of a *self*, male as well as female, written *through the body*. Personal narratives of dehumanisation offer a similar opportunity for the re-scripting of the victim's self, and present themselves as a mode of resistance to grand narratives of non-humanity while at the same time locating the victim, and the human, in an empowered and embodied subject position.

1.6 Outline of study

This first chapter has attempted to provide a guide to the main issues to be addressed in the thesis, and to introduce the reader to the relevant conceptual and theoretical positions that will be considered. The structure of this thesis reflects its methodology, which moves from close narrative studies out towards a consideration of broader, more conceptual problems. Chapter 2, accordingly, begins with a reading of personal narratives and testimonies of processes of dehumanisation at work in three extreme scenarios: the concentration camp, the torture chamber, and rape warfare. Chapter Three will consider the possibilities and limitations of such personal narratives as a means of resistance and restitution for victims. In chapter 4, the discussion will shift to questions of more fundamental

[23] For an explanation of the meaning of the term 'grand narrative' see chapter 2.5.

importance to the discourse of human rights; asking how the human, and thus the subject of human rights, might be defined in such a way as to resist the very concept of dehumanisation. Chapter 5 will, by way of conclusion, attempt to show how the different ideas put forward in the body of the thesis may be seen together to offer not only new responses but also new questions for the philosophy of human rights.

2 Stories of non-humanity

2.1 Introduction

From our reading of Gil Courtemanche's character Gentille's narrative we established two main stages in the process of dehumanisation; namely, reification and fragmentation. These two stages encompass a series of losses of qualities deemed essential to human subjectivity within Western philosophies of the self, upon which the subject of human rights is founded. Gentille's story emerges as expository in this discussion not because her suffering is more or less than that of other victims, but because she is a woman and because the female position - historically one of marginalisation, subordination and objectified corporeality - can help us to understand processes of dehumanisation and, in particular, the ways in which they are enacted upon the body by oppressive and silencing narratives of pain, power and non-humanity. It may be useful, then, to bear the significance of this female position in mind as we examine victims' testimonies of dehumanisation in three extreme examples of the process: the Nazi concentration camp (often described as the most insidious attempt at dehumanisation of the last century), the torture chamber and rape warfare. Like Gentille, the victims in these scenarios suffer the denial of their most essential 'human' capacities, and each situation involves violent transgressions of their physical integrity. The significance of the status of the body with relation to processes of dehumanisation will emerge at every stage of our attempts to answer, through our reading of often harrowing personal accounts of pain, violence and humiliation, certain fundamental questions. Firstly, what are the 'human' qualities or capacities that the victims might be seen to have lost in each scenario and how was this loss inflicted upon them? Secondly, to what extent does the apparent dehumanisation of victims in these testimonies influence our understanding of what it is to be human (an understanding that is crucial to the liberal philosophy of human rights)? This section opens with a reading of the story of the Nazi concentration camp victim, followed by a study of the narratives of torture victims in Argentina and an examination of the accounts of female victims of rape warfare in Rwanda and the Balkans, which will allow us to further relate the position of the dehumanised victim to that of the marginalised and

objectified Woman. We end with a summary of the methods and motivations of dehumanisation.

2.2 The story of the concentration camp victim

Imagine now a man who is deprived of everyone he loves, and at the same time of his house, his habits, his clothes, in short, of everything he possesses: he will be a hollow man, reduced to suffering and needs, forgetful of dignity and restraint, for he who loses all often easily loses himself. He will be a man whose life or death can be lightly decided with no sense of human affinity, in the most fortunate of cases, on the basis of a pure judgment of utility. It is in this way that one can understand the double sense of the term 'extermination camp', and it is now clear what we seek to express with the phrase: 'to lie on the bottom'.[24]

The horrific experiences of prisoners in the Nazi concentration camps have been brought painfully to light in the vast body of Holocaust literature and testimony that has accumulated since the end of the Second World War. One of the most reknowned Holocaust survivor writers is Primo Levi, whose testimonial novel, *Se questo è un uomo* (If This is a Man), immediately confronts readers – even by its title - with the fundamental question at issue here. Levi's stories of suffering, death and survival interrogate the very limits of the human, and ask what it takes for the world to consider that these limits have been crossed; for the world to declare that a man is no longer a man. By studying his text in conjunction with a collection of testimonies entitled *Different voices: Women and the Holocaust*,[25] which examines the particular experiences of female deportees, we can gain an insight into the mechanisms of dehumanisation at work in the concentration camps.

For Levi, the Nazi concentration camps issued a destructive power greater even than that of death: the power to destroy the humanity of their victims to the extent that, even in life, they were perceived to lie beneath human existence. The episodes of camp life described in *If this is a man* reflect upon this destructive power, each anecdote contributing to the — ultimately impossible — portrayal of the horrors suffered by the victims of the camp, and of the dehumanising forces at work there. As Judith Kelly notes, Levi 'concentrates upon the moment, the particular episode, the instant that epitomises for him the nature of the concentration camp experience, the dehumanisation of his state.' [26]

24 P Levi *If this is a man* (1987) 33.
25 CA Rittner & JK Roth (eds) *Different voices: Women and the Holocaust* (1993).
26 J Kelly *Primo Levi: Recording and Reconstruction in the Testimonial Literature* (2000) 6.

On Levi's arrival at the camp, he and his fellow prisoners, having been taken from their homes and separated from their families and their possessions, are ordered to strip naked. Their heads are shaved and their bodies are 'disinfected.' For Levi this violation of the prisoners' intimate, physical status instils in them the first knowledge that they have reached 'the bottom' of human experience:[27]

> It is not possible to sink lower than this; no human condition is more miserable than this, nor could it conceivably be so. Nothing belongs to us any more; they have taken away our clothes, our shoes, even our hair; if we speak, they will not listen to us, and if they listen, they will not understand.

In this one image we can locate the same four losses exposed in Gentille's story: identity (all distinguishing signs of the prisoner's individuality are removed), autonomy (he finds himself entirely at the mercy of the SS) and voice and recognition (the prisoner is not listened to or understood). Livia Bitton Jackson's description of this initiation ritual in her testimony, *Elli: Coming of Age in the Holocaust*, narrates a loss of individuality that echoes Levi's account:[28]

> The haircut has a startling effect on every woman's appearance. Individuals become a mass of bodies ... there is no distinguishing factor ... the absence of hair [has] transformed individual women into like bodies ... Facial expressions disappear. Instead, a blank, senseless stare emerges on a thousand faces of one naked, unappealing body ... We become a monolithic mass. Inconsequential.

While Levi narrates the 'haircut' as an extension of Nazi expropriations of the prisoners' property, Jackson's account, in which the image of the body is overwhelmingly present, demonstrates the extent to which the victims' identity or sense of self was affected by the physical transformation. She goes on to explain how the changes in the women's bodies brought on by starvation came to rob them also of their sexual identity. No longer menstruating, their bodies were so emaciated that the women prisoners 'were all like men.'[29] Jackson's narrative describes specifically female experiences of the camp, yet her emphasis on transgressions and transformations of the body as contributing to the loss of identity applies equally to male prisoners. It is through acts such as the shaving of hair, and through the effects of starvation and disease, that the reification of both the female and male victims was physically encoded upon their fragile and homogenised bodies.

This physical denial of individual identity is mirrored in symbolic dis-recognition. Prisoners' names are replaced with the generic label 'Häftling.' They are distinguishable only by an ascribed number,

27 Levi (n 24 above) 33.
28 LE Bitton Jackson 'Elli: Coming of age in the Holocaust' in C Rittner & JK Roth (eds) *Different voices: Women and the Holocaust* (1993) 78-9.
29 Bitton Jackson (n 28 above) 81.

tattooed onto their arms, which indicates nothing about them other than their place in the hierarchy of knowledge and suffering within the camp. By marking the prisoner's flesh with this code, as farmers mark cattle, the Nazis literally inscribed onto their bodies the erasure of identity and life-story prior to the camp. Levi describes how this classification transformed prisoners into something less than human, not only in the eyes of the SS but also in the way the victims saw each other, and themselves:[30]

> He is Null Achtzehn. He is not called by anything except that, Zero Eighteen; as if everyone was aware that only a man is worthy of a name, and that Null Achtzehn is no longer a man.

For Levi, the loss of individual identity goes hand in hand with the loss of autonomy. The prisoners in the camps are reduced to a state of child-like dependency, they must request permission to carry out the most basic and most intimate functions and they have little or no possibility to make any kind of choice or independent decision. As Judith Kelly puts it:

> Any attempt at self-assertion is immediately crushed and the victims understand that an act of identification will lead to death, and so they are forced to live with their non-personhood and come to accept themselves as non-human.[31]

Levi's description of the prisoners' daily march to work provides a shocking example of this loss of autonomy. Marching to the sound of German songs that came to represent the 'voice of the Lager [and] of the resolution of others to annihilate us first as men in order to kill us more slowly afterwards,'[32] the prisoners appear defeated. More than an act of submission to the SS, this march is evidence, in Levi's eyes, of the loss of any kind of free will in these men — not only do they not have the strength to disobey, they do not even have the ability to imagine or desire such strength:[33]

> ... marching like automatons; their souls are dead and the music drives them, like the wind drives dead leaves ... There is no longer any will…The Germans have succeeded in this. They are ten thousand and they are a single grey machine; they are exactly determined; they do not think and they do not desire, they walk.

Levi sees this rite as part of the meditated plan of the Nazis to destroy the 'man' in the victim of the concentration camp before submitting him to an 'anonymous death.'[34] The status of the '*muselmänner*' suggests that in many cases this plan succeeded. The weakest in the camp, doomed to die in the camps or the gas chambers, the *muselmänner*'s very humanity is in doubt. Too feeble even to imagine

30 Levi (n 24 above) 48.
31 Kelly (n 26 above) 11.
32 Levi (n 24 above) 57.
33 Levi (n 24 above) 57.
34 Levi (n 24 above) 61.

any kind of resistance or self-willed action, they submit completely to their own destruction:[35]

> The *Muselmänner,* the drowned, form the backbone of the camp, an anonymous mass, continually renewed and always identical, of non-men who march and labour in silence, the divine spark dead within them, already too empty to really suffer. One hesitates to call them living: One hesitates to call their death, death, in the face of which they have no fear, as they are too tired to understand.[36]

The *muselmänner* were not the only ones to show such passivity. One episode described by Levi concerns the hanging of a prisoner who, at the moment of his public execution let out a brave cry to his fellow inmates: '*Kamaraden, Ich bin der Letz*!' This exclamation — 'Comrades, I am the Last!' — could optimistically be understood to mean 'I am the last to die.' In Levi's text, however, it is an ambiguous declaration that also bears the tragic meaning 'I am the last man,' in other words, the last of the prisoners to have preserved his humanity. Indeed, having witnessed this death, and shared in the entirely passive reaction of the prisoners to the condemned man's cry, Levi is overcome with a feeling of shame and recognition of his own estrangement from the human:[37]

> I wish I could say that from the midst of us, an abject flock, a voice rose, a murmur, a sign of assent. But nothing happened ... there are no longer any strong men among us, the last one is now hanging above our heads ... from our side [there is] nothing more to fear; no acts of violence, no words of defiance, not even a look of judgment.

The phrase 'non-men' in Levi's description of the *Muselmänner* is echoed here by the use of the metaphor 'abject flock.' The Lager, Levi writes, was 'a great machine to reduce us to beasts.' Animal imagery is repeated in different ways throughout the text, betraying the fact that 'the transformation of the prisoners to a bestial state is complete, not simply with regard to their outward appearance but also in terms of their conception of themselves.'[38] Bitton Jackson notes a similar use of animal imagery in the language used by guards to address female prisoners:[39]

> From *blöde Lumpen*, 'idiotic whores,' we became *blöde Schweine,* 'idiotic swine.' Easier to despise. And the epithet changed only occasionally to *blöde Hunde,* 'idiotic dogs.' Easier to handle.

The bestialisation or depersonalisation of the prisoners was not only linguistic but also physical. Survivor writer Olga Lenyel compares the Nazi medical experiments undertaken upon deportees to the acts of

35 For an interesting discussion of the muselman, see G Agamben, Remnants of Auschwitz (2002) 41–86.
36 Levi (n 24 above) 96.
37 Levi (n 24 above) 156
38 Kelly (n 26 above) 54.
39 Bitton Jackson (n 28 above) 79.

'heartless' children that enjoy taking the legs and wings off insects. The difference, she takes care to stress, is that 'the insects were human beings.'[40] As guinea pigs in Nazi medical experiments, the bodies of the prisoners — dissected and fetishised — are simultaneously objectified and fragmented, thus displaying in their very flesh the two stages of dehumanisation. Even without being used in medical experiments, the body of the prisoner tells the story of these two stages. The following description of a nurse laughing and examining Levi's body as though it were an exhibit in a freak show demonstrates perfectly the extent to which the starved, suffering human body is deprived of its integrity and reduced to a collection of disparate barely living body parts:[41]

> The nurse points to my ribs to show the other [man], as if I was a corpse in an anatomy class: he alludes to my eyelids and my swollen cheeks and my thin neck, he stoops to press on my tibia with his thumb, and shows the other the deep impression that his finger leaves in the pale flesh, as if it was wax.

As this extract suggests, fragmentation mars the victims' relationship with their own bodies as the source of phenomenological and sentient experience. With skin like wax, the prisoner's body is numb to sensation. Similarly, at the hanging of 'the last one', the prisoners are unable to speak or to respond to what they see. Incapable of narrating their experience, they lose even the power to react inwardly to their suffering: They lose ownership of their own phenomenological knowledge of the world. This is coupled with the loss of the capacity to narrate one's own experience, or in other words, the loss of voice — something that is highly significant for Levi and must necessarily be coupled with the notion of recognition. The idea that recognition is necessary for a person to remain 'human' is powerfully illustrated in the anecdote of the chemistry examination. The officer examining Levi looks at him, but, as Levi notes, the look 'was not one between two men ... [it] came as if across the glass window of an aquarium between two beings who live in different worlds.'[42] There can be no communication between the officer and *Häftling*; there is no recognition of Levi's humanity in the eyes of his interviewer. Another manifestation of the loss of recognition — this time between prisoners — is to be found in Levi's description of the upside-down nature of morality inside the camp. In her testimony, *I was a doctor at Auschwitz,* Gisella Perl echoes Levi's shame at the moral debasement of the inmates:[43]

40 Olga Lenyel 'Five Chimneys' in C Rittner & JK Roth (eds) *Different voices: Women and the Holocaust* (1993) 120.
41 Levi (n 24 above) 55.
42 Levi (n 24 above) 111.
43 G Perl 'I was a doctor at Auschwitz' in C Rittner & JK Roth (eds) *Different voices: Women and the Holocaust* (1993) 108.

> We sank deeper and deeper into the sub-human existence where filth, pain, and crime were natural, and a decent impulse, a human gesture, something to be sneered at and disbelieved.

It is not only the *drowned* that is dehumanised but also the *saved*: He who turns his back on his fellow man in order not to perish with the others. A sense of guilt for having survived pervades all of Levi's work, and his descriptions of the ruthless tactics used by those who managed to survive are characterised by a mixture of respect and disapproval. Frederic D Homer interprets what occurs between the prisoners after the camp's evacuation in Levi's text as the establishment of a new 'social contract' — in other words, a reinsertion into a (moral) community of individuals who mutually recognise each other as human beings. After the Germans have left, Levi and two other men locate a stove with which to warm the room in which they and a number of other prisoners remain. Those who were not involved in its procurement agree to repay Levi and his two helpers with a slice of bread from their own rations. This agreement, as an act of recognition and gratitude, is an important sign that something has changed in the men:[44]

> It was the first human gesture that occurred among us. I believe that moment can be dated as the beginning of the change by which we who had not died slowly changed from *Häftlinge* to men again.

This moving and tragic scene of humanity restored serves as an indication of what, for Levi, to be 'human' means. The Nazi concentration camps, through their use of terror, violence, humiliation and starvation, through their intrusion into the most intimate and private realms of their victims' physical and psychological existence, aimed to reduce men and women to an abject, fragile, corporeal state of suffering that rendered the 'human' acts of speech, resistance, autonomous action, responsibility and mutual recognition impossible for most prisoners in most circumstances. In this sense, Levi's testimony is a narrative of something more than the death of the victims of these camps; it is the story of the destruction of their humanity.

2.3 The story of the torture victim

Torture has been used as an instrument of oppression all over the world and since the earliest years of human society. Children and adults alike marvel, with a mixture of delight and horror, at the complicated devices — on show in museums all over Europe — used by medieval torturers to stretch, slice and contort the bodies of their prisoners. The pleasure of our fascination in these moments is permissible only if we succeed in fictionalising the reality that these

[44] Levi (n 24 above) 166

instruments of torture represent: a reality that still exists today. The testimonies of Jacobo Timerman and Alicia Partnoy, both arrested and tortured by the Argentine military in the 1970s, represent a tiny selection of the ever-increasing body of *Testimonio* literature that has emerged from the Latin American continent in recent years. While less explicitly addressing the issue of dehumanisation than much Holocaust testimony, these texts consistently expose parallels between the processes at work in the torture house and those functioning in the camps — parallels made clear by Timerman when he writes that he 'felt like those Jews who wound up being convinced by the Nazis that they were objects of hatred because they were intrinsically hateful objects.'[45] As we shall see from our reading of Timerman and Partnoy's testimonies, however, the body of the torture victim serves even more explicitly than that of the deportee as the screen upon which the violence of dehumanisation is enacted, and physical pain and degradation carry with them an intense psychological effect.

Dehumanisation in the military prisons of Argentina was enacted through dual processes of humiliation and pain. Timerman's testimony, *Prisoner without a name, cell without a number,* describes instances of both of these, but the 'punishments' he describes are an example of the former. Prisoners, he writes, were forced to 'undress, lean over [and] rotate round and round, dragging their [index] finger on the ground without lifting it.' Another favourite was the so-called 'Locomotive', whereby 'five hefty policemen form a little train [and] come down the passage, picking up speed, [to] hurl themselves like a dead weight on the prisoner; plastering him against the wall.' When the guards are busy, he writes, 'they simply order the prisoner to run naked along the passageway reciting aloud sayings dictated to him. *My mother's a whore ... I masturbate'*[46] This humiliation and degradation accompanies a complete loss of autonomy that is an almost constant condition of the prisoner in the clandestine military prison. Obliged to obey the most absurd and debasing orders of their captors, both Timerman and Partnoy were also forced to wear a blindfold at all times, inflicting upon them a sense of disorientation and defencelessness that left them entirely dependent on the guards. In Partnoy's testimony, humiliation and denial of autonomy are interpreted as attempts to take from the victim his or her identity:[47]

> Throughout our continent there are many 'schools' where professors use the lessons of torture and humiliation to teach us to lose the memories of ourselves.

45 J Timerman Prisoner without a name, cell without a number (2002) 126.
46 Timerman (n 45 above) 82-3.
47 A Partnoy *The Little School: Tales of disappearance and survival in Argentina* (1988) 18.

Partnoy describes what for her was a vital struggle to hold on to who she was. Remembering the moment in which her guards decided, because of a popular song one of them was singing, to change her name to 'Death' — a highly symbolic act that challenged her identity and her humanity – she describes her only means of resistance: 'every day, when I wake up, I say to myself that I, Alicia Partnoy, am still alive.'[48] By teaching prisoners to 'lose the memories of [them]selves' the '*Escuelita*'[49] aimed to break their sense of identity. As in the concentration camp, this was to a large degree achieved through the reification of victims. Adopting the voice of a pregnant woman, also incarcerated at the Little School and also severely tortured, Partnoy demonstrates the fear and horror suffered by the victim as she realises that she is being made to believe that she is less than human, that she is descending to the status of animal:[50]

> But when they come for me ... to kill me next time ... No, please don't come ... I'm not an animal ... don't make me believe I'm an animal ... but that's not my scream ... That's an animal's scream ... Leave my body in peace.

As this female victim's plea for her body to be left 'in peace' suggests, the dynamics of torture are first and foremost an embodied experience of pain. The effects of torture demonstrate the extent to which the human subject, male as well as female, is embodied: it is by the extreme pain inflicted upon the *body* that the victim is deprived of those vital 'human' capacities that are normally understood, in Western thought, to be purely noumenal. The apparent inexpressibility of pain is a case in point. For the torture victim, as for the deportee, the loss of autonomy and identity can only be made more devastating by the lack of voice with which to communicate to others what has occurred. Timerman explains the pain of torture as something fundamentally unrepresentable; it is 'a pain without points of reference, revelatory symbols, or clues to serve as indicators.'[51] As Karen Slawner notes, 'Timerman […] refers to himself in the second person when describing his own experience, as if his very ability to speak for himself had been destroyed.'[52] Elaine Scarry's *The Body in Pain* examines this phenomenon, addressing the issue of torture and the effects of extreme pain on language and on the voice of the victim. In her analysis, the loss of voice resulting from intense pain runs deeper than the victim's inability to describe what

48 Partnoy (n 47 above) 42-3.
49 'La Escuelita' or 'The Little School' was the name given by the military to the prison and torture house in which Partnoy was held.
50 Partnoy (n 47 above) 96.
51 Timerman (n 45 above) 32.
52 K Slawner *Interpreting victim testimony: Survivor discourse and the narration of history* at http://www.yendor.com/vanished/karenhead.html (accessed 20 May 2005).

is happening; it is an indication of his or her dislocation from human language, which is itself undermined and threatened:[53]

> Physical pain does not simply resist language but actively destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned.

The destruction of language is related to the 'deconstruction' of the prisoner's voice, enacted by the interrogation that accompanies the infliction of pain in torture. Timerman notes that the torturer's aim is to usurp his victim's words in order to receive the responses that he requires, and describes how the interrogator will 'keep insisting until the sought-after reply, or the one that is suspected to exist, is obtained.'[54] For Scarry, the obtainment of the confession, made possible by the infliction of extreme pain, has devastating implications for the subjectivity of the victim:[55]

> [The confession] is a way of saying, yes, all is almost gone, there is almost nothing left now, even this voice, the sounds I am making, no longer form my words but the words of another.

Torture alienates its victims from the speech community, thus also inhibiting their ability to engage in reciprocal human relationships and denying them recognition. For Timerman, the capacity for human contact, exchange, dialogue, and reciprocity is essential to the human condition. The reader, remembering the horrific and humiliating treatment suffered by the prisoners at the whim of the guards will have difficulty understanding Timerman's assertion that 'the prisoner who is incommunicado is envious of all this' and longs 'to see a face' so desperately that even the torturer's face is desired. Yet as Timerman explains, this desire merely represents the human need for social interaction and recognition:[56]

> The man who's tortured finds in his torturer a human voice, a dialogue for his situation, some partial exercise of his human condition.

The sad irony, of course, is that the torturer has the ability to isolate the prisoner even further from his 'human' condition. Scarry's study charts torture's 'unmaking' of domestic objects and the symbols or institutions of human society, showing how previously reassuring, protecting and even humanising objects and experiences are converted into weapons and agents of pain for the victim, thus alienating him or her from the shared structures of human life. Partnoy's ironic references to the name of the torture centre — which invokes images of carefree youth and childhood security — may be understood in the light of this theory: the school, usually an image of comfort, is for the prisoners associated with pain, isolation and

53 Elaine Scarry *The body in pain: The making and unmaking of the world* (1985) 4.
54 Timerman (n 45 above) 55.
55 Scarry (n 53 above) 33.
56 Timerman (n 45 above) 38.

violence. This symbolic unmaking of the prisoner's perception of the structures of human society is coupled, in Scarry's thesis, with the contraction of the torture victim's world, whose scope is reduced to the direct concerns of the body in pain:[57]

> As the body breaks down, it becomes increasingly the object of attention, usurping the place of all other objects, so that finally, as in very old and sick people, the exclusive content of perception and speech may become what was eaten, the problems of excreting, the progress of pains, the comfort or discomfort of a particular chair or bed.

Scarry's account of the torture victim's dislocation from 'civilisation' echoes Hannah Arendt's emphasis on membership within a community of human artifice as an essential aspect of subjectivity. The 'unmaking' of the domestic objects that, in normal human life, constitute the building blocks of human society, excludes the victim from the world of human artifice, returning them to what Arendt calls 'a peculiar state of nature' akin to 'the tragedy of savage tribes […] that inhabit an unchanged nature which they cannot master, yet upon whose abundance or frugality they depend for their livelihood.'[58]

With the prisoner's world reduced to the painful sentience of the body, it takes very little for the victim to arrive at the level of self-alienation and self-devaluation characteristic of the 'dehumanised'. Scarry explains how certain methods of torture are designed to make the victim perceive his or her body as the very source of pain:[59]

> [The] unseen sense of self-betrayal in pain, objectified in forced confession, is also objectified in forced exercises that make the prisoner's body an *active* agent, an actual cause of his pain.

The victim's alienation from his or her own body in such instances forms the pivotal point in the two stages of objectification and fragmentation already identified as central to dehumanisation processes. The victim of torture, cut off from humanity and 'civilisation', from the speech community and, finally, from his or her own body — which at the same time constitutes the entire universe — is, in Scarry's eyes, experiencing in sentient presence the same negation that accompanies the absent sentience of death. In both cases, the annihilation of the subject is fully embodied.[60]

Pain is the equivalent in felt-experience of what is unfeelable in death. Each happens only because of the body. In each, the contents of consciousness are destroyed. The two are the most intense forms of negation, the purest expressions of the anti-human, of annihilation, of total aversiveness, though one is absence and the

57 Scarry (n 53 above) 33.
58 Arendt (n 9 above) 300.
59 Scarry (n 53 above) 4.
60 Scarry (n 53 above) 31.

other a felt presence, one occurring in the cessation of sentience, the other expressing itself in grotesque overload.

The torture victim is, like the camp prisoner, the victim of reification and fragmentation both on physical and psychological levels. The body of the victim is used as the object of violence directed for the obtainment of whatever it is that the torturer seeks to hear. The victim is thus deprived of autonomy, identity, voice and, alienated from human social artifice, of recognition. The infliction of extreme pain disturbs the integrity of the victim's body and alienates the victim from his or her own flesh, now perceived as the source of suffering. Physical suffering, in the form of intense pain, starvation and acts of humiliation is thus the source of the victim's psychological self-devaluation and alienation from humanity.

2.4 The story of the woman raped in war

The devastating impact of rape warfare upon victims is clearly demonstrated in *A Sunday by the pool in Kigali*. Gentille not only feels violated as a human being, she feels that her womanhood has been specifically attacked. The various stages and losses involved in the process of dehumanisation have already been discussed in relation to Gentille's narrative. After a brief expansion of this analysis, looking also at the testimonies of victims of rape warfare during the 1990's Balkans conflict, the focus of the study in this section will shift to the relationship between Western narratives of the feminine and processes of dehumanisation, which have so far only been briefly alluded to in our discussion of the concentration camp and torture. The relevance of the female position to the study of dehumanisation processes is nowhere more apparent than in the case of gender-based war crimes and genocidal rape. As Kelly Dawn Askin has stated, whereas 'World War Two will always be remembered for the Holocaust ... the Balkan conflict will be remembered for its manipulation and abuse of the female gender to commit ethnic cleansing and genocide.'[61]

Rape in war is so common that political and military leaders have even defended it as a necessary 'recreation of the warrior.'[62] This attempt to 'justify' rape in war as necessary to satisfy the physical needs and ease the hardships of soldiers is an example of the institutional reification of women as the means to the satisfaction of men's (sexual) aims. Yet, as testimonies of women raped in the

61 KD Askin *War crimes against women: prosecution in international war crimes tribunals* (1997) 296.

62 Dr Goebbels *Axis leader WWII*, cited in Askin (n 61 above) 49.

Balkans war demonstrate, rape warfare is rarely as simple as soldiers satisfying their physical need for sexual pleasure:[63]

> He was very cruel towards me. It was clear from his behaviour that his purpose was not to have sexual pleasure but to humiliate me, to kill my honour and dignity.

While gender abuse has traditionally been judged to be a private issue, in which law and government have refrained from becoming involved, genocidal or political rape represents an all too often very public violation of the victim's most intimate self. 'We want you to experience everything: Sex, and pain, and humiliation' one Serbian soldier was reported to have told a victim who begged that her children be spared the sight of her distress.[64] Rape warfare in this case serves not only to dehumanise the woman who is being assaulted but also the group(s) to which she belongs, because it 'causes the raped group to occupy an inferior position, and the raping group a superior position, in the hierarchy.'[65] As the following account testifies, during the conflict in the Former Yugoslavia, rape was frequently conditioned by acts of cruel, symbolic violence to constitute a parallel attack on the victim's ethnic group:[66]

> I felt the Serb was cutting my back with his knife, first from my neck down to my spine, and then from one shoulder blade to the other. I was all covered with blood. I was twitching and struggling under the maniac, while he was screaming: 'Now you are a Serb woman, now you are converted to Christianity.'

For the victim in such a scenario, the dehumanisation is multiple: not only is her bodily integrity and autonomy denied, not only is she humiliated to the point of feeling worthless, she also takes on the role of a pawn in the battle; her pain and suffering are no longer her own but instead transformed into symbols of the respective power and vulnerability of the aggressor and the victimised groups. A similar observation has been made in a Human Rights Watch report on sexual violence during the Rwandan genocide:[67]

> The humiliation, pain and terror inflicted by the rapist is meant to degrade not just the individual woman but also to strip the humanity from the larger group of which she is a part.

In both these conflicts, cultural specificities surrounding notions of gender are also significant to the dehumanisation process. According to traditional Muslim perceptions of rape, the victim may be

63 Testimony code 'Gagovi' in I begged them to kill me: crimes against the women of Bosnia-Herzegovina, Sarajevo, Centre for Investigation and Documentation (2000) 112.
64 Testimony code 'Brko' in the report I begged them to kill me (n 63 above) 107.
65 Askin (n 61 above) 268.
66 Testimony code 'God' in the report I begged them to kill me (n 62 above) 112.
67 Human Rights Watch/Africa 'Shattered lives: Sexual violence during the Rwandan genocide and its aftermath 1-2' in Askin (n 61 above) 266.

considered as soiled and unmarriageable, thus becoming the target of social ostracism even within her own group.[68] Similar patterns of victim repudiation can be identified in Rwanda, where the reluctance of women to testify about sexual violence at the community based *Gacaca* trials betrays the existence of cultural taboos of the kind that have silenced rape victims throughout history and across the globe.[69] The victims of rape warfare in Rwanda and the Balkans are at the same time victims because of their political or ethnic identity and because of their gender, and their victimisation as women will often continue after the end of the conflict, in their own societies. The perpetrator of the rape thus succeeds in threatening the stability of the group well after the crime is committed.

While recognising the implications of ethnic rape for the group as a whole, we should not overlook the effects of the crime upon the individual victim, which, as in the case of the deportee and the torture victim, are closely linked to her corporeal status. Rape is an exercise of power by which the victim is deprived of her physical autonomy, and, in the cases of rape warfare we have seen, of her identity, both as a member of an ethnic group and as a woman. Countless testimonies tell the story of rape infused with useless, cruel violence and the mutilation of women's bodies. The extent of physical violence endured by victims is almost unimaginable, and the nature of this violence is invariably linked to pre-existing narratives of the female body as a sexual and reproductive object. Where femininity has been constructed upon images of the maternal and sexual body, it is this body that the perpetrator of rape warfare aims so brutally to destroy, whether it be through rape, or through the mutilation of the victim's breasts and reproductive organs.[70] Such manipulations of the victim's sexualised and maternalised body render her integral whole irrelevant, fragmenting her physiological and psychological self. In Courtemanche's novel, Gentille describes how her rapists failed to see her body in its integrity, not recognising, or not wanting to recognise the things that — sexually — she could *actively do* with that body. Aware only of the pleasure that they could take from her — a passive, empty receptacle — Gentille's rapists denied her existence as anything more than a fragmented sexual object.[71]

> Today I'm only two dirty, stinking little holes they keep trying to make bigger. For them I do not have eyes, or breasts, or thighs. I do not possess cheeks or ears [...] he mounts me like I'm a bale of hay [...] I

[68] Askin (n 61 above) 268.

[69] See R Webley *Gacaca* and reconciliation in post-genocide Rwanda — Human Rights Center Final Paper at http://www.hrcberkeley.org/download/report_wradha.pdf (accessed 15 April 2005).

[70] Some have even gone so far as to cut open the pregnant woman's womb, killing the child along with the woman's maternity. Askin (n 61 above).

[71] Courtemanche (n 1 above) 244–245.

> felt like telling him I had breasts, hands, a mouth that could give him as much pleasure as my bleeding little hole. I didn't.

Writing of the sexual torture of women under military regimes in Argentina and Chile, Ximena Bunster-Burotto emphasises a specific pattern that demonstrates the manner in which narratives of femininity (the well-known Madonna or whore dichotomy, especially prevalent in the Latin American (mestizo) context of *marianismo*) are used in order to humiliate the victim, attacking her social identity through her body:[72]

> [The] assault on a woman's sense of self and the manipulation of her traditional role as wife and mother are used by torturers to break, punish, and ultimately destroy her.

The gender identity of female victims of torture and rape warfare is misused in order to challenge and violate the victims' humanity. Key to this dehumanisation are already existing narratives of gender, that are not only manipulated by the perpetrator in order to inflict greater suffering upon the victim, but also serve to perpetuate perceptions of the non-humanity of the victim or survivor once the act of violence is over. It is thus inevitable that when we consider gender based war crimes in terms of dehumanisation, we link these considerations with the status of women in law and society in general.

Kelly Dawn Askin has demonstrated the extent to which, historically, narratives of the feminine have degraded and marginalised women in legal and political discourse. She cites reactions to a 1907 US government bill to allow women to run for seats on local bodies — according to dissenters, who seemed to share the views voiced many years before by Napoleon, women were 'much too hysterical ... much too disposed to be guided by feeling and not by cold reason'[73] to be allowed such a privilege. This Cartesian-based view of women as being at the mercy of their corporeal status, determined by emotions and bodily impulses rather than rational thought, is one that persisted well into the twentieth century as the justification for excluding women from public life and has only recently been dispelled.

We have already seen the ways in which narratives of the maternalised and sexualised female body are manipulated through acts of gender-based violence that simultaneously destroy a woman's physical integrity and sense of self. Similarly, Western culture has for centuries used the narratives of the hysterical, corporeal and irrational feminine described above as weapons of discursive violence against women. These narratives can be described as dehumanising narratives and thus expose potential parallels between the position of

72 X Bunster-Burotto 'Rape and Torture in War' in M Davies *Women and violence* (1994) 164.

73 Askin (n 61 above) 214.

the victims of the human rights violations we have been discussing and that of Woman in Western discourse. These parallels will be further explained in the following summary of that which we have learned about dehumanisation in our study of victims' narratives of the process.

2.5 Grand narratives of non-humanity: A summary of the how's and the why's of dehumanisation

As has been demonstrated, the same four losses that occurred in Gentille's story — of identity, autonomy, voice and recognition — can be discerned in the narratives of these three scenarios of dehumanisation. What has become clearer is the extent to which each loss is linked to the others, within a two-stage process of reification and fragmentation enacted on both physical and psychological levels simultaneously. Nearly every testimony we have considered here describes an attempt to deny the individual identity and value of the victim and to destroy the person's sense of self, whether as a woman, a man, a citizen, a member of an ethnic group ... or, and always, as a human being.

The first and most tangible manifestation of this is in restrictions placed upon certain aspects of physical autonomy. The deportee or the political prisoner, for example, has no freedom to choose how his or her body is used and is forced to perform the most basic bodily functions under strict control and constant observation. As Scarry has indicated, in instances of extreme pain the torture victim no longer has the capacity for reason and can no longer think, speak or fully control the sounds and movements of his or her body. Similarly, accounts of the moral deprivation of the Nazi camps demonstrate the extent to which, in moments of intense physical suffering, the prisoners listened more to the needs of their bodies than to the moral voice of their reason. As estranged as one could be from Kant's wilful subject, these victims are at the mercy of both external and internal pressures. Aligned with notions of the embodied feminine position described above, they are the slaves (of the suffering sentience of) the flesh, and are thus susceptible to being perceived — as Woman has historically been — as less than human.

The second type of autonomy lost to the victim in the narratives we have examined relates more directly to the loss of identity, voice and recognition, and concerns the ability or possibility to be identified according to one's own projection of self. As we saw from Gentille's testimony, one of the effects of dehumanisation and extreme physical violence is that the victim is no longer able to interpret his or her experiences in such a way as to truly claim 'possession' of them. In this sense the victim's identity is denied. Reduced to an objectified, wholly corporeal status, the deportee, the

torture victim and the rape victim are each also alienated from their bodies' sentient capacity for worldly extension. This disconnection with their own phenomenological experience combines with the loss of voice (or the capacity to narrate their experiences) to cut the victims off from human society, or, in Arendt's formulation, human 'artifice', which provides the source of recognition.[74] The subjective destitution that accompanies this state of being can be better understood if we consider philosopher Paul Ricoeur's theorisation of the subject. For Ricoeur one of the three essential characteristics of the human subject is the ability to narrate one's own life story. The capacity to designate oneself as hero and narrator of this story is inextricably linked to the two other characteristics vital to Ricoeur's subject, namely, the capacity to designate oneself as the speaker of one's utterances and as the agent of one's actions.[75] The implicit connection between these three dimensions of human subjectivity resides in the notion of reciprocal recognition, encompassing the fourth 'loss' of dehumanisation. Every utterance, action and narration exists in a context of interlocution, within which 'there corresponds to a speaker in the first person an *addressee* in the second person.'[76] As a speaking agent, I must understand that the positions of speaker and addressee can be exchanged — that 'you' are also able to designate yourself as an 'I'. According to Ricoeur, understanding this interlocutory relationship provides the foundations for the emergence of a subject of rights.[77] Jean François Lyotard seconds this view. According to his thesis, the reciprocity of speech demonstrates and respects both the alterity and the parity of the interlocutors. To be excluded from the speech community is, for Lyotard, the highest form of abjection. This complex argument is unexpectedly clarified in a fascinating collection of the responses given by a group of children asked to complete the phrase 'I feel like nobody when ...' One child is cited as having replied: 'I feel like nobody when I am me. I feel like somebody when I am you.' This child's response can be aligned to the theories of interlocution and recognition described here: in order to feel like somebody, 'I' must be able to place myself in 'your' position, and vice versa. In other words, 'I' must also be 'you.'[78]

In being refused access to the speech community and to the possibility of interlocution, the deportee — like the torture victim or

74 Once again, this condition relates to the female position in psychoanalytic theory: too wholly embodied, and thus exceeding the structures of human language and symbolic artifice, Woman cannot fully exist within the Symbolic Order.

75 CL Hughes 'Reconstructing the subject of human rights' (1999) 25 Philosophy and Social Criticism 47–60.

76 P Ricoeur 'Self as Ipse' in B. Johnson (ed) *Freedom and Interpretation: The Oxford Amnesty Lectures* 1992 (1993) 111.

77 Ricoeur (n 76 above) 111.

78 S Heuer (ed) I feel like nobody when ... I feel like somebody when ... at www.humiliationstudies.org (accessed 7 June 2005).

the victim of rape warfare and, in Western narratives of femininity, the woman — is denied the possibility or capacity of narrating his or her own life story. This denial can be read both as a cause and as an effect or *synthesis*, of the losses of voice, recognition, autonomy and identity suffered by the victim. Inherent in the perpetrator's dis-recognition of the individual life story of the dehumanised victim is the construction of what might be called grand narratives of non-humanity. The notion of 'grand narratives' can be best explained within the context of so-called postmodern theory, which for many finds its roots in the theory of Lyotard's classic work *La Condition Postmoderne: Rapport sur le Savoir*. Lyotard identifies a particular type of knowledge — 'narrative knowledge' — which exists in the form of storytelling and constitutes, from the postmodern perspective, the nature of all knowledge. It is most clearly illustrated in the myths and legends that explain and legitimate certain 'truths' within human communities, whether in the form of tribal groups, religions, or nation-states. Lyotard argues that all aspects of modern societies rely on 'grand narratives,' or meta-theories that aim to explain the belief system that exists.[79] These meta-narratives represent totalising explanations of dominant and, in Lyotard's view, oppressive modes of thought such as Christianity and Marxism.[80] In the context of our discussion, we may suggest a slightly more inclusive use of the term as designating not only these fundamental ideologies of societies in general, but also the underlying belief systems, myths and narrative strategies that serve to support and justify the crimes committed in each of the three scenarios discussed in this study. In the case of the Rwandan and the Balkan conflicts, for example, the 'grand' narratives of ethnicity, revenge and nationalism fuelled the violence and atrocities committed against all victims, subsuming personal relationships and shared life stories and allowing for men to rape their neighbours' wives and kill their friends and cousins. Karen Slawner has cited the 'grand narrative' of national security as the doctrine used to justify torture and repression in Argentina:[81]

> The junta sought to […] re-enact the originary myth of the Argentine nation. In doing so they demonised the groups they perceived as having threatened the nation and labelled them all subversives.

A similar use of doctrine can be noted in the lead up to the Holocaust. The fiction of Nazi supremacy, of the 'final solution', and of the creation of a great, powerful, prosperous nation gradually became the all-pervading ideology sustaining the Nazi system, and to

79 Jean François Lyotard: Biography at http://www.egs.edu/faculty/lyotard.html (accessed 7 June 2005).

80 Cartesian dualism could, in this sense, be understood as a grand narrative of Western ontology.

81 Slawner (n 52 above).

those that were part of the system it came to represent a Truth that justified the marginalisation of anyone or anything that might threaten it. This was more than simple propaganda; it was the slow and contrived formation of an ideology and a vision upon which to build the identity of a community. The grand narrative of Nazi supremacy was coupled with that of the non-humanity of the Jews, which was propagated by the acts of exclusion, humiliation and dehumanisation carried out against them, but which also served to justify these acts. A citation, in Levi's *The Drowned and The Saved,* from an interview with Stangl, ex-commandant of the Treblinka, describes the purpose of useless violence and humiliation as being that of enabling the killers to do their work:[82]

> A reporter asks Stangl, 'Considering that you were going to kill them all ... what was the point of the humiliations, the cruelties?' Stangl replies, 'To condition those who were to be the material executors of the operations. To make it possible for them to do what they were doing.'

Useless violence, humiliation, and the reduction of the prisoner to a state of abject, suffering corporeality served to construct a narrative of non-humanity that made the killing in the extermination camps easier for the perpetrators. In this case, as in the other scenarios, grand narratives of non-humanity actually served to justify the dehumanising actions of the perpetrators. The process of dehumanisation can thus be described as a circular dialectic where narratives of the non-humanity of the victim or victimised group are used to justify the very acts of violence by which the denial of individual subjectivity in terms of rights is made possible. Here we can identify another parallel between the position of the victims and that of Woman in Western discourse. A postmodern feminism analyses the oppressive notions of the feminine described in the previous section as grand narratives that sustain and support hegemonic patriarchal structures. Like Lyotard, who calls for a series of mini-narratives that are 'provisional, contingent, temporary, and relative,' postmodern feminists reject the dominant essentialising narrative of the feminine - in which man is the universal self and Woman his marginalised other - in favour of multiple, decentred, self-narrating feminines. This feminist reaction to oppressive grand narratives of gender suggests the potential uses of personal narrative as a form of resistance to what we have here ventured to call the grand narratives of dehumanisation. The next chapter will examine more closely the theoretical possibilities and limitations of such a strategy.

82 FD Homer *Primo Levi and the politics of survival* (2001) 38.

3 Narrative resistance and restitution

They cut off my voice

Alicia Partnoy

They cut off my voice
So I grew two voices
Into different tongues
My songs I pour
They cut off my voice
So I grew two voices
In two different tongues
My songs I pour
They took away my sun
Two brand new suns
Like resplendent drums I am playing –
Today I am playing

3.1 Introduction

The first part of this study has focused on what has variously been called 'personal narratives', 'stories', 'accounts' and 'testimonies' of dehumanisation. For our purpose thus far, these terms have been largely interchangeable. It becomes useful at this stage, however, to consider, as a specifically evocative term, the notion of 'personal narratives'. Evocative of, amongst other things, postmodern criticisms of so-called grand narratives. If the perpetrators in the scenarios we have been discussing here can be said to construct grand narratives or ideologies that dehumanise their victims in order to make ethically possible the violation of their rights and the instrumentalisation of their bodies, then the personal narratives constructed by the victim/survivors may serve to oppose and resist these. The use of the term 'constructed' here is intentional: personal narratives are to be defined as crafted accounts, calling for selection of material and considered decisions of emplotment. As such they may also be theorised as the potential locus of restored agency and voice for the victim. But not without certain reservations. There are, for example, considerable ethical and aesthetic limitations to the narration of genocide, torture and rape warfare. The language-destroying effects of extreme pain, described by Scarry, are translated after the event into the latent unrepresentability of the traumatic experiences suffered by the victims of these crimes. Even if the problem of unrepresentability can be overcome, the success of every storyteller depends upon his or her audience, and one of the main anxieties expressed by all survivors is that their account of events will be either disbelieved of disregarded. Not withstanding these cautionary remarks, the first aim of this second chapter will be to introduce the possibilities offered by personal narrative for the

restitution of human subjectivity as we have seen it to be deconstructed in the three scenarios of dehumanisation so far presented. We will consider the response of personal narrative to the victim's loss of identity, autonomy, voice and recognition, seeking the support of, amongst others, Ricoeur's theories of narrative identity. The discussion will then turn to the limitations of personal narrative. Finally, the question of the conceptual effectivity of reconstructing the subject upon the same symbolic structures as were used in its deconstruction will be posed, leading us to consider the necessity of re-writing the human in such a way that would in itself undermine and resist the dehumanisation process. A return to the female and *feminist* position will suggest a response to this problem.

3.2 Personal resistance to the grand narrative

Lyotard's theory of postmodern incredulity towards grand narratives adopts the position that the existence and proliferation of personal narratives resists the reduction of individuals to what he calls 'criterions of efficiency'. While this comment may refer most specifically to Lyotard's study of knowledge in advanced capitalist societies, it is no less relevant in the discussion of resistance to the processes of dehumanisation at work in gross violations of human rights, as the following comment from Karen Slawner suggests:[83]

> Witness testimony contained in contemporary memoirs, human rights reports, and truth commissions [must] be studied as a type of counter-memory or counter-history that contradicts the perpetrators' grand narratives.

Slawner draws attention to the potential for individual, personal narratives to act as a form of resistance to dominant and oppressive doctrines, including those of dehumanisation. In the particular case of the Argentine 'Dirty War', she calls for the personal narratives of survivors to be positioned against the official ideology of national security, which was initially used to justify pardons issued by presidents Raúl Alfonsín and Carlos Menem, who declared that the (military) perpetrators of crimes committed in the war could not be prosecuted because they had been merely 'following orders'. The fact that the pardons were recently declared illegal in Argentine courts adds weight to Slawner's thesis — there is no doubt that this turn around was in part a reaction to the relentless and outspoken activism of certain civil society groups, including the now world famous 'Madres de la Plaza de Mayo.' These mothers and grandmothers of the disappeared began their struggle with no other weapon but their own personal stories of lost loved-ones. Initially deemed unobtrusive by the military — how could a group of unpoliticised housewives threaten

83 Slawner (n 52 above).

the regime? — the subversive potential of their personal narratives soon gained momentum as more and more women joined the weekly marches around the *Plaza de Mayo*. The lesson learned from their actions suggests the possibilities for resistance that personal narratives — or *narrative strategy* — can offer, not only in the context of the Argentine Dirty War, but also, for example, with regards to the Holocaust and ethnic conflicts in Rwanda and the Balkans. Slawner understands the strength of personal narratives to be in their ability to destabilise dominant grand narratives, thereby proving the illegitimacy of the perpetrators' justifications for their crimes:

> Retelling history from the victims' perspective is an act of resistance against the victimisers that transforms them [the victims] from being mere objects of the regime's terrible campaign to participants in the telling of their country's history. Their testimony destabilises the perpetrator's claims to justice and legitimacy.

In a study on women's rights and the postmodern possibilities for international law, Barbara Stark points to another way in which personal narratives, as actors in the rejection of grand narratives, can serve as a form of resistance. Citing Richard Rorty, she outlines the significance of personal narratives in swaying public opinion and sympathies so as to generate feelings of solidarity with victims:[84]

> Such stories can generate the sympathy that Rorty argues is crucial to a human rights culture. As he suggests, 'a better sort of answer [than] philosophy is the sort of long, sad, sentimental story which begins, 'because this is what it is like to be in her situation' ... such stories, repeated and varied over the centuries, have induced us, the safe, rich, powerful people, to tolerate, and even to cherish, powerless people — people whose appearance or habits or beliefs at first seemed an insult to our own moral identity, our sense of the limits of permissible human variation.'

What Rorty suggests here is that the personal narratives of individual victims not only resist dominant oppressive narratives, but also help to alter general perceptions of human otherness: when we hear the victim's story he or she moves back within the circle of what is 'like me,' of what is human. This is only part of the challenge, however, since overcoming dehumanisation also demands that a sense of identity and self-worth be restored to the victim. A return to Ricoeur's theory of narrative identity may prove useful in this regard.

84 B Stark 'Women and globalisation: The failure and postmodern possibilities of international law' (2000) *Vanderbilt Journal of Transitional Law* at http://law.vanderbilt.edu/journal/33-03/33-3-1.html (accessed 31 May 2005.)

3.3 Ricoeur and narrative reconstructions of the subject of human rights

For the survivors of crimes of dehumanisation, the law, when effective, offers the possibility of acknowledgement of the wrong done to them, as well as a certain kind of vengeance, in the form of justice, against the perpetrator. It may even provide material compensation. The law cannot, however, guarantee the restoration of identity, self-worth and voice — not to the survivors and even less to those who have died — and thus an additional form of restitution is called for. Some, of course, would argue that survivors who manage to achieve justice do experience restoration of voice, since justice implies that their version of the events has been accepted and recognised as truth and the actions of the perpetrator have been declared, by the victim and by the court as wrong. However, while legal justice is undoubtedly an essential part of the restitution due to the victim, it is not always in itself sufficient to ensure that he or she will regain a sense of his or her own self-worth or humanity. Moreover, if the survivor may, via his or her participation in the legal process, move from the status of victim to that of witness, this will not be the case for those who did not survive and for whom the demand for the restitution of humanity also exists. As Ricoeur puts it, there are 'victims whose suffering cries less for vengeance than for narration.'[85] Giving a voice to the victim, through personal narrative, may be an effective form of restitution, since it can restore the victim's sense of self as a speaking subject capable of narrating his or her own life story. If, for example, the tortured or raped woman is denied autonomy over her life story by the torturer, who inscribes his own story upon his victim's body, then the survivor, by narrating her experiences, reclaims this autonomy and also reintegrates herself into the speech community. The difference between a courtroom testimony and a personal narrative is that, in the courtroom, the victim's account is necessarily guided by the norms and demands of legal procedure, whereas in a personal narrative in the form of a freely given testimony, an autobiography, a novel or a work of art — indeed the possibilities of form are endless — the victim has more or less autonomous control over which moments or events are recounted, in what order they are recounted and how they are presented for interpretation. As with any narrative, the author of testimony is dependent upon his or her reader when it comes to the interpretation of the text, and the danger of mis-interpretation is great. However, there is always the possibility to guide the meaning of a text, or at least to communicate one's own interpretation, as the author, of the events depicted. Thus the personal narrative allows for a partial restoration of voice and autonomy, but also of recognition,

85 P Ricoeur *Time and narrative* (1988) 189.

since, as Ricoeur suggests, to designate oneself as capable of speaking is also to recognise the potential for speech in the addressee.

This restoration of voice, autonomy and recognition is, of course, inextricably linked to the restoration of identity. In producing a personal narrative, the victim is able, to use Ricoeur's terminology, to refigure his or her life experience according to his or her own interpretation, and thus to construct his or her own 'narrative identity'. While the act of narrating their experiences of torture or rape or the concentration camp can never eliminate these events from the victims' life histories, it is in understanding these experiences — by interpreting them as one would a narrative — that they can regain a sense of their (albeit altered) selves. Narrating the events of our life story, no matter how traumatic, allows us to understand these events and thus to envisage them as part of an open-ended narrative, in which the present, past and, crucially, the future are all significant actors. In theory, then, personal narratives offer the victim the possibility not only of resisting and undermining the grand narratives that were the fuel of their dehumanisation, but also, through the act of narrating one's own life story, of regaining subjectivity through a sense of self worth and identity in accordance with Ricoeur's theory of narrative identity. It would be naïve, however, not to recognise the difficulties associated with the construction of a personal narrative in the context with which we are dealing here. As we saw from Gentille's story, there is no guarantee that the victim will be able to find autonomy of voice; and what of the millions of *muselmänner* that did not survive the Holocaust, do they remain 'on the bottom', less than human? Can others (witnesses/bystanders/historians) legitimately speak on behalf of these voiceless victims — as Courtemanche has tried to do — in such a way as to restore to them their lost humanity? Is such a fictionalised or sublimated representation of dehumanisation ever practically possible or ethically permissible? There are many ways in which the positive potential of personal narratives (both when told by survivors themselves and by others) may be fettered, and these encompass both aesthetic concerns of representation and ethical worries about the appropriateness of certain modes of representing and listening to such intimate and harrowing stories. The next two sections of this chapter aim to examine some of these concerns.

3.4 The problem of (un)representability

> Then for the first time we became aware that our language lacks the words to express this offence, the demolition of a man.[86]

[86] Levi (n 24 above) 32.

It is not uncommon when reading survivor testimonies to come across the author's frustrated confession that there are simply no words to express what has occurred or the scale of the suffering endured. French survivor writer Robert Antelme echoes Levi's lament about the inadequacy of language in his work *L'Espèce Humaine*, describing the overwhelming but frustrated need of survivors to give an account of their experiences:[87]

> Comment nous résigner à ne pas tenter d'expliquer comment nous étions venus là ... Et cependant c'était impossible. A peine commençions-nous à raconter, que nous suffoquions. A nous mêmes, ce que nous avions à dire commençait alors à nous paraître *inimaginable*.

Antelme captures here the struggle inherent to any survivor's narration of human suffering — it is, as Robert Gordon has phrased it, 'the oscillation between narrative as a curse and narrative as a pleasure [that] marks the storytelling of the survivor.'[88] Argentine survivor Jacobo Timerman also emphasises the difficulties, emotional and psychological, encountered by the survivor that tries to remember and communicate, when he comments that his *testimonio* is 'painful' and that 'most of the time [he] feel[s] paralysed'.

To communicate what Antelme describes as *unimaginable* is a traumatic and seemingly aesthetically impossible task for the survivor, yet the obligation to speak is often so persistent that not to attempt this communication is no longer an option. Elie Wiesel describes how at the end of World War Two the Holocaust survivor, although haunted by the unrepresentability of the suffering endured in the concentration camps, 'se fit violence et se livra, ou du moins, souleva le voile'.[89] For Antelme, the only way to 'lift the veil' on the inexpressible and unimaginable events of the camps is, paradoxically, through imagination. Martin Crowley outlines Antelme's response to the aesthetic problem of representation as one that embraces artifice as the only way to communicate even the smallest parcel of truth in testimony:[90]

> It is the apparently unimaginable experience that most necessitates the work of the imagination, as the demand for reconstruction is here at its most extreme. It is in this sense, then, that the problem of the apparent unrepresentability of his experience is for Antelme an aesthetic one: if the dilemma can be confronted only 'par le choix', this means the work of imaginative, artistic arrangement which will formulate the tale in such a way that it can be told.

Crowley goes on to cite an anecdote of Antelme's, in which recently liberated survivors try in vain to communicate their experiences to

87 R Antelme *L'Espèce Humaine* (1978) 9.
88 RSC Gordon *Primo Levi's Ordinary Virtues: From testimony to ethics* (2001) 249.
89 E Wiesel *Un Juif, aujourd'hui* (1977) 191-2.
90 M Crowley 'Frightful! Yes, Frightful! Frightful, yes, frightful!' (2005) *LIX French Studies* 20.

the American soldiers that freed them. As Crowley points out, there was nothing inexpressible about the stories they were telling — Antelme describes the moment as a 'véritable hémorragie d'expression' — but the stories were nonetheless *incommunicable*, in part, it seems, because of their 'lack of artfulness'. As Antelme explains it:

> Les histoires que les types racontent sont toutes vraies. Mais il faut beaucoup d'artifice pour faire passer une parcelle de vérité.[91]

The artifice that Antelme calls for can be achieved in the notion of narrative, understood as the act of collecting and arranging material in such a way as to make it understandable. Take for example Jacobo Timerman's *Prisoner Without a Name*, which makes use of stylistic devices to demonstrate the lost consciousness of the victim of torture during electric shock treatment:[92]

> Someone places a piece of rubber in the man's mouth to prevent him from biting his tongue or destroying his lips. A brief pause. And then it starts all over again. With insults this time. A brief pause. And then questions. A brief pause. And then words of hope. A brief pause. And then insults. A brief pause. And then questions.

The repetition of the phrase 'a brief pause' produces a sequence of gaps in the narrator's speech. In these moments of intense physical pain, the words to describe his situation are lacking. Alicia Partnoy uses similar creative narrative techniques in her novel *The Little School*, which presents not a chronological or ordered account of her time as a political prisoner, but rather a series of vignettes interspersed with short epigraphs. Like Timerman, she uses ellipses to represent gaps in the thought processes of the tortured victim, and her innovative use of narrative voice — at times that of Partnoy herself, in other moments taking on the position of another prisoner or a guard — illustrates the fact that the suffering she speaks of represents a universal as well as an individual struggle.

Narrative — as a product of imagination — can also be seen as an appropriate means of representing dehumanisation because it (re)constructs a type of human artifice. The dehumanised victim, as we have seen in earlier discussions of the theories of Hannah Arendt and Elaine Scarry, is traumatically excluded from the world of human artifice. In producing a personal narrative of this process, the survivor enacts the construction of a new artifice of which he or she is an active part, thus symbolically reintroducing him or herself into the structures of 'civilised' human community, or, in Arendt's terms, into the 'public space.'

91 Antelme (n 87 above) 21.
92 Timerman (n 45 above) 33.

Yet the richness of narrative lies not only in its artifice as a constructed text, but also in the position it occupies in relation to fiction. Ricoeur calls for the interweaving of fiction into historical narratives, in order to better represent the human implications of the facts and events being recounted. Speaking of the 'representative function' of the 'historical imagination,' he stresses the duty of history to convey the horror of epoch-making events and the capacity of imagination to allow us to see such events 'as tragic, comic and so on.' Fiction, Ricoeur claims, 'gives eyes to the horrified narrator,' since horror is not a category of history, but one of fiction.[93] It is in fiction that we learn the symbolic expressions of human emotions and human suffering. From this perspective, the construction of a fictional narrative of dehumanisation that attempts to represent traumatic events that one has not oneself experienced directly – the attempt, in other words, to speak on behalf of victims – may be both viable and justifiable.

According to these arguments, then, narrative and imagination offer an effective response to the problem of the apparent unrepresentability of extreme experiences of dehumanisation. This position does not, however, stand unchallenged. In her study of rape warfare in the Balkans conflict, Beverly Allen has argued against the use of narrative to represent traumatic dehumanising experience, preferring recourse to pure testimony, which, she claims, avoids the pleasures of textual voyeurism, since testimony contains none of the elements of suspense, narrative build up, climax and release that characterise narrative. A linear narrative, she claims, creates a false sense of order that is a betrayal and misrepresentation of the disorder inherent in death, war, genocide and rape. To give structure and sense to the nonsensical risks undermining or trivialising the events. Moreover, it is argued, once such events can be imagined and explained, they are more easily repeated. Theodor Adorno has also raised this issue, with his famous statement that 'to write lyric poetry after the Holocaust is barbaric'. As Judith Kelly notes, this comment is often used as support for the assertion that 'only silence or a documentary account of Holocaust experience is allowable so as not to diminish the experience of the victims.'[94] Yet a closer reading of Adorno's position on this topic reveals that while he is certainly acutely aware of the 'uneasy relationship' between art and the victims of suffering, suggesting that 'they become victims yet again through the very art which depicts their suffering and which is consumed by the world which caused their destruction,'[95] he also acknowledges that the victim's suffering 'demands the continued

93 K Simms *Paul Ricoeur. Routledge Critical Thinkers: essential guides for literary studies* (2003) 79.
94 Kelly (n 24 above) 29.
95 Kelly (n 24 above) 29.

existence of art while it prohibits it,' asserting that 'it is now virtually in art alone that suffering can still find its own voice, without immediately being betrayed by it.'[96]

Nonetheless, the question of the appropriateness of different modes of representation when it comes to portraying human suffering emerges as highly significant, especially in cases where someone other than the victims claims to speak on their behalf. Fictional accounts of experiences of the concentration camp abound, in film, literature and art, as do portrayals of torture and rape. While these may all be very well-intentioned acts of ventriloquism that claim to give a voice to the voiceless and draw the world's attention to preventable suffering, the risk of mis-representing the victim's experience is high and must be considered. What is more, such fictional accounts pose important questions of reception. Allen argues that the reader of such narratives is put in the position of voyeur, inevitably stained with the risk of complicity or enjoyment in the victim's suffering:[97]

> Readers who enter such realms of representation are warned to be on the look out for their own complicity in another's dire suffering.

The truth of her argument might be found in experience. The 'enjoyment,' or perhaps better said, fascination, that the reader experiences when reading Courtemanche's novel, for example, is the same as one might experience with a page-turning thriller or romance. Similarly, the box office success of films such as 'Schindler's List', 'La Vita è Bella' or 'Hotel Rwanda' raises the ethical question of whether it is right to gain profit (financially or otherwise) from the memory of human hardship, and, whether it is ever possible not to do so when representing such suffering. However, as Ricoeur, Antelme and even Adorno concur, while the use of artistic or literary imagination in the representation of extreme human suffering may pose certain ethical problems, it remains the most effective aesthetic device for communicating such experiences. This does not imply that the role of the listener in response to narratives of dehumanisation, touched upon in both Adorno and Allen's criticisms, should be ignored. As the interlocutor to the victim's restored voice, the listener plays a crucial role in the restitution of his or her identity and self-worth, yet this role is not an easy one to accept, and can often prove too traumatic and frightening to embrace properly.

96 T Adorno, cited in Kelly (n 26 above) 29.
97 Allen, *Rape warfare: The hidden genocide in Bosnia-Herzegovina and Croatia* (1996) 33.

3.5 The ethics and aesthetics of listening

Before me, a black and white photograph of a woman's body lying in blood, filth and decay, the legs spread under a raised skirt. The skin and clothes are covered in dark, wet stains, the eyes hollow and the mouth open in what must once have been a scream or a final, desperate gasp for air. At the left foot lies a large dead pig. The sight is nauseating. Incomprehensible. Unimaginable. I am forced to turn the page. To spare myself this nightmare, this image of what I know in my mind to be a woman, with a life and a family, reduced to what my eyes now trick me into seeing: the body of a monster, terrifying, alien, no more a human being than the decaying corpse of the hog lying prostrate in its own excrement next to her.[98]

Looking at this photograph, which documents the death of a victim of the Rwandan genocide, the problem of unrepresentability becomes one not only of the aesthetics of expression but also of the ethics of reception. While we may certainly challenge the appropriateness of the photograph and accuse the photographer of disrespecting the dignity of the victim, we are obliged also to recognise our own complicity in her dehumanisation, since, looking at this photograph, we *see* something that exceeds what for us represent the limits of the human: we are nauseated, appalled, we turn away. What this photograph confronts us with is the already existing potential for dehumanisation in our own perception and imagination of the other. For Claus Günther, this potential is exposed in the less dramatic attitudes of everyday life — in our attitudes towards certain criminals, or towards asylum seekers. The media too, he claims, commonly present human beings as 'non-members of the community of human beings.'[99]

On a low level of self-observation we can easily discover in our own imagination at least some categories of human beings which provoke a reaction of dehumanisation already in our perception.

The reaction of not wanting to see, hear about or face the degradation of the victim, is a symptom, of course, of the traumatic and distressing content of what is being represented. It is, to this extent, a response that we might consider 'natural' or 'understandable.' Yet at the same time, and from the perspective of the survivor writer, it is ethically inexcusable. The attitude of disbelief or disregard provoked by the photograph described above is one that

98 The image described here has been exhibited as one of a series of photographs depicting the genocide in Rwanda. The collection – produced by photographer Gilles Peress and entitled *The Silence*, has also been published in book form: G Peress *The Silence* (1995).

99 K Günther 'The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture' in P Alston (ed) *The EU and human rights* (1999).

many survivors of the Holocaust faced as they tried to communicate their experiences directly after leaving the camps. The effective silencing of early Holocaust testimony, for a long time obscured by the debate about representability, has been understood by many survivors and scholars as a somewhat cowardly and slothful refusal of society to face up to its responsibility. In a 1995 television interview, Elie Wiesel explained the reluctant reception offered by society to early survivor testimony as a symptom of the fear or disgust inspired by the victims' dehumanised state: '*On ne voulait pas nous écouter. Parcequ'on faisait honte à l'humanité*.'[100]

In not listening to the survivors, society only confirms and perpetuates their non-humanity by denying them entrance into the speech community, refusing them the status of interlocutor, and failing to give them recognition. Robert Antelme, like Wiesel, sees the rejection of testimony as a reaction to the threat that the survivor is perceived to pose to humanity. He understands this response as one that in turn serves to further alienate the survivor from his or her own experience:[101]

> Et au détenu sa propre expérience se révèle pour la première fois, comme détachée de lui, en bloc.[102]

Primo Levi has also addressed the issue of reception, in what Robert Gordon calls his 'ethics of listening'. At various moments in *If This is a Man*, Levi points to the significance of storytelling to the camp prisoners, not only as a means of survival and human interaction whilst inside the camps; but also as a necessary endeavour for the survivor once outside of the camps — one that allows the survivor to bring others within reach of his own reality:[103]

> The need to tell our story to the 'rest', to make the 'rest' participate in it, had taken on for us, before our liberation and after, the character of an immediate and violent impulse, to the point of competing with our other elementary needs.

At another moment in the text, Levi describes a dream that he and many other prisoners had while in the camps — one that expressed the fear and anxiety they all shared that, once free, and able to tell the story of what had happened to them, people would not believe them or would not listen to their testimonies:[104]

> My dream stands in front of me, still warm, and although awake I am still full of its anguish [...] Why does it happen? Why is the pain of every day

[100] Elie Wiesel, cited in Crowley (n 89 above) 18. 'They didn't want to listen to us. Because we brought shame on humanity.'
[101] Crowley (n 90 above) 22.
[102] Antelme (n 87 above) 301. 'And the prisoner's own experience reveals itself to him for the first time, as if detached, in block, from his person.'
[103] Levi (n 24 above) 15.
[104] Levi (n 24 above) 66.

> translated so constantly into our dreams, in the ever-repeated scene of the unlistened-to story?

For Levi, storytelling is both 'metaethical and ethical; not merely a good way to talk about and interrogate ethical questions thrown up by experience; but also an act of value in its own right.'[105] If it is the responsibility of the survivor to tell his story, then this is necessarily coupled with the responsibility of the 'rest' to listen. Levi recognises the crucial role of the listener in any story: the failure to listen denies the dialectic of mutual recognition inherent in and essential to any interlocution or act of storytelling. In this sense, the responsibility to listen not only stems from an obligation not to forget or ignore the events; it is in itself a duty owed to the survivor, for only with the recognition of voice granted by the listener can he or she ever regain a sense of humanity. Not to listen, or to turn one's head away in fear or disgust, is to assert the success of the dehumanisation process, and to ensure that its effects endure. Karen Slawner summarises the reasoning behind an ethics of listening as follows:

> Failing to listen to the discourse of the victims and to reproduce it in all its horror silences them a second time, after having already been silenced by the torturers and murderers, and reproduces the hegemonic mode of writing history.

The argument voiced by those who, directly after the end of the Second World War, failed to listen to survivor testimonies, is that the deportees would not or could not speak of their experiences – that these experiences were simply inexpressible. This belief has proven to be a fiction. It is quite clear that the survivors wanted and needed to tell their stories and, Annette Wievorka argues, it was the responsibility of the listeners, in particular of contemporary historians, to read through the unspeakability of survivors' experience and to interpret the silences in their discourse. Instead, she says, the notion of the inexpressible was used as an excuse to conceal the failure of society, and history, to listen to the survivor's stories:[106]

> En matière d'histoire, la notion d'indicible apparaît comme une notion paresseuse. Elle a exonéré l'historien de sa tache qui est précisément de lire les témoignages des déportés, d'intérroger cette source majeure de l'histoire de la déportation, jusque dans ses silences.

The survivor's personal narrative emerges in the space between unrepresentability and reception as the vessel through which the 'truth' of the experience of dehumanisation can be known. The responsibility of the survivor to tell his or her story is equalled only by the responsibility of 'the rest' to listen. In this case, listening implies

[105] Gordon (n 88 above) 237.

[106] A Wievorka 'Déportation et génocide' cited in Crowley (n 90 above) 19. In the study of history, the notion of inexpressibility is a lazy notion. It has excused the historian from his task, which is precisely to read the testimonies of deportees, and to interrogate this major source of deportation history, even in its silences.

something more than paying polite and passive attention to the stories survivors tell: the ethics of listening here demands that the listener actively recognise the re-insertion of the survivor into the speech community by hearing not only the words but also the silences of narratives of dehumanisation.

3.6 The need for new foundations

To summarise then, we may assert that personal narratives are an advantageous mode of representation for processes of dehumanisation to the extent that they undermine the grand narratives that inspire and justify these processes, and also because they allow for the restoration of lost 'human' qualities to the victim/survivor. This restoration of the victim's humanity occurs on various levels. Through the very act of speaking and being listened to — provided the proper ethics of listening is observed — the survivor regains both voice and recognition and is reintegrated into the speech community. What is more, the act of producing a personal narrative that reconfigures the traumatic experience both asserts the victim's renewed autonomy over his or her life story and establishes a sense of (narrative) identity. Finally, the use of literary imagination and artifice in narrative symbolically enacts the victim's active (re)insertion into the world of collective human artifice. These advantages are most clearly recognisable in cases where a survivor narrates his or her own experience, yet there is no reason to believe that ventriloquisms of victims' personal narratives of dehumanisation, when carefully and sensitively constructed, can not provide at least for the symbolic restoration of the humanity of those that have not survived.

While all of these advantages stand as a very pragmatic argument in favour of personal narrative as a means of restoring agency and self-worth to the victim of dehumanisation, they do not for all of this constitute a fully convincing conceptual resistance to the process. The fact that the humanity restored through the personal narrative is one that is constructed upon the same (weak) foundations of the human subject as were seen to be deconstructed through the process of dehumanisation indicates a lacuna in the argument. Merely an inversion of the perpetrator's logic, this attempt to 'reconstruct' the victim's subjectivity according to positive, and therefore exclusive, qualities, confirms the validity of the perpetrator's distinction between the human and the non-human. Martin Crowley's study of *L'Espèce Humaine* points to Antelme's belief that true resistance to narratives of dehumanisation is not attained through the reversal of the process, by regaining identity, autonomy, voice, and recognition

and so on, but in proving that the process failed in the first place, that the dehumanisation was not achieved:[107]

> Antelme is keenly aware that to locate humanity in positive qualities or capacities is to repeat the logic of the camps, by excluding from this humanity those stripped of such qualities or capacities.

Rejecting the possibility of the *Musulman*'s return to the state of humanity enjoyed before the camps, which would only confirm the gap between men and non-men, Antelme stresses that the only viable resistance to dehumanisation is to alter our understanding of the human:[108]

> Les 'musulmans' sont dépourvus de toute caractéristique qui se laisse reconnaître comme humaine. De deux choses l'une, alors: ou bien rester avec sa vision antérieure de l'homme, et admettre cette division qui y était déjà inscrite; ou bien reformuler cette vision, à jamais dénoncée par cette complicité, repenser l'humain afin de résister à la brèche qui le menace.

Giorgio Agamben has made similar reflections in his text *Remnants of Auschwitz*. Like Antelme, he sees the *Muselmann's* destitution from such positive 'human' qualities as 'dignity' and 'self-respect' not as proof of the victims' inhumanity, but as evidence of the inadequacy of ethical concepts of the human:[109]

> If there is a zone of the human in which these concepts make no sense, then they are not genuine ethical concepts, for no ethics can claim to exclude a part of humanity, no matter how unpleasant or difficult that humanity is to see.

The need for a rearticulation of the human has also, in recent years, occupied a central place in contemporary thought, in particular in the field of gender studies. Nancy Hartsock summarises the view shared by many postmodern feminists, that for the oppressed to achieve real freedom, we must learn to dispel traditional, exclusive notions of the human subject:[110]

> The oppressed have experienced the murderous effects of the exclusive universalities promulgated by the West, which are predicated on the disembodied status of reason. The situated knowledge of the oppressed makes no claims to the disembodied universality of reason.

[107] M Crowley *Robert Antelme: Humanity, community, testimony* (2003) 10.

[108] M Crowley *Robert Antelme: L'humanité irréductible* (2004) 25. 'The 'muselmânner' are deprived of every characteristic that we would recognise as human. At which point, there are only two options: either retain one's previous vision of the human, and thus permit the division by which it was already marked; or else reformulate this vision, renounced forever because of its complicity with this division, and rethink the human in such a way as to resist the split which threatens it.'

[109] Giorgio Agamben *Remnants of Auschwitz: The witness and the archive* trans D Heller-Roazen (1999) 64.

[110] Nancy C M Hartsock. 'Postmodernism and Political Change: Issues for Feminist Theory' (1989–90) 14 *Cultural Critique* 15–33.

The marginalised female position is, as we have seen, clearly a symptom of the 'exclusive universalities' that Hartsock describes, yet women are by no means the only victims of the collateral damage caused by an ontology based upon notions of disembodied reason. A similar reflection is made by Crowley in his reading of Antelme: '*Après les désastres historiques qu'il n'a cessé d'accompagner, l'humanisme — tout ce qu'on pourrait comprendre sous ce terme — est, on le sait, profondément souillé, complice des exclusions que ses définitions positives rendent désinvoltement — ou cyniquement — possibles*.'[111] The oppression of groups classed as 'other' to the universal subject is, as Hartsock suggests, one felt in the embodied experience of all marginalised groups or individuals — including the victims of torture, rape warfare and the concentration camp. As French feminist Luce Irigaray maintains, however, the question of gender relations is key to, and can serve as a model for, any general re-evaluation of human subjectivity:[112]

> It is not a matter of changing such and such a thing within a horizon already defined as human culture, it is a matter of changing the horizon itself. It is a matter of understanding that our interpretation of human identity is theoretically and practically incorrect ... *It is the analysis of the relations between women and men that can help us change this situation*. (my emphasis)

Luce Irigaray is commonly associated with what has come to be known as 'Third Wave' feminism. As opposed to the First Wave feminists who, using the same logic of resistance criticised by Antelme and Agamben, sought to prove that women could conform to established models of universal (male) subjectivity, Second and Third Wave feminism — emerging from the 1960's on — challenged these ideas and the very concept of the universal subject. Stressing difference and freedom over equality, Second Wave and Third Wave feminists assert the need for an overhaul of cultural understandings of what it means to be 'human'. This assertion coincides with so-called postmodern scepticism of the universalist and essentialist claims usually associated with humanism, and thus poses certain conceptual challenges to the traditional ontology of human rights.

In its rejection of grand narratives, postmodernism could be understood to question the legitimacy of a universalising doctrine of human rights, which, as we have seen, relies upon a positive, liberal definition that, it is claimed, does not take account of particular contexts and local idioms of human experience. In 1992, the implications of this were the subject for a series of Oxford Amnesty

111 Crowley (n 108 above) 50. After the historical disasters that it has persistently accompanied, humanism — everything that we might understand by that term — is, as we know, profoundly soiled; an accomplice to the exclusions that its positive definitions render carelessly — or cynically — possible.

112 L Irigaray 'Love between us' in E Cadava *et al* (eds) *Who comes after the subject?* (1991) 167.

Lectures that posed the question: 'Does the self as construed by the liberal tradition still exist? If not, whose human rights are we defending?'[113] In his response, Paul Ricoeur proposed a reconstruction of the subject of human rights according to his theories of the self as *ipse* and narrative identity. Cheryl Hughes explains:[114]

> Ricoeur makes a distinction between two definitions of self, the self as *idem* and the self as *ipse*. The Latin term *idem* means the same or the same one and indicates a permanence in time that depends on an unchanging core of sameness. According to Ricoeur, it is this definition of self, a substratum underlying all apparent changes over time, that is the target of most arguments directed against the so-called liberal self. The Latin *ipse* means self, of oneself, by oneself, in person; and Ricoeur uses it to indicate a sense of selfhood that accommodates change over time and is constituted in relation to what is other than self.

The privileging of personal narratives as a form of resistance for victims of dehumanisation mirrors Ricoeur's proposal and adds force to anti-essentialist postmodern critiques of human rights, in that it argues its case from the premise that human identity is a narrative phenomenon, not necessarily built around a stable core and most certainly not universal.

In defence of human rights, however, we might argue that it is precisely the protection they provide that allows the individual to pursue his or her personal narrative — highlighting a paradox in postmodern criticisms — for could personal narratives exist in the same way, without the protection granted under the 'grand narrative' of human rights? What is more, in order for this protection to function, a certain abstraction in the formulation of the subject of human rights must be preserved, since, as Claude Lefort has argued, it is thanks to this abstraction that the concept of human rights retains its potential for critique of actual historical circumstances. For Lefort, the fact that human rights can never be defined in full, and that 'it is impossible to determine the character of the bearer of rights' is what gives rights their critical potential for reformulation.[115] According to Cheryl Hughes, Ricoeur's reconstruction of the subject responds in part to this dilemma in that while it 'takes account of the recent philosophical criticisms of sovereign subjectivity' and 'the fiction of the atomistic individual of liberal political philosophy,' it also avoids 'the fragility of a completely relativised and de-centered subject.'[116]

113 B Johnson (ed) Freedom and interpretation: The Oxford Amnesty Lectures 1992 (1993).

114 CL Hughes 'Reconstructing the subject of Human Rights' (1999) 25 2 *Philosophy and social criticism* 47 – 60.

115 C Lefort 'The political forms of modern society: bureaucracy, democracy, totalitarianism' (1986) cited in R Selecl *Why is woman a symptom of rights?* At http://www.zenskestudie.edu.yu/eng/selectedpapers/Renata%20Selecl.htm (accessed 25 June 2005)

116 Hughes (n 114 above).

We may question, however, whether Ricoeur's rearticulation of the subject of rights sufficiently addresses our initial problem of dehumanisation and whether, in fact, it is any less exclusory than that of the traditional discourse of human rights: does it not also limit the 'human' — in terms of rights — to those people capable of narrating their own life-story, of speaking and acting with autonomous agency? What then about children and the mentally ill? What about the victim of torture or the deportee who can no longer speak, no longer act, who is, as has been depicted in the narratives we have read, nothing but a fragile, abject body? Are these victims no longer human? Three challenges emerge from this discussion. The first asks how to address postmodern criticisms of the universal abstract subject without sacrificing the pragmatic potential of this abstraction, and the second, how to establish an understanding of the human, and thus of human rights, that is fully inclusive. The third question, which relates directly to what we have discussed in this chapter, asks what role personal narrative may play in this process. The following chapter, which begins with a study of Robert Antelme's suggested revision of our understanding of the human, hopes to answer some of these questions.

4 The reincarnation of humanity

Concentration camp
Miljenko Jergovi

In special moments we feel that we shouldn't have talked about Socrates
We should have talked about pigs. Generations echo his honour
Young philosophy students get fits
During the maddening spring days rooms smell of hemlock
Ah to be one's own judge! Ah to cut one's own head!
In special moments, apparently, we should talk about pigs
They don't await death with dignity
From early morning they whimper in their pigsty at the village end
Tears rolling down their pinky snouts
Fear flowing through their veins, the war is on
And it is high time to start talking about pigs
The prophet punished them by contempt, they wallow in mud dreaming
Of a deep, clear lake, of pines humming in the morning, of glacier tops
Of childhood scenes in the distance perhaps. Pigs are saying goodbye to everything
While muddy from shame they receive their last supper
No one is going to meet them in the other world
History textbooks will absorb all their blood
And nothing will remain, not a typo, not a shudder of hand on the paper
No tears. Socrates left at least that much behind
Therefore in special moments let us close our eyes and start talking about pigs.

4.1 Introduction

The exclusive universalities of traditional Western ontology have, as we have seen, been the target of much criticism in recent years. The narratives of dehumanisation that we have examined indicate a need to develop an effective means of resistance to dehumanisation that both undermines the project of the perpetrator and replaces victims within the community of humanity from which they have apparently been excluded. If — as Antelme, Agamben and contemporary feminist theories suggest — such resistance is only possible when we begin to rethink the limits of the human against which marginalised otherness is constructed, then our task must be to consider how the human may be rethought conceptually without reducing the practical efficacy of human rights as they now exist, while also accommodating postmodern criticisms of Western ontology, which reject liberal notions of the subject as a stable, isolated and essential self. Antelme's proposed rethinking of the human — introduced at the end of the last chapter — places an emphasis on a fragile, residual and in no way stable humanity that emerges in the face of its own destruction. This fragility is most clearly displayed — in all of the narratives of dehumanisation that we have looked at — in the abject suffering body of the victim. Linking the abject otherness of the victim with that of the maternal female body in Western thought and representation, we will, in this fourth chapter, consider the possibilities that contemporary feminist theories of embodied subjectivity introduce into our discussion of potential modes of resistance to dehumanisation. This will, crucially, call for a rethinking of the human subject that in turn suggests alternative ways of understanding the moral and legal foundations of a subject of human rights.

4.2 Antelme's residual humanity

> Il s'agit d'élaborer une pensée de l'humain qui restera inassimilable à toute politique, à toute violences exclusives d'une faiblesse qu'elles relèguent à une prétendue sous-humanité; d'identifier, dans et contre les mécanismes de la déshumanisation, un modèle de l'humain qui les fera gripper.[117]

Antelme's account of life in the concentration camps is no less miserable or disturbing than Levi's — he too documents with a harrowing lack of ambiguity the attempts made to rid victims of any sense of subjectivity or humanity. The entire structure of the

[117] Crowley (n 108 above) 26-7. 'The task is to elaborate a philosophy of the human that will be inassimilable to any politics , and to any form of violence that would seek to exclude the weakness they marginalise as supposedly sub-human; to identify, in and against the mechanisms of dehumanisation, a model of the human that will bring them to a halt.'

concentration camp, he says, was built upon '*cette dérisoire volonté de con*'. The message to the prisoners was simply that of the illegitimacy of their existence: '*Il ne faut pas que tu sois*'. Yet, Antelme is careful to point out, the desire to annihilate the being of the prisoners was one that it was beyond the power of the SS to fulfil, even if they did succeed in reducing the lives of millions of men, women and children to ash:[118]

> Ils ont brûlé des hommes et il y a des tonnes de cendres, ils peuvent peser par tonnes cette matière neutre. *Il ne faut pas que tu sois,* mais ils ne peuvent pas décider, à la place de celui qui sera cendre tout à l'heure, qu'il n'est pas.

The prisoners of the concentration camp are continuously threatened with their own extinction, but, Antelme insists, they remain human until the very end — in spite of death *and* in spite of the suffering and degradation inflicted upon them in the camps:[119]

> Il n'y a pas d'ambiguité, nous restons des hommes, nous ne finirons qu'en hommes.

That for Antelme the deportee cannot but remain human does not mean that he is not deprived of those qualities traditionally associated with the subject of Western humanism. On the contrary, Antelme is careful not to underplay the destitution of the concentration camp victims: Deprived, as we have seen, of identity, autonomy, voice and recognition, the deportees come, in Antelme's account as in Levi's, to resemble creatures other than human beings:[120]

> Nous sommes au point de ressembler à tout ce qui se bat que pour manger, au point de nous niveler sur une autre espèce, qui ne sera jamais nôtre et vers laquelle on tend.

The deportee is *on the point of* becoming a species other than human, he is on the path *towards* dehumanisation, but the end of the path will never be reached,[121] for it is beyond any human power to make a man become anything other than a man, and the power of the executioner is no more than a human power:[122]

[118] Antelme (n 87 above) 79. 'They incinerated men, and there are tonnes of ash, this indeterminate matter can be weighed in tonnes. You must not be, but they cannot decide, in the place of he who will later be ash, that he is not.'

[119] Antelme (n 87 above) 229. 'There is no ambiguity, we remain men, we will die only as men.'

[120] Antelme (n 87 above) 228. 'We are at the point of resembling all that which fights to eat, on the point of becoming another species, which we will never be ours and which we are approaching.'

[121] As Crowley explains: 'The prisoners are approaching the non-human, aligning themselves with it. But: this movement of approach is endless, the non-human will never be reached.' Crowley (n 108 above) 8.

[122] Antelme (n 87 above) 230. 'The worst victim can not do otherwise than to state that, in its most terrible exercise, the power of the executioner can only be that of man: the power of murder. He can kill a man, but he cannot change him into something else.'

> La pire victime ne peut faire autrement que de constater que, dans son pire exercice, la puissance du bourreau ne peut être que celle de l'homme: la puissance de meurtre. Il peut tuer un homme, mais il ne peut pas le changer en autre chose.

It is by remaining human, in defiance of the perpetrator's project of dehumanisation, that the victim achieves his greatest revenge. This resistance to dehumanisation not only asserts the impossibility of the Nazi aim, but as Crowley points out, it also links the perpetrator to his victim through the very shared humanity that the camps try to deny.[123] In a response to Antelme's text, Maurice Blanchot described the human as the indestructible that can be destroyed ('L'homme est l'indestructible qui peut être détruit'). This human is one that is susceptible to temptation, to desires and impulses beneath, or above the pedestal of reason. The acknowledgement of this susceptibility does not however put an end to responsibility. On the contrary, as Maurice Blanchot has explained, it is precisely man's fragile indestructibility even in the face of destruction that shows us that we can never be relieved of our responsibility. The Holocaust cannot, therefore, be dismissed as a freak event made possible by inhumanity, whether it be the inhumanity of its victims or its perpetrators — it was an entirely human catastrophe for which human responsibility must be attributed:[124]

> Que l'homme puisse être détruit, cela n'est certes pas rassurant; mais que, malgré cela et à cause de cela, en ce mouvement même, l'homme reste indestructible, voilà qui est vraiment accablant, parceque nous n'avons plus aucune chance de nous voir jamais débarassés de nous, ni de notre responsabilité.

Martin Crowley's extensive studies of *L'Espèce Humaine* point to Antelme's positing of a *residual humanism*. The human is that which *remains*, the *residue*. It is a humanity that makes no claims to the strengths and capacities of the traditional Western universal subject, it does not try to hold on to, or regain, what has been lost, but rather asserts itself as that which is left over once everything has been taken from a human being — everything but the one thing that can never be

123 'Non seulement le bourreau ne parvient pas, comme nous l'avons vu, à anéantir l'humanité de sa victime, mais il s'y trouve relié par cette volonté même d'anéantissement.' Crowley (n 109 above) 37. 'Not only does the executioner fail, as we have seen, to annihilate the humanity of his victim, but he finds himself bound to this humanity by the very desire of annihilation.'

124 M Blanchot 'L'Espèce Humaine' (extract) in R Antelme *Textes inédits sur L'Espèce Humaine: essais et témoignages* (1996) 78. 'That man can be destroyed is certainly not reassuring, but what is really striking is that, in spite and because of this, man remains indestructible; because we have no chance anymore to relieve ourselves of ourselves, nor of our responsibility.'

taken, which is precisely that *being*, the one thing that remains, and will always remain, after all else is gone:[125]

> Ce n'est nullement à la supposée dignité humaine, aux anciennes valeurs ici écrasées, que s'accrochent les victimes des camps, selon Antelme, mais plutôt à un résidu d'humanité qui risque à tout moment de leur être enlevé.

In this sense the prisoners are human *in spite of*, but also to a certain extent *because of*, their suffering fragility. It is in the face of the danger of destruction, in the face of the terrible processes of dehumanisation that their humanity, in its fragile yet irreducible state, emerges most strongly as a residual resistance to this process. Giorgio Agamben makes a similar comment in *Remnants of Auschwitz*. Survivor testimony, he says, makes it clear that ''human beings are human insofar as they are not human' — or, more precisely, 'human beings are human insofar as they bear witness to the inhuman.''[126] The *remnant*, or that which *remains* of man is the purest manifestation of his humanity. It is in their fragility that human beings are most human and that the prisoner of the camp is most resistant — his very destitution, in its residual presence, refutes the logic of the camp according to which it is possible to rid a man of his humanity.[127] Another Holocaust survivor writer, Elio Vittorini, echoes this view in the following description of what it means to be human:[128]

> On dit: l'homme. Et nous, nous pensons à celui qui tombe, à celui qui est perdu, à celui qui pleure et a faim, à celui qui a froid, à celui qui se fait tuer. [...] C'est cela l'homme.

Antelme's rearticulation of the human renders the prospect of non-humanity impossible in its construction of an irreducible, residual humanity that emerges out of man's very fragility. It is this human fragility that resists annihilation, surviving even the destruction of men:[129]

> That humanity is unbreachable is revealed, for Antelme, by its status as irreducible residue: its strength is that of an ultimate fragility, resistant inasmuch as it can never be removed.

If according to Antelme's philosophy we are fundamentally fragile and there is nothing more human than weakness, then our bodies serve as

[125] Crowley (n 108 above) 29. 'According to Antelme, the victims of the camps cling not to something called human dignity, nor to the old values that have here been crushed, but rather to a residue of humanity that might at any moment be taken from them'

[126] Agamben (n 109 above) 121.

[127] 'The desperation of the prisoner, clinging to his life however he can, is thus already, immediately, a resistance to and a refutation of the logic of the camp, inasmuch as his destitution already reveals the irreducible, residual humanity which his captors cannot destroy.' Crowley (n 109 above) 10.

[128] E Vittorini *Uomini o no trans* (in French) M Arnaud (1999) 195. 'We say: man. And we think of he who falls, who is lost, who cries and is hungry, who is cold, who gets killed ... that is man.'

[129] Crowley (n 108 above) 7.

the most precise and effective metaphor for this state of being. In a constant state of vulnerability — to pain, to disease, to aging and death — our flesh literally embodies the frailty that makes us human. The next section will examine this corporeal frailty in the context of dehumanisation, drawing a parallel between the body of the victim and the 'abject' female body.

4.3 Abject frailties of the body

> Later I heard the girl say: 'She is rotten. It's all over for her. Does she look human to you?'
> Then I realised that all the people around me had decayed.[130]

Processes of dehumanisation are, as we have seen, enacted upon the bodies of their victims — whether they be the victims of torture, rape, genocide or the concentration camp, their agonised, starved, and mutilated flesh becomes the site upon which the objectification and fragmentation of their humanity is scripted. Consider, for example, the 'decomposing, ugly body' of Gentille, or the ripped apart flesh of Jacobo Timerman as he undergoes electric shock treatment.[131] The fragmentation or decomposition of the body, accelerated by the effects of pain, starvation and disease, reduces the victims to a state of corporeality which transgresses its own boundaries, and it is this transgression of boundaries, this dissolution of the integrity both of the body and the self, that seals them in their otherness. Gilles Peress' photographs of the Rwandan genocide — one of which was discussed in chapter 3 — demonstrate the mechanisms of locating otherness in corporeal abjection, whereby the degradation of the victim's body symbolises his or her apparent non-humanity. The collection displays images of limbless corpses alongside pictures of tumid and rotting bodies floating in muddy rivers. Every image is a haunting, nauseating experience for the viewer, who is confronted with the guilty complicity of his or her own horrified fascination. And every image brazenly exposes the total degradation of its subject: the grotesque, frightening, and leaking bodies of these pictures are, in the very specific sense of the term, wholly *abject*.

The abject, as it appears here, was first theorised in relation to the feminine position, in particular by French feminist and psychoanalytic theorist Julia Kristeva. The position of the victims of dehumanisation resembles that of Woman to the extent that both have been marginalised as 'other,' at least in part because of their

[130] Flora Mukampore, Rwandan genocide survivor, tells her story in Living Among the Dead, BBC News online, Friday, 2 April 2004 at http://news.bbc.co.uk/1/hi1programmes/panorama/3582139.stm (accessed 14 June 2005).

[131] 'What does the man feel? The only thing that comes to mind is this: They're ripping apart my flesh. When electric shocks are applied, all that a man feels is that they're ripping apart his flesh. And he howls' Timerman (n 45 above) 33.

perceived abject corporeality. Leaking blood, milk and amniotic fluid, the maternal female body permanently displays its own fragility, continuously transgressing its own borders and causing the embodied Woman to be perceived as a threat to the unity of the universal (male) subject. The abject can be understood, in this context, as the intrusion of the interior into a narrative of exterior stability and unity. With seeping fluids is carried the trauma of recognising that our boundaries are permeable:[132]

> The abject is undecidably both inside and outside (like the skin of milk); dead and alive (like the corpse); autonomous and engulfing (like infection). It signals the precarious grasp the subject has over its identity and bodily boundaries, the ever present possibility of sliding back into the corporeal abyss out of which it was formed.

This may explain the reluctant reception offered by society to personal narratives of dehumanisation: such narratives, which make public the most intimate suffering and degradation of the victim, also reveal the intimate frailty of humanity in general. The spectacle of the dissolution of borders in the victim's body reminds us of the permeability of our own exterior, and with this reminder comes the threat of the dissolution of our subjectivity, for *how can I be without border*? The threat that regression into the 'corporeal abyss' poses is that of a lost autonomy of the kind privileged in Kant's thesis — once deprived of autonomy by oppressive external forces (the perpetrator), the victims are now threatened by domination from the inside.[133] In this sense, the repudiation of the abject can be linked to the Cartesian ontology that pervades most of Western philosophy's thought upon the human subject. Terry Eagleton make this connection very clear when he says 'it is part of the damage done by a Cartesian tradition that one of the first images the word 'body' brings to mind is that of a corpse.'[134] The abject body of the victim, like that of Woman, is a reminder of the fragility essential to all human beings and must therefore be marginalised. This repudiation is not only enacted by others towards the victim, but also by the victim towards him or herself. As in Gentille's narrative, or in the experience of the torture victim who locates the source of his pain in his own body, corporeal abjection leads to a fragmentation of subjectivity whereby the victim comes, traumatically, to see the self as (repudiated) other. In the case of the victim of processes of dehumanisation, as in the case of Woman, then, the abject body is a source of marginalisation and otherness that fuels narratives of non-

[132] E Wright (ed) *Feminism and psychoanalysis: A critical dictionary* (1992) 198.

[133] 'What the two opposite modes (the inner formless body dominating the subject and the external compulsion) have in common is their compulsory nature: in each case ... the thing deprives the subject of his autonomy.' S Žižek *On belief* (2001) 63.

[134] T Eagleton *The Illusions of postmodernism* (1996) 71.

humanity. However, as we shall see, the abject body can also serve to formulate a discourse of resistance to these narratives.

4.4 Bloody resistances: A feminist model

> Who, surprised and horrified by the fantastic tumult of her drives (for she was made to believe that a well-adjusted normal woman has a ... divine composure), hasn't accused herself of being a monster? Who, feeling a funny desire stirring inside her (to sing, write, to dare to speak, in short, to bring out something new), hasn't thought she was sick? Well, her shameful sickness is that she resists death, that she makes trouble.[135]

This citation from French feminist Hélène Cixous' *The Laugh of the Medusa* recalls Antelme's philosophy of resistant and residual humanity, whereby it is precisely the abject frailty of the victims, understood by the perpetrator as proof of their non-human status, that affirms or confirms their, and our, humanity. Woman, silenced and — according to Lacanian psychoanalysis — nonexistent within the patriarchal Symbolic Order, nonetheless persists and resists in this order by her illicit, monstrous and abject excesses. Similarly, the abject suffering body of the victim both persists and resists, literally embodying Antelme's notion of residual humanity, because it *remains*, shouting its presence in its very abjection, on the edge of its own destruction, and at the point of suffocating in its own decomposition. This residual humanity is, for Antelme, indivisible in its frailty:[136]

> He represents the indivisibility of humanity as a kind of fragile solitude, an identity only definable in terms of its threatened abolition.

This proposed indivisibility of humanity should be understood in contrast to the fragmentation implicit in Cartesian ontology, as it was explained in the first chapter. Antelme's is a residual resistance whereby abject, corporeal frailty is actually strength: it is in this fragility that the victim retains his or her humanity. Moreover, it is this fragility that points to a shared and indivisible humanity, because the *potential* for pain, suffering and humiliation is one that is shared universally by all human beings — even if the way that suffering is experienced will, of course, be culturally, socially and historically contingent. The fragile embodiment of otherness, or the abject, within the self of the victim in itself serves as a metaphor for the indivisibility of humanity. This metaphor becomes clearer when we consider the abject body of the victim as it is linked, conceptually, to the abject female maternal body. Nowhere is the presence of the

135 H Cixous 'The Laugh of the Medusa: New French Feminism' cited in Mary Eagleton (Ed) *Feminist literary theory: A reader* (second edition) 321.

136 Crowley (n 108 above) 8.

other in the self more evident than in the image of the maternal body, which is used by many contemporary feminists to challenge traditional patriarchal understandings of human interaction, which are frequently based upon the so-called 'separation thesis.' This thesis makes the claim that 'the distinction between you and me is essential to the phrase 'human being' and that individuals are distinct and not essentially connected to one another.'[137] As Renata Selecl points out, however, 'women are not essentially, necessarily, invariably, always and forever separate from other human beings'[138] - their connection to other human life is quite clearly displayed in all the 'abject' functions of their maternal body: pregnancy, for example, is the literal embodiment of the other within the self. Luce Irigaray works from this premise to privilege the possibilities offered by female embodied knowledge. In a distorted echo of traditional discourses of human dignity, Irigaray argues that in order for a woman to achieve dignity, she must form a relationship with the other - not the other in another person, but the other in the abject, in 'all those rejected, despised, unknown and forgotten dimensions of women's selfhood with which she has never been in relationship'.[139] Representing in this sense the presence of the other within the self, the abject proposes a construction of the subject that resists traditional separation theories and embraces a more 'feminine economy'.[140]

Whereas a masculine economy requires a strict delineation of property (from the ownership of one's body onwards to the ownership of the fruit's of one's labour and so on), a feminine economy is one (of proximity) of taking the other into oneself and being taken into the other also. A feminine economy is about mutual knowing and knowing again (recognition in these senses only).

Cixous, like Irigaray, and also Kristeva, promotes this 'feminine economy' when she urges women to embrace the excess or *encore* of the feminine and, refusing simply to be 'spoken by' the law of the father, to create forms of female expression in the gaps in human psychic life. This 'female expression' presents itself, in the work of all three women, as an embodied language. Kristeva, for example, theorises the 'semiotic' as an alternative to the symbolic modes of

137 R West cited in R Selecl *Why is woman a symptom of rights?* http://www.zenskestudie.edu.yu/eng/selectedpapers/Renata%20Selecl.htm (accessed 20 June 2005).

138 R Selecl (n 139 above)

139 L Irigaray 'Divine Women' in *Sexes and genealogies* (1993) 55-72 cited in K. McPhillips *Post-modern Sainthood: 'Hearing the voice of the saint' and the uses of feminist hagiography* at http://www.wsrt.com.au/conferences/peaceworks 2004/McPhillips.pdf (accessed 9 July 2005)

140 J Still cited in S Kemp & J Squires (eds) *Feminisms* (1997) 325.

expression,[141] while Cixous calls for the elaboration of an *écriture féminine* or 'writing through the body' as the most appropriate means of female expression. *Ecriture féminine*, it is said, is a writing that should be 'shot through (like shot silk) with otherness.' It is writing, then, that privileges the abject body of Woman, symbol of otherness within the self, as a strength rather than a justification for oppression and marginalisation. These feminist perspectives point to the ways in which re-thinking the human from the basis of a notion of the abject suffering body can in turn contribute to a re-thinking of human rights, both on a moral and a legal level. If we can conceive of a construction of the human that recognises the embodied reality of each individual's lived experience, we may suggest a way of both challenging modern legal and moral philosophies that appear to embrace exclusive, patriarchal definitions of humanity, and of defending human rights against recent (postmodern) criticisms. Referring in particular to Antelme's philosophy of the residual human, Sarah Kofman expresses perfectly the potential held in the notion of the universal abject suffering body, which, holding the other within itself, asserts the indivisibility of humanity and thus proposes a new, fully inclusive ethics and re-thinking of human rights:[142]

> En montrant que le dessaisissement abject dont les déportés ont été victimes signifie l'indestructibilité de l'altérité, son caractère absolu, en instaurant la possibilité d'un 'nous' d'un nouveau genre, [Antelme] fonde sans fonder, car ce 'nous' est toujours déjà défait, déstabilisé, la possibilité d'une nouvelle éthique.

4.5 The universal suffering body as the subject of human rights

Before we embark upon the question of how, bearing in mind what has been explained above, the abject suffering body of the victim can provide for an altered formulation of the subject of human rights, it may be useful to briefly recapitulate what the main criticisms of traditional Western conceptions of this subject are. The first criticism, which has been shown to be of relevance both in terms of the historical repression and oppression of women and with regards to processes of dehumanisation, concerns the exclusivity of definitions of human subjectivity. Defining the subject in terms of positive qualities such as reason, rationality and the capacity for speech and action only serves to exclude those who are deprived of these qualities from the category of human and, therefore, conceptually at

[141] For Kristeva, the semiotic is closely related to the infantile/prediscursive/pre-mirror state in Lacanian psychoanalysis. It is tied to our instincts, existing in the fissures and gaps of language rather than in the denotative meanings of words.

[142] S Kofman *Paroles suffoquées* (1987) 79. 'In showing that the abject deprivation to which the deportees were victim demonstrates the indestructibility of otherness, its absoluteness, and in establishing the possibility of another kind of 'us', Antelme founds without founding - since this 'us' is always already undone, destabilised – the possibility of a new ethics.'

least, from the protection of human rights. The second main criticism, which has been voiced mainly by so-called postmodernists and cultural relativists, concerns the notion of the subject as an abstract, isolated and autonomous individual with an essential, stable core. Postmodern notions of subjectivity reject the idea that there is a stable core to the subject, claiming that the self is an agglomeration of each individual's contextualised experiences. In this sense, the criticism made by postmodernism echoes feminist critiques of the notion of an atomised subject that is disconnected from others and from the other. In their rejection of the 'separation theory', feminist legal theorists such as Robin West accuse traditional Western discourses of human rights of establishing a 'universal' subject that is in fact highly exclusive, since it completely ignores the reality of female experience.[143] For West, as for postmodernism, every human being is inextricably bound to the rest of humanity and to their experiences of the world: traditional understandings of the subject as an autonomous, independent, and rational being quite simply do not represent the reality of human experience, and any discourse of rights that bases itself upon this subject will necessarily be exclusive and, as such, oppressive.

Against the rejected notion of the atomised individual the image of the ('abject') maternal body emerges as a site of interconnectivity, which, as we have seen, is aligned with the irreducible human frailty posited by Antelme as a symbol of universal and indivisible humanity and, as such, works in opposition to the fragmentation of the Cartesian subject. The notion of an abject suffering body that houses the other within its self, as the pregnant body literally does, can be of special significance when we consider one of the most basic moral foundations of human rights: that of mutual recognition and the theory of interlocution. The moral weight of the theory of interlocution lies, for human rights, in the fact that it enables 'me' to see myself also as 'you': to recognise the 'you' in 'me'. This recognition is provided for in the embodiment of the subject, since the fully embodied subject necessarily accepts otherness within its self. To introduce the suffering body into the ontology of human rights can thus be doubly advantageous. Firstly, by locating otherness in the self it renders impossible the marginalisation of the 'grotesque other' and demands that mutual recognition be granted to all - even those who, according to the standards set by traditional liberal notions of the subject, would normally be excluded from the category of recognised humanity. The privileging of the fragile suffering body as the incarnation of resistant, residual humanity undermines narratives of a possible cleavage between the human and the non-human in members of the human species, thus uniting perpetrator and victim in

[143] West cited in Selecl (n 137 above).

the same gesture with which the former had aimed to distinguish himself, as human, from the latter, as non-human. That the distinction between the human and the non-human ceases to be valid is crucial for the practice of universal human rights, since the indivisibility of humanity — symbolised by the image of the universal suffering body — means that neither victim nor perpetrator can ever be dehumanised — both are part of the same, abject, human community. As Rousset puts it:

> la vérité, c'est que la victime comme le bourreau étaient ignobles: que la leçon des camps, c'est la fraternité dans l'abjection; que si toi, tu ne t'es pas conduit avec ignominie, c'est que seulement le temps a manqué et que les conditions n'ont pas été tout a fait au point; qu'il n'existe qu'une différence de rythme dans la décomposition des êtres; que la lenteur du rythme est l'apanage des grands caractères; mais que le terreau, ce qu'il y a dessous et qui monte, monte, monte, c'est absolument, affreusement la même chose.[144]

That human rights be universal is essential both for the protection of those rights and for attributing responsibility when they are violated. To deny the humanity of the torturer is to deny his responsibility: in this sense, the logic of Guantanamo and Abu Ghraib, which treats as *homo sacer* those it suspects of committing 'inhuman' acts of terrorism, is profoundly counterproductive. By ascribing these suspects to the realm of otherness and legal non-humanity, and by denying them basic human rights, this logic also rids them of their human responsibility. An understanding of the human that is based upon the notion of the fragile suffering body renders impossible the kind of legal vacuity that surrounds both Guantanamo logic and Hannah Arendt's paradox of the *apatride*, since it asserts a universality of human rights based upon a universality of the human. As Antelme puts it in his formulation:

> La variété des rapports entre les hommes, leur couleur, leurs coutumes, leur formation en classes masquent une vérité qui apparaît ici éclatante, au bord de la nature, à l'approche de nos limites: il n y a pas des espèces humaines, il y une espèce humaine.[145]

At the limits of the human, humanity is universal and indivisible: political, social and cultural differences become irrelevant, since the

[144] D Rousset 'Les jours de notre mort' cited in P Rassinier *Le monsonge d'Ulysses* (1980) at www.vho.org/aaargh/fran/livres/PRmu.pdf (accessed 10 June 2005). 'The truth is that both victim and executioner are ignoble; that the lesson of the camps is brotherhood in abjection; that if you have not yet behaved dishonourably it is only because you haven't had time and because the right conditions have not presented themselves; that the variation in the decomposition of beings is only one of rythm; that while a slowness of rhythm is the characteristic of greatness, the compost, that which lies underneath and rises, rises, rises, is absolutely and horribly the same thing'.

[145] Antelme (n 88 above) 229. 'The differences between men — their colour, their customs, their division into classes - mask a truth that is strikingly visible here, at the edge of nature, at the boundary of our limits: there are not many but one human species.'

potential for pain, suffering and fragility are universal. Even if we do not — and hopefully we will not — reach the limits of the human as the victims of rape, torture and the concentration camps have done, the potential for our own fragility and suffering links us to them in a common humanity. This potential is housed within our bodies: While we may have relative corporeal integrity and autonomy, the potential abjection of our own bodies persists in the physiological processes that remain beyond our control, such as, for example, aging or disease.

The fragile suffering body, as an abstract potentiality, supports the universality of human rights while at the same time resisting discourses of dehumanisation in its assertion of the indivisibility of the human. In this sense it may provide a more solid foundation for the construction of the subject of universal human rights than is to be found in exclusive formulations of the rational thinking being - whose universalism has been frequently denied. The universal suffering body is sufficiently abstract to preserve the self-evolutionary potential of human rights, yet it is at the same time unavoidably contextualised, and therefore also accommodates postmodern and cultural relativist concerns. That the locally situated nature of the victim's body can never be ignored is evident from earlier discussions of rape warfare in the Balkans, where the trauma and dehumanisation of Muslim women victims of rape was further aggravated by the cultural context in which the women, and their bodies, lived - in other words, by the threat of repudiation and marginalisation within their own communities. Similarly, while all humanity has the potential to suffer and feel pain — in other words the potential for fragility — every individual human being will experience this pain and vulnerability in a different way. Cultural, historical and social specificities of pain and suffering exist, and the notion of a universal suffering body in no way precludes these, nor any other variations of experience. On the contrary, the fact that the body can only ever exist in context means that any formulation of human rights based upon such a notion of the human cannot but take into account the demands of the particular, even as it retains its abstract potential. The following description of Antelme's ontology demonstrates the fact that while the bodies of the suffering represent, in their resistance of dehumanisation, an abstract idea of the (residual and irreducible) human, they remain at all times concrete and particular.[146]

Antelme, then, has an ontology: the bodies of his comrades are not the 'abstract' bodies of Derrida's ghosts, nothing made flesh: they are the present bodies of the suffering, exposed to a human finitude which to be sure exceeds them, but living, existing within — as even — this exposure. Antelme as it were puts flesh on the skeleton,

[146] Crowley (n 108 above) 23.

thinking residuality as the irreducible substance of something, and that something is the human.

In order to summarise, then, the fragile suffering body may emerge as an appropriate conception of the human for the construction of a truly universal subject of human rights. The abject of corporeal frailty literally and figuratively embodies the presence of the other in the self, thus rendering conceptually impossible the marginalisation or dehumanisation of perceived otherness and providing the foundation for an ethics of solidarity based upon the recognition of the indivisibility of humanity. Moreover, in its assertion of indivisible humanity, the fragile suffering body provides a strong argument in favour of the universality of human rights and challenges the dehumanising logic that claims to exclude any group or individual from the protection and responsibility that these rights entail. Finally, and perhaps most crucially, by (re)embodying the subject of human rights, we can accommodate postmodern concerns that threaten to invalidate human rights discourse as an out-of-date and exclusive grand narrative. Understanding the human in terms of a universal suffering body suggests a notion of human rights that is both inclusive and universal, and that exists precisely for the weakest and most victimised of the human species. This vision of universality need not be in conflict with the 'postmodern' condition, and could thus serve to aid the legitimisation of human rights in an otherwise frequently hostile philosophical context.

5 In conclusion

5.1 Postscript on methodology: Why the personal narrative?

Victims' personal narratives, whether fictional or non-fictional, reveal themselves to be an appropriate starting point for the study of processes of dehumanisation both on the very particular, phenomenological level of individual experience, and on a broader, conceptual level that calls for an interrogation of Western theories of the self, and, in particular, of the self in human rights discourse. Working from a reading of individual stories of human suffering, the discussion in this thesis has, on the one hand, travelled outwards from the local to the conceptual, demonstrating the subversive and de-regulating potential of personal (non-abstract) narratives on a theoretical (abstract) level. At the same time, and in a direct inversion of this dynamic, the study of personal narratives has served to give concrete form to apparently abstract concepts, such as, most notably, the so-called 'ethics of listening.' As we have seen, the personal narrative, in as far as it restores to the victim the capacity to narrate his or her own life story and thus re-inserts his or her voice into the public realm, can, notwithstanding certain limitations,

contribute to the restitution of identity, autonomy, voice and recognition for that victim. What our reading of personal narratives has shown, however, is that for this restitution to occur, the capacity for narration must be complemented by a truly ethical listening, which can not be limited to the metaphysical, abstract level at which legal theoretical discourse and the traditional thinking of the subject has tended to occur, but must also imply a phenomenological sensitivity that takes into account personal idioms of suffering and selfhood. In light of this, we may question whether human rights law as it now stands offers a sufficient response in the context of dehumanisation - do such situations not call for supplementary, non-legal approaches? Could the law provide the means of institutionalising the necessary complementarity between the victim's narrative capacity and an ethics of listening? In his apparent support of the establishment of truth commissions, which may increasingly be understood as the (quasi-legal) institutionalisation of just such a complementarity, Tzvetan Todorov confirms the view that a purely legal approach is indeed not sufficient when addressing gross human rights violations.[147] Truth commissions, however, remain within the realms of 'official' symbolic structures, within which, as we have seen, the voice of the desubjectified victim, like that of the Woman in traditional Western discourse, is all too often silenced. Perhaps it is here that the two major themes of this thesis, the re-embodiment of the subject and the personal narrative, may be fruitfully combined. If the experiences of the victims of concentration camps, torture chambers and rape warfare — experiences of extreme sentience and abject corporeality — cannot find expression within official discursive structures, is it possible to conceive of an alternative mode of expression, based, for example, upon the feminist model of *écriture féminine*, a language that speaks *through the body*? While it certainly merits further consideration, this proposal gives rise to more questions than we have space to answer here. Instead, let us try to analyse the main conceptual ideas that have emerged from our reading of narratives of dehumanisation, as they relate to the discourse of the current human rights regime.

5.2 Collecting our thoughts: The main ideas

> C'est bien sur *l'indicible* de l'homme humilié, de l'homme torturé, de l'homme nié dans son humanité, que se fonde ce que Boutros-Ghali pourra appeler le langage commun de l'humanité.[148]

[147] T Todorov 'Tribunals, apologies, reparations, and the search for justice' *The New Republic* January 29 2001 29 -36.

[148] E Decaux 'Dignité et universalité' in Silvio Marcus Helmans (ed) *Dignité humaine et hiérarchie des valeurs - Les limites irréductibles* (1999) 167. 'It is of course in the inexpressible of the humiliated man, the tortured man, the man whose humanity is denied, that we find the foundations for that which Boutros-Ghali could call 'the common language of humanity'.

The inadequacy of traditional Western ontology for the construction of a universal subject of human rights is clearly demonstrated in the texts we have studied. This ontology, grounded as it is in positive, and therefore exclusive, definitions of the human, and loyal to a Cartesian dualism and repudiation of the body, has proved instrumental both in the historical marginalisation of Woman (along with many other 'others') in Western society, and in the production of dehumanising structures in the three extreme scenarios we have examined, namely: the Nazi concentration camp, the Argentine torture chamber and rape warfare in the Balkans and Rwanda. Both physically and psychologically objectified and fragmented, the victims in these scenarios are deprived of the positively defined qualities and capacities of the 'universal' Western subject. What this subjective destitution reveals, however, is not the non-humanity of the victims, but rather the conceptual deficit in traditional Western thinking of the human: in these instances of extreme, suffering sentience, the fiction of the separation of body and self is exposed the motivations for a conceptual re-embodiment of the subject are made clear. It is important to consider, however, the confines of this conceptual move. Philosophy offers answers but not solutions. Thus, when the victim of dehumanisation asks: What have they done to me? What am I now? The philosopher may answer: you are more human than ever before. But the victim's problems are not solved. The limits of the conceptual become painfully clear in the context of gross human rights violations. While a philosophical strategy that thinks the human in terms of a universal suffering body certainly resists and challenges the concept of dehumanisation, it cannot prevent the pain and suffering of victims unless it can be transformed into effective resistant *action.* The crucial question is how and to what extent is such a transformation possible? An initial response to this question can be found in the analysis of the potential implications of the (abject) re-embodiment of the subject for the discourse of human rights.

In the narratives of dehumanisation that we have studied, the fragile, suffering corporeality of the victim, as the embodiment of that which *remains* of the self in the face of annihilation, can be understood — in line with Antelme's thought — as the residual human that resists and denies even the conceptual possibility of dehumanisation. This residual humanity, this *remnant,* exhibits, in its very abjection, the potential for development on both vertical and horizontal levels, generating capacity from incapacitation, and community from isolation. Re-thinking the human in line with the universal suffering body has revealed a new or altered perspective of the philosophy of human rights. The practice of human rights law might, as we have seen, gain firmer theoretical foundation through embracing this new perspective, of which the first element relates specifically to the reconstruction of the subject of human rights

proposed by narratives of the universal suffering body. As we have seen, re-embodying the human in a re-construction of the subject of human rights: (1) overcomes postmodern criticisms that human rights ignore the varied concrete realities of human experience (because the body is always in context), and (2) retains the abstract character required to ensure the self-evolutionary potential of human rights (because the potential for suffering is universal but undefined) and (3) resists the logic of social exclusion and dehumanisation by locating the other within the (embodied) self.

The notion of the universal suffering body proposes an altered thinking of the human, which, based upon a fragile corporeality common to all human beings, and a potential for suffering shared by every individual, does not depend upon exclusive, positive qualities from which it is possible to alienate certain members of the human race. Nonetheless, certain doubts may emerge in relation to this proposal. The practical implications and specific possibilities of the notion of the universal suffering body as subject of human rights require further interrogation. Does such a notion imply the universality of all human rights, or only of certain core human rights? If so, which rights? Or, on the other hand, might such a notion rather argue for a relativistic approach by which human rights, while generally universal, would be subject to interpretation based on local idioms of suffering?

It would, moreover, be both naïve and unhelpful to assert — as a result of our rethinking of the human — the redundancy of *all* traditional Western formulations of the subject; qualities and capacities such as identity, autonomy, voice and recognition remain essential to the subject if (s)he is to exist, act, interact and be heard within the structures of the human artifice or, in Arendt's terms, the public realm. But the proposed rethinking of the human in no way implies such a assertion, on the contrary, the right to possess and develop these positive capacities, which allow the individual to narrate his or her personal life story, is universalised by its implicit refutation of the logic of dehumanisation. In this sense, the notion of a residual humanity that is symbolised by the universal suffering body could be aligned, in terms of its function, to the elusive notion of human dignity in traditional discourse of human rights. Residual humanity, it is important to stress, is not a positive quality that can be lost. It is that which *remains,* as human rights maintains that dignity remains, as something inherent to every human being. Unlike dignity, however, residual humanity reveals itself in abjection, humiliation and weakness, and thus resists any forces that would seek to undermine it. It does not call for compassion or action upon the basis of a predefined shared human quality, but instead renders indifference conceptually impossible by eliminating the link between victimhood and otherness. If the ethics of listening is to be respected, the abjected victim must be liberated from his or her position of

(grotesque and traumatic) otherness. The notion of the universal abject body, in its conceptual housing of the other within the self, makes such a liberation possible, and suggests a vision of humanity or human community that is clearly accommodating to human rights. The abject of the fragile suffering body could be understood as the underlying 'support' for a human community of artifice — political, legal, cultural or social - in which the subject of rights finds his or her place. The abject body — rejected by the 'collateral Cartesianism' of these symbolic structures — re-emerges as that which holds human community together. This, in the end, may be the real site of cohesion of the personal narrative and the body, of the conceptual and the real. If we can envisage a human community based upon the notion of the universal suffering body, and thus upon the acceptance of otherness within the self; a human community which builds its common history not upon an abstract, predefined notion of one, shared 'self', but upon the many personal stories that together make a joint narrative of resistance, we may, perhaps, be a step closer to suggesting a response to what are, as we have seen, all too human experiences suffering and dehumanisation.

Narratives of human fragility should remind us that we all share the potential both to suffer as victims and to cause suffering as perpetrators. Yet they should also remind us of our creative potential, despite this, to script our own life stories. If this power and autonomy, this voice, is denied us, we may claim, correctly, that our most fundamental rights have been violated; but we are never less than human. It is only by (narratively) preserving the humanity of the victim, in his or her most abjected state, that we, as observers and bystanders to this abjection, recognising the otherness of this suffering within ourselves, can be inspired to engage, and to provide a voice, and an ear, to the silenced. I end with the words of Robert Antelme, which are in themselves proof of the strength and fertility of the human in the face even of those who seek its most abject annihilation.[149]

> Ils ne peuvent pas non plus enrayer l'histoire qui doit faire plus fécondes ces cendres sèches que le gras squelette du lagerführer.

[149] Antelme (n 87 above) 79. 'Nor can they erase the (his)tory that must render these dry ashes more fertile than the fat skeleton of the lagerführer.'

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Eradicating delay in the administration of justice in African courts: A comparative analysis of South African and Nigerian courts

Obiokoye Onyinye Iruoma

Preface

> The law's delay in many lands and throughout history has been the theme of tragedy and comedy. Hamlet summarised the seven burdens of man and put the law's delay fifth on his list. If the meter of his verse had permitted, he would perhaps have put it first. Dickens memorialised it in *Bleak House*, Chekhov, the Russian and Moliere, the Frenchman, have written tragedies on it. Gilbert Sullivan has satirized it in a song. Thus, it is no new problem for the profession, although we doubt that it has ever assumed the proportions, which now confront us. 'Justice delayed is justice denied,' and regardless of the antiquity of the problem and the difficulties it presents, the courts and the bar must do everything to solve it.
>
> Judge Ulyses Schartwz of the Illionis Appellate Court
> *(Gray v Gray* (1955 (6) Ill App 2d, 571,128 NE 2d 602)

This quotation rings true of the focus of this study. The current state of affairs in many African countries with regard to delays in the administration of justice motivated the writing of this work. The increasing prolongation of the duration of court proceedings within many African countries is such that it is beginning to pose a problem to judiciaries of the courts concerned, as well as to the entire justice system. This problem creates such legal insecurity and social discontent that in recent times; many African countries are beginning to seek ways to put an end to it.

The purpose of this work is to examine the nature, extent and causes of delay in two selected African countries with a view to drawing a comparison, which will enable the author to make recommendations on how delay can be eradicated. Thus, this study proceeds from the premise that a 'reduction approach' to the problem of delay is not enough to tackle the situation. It is believed that the sooner African countries begin to adopt an 'eradication approach', the more intensive the efforts to do something about the problem will be.

An 'eradication approach' is especially necessary considering the grave consequences posed by delays on the entire administration of justice. As aptly put by Zeisel:

> Delay in the courts is unqualifiedly bad. It is bad because it deprives citizens of a basic public service, it is bad because the lapse of time frequently causes deterioration of evidence and makes it less likely that justice be done when the case is finally tried; it is bad because delay may cause severe hardship to some parties and may in general affect litigants differentially; and it is bad because it brings to the entire court

system a loss of public confidence, respect and pride. It invites in brief the wisecrack made a few years ago in a magazine editorial, 'Okay, blind, but why so slow.'

H Zeisel, H Halven & B Bucholz Delay in the Court (1959) xxii

1 Introduction

1.1 Background to the study

A well functioning judiciary is a central element of civil society.[1] It is the sole adjudicator over the political, social and economic spheres. Judiciaries in many African countries suffer from backlogs, delays and corruption. In countries such as Nigeria,[2] South Africa,[3] Ghana,[4] Tanzania,[5] and Uganda,[6] speedy resolution of disputes is becoming increasingly elusive.

Although many African countries have constitutional provisions against delay, and have identified congestion, excessive adjournments, local legal culture and corruption as some of the major causes of delay, nevertheless, the problem continues to be a feature in African Courts.[7]

In Nigeria, the average period to commence and complete litigation is six to ten years.[8] In some instances, the litigation period is even longer. For example, in the case of *Ariori v Muraimo Elemo,*[9]

1 N Tobi 'Delay in the administration of justice' in C Nweze*: Essays in honour of honourable Justice Eugene Ubaezona* (1997) 21.

2 R Durojaiye & V Efeizomor 'Pains of delayed justice in Nigeria' Daily *Independent Online*, Thursday, 20 November 2003 http://www.nigerianlawsite.citymaker.com/page/page/821488.htm (accessed 6 September 2005).

3 Statement to Parliament by Dr Penuell Maduna, Minister of the Department of Justice and Constitutional Development, delivered 9 September 1999 where he alluded to tremendous delays in the High Courts in Port Elizabeth and in Cape Town.

4 US Department of State '2003 country reports of Ghana' Released by the Bureau of Democracy, Human Rights, and Labour 25 February 2004.

5 'Tanzanian Court releases Mozambican Boat' http://allafrica.com/stories/200510130438.html (accessed 5 September 2005).

6 B Odoki 'Reducing delay in the administration of justice' (1994) 5 (1) *Criminal Law Forum* 57-58.

7 The Pan-African Forum on the Commonwealth (Latimer house) principles on the accountability of and the relationship between the three branches of government Nairobi, Kenya, 4-6 April 2005 *communiqué* http://www.thecommonwealthorg/shared_asp_files/uploadedfiles/00DAF29C-F64E-4178-84E097DB24F42D05_Nairobi Forum-Final2.pdf (accessed 15 October 2005).

8 M Abdullahi 'The High Court of the Federal Capital Territory, Abuja, Civil Procedure Rules, 2004: Can the new rules lead to just, efficient and speedy dispensation of justice?' http://www.gamji.com/ article4000/NEWS4652.htm (accessed 3 August 2005).

9 (1983) 1 SCNLR 1.

proceedings commenced in October 1960 and took 23 years to reach the Supreme Court of Nigeria.

In South Africa, despite many programs and projects in place to solve the problem, delay in the administration of justice is still a problem.[10] Appraising the extent of the problem, Penuell Maduna addressing the National Judges Symposium stated: 'The public is perturbed by substantial backlogs in the criminal courts and in finalising prosecutions ...'.[11]

Mindful of the increase of this problem, especially in view of the consequences it poses, this study perceives a need to eradicate delay in the administration of justice.[12] Thus, this study analyses the problem of delay in Nigerian and South African Courts with a view to ascertaining the nature, extent and causes of delay in the two countries, and suggests possible solutions to the problem. South Africa and Nigeria were chosen because they have similar judicial systems and experience delays in judicial proceedings.

1.1 Statement of the research problem

The effectiveness of the law depends on the speed of the proceedings, which seek to uphold that law. Consequently, the recognition and protection of human rights by numerous international instruments and national constitutions would be meaningless if victims of violations are unable to access justice within a reasonable time. This study seeks to address the following questions:

(a) What is a delay in the administration of justice and why should it be eradicated?

(b) What are the nature, extent and cause of delay in South African and Nigerian Courts?

(c) What efforts have been undertaken to eradicate delay in judicial proceedings in South African and Nigerian Courts?

(d) What practical solutions can be suggested to help eradicate delay?

1.2 Aims and objectives of the study

Based on the assumption that speedy resolution of civil and criminal cases is an important social goal, inextricably linked to human rights,

10 Discussed in chapter 4.

11 Address at the banquet of the judicial officer's symposium by Dr Penuell Maduna, the Minister of Justice and Constitutional Development (2003) *120 South African Law Journal* (part 4) 669.

12 H Zeisel *et al Delay in the Court* (1959) XXII. Consequences is further discussed in chapter 2.

part of this study attempts to disprove the legal fallacy that, it is undesirable for courts to operate with speed. In this regard the objectives of this study are to:

(a) examine the consequences of delay on human rights and the society in general;

(b) determine whether there are any human rights provisions regulating delays in the administration of justice;

(c) examine the nature, extent and causes of delay in South African and Nigerian courts;

(d) proffer practical and appropriate solutions to the problem of delay in South African and Nigerian Courts;

(e) assess the tenability of argument that 'expeditious disposition of trial court cases is not impossible'.

1.4 Significance of the study

This study adopts a human rights perspective in its consideration of the problem of delay in African courts. Drawing from South African and Nigerian experiences, the study explores the contention that there can be no real judicial protection and enforcement of human rights without efficient functioning of the institutional framework under which these rights are to be asserted. A comparative analysis of the factors causing delay in South African and Nigerian judicial systems, and recommendations from the analysis can inform judicial reform and practice in the two countries.

1.5 Hypotheses

The study proceeds from the hypothesis that delay in judicial proceedings is a result of court congestion, prolonged adjournments and backlog of judicial proceedings; and a function of a variety substantive, procedural, institutional, cultural and colonially inherited factors. It is pre-supposed that the only way in which delay can be eradicated is where it is viewed as a human rights problem and through a holistic tackling of these factors as well.

1.6 Literature survey

Books by Hans Zeisel,[13] Thomas Church,[14] John Martin,[15] Michael Code,[16]James Kakalik,[17] and the Canadian Institute for the Administration of Justice[18] are the major sources on the subject of delay in the administration of justice. Although these works are instructive, they do not take into consideration the peculiarity of the African situation. Nigerian and South African works on the topic are by Niki Tobi,[19] Esther Steyn,[20] C van Rhee[21] and W de Vos.[22] These works have looked at the various dimensions of the causes of court delay, especially in criminal proceedings. This study approaches the concept of delay from a much more holistic viewpoint. It does not only tackle delay in both civil and criminal proceedings, but goes beyond the usual speedy trial approach by showing linkages between delay in the administration of justice and, the rights to judicial remedy, speedy and fair trial.

A number of articles have also discussed the issue delay in the administration of justice.[23] However, none of these articles gives the topic an in-depth treatment. As far as the author can ascertain, no attention has been given to the comparative study of delay in, and between the two countries under consideration.

1.7 Methodology

This research combines information obtained from library sources with data collected through administering thirty questionnaires and conducting fifteen interviews of stakeholders in the judicial system. In South Africa, fifteen interviews were conducted covering the bar, bench, police and the judiciary. Statistical data from South Africa's Court Nerve Centre in Pretoria, and the National Prosecution Authority was also used. For Nigeria, data was collected from

13 H Zeisel (n 12 above).
14 T Church, A Carlson and L Tan *Justice delayed: The pace of litigation in urban trial courts* (1978) 1.
15 J Martin and E Prescott *Appellate court delay: Structural responses to the problems of volume and delay* (1981).
16 M Code *Trial within a reasonable time* (1990).
17 J Kakalik *et al Averting gridlock*: *Strategies for reducing civil delay in the Los Angeles Superior Court* (1990) 8.
18 The Canadian Institute for Administration of Justice *Expeditious justice* (1979); *Cost of Justice* (1980).
19 N Tobi (n 1 above) 135.
20 E Steyn 'Undue delay in criminal cases: The Scottish and South African Courts response' in J Burchell & A Erasmus *Criminal justice in a new society: Essays in honour of Solly Leeman* (2003) 139.
21 C Van Rhee *Essays on undue delay in civil litigation* (2004) 1.
22 W de Vos 'Delay in South African civil procedure' in *C Van Rhee The laws delay: essays on undue delay in civil litigation* (2004) 335.
23 See Bibliography for further details.

published reports and thirty questionnaires administered in Anambra, Borno, Delta, Enugu, Ekiti, and Lagos states.[24]

1.8. Limitations of the study

This research is an overview of the nature, extent and causes of delay in civil and criminal proceedings in South African and Nigerian contexts. It is neither an in-depth analysis of the effects of delay in both proceedings, nor a historical account of the evolution of delay.

1.9. Overview of the chapters

Chapter one introduces the study.

Chapter two answers the questions: 'What is delay in the administration of justice?' and why is it necessary that it be eradicated?

Chapter three examines international and regional provisions and standards regulating delay in the administration of justice, and their interpretation by various human rights bodies.

Chapter four identifies the problem of delay in the administration of justice in Nigerian and South African courts, focusing on the legal frame work, causes; and efforts to eradicate delay.

Chapter five presents the conclusions and recommendations of the study.

2 A foundational analysis of the impact of delay on the administration of justice

2.1. Introduction

The concept delay in the administration of justice can be defined in a variety of ways. This chapter discusses the meaning of 'delay in the administration of justice,' with the aim of differentiating, clarifying and delimiting its meaning within the context of the study. Additionally, the consequences of delay on human rights will be evaluated.

[24] See Annexure A: Copies of letters of introduction and questionnaire [omitted-eds].

2.2 Delay defined

Delay in the administration of justice is used in a general sense to refer to time spent before case disposition that is not necessary for case development and processing.[25] Buscaglia and Dakolias defined delay as time spent before case disposition that extends case development and processing beyond a reasonable point.[26]

However, for Shertreet, it is important to distinguished between the two meanings of the term in the context of court proceedings. According to Shertreet, court-system delay which refers to waiting time exacted of litigants who are ready and eager to go ahead when the court is not because other cases have priority should be distinguished from lawyer-caused delay which is delay created through lawyers or parties' unreadiness or unwillingness to proceed with a case.[27]

In criminal proceedings, delay in the administration of justice is referred to as an antonym to the right to trial within a reasonable time or expeditious justice. Niki Tobi defines it as an unnecessary prolongation of proceedings by the prosecution in bringing the accused to trial or by the court during trial, which has the legal consequence of not only affecting the liberty of the accused but also his right to fair trial.[28] According to Tobi's definition, the concept of delay begins to run as soon as the accused is arrested and lasts until judgment and sentencing.

In civil proceedings, delay is defined as prolongation of court proceedings involving a private wrong.[29] According to Van Rhee, delay in the administration of justice occurs in a situation where too much time elapses between the filing of an action and its ultimate decision by the court.[30] He argues that delay becomes problematic only when it is undue, as no lawsuit can be decided fairly without at least some minimum time between first presenting the case to a court and obtaining a final judgment.

In this study, delay in criminal or civil proceedings is understood to be unnecessary or undue prolongation of proceedings, assessed from the time an action is commenced through filing of a charge or issuing of a writ, until final judgment. Recognising that by the nature of litigation, some time must be allowed for the smooth running of the process, this study emphasises 'undue' or 'unnecessary' prolongation.

25 J Kakalik (n 17 above) 8.
26 E Buscagalia & M Dakolias *Judicial reform in Latin American Courts: The experience in Argentina and Ecuador* (1996) 3.
27 S Shertreet 'The limits of expeditious justice' in *Expeditious justice* (n 18 above) 3.
28 N Tobi (n 1 above) 135.
29 N Tobi (n 1 above) 135.
30 C van Rhee 'The law's delay an introduction' in C Van Rhee (n 21 above) 1.

Delay occurs whenever litigation is so unnecessarily protracted, that it affects the administration of justice.

2.3. Consequences of delay in the administration of justice

The consequences of delay on human rights and impact on society affect administration of justice in a variety of ways. First, delay leads to denial of justice. According to Edward Coke:

> Every subject of this realm, ... may take his remedy by the course of the law and have justice and right for the injury done to him, freely without sale, fully without denial and speedily without delay ... it must be free, because nothing is so criminal as justice on sale; full, because justice ought not limp; speedy, because delay is indeed denial.[31]

Waiting for years to resolve a dispute blurs truth, weakens witness memory and makes the presentation of evidence difficult.[32] Lengthy delays prior to trial may cause physical evidence to be lost, tainted or destroyed. Moreover, a correlation exists between time and the accuracy of eyewitness testimony.[33]

In criminal cases, delay causes hardship to accused persons, particularly those in custody.[34] Delay is also a denial of justice because contrary to the notion of presumption of innocence, awaiting trial prisoners detained because they cannot afford bail or due to the seriousness of the offence, often spend more time in detention than the maximum sentence prescribed for that particular crime. Hence, an innocent person may end up serving punishment for an offence he never committed before the case is concluded. This erodes confidence in justice and presumption of innocence.

In addition, delays in judicial proceedings may cause litigants to suffer financially.[35] Quite often a litigant pursuing a judicial remedy spends more than the value of the remedy claimed. This increases the cost of litigation, and may cause litigants to abandon meritorious claims or to accept lesser, unjust settlements out of court.[36] Furthermore, the prospect of delay may encourage defendants to deny meritorious claims against them, hoping that the plaintiff will not pursue a lengthy and costly court action.[37]

31 E Coke *Institutes of the laws of England* (1642) 55-56.
32 M Bassiouni 'Human Rights in the context of criminal justice: Identifying International procedural protections in national constitutions' (1993) 3 *Duke Journal Contemporary & international law* 235, 285.
33 E Loftus *Eye witness testimony* (1979) 53. Loftus commenting on Prof Ebbinghaus renowned study. A Ebbinghaus *Memory: A contribution to experimental psychology* (1964) 18.
34 M Bassiouni (n 32 above) 285.
35 J Hugeessen 'Are the courts cost efficient' in *Cost of justice* (n 18 above) 47.
36 J Kakalik (n 17 above) 1.
37 S Shertreet (n 27 above) 15.

Delays in legal proceedings may force people to resort to self-help means of resolving disputes.[38] When the position of the courts as the duly authorised arbitrators in society is diminished through undue delay, peace, social order and good governance are threatened. As UN Secretary-General, Kofi Annan observed:

> The United Nations has learned that the rule of law is not a luxury and that justice is not a side issue. We have seen people lose faith in a peace process when they do not feel safe from crime. We have seen that without a credible machinery to enforce the law and resolve disputes, people resorted to violence and illegal means ... We have learned that the rule of law delayed is lasting peace denied, and that justice is a handmaiden of true peace.[39]

Thus, a total loss of faith in the public justice system's ability to resolve disputes would tend to prevail if nothing is done about delay in the administration of justice.

In criminal cases, delay increases the emotional strain on the accused. Despite the presumption of innocence, in reality the accused is viewed with suspicion until acquitted.[40] Delays also impose a lot of emotional strain on victims. For example, victims of rape who would rather get on with their lives are made to dwell on the incident during the period of the delay. Some victims of crime may even lose interest in the pursuit of justice.

2.4 Impact on human rights

From a human rights perspective, delay erodes three key rights: the right of access to justice, the right to effective remedy and the right to fair hearing.

2.4.1 Access to justice/courts

Legally defined, 'access to justice' or 'access to court' is the right to have a charge, allegation or civil dispute examined by a competent judicial authority.[41] The failure to address the problems of backlog and delay in many court systems could constitute denial of access to justice[42] especially since protracted litigation provides a strong disincentive for using the courts. Where legal and judicial outcomes are not just and equitable due to delays in the process, access to justice is definitely denied. Where litigants are weary or reluctant to

38 H Chodosh *et al* 'Egyptian civil justice modernisation: A functional and systematic approach' (1996) *Michigan Journal of International law* 24.
39 Speech by Kofi Annan, the Secretary-General of the United Nations.
40 B Farrell 'The right to speedy trial before international criminal tribunals' (2003) 19 *South African Journal on Human Rights* 99.
41 B Stormorken & L Zwaak *Human rights terminology in international law: A thesaurus* (1988) 21.
42 H Chodosh (n 38 above) 24.

approach the courts due to the length of time it will take them to obtain a remedy, the right of access to justice is threatened. Some litigants avoid the court if the remedy claimable would be ineffective because of delay.

2.4.2 Right to effective remedy

One of the reasons for the existence of judiciaries in many countries is to rectify the wrong done to a victim. [43] According to Aristotle:

> What the judge aims at doing is to make the parties equal by the remedy it imposes, whereby he takes from the aggressor any gain he may have secured ...

Therefore, a remedy is only worth pursuing where the victim of a wrong/violation is sure it is going to be effective. Where remedies are incapable of redressing a harm alleged due to unnecessary delays in court proceedings, the right to effective remedy would be breached.

Often times, judgments obtained in the course of litigation become valueless or unenforceable due to delays. For example, a litigant who approaches the court for monetary or material remedy for damages done to his or her goods might not obtain an effective redress at the end of ten-year litigation because the value of the goods, which was being claimed at a fixed price, would have changed. In the case of urgent interim or interlocutory proceedings, delay deprives an applicant the urgent protection sought from the judicial system. Thus, interlocutory hearings and judgments serve no useful purpose where the wrong that needed to be averted has already occurred. In addition, the legal costs of a protracted process are burdensome on the litigant over the years.

The right to effective remedy entails that courts must use all objectively feasible and appropriate means to ensure the enjoyment of the right.[44] International human rights instruments cannot prescribe the procedural guarantees accorded parties in pending proceedings without protecting that which makes it possible for them to benefit from such guarantees

2.4.3 Right to fair hearing

Whether proceedings be criminal or civil, the broader concept of fair trial or hearing includes not only the obligation of independence and impartiality of the judiciary but also respect for expeditious

43 D Shelton *Remedies in international human rights law* (1999) 38.
44 N Jayawickrama *The judicial application of human rights law: National, regional and international jurisp*rudence (2002) 481.

proceedings.[45] When proceedings take unreasonably long to conclude, the right to fair hearing of the parties become eroded. Two interests are challenged by unreasonably delayed proceedings: (1) The very purpose of establishing the truth is undermined by a lengthy delay; (2) The expeditious completion of hearing is like finality, a value in itself.[46] In *Munoz Hermona v Peru*,[47] the United Nations Human Rights Committee (HRC) held that the concept of fair hearing necessarily entails that justice be rendered without undue delay and that the inability of the state party to explain the delay constituted an aggravation of the violation of the principle of fair hearing.[48]

2.5 Conclusion

This chapter analysed what constitutes delay and pointed out the importance and necessity for eradicating delay in African courts. The concepts of access to justice, effective remedy and fair hearing were examined, and the impact of delay on certain human rights was enunciated.[49] Having ascertained the meaning of delay and its impact on society and human rights, the next chapter will examine the regulation of delay in the context of international and regional instruments.

3 International and regional instruments governing delay in the administration of justice

3.1 Introduction

This chapter outlines the various ways in which the problem of delay has been regulated by international and regional instruments with specific emphasis to the human rights provisions governing this area of law. The standards set by these provisions coupled by the interpretations given to those standards by various international and regional bodies are explored.

45 *Fei v Colombia,* communication No 514/1992, UN Human Rights Committee (1995).
46 N Steytler *Constitutional criminal procedure: A commentary on the Constitution of the Republic of South* Africa 1996, (1998) 274.
47 Communication 203/86 para 11.3.
48 *Muknto v Zambia* 768/97.
49 A Alschuler 'Mediation with a mugger: The shortage of adjudicative services and the need for a two tier trial system in civil cases' (1986) 99 *Harvard Law Review* 1808.

3.2 International instruments

International instruments that protect litigants in civil and criminal proceedings include human rights and humanitarian treaties. Provisions under these treaties are often couched as 'right to speedy trial,' 'trial within a reasonable time' and 'undue delay.' Discussions of these instruments follow.

3.2.1 International Covenant on Civil and Political Rights

Article 14(3)(c) of the International Covenant on Civil and Political Rights (ICCPR) provide for the 'right to be tried without undue delay.' Linked with article 14(1) of ICCPR, which provides for the general fair hearing rights of litigants, article 14(3)(c) is a powerful tool for condemning delay in the administration of justice.

The precise meaning of the term 'undue delay' is not set out in the ICCPR or in its *travaux preparatoires*,[50] however, the HRC has stated in General Comment 13 that this guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered. According to the HRC, all stages must take place 'without undue delay'. To this end, a procedure must be available to ensure that a trial proceeds without undue delay both in first instance and on appeal.

The import of this comment is that in defining delay, the period to be taken into consideration begins to run from the moment a charge is drawn up to the final determination of the case whether on appeal or in the court of first instance.[51] Hence, in *Earl Pratt and Ivan Morgan v Jamaica*[52] the HRC held that article 14(3)(c), and article 14(5), are to be read together so that the right to review of conviction and sentence must be made available without undue delay. Although this case outlines the scope of the proceedings to which article 14(3)(c) applies; it does not define what constitutes 'undue delay in a proceeding.'

A review of the jurisprudence of the HRC show that it has refrained from defining delay but prefers a case by case approach, taking into account the circumstances of each individual case.[53] This approach is based on a reasonableness standard taking into consideration factors such as: the seriousness of the offence,[54] the

50 M Bossuyt *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (1987) 297.
51 *Earl Pratt and Ivan Morgan v Jamaica* communication 225/1987 (1989) para 13.3 – 13.5.
52 As above.
53 *Girjadat Siewpersaud v Trinidad and Tobago* communication 938/2000 (2004).
54 *Francis et al v Trinidad and Tobago* communication 899/1999 (2002) para 5.4.

complexity of the case,[55] the authors contribution to the delay,[56] the length of time it takes a court to reach a final decision[57] and the inability of the state party to adduce exceptional reasons to justify delay.[58]

Thus, where the state fails to show that the delays were justified a violation will be found.[59] In *Clyde Neptune v Trinidad and Tobago*[60] the HRC held that in the absence of any explanation by the state party, a twenty-nine month pre-trial delay and a 7 years and 5 months delay from the time of trial to appeal was incompatible with article 14(3)(c).

For a justification to be accepted, such a justification needs to be strong, the HRC does not accept considerations of administrative nature or explanations that the investigations in criminal cases are carried out by way of prolonged written proceedings.[61] Thus, in *Bernard Lubuto v Zambia*[62] whilst acknowledging the difficult economic situation of the state party, the HRC emphasised that the rights set forth in the Covenant constitute minimum standards, which all state parties have agreed to observe. It held that the period of 8 years between the author's arrest in February 1980 and the final decision of the Supreme Court, dismissing his appeal in February 1988 constituted undue delay and is a violation of article 14(3)(c) ICCPR.

With regard to delay in civil proceedings, the HRC has stated in paragraph 3 of General Comment 13, that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law.[63] In *Deisl v Austria*[64] the authors alleged violations of their rights under articles 14(1), and 26 of the Covenant. Holding that the delay complained of was not unreasonable, the HRC reiterated that the concept of a 'suit at law' in article 14(1), of the Covenant is based on the nature of the right and obligations in question rather than on the status of the parties.[65] It notes that the proceedings concerning the author's request for an exemption from

55 *Franz and Maria Deisl v Austria* communication 1060/2002 (2004) para11.5 -11.6
56 *Leon Rouse v Philippines* communication 1089/2002 (2005) para 7.4.
57 *Bozize v Central Africa Republic* communication 428/1990 (1994) para 2.1, 5.3.
58 Antonio *Martínez Muñoz v Spain* communication 1006/2001 (2004) para 7.1.
59 David Weissbrodt, *The right to a fair trial, articles 8, 10 and 11 of the Universal Declaration of Human Rights* (2001).
60 Communication 23/1992 (1996).
61 *Fillastre v Bolivia* communication No 336/1988 (1991) the Committee held: 'the lack of adequate budgetary appropriations ... does not justify unreasonable delays in the adjudication of criminal cases. Nor does the fact that investigations into a criminal case are ... carried out by way of written proceedings, justify such delays ... Considerations of evidence gathering do not justify such prolonged detention.')
62 Communication 390/1990 (1995) para 7.3.
63 See *Paul Peterer v Austria* communication 1015/2001 (2004) para 10.7.
64 Communication 1060/2002 (2004) para 3.1.
65 As above para 11.1.

the zoning regulations, as well as the orders to demolish their buildings, relate to the determination of their rights and obligations in a suit at law. The Committee further held that the right to a fair hearing under article 14(1) entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously.[66]

3.2.2 Other international instruments

A number of international instruments also contain fair trial provisions, which protect against delay in the administration of justice. Although not as significant as the ICCPR, these instruments demonstrate a widespread acceptance of the right to speedy trial.[67] These provisions include:

Article 40(2)(b)(iii) of the Convention on the Rights of the Child which states that every child accused of violating penal law has the right to have the matter determined without delay.

Article 71 of the Fourth Geneva Convention, concerned with the protection of civilians in times of war which states that accused persons who are prosecuted by the occupying power ... shall be brought to trial as rapidly as possible.[68]

Article 54 Draft Declaration on the Right to a Fair Trial and a Remedy,[69] which is a synthesis of article 14(3)(c) of the ICCPR, General Comment 13 of the HRC and the decisions of the HRC.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, which require that each case shall from the outset, be handled expeditiously, without any unnecessary delay.[70]

3.3 Regional Instruments

International human rights instruments are supplemented with regional human rights systems in Europe, America and Africa. Although these systems are limited to specific geographical areas, they are nonetheless highly developed, particularly in the case of Europe.[71]

66 As above para 11.2.
67 B Farrell (n 40 above) 102.
68 Geneva Convention 75 UNTS 287 (1950) art 71.
69 UN Doc E/CN.4/1991/66 (1991).
70 UN Doc A/40/881(1995) rule 20.1.
71 B Farrell (n 40 above) 103.

3.3.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention)[72]

Article 6(1) of the Convention provides:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

From this provision, delay is conceived as a situation where proceedings are not concluded within a reasonable time. Thus, where proceedings are prolonged unreasonably, the European Court of Human Rights (ECHR) would likely hold a violation of the provision. In *Wemhoff v Germany*[73] the ECHR held:

> The Court is of opinion that the precise aim of this provision in criminal matters is to ensure that accused persons do not have to lie under a charge for too long and that the charge is determined. There is therefore no doubt that the period to be taken into consideration in applying this provision lasts at least until acquittal or conviction, even if this decision is reached on appeal. There is furthermore no reason why the protection given to the persons concerned against the delays of the court should end at the first hearing in a trial: Unwarranted adjournments or excessive delays on the part of trial courts are also to be feared.[74]

In defining the concept of 'a reasonable time' as used in the Convention, ECHR has held that the definition will depend on the circumstances of each particular case.[75] To determine whether length of proceedings are reasonable, the ECHR will take into consideration the complexity of the proceedings as well as the applicant's conduct and the conduct of the relevant authorities.[76]

Thus, the ECHR has held that delays occasioned by difficulties in the investigation and by the applicant's behaviour do not of themselves, justify the length of proceedings. Rather the ECHR has often held that the principal reason for the length of proceedings is to be found in the conduct of the case.[77]

In cases where the applicant has a significant stake in the case's outcome, the ECHR will hold state parties to a higher standard. For example in *Vallee v France*,[78] the applicant who was suffering from an incurable disease with a dramatically reduced life expectancy had a crucial stake in receiving compensation. In such cases the ECHR held

72 213 UNTS 222.
73 (1968) 7 ECHR (ser A) para 12.
74 *Eckle v Germany* (1982) 51 ECHR (ser A) paras 73.
75 *Buchholz v Germany* (1981) 42 ECHR (ser A).
76 *Kovacs v Hungary* 67660/01ECHR 2004.
77 *Rimgeisen v Austria* (1971) 13 ECHR (ser A).
78 (1994) 289 ECHR (ser A) 11.

that 'exceptional diligence' is appropriate. This standard places an affirmative duty on domestic courts to do everything in their power to expedite proceedings.[79]

In this regard, contracting states are obliged to organise their legal system to allow their courts to comply with the requirements of trial within a reasonable time.[80] Nonetheless, the ECHR has held that a temporary backlog of business does not involve liability on the part of contracting parties provided they have taken reasonably prompt remedial action to deal with an exceptional situation.[81]

Thus, in civil proceedings, the fact that it is for the parties to take initiatives with regard to the progress of proceedings does not avail a state party from its obligations to ensure compliance with article 6(1).[82] In *Scopelliti v Italy*[83] the ECHR held that although the nature of civil proceedings indicate that parties should dictate the pace of the proceedings, the judge responsible for the case should take all possible steps to ensure that the proceedings are conducted with the utmost speed and fairness.

In *Katte Klitsche de la Grange v Italy*[84] the ECHR has held that the convention underlines the importance of administering justice without delays, which might jeopardise its effectiveness and credibility.[85]

3.3.2 The Inter-American Declaration and Convention on Human Rights

There are two major instruments under the Inter-American system governing the promotion and protection of human rights: The American Declaration of the Rights and Duties of Man (the American Declaration) and the American Convention on Human Rights (the American Convention).[86]

Article XXV of the Declaration provides that 'every person has a right to be tried without undue delay or otherwise to be released.'[87] Article 8(1) of the Convention provides that 'every person has a right to a hearing, with due guarantees and within a reasonable time, ... in the substantiation of any accusation of a criminal nature made against

79 *Bock v Germany* (1989) 150 ECHR (ser A) para 38.
80 *Di Mauro v Italy* ECHR (ser A) (1999).
81 *AP v Italy* ECHR (ser A) (1999).
82 *Morreira v Portugal* (1988) 143 ECHR (ser A) para 46.
83 (1993) ECHR (ser A) para 25.
84 (1994), Series A no. 293-B, p. 39, & 61.
85 *Muzenjak v Croatia* Application no. 73564/01 (7/7/2004).
86 Basic documents pertaining to human rights in the Inter-American system, 2004 General secretariat Organisation of American States 6.
87 Declaration article XXV.

him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature.'

In *Desmond Mckenzie and others v Jamaica*,[88] the Inter-American Commission on Human Rights (IACHR) also adopted the criteria set out by the ECHR regarding the determination of trial within a reasonable time. Consequently, in *Michael Edwards and others v Bahamas*,[89] the IACHR held that the failure of the state to try the accused persons without undue delay was a violation of article XXV of the Declaration.[90]

With regard to civil proceedings, the IACHR held in the case of *Milton Fajardo et al v Nicaragua*[91] that the obligation to ensure hearing within a reasonable time was established in order to avoid unnecessary delays that may lead to a deprivation or denial of justice. Thus, the IACHR held that one-year delay by the Supreme Court of Justice of Nicaragua to deliver a judgment in a labour dispute, which should according to the law have been delivered in 45 days, was unreasonable.

In *Maya indigenous communities of Toledo district v Belize*,[92] a *locus classicus* in relation to the protection of indigenous communities and their resources, the IACHR concluded that the State violated the right to judicial protection enshrined in article XVIII of the Declaration to the detriment of the Maya people, by rendering judicial proceedings brought by them ineffective through unreasonable delay. In finding an 8-year delay to be contrary to the Declaration, the IACHR held that there is no question that the duty to conduct a proceeding expeditiously and swiftly is a duty of the organs entrusted with the administration of justice.

3.3.3. The African Charter on Human and Peoples' Rights

Article 7(1)(d) of the African Charter on Human and Peoples' Rights (African Charter) provides that every individual shall have the right to be tried within a reasonable time by an impartial court or tribunal. This is reinforced by paragraph 2(c) of the African Commission's Resolution on Fair trial of 1992, which provides that persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within reasonable time or to be released.

88 Cases 12.023,12.107, 12.126,12.044,12.146 Report No 41/00.
89 Case 12.067, 12.068 and 12.086, Report No 48/01 para 218 – 224.
90 *Milton Fajardo et al v Nicaragua* Case 12.067, 12.068 and 12.086, Report 48/1 para 218 – 224.
91 Case 11.381 Report 100/01 October 11, 2000.
92 Case 12.053, Report 40/04, 12 October 2004.

The import of these provisions is that the African Charter only seeks to regulate delay in criminal proceedings. To deal with this seeming lacuna in the Charter, the African Commission on Human and Peoples' Rights (AFCHPR) has held that unwarranted delays in the administration of justice in civil proceedings would still constitute a violation of article 7 of the Charter. Hence, in *Pagnoulle (on behalf of Mazou) v Cameroun*,[93] the author submitted petitions to the Supreme Court of Cameroun against the Ministry of Justice of Cameroun for his reinstatement as a magistrate, one of the issues before the AFCHPR was whether a delay of 2 years by the Supreme Court was a violation of article 7 of the Charter. In holding that there was a violation, the AFCHR held:

> Considering that the case under examination concerns the possibility of Mr Mazou exercising his profession and that there are undoubtedly some people who depend on him for their survival, two years without any action in a case ... constitutes a violation ... of the Charter.

Furthermore, in *Mouvement, Burkinabe des droits de l'homme et des peuples v Burkina Faso*, the author complained of a 15 year delay by the Supreme Court of Burkina Faso in handing down a decision in the case. The AFCHPR reiterating it's holding in *Pagnoulle's case* held:

> Fifteen years without any action being taken on the case or any decision being made either on the fate of the concerned persons or on the relief sought, constitute a denial of justice and a violation of article 7(1)(d) of the African Charter which proclaim the right to be tried within a reasonable time. [94]

With regard to delay in criminal proceedings, the only case that comes within the ambit of this study is *Constitutional Rights Project v Nigeria*.[95] Where the AFCHPR held:

> In a criminal case, especially one in which the accused is detained until trial, the trial must be held with all possible speed to minimise the negative effects on the life of a person who, after all, may be innocent.

The failure of the AFCHR to define what constitutes 'a reasonable time' or otherwise establish criteria for determining a violation of article 7(1)(d) leaves much to be desired. Using terms such as 'denial of justice' or 'does not meet with the spirit and purport of article 7(1)(d)' only serves to create further ambiguity as to when a proceeding would have been said to be unduly prolonged to warrant a violation of the Charter.

93 Communication 39/90 (2000) AHRLR para 17.
94 Communication 204/97 14th AARACHPR para 16.
95 Communication 153/96, 13th AARACHPR para 19-20.

3.3.4 Other regional instruments

One other regional instrument that protects against delays in the administration of justice in Africa is the African Children's Charter. The relevant provision in the Children's Charter is article XVII(2)(c)(iv). It provides that state parties shall ensure that every child shall have any matter against him/her determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to appeal to a higher tribunal.

3.4 Conclusion

Attempts to regulate delay in the administration of justice have led to various international, regional and national provisions. However, the expressions 'reasonable time' and 'undue delay' used in human rights instruments do not convey a precise legal meaning and there is no yardstick by which to assess the problem. Various judicial bodies seem to be content to deal with the situation on a case-by-case basis.

Unwillingness to prescribe a specific approach which state parties should adopt to eradicate delay within their systems is problematic. At best what emerge are guidelines as to when a delay would be a violation and who bears the responsibility of justifying such delays. It is suggested that in future decisions, clearer and definite standards should be adopted to enable potential litigants to understand the ambit of their rights, and to emulate bodies in the USA and Britain which have introduced standards to regulate the pace of proceedings in the courts.[96]

The work reported in the last two chapters informs discussions in the next chapter, which is a comparative analysis of delays in Nigeria and South Africa.

4 Delay in the administration of justice in Nigerian and South African courts

4.1 Introduction

The problems of delay, and efforts to eradicate them in the administration of justice in South African and Nigerian courts vary in terms of degree, nature, extent and causes. This chapter analyses the legal framework, nature, extent, causes of delay, and examines

[96] M Code 'The development of legislated 'speedy trial' standards in the United States and Great Britain in M Code (n 16 above) 38.

efforts to eradicate delay in South African and Nigerian courts. The study considers general and specific aspects of delay in both civil and criminal proceedings. Finally, a comparative analysis, highlighting similarities and differences between the two countries shall be considered.

4.2 Delay in South African courts

4.2.1 Legal framework

Section 35(3)(d) of the South African (SA) Constitution provides that every accused person has a right to fair hearing including the right to have his trial begin and concluded without unreasonable delay. At first blush, it would appear that delay in the administration of justice is protected only in the context of criminal proceedings. However, jurisprudence examined, show that courts are willing to hold that the right to speedy trial in civil proceedings are protected under the general provision for fair hearing.[97]

In *Exparte Minister of Safety and Security and others in Re: S v Walters*,[98] the SA Constitutional Court reacting to the indefinite adjournment of a case held:

> It is an established principle that the public interest is served by bringing litigation to a close with all due expedition ...

In *Moeketsi v Attorney General Bophuthatswana*[99] it was held that the right to trial within a reasonable time was indissolubly associated with the canon of fair trial and that an inordinate long and unexplained delay negated the concept. The court further held that in assessing the reasonableness of delay courts should consider *inter alia* the following factors: (1) the length of delay, (2) the reasons for delay including delay (i) attributable to the parties; (ii) the complexity of the case (iii) institutional or systematic delay, (3) waiver of time periods by the accused, and (4) prejudice to the accused.[100]

For civil proceedings, the court will only hold unreasonableness of delay only in circumstances where there is clear abuse of the court process either on the part of the plaintiff or the defendant.[101] Factors considered when exercising discretion as to reasonableness of delay include: the length of delay, whether the delay is inexcusable, whether the aggrieved party or parties is seriously prejudiced by the delay.[102]

97 SA Constitution sec 34.
98 2002 (7) BCLR 663 para 63E-G.
99 1996(1) SACR 675 (B).
100 Note the developments in *Sanderson v Attorney General* 1998 (1) SACR 227 (CC) and *Wild v Hoffert* 1998 2 SACR I (CC).
101 *Molala v Minister of Law and order and another* (1993) (1) SA 673 (W).
102 *Gopaul v Subbamah* (2002) (6) SA 551 (D).

Where the parties are the primary agent of delay, SA Courts have held that they cannot rely on the right protected under section 35(3)(d).[103] On the other hand, where the state is responsible for the delay either because of the newness or importance of the issues raised or due to systematic delays, the courts are very reluctance to hold a violation.[104] This approach is problematic especially in the light of decisions of the HRC and other international human rights bodies.[105] The courts should recognise that by refusing to tolerate systematic delays and through judicial intervention, they may play an important role in ensuring that more resources are allocated to the administration of justice. Moreover, a country that entrenches the right to a speedy trial must live up to its standards.[106]

4.2.2 Nature and extent of delay

Since 1994, delay in the administration of justice has been considered a serious problem in SA justice system.[107] This problem has been identified as one of the consequences flowing from the transformation from apartheid controlled system to a democratic system.[108] Although the problem has improved over the years due to various efforts by the government and stake holders, the problem of delay still linger in SA courts.[109]

In criminal proceedings

As most of the criminal cases begin in the district (magistrate) courts, the cases that take the longest time to reach judgment are cases, which are so serious in nature that the regional courts or the high courts have to assume jurisdiction.[110] Furthermore, the complexity of a case, the nature of investigation required and the backlog or volume of outstanding cases within a definite court also play a role in determining the length of time to case disposition. Thus, although,

103 E Steyn (n 20 above).

104 *Sanderson* (n 100 above) para 35; Wild (n 100 above) para 25 and *Coetzee v Attorney-General* 1997 (8) BCLR 989(D).

105 *Fillastre v Bolivia* (n 61 above).

106 Steytler (n 46 above).

107 W Scharf and B Tshehla 'Stumbling at the first step? Lost opportunity in the transformation of the South African Justice System' 2003 (1) *Acta Juridica* 161.

108 M Shaw 'Reforming South Africa's criminal justice system' *Occasional paper no 8 — August 1996*.

109 The discussion centres on 3 major courts in the SA judicial system: District, regional and the high Courts. The district courts and the high courts have both civil and criminal jurisdictions while the regional courts have jurisdiction only in respect of serious crimes such as rape, murder, manslaughter etcetera.

110 Reports of the Court Nerve Centre on 'Criminal court performance in the lower courts during 2002 and 2003' and 'An analysis of criminal court work in the high courts during 2002 and 2003' Department of Justice and Constitutional development Business Unit: Court services pg 1-35 and 1-24 respectively. See specifically T Leggett *et al* 'Criminal justice in review 2001 / 2002' No 88, November 2003 http://www.issafrica.org/pubs/Monographs/No88/Contents.html (accessed 10 October 2005).

reports tend to show progressive increase in the finalisation of cases, in many SA criminal courts, however, this has not substantially affected the length of time averagely spent in the disposition of the cases.[111]

According to Judge Moosa,[112] the average time to dispose of a case in SA criminal proceedings range from 18 months to 4 years. Cases governed by the minimum sentencing legislation often last up to 5 years. [113] To substantiate this fact, a report prepared by the Court Nerve Centre Pretoria, stated that the average criminal case in the high court ranged between 150 days – 1781 days (4 years 9 months) from the time it was first placed on the high court roll to the time sentencing was completed. This excludes time spent in the lower court. [114]

With regard to SA regional and districts courts, reports and interviews show that the average time in which cases are disposed is 3-30 months and 3 -12 months respectively.[115] This is an average, as some cases in both courts get disposed in less than 3 months[116] while others take longer.[117] For example the case of *State v Vincent Thorne*[118] took 7 years to disposition.[119]

The extent of the problem of delay in South African Courts is reflected in the ongoing application by the *Prison Care and Support Network v The Government of RSA*,[120] concerning overcrowding and the inhuman conditions existing in SA prisons. Relying on the 2003/ 2004 and the 2004/2005 reports of the Inspecting Judge Fagan on Prisons and Prisoners (IJP), the application reveal that 1424 prisoners have been awaiting trial for four years (or more) and more than half of the 3,284 children in jail are still awaiting trial.[121] This case also

111 M Schonteich 'Tough choices: Prioritising criminal justice policies' *Occasional paper no 56 - May 2002* http://www.issafrica.org/PUBS/PAPERS/56/Paper56.html (accessed 10 October 2005).

112 Interview Judge Essa Moosa High Court Judge Cape Town 14 October 2005.

113 Minimum sentencing is explained in detail later in this chapter.

114 Court Nerve Centre Report (n 110 above). Note that this figure has improved. In the unpublished, Audit for Trials in the High court obtained from Advocate J Gerber (SC) Deputy Director of Public Prosecution (DDPP)(11 October 2005) the average case disposition time from the month of April to August is 554 (1 and a half years) Annexure B.

115 Court Nerve Centre Report (n 110 above).

116 Chief Magistrate A Jooste Western Cape Magistrate Court (13 October 2005) and Magistrate Ivan Munnik Regional Court Magistrate for Mitchells Plain (11 October 2005).

117 Example Kenneth Klopper (7 October 2005) court manager Justice Centre Cape Town revealed that he was still presiding over cases, which arose when he was magistrate despite the fact that he had resigned over 3 years ago.

118 Interview Magistrate Wilma van der Merwe Regional Court Magistrate Cape Town (13 October 2005).

119 Judgment was rendered the morning of interview with Magistrate Wilma van der Merwe.

120 Case No. 9188/05, Notice of Motion last heard in court 13 October 2005.

121 Paragraphs 25 – 39 of the founding affidavit deposed to by John Moorhouse attached to the Notice of Motion, paras 7.3 – 11.3 2004/2005 IJP's Report.

reveals the dire consequences of delays in the administration of justice. For example, the affidavit attached to the application sworn to by one of the prisoners on behalf of the other prisoners reveals the horrible situation in SA prisons.[122]

Furthermore, the briefing by the South African Human Rights Commission (SAHRC) to the Parliamentary Portfolio Committee on Correctional Services again reveal the inordinate long periods juveniles wait in courts before their cases are determined. The SAHRC gave examples of the case of a 16 year old girl charged as an accomplice in a car hijacking who has been awaiting trial for almost 4 years, and the case of four boys charged with stealing a sheep who are still awaiting trial after three months.[123]

Another area where delays are prevalent is with regard to un-sentenced prisoners. The 2004/2005 Report by the IJP, show that 22,934 un-sentenced prisoners in the country wait for over 3 months before their cases are finalised. Out of the 22,934 cases, 1424 remain in court for over 24 months for the courts to decide on the sentence to be served.[124] Reports has it that many of these un-sentenced prisoners are really not before any court as their cases have been struck of the roll of lower courts and are unable to get onto the roll of the high courts due to congestions in the system.[125]

In civil proceedings

Mass migration of people into urban areas, coupled with increased confidence in the courts by previously disadvantaged groups in post-apartheid SA has led to the increase in commercial transactions and disputes in SA civil courts. The inability of the courts to accommodate the increase in civil cases led to backlogs and delays in proceedings.[126] The average length of time for disposition in civil matters ranges between 18 months and 3 years.[127]

The volume of cases that suffer delay in SA civil proceedings is low since a majority of the cases get settled either before they get to court or while in court.[128] The few instances of delay in civil proceedings are reflected in the case of *Christas Sanford v Patricia*

[122] Gangsterism, murder, rape with frequent transmission of HIV, assault, sodomy etc. Annexure C Affidavit of two prisoners describing experiences.
[123] C McClain-Nhlapo 'Briefing by the SAHRC to the Parliament Portfolio Committee on Correctional Services' http://www.pmg.org.za/docs/2004/appndices/040907cohen.htm (accessed 12 October 2005).
[124] 2004/2005 Report of IJP (n 121 above) Annexure D.
[125] Interview W Tarantaal, Prosecutor National Prosecution Authority (28 September 2005).
[126] Interview Advocate H. Mohammed, Head Department of Justice, Cape Provincial Division 13 October 2005.
[127] E Moosa (n 112 above); for the magistrate courts not more than 6 months.
[128] Interview Schalk Meyer President Association of University Legal Aid Institutions 29 September 2005.

Haley where divorce proceedings were delayed for 15 years.[129] Another case in point is the case of *Randell v Multilateral Motor Vehicle Accident Fund*[130] in which the costs of the protracted litigation amounted to more than the R3 million compensation sought by the plaintiff.

4.2.3 Causes of delay

The general causes of delays in SA courts has been identified as:

Transformation

The transformation from apartheid to a democratic state led to a lot of changes in the SA judicial system.[131] Some of these changes occasioned circumstances, which the new SA was not appropriately equipped to contain. For example, the amalgamation of the former 11 departments of justice and courts in the old separated SA into one unit,[132] the introduction of a Bill of Rights,[133] and the incorporation of previously disadvantaged groups into the justice system and increased knowledge of rights led to increased cases filed in court.[134] The new system, riddled with problems such as: resource constraints, dilapidated infrastructures, ideological divisions,[135] lack of adequately trained personnel, coupled with poor planning and management, could no longer cope nor contain the effects of the changes in the system.[136] This failure in the administration of justice led to the escalation of delays and consequent backlogs in courts.[137]

Congestion and backlogs

This is one of the major causes of delay within the SA justice system. Statistics has it that between the years 2002-2003 that there was a backlog of over 200,000 cases in the country's criminal courts.[138] Between April 1999 and July 2001, the country's regional courts finalised an average of 3,010 cases a month, but had an average of 43,500 cases per month outstanding on the court's roll.[139] The

129 Unreported high court decision case no 97/1989 decided on 11 December 2003.
130 16/06/1993 case no. 14027/83, 1994 (4) SALR 24.
131 Interviews H Mohammed, A Jooste (n 126 and 116 above).
132 Interview A Jooste and E Moosa (n 116 and 112 above).
133 Interview Wilma van der Merwe (n 118 above).
134 Interiews A Jooste and E Moosa (n 116 and 112 above).
135 Interview H Mohammed (n 126).
136 Interview A Jooste and E Moosa (n 116 and 112 above).
137 *M Lue-Dugmore* 'South Africa: An examination of institutional models and mechanisms responsible for: the administration of justice and policing, the promotion of accountability and oversight; and a review of transformation strategies and initiatives developed in relation to the administration of justice and safety and security.' Paper by the Committee on the Administration of Justice, Northern Ireland and the Institute of Criminology University of Cape Town.
138 T*Leggett* (n 110 above).
139 *M Schonteich* (n 111 above).

existence of these backlogs tend to clog up the court's roll such that it takes a long time to get a case into the court's roll. Parties often have to wait for months to get a trial date.[140]

Constitutional constraints

Some commentators have attributed the existence of so many rights in favour of the accused as one of the causes of delay.[141] The accused's right to silence, right to an interpreter (where interpreters are difficult to find), right to adequate time and facilities to prepare for defence, right to legal representation, has been cited as causes of delays.[142] The exercise of the accused of these rights often leads to delay in investigation and in the smooth running of the process of the court. It has been argued that this overindulgence of the accused with rights failed to balance the protection of the interest of the accused and the interest of victims of crimes in seeing that justice is done.[143]

Resources

The existence of inadequate magistrates, judges, courtrooms, court facilities, interpreters, court personnel, and legal-aid workers to represent accused persons as well as financial resources are huge causes of delays in SA courts.[144]

Systematic causes

Some of the systematic causes of delay within the system have been identified in terms of missing dockets or charge sheets with respect to criminal cases, bureaucracy among the various court departments, outdated procedural laws (for, example the current Criminal Procedure Act was enacted in 1977).[145]

Local legal culture

According to Church:

> The pace of civil and criminal litigation is based less on formal aspects of court structure, procedures, and caseload than is commonly believed. Rather on ... attitudes, concerns, and practices of all members of a local legal community. This web of related factors is termed local legal culture.[146]

[140] D Davis 'The Criminal justice system: How much transformation has taken place during the first decade of constitutional democracy?' http://www.csvr.org.za/confpaps/davis.htm (accessed 10 October 2005) see also Annexure E graph showing the pattern of outstanding cases in SA lower courts until 2002.
[141] Interview Wilma van der Merwe (n 118 above).
[142] Interview Wilma Merwe and H Mohammed (n 118 and 126 above).
[143] As above.
[144] Interview A Jooste and J Gerber (n 116, 114 and above)
[145] Interview Mr Cobus Esterhuizen Executive Director Cape Town Justice Centre 26/9/2005.
[146] T Church (n 14 above).

Lack of commitment by all the stakeholders to ensure the smooth, efficient and speedy resolution of cases is a crucial cause of delay in SA courts.[147] Although there are efforts towards ensuring commitment, some stakeholders have not bought into the principle of speedy resolution of cases.[148] The culture of delay is still prevalent among the police, prosecutors and legal practitioners. This culture is illustrated by the incidence of double booking by some legal practitioners, and prosecutors, which leads to postponements.[149] Absenteeism, poor attitudes to service delivery and laziness also lead to delays.[150]

Unnecessary/easy adjournments

The most pronounced cause of delay in SA courts is adjournments. Judges or magistrates often grant unnecessary adjournments to parties out of fear of being accused of not affording parties their constitutional right to fair trial.[151] Incessant adjournments especially have often led witnesses to refuse to appear after tiring of coming to court only to meet with adjournments. In the year 2000, the prosecution had to withdraw a lot of cases due to failure to get witnesses to testify[152]

Court recess system

Productivity in the High Court is dependent on the optimal utilisation of the hours available, per calendar day, per court, on the one hand, and, on the other, the number of such calendar days available, per court, to dispose of the business of the courts. Given the present crisis in the courts system, the recess system dating back to the colonial times which allows the courts to go on vacation four times per year is a luxury which the country cannot afford. Commentators argue that a well nigh complete shut-down of fourteen weeks of the year, in each of the well-equipped and staffed high courts across the country, is not only a waste of public resources but has led to a lot of delays in the system.[153]

Uncoordinated government programmes

The fact that the government has too many programmes geared towards eradicating delays has been identified as a problem. The criticisms against these efforts are that, they are uncoordinated. Such un-coordination prevent an in depth application of the solutions to

147 Interview Mr Taswell Papier, Former Chairman, Cape Law Society, Partner Sonnerberg Hoffman Galombik 11 October 2005; and JC Gerber DDPP (n 114).
148 Mr William Kerfoot, Executive Director Legal Resource Centre (LRC) and Mr Lloyd Padayachi Legal practitioner LRC 11 November 2005.
149 W Tarantaal (n 125 above)
150 William Kerfoot and Mr Lloyd Padayachi (n 148 above).
151 M Schonteich (n 111 above).
152 Interview Taswell Papier and William Kerfoot (n 147 and 149 above).
153 F Kahn (SC) & T Heunis *A review of the administrative recess system in the high court* (2003) 16.

the problem. The scenario-painted by this problem is likened to the adage 'too many cooks spoil the broth.'

Appeals

Although the appeal decision is liable to a statutory time limit, the rules of court often allow parties to seek for extension of time within which to appeal and that causes delay in the appellate process. Also a lot of cases get delayed because of the long time it takes to obtain record of proceedings in the court's registry.

Causes specific to criminal proceedings

Structure and organisation of criminal justice system

The present structure and organisation of the criminal justice system is in the author's view one of the major causes of delay. The process by which arrests and charges are made before proceeding to investigation is very problematic. This procedure not only clog up court rolls especially in the lower courts but also increase the number of people in the prisons. The inordinate delay in the investigation of cases while these cases sit in the court roll does not help matters.[154] Thus, by the time a case is ready to proceed to the regional or high courts where they would ultimately be tried, the case would have spent close to 2 years or more on the roll of the lower court. The recent case of Schabir Shaik is a good illustration. Shaik was arrested and charged in the SA lower courts in 2001, brought to trial in the high court in October 2004 and his case was decided in May 2005. The case which is presently on appeal before the Supreme Court of Appeal[155] is 4 years old and is not nearing completion as proceedings before the appellate court might take a while.[156] The question is: 'why arrest a potentially harmless person and bring him to court when the system is not ready to try the person?'

Accused related delays

Non-appearance of the accused in court often leads to adjournments. The failure of some accused persons to answer to their names in prison because they want to evade trial also causes delay. Cases involving multiple accused persons are also problematic, because trial cannot go on where one of the accused persons is absent.[157]

[154] 2003/2004 Report of the IJPS.
[155] Wikepedia Encyclopedia 'Schabir Shaik trial' http://en.wikipedia.org/wiki/Schabir_Shaik_Trial (accessed 22 October 2005).
[156] The case of Zuma, the former Vice President of SA is another example, see 'Zuma: Vavi slams delay tactics' http://www.news24.com/News24/South_Africa/Zuma/0,2-7-1840_1814398,00.html (accessed 18 22 October 2005).
[157] J Gerber and W Tarantaal (n 114 and 125 above).

Transportation of prisoners to courts

The late arrival or failure of correctional services to transport prisoners to courts also leads to delays.[158]

Court and case management

The method in which matters are set down for hearing in the lower courts has been criticised as one of the causes of delay. Unlike what is obtainable in the high courts where cases are tried continuously for a certain period of time until completion, the cases in the lower courts are often staggered. This mode of organisation leads to less finalisation of cases as many cases are competing to be heard over a period of time. [159]

Minimum sentencing

The Minimum Sentencing Legislation Act 105 of 1997 not only prescribes minimum sentences in cases of serious offences but also bestow jurisdiction on the high court with regard to some cases that require minimum sentencing. This legislation has been heavily criticised by interviewees, authors and the Inspecting Judge of Prisons.[160] The problem with the legislation lies in the fact that it has led to a situation where there are many un-sentenced prisoners waiting to get on the roll of an already clogged up high court roll. What is even more problematic is that when these cases get on the roll and dates are set down for hearing, the judges, instead of addressing their mind to the issue of sentencing often go the whole hog of conducting trial again before finally settling down to sentencing.[161]

Causes specific to civil proceedings

Adversary nature of litigation process

The process of leaving the conduct of litigation almost entirely in the hands of the lawyers resulting in no judicial control to ensure that they comply with time limits lead to delays.[162] Although the judge presiding at the trial must see to it that the lawyers respect the rules of the game, lawyers are in control of their cases, and they decide how many witnesses to call and mode of the questioning of witnesses. As Judges are often reluctant to intervene in this process, the result is that the system lends itself to abuse by lawyers.[163] Thus, the lawyer of one of the parties can therefore prolong a case by taking

158 Minutes of the meeting attended by the author of the provincial stakeholders meeting held on 7/10/2005, Annexure F.
159 As above.
160 Annexure G, letter to President RSA calling against the renewal of the minimum sentencing legislation.
161 Adv Tarantaal & T Papier (n 126 and 147 above).
162 W de Vos (n 22 above) 337.
163 As above 338.

procedural points to wear his opponent down. This manner of conducting cases often causes unnecessary delay and leads to excessive costs. In *Randell's* case,[164] the court held that the fundamental cause of the delay and high cost in the matter was the failure of the lawyers to comply properly with the rule requiring pre-trial conference between parties such that the conduct of the plaintiff in calling 41 witnesses and the excessive time wasted in the conduct of the proceedings would have been curtailed.[165]

4.2.4 Efforts to eradicate or reduce delay

Some of the major efforts in place to eradicate or at best reduce the problem include:

Justice Vision 2000

This is a strategic plan launched in October 1997 to transform the administration and administering of justice and state legal affairs in South Africa. The progressive implementation of this vision has led to the introduction of projects such as: (1) integrated court management project aimed at introducing a semi-automated court and case management system in a number of courts where case backlogs are unacceptably high.[166] (2) Establishment of specialised court such as the special commercial crime courts, priority courts, small claims court, community courts, equality courts, sexual offences courts etc.[167] (3) Introduction of the cluster system of court management.[168]

Utilisation of methods of disposing cases without going to trial

Diversions and decriminalisation programmes were introduced in criminal cases to divert and decriminalise less serious offences, which can comfortably be dealt with through other means.[169] The use of plea-bargaining allows parties in criminal cases to negotiate lesser penal consequences where the accused is willing to plead guilty.[170] In civil proceedings, increased used of alternative dispute resolution mechanisms such as arbitration has been encouraged.[171]

164 Randell (n 130 above).
165 See H Erasmus 'Much ado about not so much-or the excess of the adversarial process' (1996) 7 *Stellenbosch Law Review* 1.
166 M Schoneteich 'Making the courts work: A review of the IJS Court Centre in Port Elizabeth' http://www.issafrica.org/Pubs/Monographs/No75/Content.HTML (accessed 12 October 2005).
167 A Altbeker 'Justice through specialisation? The case of the specialised commercial crimes court' (2003) No 6 http://www.issafrica.org/Pubs/Monographs/No76/Content.html (accessed 12 October 2005).
168 Interview A Jooste (n 116 above).
169 C Barrows 'The justice system ten years on' (2004) 3 *Service Delivery Review* 1.
170 Institute of Security Studies 'How are the police, courts, and prisons performing?' http://www.iss.org.za/CJM/Justice.html (accessed 10 October 2005).
171 Interview Lloyd Padayachi (n 148).

Introduction of case flow management system (CFMS) and guidelines

This is the most recent approach by all the stakeholders in the judicial process to ensure the smooth administration of justice. The introduction of case flow management into all facets of the court process has helped and has been seen by most court officials as a viable solution to delays in the administration of justice. For example, two magistrates interviewed attested to the fact that when they utilised the CFMS guidelines, they witnessed a triple increase in the finalisation of cases in their courts. The recent publication and distribution of a 'Practical Guide' handbook on CFMS has tremendously helped to ensure efficient disposition of cases.[172]

Procedural efforts

Statutorily amendments within existing civil and criminal procedural laws have empowered judges to assume more active and supervisory roles in relation to proceedings.[173] In criminal proceedings especially, judges have been empowered to investigate delays.

Adoption of speedy disposition of case policies

The adoption of internal standards and time limits by different stakeholders has helped to increase consciousness of the need to finalise cases speedily.[174] The judge president's recent habit of publishing the list of courts with the most reserved judgments has helped the courts to monitor excessive delays in rendering judgments. The measure also serves as deterrence for judges.[175]

The introduction of nag clerks who constantly remind all parties to prepare for the next court appearance ensure that nothing hinders the smooth running of the cases.[176]

Project 'Re aga boswa'

Project 'Re aga boswa' ('we are building a legacy') is part of the overall Criminal Justice Strengthening Programme (CJSP).[177] The CJSP is an initiative aimed at supporting and strengthening the capacities of the Department of Justice and Constitutional Development's role in making the criminal justice system swift, effective, accessible and efficient. A significant innovation introduced by this project is the appointment of court managers and

172 Interview Ivan Munnik (n 117 above) and H Mohammed (n 126 above).
173 Introduction of section 342A of the Criminal Procedure Act and Rule 37 of the High Court Rules, applicable to all high courts except Cape Town High Court.
174 Minutes of the provincial meeting (n 160 above).
175 Interview T Papier (n 147 above).
176 Interview W van Merwe (n 118 above).
177 S Jiyane 'Court managers and challenges facing the courts' (2002) 1 *Security Delivery Review* (3) 1.

other functionaries. This enables judicial staff to focus on core functions.[178]

4.3 Delay in the administration of justice in Nigerian courts

4.3.1. Legal framework

Section 36(1) of the 1999 Constitution of Nigeria provides that every person is entitled to in the determination of his civil rights and obligations to a fair hearing within a reasonable time.[179]

Nigerian courts have dealt with the expression 'within a reasonable time' in the light of the peculiar facts of each case *vis a vis* the constitutional provision. In *Najiofor and others v Ukomu and others,*[180] the Supreme Court of Nigeria held that a reasonable time within the context of section 33(1) of the 1979 Constitution can only be determined in the light of the circumstances and peculiarities of each case. Therefore, it is impossible to lay down a fixed rule as to what 'reasonable time' is in the trial of every case.

The paucity of judicial decisions prescribing the criteria for determining the question of reasonable time in Nigerian Courts is however remedied by the non-hesitation by the courts in condemning delay. In *Agiende Ayambi v The State*[181] the court held that inordinate delay in the prosecution of a criminal case constituted an infraction of the accused's constitutional right to fair hearing. In his judgment, Olajide Olatawura JCA held:

> The trial which lasted over two years could not be said to have been conducted within a reasonable time. Besides, the accused was said to be 70 years old when the trial started. His age and confinement ought to have been taken into account when the various applications for adjournment were granted ... we had cause in the past to point out the inordinate delay in the prosecution of cases. We will continue to do this until the position improves.

In *Fanz Holdings Limited v Mrs Patricia Lamotte*, *Justice* Mohammed Uwais, now the Chief Justice of Nigeria, noted that delaying tactics by legal practitioners must in no uncertain terms be deprecated and courts should not approve such unbecoming behaviours.[182]

178 As above.
179 Nigerian Constitution 1999 sec 36(4).
180 1985 2 NWLR (pt 9) 686.
181 Decided in 1985.
182 1990 NWLR (12) 105.

4.3.2 Nature and extent of delay

Delay in the administration of justice in Nigerian courts is an endemic problem which has terrible impacts on access to justice and the quality of justice.[183] In a recent survey by the United Nations Office on Drugs and Crimes (UNODOC) in collaboration with the Global Programme against Corruption and the Nigerian Institute of Advanced Legal Studies, delay was rated by the public, judges and legal practitioners as the worst problem plaguing the country's civil and criminal proceedings.[184] On a range of 0-60%, delays have been averagely rated by court users, judges and legal practitioners as constituting 42-48% of the court's problems.[185] The survey stated that delays occur in every stage of proceedings in Nigerian courts especially during: institution of proceedings, commencement of trial, trial proper and transmission of court proceedings to appellate courts and judgment.[186] Cases that get delayed most are criminal, contract, land and property cases.[187] The average time for case disposition in Nigerian courts range between 6 - 10years.[188] With regard to appeals, it takes a minimum of two years for the Supreme Court to hear an appeal from the Court of Appeal.[189] This period excludes the time of preparation of record of appeal.

In criminal proceedings

The extent of delays in criminal proceedings is such that accused persons especially awaiting trial prisoners have little or no hope of being acquitted or convicted of charges against them within a reasonable time. Many accused persons spend nothing less than 6 – 8 years without being brought to trial talkless of being convicted or acquitted. The result is that many accused persons often spend double the amount of time in prison or answering to a charge than they would have spent if they were immediately upon charged, convicted and sentenced to the maximum sentence applicable to crimes committed.[190] A recent report on the plight of awaiting trial prisoners show that majority of awaiting trial prisoners spend an average of 20 – 47 months before the case proceeds to trial.[191]

183 R Durojaiye (n 12 above).
184 United Nations Office on Drugs and Crimes 'Assessment of justice system integrity and capacity in three Nigerian States: Technical research report May 2004.
185 UNODOC Report (n 184 above) (UNODOC) Annexure H.
186 UNODOC (n 184 above).
187 UNODOC (n 184 above).
188 O Oko 'The problems and challenges of lawyering in developing societies' (2004) 35 *Rutgers Law Journal* 15.
189 N Tobi (n 1 above).
190 L Ogumdele, Chairman Nigerian Bar Association Ekiti State and Chuka Obele, Partner and Legal Practitioner Obele-Chuka and Co Enugu State.
191 UNODOC (n 184 above).

Notwithstanding the fact that magistrate courts in Nigeria are courts of summary jurisdiction, however majority of criminal cases before them last over four years. The ongoing cases of *Police v* Olaitan,[192] and *Police v Adewale Ogunsakin and Madam Kosenatu*[193] are already over four years without nearing completion.[194]

The situation in the high courts is even worse. In the case of *State v Adebayo*,[195] the accused was arrested and charged for armed robbery in 1994. He was only discharged and acquitted 11 years later early this year. Furthermore, in 1999, the Lagos State government arraigned Major Hamza Al-Mustapha, Chief Security Officer to the late Head of State, General Sani Abacha, and four others for allegedly attempting to assassinate *The Guardian* publisher, Mr Alex Ibru. Five years later, the case is still far from being concluded.[196]

In civil proceedings

Unlike the situation in South Africa, civil proceedings in Nigeria is often characterised with lots of delays. Notorious among cases that take the longest times is mostly land and property cases, which often suffer incredible delay.[197] The recognition of the severe extent of delays in civil cases is reflected in the ongoing case of *Titilayo Plastic Industries Limited v Omega Bank Plc and others* where the judge held:

> I will be very strict in granting adjournment, cases dragging on for too long is not good for our system. Some people believe that if a case is taken to court, it dies there.[198]

Other examples of delay in Nigerian Courts include:

The case of *Dabo v Abdullahi*,[199] filed in the Kaduna State High Court in 1990, for a declaration of title, an injunction and ₦10, 000 general damages for trespass to land. The case was decided by the high courts 9 years later in 1999, in the Court of Appeal a year later and finally in the Supreme Court five years later on 12 February 2005, totalling fifteen years of time spent in court.

The case of *Shell Petroleum Dev Co v Uzo & 3 Others*[200] instituted in the high court in 1972, decided by the high court in 1985 and finally

192 MAD/357c/2002.
193 ADRT/162/2002.
194 Information obtained from Mr J Apuabi, Chief Magistrate Ekiti State Magistrate Court.
195 Suit No: HAD/13c/2000 (unreported). Obtained from Honourable Justice C Akintayo, High Court Judge, Ekiti State, Nigeria.
196 Durojaiye(n 2 above).
197 One of my colleague Opeoluwa Ogundokun, informed me of a land case filed by her father before 1976 which is still in the trial stage 31 years later.
198 'Court warns lawyers against delay' AllAfrica.com newspaper http:// allafrica.com/stories /200509290397.html.
199 2005 ALFWLR pt 255 pg 1039.
200 194 (9) NWLR pt 366 pg51.

determined by the Court of Appeal in 1995, 22 years after the date the case was filed.

The case of *Elf Nigeria limited v Operesilo & Another*[201] filed in 1967, decided by the high court in 1987, Court of Appeal in 1990, and finally by the Supreme Court in 1994, 29 years later.

The ongoing case of *Echetabu v Ministry of Information* in the Federal High Court, Lagos, instituted around 1993. The parties were still going back and forth on procedure for tendering documentary evidence when the plaintiff who was an old man passed away last year.[202]

In recent times the most celebrated instances of where delay has led to a lot of substantial injustice is in election petition cases. Notwithstanding the fact that election petition cases by their very nature, should be disposed of expeditiously so that winners of the election would assume their deserved political positions, election petition cases often last in court until the next election date. The recent election petition cases by Peter Obi of the All Progressive Alliance against Dr Chris Ngige of the Peoples Democratic Party (PDP) and the presidential election petition of Muhammadu Buhari of the All Nigerian Progressive Party against the President of Nigeria, both instituted immediately after the 2003 elections were only decided in 2005. The former is on appeal in the country's appellate court.[203]

4.3.3 Causes of delay

Corruption

Nigeria is a country with a long history of corruption, which have permeated every nook, and cranny of the nation.[204] Corruption is so manifestly entrenched and institutionalised that the judiciary, the police and the entire justice system is wallowing under the trenches of corruption. Next to delays, corruption has been rated the second greatest obstacle that impedes the efficient administration of justice in Nigeria.[205]

To start with, corrupt practices in the appointment of judges; magistrates and court officials have led to the increase of poorly qualified judges, magistrates and court officials. Appointment to the bench is often because of whom you know, or how much money you

201 1994 (6) NWLR pt 350 pg258.
202 Information from Opeoluwa Ogundokun counsel handling the matter.
203 Divorce cases often suffer the same fate. Questionnaire Egbuna Obata Director-General International Centre for Nigerian Law.
204 N Ribadu 'Problem associated with the enforcement of economic crimes' paper presented at the Nigerian Bar Association Annual Conference Abuja 23-27 August 2004.
205 UNODOC (n 184 above). Annexure I.

can bribe your way through rather than on merit. Thus, the Nigeria justice system is full of people who hardly qualify to be in the position, which they operate.[206]

Secondly corruption in the court registry is a big impediment in not only accessing justice but also in timeliness of court proceedings. Court registry officials often times are unwilling to perform their duties except when bribed. In fact some officials will outrightly demand payments for things, which should ordinarily be free of charge without which they would not budge at all. Litigants who want their cases to proceed speedily have no option but to engage in bribery to get their cases moving.[207]

On the part of the police, Nigerian police have the responsibility of investigating crimes and prosecuting in the lower courts of Nigeria. However, due to corruption, the police would often not engage in any meaningful investigation until the complainant or victim who is interested in the vindication of the wrong done to them bribe them. Likewise, some of the delays in the magistrate courts are as a result of failure of the accused persons to comply with the corrupt demands of the police officers. In such circumstances, the police will always have one excuse or the other to postpone the case and delay trial until the accused is forced to comply.[208]

The same scenario painted above also repeats itself with High Court cases, which are handled from the office of the Director of Public Prosecution (DPP). The system of holding charge, which requires, the office of the DPP to proffer advice as to whether a *prima facie* case has been made out against an accused without which the accused will be discharged is also permeated with corruption. Legal advice often takes ages to get to the magistrate courts due to failure of the parties to bribe the DPP or some of his officials.[209]

Corruption among the judges and magistrates is another cause of delays. Judges are sometimes in cohort with parties and their legal practitioners after receiving substantial amount of bribes. Judges and magistrates who receive these bribes either grant frivolous adjournment or often withhold judgments or use any other tactics to frustrate the other party in the case.[210]

206 Questionnaire, Uyi Omonuwa, Senior Advocate of Nigeria (SAN).
207 UNODOC (n 184 above).
208 UNODOC (n 184) above. I once handled a case in which the police officer in charge urged me to co-operate with him, failure of which, he will continue to delay the case until I comply.
209 Questionnaire Banjo Ayenakin, AO Akanle (SAN) Ado-Ekiti, Ekiti State.
210 UNODOC (n 184 above).

Congestion and backlogs

The paucity of courts and judicial personnel in Nigeria do not measure up to the teaming population of Nigeria.[211] When compared to this huge population, Nigeria has only about 43,953 lawyers called to Bar, 707 High Court and *Sharia* Court Judges, 47 Federal High Court Justices, 46 Court of Appeal Justices and 15 Justices of the Supreme Court of Nigeria.[212] It is clear that even if only one-quarter of the population engages in litigation, this handful of people cannot possibly meet up with the teaming cases before the courts. The existence of this state of affairs has led to long court lists especially within courts in Lagos State.[213]

Resources

To a large extent, the quality of judicial infrastructure and consequently the expediency with which cases can be handled in court is dependent on how much a state is willing to spend on the courts. Many Nigerian Courts lack basic infrastructure. Unlike in South Africa where almost every office is equipped with computers, Nigerian Courts are equipped with few computers. Many things are still conducted manually. The greatest complaint of judges interviewed is the lack of good libraries from which they could obtain materials to write judgments.

Record of proceedings

Most magistrates and judges in Nigeria take down evidence in longhand and for long hours.[214] This certainly slows down trial as lawyers and witnesses have to speak very slowly in-order to meet the pace of the judges writing. Because of the tedium involved, magistrates or judges get tired and at times ill. He/she needs a break and that is another cause of delay. Statistics has it that quite a number of adjournments is because of the absence or inability of judges to sit.[215]

Judicial and non judicial personnel

Judicial personnel are the judges and magistrates while non-judicial personnel are the staff of the judiciary. The lack of industry, indifference and lack of commitment in the performance of the duties by judicial and non-judicial personnel is a cause of delay. Some judicial personnel particularly of the magistrate cadre sit late and rise early. Although the official time of the court is 9 am, some

211 Presently Nigeria has over 132 million people.
212 N Ribadu (n 204 above).
213 Lagos State alone has over twenty million people.
214 N Tobi (n 1 above).
215 As above.

magistrates and judges sit one or two hours later. Some of them only sit to adjourn all the cases in their court list.[216]

Another cause of delay is lack of adequate legal knowledge by judicial officials. Counsel may raise an elementary point of law, which necessitate a ruling. Because the court is not equally knowledgeable, it adjourns the matter for a ruling, instead of giving a bench ruling.[217]

Delay mechanisms erected by law

These include delays as a result of colonially inherited laws which are out dated. One of the sources of Nigerian law is the received English law and common law. The rules and procedures in these sources of law utilised in Nigerian courts are often no longer used in the United Kingdom. These rules are still cited in courts and utilised to clog up and stall proceedings. For example, the English common law rule established in the case of *Smith v Selwyn* provides that where a case is before both civil and criminal courts, the case before the civil court would have to be stalled until the criminal case is conclude. This procedure although abolished in many common law countries including England is still applicable in Nigeria.[218]

Institutional management

Many courts in Nigeria are poorly managed. Due to the absence of an adequately organised system of court and case management, where the Chief judge or magistrate is absent, cases are not assigned. In fact things are stalled pending the return of the judicial administrative head. Reassignment or reshuffling of judges often cause cases that are at trial stage to start *denovo*.

Strikes

The failures of the government to pay salaries as and when due culminate into strikes. For example in the years 2002 and 2003, the entire Anambra State judiciary went on strike for over six months due to reasons related to remuneration and infrastructure. These strikes often stall proceedings and cause delays.

Appeals, local legal culture, prison authorities, adjournments,[219] adversarial mode of adjudication and constitutional constraint [220] also cause delay.

[216] N Tobi (n 1 above)
[217] As above.
[218] Questionnaires Familoni Adeniyi Director Civil litigation Ekiti State, Magistrate Nonye Ene, Enugu State Judiciary.
[219] Questionnaire Paulinus Obichukwu, legal practitioner.
[220] N Ribadu (n 203 above).

Causes specific to criminal proceedings

Holden charge and delays from the office of the DPP

This is almost similar with what is obtainable in South African district courts with respect to serious offences. The difference is that in Nigeria, where an accused person is first arrested, he is formally charged before the magistrate court. However, since the magistrate does not have jurisdiction over capital offences, the accused person continues to be remanded in prison custody pending the advice of the DPP as to whether the accused has a case to answer (*prima facie* case is made out). An accused who has no case to answer based on the advice of the DPP is discharged and acquitted. However, where the accused has a case to answer, such an accused is remanded until the DPP prefers a charge/information to the high court.[221]

This procedure leads to many delays in the system. Sometimes an accused has to wait for years pending the release of the DPP's advice while continuously brought to court. This is time wasting and clogs the roll of the court. When the advice is finally presented, the DPP's office often delays in preferring an information against such accused. Procedural rules, which require the obtaining of the judges consent in order to prefer a charge or information further complicates issues.[222]

Causes specific to civil proceedings

Interlocutory applications/appeals

The use of interlocutory applications/appeals to stall proceedings in the lower courts has become one of the rampant causes of delay. Many cases in the high courts are adjourned *sine die*[223] because of the penchant of counsels to file interlocutory appeals/applications. The case of *Amadi v NNPC*[224] a 13-year delay was occasioned by interlocutory appeals alone.

4.3.4 Efforts to eradicate or reduce delay

Since Nigeria is a federal country, Most of the efforts to eradicate delays in courts are state oriented. Some of the efforts in place include:

Adoption of new high court rules and practice directions

Many states in Nigeria have reviewed their old procedural laws, rules and practice directions to make for a much speedier efficient disposition of justice. The most popular and earliest law and rule reforms are those carried out in 2004 by the governments of Lagos

221 R Doroajaiye & V Efeizomor (n 2 above).
222 N Tobi (n 1 above) 150.
223 Indefinitely.
224 (2001) 10 NWLR (674) 76.

State and the Federal Capital Territory (FCT) Abuja.[225] The success of reforms in these two states influenced similar reforms in other states. Some of the legal reforms introduced in Nigeria are:

- introduction of front-loading (parties to reveal their entire case before trial);[226]
- pre-trial conferences;[227]
- the need for a pre-trial judge as different from the trial judge;[228]
- the effect of non-compliance with rules under the Lagos Model shall nullify proceedings and does not render the proceedings or process merely irregular;[229]
- amendments of pleadings *ad infinitum* have been removed and have now been limited to only two opportunities;[230]
- adjournments at the request of a party have been limited to not more than two times during trial and costs have been imposed to take care of other judge-approved adjournments;[231]
- absence of oral examination-in-chief, which has been replaced by the witness's statement as filed;[232]
- expunging rules which allowed courts to have recourse to English rules;[233]
- introduction of written addresses;[234]
- requirement for pre-action counselling certificate;[235]
- requirements for court to promote alternative dispute resolution and out of court settlements.[236]

Introduction of a multi door courthouse

With the increased requirement for courts to encourage alternative dispute resolution (ADR) and settlements, the government of Lagos State and FCT has ahead of other states introduced the concept of a new multi door courthouse (MDC) system. This refers to a court-connected or court-annexed ADR program. The 'multi-door' concept originally developed in 1976 by Professor Frank Sander constitute a courthouse where there will be several dispute resolution 'doors' and that each case will be diagnosed and referred to an appropriate 'door' or mechanism best suited to its resolution. Thus, within the court premises several doors where litigation, mediation, conciliation and arbitration are done are found. At the end of pre-trial conferences

225 M Abdullahi (n 8 above).
226 Order 3 rule 2 (1) High Court Rules of Lagos State (Lagos).
227 Order 25 Lagos.
228 As above.
229 *Jabita v Onikoyi* http://www.gamji.com/article4000/NEWS4652.htm (accessed 15 August 2005).
230 Order 24 Rule 1 and Order 39 Rule 1 Lagos.
231 Order 30 Lagos.
232 Order 32 rule 3 Lagos.
233 Section 2 of the High Court Rules Lagos.
234 Order 36 Abuja and order 31 Lagos.
235 Order 4, Rule 17 Abuja.
236 Order 25 (1) (2) (c) Lagos, section 259 Practice Direction Abuja.

parties are appropriately referred to the door that would best meet their needs.[237]

UNODC project on strengthening judicial integrity and capacity

The UNODC project on strengthening judicial integrity and capacity in Nigeria is not a self-standing exercise but part of a larger international judicial reform initiative, guided by an International Judicial Group on Strengthening Judicial Integrity, formed in April 2000 by the Chief Justices of Uganda, Tanzania, South Africa, Nigeria, Bangladesh, India, Nepal and Sri Lanka, Egypt and the Philippines.[238]

UNODC in collaboration with the government helps in judicial reform initiatives, both at the federal and state levels. Some of the reforms made possible by the UNODOC project include:

- construction/rehabilitation of high and magistrate courts;
- periodic conferences seminars, symposia for judges and court staff on need for effectual dispensation of justice;
- introduction of information technology and communication equipments in some courts;
- improved co-ordination amongst criminal justice institutions;
- assisting the national government organisation set up to fight corruption;
- introduction and training of judges to embrace case flow management as well assisting in the appointment of administrative judges who would focus only on court administration.

4.4 Comparative analysis

It is clear from the above, that there are various points of convergence and divergence with regards to delay in South African and Nigerian Courts. The points of convergence revealed by this study include:

- delay is both a problem in both countries although to different degrees;
- constitutional and judicial recognition of the need to prevent and protect against delay in the administration of justice;
- causes such as resource constraints, court congestion and backlogs, prisoner transportation, clogging of lower courts by filing of all cases in lower courts, local legal culture, adjournments, appellate causes, constitutional constraints,

[237] K Aina 'ADR and the relationship with court process' http://www.nigerian bar.com/paper7.htm (accessed 15 August 2005).

[238] Langseth, P 'Strengthening judicial integrity and capacity in Nigeria, a progress report Panel on Judicial Integrity 11th IACC, South Korea,' May 2003 UNODC.

adversarial mode of adjudication etcetera are common to both countries;
- both countries have exacted efforts whether by the government or by other means to reduce the problem of delay. Similar efforts adopted include: adoption of case flow management techniques, provision of more infrastructures and equipment to the courts, encouragement of alternative dispute resolution.

The point of divergence in both countries as revealed by the case study include:

- The existence of a more developed legal framework in line with international standards[239] in SA than obtainable in Nigeria.
- Delay is more of a problem in SA's criminal justice system than in its civil system. In Nigeria delay is a huge problem affecting both civil and criminal proceedings.
- The extent of delay is much more pronounced in Nigerian than in SA. The maximum length of proceedings gathered from the study in the case of South Africa is 15 years while in Nigeria we see cases, which are 31 years old.
- Historical factors play a role in delay in SA, where as this is not the case in Nigeria.
- Causes such as corruption, strikes, holden charges, interlocutory applications, method of recording proceedings etc do not feature in SA. On the other hand, causes such as minimum sentencing, uncoordinated government programmes do not feature in Nigeria.
- The efforts in SA to reduce the problem are more diverse than that obtainable in Nigeria. Programs such as decriminalisation and diversion programmes, introduction of court managers and nag clerks, existence of specialised courts etcetera are absent in Nigeria's efforts to combat delay. On the other hand, the extensive efforts to revise laws and rules of procedure coupled with the MDC approach to dispute resolution is absent in SA.

4.5. Conclusion

From the comparative analysis, it is decipherable that there are similarities and differences in both countries approach to the problem. Thus, there are definitely areas from which each can draw from the others experience. In this regard, the next chapter will briefly summarise what has been said in this study with a view to recommending possible solutions and strategies, which could be adopted by both countries to eradicate delay.

[239] With the exception of comments made above.

5 Conclusions and recommendations

5.1 Introduction

The question of delay in the administration of justice is far from theoretical preoccupation.[240] The problem affects the running of the judiciary in many practical ways and has a tremendous impact on society in general and on litigants in particular. As we write, people are nursing wrongs done to them and do not want to approach the court because of their experiences with the judicial system. Cases are being unnecessarily adjourned and witnesses are recounting their painful court experiences. In this chapter, a summary of the conclusions drawn from the entire study is presented; and general and specific recommendations for effective eradication of delay in South Africa and Nigeria are proffered.

5.2 Summary and conclusion

This study has made a case for the need to eradicate delay in the administration of justice in African countries, especially South Africa and Nigeria. The study defines delay as elapsed time beyond that necessary to prepare and conclude a case. Since timeliness in the justice sector involves human elements who cannot be automated to operate with desired speed, emphasis was placed on 'undue' or 'unnecessary' prolongation of proceedings.

This study established the urgency of the need to eradicate delay in African Courts. Delay in the administration of justice has many undesirable ramifications. As the Texas Supreme Court noted, 'delay haunts the administration of justice. It postpones the rectification of a wrong and the vindication of the justly accused.'[241] Delay often results in the acquittal of the guilty and frustration of the innocent.[242] The financial burden on litigants when court action stretches over long a period is particularly harsh on individuals with low and fixed incomes. The prohibitive costs of lengthy litigation often deny some persons their right to a day in court.[243] In this regard, the impact of delay on human rights such as access to justice, effective remedy and fair hearing cannot be under-estimated. The culmination of these consequences has also led to loss of faith in the legal system and disrespect for the system of justice.[244]

240 D Barry and S Keefe 'Justice denied: delay in criminal cases' 1998 49 *Northern Ireland Legal Quarterly* (4) 385-403.
241 *Southern Pacific Transportation Company v Stoot* (1975) 530 S.W.2d 930,931.
242 G Gall 'Efficient court management' in: *Expeditious justice* (n 18 above).
243 As above.
244 Z Motala 'Judicial accountability and court performance standards: Managing court delay.' Howard University School of Law.

This work analysed the various international and regional instruments regulating delay, with a view to establish a background for the assessment of the legal framework, nature and extent of delay in South Africa and Nigeria. The international instruments and interpretations failed to prescribe standards that state parties must adhere to, but they enunciated the period under which the length of delay in courts should be measured, and clearly stated that it is the courts and not the lawyers or litigants, who should control the pace of litigation. Holding that the international provisions against delay constitute minimum standards, which all states parties have agreed to observe, human rights bodies have held that speedy trial provisions place a duty on contracting states to organise their legal system to comply with the requirements of trial within a reasonable time.[245]

The study revealed that despite compliance of the legal frameworks in South Africa and Nigeria with international and regional standards, there are shortcomings in practice. In South Africa, delays are most prevalent in criminal proceedings. Many awaiting-trial prisoners spend close to 4 years without being brought to trial.[246] There are fears that some innocent persons held for long periods before acquittal come out of prison physically battered, emotionally bruised or even infected with diseases.[247] In Nigeria, the situation is even worse as significant delay is prevalent in both civil and criminal proceedings. The average time for case disposition is in the order of 6 – 10 years.[248]

5.3 General recommendations

In spite of all the efforts to reduce delay, especially in SA, the problem persists. However, documents perused during this study show that it is not impossible to eradicate delay in the administration of justice. All the respondents who participated in the 30 questionnaires and 15 interviews conducted unanimously agreed that with the necessary commitment and political will, delay in the administration of justice could be eradicated. This is consistent with earlier findings by Thomas Church *et al* who conducted extensive research on court delays in America and concluded that:

> Trial court delay is not inevitable. The crucial element in accelerating the pace of litigation in a court is concern on the part of judges with the problem of court delay and a firm commitment to do something about it. Changes in case processing speed will necessarily require changes in the attitudes and practices of all members of a legal community. Such

245 *Salesi v Italy* (1993) Series A no. 257-E, p. 60, & 24).
246 2004/2005 Report of the IJP and briefing of the SAHRC (n 121 and 123 above).
247 2004/2005 Report IJP (n 121 above).
248 G Ali 'Panacea to Delays in judicial proceedings, in: Essays in honour of Justice Nurudeen Adekola 88 (2002) 15.

changes are by no means impossible to effect, but they seldom come easily.[249]

In the light of the above, the following recommendations if effectively and efficiently utilised with due commitment from all stakeholders and political will on the part of the executive and legislators would go a long way in eliminating delay in African courts in general, and South African and Nigerian courts particularly.

5.3.1 Adopting a culture of joint responsibility

The best way towards elimination of delay involves assumption of joint responsibility by all stakeholders. There is need for parties to see litigation as a means to resolve conflict peacefully. Lawyers, prosecutors, and court personnel who benefit from unduly protracted proceedings need to change. Stakeholders in the judicial process should appreciate that as ministers in the temple of justice, it is their joint responsibility to realise the main aim and goal of courts, which is to ensure that justice is done. It is therefore recommended that stakeholders organise their work in such a way that cases can be tried justly and expeditiously. Obstruction and deliberate attempts to slow down the pace of justice should be minimised, discouraged and sanctioned.

5.3.2 Case flow management and continuous practices

As held by human rights bodies, it is recommended that governments honour their obligation to ensure that their judicial systems are organised to achieve the right to trial within a reasonable time. Consequently, courts should fully utilise case flow management principles. Case flow management is defined as the management of the continuum of processes and resources necessary to move a case from filing to disposition. Case flow management operates from the realisation that increased resources (including more judges and personnel), while helpful to ameliorating the problem of court delay, are unlikely to be provided given the competition for scarce resources.[250] It prescribes that a court concerned about change in the pace of litigation should institute an organised process of discipline for all parties.[251] Rather than allowing lawyers to set the pace of litigation, it is a call for courts especially the judges to play a more active role in the management of cases before them.[252]

[249] T Church (n 14 above), J Martin (n 15 above) and E Buscagalia and Maria Dakolias (n 26 above).

[250] P Sallman 'The impact of case flow management on the judicial system' 1995 18 *Union of New South Wales Law Journal* 195.

[251] J Kakalik (n 17 above) xi-xii.

[252] L Sipes, A Carlson, T Tan, A Aikman & R Page 'Managing to reduce delay' (1990) 25.

Case flow management should be utilised together with the principle of continuous practice. This principle ensures that courts are consistently and continuously firm with deadlines set for the hearing of a case. Continuous practices should operate to create an expectation on the part of all concerned that a trial will begin on the first date scheduled.[253]

Although South Africa and Nigeria have begun to implement case flow management principles, the principle of continuous practice is yet to be adopted. It is recommended that the efficiency of the management systems already implemented should be improved through consistent and continuous application.

5.3.3 Calendaring systems

Linked to case flow management and continuous practice is the utilisation of a good calendaring system. In individual calendaring, cases are assigned to each judge who has a calendar of cases, which he or she is responsible for, from filing through trial. Master calendaring operates where the court has one master calendar of cases for all the judges combined. Different judges are assigned if they are needed for different stages of the case and no one judge has responsibility for the case as a whole.[254] Studies have shown that courts, which use the individual calendar systems, operate faster than courts, which operate a master system.[255] It has also been proved that individual calendaring system works better with case flow management.[256] It is recommended that states adopt the most suitable system, with due consideration for timeliness and efficiency.

5.3.4 Performance standards

In order to determine whether the courts are functioning as expected and within pre-established guidelines, standards (in particular legislative numerical standards) should be developed.[257] Numerical standards refer to time limits prescribed by legislation,[258] court rules[259] and associations[260] regulating the period within which courts or judges should conduct proceedings before them. When combined

253 T Church (n 14 above) 69.
254 J Kakalik (n 17 above) 72-75.
255 J Kakalik (n 17 above) 83, T Church (n 14 above) 72-75.
256 J Trotter & C Cooper 'State trial Court Delay: Efforts at reform' (1982) 31 *American University Law Review* 213, 220 –221.
257 E Buscagalia (n 26 above).
258 See for example US Federal Speedy Trial Act 1974.
259 Kansas Judicial Branch Rules adopted by the Supreme Court Rules Relating to District Courts http://www.kscourts.org/ctruls/disctrls.htm (accessed 15 October 2005).
260 See for example, American Bar Association (ABA) Standards with regard to civil and criminal proceedings1986 Supp 1 & 2.

with the preceding recommendations, the knowledge of time standards and fear of breaching provisions of the law would encourage judges and lawyers to take more responsibility for proceedings.

Linked to this recommendation is the need to develop a statistical information system. Keeping good statistics would enable those responsible for court administration to keep track of trends in the volume of cases, the length of the proceedings and waiting time. This facilitates planning and efficient running of the court.[261]

5.3.5 Legal remedies against delays

The need to establish internal remedies for victims of delays in the administration of justice might also serve to deter actions that lead to delay. For example, where delays are as a result of the actions of a lawyer, remedies should be created to ensure the party wronged could proceed against the lawyer for damages. Where the court causes delay, a victim can proceed against the state for failing to organise their judicial system. The state can therefore appropriately discipline the judge or court official involved. Finally where delays are attributable to the litigants themselves, then they are liable to pay fines to the court or to the aggrieved party for not complying with time limits.[262]

5.3.6 Technology in courts

Courts should be appropriately equipped with sufficient technology to enable them to function efficiently. It is recommended that courts should at a minimum be provided with computers, recording systems and stenographers to facilitate efficiency and record-keeping.

5.3.7 Improved procedures

There is need for more simplified procedures to eradicate delays. In South Africa, some interviewees were of the view that the introduction of specialised courts such as the small claims courts did not fundamentally reduce delays in the system due to the complex rules and bureaucracy that quickly developed within the courts. The existence of such rules defeats the purpose of establishing the courts as cases continue to be delayed despite more courts. It is suggested that law and rule reforms should be engaged to review or create laws and rules that are better oriented to save time.

261 Expeditious justice (n 18 above).

262 For other examples of remedies see A Uzelac 'Accelerating civil proceedings in Croatia: A history of attempts to improve the efficiency of civil litigation in: C van Rhee (n 21 above).

5.3.8 Disposition without trial

A civil or criminal dispute does not necessarily need to undergo trial before it can be resolved. Judicial systems that suffer from backlogs and congestion should explore non-trial ways of settling disputes such as diversion and decriminalisation mechanisms; plea-bargaining, or alternative dispute resolution. In criminal proceedings, it is trite that the interest of justice is not that an accused is prosecuted, but that a person who has wronged the state is accordingly punished. Thus where an accused is willing to admit a wrong, there is no need to proceed through the courts.

5.3.9 Political sensitivity and sensitisation

Article 25 of the African Charter on Human and Peoples' Rights, obliges all state parties to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood. It is recommended that the incidence of increased crime and wrongdoings be reduced through concerted government efforts to make people aware of human rights and the need to respect them. A society, which is rights-based in all ramifications, will have reduced wrongdoings.

5.2.10 Regional effort

Procedural delay is a problem that should be tackled at the national and regional (African) levels. It is suggested that Africa as a region should aim at solving the problem by either setting targets and adopting guidelines for individual states, or establishing institutions to conduct a comprehensive enquiry on the reasons for delay as well as analyse the merits of different potential remedies.

5.3.11 Other recommendations

Other recommendations include:

(1) Police should speed up investigations. In Nigeria, The DPP should also take steps to ensure that legal advice in capital offences are brought to the court promptly.

(2) Courts should give liberal interpretations to the constitutional provision on speedy hearing with a view to achieving quick dispensation of justice.

(3) Courts should sit on time and take little or no recess in the course of the days hearing. Magistrates and judges should only rise in very compelling circumstances, such as is ill health.

(4) Parties in litigation should fully brief their counsel and pay the professional fees, to avoid applications of adjournments by counsel for the undisclosed reason of non-payment of fees.

(5) Prison authorities should deliver pre-trial detainees to court at the appointed days punctually.

(6) Appeal procedures should be less complicated to facilitate speedy dispensation of justice.

5.4 Recommendations peculiar to South Africa

In addition to the above recommendations, the South African government should ensure co-ordination of existing strategies. There is need for the government to either focus on a strategy that could yield best results and ensure its nation-wide implementation, or harmonise all the efforts into one effort capable of practical implementation.

In addition, the minimum sentencing legislation, which has been decried as causing delays and congestion in prisons, should either be abolished or revised.

5.5 Recommendations peculiar to Nigeria

The Nigerian government should:

5.5.1 Combat corruption

Nigeria has been recently rated the sixth most corrupt nation in the world.[263] This is a tremendous improvement on its record over the years. However, more effort needs to be made to reduce corruption.[264] Drastic measures should be adopted to sanitise Nigeria's judicial system, and stringent measures should be taken against corrupt officials within the judicial system.

5.5.2 Specialised courts

It is recommended that specialised courts be established in Nigeria. Such courts could go a long way to relieve the load of the regular courts. The population of Nigeria is three times that of South Africa,

[263] 'TI: Nigeria, 6th Most Corrupt Country' *This Day* newspaper 18 October 2005 http://www.thisdayonline.com/nview.php?id=31226 (accessed 18 October 2005).

[264] Nigeria used to be rated the most corrupt country in the world.

therefore specialised courts would have a significant impact if established in Nigeria.

5.5.3 Diversion and decriminalisation

The alarming number of awaiting trial prisoners in Nigerian prisons necessitates that Nigeria should explore other means of handling criminal matters. South Africa's experiments and experiences with decriminalisation and diversion could provide useful insights.

5.5.4 Judgments and interlocutory applications and appeals

Magistrates and Judges in Nigeria should be advised to write simple and un-complicated rulings with a view to delivering them in court the same day. The habit of adjourning for days and weeks should be discouraged.

Parties and their counsel should be discouraged from filing frivolous interlocutory appeals or applications. Stringent penalties should be imposed. Another alternative with regard to appeals is to make rules or law, prohibiting appeals until the final disposition of the case on merit in the lower court. Interlocutory issues should be joined together with any appeal on merit.

5.6 Conclusion

By going through all the issues dealt with from chapters 2 to 5, the study achieved its aims and objectives and successfully proved its hypothesis. Thus, we can safely conclude by restating that delay in judicial proceedings is a result of court congestion, prolonged adjournments and backlog of judicial proceedings. It is also a function of a variety of substantive, procedural, institutional, cultural and colonially inherited factors. The only way in which delay can be eradicated is through holistically tackling all these factors.

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Advocate Esterhuizen, Cobus, Executive Director Cape Town Justice Center

Advocate Gerber, JC (SC) Deputy Director of Public Prosecution

Advocate Tarantaal, W, Senior Prosecutor, Office of the Director of Public Prosecution

Mr Taswell Papier, Chairman, Cape Law Society, Partner Sonnenberg Hoffman Galombik

Mr Meyer, Schalk, Director, Center for Community Law and development Potchefstroom, Chairman University Legal Aid Institution of South Africa

Mr Kerfoot, William, Director, Legal Resources Center, Cape Town

Mr Padayachi, Lloyd, Legal Practitioner, Legal Resource Center.

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Barrister Akanle, AO, Senior Advocate of Nigeria (SAN)

Barrister Obata, Egbuna Director-General International Centre for Nigerian Law Lagos Ikoyi, Nigeria.

Barrister Adeniyi, Familoni, Director of Civil litigation, Ministry of Justice, ado-Ekiti, Ekiti State

Barrister Olabanjo, Ayenakin, Executive Co-ordinator, African Center for Human Development

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Barrister Falana, Femi, Chairman West African Bar Asssociation

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Barrister Mbanefo, Legal practitioner, Enugu, Enugu State, State Nigeria

Miss Obiokoye, Nneka, Final year Law student, University of Nigeria Nsukka, Enugu State Nigeria

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Mwenifumbo, Anganile, Head of litigation Banda, Banda & Company, Blantyre Legal practitioner, Malawi

Protection of access to essential treatment for people living with HIV/AIDS in Uganda from a human rights perspective

Liliana Trillo Diaz

1 Introduction

1.1 Background of the study

HIV/AIDS epidemic in Uganda has claimed over one million lives in two decades[1] and continues to be the country's main cause of death amongst adults.[2] According to the 2005 HIV/AIDS Sero-Behavioural Survey, approximately 800,000 people are living with HIV/AIDS in Uganda.[3] This Survey reveals that an estimated 7 percent of Uganda's adult population is living with HIV/AIDS, up from previous average estimate of 4.1 percent.[4] All these adults are between the ages of 15-49 years, the most economically productive age group and often fenders of families.[5] In addition, at the end of 2003, about 84,000 children were living with HIV/AIDS in Uganda, and the number of AIDS orphans amounted to 940,000.[6]

Although the number of new infections has dramatically decreased during the last ten years, portraying this country as the 'AIDS miracle', the number of people already infected and progressing to AIDS is increasing.[7] Access to anti-retroviral (ARV) drugs, as well as to medicines for treatment of opportunistic infections (TOI), is essential for people living with HIV/AIDS (PLWHA) to enjoy their right to life[8] and to health.[9] Although access to these essential medicines forms part of the core content of the right to health, which states should be able to provide irrespective of their available resources,[10] slightly more than half of the people in need in Uganda were accessing them in June 2005.[11]

1 Uganda AIDS Commission (UAC) 'HIV/AIDS in Uganda: The HIV/AIDS epidemic' http://www.aidsuganda. org/aids/index.htm (accessed 28 August 2005).
2 Joint UN Programme on HIV/AIDS (UNAIDS) Uganda http://www.unaids.org/en/geographical+area/ by+country/uganda.asp (accessed 28 August 2005).
3 Plusnews 'UGANDA: Adult HIV infections rise to seven percent' (5 May 2005) http://www.plusnews.org/AIDSreport.asp?ReportID=4763&SelectRegion=East_Africa&SelectCountry=UGANDA (accessed 30 August 2005).
4 World Health Organisation (WHO) 'Uganda-Summary country profile for HIV/AIDS treatment scale-up' (2005) 1 http://www.who.int/3by5/june2005_uga.pdf (accessed 15 August 2005). Ministry of Health (MoH) officials attributed the difference to the methods used to collect data. This latest survey was based on a nationwide sample of people who voluntarily gave their blood to be tested for the virus, whereas previous data was based on records from hospitals and antenatal clinics (ANC). Plusnews, as above.
5 UAC 'The HIV/AIDS and impact' (2002).
6 UNAIDS/WHO 'Epidemiological Fact sheet on HIV/AIDS and sexual transmitted diseases in Uganda' (2004) 3.
7 F Okero *et al* (WHO) 'Scaling up anti-retroviral therapy: Experiences in Uganda-Case study' (2003) Perspectives and practice in anti-retroviral treatment 6.
8 Human Rights Committee (HRC) General Comment (GC) 6: 'The right to life' (1982) para 5.
9 Committee of Social, Economic and Social Rights (CESCR) GC 14: 'The right to the highest attainable standard of health' (2000) UN.Doc.E/C12 2000/4.
10 As above.
11 63,896 out of 114,000 people, WHO (n 4 above).

Of 63,896 PLWHA accessing ARVs, still 83.5 percent are paying the medicines out of their pockets.[12] This is despite the fact that Uganda receives funds from various sources, among which Global Fund to Fight AIDS, Tuberculosis and Malaria (GF) and the US President's Emergency Plan for AIDS Relief (PEPFAR).[13] Although the cost of ARV treatment (ART) in Uganda has dramatically decreased since 1997, the price of treatment remains still unaffordable for most Ugandans.[14]

1.2 Statement of the problem

This study looks at this reality from a human rights (HR) approach, identifying right-holders and duty-bearers with regard to access to essential treatment for PLWHA. The state of Uganda, as well as other relevant stakeholders, is bound by various HR instruments at international level, which impose on them various obligations with regard to access to essential treatment. From this perspective, the study aims at determining the extent to which these obligations have been met at national level, and the obstacles that impede the government, and other relevant non-state actors, discharging their obligations with regard to this right. The study then provides various recommendations to the different stakeholders in order to fully realise the right at stake.

1.3 Working definition

For the purpose of this study, access to essential treatment for PLWHA is understood as access to those ARVs, and those drugs essential for TOI, which are included in the WHO Essential Medicines List (EML).[15] Access to these drugs implies that they should be provided in sufficient quantity by trained personnel, respectful of cultural and ethical issues.[16] They should be geographically accessible and economically affordable to everyone without discrimination and should follow standards of quality.[17]

12 As above.
13 As above. GF has recently decided to freeze the funds granted to Uganda because of the findings of an auditor's report pointing to 'serious mismanagement' by the MoH. 'Global Fund suspends grants to Uganda' http://www.theglobalfund.org/en/media_center/press/pr_050824.asp (accessed 1 September 2005).
14 D Ovett (3D-Trade-Human Rights-Equitable Economy) 'Implementation of the Covenant on Civil and Political Rights in Uganda: Trade-related intellectual property rights, access to HIV/AIDS medicines and the fulfilment of civil and political rights' (2004).
15 http://www.who.int/medicines/organization/par/edl/expcom14/EML14_en.doc (accessed 17 August 2005).
16 GC 14 (n 9 above) para 12.
17 As above.

1.4 Scope of the study

This study focuses on the right of PLWHA to access essential treatment in Uganda. It analyses this right within the spectrum of international HR instruments of relevance for Uganda, as well as the guidance provided by the different international HR monitoring bodies. It then looks at the compendium of national legislation, policy and jurisprudence that delimitate the scope of this right at national level. It finally examines the interaction of the market forces in the realisation of this right, as well as the political and socio-economic factors that hinder access at national level.

The present dissertation is an abbreviated version of the research carried out. A full version of the study is available on request.

1.5 Objectives

The overall objective of this study is to determine how access to essential treatment for PLWHA in Uganda can be realised using a HR-approach. The specific objectives of this study are the following:

- determine the scope of the obligations derived from the right to access essential treatment for state and non-state actors;
- examine the particular needs of PLWHA in Uganda in terms of access to essential treatment;
- assess the role played by the different stakeholders in Uganda, both state and non-state actors, in the realisation of the right of PLWHA to access essential treatment;
- examine the obstacles that impede the realisation of this right to PLWHA in Uganda;
- provide recommendations to the relevant stakeholders regarding the different lines of action and their adequacy for the realisation of this right.

1.6 Research questions

The study attempts to answer the following research questions:

- Is there a right to access essential treatment for PLWHA and what does it entail?
- To what extent does the definition of this right at international level play a role in its realisation in Uganda?
- Have state and non-state actors discharged their international obligations at national level?
- What are the obstacles impeding the realisation of this right in Uganda?
- How can the action taken by the relevant stakeholders be improved?

1.7 Overview of related literature

There is a dearth in the literature on access to essential treatment in Uganda from a HR perspective. Wandira[18] deals with the subject from a socio-legal point of view, mentioning the potential rights affected by access to ARVs but discouraging any HR-approach to the problem.[19] Moreover, the author limits the scope of her research to the governmental response to access to ARVs, without looking into the role played by the judiciary and non-state actors. Similarly, Richey and Haakonsson deal with ARVs taking Uganda as an example, without adopting a HR-approach.[20] Muwanguzi[21] adopts a much broader approach and looks into all the HR affected by HIV/AIDS. Although he provides an overview of judicial activism with regard to the HR affected, his study does not draw conclusions from other jurisdictions. Nakadama[22] provides some recommendations regarding treatment of HIV/AIDS in Ugandan prisons, without dealing with the status of the situation as such and acknowledging the lack of statistics available. Muganda[23] deals superficially with HIV/AIDS, among other contagious diseases in Uganda. On the local level, therefore, I have not come across literature that discusses the subject deeply from a HR perspective, looking into how to render this right justiciable.

As regards those authors that have dealt with access to essential treatment for PLWHA from a South African (SA) perspective, it is worth mentioning Chirwa,[24] who does not, however, dwell too much into the justiciability of the right, in De Vos,[25] Baimu,[26] Klug,[27] and

18 A Wandira 'The legal aspects and practice relating to the access to and use of antiretroviral drugs in Uganda', (2005) unpublished LLM dissertation Makerere University, Kampala.

19 The author concludes that the right to essential treatment is not justiciable, and the international HR instruments binding on Uganda are not enforceable.

20 L Richey, S Haakonsson (Denmark Institute of International Studies-DIIS) 'Access to ARVs: Aid, trade and governance in Uganda' (2004) DIIS Working paper 2004/19.

21 G Muwanguzi 'HIV/AIDS and human rights: An assessment of compliance with international guidelines in the legal sector in Uganda', (2002) unpublished LLM dissertation Makerere University, Kampala.

22 E Nakadama 'The right to health of prisoners in Uganda', (2001) unpublished LLB dissertation, Makerere University, Kampala.

23 C Muganda 'The right to medial care in Uganda: a socio-legal analysis' (2002) unpublished LLB dissertation, Makerere University, Kampala.

24 D Chirwa 'The right to health in international law: Its implications for the obligations of state and non-state actors in ensuring access to essential medicines' (2003) 19(4) *South African Journal on Human Rights* (*SAJHR*) 541.

25 P De Vos 'So much to do, so little done: The right of access to anti-retroviral drugs post-Grootboom' (2003) 7 *Law, Democracy and Development* 83.

26 E Baimu 'The government's obligation to provide anti-retrovirals to HIV-positive pregnant women in an African human rights context: The South African Nevirapine case' (2002) 2 *African Human Rights Law Journal* 160.

27 H Klug 'Access to healthcare: Judging implementation in the context of AIDS' (2002) 18(1) *SAJHR* 114.

Berger,[28] who undertake an analysis from the point of view of the SA jurisprudence.

HIV/AIDS from a HR perspective has been dealt with by recognised scholars such as Mann,[29] Gruskin and Tarantola[30] or Cook.[31] The link between health and HR has also been explored by Gostin,[32] Tomaševski,[33] and Toebes,[34] who explore the obligations of the state to respect, protect and fulfil the right to health. Chapman and Russell, develop the concept of 'core content' of this[35] right, whereas Twinomugisha[36] and Kiapi,[37] analyse this right in the Ugandan context.

There is substantial literature on the right to health as a socio-economic right. The scholars are divided into those that consider the right to health as costly-driven, programmatic and therefore, not justiciable, such as Bossuyt[38] or Vierdag,[39] and those that consider all HR as interdependent and justiciable, either from a Ugandan perspective, such as Oloka-Onyango,[40] South African, such as Brand;[41]

28 J Berger 'Litigation strategies to gain access to treatment for HIV/AIDS: the case of South Africa's Treatment Action Campaign' (2002) 20 Wisconsin *International Law Journal* 595.

29 J Mann, 'Human rights and AIDS: the future of the pandemic' (1996) 30 *John Marshall Law Review* 195.

30 S Gruskin, D Tarantola 'Human rights and HIV/AIDS' (2002) HIV InSite Knowledge Base Chapter http://hivinsite.ucsf.edu/InSite?page=kb-08-01-07 (accessed 15 August 2005).

31 R Cook *et al*, *Reproductive health and human rights, integrating medicine, ethics and law* (2003).

32 L Gostin 'Public health, ethics, and human rights: a tribute to the late Jonathan Mann' (2001) 29 *Journal of Law, Medicine and Ethics* 121.

33 K Tomaševski 'Health Rights' in A Eide *et al Economic, Social and Cultural Rights: A Textbook* (1995).

34 B Toebes 'The Right to Health' in A Eide *et al* (eds) *Economic, Social and Cultural Rights: A Textbook* (2001).

35 A Chapman, S Russell (eds) *Core obligations: building a framework for economic, social and cultural rights* (2002).

36 B Twinomugisha 'Barriers to the protection of rural women's right to maternal healthcare in Uganda' 11(1) (2005) *East African Journal of Peace & Human Rights* (*EAJPHR*) 67.

37 S Kiapi 'Interpreting the right to health under the African charter' 11 (2005) *EAJPHR* 1, 1.

38 M Bossuyt 'Non-discrimination as enshrined in art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights' (2005) UN.Doc.E/CN.4/Sub.2/2005/19.

39 E Vierdag 'The legal nature of the rights granted by International Covenant on Economic, Social and Cultural Rights', (1978) *Netherlands Yearbook of International Law* 69, cited by Bossuyt, as above.

40 J Oloka-Onyango 'Economic and social human rights in the aftermath of Uganda's Fourth Constitution: A critical Reconceptualisation' (2005) Centre for Basic Research Working Paper No.88/2004.

41 D Brand 'The 'politics of need interpretation' and the adjudication of socio-economic rights claims in South Africa' (2005) (unpublished).

or international, such as Viljoen,[42] Robertson,[43] An-Na'im,[44] or Hunt.[45] The role of Ugandan courts in enforcing HR has been tackled by Tibatemwa-Ekirikubinza,[46] Onoria,[47] and Mukudi Malubiri[48] among many others.

Finally, the link between globalisation and access to drugs is dealt with by various authors, among which Correa,[49] Rovira[50] and Vawda.[51]

1.8 Relevance of the study

The following study attempts at providing a HR response to the existent problems regarding access to essential treatment for PLWHA in Uganda. In view of the scarcity of the literature in the subject, this study tries to bring some thoughts as to the possible solutions foreseen from this angle.

Particular questions of deprivation, such as poverty, or inadequate access to ARVs, are often attributed to forces over which the state has no control, such as the impact of globalisation, or the general lack of resources of a particular country.[52] These deprivations are taken away from the political contestation and their eradication is considered more as an aspiration rather than an entitlement of every human being, particularly for those vulnerable groups suffering the deprivation. The HR-approach challenges this depolitisation, raises awareness and empowers those affected with the means to claim accountability from those bound to discharge their duties. This approach proves particularly relevant in Uganda, where issues like poverty diminish the capability of vulnerable groups to react against violations of the core content of their rights.

42 F Viljoen 'The justiciability of socio-economic and cultural rights: experience and problems' (2005) (unpublished).

43 B Robertson 'Social, economic and cultural rights: time for a reappraisal' (1997) New Zealand Business Roundtable.

44 A An-Na'im 'To affirm the full human rights standing of economic, social & cultural rights' in Y Ghai *et al*, *Economic, social & cultural rights in practice* (2004) 9.

45 P Hunt *Reclaiming social rights - international and comparative perspectives* (1996).

46 L Tibatemwa-Ekirikubinza 'The judiciary and enforcement of human rights: Between judicial activism and judicial restraint' (2002) 8(2) *EAJPHR* 145.

47 H Onoria 'Review of major decisions on fundamental rights and freedoms in Uganda in 2001 and 2002' (2003) 9(2) EAJPHR 332.

48 P Mukudi Walubiri (ed) *Uganda: Constitutionalism at crossroads* (1998).

49 C Correa 'Implementation of the WTO General Council Decision on paragraph 6 of the Doha Declaration on the TRIPS agreement and public health' (2004) 5.

50 J Rovira 'Trade agreements, intellectual property, and the role of the World Bank in improving access to medicines in developing countries' (2004) *Yale Journal of Health Policy, Law, and Ethics*.

51 Y Vawda 'From Doha to Cancun: The quest to increase access to medicines under the WTO rules' (2003) 19 *SAJHR* 679.

52 Brand (n 41 above) 4.

1.9 Outline of the chapters

This study comprises five chapters. The present chapter exposes the problem, the objectives of the study and the research questions, reviews the literature available on the subject, outlines the study's structure, proposes a methodology and points out to the study's limitations and relevance.

Chapter 2 sets out the international legal framework of the study. It outlines the scope of the right of PLWHA to access to essential treatment under different international instruments of relevance for Uganda and its connection with other HR. The chapter also assesses the implications of this right for state and non-state actors.

Chapter 3 sets out the national legal, policy and judicial framework. It explores the action taken by the various branches of the government in addressing the international obligations with regard to access essential treatment. This chapter will also look at the role played by other relevant stakeholders in the realisation of this right in Uganda.

Chapter 4 analyses the various obstacles that impede the realisation of this right at national level, taking into account the globalisation process, the political situation of Uganda, as well as other socio-economic factors.

Chapter 5 provides the final conclusions and recommends legal, judicial and administrative channels towards the realisation of the right to access essential treatment for PLWHA in Uganda.

1.10 Research methodology

The analysis of this topic will be carried out following two types of methods:

- Non-empirical: The major part of the analysis will be conducted through library and desk research, reviewing the literature, international instruments and case-law available regarding access to essential treatment for PLWHA. The legislation and policies existent in Uganda, as well as the case-law dealing with socio-economic rights will also be looked at. Sources of secondary data include various libraries (official and private) and the Internet.
- Empirical: Qualitative methods of research will also be used to assess the problems on the ground related to access to essential treatment in Uganda. Although cognisant of the importance of interviewing PLHWA in order to obtain information from primary sources, this study will rather choose key informants from the major non-governmental organisations (NGOs) in Uganda dealing with access to essential treatment, and, when possible, from medical centres as well as key policy makers. This qualitative

method is considered to be more suitable, bearing in mind the broad spectrum of the informants and recognising the time implications of conducting a quantitative exercise.

1.11 Limitations

Although cognisant of the fact that the study of the realisation of access to essential treatment requires a multi-disciplinary approach, this dissertation will focus on access to essential treatment from a HR perspective. Ideally, all aspects regarding HIV/AIDS and HR should be looked at, due to their interrelation and interdependence, but, for the purpose of this study, I will only focus on the right of PLWHA to access to essential treatment in Uganda.

2 Scope of access to essential treatment for People Living with HIV/AIDS under international law

2.1 Introduction

The following chapter outlines the scope of access to essential treatment for PLWHA under the HR law applicable to Uganda, with a view to illustrate that PLWHA have a right to access such a treatment. Because of the absence of a specific provision in the 1995 Ugandan Constitution recognising the right to health,[53] this delimitation is particularly relevant in this study. It will help to establish the obligations that Uganda undertook at international level and the implications that these international obligations have at national level.

The objective of this chapter is twofold: first, to place the debate of access to essential treatment for PLWHA in the HR arena, identifying the right-holders and the duty-bearers of this right according to HR law; and secondly, to set out the international standards against which the action of the different actors involved in the realisation of this right in Uganda is to be assessed, with a view to determine their compliance with their international obligations.

2.2 HR response to HIV/AIDS and access to treatment

This study analyses access to essential treatment of PLWHA in Uganda from a HR perspective. A rights-related approach proves particularly

[53] The only references to health issues in the Constitution are found in Objectives XX and XIV of the National Objectives and Directive Principles of State Policy (NODPSP). See below, chap.3.

useful with regard to HIV/AIDS, where many societal factors, such as poverty or gender inequality, are determinant in people's vulnerability to the pandemic,[54] and cannot, therefore, be tackled through traditional public health programmes.[55] Vulnerability to HIV is further increased when the disadvantaged groups are denied their rights.[56] Therefore, a HR-approach to HIV/AIDS is essential to empower PLWHA to respond to the pandemic, enabling them to improve their quality of life.[57]

A rights-related approach, 'brings into focus the relationship between the state — the first-line provider and protector of HR—and individuals who hold their HR simply for being human.'[58] It provides the means through which individuals can legitimately assert their entitlements and require the government to observe those international standards to which it has committed itself.[59]

However, this approach is not free of criticism. Among the most common critics, as summarised by Robinson stand those that believe that HR use 'adversarial and judgmental techniques to monitor state performance', and 'diminish the notion of national sovereignty' by referring to international standards. These techniques reduce ultimately the willingness of governments to cooperate.[60]

To these critics several points are worth mentioning: First, a HR-approach is not necessarily adversarial, since it can also help governments to design more efficient policies that take into account societal factors.[61] Secondly, this approach does not diminish the notion of sovereignty but utilises it, by reminding states that they should abide by the international obligations that they have voluntarily undertook, exercising their national sovereignty. Finally, the notion of responsibility used under the rights-related approach is broadening to cover non-state actors as well,[62] bearing in mind the determinant role played by many stakeholders in the realisation of rights.

54 Gruskin, Tarantola (n 30 above).
55 Mann (n 29 above).
56 Gruskin, Tarantola (n 30 above).
57 S Gruskin, *et al* 'HIV/AIDS and human rights in a nutshell' (2004) 4.
58 D Tarontola 'Building on the synergy between health and human rights: A global perspective' http://www.hsph.harvard.edu/fxbcenter/FXBC_WP8--Tarantola.pdf (accessed 16 August 2005).
59 Cook *et al* (n 31 above).
60 M Robinson 'Realizing rights: challenges for the international forum for development' 55 http://www.ssrc.org/programs/ifd/publications/DevImperative/Robinson.pdf (accessed 16 August 2005).
61 As above.
62 As above.

2.3 The right to access essential treatment as part and parcel of the right to health

2.3.1 The right to health within the framework of social, economic, and cultural rights

Since its codification in the International Covenant of Economic, Social and Cultural Rights (ICESCR) in 1966,[63] the right to health has been considered separate from those rights codified in the International Covenant of Civil and Political Rights (ICCPR). Although this separation responded to the political momentum in which these rights were codified,[64] some authors justified this distinction on the grounds that socio-economic rights impose 'positive' obligations that require state intervention,[65] they need substantial spending for their implementation, and 'judges lack two essential qualifications: expertise and political accountability' for adjudicating upon them.[66] Moreover, the terms of these rights are imprecise to guide judges as to their content.[67] Unfortunately, these arguments gained support in many jurisdictions, like Uganda, which converted various socio-economic rights into programmatic aspirations within its Constitution.[68]

Today the idea that all rights are interrelated is growing faster since its recognition in the Vienna Declaration.[69] The interdependence of all the rights can be clearly exemplified by the right to access essential treatment. When PLWHA are denied access their right to life is clearly at stake. The justiciability of this right has been largely demonstrated in various jurisdictions.[70] Moreover, this right cannot be considered to be vague, since its content has been recently spelled out by the CESCR, among other international bodies.

However, part of the arguments distinguishing between generations of rights was founded on the International Covenants themselves. Under the ICESCR, the states parties' obligation is not immediate, as it is under the ICCPR, but explicitly progressive and subject to the availability of resources. This was a 'necessary

63 Art.12 ICESCR, ratified by Uganda in 1987. Information on the UN HR instruments ratified by Uganda in http://www.bayefsky.com/./html/uganda_t1_ratifications.php (accessed 17 August 2005).

64 Western countries favoured the exclusion of socio-economic rights and socialist countries their inclusion. Bossuyt (n 38 above).

65 Bossuyt (as above) para 10 or Vierdag, cited in Eide *et al* 'Economic, social and cultural Rights: A universal challenge', in Eide *et al* (n 33 above) 4-5.

66 As summarised by Hunt (n 45 above).

67 Robertson (n 43 above).

68 These arguments were raised by various parliamentarians during the constitutional process. Oloka-Onyango (n 40 above).

69 World Conference on Human Rights (1993) UN.Doc.A/CONF.157/23, para 5.

70 Eg *Cruz Bermudez et al v Ministerio de Sanidad y Asistencia Social*, Case No.15.789, Decision No.91615 (1999).

flexibility device',[71] bearing in mind the reality of many countries, but soon it became 'an escape hatch (for) recalcitrant states'.[72] In order to avoid this perverse result, the CESCR clarified that the Covenant imposed various obligations: some are immediate, such as the principle of non-discrimination; others belong to the minimum core content of each right, which every state must satisfy, whatever their stage of economic development; and others vary from one state to another - and over time in relation to the same state- depending on the available resources (the 'variable dimension').[73]

2.3.2 The right to access essential treatment as part of the core content of the right to health under the ICESCR

The CESCR has spelled out these various obligations within the right to health in its GC 14. Access to essential treatment can be clearly identified as a minimum core obligation in the duty 'to provide essential drugs, as from time to time defined by WHO's Action Programme on Essential Drugs'. However, it is also implicit in the core obligations to ensure maternal and child healthcare, access to health facilities, and to take measures to prevent and treat epidemic diseases.[74] According to CESCR, state parties cannot, under any circumstances whatsoever (including financial constraints), justify its non-compliance with the core obligations, 'which are non-derogable'.[75]

Commenting on the core obligations, Chapman argues that GC 14 does not mandate the universal availability of specific items.[76] She bases herself on the language used in these obligations, which sometimes is left unspecific. However, I do not share her opinion, in particular with regard to the obligation to provide essential drugs. I believe this core obligation is as specific as it can be, bearing in mind that it should be susceptible of being applicable by any state at any point in time. Moreover, this core obligation is qualified by the requirements of availability, accessibility, acceptability and quality.[77] In addition, I believe the delimitation of minimum essential levels of the right to health is a crucial starting point to render this right tangible and enforceable *vis-à-vis* those recalcitrant states that

71 GC 3: 'The nature of States parties obligations' (1990), UN.Doc.E/1991/23 para 9.
72 S Leckie, 'Another step towards indivisibility: identifying the key features of violations of economic, social and cultural rights' (1998) 20(1) *Human Rights Quarterly* (*HRQ*) 81, 94.
73 GC 3 (n 71 above).
74 GC 14 (n 9 above) para 43.
75 As above, para 47. However, the CESCR may take into account the possible lack of resources if the country demonstrates that every effort has been made to use all available resources in an effort to satisfy, as a matter of priority, those minimum obligations.
76 Chapman (n 35 above).
77 Above, sec1.3.

put forward the alleged 'programmatic' nature of this right to avoid compliance. Thus, I do not share the view that defining these levels requires 'thinking small', as Chapman puts it, but rather thinking in accountability terms.

Chapman also questions whether these minimum core obligations are reasonable *vis-à-vis* the poorest countries. Kiapi agrees and purports that there is a need for country-specific core contents.[78] I argue in this paper, however, that implementing the minimum core content is more a question of prioritisation of expenditure,[79] well-managed healthcare strategies, and political will, rather than a question of resources. Moreover, states have the obligation to seek international assistance, if necessary, to meet these obligations.[80] Those who advocate for a country-based minimum core content seem to identify the core content of the right to health with its variable dimension, and therefore, deprive the concept of 'core content' of its real meaning, that is, the essence of the right at stake, which should be universal, and non-derogable, as indicated by the CESCR.

2.3.3 The right to health as interpreted in other human rights instruments

The Universal Declaration of human rights (Universal Declaration), today considered by some scholars as part of international customary law[81] and therefore binding on all states, recognised the right to health not only as a right to healthcare but also to the underlying determinants of health, such as food or social services.[82]

The right of women not to be discriminated against with regard to access to healthcare has also been recognised in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[83] ratified by Uganda in 1985. The Committee on CEDAW imposed on the states the obligation to ensure timely, affordable, and acceptable access to healthcare.[84] In addition, the Committee has frequently inquired on HIV/AIDS issues when analysing country reports, for example with regard to Uganda.[85]

78 Kiapi (n 37 above) 6.
79 Chirwa (n 24 above).
80 GC 3 (n 71 above).
81 Weston and Marks, cited by Gostin (n 32 above).
82 (1948) UN.Doc.A/810, art 25(1).
83 (1979) UN Doc. A/34/36. Art 11(1)(f), 12, 14(2)(b).
84 General Recommendation (GR) 24: 'Art.12: Women and Health', (1999) UN.Doc.A/54//38 paras.21-22.
85 The Committee showed concern on the drastic cuts in the health budget and the pervasive effect of customary family law (ex. polygamy) on the spread of the pandemic (2002) UN.Doc.CEDAW/C/SR.576.

The Convention of the Rights of the Child (CRC), ratified by Uganda in 1990, also protects the right to health of children.[86] According to the Committee on CRC, states should provide ARVs to pregnant women and their partners, as well as children, on the basis of non-discrimination.[87] In addition, states parties must ensure the incorporation of HIV/AIDS and child rights issues in programmes dealing with children victims of abuse.[88]

The right to health is also recognised in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), ratified by Uganda in 1980.[89] The Committee on the Elimination of All Forms of Racial Discrimination (CERD) expressed its concerns with regard to the rapid spread of HIV/AIDS among marginalised groups, particularly women, when analysing Uganda's latest report.[90]

At regional level, the African Charter on Human and Peoples' Rights (ACHPR),[91] ratified by Uganda in 1986,[92] protects the right to health in its article 16. The ACHPR provides an adequate forum for the enforcement of this right, since it does not limit its realisation in any sense[93] and recognises the interdependence of all HR.[94] Moreover, the African Commission of Human and Peoples' Rights (African Commission) can draw inspiration from various sources of international law when deciding on complaints.[95] The Commission already stressed the difficulties that PLWHA face in accessing treatment as one of the major obstacles in realising their right to health.[96] Furthermore, in *Free Legal Assistance Group and others v Zaire*, the African Commission held that a shortage of medicines constituted a violation of article 16.[97]

The African Charter on the Rights and Welfare of the Child (ACRWC), ratified by Uganda in 1994, emphasises the right to access primary healthcare (PHC).[98]

86 (1989) UN.Doc.A/44/49, art 6, 24.
87 GC 3 'HIV/AIDS and the rights of the child' (2003) UN.Doc.CRC/GC/2003/1, para 23.
88 As above, para 34.
89 (1965) GA.Res 2106 (XX), art 5.
90 (2003) UN.Doc.A/58/18 para 280.
91 (1982) OAU.Doc.CAB/LEG/67/3/Rev 5.
92 http://www.achpr.org/English/_doc_target/documentation.html?../ratifications/ratification_charter_en.pdf (accessed 23 August 2005).
93 CA Odinkalu 'Implementing Economic, Social and Cultural Rights under the African Charter', in M Shaw *et al* (eds) *The African Charter of Human and People's Rights: The system in practice* (2002).
94 Art 8 ACHPR.
95 Art 60 ACHPR.
96 (2001) Final communique of the 29th ordinary session, para 7.
97 (2000) AHRLR 74 (ACHPR 1995).
98 (1990) OAU.Doc.CAB/LEG/24.9/49.

With the establishment of the African Court on Human and Peoples' Rights, the protection of the right to health could be enforced through binding judgments.[99] Moreover, since the jurisdictional scope of the Court will also encompass other HR instruments ratified by the country,[100] it could become a complaint mechanism for those HR instruments that do not have it, such as the ICESCR or the CRC.

2.4 The right to access essential treatment and its relationship with other human rights

As indicated above, the right to access to essential treatment is essential for the enjoyment of many other rights, such as the right to life.[101] The HRC has indicated that, in protecting human life,[102] states are obliged to undertake measures to eliminate epidemics, to reduce infant mortality and to increase life expectancy.[103] Access to essential treatment is also crucial for PLWHA to enjoy their right to an adequate standard of living[104] and to physical integrity.[105] To that extent, the withdrawal of essential treatment, in cases where someone is suffering, can amount to inhuman treatment,[106] and so does non-consensual experimentation with new drugs.[107]

The right to freedom from discrimination[108] is implicit in the concept of access to essential treatment, which has been defined above as access to drugs geographically and economically accessible to everyone without discrimination. Moreover, PLWHA have a right to be informed[109] of the availability of essential treatment and the benefits and risks of the different drugs they may take in order to make well-informed choices, either before participating in research projects or in their day-to-day life.[110] The fulfilment of the right to HIV/AIDS-related education[111] is also crucial for PLWHA to be able to follow the treatment in an effective manner.

99 The Protocol to the African Charter on the Establishment of an African Court became into force in 2004, but the Court is not yet operational. Uganda ratified the Protocol in 2001.
100 Art 3, 7.
101 De Vos (n 25 above), S Marks 'Jonathan Mann's legacy to the 21st century: the human rights imperative for public health' (2001) 29 *Journal of Law, Medicine and Ethics* 131.
102 Art.6 ICCPR, ratified by Uganda, together with its Optional Protocol 1, in 1995.
103 GC 6 (n 8 above).
104 Eg art 11(1) ICESCR.
105 Eg 5 ACHPR.
106 Case *D v UK* (1997), 24 EHRR 423.
107 HRC, GC 20 'Replaces GC 7 concerning prohibition of torture and cruel treatment or punishment' (1992) para 7.
108 Eg art 26 ICCPR.
109 Eg art 9(1) ACHPR.
110 *LCB v UK* (1998) 27 EHRR 212, para 36.
111 Eg art 12(2)(c) ICESCR.

PLWHA should have the right to benefit from the latest advancements regarding essential treatment,[112] while respecting the minimum guarantees established in article 15(1)(c) ICESCR regarding the right of the author to benefit from the protection of the interests of its production. Access to essential treatment requires prior HIV-testing, which should be voluntary and confidential, as well as prior and post confidential HIV-counselling, in order to protect the right to dignity, and privacy of PLWHA.[113] According to the Committee on CRC, the accessibility of voluntary, confidential HIV-counselling and testing (VCT), with due attention to the evolving capacities of children, is fundamental to their rights,[114] particularly for children sexually exploited.[115]

The CESCR has specifically recognised the right of victims of violations of the right to health to have access to effective judicial or other appropriate remedies,[116] which should be accessible, affordable, timely and effective,[117] and provide for adequate reparation. Neglect by the courts of the responsibility to ensure that the state's conduct is consistent with its obligations under the international HR instruments is incompatible with the principle of the rule of law.[118] Moreover, it contradicts the general principle of law of reparation for breach of an undertaking.[119]

2.5 Implications of the right to access essential treatment for state and non-state actors

2.5.1 Implications for the state

Through ratification or adherence to the international instruments mentioned above, Uganda has undertaken the duty to give effect in its territory to the international HR obligations specified in those instruments.[120] The state has a liberty of means to give effect to that duty, but whatever means it chooses, they must be adequate to ensure fulfilment of the rights recognised in those treaties.[121] However, even if Uganda does not incorporate these agreements into

112 Art 15(1)(b) ICESCR.
113 Eg art 10(1), 17 ICCPR.
114 GC 3 (n 87 above).
115 GC 4: 'Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (2004) UN.Doc.A/59/41 para 37.
116 GC 14, (n 9 above) para 59.
117 CESCR, GC 9: 'The domestic application of the Covenant' (1998) UN.Doc.E/C.12/1998/24, para 9.
118 Above, para 14.
119 *Chorzow Factory* (merits) (1928) PCIJ, Series A no.17, 29.
120 Art 26, Vienna Convention on the Law of Treaties (VCLT) (1969) UN.Doc.A/CONF.39/27.
121 GC 9 (n 117 above) para 7.

its national legal order, it remains liable at international level for any violation of the rights it undertook to respect.[122]

Scholars have developed the so-called tripartite typology of state obligations, which makes a distinction between obligations to 'respect', 'protect' and 'fulfil' each HR.[123] The CESCR has explained each of these obligations with regard to the right to health.[124]

The obligation to respect compels the state to desist from preventing the realisation of a right. Denying or limiting equal access to essential treatment to certain groups, marketing unsafe drugs, or limiting access to healthcare as a punitive measure, would be clear examples of violations.[125]

The obligation to protect requires states to take measures that prevent third parties from interfering with a right.[126] This would include ensuring that privatisation does not constitute a threat to access to essential treatment;[127] to control the marketing and production of medicines by third parties; and to ensure that health professionals meet appropriate standards of education, skills and ethical codes of conduct.[128]

Finally, the obligation to fulfil requires states to adopt appropriate measures towards the full realisation of the right to health.[129] Legislative measures are considered indispensable to combat violations.[130] In addition, appropriate remedies must be available to individuals, and appropriate means of ensuring governmental accountability must be put in place.[131] At policy level, the state is obliged to adopt a national health policy (NHP), based on HR principles, with a detailed plan ensuring provision of healthcare for everyone. In fact, the adoption of such policy constitutes one of the core obligations of the right to health. It should be based on a participatory and transparent process and include indicators and benchmarks, by which progress can be monitored.[132] The strategy should identify the resources available to attain the objectives, and the most cost-effective way of using those resources.

122 Art 27, VCLT (n 120 above).
123 Eide (n 33 above), Toebes (n 34 above) 178.
124 GC 14 (n 9 above) paras.102-110.
125 As above, para 34.
126 *Social Economic Rights Action Centre (SERAC) and The Centre for Economic and Social Rights (CESR) v Nigeria* (2001) Communication No.155/96.
127 Concluding observations-Philippines, UN.Doc.E/C.12/1995/7, para 20.
128 GC 14 (n 9 above), para 35.
129 As above, para 33.
130 GC 3 (n 71 above) para 3.
131 GC 9 (n 117 above).
132 GC 14 (n 9 above) para 43(f).

2.5.2 Implications for non-state actors

Traditionally, HR were conceived as applicable to relations between the state and the individuals, to protect the latter from the other more powerful counterpart.[133] However, this distinction has been increasingly challenged, in view of the continuous HR violations committed by non-state actors. Moreover, the wording of the various HR instruments does not support this view, since they include obligations also *vis-à-vis* third parties.[134] The CESCR has clearly indicated that all members of society have responsibilities regarding the realisation of the right to health,[135] particularly the duty not to restrict access on discriminatory grounds. However, despite these clear HR implications for private actors, it is not yet possible to directly enforce them at international level.[136]

Third party states are bound by articles 55 and 56 of the UN Charter to take joint and separate action to find solutions to international health problems. The ICESCR also imposes on its signatories the furnishing of technical assistance.[137]

Equally, international organisations have the duty to cooperate effectively with states parties, with due respect to their individual mandates.[138] They are, together with states, subjects of international law, and therefore, they are also liable at international level in cases of violations.

2.6 Conclusion

The right of PLWHA to access to essential treatment is recognised in various HR instruments. According to the CESCR, this right forms part of the core content of the right to health, which states must satisfy, whatever their stage of economic development. In addition, access to essential treatment is crucial for the realisation of many other rights recognised in the international instruments of relevance to Uganda.

These international instruments impose on Uganda the obligations to respect, protect and fulfil the right in question, irrespective of the means chosen by the country to implement them at national level. Equally, non-state actors have also undertaken obligations with regard to this right at international level and their interaction in the realisation of this right would need to be assessed.

133 N Jägers *Corporate human rights obligations: in search of accountability* (2002).
134 Preamble, UDHR, ICCPR, ICESCR.
135 GC 14 (n 9 above), para 42.
136 Jägers (n 133 above).
137 Art 23 ICESCR.
138 GC 14 (n 9 above), para 64.

3 Implementation of the right to access essential treatment in Uganda

3.1 Introduction

The following chapter analyses the status of the right of PLWHA to access to essential treatment in Uganda, with a view to determine to what extent the international obligations emanating from this right have been discharged at national level.

The chapter looks at the three branches of government and their activities towards the respect, protection and fulfilment of the right. It will also analyse the role played by non-state actors in its realisation.

3.2 The state's response to the right to access essential treatment in Uganda

3.2.1 The national legal framework

The Constitution of Uganda

As is normally the case in common law countries, the Ugandan Constitution does not contain a provision automatically incorporating international treaties into the national legal system. Moreover, the right to health and, consequently, the right to access essential treatment, have not been included in Chapter Four of the Constitution, where HR are guaranteed and rendered justiciable.[139] Nonetheless, Objective XIV(b) of the NODPSP sets out the state's duty to ensure that all Ugandans enjoy access to health services, whereas Objective XX expresses the state's commitment to take all practical measures to ensure the provision of basic medical services to the population. Moreover, Objective XXVIII refers to respect for international obligations.

It is certainly regrettable that the right to health as defined in the international instruments binding on Uganda had not been more adequately expressed in the Constitution. Moreover, the inclusion of this right among the NODPSP had the expressed intention to render it 'unenforceable and non-binding on the state'.[140] In addition, its location within the introductory provisions of the Constitution, instead of the main body, as it was initially foreseen,[141] also prejudiced its importance.

[139] Art 20(2), 50.
[140] Report of the Uganda Constitutional Commission, cited by Oloka-Onyango (n 40 above) 14.
[141] As above.

However, although these objectives are not immediately justiciable, they are meant to serve as guidance in interpreting other provisions of the Constitution or any other law, and implementing policy decisions.[142] In this regard, article 45 of the Constitution sets out that the rights included in Chapter Four should not be regarded as excluding others not specifically mentioned. This inclusive clause, read in conjunction with Objectives XIV, XX, and XXVIII, as well as with the international obligations undertaken by Uganda with regard to the right to health, provides a clear legal basis for rendering this right justiciable under the constitutional enforcement system.

The right to health could also be enforced in Uganda through its link to other rights well entrenched in the Constitution, such as the right to life[143] or freedom from ill treatment.[144]

The non-discrimination aspects of the right to access essential treatment can also be enforced through the equality and freedom from discrimination clause of the Constitution,[145] which is reinforced by various other provisions providing special attention to the rights of women,[146] children,[147] minorities,[148] persons with disabilities,[149] and affirmative action in favour of marginalised groups.[150] Moreover, the right of access to information (and, implicitly, information related to essential treatment) is also guaranteed,[151] as it is the right to education,[152] which should also include HIV/AIDS-related aspects.

Therefore, the regrettable lacuna of the Constitution with regard to the right to health could be overcome by utilising other provisions thereof. Nevertheless, the Ugandan HR Commission (UHRC)'s proposed incorporation of the socio-economic rights in Chapter Four of the Constitution would have been an ideal solution to their disputable justiciability.[153] However, the opportunity was lost during the recent constitutional review, which had no bearing on the status of the socio-economic rights.

142 Objective I(i), NODPSP.
143 Art 22(1). *The Environmental Action Network (TEAN) v Attorney General (AG) and National Environmental Management Authority (NEMA)*, Misc.Appl. 39/2001.
144 Art 24. With regard to the interpretation of the Constitution as a whole, see Tinyefuza v AG, Constitutional Petition No 1/1997, 14.
145 Art 21.
146 Art 33.
147 Art 34.
148 Art 36.
149 Art 35.
150 Art 32.
151 Art 41.
152 Art 30.
153 2003 Report para 10.09. 1-2.

3.2.2 Relevant legislation

None of the international HR instruments recognising the right to health have been incorporated into the Ugandan legal system through the adoption of specific legislation. Moreover, access to essential treatment is not specifically dealt with in any national legislation touching upon HIV/AIDS issues. The UAC Act,[154] establishing the organ with the same name, empowers this body with the functions of drafting policy, mobilising resources and coordinating the activities of different stakeholders regarding HIV/AIDS, but does not regulate specific areas of activity. Others, such as the Venereal Diseases Act[155] or the Public Health Act,[156] do not deal specifically with HIV/AIDS and take an approach contrary to HR, providing for quarantine measures, compulsory notification, and compulsory treatment.

Legislation is more prolific with regard to the regulation of drugs. The Food and Drugs Act[157] makes it an offence to sell injurious drugs but does not define what types of drugs would be considered injurious. The Pharmacy and Drugs Act,[158] regulating the profession of pharmacists, only refers in a general manner to professional misconduct in cases of lack of quality of the service. The National Medical Stores (NMS) Act[159] creates the organ with the same name, which, among others, ensures efficient, economic and quality procurement of medicines by the government. Finally, the National Drug Policy and Authority Act[160] creates the National Drug Authority (NDA), in charge of implementing the National Drug Policy (NDP).[161] The law is in the process of being amended to strengthen the role of this body.[162]

The limited scope covered by these legislative measures renders them an inadequate means of guaranteeing the right to health. The right to access to essential treatment is completely disregarded, as it is the HIV/AIDS pandemic itself, and individuals are being deprived of any means to challenge the governmental decisions regarding the provision of essential drugs.

154 (1992) cap 208 Laws of the Republic of Uganda (2000), vol.VIII, 4447.
155 (1977) cap 284 (as above) vol XI, 6194.
156 (1935) cap 281 (as above) 6084.
157 (1959) cap 278 (as above) 6001.
158 (1971) cap 280 (as above) 6062.
159 (1993) cap 207 (as above) vol.VIII, 4437.
160 (1993) cap 206 (as above) 4377.
161 See below sec 3.2.2.6.
162 MoH http://www.health.go.ug/National_drug.htm (accessed 5 September 2005). Other laws regulating the various professions that handle drugs are the Medical and Dental Practitioners Act, Cap 272; the Nurses and Midwives Act, Cap 274; and the Allied Professionals Act, Cap 268.

3.2.2 The national policy framework

The National Health Policy (NHP) and the Health Sector Strategic Plan (HSSP)

Uganda's NHP was adopted in 1999 for a period of ten years.[163] The policy designs a Minimum Health Care Package (MHCP) to provide PHC, which is supposed to be reviewed regularly. Since HIV/AIDS is one of the highest policy priorities,[164] various HIV-related aspects are included within this package, but there is no mention of access to ARVs.

The policy indicates that public expenditure would focus on cost-effective interventions, having the greatest impact on reducing mortality and morbidity, and protecting the most vulnerable population.[165] However, there is no indication on how this will be achieved, and government spending on non-priority healthcare, such as tertiary hospitals, would remain constant.[166]

In addition, the policy undertakes to update and formulate new legislative measures regarding pharmaceuticals, among others, without even referring to the interlinked patent issues.[167]

A general evaluation of the NHP indicates that, to a certain extent, it is driven by HR considerations, but it is not specific in terms of the implementation measures and accountability mechanisms.[168] Most importantly, there is no reference to access to ARVs within the MHCP and the latter is not given absolute priority in terms of health expenditure. The lack of implementation of many of the provisions foreseen, such as the revision of the MHCP or of the laws, confirms its weak legal force.

The HSSP for 2000/1-2004/05 aims at implementing the MHCP. Of the overall costs needed to deliver the MHCP, only US$2 million (1 percent) is allocated to the control of HIV/AIDS. The HSSP attempts to review the NDP, the Pharmacy Act and NDA statute.[169] However, almost five years after the adoption of the HSSP, there is no indication of such review.

The second draft of the HSSP II 2005/06-2009-2010[170] indicates that the health budgetary allocations followed an increasing tendency

163 http://www.health.go.ug/docs/NationalHealthPolicy.pdf (accessed 3 September 2005).
164 As above, sec 3.
165 As above, sec 6.2.
166 As above, sec 4.3.
167 As above, sec 13.
168 Contrary to GC 14 (n 9 above) para 43.
169 As above.
170 MoH (2004).

from 7.6 percent in 2000/01 to 11.5 percent in 2005/06.[171] However, of the total health budget for 2005/06, only 47 percent is government funded, and the slight increase *vis-à-vis* the previous year corresponds to wages.[172] Unfortunately, the proportion allocated to the provision of essential treatment for PLWHA is not disclosed, although the MoH recognises that it is 'largely donor founded'.[173] HSSP II foresees that by 2010, ART will be available in the smallest units (health centre IV).[174]

The HSSP is the only policy paper providing an indication of the budgetary allocations for the strategies planned. The percentage allocated to HIV/AIDS activities for 2000/1-2004/05 is extremely low and, in this regard, it seems that prioritisation of resources bears a lot of weight in the inability of the government to provide full coverage of essential drugs for PLWHA.

Revised National Strategic Framework for HIV/AIDS activities (NSF)

The NSF 2003/4-2005/6[175] was adopted after a consultation with different stakeholders. The NSF contains various goals, among which expanding ART to 50 percent of the population in need[176] and providing 100 percent OI care. These goals are implemented through the use of policy indicators that enable the MoH to supervise the implementation of ART and TOI across the country.

The NSF can be praised for being precise in its targets and strategies to achieve them, for setting up an evaluation mechanism that allows continuous monitoring, and for being the outcome of public consultation. However, the NSF omits any reference to funding or to the way in which the difficulties of the most vulnerable population to access to essential treatment are going to be tackled. The activities seem to be more focused on training and research than the provision of drugs, and there is no reference to the possibility of utilising the flexibilities provided by trade-related agreements. The absence of a timetable for completion of the targets, or an accountability mechanism, renders this NSF inappropriate to ensure the fulfilment of the right to access to essential treatment.

The Antiretroviral Treatment Policy (ATP)

The ATP for Uganda is said to take a HR-approach to HIV/AIDS.[177] The policy proposes a prioritisation of access to ARVs, which favours first

171 As above, 90.
172 J Muhwezi 'Health Policy Statement 2005/06' (2005) 71.
173 Interview with Dr Lule, AIDS Control Programme at the MoH (25-09-2005).
174 HSSP II (n 170 above) 44.
175 UAC & The Uganda HIV/AIDS Partnership, NSF, 'A guide for all HIV/AIDS stakeholders' (2004).
176 Coinciding with the target set up by the '3 by 5' WHO and UNAIDS Global Initiative. As above, 29.
177 MoH (2003), sec 2.1.

cases of MTCT and post-exposure prophylaxis, that is, ART in cases of accidental exposure to the virus or rape victims.[178] In cases of treatment, priority should be given, once clinical eligibility is determined, to HIV-positive mothers identified in MTCT programmes and their infected family members; to HIV-positive children; to PLWHA already enrolled in care activities, and to PLWHA after their participation in ARVs research projects.[179] Outside these cases, people in need of ARVs would have to pay for their treatment.[180] As regards geographic distribution, the policy aims at providing ARVs first in the bigger administrative units (regional hospitals) and progressively in the smaller ones (health centre IV's).[181]

It is unfortunate that the socio-economic situation of those qualifying for treatment has had and still has so little consideration in determining who should have priority access.[182] Moreover, other groups at risk, such as prisoners, rural women or sex workers who are not part of a MTCT programme, are being totally disregarded.[183] Furthermore, the geographic distribution of the drugs should have taken into consideration the proximity of population to a health facility, and the areas with higher HIV/AIDS prevalence, rather than the dimension of the facility itself. Thus, the victims of the conflict in Northern Uganda should have been given preferential access, since the risk of being infected is higher, and the conditions to obtain access to healthcare are more precarious.[184]

Essential drugs for the public sector are procured by the NMS in limited variety and quantity.[185] The policy recognises that the NMS has not been able to ensure a reliable supply of drugs and proposes a service agreement with NMS to outline performance measures for ARVs.[186] Indeed, the persistent stock outs of drugs in hospitals are one of the major concerns with regard to the availability of ARVs.[187] A

178 As above, sec 3.11-12, 7.2.
179 As above, sec 3.11-12.
180 As above, sec 7.3.
181 As above. According to the MoH, this prioritisation is somehow obsolete now, given that the government has launched universal ART in June 2004, interview at MoH (n 173 above). However, one year later the programme is still far from providing access to treatment to all the population in need.
182 Uganda Coalition for Access to Essential Medicines (UCAEM) 'Memorandum on legal mechanisms for expanding access to generic medicines in Uganda' (2003) http://www.cptech.org/ip/health/c/uganda/ugandacoalition-memo-11242003.pdf (accessed 23 September 2005).
183 According to the MoH, the itinerant character of prisoners and the lack of interest in being treated with regard to sex workers, impede any programme targeting them to be successful, interview at MoH (n 173 above). These circumstances should not, however, excuse the government to fulfil its obligation to provide access to essential treatment without discrimination.
184 UCAEM (n 182 above).
185 As above, sec 6.2.2.
186 As above, sec 6.3.1.
187 Interview with R Mutambi, Coordinator of UCAEM, C/O Coalition for Health Promotion and Social Development (HEPS) (24 September 2005).

National Survey indicated that stock-outs duration in public health facilities and district warehouses was three and six months respectively.[188]

The MoH issues accreditations for the provision of ARVs to public facilities only, according to certain requirements.[189] In order to avoid diversion of ARVs from the public sector, the public facilities would need to submit regular reports on the use and status of ARVs and, in addition, drug inspectors would ensure their adequate distribution.[190] The facilities would only maintain stocks for first line ARVs. Drugs for alternate regimens would be stored at the NMS warehouse and be provided on a needed-basis.[191] Surprisingly, private facilities do not seem to be submitted to any control with regard to this issue or procurement of drugs.

The ARVs included in the standard treatment regimes will be considered essential drugs and be included in the EML of Uganda.[192] But the policy does not indicate which drugs, on what criteria they were chosen, and their prices.

Finally, the MoH is meant to monitor the ARV programme both in the public and private sectors, even with regard to the incidence of government subsidies, although it does not indicate how this will be undertaken.[193]

In general, the ATP can be praised for its degree of specification and for having followed, to a great extent, the international guidelines provided by WHO. However, the policy is heavily infused by the model of free market, with lack of control over the private sector and the prices it imposes. In addition, the policy does not establish a long-term timeline estimating the proportion of the population in need that could access drugs for free or at subsidised prices and it does not put in place any accountability mechanism, which is essential, bearing in mind the non-binding nature of the policy.

The policy for reduction of MTCT

The elaboration of a policy for reduction of MTCT in Uganda[194] is justified on the grounds that ART to pregnant women can reduce the risk of MTCT by up to half, and it has proved cost-effective in these circumstances.[195] The policy favours the prescription of Nevirapine, since it is cheaper than any other regime (US$1 per mother-baby pair)

188 MoH, WHO, HEPS (Health Action International) 'Uganda Pharmaceutical sector baseline survey' (2002) 27.
189 ATP, sec 5.2-3.
190 ATP, sec 6.3.1.
191 As above.
192 As above, sec 6.5.2.
193 As above, sec 8.1.
194 MoH (2003).
195 As above, 5.

and as effective as the others, but alternative regimens are also suggested.[196] The policy recommends extensive information about the risks and benefits of breastfeeding and alternative replacement feeding.[197] The policy indicates that, ideally, an HIV positive mother should not breastfeed but, if the women must do so because of social or economic reasons, then exclusive breast-feeding for three months is recommended.[198]

The policy does not set up a scaling-up programme with targets, and does not take into account the resources, the needs and a timeframe for accomplishment. It merely suggests practices, without considering them compulsory, failing to ensure implementation, as required by the Committee of CRC.[199]

The Uganda National Drug Policy

The 1993 NDP is embedded in the NDP and Authority Act.[200] A new NDP was adopted in 2001 within the MoH and, although not capable of repealing the previous one, is the one that is being implemented. According to the NDP, the update of pharmaceutical legislation is necessary, as well as the regular review of the EML, at least every three years, using the WHO model list as a basis and taking into account available resources and applicable clinical practices.[201]

Drug quality would be assured through the establishment of a national laboratory and a system of post-marketing surveillance, among others.[202] As regards the prescription of drugs, the NDP will revise at least every three years the standard clinical guidelines, the compulsory prescription of generic names in the public sector and its promotion in the private sector, and encourage reporting on adverse drug reactions.[203]

As regards drug financing, the NDP will ensure adequate budget allocations, it will encourage schemes for the sustainable financing of drugs and the creation of a committee that would investigate available options for funding and disseminate drug indicator prices to suppliers and consumers.[204] The NDP will also ensure that the implications of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are well understood by the policy-

196 As above, 10.
197 As above, 13.
198 As above. Surprisingly, though, the policy lists more benefits in breast-feeding than risks.
199 GC 3 (n 87 above) para 22.
200 n 160 above.
201 As above, 5.
202 As above 12-13.
203 As above, 17.
204 As above, 20.

makers.[205] A system of guidelines and indicators for monitoring the NDP is suggested, with evaluation every two-three years.[206]

The NDP is the only policy addressing the TRIPS obligations as well as the sustainable financing of drugs. It is a detailed and ambitious policy in its strategies, but it does not provide a timeline to check compliance. Some of the strategies remain vague, and there is no consideration of HR issues throughout the policy.

3.2.4 Judicial and other appropriate remedies relating to access to essential treatment

Justiciability of the right to access essential treatment in Uganda

The right to access to essential treatment for PLWHA has never been brought before the Ugandan courts. An attempt to bring the right to health was made in *TEAN*,[207] where the applicants, relying upon the ICESCR and the CRC, initially argued that smoking in public places violated this right, as well as the right to life and the right to a healthy environment.[208] Eventually, the applicants pursued their allegations only on the two other rights, probably because of the weak recognition of the right to health in the Constitution.[209] Despite the lost opportunity to test the justiciability of the right to health, this case shows a degree of judicial activism to the extent that, by finding a violation of the right to life and to a safe environment, the High Court implicitly established the link between these rights and the right to health.[210]

In fact, the interpretative value of the NODPDP and the importance of international instruments as a source of inspiration, was already recognised in *Tinyefuza*.[211] The judgment held, moreover, that courts should be dynamic and progressive when interpreting provisions containing fundamental rights, keeping in view socio-economic values.[212] This view led the courts in various jurisdictions to utilise the interdependence of all HR to render the right to health justiciable. In India, for example, the Supreme Court (SC) found that the failure of public hospitals to provide urgent medical treatment to someone because of lack of capacity, violated

205 As above, 21.
206 As above, 28.
207 n 143 above.
208 Kiapi (n 37 above) 18.
209 As above.
210 See also *Salvatori Abuki & Anor v AG*, Constitutional petition No 2/1997, para 9, were the right to life was found to include right to livelihood.
211 n 144 above.
212 As above, 16.

his right to life.[213] Similarly, in *Cruz Bermudez,*[214] the SC of Venezuela held that the right to health and the right to life of PLWHA that did not have access to ARVs were closely linked to their right to access the benefits from science and technology. Consequently, it ordered the government the provision of free ARVs, TOI and testing for all citizens and residents.

TEAN is also relevant in that it recognised the doctrine of public interest litigation in article 50(2) of the Constitution. According to the court, an organisation can bring a public interest action even though it has no direct individual interest in the infringing acts it seeks to have redressed.[215] This finding is especially relevant with regard to HR litigation since, as indicated by Tibatemwa, through public interest litigation the disadvantaged sections of society can meaningfully access justice.[216]

In *Osotraco (U) Ltd v AG,*[217] the Ugandan High Court found that article 50(1) of the Constitution assures a person *effective* redress before the courts for violations of their rights. The court found that 'a less than appropriate redress is not effective redress'.[218]

The appropriateness of the redress, when adjudicating on access to essential treatment, may be problematic because of its link with the availability of resources of the government. In the SA jurisprudence, resource constraints were one of the factors in the review of the 'reasonableness' of the programme adopted by the administration to provide access to treatment.[219] According to the SA Constitutional Court (CC), considering 'reasonableness' will not enquire whether other more desirable measures could have been adopted. However, it will take into consideration whether the measure grants at least minimum core entitlements to those most in need of them.[220]

The Colombian courts went even further, arguing that the public purpose of containing an epidemic such as HIV/AIDS cannot be made subservient to resource constraints.[221] Consequently, it granted an order made by an AIDS patient to compel a hospital to arrange for the immediate provision of services.

213 *Paschim Banga Khet Majoor Samity v State of West Bengal* (1996) 4SCC 37; AIR 2426 (SC) para 9.
214 n 70 above.
215 TEAN (n 143 above) 5.
216 Tibatemwa-Ekirikubinza, (n 46 above).
217 HCCS 1380/1986 (unreported).
218 As above, paras 46, 48.
219 *Soobramoney v Minister of Health* (KwaZulu-Natal) (1997) (12) BCLR 1696.
220 *Government of the Republic of SA and others v Grootboom and Others* (2000) (11) BCLR 1169 (CC); para 41.
221 Tutela No T-505/92 (1992).

Canadian courts have, on the other hand, held that resource constraints cannot serve to justify a violation but can be taken into consideration when tailoring the appropriate remedy.[222] On the same line, in *Treatment Action Campaign (TAC)*[223] the SA CC ordered the roll-out of a MTCT programme throughout the public sector because of its limited resource implications, among others.[224] This judgment was also relevant because it pointed to the cost-benefits of the provision of essential treatment.[225]

Other argument that could be raised against the justiciability of access to essential treatment is the fact that the judiciary would break into spheres better dealt with by the legislature and the executive. This is either because the judiciary has not the expertise to deal with budgetary implications, or because this would threaten the separation of powers.[226] The SA CC held in *TAC* that the *limited* judicial review may have budgetary implications, but courts are not directed at rearranging budgets.[227] SA courts took, however, a new approach in the most recent jurisprudence, which advocates for a participatory model of democracy that overcomes the strict separation of powers and provides equal political power to the citizenry.[228] Another solution purported by the Indian courts to overcome lack of expertise is to rely on the findings of an expert body to provide the remedy.[229]

Despite the positive steps taken by the Ugandan courts, the enforcement of HR has been somehow prejudiced by the confusion existent on whether the CC is competent in terms of article 50 of the Constitution to enforce HR, or whether its jurisdiction is limited to interpretation issues, according to article 137.[230] Since *Rwanyarare & Afunadula v AG,*[231] the CC held that it had no jurisdiction in matters not covered by article 137. In *George Willian Alenyo v AG & 2 Ors,*[232] however, the CC clarified that it could also deal with petitions brought under article 50 as long as they were brought within the context of interpretation of article 137.[233] Consequently, its primary role would be to make a declaration on the meaning, but could also grant redress if appropriate.[234] In *Joyce Nakacwa v AG & 2 Ors,* the CC further clarified that any court would be obligated to submit to it

222 *Schachter v Canada* (1992) 10 CRR 1.
223 *Minister of Health and others v Treatment Action Campaign and Others* (no.2) 2002(5) SA 721(CC).
224 Above, para 135.
225 Above, para 116.
226 Viljoen, (n 42 above) 33.
227 Para 18.
228 Eg *Port Elisabeth Municipality v Various Occupiers* (2004) (12) BCLR 12 68 (CC).
229 n 213 above.
230 Onoria (n 47 above) 360.
231 Constitutional Petition No 11/1997.
232 Constitutional Petition No 5/2000.
233 As above, para 7.
234 As above, 8.

interpretation issues, even if the matter involves also enforcement aspects. [235]

Despite these clarifications, there seems to be a fine line between interpretation and application of the Constitution that could frustrate the viability of many petitions. Moreover, the possibility of obtaining a mere declaration from the CC does not provide sufficient reparation for the victims. Indeed, the lack of actions brought before the courts regarding access to essential treatment denotes a lack of confidence in the judicial system with regard to the enforcement of socio-economic rights.

3.3 Other remedies available with regard to the right to access essential treatment

The UHRC offers another useful means of enforcing fundamental rights in Uganda. This organ is mandated by the Constitution with the quasi-judicial function of investigating, by its own initiative or on a complaint, HR violations.[236] In addition, this body is mandated to recommend the Parliament effective measures to promote HR, including compensations to the victims.[237] Another important function is to monitor government's compliance with HR treaties.[238]

In its recommendations to Parliament throughout the years, the UHRC suggested the adoption of a national health insurance policy for the subsidisation of ARVs,[239] and the coordination of efforts at African level to raise awareness on the implications of intellectual property rights (IPR).[240] Unfortunately, the legislative branch has not followed up the majority of these recommendations.

In the latest annual report published, the UHRC reports a case of alleged medical experimentation without consent and indicates that, although there are many more cases related to HIV/AIDS, they are not reported for lack of awareness.[241] The UHRC recommended measures to ensure that the private pharmaceutical companies subsidise the drugs.[242] It also suggested mechanisms to monitor the administration of drugs, including by private dealers.[243] According to the UHRC, more focus should be put on the poor and the population in conflict areas, and on the revision of laws.[244]

235 Constitutional petition No 2/2001, 15.
236 Art 52(1)(a), Constitution.
237 Art 52(1)(d), Constitution.
238 Art 52(1)(h), Constitution.
239 2000-2001 annual report, 74.
240 1998 annual report, 42-43.
241 2003 annual report, para 15.08.
242 As above, para 15.52.
243 As above.
244 As above.

The UHRC has also been very progressive in the recognition of socio-economic rights, as demonstrated in the case of *Kalyango Mutesasira & Anor v Kunsa Kiwanuka & Ors*.[245] The UHRC read in article 254 of the Constitution a right to a pension,[246] and it referred to the binding obligations under article 9 ICESCR in support of its arguments.[247] Moreover, it further argued that it was wrong to leave social security payments at the mercy of government,[248] thereby rejecting to subject the realisation of the right to the availability of resources.[249] In addition, the UHRC can be praised for having granted adequate compensations to victims of violations, which unfortunately are not always honoured by the government.

In view of the prolific activity of the UHRC, the government's proposal to eliminate this organ can only be considered a retrogressive step in the protection of HR in Uganda.[250] According to the institution, the main beneficiaries of the complaint-handling process are marginalised groups, because they cannot afford access to justice in the regular courts.[251] Thus, its elimination would close another channel towards the realisation of this right for the most vulnerable groups.

3.4 The response of non-state actors to the right to access essential treatment in Uganda

In addition to the public sector, treatment is also provided through NGOs, community-based centres, or faith-based organisations.[252] All these centres are donor-funded and share to a great extent the burden of the government to provide ARVs. As indicated by Oloka-Onyango, the intervention of these organisations has been more from a welfarist, rather than an activist point of view.[253] The majority has never considered the possibility of bringing an action for the enforcement of the right to essential treatment, despite the great opportunity that public interest litigation represents, or the flexibility of the complaint mechanism before the UHRC.[254] The fact that many

245 UHRC complaint No 501/2001.
246 As above, 8-9.
247 As above, 4-5.
248 As above, 6.
249 Onoria (n 47 above) 359.
250 Proposal of the Government of Uganda for amendment of the 1995 Constitution presented to the Constitutional Review Commission (2003).
251 A Makubuya, 'National human rights institutions under the fire: the Uganda Human Rights Commission on the brink' (2004) 10(1) *EAJPHR* 86.
252 WHO (n 4 above) 1.
253 Oloka-Onyango (n 40 above) 48.
254 Interview with P Ssebanjja, Advocacy and capacity building director of The AIDS Support Organisation (TASO), (20 September 2005); interview with M Ruhindayo, Project Manager at the Health Rights Action Group (HAG) (23 September 2005); interview with H Darson, Assistant Information Officer at Uganda Network of AIDS Service organisations (UNASO) (20 September 2005).

NGOs are receiving funds from GF or PEPFAR initiative can also bias their advocacy work and level of criticism with regard to the provision of ARVs.[255]

Noteworthy is also the initiative undertook by various companies in the private sector to afford ART to HIV-positive workers and, in some occasions, their families.[256]

As regards the international organisms, the most important actor in WHO, which has taken the HIV/AIDS care agenda from UNAIDS to provide support in the development of policies and drug procurement, among others. [257]

Uganda benefits largely from the international donor community, to the extent that 53 percent of its national budget for 2005/06 comes from grants and loans.[258] According to WHO, between US$69.2 million and US$131.7 million were required to reach the '3 by 5' target for Uganda of 55 000 people by the end of 2005.[259] This budget was reached with PEPFAR's contribution alone, which provided close to US$142 million during 2004-2005.[260] In addition to this, Uganda benefited from the World Bank (WB) Multi-Country HIV/AIDS Program for Africa, from US$2 million received from multilateral sources and from US$1 million received from NGOs.[261] To top it all, the total funding estimated to be available for treatment from GF is about US$35.1 million for 2004–2005.[262] The government itself was expected to commit estimated US$5.6 million to scaling up ART during 2004-2005,[263] although the only amounts budgeted for HIV/AIDS control issues that were publicly available were US$2 million for five years.[264]

Bearing in mind these funds (US$185.7, US$54 in excess of the maximum amount required by WHO), it is not surprising that Uganda reached its target six months ahead schedule.[265] In fact, what is surprising is that the number of people acceding ARVs in Uganda is

255 Interview at HEPS (n 187 above).
256 S Tamale 'Gender, Work & HIV/AIDS: Reflections of the case of Uganda' (2004), paper submitted to the UN Economic Commission for Africa, 45.
257 The role of UNAIDS was particularly relevant for the development of the Drug Access Initiative, which showed the feasibility of providing ARVs in a resource-limited setting. J Serutoke (WHO) 'Accelerating access to comprehensive HIV/AIDS care with emphasis on antiretroviral therapy in Uganda', www.who.int/medicines/organization/par/ EssMed_25thAnniversary/2-access/accel_access_uganda.ppt (accessed 12 September 2005).
258 II HSSP (n 170 above).
259 WHO (n 4 above) 3.
260 As above.
261 As above.
262 As above.
263 As above.
264 HSSP 2000/01-2004/05, above sec 3.2.3.1.
265 WHO (n 4 above) 1.

only 63,896,[266] or that only 10,600 people of those are acceding ARVs free-of-cost.[267] In a country where 35 percent of the population lives with less than a dollar per day,[268] the cost of a first-line regimen remains unaffordable, even if it represents only US$180 per person per year.[269] The public health goal cannot simply be the reduction of morbidity and mortality for those targeted, but for the whole population in need,[270] to the extent that the resources available allow.

These diverse funds call into question the effective coordination between the different donors.[271] Moreover, the amount of funds directed to preventive measures clearly outweighs that channelled towards essential treatment.[272] The recent decision of GF to temporally suspend all the grants to Uganda because of evidence of serious mismanagement[273] challenges also the reliability of the structures set up to administer those funds and the effective 'unavailability of resources' of this country to meet up its core obligations.

3.5 Conclusion

An analysis of the measures adopted at national level indicates that Uganda has not made every effort to satisfy, as a matter of priority, this minimum content of the right to health. Indeed, the legislative framework in place is outdated and completely inadequate to tackle the epidemic. The measures at policy level do not provide a structured response to the problem, and they do not identify the resources available and needed for achieving the objectives. Furthermore, the resources mobilised at national level are insufficient and those obtained from the donor community do not seem to be handled in the most effective way.

The justiciability of the right to access to essential treatment faces also some obstacles, derived from its weak recognition in the Constitution, the conservative approach taken by some of the courts, and the lack of activism among the civil society. Moreover, its

266 Instead of 74 000, as it would correspond following WHO maximum budgetary estimations.
267 WHO (n 4 above) 3.
268 Millennium report, www.unmillenniumproject.org/ documents/TF5-medicines-Appendixes.pdf (accessed 10 September 2005) 123.
269 WHO (n 4 above) 1.
270 M Desvarieux *et al* 'Anti-retroviral therapy in resource-poor countries: illusions and realities' 95(7) *American Journal of Public Health* (2005) 1117.
271 According to the DIIS (n 20 above) 12, PEPFAR is perceived as duplicating many of GF's activities.
272 The amount of funds allocated to ARVs by GF represented 30 percent of the total funds granted, WHO (n 4 above).
273 GF (n 13 above). See also sec 4.3 below.

justiciability through the UHRC seems to be threatened by the risk of eliminating this body or weakening its powers.

4 Obstacles to the realisation of the right to access essential treatment in Uganda

4.1 Introduction

This chapter analyses the situation on the ground in Uganda and identifies some of the obstacles that impede access to essential treatment. An analysis of these factors is necessary in order to better understand the reasons behind the insufficient response given by the government of Uganda to access to essential treatment. Moreover, by acknowledging the interaction of different factors and role-players, this analysis will help to provide more comprehensive and tailored recommendations.

4.2 Impact of the globalisation process on access to essential treatment

4.2.1 Conceptualisation of the globalisation process

According to the International Monetary Fund (IMF), globalisation refers to the increasing integration of economies around the world, particularly through trade and financial flows.[274] Many other definitions have been given with regard to this process,[275] but for the purpose of this study, globalisation means the process whereby states are compelled by the international economic forces to take measures that negatively impact on the enjoyment of the right of PLWHA to access essential treatment. This section will focus on how the decisions of the multilateral institutions impact on the measures of the government to tackle the major barriers to access to essential treatment, which are insufficient budgetary allocations, poverty and insufficient health infrastructure. It will also look at how the international trade regime established by the World Trade Organisation (WTO) influence on access to essential treatment.

[274] IMF, 'Globalisation threat or opportunity?' http://www.imf.org/external/np/exr/ib/2000/041200.htm#II (accessed 10 October 2005).
[275] Twinomugisha (n 36 above) 76.

4.2.2 The role of the policies of international financial institutions (IFIs) on barriers to access essential treatment

Insufficient health budgetary allocations and the role of IFIs

As indicated above, the 2005/06 increase in the health budgetary allocations was due to a raise on the amount allocated to wages, and had no impact on the health infrastructure or provision of drugs.[276] Consequently, civil society has urged the government to meet its commitment at the Abuja Summit[277] to allocate at least 15 percent to health matters.[278]

However, an important factor that prevents the government to increase public health spending is the policy of the IMF to keep budget ceilings in order to maintain macroeconomic stability.[279] This explains the Ministry of Finance (MoF)'s initial rejection to the 2003 GF's grant, indicating that Uganda would have to cut out that amount from the existing health budget because an excessive inflow of foreign aid could lead to currency overvaluation.[280] Due to public pressure, however, the MoF eventually agreed.[281] Nonetheless, despite IMF's statement that the acceptance of GF's grant and its use to top priority spending would not have an adverse effect on the macro economy,[282] the organisation still argues that raising national levels of inflation would serve only 'to create uncertainty and complicate macroeconomic management'.[283] These comments overlook the fact that, even from a mere economic point of view, the provision of ARVs allows the government to save money by reducing hospitalisation costs and increasing the productivity of PLWHA and their relatives at work.[284]

276 Health Policy statement (n 172 above). As indicated above, ARVs are largely donor-founded.

277 Abuja Declaration on HIV/AIDS, tuberculosis and other related infectious diseases (2001) OAU/SPS/ABUJA/3 26.

278 Uganda AIDS Advocacy Network 'Dr Nelson Musoba's Presentation of a Letter to Hon Dr Elioda Tumwesigye' www.phrusa.org/campaigns/aids/uganda/musoba.php (accessed 12 September 2005).

279 R Rowden (Action Aid *et al*) 'Blocking progress: How the fight against HIV/AIDS is being undermined by the World Bank and International Monetary Fund' (2004) http://web.worldbank.org/WBSITE/ EXTERNAL/TOPICS/CSO/0contentMDK:20127029~menuPK:277368~pagePK:220503~piPK:220476~theSitePK:228717,00.html (accessed 25 September 2005) 1.

280 As above. This reason was rejected by J Sachs http://www.eurodad.org/uploadstore/cms/docs/ crs_sachs_uganda.doc (accessed 20 September 2005).

281 As above.

282 T Dawson 'A Response to ActionAid International and Other Organizations' (2004) www.imf.org/external/np/vc/2004/093004.htm (accessed 27 September 2005).

283 As above.

284 Desvarieux (n 270 above) 1117.

Since 1998, Uganda has benefited from the WB Heavily Indebted Poor Countries Initiative, aiming at ensuring debt relief with a link to poverty reduction.[285] However, this initiative has not succeeded to reduce Uganda's debt load to sustainable standards,[286] and this leads to further borrowings under IMF's strict conditions.

Finally, IMF's open preference for HIV-preventive measures against treatment measures could also have influenced the spending decisions of the government.[287] The organisation seems to disregard the fact that access to essential treatment is a right, not an economic choice for governments, which cannot be taken away simply because of its financial implications. Prevention and treatment should be complementary aspects of the action to fight HIV/AIDS.

Poverty and the role of the IFIs

The entire key informants interviewed during this research mentioned poverty as the major barrier to access to essential treatment.[288]

In 1999, the IFIs adopted the Poverty Reduction Strategy Papers (PRSP), which are the basis on which lending and public debt relief is granted in developing countries.[289] Uganda's PRSP is based on a revision of its Poverty Eradication Plan (PEAP), which was adopted for the first time in 1997.

The expenditure implications of the PEAP are translated by the MoF into concrete spending decisions through a macroeconomic model designed by the IMF that determines rigid budget ceilings for each ministry.[290] Thus the margin left in the budgeting process for social and HR considerations, as well as for national public involvement is minimal, since they can neither question the model nor the ceilings. Moreover, the lack of efficiency of these macroeconomic strategies is demonstrated by the fact that the percentage of the population living below the poverty line in Uganda has increased from

285 WB, Uganda-country brief (2005) http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ AFRICAEXT/UGANDAEXTN/0,,menuPK:374947~pagePK:141132~piPK:141107~theSitePK:374864,00.html (accessed 22 September 2005).

286 Jubilee USA Network 'Uganda-factsheet' http://www.jubileeusa.org/learn_more/uganda.pdf (accessed 30 September 2005).

287 M Haacker, 'The impact of HIV/AIDS on government finance and public services' in The Macroeconomics of HIV/AIDS (2004) 216, http://www.imf.org/external/pubs/ft/AIDS/eng/index.htm (accessed 3 September 2005).

288 E g, interview with R Musoke, Legal adviser in charge of HIV/AIDS at the Law Reform Commission (LRC) (30 September 05); interview with Dr M Nannyonga, Head of Homecare department at St Francis' Hospital Nsambya, (26 September 05); Interview with Dr Namulema, Head of AIDS department at Mengo Hospital, (11 October 05).

289 IMF, PRSP factsheet, http://www.imf.org/external/np/exr/facts/prsp.htm (accessed 30 September 2005).

290 Uganda Debt Network (UDN) 'Uganda's Poverty Reduction Strategy Papers and resource allocation to the health sector' (2003) 22.

34% in 2000 to 38% in 2003, and HIV/AIDS morbidity is one of the major reasons for this raise.[291]

Insufficient public healthcare infrastructure and personnel and the role of IFIs

Insufficient healthcare infrastructure and personnel was also one of the most cited barriers to access to essential treatment by key informants. Hence, it is surprising that only 20 percent of the health budget for 2004/05 was allocated to public healthcare units in the country, whereas 53 percent was allocated to the MoH and the UAC alone.[292] Moreover, allocations to district health services dramatically decreased during this period (from 54 percent to 29 percent) whereas allocations to the MoH headquarters increased considerably (from 24 percent to 46 percent).

The state has encouraged an increasing role of private actors in the health service delivery, following the recommendations of the IFIs.[293] The idea behind privatisation is that government can save money and shift liability to the private sector.[294] However, these macroeconomic arguments disregard the fact that the government is still liable to ensure that privatisation does not constitute a threat to access to essential treatment.[295] Although in many cases essential treatment is provided free-of-charge through not-for-profit organisations, the government should not be released of its obligation to provide for sustainable solutions, should these organisations stop their activities in the future.

4.2.3 The role of the international trade regime

Impact of the international trade regime on access to essential treatment

By becoming a member of WTO right after the entry into force of the agreement creating this organisation in 1995,[296] Uganda was automatically bound by those agreements made in the Uruguay Round document. These include the TRIPS,[297] the most relevant trade agreement for access to essential treatment.

291 MoF, PEAP (2004), xv.
292 Report of the Parliament's Commission of Social Services http://www.parliament.go.ug/ social%20rpt7_session4.htm (accessed 20 September 2005).
293 Twinomugisha (n 36 none) 80.
294 As above.
295 GC 14 (n 9 above) para 35.
296 WTO http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 29 October 2005).
297 TRIPS (1994).

According to this agreement, member countries must provide, among others, patent protection for a minimum of twenty years on new drugs.[298] This enables patent-holders to set up prices for their new drugs higher than those that would be obtained in a competitive market, as a return for the investment incurred.[299] Therefore, since most HIV-related drugs are under patent protection, this agreement restricts access to essential treatment by raising its cost implications.

TRIPS indicates, however, that states have the right to protect public health as long as this is done within the provisions of the agreement.[300] To that effect, TRIPS provides a series of flexibilities, among which, the exception foreseen in article 30, mainly for research purposes or to obtain marketing approval just before the patent expires (the 'regulatory exception'). TRIPS also allows parallel importation, that is, the importation, without the patent-owner's approval, of products marketed by the patent-owner at cheaper prices in another country.[301] But perhaps the most important flexibility is the possibility for a government, or for a company authorised by the government, to produce drugs under compulsory licence, that is, without the patent-owners' approval, provided prior request for a voluntary licence was not successful[302] and compensation was paid to the patent-owner.[303] However, the licence had to be granted predominantly to supply the domestic market, and this rendered this possibility of no use for those countries, like Uganda, that lacked the capability to produce drugs.

In Doha, the difficulties of LDCs to enforce patent protection purported an extension of the period granted to them to comply with TRIPS from 2006 to 2016.[304] However, this did not resolve the problem of LDCs that lacked the capability to produce drugs, and could not import them either from those countries were TRIPS rules were in force. The major source of supply for LDCs was, therefore, those developing countries, such as India, which did not provide patent protection for pharmaceuticals and had developed a generic pharmaceutical industry that was able to provide drugs at significant lower prices. However, this source of supply was coming to an end, since these developing countries had until January 2005 to provide patent protection for pharmaceutical products.

As a result, a 2003 General Council decision waived exporting countries' obligation to produce 'predominantly' for their markets,

298 Art 27(1), 33 TRIPS.
299 C Correa, 'Implications of the Doha Declaration on the TRIPS Agreement and Public Health' (2002).
300 Art 8 TRIPS.
301 Art 6 TRIPS.
302 Except in cases of national emergencies or government use.
303 Art 31 TRIPS.
304 Para 7 of the Doha Declaration on TRIPS and Public Health (2001) WTO Doc WT/MIN(01)/DEC/2.

allowing them to issue compulsory licences for the exclusive supply of a country, mainly LDCs, provided certain conditions were met to prevent diversion of medicines.[305] The Decision waived also the obligation to pay compensation to the patent owner in the importing country.[306]

Although these were positive steps, they did not focus on improving the capacity of LDCs to create an industry of their own. Indeed, developed countries have made little effort to promote the transfer of technology to LDCs, as required in article 66(2) TRIPS.[307] Moreover, some developed countries are using their positions as trading partners and donors to push LDCs for the adoption of agreements that guarantee further protection to patent-holders (TRIPS-Plus agreements),[308] to restrict the suppliers of ARVs through their aid programmes to patent-holding companies, or to impose quick implementation of patent laws.

Implementation of the international trade regime in Uganda

Uganda has in place a Patents Statute since 1991. Although the country had several years to bring its legislation in conformity with TRIPS,[309] it rushed into a revision process as early as in 1998, following the argument from USAID that the country was losing out on foreign investment and technology transfer.[310] This revision raised considerable criticism from civil society, who claimed that there should have been a broader public consultation[311] and that the involvement of US consultants and USAID would result in a legislation that suits US' purposes.[312] This reaction seemed to have positively influenced the direction of the discussions towards a text that suspends the application of patent legislation for pharmaceuticals until 2016, and includes other flexibilities, such as compulsory licensing and parallel importation.[313]

[305] WTO, Decision on the implementation of paragraph 6 of the Doha Declaration on the TRIPS agreement and public health (2003) WTO Doc WT/L/540.
[306] As above, para 3.
[307] Para 7, Doha Declaration.
[308] Correa (n 49 above) 7.
[309] First until 2006 and then, after the Doha Declaration, until 2016.
[310] A Mpeirwe 'Uganda: Lessons for reform' in The Panos Institute, Patents, pills and public health, Can TRIPS deliver? (2002) 48, http://www.panos.org.uk/PDF/reports/TRIPS_low_res.pdf. (accessed 20 September 2005).
[311] HAI News 'Civil Society Organizations concern as Uganda rushes to implement TRIPS, 5 years ahead of deadline', July-September 2001 http://www.haiweb.org/pubs/hainews/200107.html (accessed 4 September 2005).
[312] GM Watch 'US turning AIDS into big business/USAID=big business' (20 July 2004) http://www.gmwatch.org/p1temp.asp?pid=37&page=1 (accessed 12 September 2005).
[313] Interview at LRC (n 288 above).

The current Patents Statute grants a high protection to patent-holders, since it totally excludes parallel importation,[314] the regulatory exception,[315] and restricts the application for compulsory licenses to very limited grounds.[316] However, it also contains some flexibilities, such as the possibility for the MoH to request patent-holders to surrender their patents rights in Uganda, for example until 2016.[317] Certain products could also be excluded from patentability 'in the public interest' for a period of two years. The Minister of Justice can also order the exploitation of a patent invention 'for matters of paramount importance' pertaining, among others, to public health, provided that the patent-owner has been given an opportunity to be heard and adequate remuneration is paid.[318]

In reality, none of these flexibilities have been utilised by the government so far. According to HEPS, the reasons are the fear of lawsuits from big pharmaceutical companies and of retaliation measures from the US.[319] Indeed, these threats are not negligible, since the risk of losing the US, as a partner in trade[320] and one of the major donors, is too high to be overlooked.

US' protection of pharmaceutical companies can also be felt in the way it handles the PEPFAR initiative in Uganda, since all the ARVs bought under this programme are branded.[321] This requirement not only impedes the use of funds to buy cheaper drugs and treat more people and for a longer period of time, but also affects adherence and supply, since generic ARVs can be provided in a much easier way through fixed-dose combinations in one tablet.[322]

It is worth noting that, although various generic versions of ARVs are now registered with the NDA, they are legally subject to challenge.[323] It seems that their use in Uganda is being 'tolerated' by the global pharmaceutical companies, as part of an informal agreement with the government, 'as long as the number remains small'.[324]

Local inventions have been rear in Uganda, due to the absence of research and development capacity,[325] and the small size of the

[314] sec 25.
[315] sec 26.
[316] sec 31.
[317] sec 36.
[318] sec 30.
[319] Testimony registered by DIIS (n 20 above) 44.
[320] Uganda is one of the major beneficiaries of the Africa Growth and Opportunity Act (AGOA), a US initiative giving free access to a number of products from African countries.
[321] DISS (n 20 above) 30.
[322] As above.
[323] A Martinez-Jones *et al* (Oxfam) 'Access to antiretroviral therapy in Uganda' (2002).
[324] Testimony of a pharmacy manager, DIIS (n 20 above) 43.
[325] As above.

economy.[326] In any event, competition with large pharmaceutical companies would be very difficult, since the latter can profit from economies of scale and sell at low prices.[327] Moreover, any attempt of subsidising the prices of local drugs could give rise to litigation within the WTO because of discriminatory practices.[328]

4.3 Lack of accountability mechanisms and good governance

As indicated in chapter three, the lack of accountability mechanisms in all the policies related to the provision of essential treatment for PLWHA in Uganda is outstanding.

Transparency mechanisms are also missing with regard to the management of funds. The auditor's report providing *prima facie* evidence of 'serious mismanagement' of the funds received by the MoH from GF[329] clearly shows that mismanagement happens and may still happen in the future if no mechanisms are put in place to stop these practices. The reaction of the government to appoint a commission of inquiry on the matter,[330] instead of allowing the criminal justice system to take care of it does not, in my opinion, demonstrate a sufficient political commitment towards the eradication of these practices. Indeed, the discretion given to the President to appoint the members of such commission and to disregard its findings if he wishes may take away the possibility of justice being done, although it is unlikely that this will happen, in view of the international impact this could have.[331] While in the case at hand a motion of censure against the Minister of Health did not succeed in Parliament,[332] it should be noted that such mechanism has not proved efficient in the past to fight corruption.[333]

4.4 Lack of awareness of the right to access essential treatment

All the key informants, including the MoH, mentioned the lack of awareness of the population on the possibility of being treated as one

326 S Musungu, *et al* 'Utilising TRIPS flexibilities for public health protection through South-South regional frameworks' (2004) 1627.

327 Although Uganda could bring an anti-dumping complaint in case of unfair practices, it is unlikely that it would be willing to involve itself in a protracted litigation process.

328 Wandira (n 18 above).

329 GF (n 13 above).

330 F Nyakairu (Daily Monitor) 'GF inquiry starts' (14 September 2005) 4.

331 It should be noted, though, that the findings of previous commissions were not followed up. C Mwanguhya (Daily Monitor) 'Ministers won't resign over GF cash' (2 September 2005), 1-2.

332 K Ssemogere (Daily Monitor), 'The post-mortem of Muhwezi's censure' (22 September 2005) 10.

333 The President reappointed the Ministers that had been censured by the Parliament in 1998. Daily Monitor 'Muhwezi censure hangs in balance' (11 September 2005) 2.

of the major barriers to access to essential treatment. Indeed, the efforts of the government seem to focus mainly on prevention, with almost no information regarding the centres providing essential treatment, the cases in which ARV therapy is recommended, or the benefits and risks such a treatment could provide to PLWHA.

In addition, the relevance of the right to health and its impact with regard to the provision of essential treatment seems immaterial for the majority of the informants. It is obvious that the right to information and to HR-education are being violated and this is a major obstacle for the right to essential treatment to be realised.

4.5 Armed conflict in Northern Uganda and its effect on access to essential treatment

The insurgency of the Lord's Resistance Army (LRA) in Northern Uganda has significantly contributed to the spread of HIV/AIDS in the region. Sexual assault, as well as the behavioural change due to interruption of social networks and economic vulnerability,[334] rendered this area one with the highest HIV/AIDS prevalence rates in the country.[335]

The provision of essential treatment in this area is highly disrupted by the conflict, rendering it difficult for the government to supply the HIV-health centres due to security reasons.[336] Surprisingly, there is only one centre providing ARVs in the northern region, but the government is liaising with WHO and MSF to extend ART to a larger group of people.[337] Though admittedly difficult, the government should not rely on security arguments to justify the absence of attention on the population in the North, as it is bound internationally to provide medical care to sick people 'to the fullest extent practicable and with the least possible delay'.[338] This includes not only civilians but also rebels. The availability of treatment could eventually act as an inducement for combatants to stop fighting.[339]

The HIV/AIDS prevalence rate among the Uganda People's Defence Force (UPDF) is estimated to be around 20 percent.[340] Local sources indicate that soldiers are also perpetrators of sexual abuse in

334 UNAIDS, Fact Sheet No 2 'HIV/AIDS and conflict', http://www.unaids.org/html/pub/Topics/Security/ FS2conflict_en_doc.htm. (accessed 12 September 2005).
335 Interview at MoH (n 173 above).
336 As above.
337 As above.
338 Art 7, Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).
339 International Crisis Group (ICG) 'HIV/AIDS as a Security Issue in Africa: Lessons from Uganda' (2004) 3 *ICG Issues Report*, 12.
340 As above, 6.

the region[341] and, therefore, their presence also contributes to the spread of the disease. Soldiers diagnosed with HIV/AIDS must leave military service.[342] Such measure is highly regrettable, since increases stigmatisation and prevents disclosure and control of the disease.

4.6 Gender relations as a barrier to access treatment

As indicated by HRW, cultural perceptions of women's sexual and reproductive obligations deprive them of bodily autonomy.[343] This factor, together with male-dependency and poverty, render women particularly vulnerable to the pandemic.

Particularly with regard to rural women, the multiple tasks they undertake impede them to get the time to take care of their health status. The fact that ARV-centres have not yet reached the rural areas further diminishes the possibility of being treated, since this adds more time and transport costs to the mere consultation.[344] In addition, the male-dependency on any decision impedes women to go for treatment, since this implies not only revealing their HIV-status, with the consequent rejection of family and social environment, but also being victims of violence.[345]

4.7 Conclusion

This chapter demonstrates that many socio-political as well as economic factors may influence the provision of essential treatment in Uganda. In addition to the government, various non-state actors influence the decisions taken with regard to essential treatment, and their degree of responsibility should also be measured against their HR obligations. On the other hand, the response of the government seems to be short of the same political will demonstrated with regard to HIV/AIDS prevention, and this shows another reality behind the apparent success story of Uganda with regard to HIV/AIDS.

341 Human Rights Watch (HRW) 'Uprooted and forgotten: Impunity and human rights abuses in Northern Uganda' (2005) 24.
342 ICG (n 339 above) 9.
343 HRW, 'Just die quietly: domestic violence and women's vulnerability to HIV/AIDS' (2003) 21.
344 As above.
345 HRW (n 343 above) 2.

5 Conclusions and recommendations

5.1 Conclusions

5.1.1 Scope of access to essential treatment for PLWHA under international law

Access to essential treatment for PLWHA has been clearly identified as a right within the international HR framework. By contrast to the majority of socio-economic rights, this right is non-derogable, and constitutes one of the core aspects of the right to health that the state of Uganda must satisfy, whatever its stage of economic development. The state of Uganda remains liable at international level for any violation of this right, despite the fact that it has not incorporated the international HR agreements that it ratified into its national legal order and it has not expressly recognised this right in its Constitution.

The international obligation of the state is tripartite and involves the duty to respect, protect and fulfil the right to access to essential treatment. Non-state actors have also undertaken obligations with regard to this right at international level and their interaction in the fulfilment of the right at stake is important in order to measure the response that needs to be adopted from a HR-perspective.

5.1.2 Implementation of the right to access essential treatment in Uganda

Although the state of Uganda has already met the target set up by UNAIDS to provide ART to 60,000 people by the end of 2005, a closer look at the constitutional, legislative, policy and judicial framework indicates that the State has not made every effort to realise this minimum core obligation for the whole population in need.

First of all, the right to health is deprived of the same protection guaranteed to other rights in the Constitution, by being relegated to its NODPSP with the intention to render it unenforceable. Secondly, the HIV/AIDS pandemic in general, and the right to access essential treatment in particular, have been completely ignored within the legislative framework, making it difficult to render it justiciable. Thirdly, the state has failed to provide a comprehensive NHP with effective mechanisms of implementation. On the contrary, access to essential treatment is dealt with in numerous policies that are short of an implementation strategy and accountability mechanisms. In view of this weak legal basis, it is not surprising that the jurisprudence has not paid too much heed to the right to health or its minimum threshold. Finally, the inefficient management of funds, and the

evidence of 'serious mismanagement' with regard to the GF's grants, clearly indicates that the government is far from making every effort to satisfy the right of PLWHA to essential treatment.

The provision of ARVs by the civil society has effectively discharged the government of much of the burden implicit in the provision of access to essential treatment. Advocacy from a HR-perspective is, however, weak and this perpetuates the myth of considering the government as a provider of goods and services, rather than a duty-bearer of the rights of individuals.

A cursory look at the activity of donors and international organisations indicates that, quantitatively, they have been forthcoming in their contributions, but qualitative, there is a lack of coordination that renders this aid less effective.

5.1.3 Obstacles to the realisation of the right to access essential treatment in Uganda

An analysis of the obstacles to the realisation of access to essential treatment reveals the major role played by globalisation in the government's strategy to tackle access to essential treatment. Lack of commitment and good governance also had a major impact on the efficiency of the government's response, and the perceived lack of knowledge of the population with regard to the existence of HIV-drugs indicates that the rights to access HIV-information and education are being violated.

The political conflict in the North has greatly contributed to the spread of the disease as well as to the difficulties in providing essential treatment in this region. Finally, the strong influence of patriarchy social conceptions with regard to the role of women in the Ugandan society, has served as a deterrent to seek treatment among the women affected.

5.2 Recommendations

5.2.1 Recommendations for the government

Legislative measures

The inclusion of the right to health in Chapter Four of the Constitution could clarify any doubts regarding its contestable justiciability. It could also encourage public interest litigation with regard to this right, since a clear legal basis provides more chances for cases to succeed before courts.

In addition, national legislation should be adopted imposing on the government the obligation to make every effort to use all

available resources, including those of the international community, in an effort to satisfy, as a matter of priority, the right to access to essential treatment for the population in need. The government should be obliged to put mechanisms in place that will guarantee the geographic accessibility of the drugs, particularly in neglected areas. In addition, criteria should be developed to determine the category of people that could have access to free drugs, subsidised drugs or pay drugs. The government should be made liable to seek a rapid and sustainable solution for the provision of essential treatment to population living in conflict areas. Efforts should be made to negotiate humanitarian arrangements, similar to the 'days of tranquillity' first employed in El Salvador in 1985,[346] to allow combatants and civilians to access to essential treatment in health centres, in cooperation with international organisations. The law should also impose on the government the immediate obligation to inform the population of the possibility of obtaining essential treatment and the benefits ART brings to PLWHA. The possibility of challenging the implementation of the law before the courts should also be foreseen.

New legislation regulating pharmaceuticals should also be adopted, merging the various statutes that touch upon drug issues. Tighter measures should be provided with regard to essential medicines, particularly those treating epidemics, as foreseen in the National EML, whose periodical update should be established by law taking into account WHO's recommendations.[347] This legislation should focus on avoiding the frequent and long stock outs in hospitals, imposing the obligation on health units to keep accurate records that should be reported periodically to the MoH.[348] Moreover, all the drugs should be kept in sufficient quantity in the healthcare units, and a rigorous system of control should be imposed in order to avoid their diversion. The law should also impose routine inspections[349] both in public and private facilities, and an accountability mechanism should be foreseen in order to monitor compliance.[350]

The Industrial Property Bill should impose on the government the obligation to make every effort to promote the development of a local pharmaceutical industry. In addition, it should also facilitate the use of compulsory licences to be issued at national level or at the request of foreign countries. The Bill should also ensure that the possibility of importing generic drugs is not restrained.

346 ICG (n 339 above) 12.
347 At the moment this is only established in the NDP (n 201 above).
348 As required in the ATP, (n 190 above).
349 As above.
350 Eg disciplinary measures for hospitals or practitioners found to keep continuous irregularities in their files.

The provisions contained in the Venereal Diseases Act and the Public Health Act providing for restrictive measures should be repealed and be substituted for a general clause allowing their use insofar as they are proportionate to the aims pursued.

Administrative measures

The government should engage into a revision of the existent national policies regarding HIV/AIDS, bearing in mind their HR implications. The long-term needs of the country should be converted into targets in the policies, and a timetable should be established for their completion, which should be monitored through the use of benchmarks and indicators. A periodic audit of the policies should also be foreseen, as well as an accountability mechanism to render the ministries affected liable for their performance. In addition, the distribution of international funds should be based on public tenders, whose requirements follow principles of non-discrimination.

The adoption of mechanisms to ensure the sustainability of the provision of essential treatment should be established as a matter of urgency. A thorough study should be carried out comparing the mechanisms of sustainability established in other African countries (for example, the establishment of a HIV/AIDS duty in Zimbabwe), and bearing in mind the capacity of the Ugandan population to bear the costs according to their economic power. These measures should be accompanied by an increase of the budgetary health allocations of the government to provide access to essential treatment. The government of Uganda should resist the pressures of the IFIs, particularly bearing in mind that this increase will be used for top priority spending.

The PEAP should take into consideration the interlink between HIV/AIDS and poverty, as well as other variants, like gender, and balance the cost implications of providing essential treatment against its impact on the overall economy.

The government should make use of the flexibilities established in the current Patent statute in order to openly import generic drugs up until the Industrial Property Bill is adopted.

The promotion of information campaigns on essential treatment is equally important, since they will serve as a measure of control of the disease, encouraging people to get tested, and as a way of increasing productivity at the work place and reducing the number of medically-ill patients in the already overcrowded hospitals.

Judicial protection

Following the excellent precedents of *TEAN* and *Tinyefuza,* and looking at the creative interpretations given in other jurisdictions, Ugandan courts should be encouraged to adjudicate on the right to

access to essential treatment by referring to its link to various other rights.

The resource constraints faced by the government in fulfilling this right are not negligible and should not be overlooked by the judiciary. However, justiciability should be a way of controlling how the available resources are being prioritised and spent. Bearing in mind the public purpose of containing HIV/AIDS and the cost-benefits of the provision of ART, the government's inefficient use of resources needs to be reviewed in order to provide the right-holders, particularly those most disadvantaged, their minimum entitlements.

These recommendations are equally valuable for the UHRC, whose flexibility in proceedings makes it an ideal forum to bring matters by those affected. In addition, the UHRC should better utilise its quasi-judicial powers to render the government accountable with regard to the right to essential treatment.

5.2.2 Recommendations to non-state actors

Recommendations to the international organisations and the donor community

With regard to the IFIs, in should be noted that, despite being limited by their mandate to economic matters,[351] they have broadened it to good governance issues, and, as UN agencies, they are obliged to promote the HR mission, in cooperation wit other agencies. In order to tackle poverty, the IFIs should first insist on the participation of the most vulnerable in the solutions of which they are the targets. Moreover, the fight against HIV/AIDS requires budgetary implications and life-saving measures that cannot be sacrificed in the name of economic stability.

With regard to third states, it is essential that developed countries empower LDCs with the tools that could diminish their technological and economic dependence on Western economies. In addition, a firm commitment towards the eradication of prejudicial practices that are against the spirit of cooperation of the UN Charter, should be abide by at UN level.

Recommendations to the civil society

There is an urgent need for the civil society, not only to assist in the provision of ARVs, but also to advocate for it and to be the voice of disadvantaged groups that are not aware of their rights.

In addition, civil society should take the opportunity to engage in public interest litigation regarding access to essential treatment. This

[351] Art IV para 3(b) of the Agreement of the IMF, (1945) 2 UNTS 39.

has been shown very successful in other countries, as demonstrated by the *TAC* case. Bringing matters in the framework of an organisation will enable PLWHA to deal with the costs and technicalities normally implicit in judicial suits.

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Reconciling universality of children's rights and cultural diversity

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Mankind owes to the child the best it has to give.[1]

1 Analytical framework

Today, United Nations Convention on the Rights of the Child (CRC) presented in 1989 is signed and recognised by more states than any other international document regarding human rights ever, implying that there is a universal understanding and acceptance of the concept of children's rights. However, practices such as infanticide, male and female circumcision and forced child labour are still present in many cultures. Also, according to a United Nations Children's Fund report previous to the proposal of the CRC 'in the wars of the last decade far more children than soldiers have been killed and disabled.'[2] The universal recognition of the CRC and the lack of realisation in reality of children's rights in different cultures depict, maybe better than most other issues, a dichotomy between the universal theories of human rights and cultural diversity. Universal rights of children concern every individual child, regardless of colour, race and beliefs. *Regardless* in the context of CRC is implying the universality of the idea, but it actually makes it exclusive taking a child out of the concept of his or her immediate and distant community. On the other hand, religion, economical and political circumstances are still used as an excuse for mistreatment of children in many cultures like, for example, as Alston points out 'arguments designed to defend the full range of practices relating to female circumcision, to justify the non-education of lower class or caste children, or to justify the exclusion of girls from educational and other opportunities which would make them less sought after in marriage.'[3]

According to Goodhart and other writers universalists and relativists have clashed since 1970s: 'At least since the publication of Pollis and Schwab's *Human Rights: Cultural and Ideological Perspectives in* 1979, human rights universalists and cultural relativists have clashed over the validity and applicability of human rights outside the West.'[4] Since their origins lie in the West it is claimed that the philosophy of human rights is not universal but represents only one notion of them and cannot be transferred to other parts of the world. For relativists different cultures hold different ideas of moral values and therefore there can be no talk of globally

1 http://home.page.ch/pub/rmf@vtx.ch/unroc.html. (accessed 8 August 2004).
2 AG Mower Jr Convention on the Rights of the Child.(1997) 28.
3 Alston, Philip 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in P Alston. (ed.) *The Best Interests of the Child* (1994) 20.
4 M Goodhart. 'Origins and universality in the human rights debates: cultural essentialism and the challenge of globalization' (2003) 25 *Human Rights Quarterly* 938.

accepted or absolute values and principles.[5] Many fundamentalist leaders encourage the development of an exclusivist character in particular religious and ethnic communities and classify outsiders as inferior. It is claimed by such leaders that whenever a conflict arises between internationally recognised human rights and the prescriptions of a religion or belief, the latter must prevail. This position squarely defies the whole movement for the universal promotion and protection of human rights as embodied in the UN Charter, the Universal Declaration oh Human Rights, and subsequent international instruments.

Universalists, on the other side, hold that at least some values are globally recognised and common to most cultures and that the rights contained in Universal Declaration of Human Rights and all other relating international conventions and treaties are based on such values. Yet, they are all criticised for their westerness and as such not applicable elsewhere. The main concern of this thesis will be the development of the idea of children's rights within the framework of universalism vs relativism debate.

My argument is that, although universal in its theory, in order for CRC to be implemented worldwide it cannot be simply imposed. Its universality rests on liberal philosophy and placing an individual before the group while the main principle for determining rights and duties is equality. This often leads to the wrong conclusion of regarding everyone as the same which, starting with our skin, hair and eye colour to our mental and physical abilities, we are obviously not. It is important to note that equality implies 'merely that all human beings are of equal moral worth' and that they all have the same right to pursue their goals in life unhampered by others' interference. [6] However, since most people live within a community it is impossible to keep within one's borders and one finds that interacting with others on a daily basis brings positive but also negative outcomes. The biggest task of all universal human rights treaties is finding a way of applying universal human rights to a very diverse world. And it is not all diversity that contradicts the theory of human rights. For Jones 'the troubles are caused by a particular type of diversity: diversity of belief and value.'[7] As already explained the question posed over validity of universal human rights lies in their origins. Stemming from the liberal theory and developed western countries they are disapproved of on the account of not being universal at all but western ideas being imposed on the rest of the world.

5 T Van Boven 'Advances and obstacles in building understanding and respect between people of diverse religions and beliefs' 13 (1991) *Human Rights Quarterly* 441.

6 R Bellamy 'Liberalism' in R Eatwell & A Wright (eds) *Contemporary political ideologies*. (1993) 24.

7 P Jones 'Human Rights and Diverse Cultures: Continuity or Discontinuity?' in S Caney & P Jones (eds) *Human rights and global diversity* (2001) 28.

In this thesis I shall argue that the answer to this question is not necessarily of either or nature but rests on the purpose and principles of human rights theory. As Goodhart explains: 'Human dignity is a universal value, but human rights originated in the West and require a liberal regime for their realisation. Human rights are not equivalent with human dignity but are rather a means to the end of protecting human dignity.'[8] The analysis of both universal principle and cultural relativism will serve as the foundation for the rest of this thesis which will include a more detailed analyses of a number of issues arising from the universalism vs relativism debate that specifically relate to development of children's rights theory. Although the main argument will concern the negative cultural influence on children and their aspects in later life mostly in undeveloped parts of the world, I shall also argue that there are many traditional habits maintained in western states that are not in line with guidelines promoting respect for human dignity. Keeping in mind that the idea of children as independent right-holders is a very recent one and still developing, the significance of it as a component of the whole theory of human rights must be stressed. In the light of the debate between universalism and relativism I shall look at the importance, influence and implementation process of the CRC worldwide and the problems regarding these issues, and put forward proposals for a successful reconciliation of the two sides of the argument. In order to support and develop my arguments I shall rely on several international human rights conventions including, primarily, CRC and Universal Declaration. In addition, I will refer to the works of a number of writers starting with Aristotle and Locke regarding the issues of a child's status throughout history, but also contemporary theorists working on the development of the idea of children's rights such as Van Bueren, Alston, Hendrick, O'Neill and Eekelaar.

1.1 Children's rights in the context of universality of human rights

CRC is an outcome of changes regarding the idea of human rights, started with the progress of liberal thought and the acceptance of the American Declaration of Independence in 1776 and French Declaration of the Rights of the Man in 1789. Recognition of the universality of basic human rights was, for the first time, subject of the philosophical works of Rousseau, Locke, Hobbes, and is based 'on liberalism and democracy, but also on socialism'.[9] Even with both of the above-mentioned declarations in effect, children's rights were included into human rights documents only in the twentieth century, mostly due to predominant view of children as property of their father

8 Goodhart (n 4 above) 936.
9 W Benedek & M Nikolova (eds) *Understanding Human Rights* (2003) 18.

throughout history. Aristotle wrote that 'there can be no injustice in the unqualified sense towards thing that are one's own, but a man's chattel, and his child until it reaches a certain age and sets up for itself, are as it were part of himself.'[10]

Change in the child's status began in the nineteenth century within liberal political theory. With the ever growing conscience of universal human rights it became apparent that children, apart from adults' obligations towards them, also had rights independent of any person acting on their behalf. Locke, for example, stressed the importance of parental duties concerning their offspring including their nourishment, education and protection, but also noted that children acquired their natural rights from birth:[11]

> Thus we are born free as we are born rational; not that we have actually the exercise of either: age that brings one, brings the other too. And thus we see how natural freedom and subjection to parents may consist together, and are both founded on the same principle.

These ideas sparked the debates over children's rights, many still ongoing today. The changes in general outlook on children, childhood, relationships within family, however slow, were inevitable. In addition, Hendrick reminds that 'one of the principal reasons for the new interest in children and childhood was the introduction and gradual consolidation of compulsory mass schooling' which provided them with better possibilities for reaching their mental, physical and employment potential later in life.[12]

First ever document regarding universal children's rights was Declaration on the Rights of the Child, presented by Eglantyne Jebb in 1924. This was in the aftermath of World War I, the events of which led to realisation that children needed to be recognised as carriers of independent rights in order to be eligible for legal protection from various forms of discrimination and harm. 1959 saw drafting and proposal of the updated and upgraded version of the Declaration from 1924 intending to include new ideas stemming from furthering and broadening realisation about the status of children within home and society. However, it still was a very general document lacking basic definitions such as the very definition of what a child is or relating to specific problems regarding children. According to Van Bueren this document was never intended as 'an instrument which placed binding obligations upon states' and it regarded 'children as recipients of treatment rather than as the holders of specific rights.'[13] It really only concentrated on reaffirming the duties of adults involved in the care of children. Far from trying to imply that this document was not

10 Aristotle 'Nichomachean Ethics' *Required Course Reader, Cluster*1 (2003/2004).
11 J Locke 'An Essay Concerning the True Original, Extent and End of Civil Government' in J Locke, D Hume, JJ Rousseau *Social contract*. (1962) 35.
12 H Hendrick *Child Welfare*. (2003) 21.
13 G Van Bueren *The International law on the rights of the child*. (1995) 7.

relevant — it was one of the first and biggest steps in first, realising the uniqueness of the status of a child, and second, in trying to improve it.

World War II, influence of the growing gap between the industrialised countries and the poor ones, and cultural diversity among other factors opened the question of children's rights to new issues. From the early concerns with basic rights such as the right to life and protection, the debate has moved on to include subjects like adoption, child labour, child abuse, education and traffic in children. It is stated in the *Understanding Human Rights* that CRC is 'under continuous development', and the most recent projects include 'adopting new standards such as the Optional Protocols (2000) to the CRC on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography.'[14] It has become apparent that every person under the age of 18, as much as he or she is in a specific position due to the fact that they might not have the full use of reason and do depend on protection of his or her parents or guardians, has the same right as adults to have their dignity respected. In other words 'as human beings, children have the same inherent value as adults'.[15] What is often forgotten is that children are future adults, and even though until 18 are under special circumstances shouldn't be treated any different when it comes to application of universal human rights.

This was confirmed by the adoption of CRC in 1989, so far the most comprehensive document concerning children's rights. It is universal in its aim to refer to every individual child, acknowledging its rights as well as its need to be protected, and clearly gives children legal rights empowering them further, in order to move them closer to independence regarding dignity and identity. As Mower states:[16]

> The rights possessed by the child, in other words, are not held by implication or by any assumption that such rights are held by parents or other pertinent adults or groups are also held by the child. As far as rights are concerned, then, the child, because of the convention, is an independent person, not relying on his or her relationship to any other persons or groups for protection under international law.

The argument about acknowledging children's rights occasionally loses direction due to the existence of several kinds of rights 'civil, political, economic, social and cultural' and instead of this being one of starting points for discussion, it is sometimes concluded that children have no rights at all.[17] Needless to say, this is wrong. Because, if it was confirmed that persons under the age of 18 had no rights, then how and where from would human rights in general be

14 Benedek & Nikolova (n 9 above) 18.
15 RJR Levesque *Sexual abuse of children: a human rights perspective (1999)* 24.
16 AG Mower, Jr *Convention on the rights of the child* (1997) 4.
17 Van Bueren (n 13 above) 4.

derived from? We cannot assume them out of thin air once a person is 18. They cannot be only age related and dependent, which brings me back to the already mentioned question of natural, inborn rights. Every being born into human race has basic rights, due to the mere fact that they are human. Other rights, such as economic and political, stem from social structures we live in, and this is where the main dispute about children's rights is taking place today.

1.2 Universal principle

Universality of children's rights is derived from the same fact that human rights in general are assumed from 'universal normative consensus on who is a human being, and what is due to a human person by virtue of his or her humanity.'[18] There is no doubt of the worldwide applicability of this principle, rooted in the basics of who we are and placing us all inside the same circle. Before and after all our differences we are all human beings. Shestack claims that although many would argue that the idea of human rights is incompatible with religion it is in theology that we can find foundations of human rights theory since 'in a religious context every human being is considered sacred. Accepting a universal common father gives rise to a common humanity, and from this flows a universality of certain rights.'[19] The point of separation between religion and human rights theory is dichotomy between rights and duties. The human rights theory gives priority to individual rights and freedoms and most religions put accent on duties one has towards their community. It is this dispute that has been the greatest obstacle to worldwide implementation of human rights. Nevertheless, Vienna World Conference in 1993 was 'hailed by some as victory for the universalists over the opponents of cultural relativism ... affirming that the universal nature of the rights and freedoms is beyond question.'[20] The fact that the CRC is the world's most ratified human rights document (United States and Somalia are the only states who have not ratified it) somewhat supports this statement. It could be said that there is no doubt about the universality intended by this document, but the question is raised over its worldwide applicability due to cultural plurality.

Culture and tradition with their vast diversity, have been an obstacle to the implementation of what are considered to be universal human rights rooted mainly in the liberal political theory, which, as

18 A An-Na'Im 'Cultural transformation and normative consensus on the best interest of the child' in P Alston (n 3 above) 64.

19 JJ Shestack 'The philosophic foundations of human rights' 20 (1998) *Human Rights Quarterly* 205.

20 S Harris-Short 'International Human Rights Law: imperialist, inept and ineffective? Cultural relativism and the UN Convention on the Rights of the Child'. 25 (2003) *Human Rights Quarterly* 131.

Kymlicka writes 'concentrate on the individual.'[21] Supporters of cultural relativism, on the other hand, oppose the individualistic view claiming that it is incomplete due to disregarding the influence of community on the individual. Theoretically at least, it seems that children's rights and welfare are globally understood and recognised, and just like human rights refer to every individual, so does the CRC ask of all states parties to implement rights 'set forth in the present Convention to each child within their jurisdiction without discrimination of any kind.'[22] Politicians and organisations, on national and international level, want to at least appear to be concerned about the welfare of children. The Convention, building on from the work already done in previous declarations concerning children's rights, is undisputedly universal in its wanting to cross borders of cultures and nations, but also in broadening the scope of the rights of children and adults obligations towards them. Moving on from the basic rights it is including more complex subjects today, for example, forced child labour and child soldiers. It can be said that in a way, CRC reconciles the two generations of rights: political and civil, and economic, social and cultural.

In reality, CRC has proven difficult to implement due to traditional differences in values, but also due to its own impediment. In its seeking for universal applicability and intention to protect all children 'irrespective of the child's or his or her parents or legal guardians race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status' it is irrespective of child's identity and its immediate community', falling into the trap of liberalism.[23] There is no child stripped bare of the world it lives in and therefore no child can be defined only as a member of human race. Family, friends, teachers and tradition all have a huge influence on each individual. They form our opinions, beliefs and habits and are almost like our protective layer. They provide us with our initial set of identity choices. If CRC is to be universally realised, it should, perhaps, in addition to its starting point which is the general definition of a child as a human being, also be more sensitive to the differences between children due to the different circumstances they live in.

On the other hand, with its disregard for differences in children, CRC is, in a way, giving licence to different interpretations of its

21 W Kymlicka *Liberalism, community and culture* (1989) 253.
22 UN Convention on the Rights of the Child. (1991) Article 2.
23 UN Convention on the Rights of the Child (1991) Article 2.

contents within cultures and really disabling itself to a certain extent in trying to protect them. As Parker explains:[24]

> If one believes that there are spirits in the world which will be offended by one arrangement rather than another then this belief will become part of the background understanding of the best interest of the child. It will form part of the local convention as to how best interests standards should be operated. Alternatively, if one takes a particular view about what the self is and how it develops, then this will contribute to a particular local convention.

The problem arises due to the lack of clear universal definition of *what* the best interests of the child are, giving space for the development of various cultural conceptions of what Article 3 means. For example, female genital mutilation is in the best interest of the child since it is a clear and permanent mark of group identity. Therefore, an individual who has undergone FGM belongs to her community and is valued and accepted by its other members on this merit alone, regardless of her other personal traits. On the other hand, if a person living in an FGM practising community refuses to undergo FGM, she will be outcast on this merit alone, regardless of her other personal traits. This clearly points to the fact that individuality is not taken into account and that group identity is considered to be the only valuable one.

In order to find its way to every child through the maze of tradition, instead of imposing CRC, the international community needs to gradually educate all actors involved in welfare of children about human rights and encourage cross-cultural dialogue.

2 Children as rights holders and self-determined individuals

> We have rights because they allow us to make of our lives what we will – make them truly our own. [25]

Theory of self-determination 'focuses on the degree to which human behaviours are volitional or self-determined.'[26] Its main task is analysing our actions and the degree to which they are a product of choice. The relationship between the individual and the society is given much importance since our ties to our culture, family or nation

24 S Parker 'The best interests of the child – principles and problems' in P Alston (n 3 above) 39.

25 H Brighouse 'What Rights (if any) do Children Have?' in D Archard & CM Macleod (eds.) *The moral and political status of children.* (2002) 31.

26 http://www.psych.rochester.edu/SDT (accessed on 9 September 2004)

are the most common basis for self-identification, thus providing the territory within which we confidently exercise our right of choice.[27]

Crucial to these debates are the issues of which 'self' is in question and what counts as self as opposed to other determination. For some normative theorists, the selves that should be self-determining in the international context are the selves of the individual human being, the nation and the state and for yet others they include gendered human being or the participants in new social movements ... Within each of these possibilities are concealed a host of further complex debates about why these particular entities are important and how their autonomy should be understood, accommodated and encouraged.

Theorists' starting point is that people have 'innate tendencies toward psychological growth and development ... and strive to master ongoing challenges and to integrate their experiences into a coherent sense of self' but stress that this does not function automatically.[28] We need constant support of our social environment.

Self-determination stands high on the list of democratic principles. In the opening article of International Covenant on Economic, Social and Cultural Rights (CESCR) it is stated that 'All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[29] In case of an individual it implies the ability to make choices that one believes will aid their development and also take control over their own lives. Within a democratic society to have the right to self-determination means to be able to participate in social processes that directly influence our lives and according to Kymlicka 'people can, and should be able to, question and revise their projects and commitments.'[30] When it comes to children the debate regarding self-determination is a very recent one. Since they have been seen as mere property items within home throughout history and still are today in many societies, it is easy to see why recognising them as independent right-holders causes so much controversy. It disrupts the routine within home asking parents to, in their opinion, give up some of their rights and status in order to make room for their children's wishes and take them into consideration more seriously than they have before. In Freeman's view:[31]

27 K Hutchings 'The question of self-determination and its implications for normative international theory'. in S Caney & P Jones (eds.) *Human rights and global diversity* (2001) 91.
28 http://www.psych.rochester.edu/SDT (accessed on 9 September 2004).
29 www.unhchr.ch/html/menu3/b/a_cescr.htm (accessed on 9 September 2004).
30 W Kymlicka (n 21 above).
31 M Freeman 'Taking Children's Rights More Seriously' in P Alston *et al* (eds) *Children, rights and the law* (1992) 54.

> Children have not been accorded either dignity nor respect. They have been reified, treated as objects of intervention rather than as legal subjects, labelled as a problem population, reduced to being seen as property. They complete a family rather as the standard consumer durables furnish a household.

Here one must stress that the problem does not lie in deciding whether or which rights to award children and how to do it, although a great part of the debate on children's rights has taken this route, but realising that the norms of behaviour within a family regarding children until today are not necessarily right and that they need to be re-adjusted. Freeman argues that only when we have answered the question 'why we believe it is morally important that adults should be regarded as right-holders with all that this entails' can we seriously consider children and 'investigate whether any of the supposed reasons for discriminating against children stand up to rational scrutiny.'[32] In other words, just because people have gotten used to treating children in a certain manner does not mean it is right and just.

The development of the idea of human rights has meant that the idea of children's rights has developed too. Although childhood is a social construct Van Bueren stresses that 'it is no more so than adulthood, and the arbitrariness of the definition is not a reason for denying the existence of specific rights attaching to childhood.'[33] One of the first and most important things that need to be established is that children are human beings on equal footing with adults regarding the worth of their humanity and as such independent right-holders. Freedom of choice plays an important role in an individual's life providing a source of confidence and responsibility. It gives one a sense of freedom. But, since a great majority of people live in a society and are very much influenced by the norms of the immediate social groups they belong to, Parekh affirms that 'culture deeply matters to people ... their self-esteem depends on others' recognition and respect.'[34] It is important to note that, most likely, an individual will identify herself with more than one group it belongs to at once but with different degrees of intensity and all these identities will influence her choices. In the case of children their undeveloped capacities of reason more than often serve as an excuse to deny them a right to choose. It is all to easy to explain this away by stating that on occasions they might choose something that is not in their best interest. Franklin notes that:[35]

32 Freeman. (n 31 above) 61.
33 Van Bueren (n 13 above) 32.
34 B Parekh *Rethinking multiculturalism.* (2000) 8.
35 B Franklin 'Children's rights and media wrongs' in B Franklin *The new handbook of children's rights: comparative policy and practice.* (2002) 21.

> Denial of rights is evident in the public realm of children's involvement in education and the care arrangements of the state, as well as the private realm of the family. The latter is significant since conventions cannot enforce rights within family: it is virtually impossible to police what goes on behind closed doors. Children's exclusion from decision-making ranges from relatively unimportant matters such as decisions about what to eat, which clothes to wear or what time to go to bed, to more significant concerns about the right to a voice in shaping the curriculum at school and the right to vote.

One of the main arguments is the dichotomy between the rights of the children and obligations parents and other persons responsible for their welfare have towards them. The opinions of theorists are divided on this issue, some putting accent on obligations and others on rights. However, the problem is not so clear cut. A balance is needed due to the unique state of children: obviously belonging to human species qualifies them for the role of rights bearers and yet not fully developed which requires aid in everyday life. For O'Neill 'children's fundamental rights are best grounded by embedding them in a wider account of fundamental obligations, which can also be used to justify positive rights and obligations.'[36] By giving preference to either rights or obligations, an important dimension is missed in trying to find the best solution for organising care of the children in society. Domestic and international legal frameworks provide guidelines for protection and welfare of children but the most important framework within which a child's rights are developed is the family and the relationship between the parents or guardians and children. For Van Bueren 'the implementation of the principle of equality within the family will be retarded unless both the gender and age dimensions of equality are fully explored and applied, both in relation to the content of international law and to the methods of implementation.'[37] Therefore, achieving the full potential of this relationship is crucial to the fulfilment of child's rights and welfare.

O'Neill and other theorists make a distinction between two types of rights in trying to establish those that apply to children. The principle used most often is based on the ability to claim rights which seems the obvious one. However, there are inconsistencies with this line of thinking. First, it is an adult perspective which would exclude a great number of very young children, who 'do not always have the requisite capacities to claim rights',[38] but also other groups of people who, for many reasons are not able to claim rights in an obvious and usual manner including disabled people. Alston and Parker stress that 'where a child lacks the practical capacity to make a claim then it can

36 O O'Neill 'Children's rights and children's lives' in P Alston *et al* (n 31 above).
37 G Van Bueren 'The international protection of family members' rights as the 21st century approaches' (1995) 17 *Human Rights Quarterly* 740.
38 TD Campbell 'The rights of the minor: as person, as child, as juvenile, as future adult' in P Alston *et al* (n 31 above).

be made for her or him, but only on the basis of what the child would plausibly have claimed had she or he been capable.'[39] Having rights does not only depend on our ability to claim them but also on others' respect for them. In case of children until they are able to claim for themselves, the respect of parents and others is crucial. As O'Neill states:[40]

> Unless children receive both physical care and adequate socialisation, they will not survive; if they merely survive they may not become competent agents: without education and instruction appropriate to their society they will lack capacities to act that are needed to function in the specific contexts available to them.

Second, alongside respect, adults need to teach children about their rights and obligations within community. This way when fully grown they will have better understanding of the idea of their own and others' rights. Here, one must remember that rules of behaviour within communities are decided by adults, and children, even today, have little say in important social and political matters. It has always been assumed that children have no capacity to reasonably deal with these issues regardless of age. The self-implying question is: What if we stop assuming that this is true and try to spend more time listening to children's concerns and educating them about making decisions? It would ultimately mean taking time to do this and allowing for mistakes as at times they would make choices that adults might consider not in their best interests.

However, for fairness sake, it must be noted that:[41]

> Adults are not skilled decision-makers but since *they* are not excluded from making decisions on this ground, it is important to avoid double standards. A brief scan of modern history reveals a catalogue of adult blunders and the extent of human fallibility. War, inequality, famine, the burning of witches, nuclear weapons, apartheid and environmental pollution are some of the fruits of rational adult deliberation.

It certainly is not fair to deny autonomy to individuals on the account of their age especially having in mind the fact that there are big differences between those aged five and those aged thirteen for example. The law classifies them both as children and therefore incapable of making decision and participating in social and political processes and yet there are significant differences in their mental and physical development. Even a five-year-old is capable of making reasonable decisions to a certain extent and should be given space to do this on a daily basis as only through practice and making mistakes under supervision of parents and teachers can they develop these capacities to their full potential.

39 Alston, Philip and Parker, Stephen. 'Introduction' in P Alston *et al* (n 31 above) 9.
40 O O'Neill 'Children's Rights and Children's Lives' in P Alston *et al* (n 31 above) 34.
41 B Franklin 'Children's Rights and Media Wrongs' in B Franklin (n 35 above) 24.

3 Cultural diversity and children's rights

Culture is always connected with tradition and family. The obvious association is that of comfort and the protective layer of an individual, while the state is more a source of official or legal support. As I have already mentioned, no child can be considered without taking into account the influence of its immediate social circle. According to An-Na'im this is where its personality is formed together with the ties to traditions, positive and negative, and it is also the dimension that defines child's prospects in life:[42] For example, A major Arab League study of the basic needs of the child in the Arab world, by Ismail Sabri Abdalla, is premised on the view that a child is born into an economic, social and cultural environment which determines to a great extent his or her capabilities at the time of birth. These capabilities develop subsequently in accordance with the same determinants.

For Bar-Tal communities we belong to function by 'providing a meaningful and comprehensible picture of the societal world' we live in. [43] However, the cultural protective layer often includes practices that do not fulfil basic requirements for the respect of human dignity. Unfortunately, governments of many countries who have ratified the CRC in their attempt to be seen as caring for children, often use tradition as an excuse for not complying with some articles of the convention. Nevertheless, Alston points out that 'footbinding in pre-World War II China, child slavery or bondage, and female infanticide in various societies are examples of practices in relation to which culture-based arguments have already had to yield.'[44] It gives hope to the possibility eradicating in future other degrading and dangerous traditions including FGM and non-education of girls, which continue to disable many children all over the world.

Patriarchal social habits have had a huge influence on the treatment of girls and women in many societies. With the development of modern democratic states equality became one of the building blocks of a social system including that of the two sexes. Yet, despite theoretical support, patriarchy still remains deeply ingrained into social interaction thus continuing the custom of subordinating girls and women due to various 'exclusionary rules and practices ... as well as marriage and property law and legalised male violence against women.'[45] Women began calling upon the principle of equality in order to gain political and civil recognition in 1700's and

42 A An-Na'Im 'Cultural Transformation and Normative Consensus on the Best Interest of the Child' in P Alston (n 3 above) 71.
43 D Bar-Tal *Shared beliefs in society.* (2000) 5.
44 P Alston (n 3 above) 20.
45 S Rowbotham 'Introduction' in M Tredfall. (ed) *Mapping the Women's Movement* (1996) 20.

paved the way for new generations and many other gender related issues. Mill was one of the first to stand up for women's rights: 'The principle which regulates the existing social relations between the two sexes — legal subordination of one sex to the other — is wrong in itself, and one of chief hindrances to human improvement.'[46] The common belief was and still prevails in many societies today that women are naturally weaker both physically and mentally than men which supports the customary behavioural habits of treating women as less deserving of respect or lacking in humanity in comparison to men. Alongside Mill, Wollstonecraft was one of the most prominent writers fighting for women's equality. She claimed that women were not *naturally* weaker than men, but their physical weakness was a *product* of upbringing habits. While boys were encouraged to play freely and develop, girls' 'limbs and faculties are cramped with worse than Chinese bands.'[47] The work of Mill and Wollstonecraft colliding with the first waves of industrialisation and its need for cheap labour provided a perfect foundation for the realisation of women's recognition outside home for the first time. Women gained a status almost equal to that of men in public domain in developed states. Still, the situation within domestic domain remained the same, leaving women in not such a favourable position. Patriarchy still hinders democracy and in its worst guises leaves space for mistreatment of girls and women in many cultures today supporting the maintenance of traditional practices that are harmful to individual's mental and physical development.

Due to the differences between cultures and also diversity within any one culture, the implementation of the CRC has been partial, to say the least. Another factor adding to the problem of implementation is possibly Article 3 of the Convention which states that: 'In all actions concerning children, whether undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.'[48] It implies licence to act on behalf of a child and concerns obligations of parties acting on behalf of a child rather than the rights of the child. Necessary as it is to define this fact, Article 3 is probably where the Convention leaves space for all excuses made for mistreatment of children in the name of tradition. For example, according to Harris-Short many reasons are given for non-compliance with certain articles of CRC concerning FGM, but they 'all, however, share one common root: that FGM is deeply entrenched within the socio-cultural life of the communities in question and the state's willingness to accept that FGM is 'prejudicial to the health and welfare of the child' is simply not

46 JS Mill 'Subjection of Women' in *On Liberty and Other Essays* (1991) 471.
47 M Wollstonecraft *A Vindication of the rights of woman* (1975) 129.
48 UN Convention on the Rights of the Child (1991) Article 3.

shared by the populace at large.'[49] Keeping in mind the fact that a large number of harmful practices take place on the African Continent it is easy to understand why according to Van Bueren the African Charter on the Rights and Welfare of the Child (African Children's Charter) is 'the most progressive of the treaties on the rights of the child.'[50] It is due to such high number of practices detrimental to mental and physical development of a high number of children (for example, approximately 2 million girls every year undergo FGM) that a highly developed treaty is required. Unfortunately, as far reaching and advanced as ACRWC is, it took ten years for it to enter into force and 'to date only 28 OAU/AU Member States have ratified it' with 25 states yet to follow suit. [51] For Steiner and Alston it is 'the least effective, the most distinctive and the most controversial of the three established regional treaties' owing to the gap between its advanced contents and the lack of readiness of populace at large to accept it.[52] A lot of promise, good will and intentions went into its construction, but sadly due to unfavourable economic, social and cultural circumstances of the region they cannot still be followed through with actions of matching standards. Nevertheless, on the more positive note, the advance of this document mirrors the development of the idea of children's rights itself and gives hope to the implementation of theory in practice in future. Realising the severity of problems children on the African Continent are facing throughout their lifetimes including 'the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger' and being able to conduct a treaty that aims to be applicable to these problems is a first step towards improving the overall status of a child in this region.[53] The way forward in bringing culturally different conceptions of human dignity in line with universal human rights theory is through free information flow between states and cultures, accepting our differences but also trying to give more space for individual choices.

3.1 Definitions and the status of culture

It is hard to imagine a human being living a life of utter isolation. A great majority of us live in a community of some sort which presents a source of knowledge, safety and comfort. According to Kymlicka 'from childhood on, we become aware that we are already participants in certain forms of life (familial, religious, sexual,

49 Harris-Short (n 20 above) 141.
50 G Van Bueren (n 13 above) 402.
51 Http://www.uwr.ac.uk/law/research/acr/report.htm (accessed 27 September 2004).
52 HJ Steiner & P Alston *International human rights in context - law, politics, morals* (2000) 920.
53 Http://www.uwr.ac.uk/law/research/acr/report.htm accessed on 27 September 2004.

educational etc.)' but also that 'there are other ways of life which offer alternative models and roles that we may, in time, come to endorse.'[54] The people in one's community and their habits and forms of interaction present a social foundation within which the individual develops its mental and physical abilities and gains knowledge about its immediate and distant surroundings necessary for her to confidently fulfill various tasks in life. Furthermore, this passed on knowledge helps one give sense to their life, their actions and the world around them. The total sum of the communal knowledge, habits and traditions of living, forms of interaction and shared beliefs tend to be considered the culture of one community.

The right to culture is a controversial one. It is clearly stated in the Article 27 of the Universal Declaration from 1948 that 'everyone has the right freely to participate in the cultural life of the community'[55] which is reconfirmed in the Article 15 of CESCR from 1966 stating that everyone has a right 'to take part in cultural life.'[56] Yet, there is still no agreement among analysts today on what culture is or whether the right to culture should carry the same importance as civil and political rights do. Reading the above mentioned documents one does not come across a clear definition of culture but gets various statements with different implications as to what culture is considered to be.

Rodolfo Stavenhagen classifies the many views of culture into three groups. According to him one of these views 'identifies culture with the accumulated material heritage of human kind as a whole or of particular groups.'[57] In addition, many would include cultural as well as economic, social and political development within this theory. One problem with this line of thinking is that there really is no consensus on what 'cultural development' is and Stavenhagen's concern is based on the fact that 'the general statements about the right to cultural development … too often hide the fact that there are underlying cultural conflicts in our societies, just as there are social, political, and economic conflicts.'[58] Referring to culture from this perspective it would be important to understand the right to culture as 'the right to one's own culture' and not culture in general terms.

A second conception of culture interprets it as 'the process of artistic and scientific creation.'[59] This would mean that the right to culture allows for individuals to openly express themselves in creating *culture* and also free access to it, like for example, museums and

54 W Kymlicka (n 21 above) 165.
55 www.unhchr.ch/udhr/ (accessed on 5 October 2004).
56 www.unhchr.ch/html/menu3/b/a_cescr.htn. (accessed on 9 September 2004).
57 R Stavenhagen 'Cultural Rights and Universal Human Rights' in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (1995) 65.
58 As above.
59 As above.

libraries. It is an important notion of the right to culture as it ensures the space for artists, writers and performers to contribute to the cultural changes and overall conscience of human kind. A third view of culture is the anthropological one considering culture to be 'the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups.'[60] From this perspective culture also includes a whole system of values and symbols used by members of a social group which help them give meaning to social interaction and activities within that group and it is this conception of culture I shall be referring to in this thesis.

There are many different cultures in the world today. The boundaries between them are not clear nor are the rules of belonging. They are prone to change due to changes in individuals' perceptions of their culture. The right to culture today could be understood as the right of every group to 'maintain and develop its own specific culture' regardless of the activities this might include and their relationship to other groups. Since non-discrimination is the preferred principle of the universal human rights theory it leaves space for maintaining questionable cultural activities that often break the first rule of human rights theory, namely human dignity. This is why Alston and Parker claim that 'the relationship between human rights norms and their counterparts at the domestic level is an important one' since the domestic cultural domain should be the starting point of every inquiry aiming to achieve universal international standards. [61]

As I have already mentioned majority of us live in a collective and as we grow we learn about the world around us from this close group of people. What we learn is much influenced by the habits and traditions existing within this immediate circle of interaction and according to Mill 'it would be absurd to pretend that people ought to live as if nothing whatever had been known in the world before they came into it.'[62] In other words, none of us start with a clean slate but rather get a head start in comparison to previous generations having their accumulated knowledge and experience as a springboard in life. This provides individuals with a source of confidence as they can find most answers to life's questions as and when they appear within their community instead of having to spend time searching for the simplest facts. Kymlicka's summary of the significance of culture is that:[63]

> People *are* bound, in an important way, to their own cultural community. We can't just transplant people from one culture to another, even if we provide the opportunity to learn the other language and culture. Someone's upbringing isn't something that can just be erased; it is, and

60 R Stavenhagen (n 57 above) 66.
61 P Alston (n 31 above).
62 J S Mill (n 46 above) 64.
63 W Kymlicka (n 21 above) 175.

> will remain, a constitutive part of who that person is. Cultural membership affects our very sense of personal identity and capacity.

In a way, one's own culture represents safety and comfort of familiarity. One feels confident and secure within the boundaries of a known world and interacting with familiar people who share the same or similar beliefs and outlook on life. As Bar-Tal explains: 'Defining themselves as group members, individuals adopt these beliefs as part of their social identity. Sharing these beliefs provides group members with validated information about reality.'[64] It could be said that culture influences an individual in many ways providing them with knowledge necessary to carry out tasks in life, but also to express their beliefs and fulfill these tasks in a familiar environment among people who understand and support one's beliefs and a way of life.

The most important and used medium for passing on culture and tradition is language. In words of Kymlicka: 'Whether or not a course of action has any significance for us depends on whether, or how, our language renders vivid to us the point of that activity. And the way in which language renders vivid these activities is a matter of our cultural heritage.'[65] Our cultural heritage helps us form our private and social identity but also enables us to distinguish members of other groups from our own. Even though people differ in many ways, like for example, skin and eye colour or facial features, cultural traits are mostly used by people to differentiate between the groups. According to Van Den Berghe this is due to the fact that kin selection is an important part of human behaviour and cultural criteria 'are far more reliable than physical ones' when assessing kin relatedness which 'must meet the basic requirement of discriminating more reliably *between* groups than *within* groups.'[66] This way a certain level of homogeneity is preserved within any one group strengthening the bonds between its members.

By ensuring that the ways of bonding are maintained people preserve their culture passing it on to the next generations who will also preserve it and possibly change and develop it further. All cultures change over time in line with the readiness of the people to accept new knowledge and in words of Bar-Tal beliefs and tradition will remain as long 'as they at least fulfill their epistemic and identity functions' for people and as long as people believe that their culture and 'societal beliefs illuminate the society in a valid way and characterise that society.'[67] Some changes take longer to come into effect than others. In order for changes to take place at all majority of any given group has to be ready to accept it, but nonetheless,

64 D Bar-Tal (n 43 above) 5.
65 W Kymlicka (n 21 above) 165.
66 Van Den Berghe, Pierre. 'A Socio-Biological Perspective' in J Hutchinson & A Smith (eds) *Nationalism* (1995) 101.
67 D Bar-Tal (n 43 above) 69.

changes are inevitable. If a culture, tradition or religion is to survive it needs to become flexible because 'as the individual's situation changes, so will the group identification; or at least, the many identities and discourses to which the individual adheres will vary in importance for that individual in successive periods and different situation.'[68] This is an ongoing and process influenced by various factors such as 'technological development, economic change, development of new ideas, or political development'[69] due to both 'external influence as well as internal demands.'[70] It could be concluded that people and culture are dependant on each other, influencing one another in many ways. Culture exists because of human interaction between themselves and with the surrounding world and the knowledge gained through these interactions people use to understand each other and the world around them with confidence.

3.2 Harmful traditions and children

> Indeed, even the most confirmed relativist scholars are repulsed at practices that are highly coercive and abusive and accept that at least some human rights values are absolute. This is no more that a recognition, grudging or not, that suffering and abuse are not authentic values and cannot be justified in the name of cultural relativism. In short, it is wrong to say that all cultures are equally valid; some cultures contain evil elements which have no rational, intuitive, or empirical claim to moral equivalence with nonabusive cultures. [71]

The controversy over the right to culture, among other reasons, stems from the maintenance of many harmful cultural traditions that have been practised for centuries. Practices such as male and female circumcision, infanticide, burning of widows in India, forced feeding, non-education of girls and children of lower castes, arranged and forced marriages have all been defended in the name of tradition, religion and group bonding as group rights to culture and this sort of 'abuse can be found at all levels and in all forms of social groupings.'[72] Most of them are detrimental to the individual's mental and physical health minimising one's prospects in life. These traditions are unwritten compulsory rules of behaviour and participation deriving authority from 'either the people's religious beliefs or their communal practice from time immemorial'[73] and as such are not considered to

68 A Smith *National identity* (1991).
69 D Bar-Tal (n 43 above) 69.
70 A An-Na'Im 'Cultural Transformation and Normative Consensus on the Best Interest of the Child' in P Alston (n 3 above) 67.
71 J J Shestack (n 19 above) 232.
72 http:/meltingpot.fortunecity.com/Lebanon/254/eca4.htm. (accessed on 9 September 2004) 4.
73 A An-Na'Im 'State Responsibility Under International Human Rights Law to Change Religious and Customary Law' in HJ Steiner & P Alston (n 52 above) 426.

be harmful or dangerous or if 'the harm and disadvantage is recognised, it is justified or compensated for in the wider cultural context.'[74] It must be stressed that even though some cultural practices are considered harmful by other groups all cultures maintain traditions that are abusive to children but go unnoticed as 'they impose their own meanings on apparently sexual behaviour and can make sexual acts sexless'. Levesque argues that in the West 'girls' early sexual experiences are marked more by trauma than by enjoyment' and also that 'girls and boys are sexually harassed in the full view of adults, yet adults simply ignore or excuse the abusive behaviour.'[75] It is difficult distinguishing from *good* culture and *bad* culture when some of the traditions and behaviours have been around for centuries and have always been considered as *normal*.

One interesting comparison is that between the perceptions most people have about male and female circumcision and tattoos and piercings. Considering the actions and end results they are very similar in that they all cause a certain amount of discomfort or pain and leave a permanent physical mark on the individual. And yet the way people perceive them depends fully on their cultural and social approval: most people associate tattoos and modern piercings with the notion of negative individualism and negative attention seeking. FGM and male circumcision are mostly left unquestioned even by cultures that do not practice them only because they are themselves considered culture. Piercings provide an even more intriguing element to this argument as apart from the ever more popular kinds being displayed in the streets of modern western cities 'in many cultures, piercing is part of religious tradition, while in others, it is non-religious tradition' which gives them the needed cultural coating in order to be accepted by general public.[76] On the other hand, 'in the United Kingdom decorative piercings are legal but those done in a sexual context are not' because they are considered violent and cruel. One should rightfully question the difference between genital piercings and female and male circumcision. Again, their effect on one's body is very similar but the difference is in their cultural acceptance posing a further question of cultural or group membership and also the age of persons undergoing these practices. In western countries due to legal requirements tattooing and piercing of persons under 18 is prohibited which means that those choosing to have tattoos and piercings are fully consenting adults. With both male and female circumcision it is usually performed on very young children who either don't know what is about to happen to them or why or even if they are told it is questionable how much they actually

74 E Brems 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse' (1997) 19 *Human Rights Quarterly* 148.
75 R J R Levesque (n 15 above) 2.
76 encyclopedia.thefreedirectory.com (accessed 6 October 2004).

understand what circumcision involves. Once permanently marked by circumcision a person can enjoy the benefits of her or his group membership including protection, passed on knowledge and so on. But no one can predict how much this cultural or group membership will matter to the individual later in life which makes any permanent cultural marks contradictory to the Article 14 of the CRC on the child's freedom of religion and Article 18 of the Universal Declaration also on freedom of religion which, in addition, states that 'this right includes freedom to change religion or belief.'[77] Once circumcised a boy or a girl deciding to follow Christian or any other faith later in life will still bear the mark of their imposed religious origins. This will possibly lead to, if not complete exclusion from their new community, than some form of pressure and uneasiness will be present in a whole range of new relationships causing anxiety, unhappiness and depression to the individual. More importantly, it is doubtful that such a person will ever feel they fully belong to their new community.

Tattooing and piercing is legally defined in most western countries bringing it in line with democratic notions of individual autonomy and freedom of choice. Whether tradition or not, it gives the priority to the individual in controlling her own life and it could be said that the development of human rights philosophy with the accent on individual human dignity has imposed questions on culture and the validity and worth of its practices for individuals.

Although various harmful practices are present in many different cultures across the world they all have certain features in common. In most cases they are gender and age specific involving underage persons of female sex as objects of these practices. The girl-child is discriminated against throughout her life:[78]

> In many societies preference for sons is a powerful tradition. This preference manifests itself in neglect, deprivation, and discriminatory treatment of daughters to the detriment of their physical and mental health. Male preference adversely affects females through inequitable allocation of food, education, and health care, a disparity frequently reinforced throughout life.

This course of thinking is an outcome of patriarchal social habits that have been dominating the scene of social interaction for centuries and are present today even in the western democratic countries. In the extreme cases of the harmful practices they are used and defended as necessary to control women and mould and prepare them for womanhood and the only tasks they are considered fit to fulfill: those of a mother and wife. Recognising the dangers of practices which in the case of FGM (considered to be the most

77 www.unhchr.ch/udhr/ (accessed 5 October 2004).
78 http://www.advocatesforyouth.org/publications/iag/harmprac.htm (accessed 23 September 2004).

'barbaric torture'[79] by many) for example include the immediate problems such as 'haemorrhage, shock, infections, damage to the girl's genitalia, fractured bones due to heavy pressure applied to the struggling girl and death' but also problems later in life due to severe scaring and 'abnormally small opening left for the passage of urine' causing reoccurring infections and complications during labour, many proposals have been made on how to proceed with eradicating harmful traditions. [80]

They have been included into various human rights documents as dangerous and degrading but this has not had the desired results so far as FGM affects 'up to 18 million girls and, although the mutilation is usually less severe, millions more boys' which as well as the physical consequences influences their mental development. [81] Most of the time the girls education comes to an end after they have undergone FGM as this marks their 'initiation into womanhood' and they stay at home until they are married thus never 'reaching their full intellectual and employment potential.'[82] These kinds of practices are still present even though the Universal Declaration under Article 5 prohibits 'torture and cruel, inhuman, or degrading treatment' which the CRC reconfirms and reinforces under Article 24 by stating that the governments should 'take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.'[83] One of the obstacles might be in the wording of the human rights documents as they tend to contradict themselves in some parts creating space for different interpretations of their contents. For example, CESCR affirms that each individual has 'duties to other individuals and to the community to which it belongs'. This statement in combination with the right to culture taken from the perspective of a corporate right where a group is viewed as the primary right-holder, can be used to justify harmful practices as necessary in keeping the tradition and beliefs alive within the community. Stressing the duties of one to their community gives the group the deciding power thus lacking the universal aspect and taking away the individuals right to choice and self-determination.

I would like to stress that the problem does not lie in the actual practices or the group rights. The problem is in the fact that they are imposed on an individual (in most cases the victims are the most vulnerable members of society) by the group and in most cases without one's consent or understanding of what is being done to them or why. Jones asks a very important question: 'Suppose, for example,

79 E Brems (n 4 above) 148.
80 http:/meltingpot.fortunecity.com/Lebanon/254/eca4.htm (accessed 3 September 2004) 34.
81 R J R Levesque (n 15 above) 2.
82 http:/meltingpot.fortunecity.com/Lebanon/254/eca4.htm (accessed on 3 September 2004).
83 The Convention on the Rights of the Child. (1991) Article 24.

that within the well-established and well-defined cultural group some individuals develop a wish to live in ways that depart from, and are at odds with, the group's tradition. Should they be free to break from the group's traditional pattern of life?'[84]

The importance of giving the upper hand to the individual even when group rights are in question can be derived from the fact that the individual is a real entity. It is a real being with clear and defined borders able to think and feel. A group, at its best, is a composite of a number of individuals. It is a construct without definite border, unable to think or feel as one. The actions and decisions within the group are a product of joint efforts of individuals who are its members or, more often, of the few on top of the societal hierarchy. These actions and decisions influence and shape the lives of group members and although in the case of harmful traditions the negative influence outweighs the positive it has been almost impossible to eradicate them. What it requires is 'the cooperation and understanding of community leaders, policy makers, and the people who have experienced or witnessed hardships these practices cause.' Furthermore, what's critical is 'increasing public awareness of the negative consequences while changing societal norms and enforcing laws condemning these practices.'[85] The rest of the answer lies in the perspective from which we view group rights. If the right to culture is a collective right where an individual is the primary right-holder, than each person should be able to choose what parts of their tradition they want to follow and when it comes to controversial practices they should be a matter of personal choice once a person is of age and able to fully grasp what embracing this side of tradition involves.

4 Children's rights today

As already stressed, childhood is a socially constructed idea which serves the process of classification of people into children and adults, immediately underlying differences in mental and physical development of individuals, with children considered to be the dependent group incapable of fully and autonomously taking care of themselves, and adults enjoying the status of independent right-holders able to provide for themselves. This notion of children has made it possible for adults to maintain treating children as either property items or at its best not equal in mental and physical capacities to those considered to be adults and therefore rightfully subordinated. However, with the development of the idea of human

84 P Jones 'Human Rights, Group Rights and People's Rights' (1999) 21 *Human Rights Quarterly* 92.

85 http://www.advocatesforyouth.org/publications/iag/harmpract.htm (accessed 20 August 2004).

rights these views have shifted in some societies and brought changes in the status of children at home and in public domain. For Franklin this meant, among other things, that:[86]

> The modern conception of childhood, which in Europe dates from the sixteenth century and stresses the innocence, frailty and dependence of children, forcefully ejected children from the worlds of work, sexuality and politics – in which previously they were active participants – and designated the classroom as the major focus for their lives.

Although it could be said that this had positive effect on the status of a child it was also a product of the need to organise public and home life differently and still only in favour of parents and other adults responsible for the welfare of children. The participation of children in public life and decision making processes, even those that immediately concern them, is still a matter of dispute.

Even western countries often maintain traditions and legal habits that are not in line with development of philosophy of children's rights and provisions of the CRC. United Kingdom, for example, according to Hendrick has never quite distinguished clearly between 'children victims of abuse and children villains'. He reminds that in 1927 Departmental Committee on Juvenile Offenders put forward recommendations which were 'enacted in the 1933 Children and Young Persons Act' based on the statement that 'there was little or no difference in character and needs between the neglected and the delinquent child.'[87]

Keeping in mind that a family has been considered the basic unit of society and children subordinated to their parents it is easy to see why children's rights were one of the last groups of human rights to develop. The family circle has become more prone to the outside influence and the fact that 'one cannot own what is itself self-owning and in as much as a child is, or at least becomes, self-owning it cannot be owned by its parents'[88] is slowly becoming accepted in both private and public domain.

CRC was a result of but is also providing significant support to the development of children's rights theory. It covers a whole range of issues and incorporates all five sets of rights which as positive as it is still causes disputes and many reservations upon its ratification. For example, United States, even though present during the drafting of the Convention have still not ratified it. Reasons given are various and opposition great:

86 B Franklin 'Children's Rights and Media Wrongs' in B Franklin (ed) *The New Handbook of Children's Rights: Comparative Policy and Practice* (2003) 17.
87 H Hendrick *Child welfare*. (2003) 159.
88 D Archard & C Macleod 'Introduction' in *The Moral and Political Status of Children* (2002) 3.

> Websites, and videotapes published by opposition organisations paint a picture of the CRC as a radical and dangerous document that will guarantee unlimited government interference in family life. The CRC has been variously described as 'the most dangerous attack on parents' rights in the history of the United States, 'the ultimate program to annihilate parental authority', and a 'tool for perverts.'[89]

So it is not only undeveloped Rest that oppose new ideas relating to human rights theory but also highly developed western states who are usually pursuing other states to ratify international human rights documents. As all new ideas, children's rights are causing disputes but also making people rethink the status of a child in society and its consequences, not only from a utilitarian perspective but also for children as autonomous individuals. The importance of the CRC is therefore manifold:[90]

> Although it is important to reiterate that the Convention rarely dictates clear-cut answers to pressing children's issues, the treaty does express basic values about the treatment of children, their protection, and their participation in society. The vision is reflected in its agreed-upon guidelines, major principles, and reverberating themes. These developments are truly visionary. The rights enumerated in the Convention and the principles used to guide their interpretations urge us to rethink fundamentally ingrained ideologies of childhood, families, rights, communities, and international law.

According to Levesque this fundamental vision is respect for human dignity. What its limits are is not easily determined as different situations people find themselves in require different provisions for maintaining their feelings of self-worth. For example, in a time of war one cannot expect levels of mutual respect to be the same as in a time of peace. However, it is necessary to note that even in times of displays of the most inhumane behaviour basic guidelines for a fair fight can and should be established.

In order to ensure and monitor implementation of human rights documents on domestic level various monitoring systems are created. The Committee on the Rights of the Child is the only monitoring body responsible for overseeing implementation process of the Convention in the states who have ratified it. It consists of ten members who work a term of four years. State parties to the Convention are obliged to hand in the first report two years after ratification and afterwards every five years. According to Van Bueren 'The reports which State Parties are under a duty to make widely available to the public in their own states should provide the Committee with sufficient information on how the Convention is being implemented domestically.'[91] The

89 S Kilbourne 'Placing the Convention on the Rights of the Child in an American Context' in H J Steiner & P Alston (n 52 above) 519.
90 RJR Levesque (n 15 above) 23.
91 G Van Bueren (n 13 above) 389.

Committee being the only monitoring body is one of the weaknesses of the Convention due to the fact that such high number of states parties requires a lot of attention and one cannot forget that the idea and system of children's rights is a relatively young one. Nevertheless, it must be noted that there are several other organisations and NGOs providing support in monitoring implementation process and offering recommendations for improvements, UNICEF being the most significant one.

Regional human rights systems provide an additional source of back up, each developing the system of children's rights within them. In a way they are more competent to deal with issues on their own territory as they are more culture sensitive. 'The European Parliament has called upon all European states which have not yet done so to become party to the Convention on the Rights of the Child', the African system of human and children's rights is developing fast and American states have established Inter-American Children's Institute in 1972.[92] Another dimension is offered to the CRC by the drafting of two optional protocols, both opened for signature, accession and ratification in May 2000. They are an extension to the Convention's existing provisions incorporating new issues thus bringing it in line with the development of the idea and philosophy of children's rights. The problems they relate to are not necessarily new, but the realisation that things like child prostitution, child soldiers, child labour are breaches of children's rights is, requiring a more detailed treaty in order to provide optimal support to the Convention and affected children. Another international document worthy of mention is The Cairo Declaration on Human Rights in Islam from 1990. Its significance lies in the attempt to introduce the idea of universal human rights into a religious framework. On one hand the declaration only restates the obligations of the Shari'a. In its reference to children no rights are mentioned apart those 'parents are entitled to from their children',[93] but it is interesting to note that it is the only international document offering protection to an unborn child, stating in Article 7(a) that 'both the fetus and the mother must be safeguarded and accorded special care.'[94] However incompatible the two doctrines may appear, it is a way of starting a process of transition from beliefs and traditions to universal values.

Adding to the development of children's rights philosophy is the work of many theorists setting new questions and new ways of looking at problems related to the subject. For example, Levesque looks at traditional practices such as FGM, male circumcision, but also some concerning western states like the United States and their practice of

92 G Van Bueren (n 13 above) 403.
93 www.humanrights.harvard.edu/resources/regionaldocs/cairo.dec.html. (accessed on 7 August 2004) Article 7 c.
94 As above, article 7 a.

'high school students in the 1980s regularly taking group showers after physical education classes' from a new angle: that of child abuse, and argues that these are all violations of children's rights.[95] This kind of work aids raising awareness among public at large and slowly attitudes are shifting. Many practices and views on the status of the child within home and society have changed over time but still a lot needs to be done in order to provide the best we can for children and also to fully understand their needs.

4.1 Caught in the society web: The relationship between children, society and state

In addition to having links to its culture, a child is also a part of an intricate web of society. One of the most important things one has to remember is that childhood itself is 'a social construction, a man-made phenomenon: it has not always existed ... Those in authority determine who is a child.'[96] There are several ways in which childhood is determined: legal, religious, social. They all serve different purposes clashing with each other on occasions and supporting each other at other times. Today's 'the best interest of the child' principle that is becoming more and more accepted is a big step from previous legal guidelines regarding children. 'Early English common law recognised the superior parental right of a man in a family unit created within marriage, and was more concerned with safeguarding his parental rights than the interests of children.'[97] The changes towards a legal approach more sensitive to children and their wishes and interests was apparent by the beginning of the last century having also influenced many indigenous systems. However, it has taken a long time to come to realisations of today regarding a child's status in society. For example, neither the 1924 nor the 1959 Declaration on the Rights of the Child included a definition of a child or the period of childhood. CRC has tried to move one step further towards a universally accepted idea of a child setting the age of majority at 18. However, this is not clearly stated nor followed throughout the Convention which leaves it up to the domestic legislation to have the deciding power. All differences aside, one similarity most states share is that in general terms a person is considered to have reached adulthood at the age of 18 in 'an overwhelming majority of 109 states.'[98] Apart from the family, there are other actors involved in the welfare of children, including education system and the state providing official or legal support to the child and to each other. All these parties, in theory, have the best

95 R J R Levesque (n 15 above) 4.
96 M Freeman (n 31 above) 56.
97 S Goonesekere 'The Best Interests of the Child: A South Asian Perspective' in P Alston (n 3 above) 119.
98 I Cohn & G Goodwin-Gill *Child soldiers* (1994) 7.

interest of the child at heart, and in a textbook scenario they all work in harmony, supporting each other in order to provide optimal conditions for the child's development. In words of Eekelaar, 'in the case of young minors, of course, their incomplete personal development demands that decisions be taken on their behalf.'[99]

Obligations of the state towards protecting human rights include implementation and following of the international documents and laws on a national level and they concern both individual and community. It also protects its citizens abroad to a certain extent. The state should ensure realisation of main principles of human rights freedom, equality and solidarity, which are foundations for the five groups of rights defined in ICCPR and CESCR both proposed in 1966. Although some states have shown preference for one group of rights it has been confirmed in Vienna Declaration from 1993 that 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.'[100] The dispute in the area of children's rights has gone along the lines of defining the level of political rights children have or 'a level of involvement of children which allows them to truly influence processes, to have an impact on decision-making.' On the other hand, even though the role of the state in the welfare of the child is important, it is still considered that the family is the primary unit within which a child should develop. According to CRC the state is obliged to protect the rights of children just as well as the rights of adults.

However, in practice, all parties involved in welfare of children often have different views on what the best interest of the child is. Traditionally, family is a basic unit of a society and as such has been perceived as somewhat private and out of bounds of state interference. Therefore, 'it is somewhat ironic that… there still is some confusion as to precisely the nature of the institution' and in agreement with Van Bueren 'family is still a concept in transition.'[101] The right to privacy often didn't reach beyond the doorstep of a family home thus rarely applying to individuals, almost never to children. For Cass the right to privacy 'is no more than a protection of patriarchal rights to maintain relations of inequality and dominance under the guise of family inviolability.'[102] Over the last few decades, however, due to a number of great changes including those relating to family structures and gradual acceptance of single

99 J Eekelaar 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' in P Alston (ed) *The Best Interests of the Child* (1994) 44.

100 www.unhchr.ch/huridocda/huridoca.nsf. (accessed 7 August 2004).

101 G Van Bueren 'The International Protection of Family Members' Rights as the 21st Century Approaches' (1995) 17 *Human Rights Quarterly* 733.

102 B Cass 'The Limits of the Public/Private Dichotomy: A Comment on Coady & Coady' in P Alston *et al* (n 31 above) 143.

parent units and homosexual ones, especially in the developed countries of the West, the state has become a prominent participant and decision-maker in the upbringing of children.

Other factors include developing conscience of the child's status as an independent individual and its rights, but also the obvious fact that children often need protection from the members of their family (sometimes because of adults' incompetence to understand the needs of a child, but also because of neglect or/and abuse of the child). According to Brighouse parents have a duty to provide a 'high level of care'. However, 'If parents fall down the state must step in: it is, again, guarantor of last resort.'[103] With the recognition of the CRC many societies were faced with a new idea: children as possessors of rights. As Geraldine Van Bueren explains, even though this is seen as a cause of conflict within the family:[104]

> It is not, however, the possession of rights which inevitably cause conflicts of interest, although on occasion this may happen. It is rather that until individuals are acknowledged as possessors of rights they may be forced to suffer intolerable treatment because of the absence of a framework within which to mount a challenge.

Giving children legal status has meant that now apart from them being independent right-holders, the state has to balance 'parents' rights against children's rights'. It has been argued that in most cases the states still prefer to favour the views of parents even though on paper children's views should be given due weight in matters directly concerning them.

Examples of old habits and traditions of treating children in certain ways prevailing over new legal frameworks are many:[105]

> For most Kenyan children, violence is a regular part of the school experience. Teachers use caning, slapping, and whipping to maintain classroom discipline and to punish children for poor academic performance. The infliction of corporal punishment is routine, arbitrary, and often brutal. Bruises and cuts are regular by products of school punishments, and more severe injuries (broken bones, knocked-out teeth, internal bleeding) are not infrequent. At times beatings by teachers leave children permanently disfigured, disabled or dead.

Only the head teacher is permitted to administer corporal punishment and there are strict rules on the procedure. Although against domestic law this tradition is still maintained. Even developed western countries are not an exception in continuing practices that disregard a child's dignity and autonomy. Examples range from UK and its disregard for child's welfare 'in adoption' process and also 'in

[103] H Brighouse 'What Rights (if Any) do Children Have?' in D Archard & C M Macleod (n 25 above) 34.
[104] G Van Bueren (n 13 above) xix.
[105] 'Human Rights Watch, Spare the Child: Corporal Punishment in Kenyan Schools 1999' in H J Steiner & P Alston (n 52 above) 524.

immigration matters', to the ability of parents to (in cases of attempt to protect children against parental abuse) 'reinforce their opposition to a care order by arguing that it will infringe their rights to family privacy under Article 8(1) of the European Convention.'[106] A change in attitudes can be noticed and it gives hope to the development of a more child orientated and sensitive approach. CRC has had a great influence on the understanding of children's status and has lead the way towards trying to find a balance between children's and parents' rights regarding legal matters.

Education of children about their own and others' human rights, but also all adults involved in their welfare, should play a huge role in the process of their development as well as, according to Alston and Parker 'seeking to balance competing and conflicting rights, and the most appropriate mix of responsibilities to be accorded respectively to the child, the family, the community, and the government.'[107]

It is possible to imagine a system of childcare based on the theory of human and children's rights that involves all actors responsible for their welfare in such a way that provides the best conditions for children's development without too many competing and conflicting views. What needs to be developed is our understanding of the uniqueness of the status of a child and the will to allow more time for considering their wishes and needs.

5 The importance of human rights education[108]

The existing generation is master both of the training and the circumstances of the generation to come; it cannot indeed make them perfectly wise and good, because it is itself so lamentably deficient in goodness and wisdom; and its best efforts are not always, in individual cases its most successful ones; but it is perfectly well able to make the rising generation, as a whole, as good as, and a little better than, itself.

The point of this chapter is fairly simple, but probably the most important statement of this thesis: without respect for children's rights there can be no respect for human rights. This is where the importance of human rights education becomes obvious. I have already explained that the idea of children's rights is derived from the very consensus on what a human being is and what its rights are; respect for one's dignity. One thing that is often forgotten is the very dignity of children leading to misunderstandings over the idea of

[106] M Freeman 'Children's Rights Ten Years after Ratification' in B Franklin (ed) *The New Handbook of Children's Rights: Comparative Policy and Practice* (2002) 98.
[107] P Alston & S Parker *Children, Rights and the Law* (1992) vii.
[108] J S Mill 'On Liberty' in *On Liberty and Other Essays* (1991) 91.

children's rights. Maybe the reason for this is that they cannot articulate their feelings and needs in a language that adults understand. Even when they do, their comments are usually brushed aside as unimportant in comparison to things adults have to deal with. And yet as Noggle states:[109]

> Virtually all reasonable people hold that children are persons, and not, for example, pets or property. Normally, we think of persons as beings who can and should run their own lives, yet children are neither expected nor allowed to run their own lives. We tell them what to eat, when to bathe, where to sleep. We make them attend school and do their homework. We forbid them from hitting their siblings or pulling the dog's tail.

We teach them about everyday things and a lot of the time expect them to understand without much thought about the language we use and whether it is 'child friendly'. We tell them how to behave in certain situations without considering it necessary to explain why this is the correct way to behave. We do it out of habit and because generations before us have done certain things in certain ways, without questioning their value and accuracy. And yet many of us assume that children could not comprehend the idea or the philosophy of human rights and respect for human dignity.

Since adults have the deciding power in all organisational matters of societal life the habit of subordinating children is a difficult one to break. What we fail to acknowledge is that what is important to us is not necessarily important to them. For Campbell it is about 'taking more seriously what children are interested in, or concerned about, rather than the sort of paternalism associated with the best interest rule.'[110] With disrespect and ignorance of children, intentional or not, we often break the first rule of human rights, respect of one's dignity. The self-implying question is: How can adults have a grasp of the notion of human dignity if their dignity was never respected in the early stages of life? The best interest principle unintentionally allows for children to be mistreated and as Parker writes 'there is something contradictory in the statement that a person has a right to have welfare done to them by others.'[111] By not recognising their rights and dignity we teach children that invading one's privacy is the norm and they almost have no option but to repeat the pattern on the next generation.

[109] R Noggle 'Special Agents: Children's Autonomy and Parental Authority' in D Archard & C Macleod (eds) *The Moral and Political Status of Children* (2002) 97.

[110] T D Campbell 'The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult' in P Alston., S Parker & J Seymour (eds) *Children, Rights and the Law* (1992) 7.

[111] S Parker 'The Best Interests of the Child – Principles and Problems' in P Alston (ed) *The Best Interests of the Child* (1994) 41.

As this pattern of disrespect keeps repeating we struggle to define human rights and learn to accept each other with all our differences. Education is the key and our path towards worldwide implementation of mutual respect. Another step in that direction would be starting the implementation with understanding of children and allowing them to be heard, which would mean that adults should step in as the voice of children while aiding their overall development.

As I have pointed out already, a child's immediate community has the biggest influence on him or her in their first stages of life and these influences are not easily discarded of as they are the source of comfort and safety for an individual. Therefore, it is hard if not impossible to break through the learnt pattern of traditional values and teaching adults whose rights were not respected in childhood about universal human rights is sometimes in vain. CRC makes human rights education a state's duty in Article 29 stating that 'states parties agree that the education of the child shall be directed to the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations.'[112] But, this education must take on a very broad perspective: it cannot be limited to human rights in general or basic information we find in daily papers. Only by becoming a part of everyday lives, taking on different guises from a subject at school to simple examples from friends and parents to be followed, respect for human rights can strive to achieve global acceptance.

Children need to understand that respect for one's dignity applies to all ages and all cultures. In addition to obligations stated in CRC Vienna Declaration from 1993 promotes and confirms the importance of 'human rights education, training and public information'[113] and for example, activities taken up by Amnesty International USA 'to help teachers develop a stronger human rights perspective to the established curricula.'[114] are ways of making human rights part of everyday life.

In order to move forward we have to consider children more seriously. It is repeatedly written that children were awarded the status of an individual person in the twentieth century. They were always persons with inborn rights, only that was not realised before, mostly due to social habits of treating them as property items. We cannot award them the rights they already have, but it is our responsibility to hold or carry them for the children until they are capable of claiming them for themselves. Giving them more freedom to actively practice participation in democratic processes and their

[112] The Convention on the Rights of the Child Article 29.
[113] www.unhchr.ch/huridocda/huridoca.nsf. (accessed 7 August 2004).
[114] http://www.amnestyusa.org/education/projects/rightsinsight (accessed 28 September 2004).

knowledge of human rights will equip them better for future. Children's parliaments are an excellent example of such an activity with several countries like the UK already having established and active children's parliaments where children actively and autonomously learn about democratic processes and how to participate. International Youth Parliament organised by Oxfam is supporting 'a network of young leaders in 150 countries to work for positive and lasting change in their communities.'[115] In a way, all we have to do is stop ignoring children's rights and maybe in future, there will not be so much confusion about what human rights are. In words of Parker 'in order to maximise the welfare of a society over time, one should give greater weight to children's welfare.'[116] Although a noble and rightful claim this statement carries in itself a utilitarian concept of children which has become popular especially within the Third Way theory. Hendrick confirms that New Labour's philosophy in the UK 'rarely mentions child welfare as such, much preferring to speak in terms of children as investments, the future, our future, and so on.'[117] Again, we cannot seem to escape claiming them as our possessions, as well-meaning as it might appear in this case. Considering children as a means to a better future is a dangerous notion hampering, yet again, their right to autonomy. And being the ones laying the foundations for the future, aren't adults of today their children's future? In order to have a successful harvest we have to plant good seeds, plant them with care and watch over their growth. It could be said that human rights education needs to cover two sides of the human rights theory if it wants to have effect: first, it needs to include information about the rights themselves. Second, the importance of respecting these rights should be stressed and taught as well, especially when it comes to children. Do we ask them what their visions of a better future include? Instead, by learning to respect them as equal to us in their humanity we will teach them about the foundations of human rights.

6 From beliefs to knowledge: Different approaches to reconciling universality and cultural diversity

The Convention on the Rights of the Child is without doubt the most comprehensive document stating and intending to implement universal children's rights worldwide. It has been ratified by almost all states implying the global concern for children's welfare. It is a first step towards acknowledging and understanding the rights of children. Although many would agree that CRC is universally applicable, it has

115 http://www.iyp.oxfam.org/ (accessed 29 September 2004).
116 S Parker 'The Best Interests of the Child – Principles and Problems' in P Alston (ed) *The Best Interests of the Child* (1994) 41.
117 H Hendrick *Child welfare* (2003) 205.

been difficult to realise its theory globally. Cultural diversity of our world, but also diversity within any one culture have been the main barrier to this process. According to An-Na'Im one of the reasons for such strong opposition to the theory of human rights is that[118]

> This common perception of authority of religious and customary laws is founded on a complex web of economic, social and political factors, and tends to reflect existing power relations within the community. The perception is also maintained and promoted through processes of individual socialisation and communal identification.

International human rights documents including CRC are often seen as a set of western ideas that are being imposed on locals who often do not understand them. More than often this has been used as an excuse for non-compliance with the guidelines proposed in international human rights documents, blaming the West, in words of Cerna, for being 'interfering, imposing and hampering.'[119] The gap between the developed and poor countries is such that the levels of discussion about human rights are very different. Where in some parts of the world people have no notion of human rights at all and therefore are not aware of their own basic rights and freedoms, in other places the process of implementation of human and children's rights is on a much higher level. Due to a poor understanding of basic rights and freedoms, many governments who have ratified CRC have done so with various reservations, as this example from the Republic of Singapore shows:[120]

> The Constitution and the laws of the Republic of Singapore provide adequate protection and fundamental rights and liberties in the best interests of the child. The accession to the Convention by the Republic of Singapore does not imply the acceptance of obligations going beyond the limits prescribed by the Constitution of the Republic of Singapore nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution.

However, this dichotomy between the West and the Rest should not be used in defence of culture, especially culture that is not in line with human rights theory and its concept of respect for human dignity. The origins of human rights should not be a threat to their validity as Goodhart rightfully argues. After nearly three decades of

118 A An-Na'Im 'State Responsibility Under International Human Rights Law to Change Religious and Customary Law' in H J Steiner & P Alston *International Human Rights in Context: Law Politics Morals* (2000) 426.

119 C M Cerna 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts' (1994) 16 *Human Rights Quarterly* 740.

120 S Harris-Short 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child.' (2003) 25 *Human Rights Quarterly* 135.

suffering from 'the interference complex' it is time for the West to confirm its intent for a global implementation of the human rights theory in a considerate but confident manner. For Jones:[121]

> The doctrine of human rights is meant to be a fighting doctrine. Its purpose is not to leave the world as we find it, but to transform it into a better, more just world. A doctrine of human rights should challenge other ways of thinking; it should confront and seek to displace cultures and ideologies that fail to recognise human rights.

The clash between the universal principle and culture is very slow in resolving itself also because 'in the case of children's rights ... primarily because international law has recently moved significantly ahead of domestic law in this domain.'[122] Even though there is no doubt over CRC being universal in its respect for children's rights, insisting on applying it worldwide without considering differences between cultures has not been effective. As Harris-Short states, 'The preferred approach of most states, according to their delegations, is to try and change the attitudes and practices of the local communities by raising awareness among the population, and in particular among those who carry out the practice, of the dangers of FGM.'[123]

So, instead, education about human rights but also education of the international community about cultures most resistant to the universal principle with intention to find the reasons for opposition and possible ways of breaking through the barrier of tradition should be given a more prominent role. Human rights education is one of the most important tasks. In a way it is like teaching anything else: language, science or maths. If people are not exposed to it from an early age they will have no or very little knowledge of it. Whether they can grasp any subject depends on their social background, personal traits — different people will learn in different ways, with different levels of understanding. Therefore, it is of utmost importance to introduce human rights education at an early age. That way one would get the best start and the best chance to understand and later practice the philosophy of human rights. According to Kymlicka it is about making it possible for 'various groups of people to freely pursue and advance their shared communal and cultural ends, without penalising or marginalising those groups who have different and perhaps conflicting goals.'[124]

Perhaps, it is not always a matter of will when it comes to opposing the convention, but the lack of knowledge which Harris-

[121] P Jones 'Human Rights and Diverse Cultures: Continuity or Discontinuity?' in S Caney & P Jones (eds) *Human Rights and Global Diversity* (2001) 28.

[122] P Alston & S Parker 'Introduction' in P Alston et.al. (eds) *Children, Rights and the Law* (1992).

[123] S Harris-Short 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child.' (2003) 25 *Human Rights Quarterl.y* 143-144.

[124] W Kymlicka *Liberalism, community and culture*. (1989) 254.

Short depicts with a statement from a delegate from the Ivory Coast: 'A UNICEF report had indicated that most domestic legislation was consistent with the Convention, but that it was poorly implemented and largely unknown to the population as a whole.'[125] It is obvious that the informative process should be started on all levels within a society to ensure the best results. The world with all its cultural diversity is always in motion, changing constantly, and although the changes are inconsistent and depend on various factors, it gives hope to reaching the universal applicability of CRC which An-Na'im sees possible through 'promoting normative consensus within and among cultures through processes of cultural transformation'[126] but stresses that 'since the original practice derives its authority from religious or customary sanction, an effort to discredit it must draw its authority from the same source on which the original practice was founded.'[127]

In other words, exchange of knowledge and information between cultures but also aiding development of internal discourse should be encouraged in order to open them up to different influences. Continuing promotion of human rights theory worldwide is bound to have effect, possibly turning the respect for human rights and each other into culture itself, a *universal culture*.

Another path towards a more unified humanity can be found in the theory of cosmopolitanism which offers a way of looking at the issue of human interaction that is based on respect of our differences. 'The nebulous core shared by all cosmopolitan views is the idea that all human beings, regardless of their political affiliation, do (or at least can) belong to a single community, and that this community should be cultivated.'[128] In line with this kind of thinking giving education a more cosmopolitan feel would involve teaching people to recognise humanity wherever they encounter it which is also stressed in the UN Charter as one of the main principles of maintaining international peace.

This way we would be able to learn enough about our differences in order to see the commonness in them and also know enough about the common customs to recognise them in their various forms in many different cultures. In other words, cosmopolitanism looks to give more freedom for individual choice while respecting our differences. If we want to be able to understand and appreciate the world in all its

[125] S Harris-Short 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child.' (2003) 25 *Human Rights Quarterly* 143.

[126] A An-Na'im 'Cultural Transformation and Normative Consensus on the Best Interest of the Child' in P Alston (ed) *The Best Interests of the Child.* (1994).

[127] A An-Na'Im 'State Responsibility Under International Human Rights Law to Change Religious and Customary Law' in H J Steiner & P Alston *International Human Rights in Context: Law Politics Morals.* (2000) 428.

[128] http://www.seop.leeds.ac.uk/archives/fall2002/entries/cosmopolitanism (accessed 29 September 2004).

diversity we cannot look at it from a narrow perspective of one culture only. Opening ourselves to different influences, knowledge and information we could also give others and ourselves more space for making choices. An individual who feels protected by its community and has its dignity respected regardless of the directions they decide to broaden their experiences in, is the most valuable possession of society because they can then protect and positively promote it outside its borders.

7 Conclusion

The aim of this thesis was an analysis of the issues relating to the idea of children's rights within the framework of the dichotomy between the universal principle of human rights theory and cultural relativism. This gap is most obvious in the rift between the recognition and worldwide ratification of the Convention on the Rights of the Child and the unfavourable status of the child in many parts of the world. In their attempt to appear concerned and caring for the young almost all states have ratified the Convention but its implementation certainly does not mirror the enthusiasm expressed by its signing. Despite constant reconfirming of the universality of the human rights principles in many international documents such as Vienna Declaration from 1993, relativists still deny the global applicability of human rights arguing that they are a set of western ideas non-transferable to other corners of the world. According to Cerna it is 'the private sphere, which deals with issues such as religion, culture, the status of women, the right to marry and to divorce and to remarry, the protection of children, the question of choice as regards family planning, and the like ... in which the most serious challenges to the universality of human rights arise.'[129] Children have suffered burdens of insufficient understanding from adults responsible for their welfare throughout history. Their subordinated status has been explained away by their incomplete development thus justifying denial of their rights.

However, their status is changing and has improved significantly although, admittedly, in some states more than others. From total subjection within family their autonomy is given much consideration today owing to the proposal of the CRC and overall development of human rights theory among other factors. Parents, courts, teachers, social workers are obliged, by the provisions of the CRC, to give due weight to children's views in matters concerning them directly. Although unsettled, the dispute between children's rights and parents

[129] C M Cerna 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio.Cultural Contexts' (1994) 16 *Human Rights Quarterly* 746.

rights and obligations towards them is making us rethink our conceptions of children, childhood and family and further changes in the status of the child in society seem inevitable.

As much as relativism has posed questions for universal principles its own validity has been threatened by universalism in return. Many cultures maintain practices that are harmful and detrimental to one's overall development and are aimed at children as a part of their initiation into their community or adulthood. Although culture provides one with knowledge, confidence and feelings of safety and security within a familiar world, it imposes, at times, suffering and abuse due to its requirements for membership. Distinguishing between good and bad culture could offer part of the solution. Encouraging positive traditions and ceremonies and proposing ways of modifying harmful practices into celebrations of culture that do not involve harm and abuse of individuals must be promoted and implemented. Updating domestic and international legislation provides additional help in eradicating harmful practices. FGM is outlawed in many western countries and importantly 'in September 1997, African legislators endorsed a plan to end female genital cutting in Africa by the year 2005. The forum called all African states to enact specific, clear legislation for the abolition of genital cutting and other harmful practices.'[130] The most important aspect to keep in mind is the relationship between the group and the individual. As long as culture is not imposed on one by the rest of the community but instead is enjoyed by one according to their own choice, it will serve its purpose of a protective layer.

In order to further improve children's status within family and society children's rights should be included into school curriculum but also all other institutions involved in child welfare. In order to raise consciousness about respect for children, their wishes and interests, and the need for protection of their rights, all individuals responsible for them should be additionally trained and informed of the new issues regarding children's rights. Education, apart from being compulsory part of most children's lives, is essential to their development helping them reach the several potential dimensions. To educate them means to teach them about being a person. Traditions can provide a framework that will stimulate a coherent image of a human being. Every human being is in need of such a perspective, as it helps an individual transform her experiences into her own life. This process helps her to balance the inner and outer world. As a consequence a child should be able to express her experiences in many ways. Growing up is a life-long process and traditions help provide answers to the question of how to fulfill this task.

[130] http://www.advocatesforyouth.org/publications/iag/harmprac.htm (accessed 23 September 2004).

The idea of the great human virtues, as told in the grand traditions of various cultures incorporates the same values: love, respect, honesty, discipline and perseverance. These are the common elements that An-Na'Im refers to when stating that 'the golden rule of treating others as one would wish to be treated by them — which is found in some formulation or another in all the major cultural traditions of the world — can be presented as a universal moral foundation of human rights norms.'[131] Cultural diversity gives reason for caution over this statement and its universal application as people are conditioned by their community to that community's way of life and within that framework learn to want to be treated in a certain way. If one grows up believing that FGM, piercing girls' ears or male circumcision are necessary and normal part of life then this individual will believe that every other person regardless of their cultural membership will have a similar opinion and will want to impose this belief on them with best intentions.

If instead of the word *treatment* we use the word *respect* than it is possible that respecting others as one would wish to be respected by them gives a new meaning that fits the individual orientated universal principle. Apart from encouraging international and intercultural dialogue internal discourses have to be included into transformation processes. As the differences between cultures are gaining in respect the respect for differences between individual members of any one culture should follow suit, remembering that, in words of Goodhart:[132]

> The natural man of early liberal thought is paradigmatically an individual in his own right rather than a member of a community, and his rights belong to him independent of and prior to any social obligations of performance or obedience tied to his role in the community. Indeed, they are natural and exist prior to the political community.

The respect for one's dignity regardless of where and how one finds dignity for oneself should be promoted and implemented from the earliest stages of life. Crucial to the process of child's overall development including its notions of respect for itself and others and its system of values is the child's relationship with its parents or guardians. What CRC is offering is a framework of new ideas of how to interact with children while fully respecting their human rights but also looking to create 'a democratic model of family'[133] within which children's rights, parents rights and parents obligations would not clash. Education about human rights starts at home. It is adults that

[131] A An-Na'im 'Cultural Transformation and Normative Consensus on the Best Interest of the Child' in P Alston (ed) *The Best Interests of the Child* (1994) 68.

[132] M Goodhart 'Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization' (2003) 25 *Human Rights Quarterly* 948.

[133] G Van Bueren 'The International Protection of Family Members' Rights as the 21st Century Approaches' (1995) 17 *Human Rights Quarterly* 741.

organise rules of interaction in both private and public sphere and it is ultimately adults that have to be responsible for improving the status of children. It is adults who are their children's future as they are presenting them with the basis of overall knowledge on human interaction. Allowing them to participate in decision making processes at home and in political and social matters that concern them will not only give as insight into their own interests, views and visions but also prepare them for the role of active and confident citizens.

Proposals for overcoming the rift between universal values and cultural diversity are many. It must be stressed that they all need to include both the intercultural and international dimension but also the internal discourse when looking for best ways to transform abusive cultural traditions into culture that is in line with the human rights theory. The cultural imperialism West is being accused of cannot serve as a shield for maintaining practices that clearly hinder one's prospects in life. While aiding international and internal dialogues promotion of human rights principles should be continued in order for the philosophy and practice of human rights to eventually become a global culture. In words of An Na'Im:[134]

> Human rights scholars and activists throughout the world must recognise that a universal project, for the rights of the child in this case, cannot be legitimately achieved through the universalisation of the norms and institutions of dominant cultures, whether at a local, regional or international level. Such recognition does not mean that one should condone or concede the apologetic or manipulative abuse of contextual specificity or cultural relativity of the type attempted by some governments and elites, especially in certain parts of Africa and Asia today. On the contrary, taking cultural diversity seriously is the best way to combat such abuse by challenging its basis in the consciousness of the relevant constituencies.

[134] A An-Na'im 'Cultural Transformation and Normative Consensus on the Best Interest of the Child' in P Alston (ed) *The Best Interests of the Child* (1994) 80.

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New wine in old bottles consociational democracy: Comparative analysis of Bosnia and Herzegovina, Kosovo and Macedonia

Kumjana Novakova

1 Introduction

Ethnicity, ethnic affiliations, ethnic groups, ethnic conflicts, ethnic wars ... World politics in the last decade since 1990s seem concentrated on issues deriving from the question of ethnicity. Ethnicity is at the centre of politics in country after country, a potent challenge to the cohesion of states and of international tension. It has fought, bled, and burned its way into public and scholarly consciousness.[1] What has happened in the 1990s, as Lijphart rightly underlines, is that ethnic divisions have replaced the cold war as the most serious source of violent conflict.[2]

What is about to be done so that ethnic divisions do not necessarily mean ethnic conflict? Why in some cases it is so, and in others not? What drives ethnic groups into conflict, and what is the primary aim to be achieved by it? In addition, finally what can be done to prevent or reduce ethnic conflicts? What are the mechanisms of promoting and improving interethnic co-operation, tolerance, and coexistence? What conditions should be met, so the differences can be overcome peacefully?

Horowitz argues that in divided societies, democracy is about 'inclusion and exclusion', about 'access to power', and the role of ethnic identity 'to determine who will be included and who will be excluded.'[3] Furthermore, the argument goes that ordinary democracy,[4] 'either does nothing about ethnic exclusion or actually fosters it',[5] as there is a high intolerance towards the minorities of any types as well as their permanent exclusion.

This study is concentrated on one of the inclusive approaches of regulating ethnic conflict, namely power-sharing democracy, aiming at the inclusion of all groups in ruling the country, seen as a contrast to the majoritarian, winner-takes-all democracy. The first chapter will deal with the consociational model, as most prominently developed by the Dutch political scientist Arend Lijphart, with its basic presumptions and favourable conditions. In the next chapter the institutionalised arrangements of consociational character implemented in the cases of Bosnia and Herzegovina, Kosovo and Macedonia will be examined comparatively, with an emphasis on

1 DL Horowitz *Ethnic groups in conflict* (1985) xi.

2 A Lijphart 'The wave of power-sharing democracy' in A Reynolds (ed) The architecture of democracy – constitutional design, conflict management, and democracy (2002) 37 54.

3 DL Horowitz 'Democracy in divided societies' in L Diamond & MF Plattner (eds) *Nationalism, ethnic conflict, and democracy* (1994) 35 55.

4 'That is, democracy heedless of the special needs of divided societies'. in DL Horowitz Some realism about peacemaking A Wimmer (ed.) *Facing ethnic conflicts: perspectives from research and policy-making* (2002).

5 DL Horowitz 'Democracy in divided societies' in L Diamond & MF Plattner (n 3 above) 35 55.

proportional representation mechanism, decision – making processes and procedures, and finally, instruments of self – government. The third chapter will deal with the current situation in the three cases, or precisely with the success or failure of the power – sharing arrangements, having in mind different timing of the changes made to the political system. In conclusion, it will be discussed if the development and progress made is directly linked to the consociational arrangements made or if there is a complex interdependence between the different factors on the ground.

The type and degree of implementation of the package of consociational arrangements is crucial in post – conflict societies, deeply divided along ethnic lines. The basic argument in the study is that consociational arrangements as such are not the only precondition for successful conflict management and institution – building. Full implementation of the peace agreements, efforts of both domestic and international key actors in the process and rather the use of both bottom-up and top-down approaches in the post-conflict period, then just changing the shape of the state without working on the inter-group relations on all other fields. Actually, it will be shown that consociational arrangements are maybe the most probable solution and the most promising path to lead to democracy and prosperity, while each measure cannot be judged separately as there is a complex interdependence between the factors in the process, such as political culture, economic development, legal framework and international players. The consociational model itself is not a one-size-fits-all solution, but assumes a variety of institutional forms, and different forms do not equally well lead to ethnic accommodation, so the result will also vary.

The method used in this research is content analysis. During the research period, the peace agreements as the basic legal framework of the cases studied were analysed, by focusing on the consociational arrangements within them, as well as the consociational arrangements made in the institution-building process in the post – conflict period in the cases of Bosnia and Herzegovina, Macedonia, and Kosovo. The results will be analysed comparatively in the forthcoming chapters of this study. For that purpose, different scholarly literature was used, along with the legal documents, reports of variety of organizations dealing with the three cases mentioned above.

The theoretical part, introduced in the first chapter, as previously mentioned, is mainly based on the model of consociational democracy as developed by Lijphart, and some other prominent scholars in the field, in order to provide a theoretical framework and critique.

2 Consociational approach as a theory

The consociational approach, or group building block approach,[6] has been originally developed in the 1960s by the Dutch political scientist Arend Lijphart, as a concept to describe societies divided along ethnic, religious, or cultural lines, with the basic idea of managing the differences between the groups. The key - point of the model is joint rule and decision - making process based on consensus.

Before concentrating on the main features of the model, it is important to stress that the consociational approach is under the umbrella of the so-called power-sharing democracy, which practices offer an alternative to simple majoritarian practices of democratic governance.[7] The two main models of power sharing democracy are the Horowitzian, integrative approach, and Lijphart's consociational approach.[8] Sisk describes the two models as 'conceptual poles in a spectrum of specific conflict-regulating institutions and practices that promote power sharing.'[9] Indeed, there are important differences - theoretical and in practice - between the consociational systems, and the integrative one. As Reynolds explained, 'both types contain power sharing provisions, but are based upon different structures, objectives, and most importantly, rest on different premises.'[10] Punctually, the differences along side with each approach weaknesses and strengths are shown in Appendix I.

The term consociationalism itself, as Lijphart also states was not used for the first time by him, it derived already in 1603 from Johannes Althusius's concept of *consociatio,* Latin term – to associate in an alliance, in his *Politica Methodice Digesta.*[11] Nor Lijphart was the first one to define the term, as Lehmbruch analyses the cases of Austria and Switzerland as *Proporzdemokratie* or *Konkordanz-demokratie,* and also Lewis and Ake are his predecessors in the field, when working on West Africa.[12]

6 This term is used in a study concentrated on the different methods of conflict resolution in deeply divided societies: B Reilly *Democracy and deep-rooted conflict: options for negotiators* (1998); also Sisk uses the same term, see: T D Sisk *Power sharing and international mediation in ethnic conflicts* (1996) x.

7 T D Sisk *Power sharing and international mediation in ethnic conflicts* (1996) ix.

8 Sisk (n 7 above) ix.

9 Sisk (n 7 above) ix.

10 A Reynolds 'Majoritarian or power - sharing government' in M Crepaz and T Koelble (eds) Democracy and institutions: the life work of Arend Lijphart (2000) 155 196.

11 A Lijphart *Democracy in plural societies - A comparative exploration* (1977) 1.

12 R B Andeweg 'Consociational democracy' (2000) 3 *Annual Reviews of Political Science* 510 511.

Lijphart first used the term when characterising the political system of Netherlands, in his 'The Politics of Accommodation: Pluralism and Democracy in the Netherlands', published 1968.[13] By describing the Netherlands' system, on one side as democratic, but on the other different from the simple majority rule as in most of the European societies, he further developed the model, which he later applied in examining many European and third world countries. One of the main characteristics of all of them is that they are divided societies, and divided along lines of religion, ethnicity, ideology, language or a combination of it.

He defines the phenomenon as 'government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy,'[14] perceived as a core definition. To put it with other words, it is a set of principles that, 'when carried out through practices and institutions, provide every significant identity group or segment in a society representation and decision-making abilities on common issues and a degree of autonomy over issues of importance to the group.'[15] The idea is the important decisions to be brought with the consent of all the significant groups in the society, and whether on informal or formal grounds, all of the groups to have access to power and to all the resources.[16]

Finally, consociational approach can be perceived as a model that provides all the groups in the society equal status and representation, and in that way a maximal protection and recognition. As Kellas describes it, in the context of politics of nationalism and ethnicity, consociationalism 'provides a model of government which allows for the peaceful coexistence of more than one nation or ethnic group in the state on the basis of separation, yet equal partnership rather than the domination by one nation of the other(s).'[17]

2.1 Basic principles

The phenomenon of consociational democracy assumes four basic characteristics, as described by Lijphart.

The first and maybe the most important one at the same time, is power – sharing cross-community executive, or (1) grand coalition of the leaders of all significant groups of the society. The second one are (2) veto right for minorities, (3) proportional representation in civil

13 A Lijphart *The politics of accommodation: pluralism and democracy in the Netherlands* (1968).
14 A Lijphart 'Consociational democracy' (1969) 21 *World Politics* 207 225.
15 T D Sisk *Power sharing and international mediation in ethnic conflicts* (1996) 5.
16 U Schneckener 'Making power-sharing work – lessons from successes and failures in ethnic conflict regulation' (2002) 39 *Journal of Peace Research* 203 228.
17 J G Kellas *The politics of nationalism and ethnicity* (1998) 178.

service and public funds, and, the last but not least, is (4) group autonomy or community self-government.[18]

However, before to focus on the basic principles as given above we have to underline that what stands in the very basis of the model is the idea of elite co-operation what at the same time is the most criticised assumption by many scholars.[19] Consociational scholars claim that even in conditions of deep group differences, 'overarching integrative elite co-operation is a necessary and sufficient condition to assuage conflict'.[20] According to the theory, elite performance is the missing link between a divided society and political stability, and, political elite, or group leaders act in order to build political ties at the centre. Moreover, Lijphart argues that an incentive for the elites in order to act cooperatively is simply political power. Based on the Riker's minimum winning coalition theorem Lijphart simply points out that parties wants to enter and to remain in power.[21] '… The only way for ethnic or any other parties not just to enter but also to stay in the cabinet is to reach compromises with their coalition partners, they have a very strong incentive to compromise – political power – instead of no such incentive …'.[22]

At the beginning of this chapter was stated that grand coalition is the most important condition for successful consociational type of government. The argument here is that only this type of executive gives possibilities to minorities not to be excluded from the government. Furthermore, it is a 'vital instrument for the attainment of political stability in plural societies', as by being involved in the government of the country together, parties that do not mutually trust each other have some kind of guarantees of political security.[23]

The institutional forms the consociational model can have are various, and indeed, the model can be compatible with a rich spectrum of institutional solutions, of course provoked by the different cases and followed by different results. Generally two debates are ongoing on the typologies of democratic regimes: parliamentary versus presidential system, and republics versus monarchies.

In the first case, the parliamentary solution is 'superior' over the other variant as a result of many factors. First, it is difficult to form a coalition of the leaders of all the significant groups in the society in

18 A Lijphart *Democracy in plural societies - a comparative exploration* (1977) 25 52.

19 On the critiques see: D L Horowitz *A democratic South Africa? Constitutional engineering in a divided society* (1991).

20 T D Sisk *Power sharing and international mediation in ethnic conflicts* (1996) 34.

21 A Lijphart 'The wave of power-sharing democracy', in A Reynolds (ed) *The architecture of democracy - constitutional design, conflict management, and democracy* (2002) 43 44.

22 A Lijphart 'The wave of power-sharing democracy', in A Reynolds (n 21 above) 44.

23 A Lijphart *Democracy in plural societies - a comparative exploration* (1977) 30.

a presidential system, and a one-person leadership idea is not relevant to the consociationalism, although as Lijphart reminds, they are not completely incompatible.[24] The second reason for preference of the first alternative is that 'executive is selected by the legislature and is dependent on legislative confidence, whereas, in presidential systems, the executive is elected, directly or indirectly, by the voters and is not dependent on the confidence of the legislature,'[25] and also, executive in a parliamentary system is a collegial body. Of course here one can also take into consideration many types of systems that derive from these two forms, but due to the criteria here the mainstream discussion are presented.[26]

The debate on whether republican or monarchial type of regime, also plays an important role on the grand coalition formation.

The second principle, the minority veto, is 'the ultimate weapon that minorities need to protect their vital interests', as even being represented in a grand coalition cabinet, their representation can easily be marginalised by the majority simply with outvoting them. Minority veto plays crucial role 'when a minority's vital interests are at stake', mainly because of the protection the mechanism presents.[27]

The proportionality principle in the spheres of political representation, public service, and public funds, is providing all groups inclusion and fair distribution, with a impact on fair representation of ethnic minorities.[28] This principle, as Sisk reminds us, lies behind consociational practices in almost every sphere of political life:[29] '… proportionality is introduced at every level of government decision making (central, regional, and local) to give minority groups power, participation, and influence commensurate with their overall size in society.'[30] The principle itself, as described above, manifests itself in two ways, namely through electoral systems, the composition of the governing elite should mirror the demographic structure, and, through the distribution of resources, as fair distribution of public administration posts and public spending.

24 Lijphart (n 23 above) 32 36. See also A Lijphart 'The wave of power-sharing democracy', in A Reynolds (n 21 above) 49 51.

25 A Lijphart 'The wave of power-sharing democracy', in A Reynolds (ed) *The architecture of democracy - constitutional design, conflict management, and democracy* (2002) 49.

26 In the consociational stream, there is also an ongoing debate on whether republican or monarchical type of regime, as also that also plays an important role on the grand coalition formation, but as irrelevant for our cases, this is not presented.

27 A Lijphart 'The power-sharing approach' in J Montville (ed) *Conflict and peacemaking in multiethnic societies* (1991) 495.

28 A Lijphart 'The power-sharing approach' in J Montville (note 27 above) 491 509.

29 T D Sisk *Power sharing and international mediation in ethnic conflicts* (1996) 37.

30 As above.

The principle of group autonomy is the one securing groups control over 'their' problems, as the issues of common concern are to be made jointly, and all others should be left to and for each group: 'the final deviation from majority rule is segmental autonomy, which entails minority rule: rule by the minority over itself in the area of the minority's exclusive concern.'[31]

If the groups are concentrated geographically, Lijphart addresses the form of federation, and in the other cases, a non-territorial form ('corporate federalism') or a combination of territorial and non-territorial forms of autonomy should take place.[32]

Another influential issue is the electoral system, due to the influence it has on the accommodation in divided societies, and in any democracy at all. Although, the electoral system that can serve best in a post-conflict period of the society does not has to be the best in longer-term conflict management.[33]

Here the system of proportional representation (PR) is preferred, because of one simple reason - it guarantees just representation of the minorities, as a contrast of the majoritarian system, which in a deeply divided society favours one ethnic group, and in that way excludes others. As Norris underlines, majoritarian electoral systems, like first past the post, exaggerate the parliamentary lead for the party in first place with the aim of securing a decisive outcome and government accountability, thereby excluding smaller parties from the division of spoils.[34] Moreover, in comparison with majoritarian, PR electoral system ensures representation of the minorities that have shown will to be represented as minority parties.[35]

Furthermore three recommendations are given for the electoral system in order to be a successful consociational democracy: list PR preferable to the single transferable vote system; list PR with closed or almost closed lists in front of open-list PR; and, not to introduce high electoral thresholds, as to secure full or close to full proportionality, as the numerical size of a group can be below the threshold.[36]

31 A Lijphart *Democracy in plural societies - A comparative exploration* (1977) 41.
32 A Lijphart 'The power-sharing approach' in J Montville (ed) *Conflict and peacemaking in multiethnic societies* (1991) 494.
33 L Malazogu & I Dugolli *Reforming the electoral system of Kosova* (2003) 4.
34 P Norris 'Ballots not bullets: testing consociational theories of ethnic conflict, electoral systems, and democratisation' in A Reynolds (ed) *The architecture of democracy - constitutional design, conflict management, and democracy* (2002) 207.
35 A Lijphart *Electoral systems and party systems: a study of twenty-seven democracies, 1945-1990* (1994) 140.
36 A Lijphart 'The wave of power-sharing democracy', in A Reynolds (ed) *The architecture of democracy - constitutional design, conflict management, and democracy* (2002) 52 53.

In addition of the main principles of the consociational approach, some scholars dealing with this subject give a list of favourable conditions for successful consociational arrangements. The next subchapter will deal with this issue.

2.2 Favourable conditions

In the consociational literature one can find different lists of factors which have a positive or negative impact on the arrangement of the consociational model in one or another country. One can mention scholars like Schneckener, who presents structure-oriented conditions, and actor-oriented ones, then Nordlinger, Kenneth D. McRae, Brennan O'Leary. For the purpose of this study Lijphart's list(s) will be discussed.

The favourable factors for an establishment of successful consociational system have provoked a lot of attention in the academic community, being a subject of a lot of debates. The reasons for this is the character of the factors, their origin, and whether one is in a position on the basis of the list to predict, or to presuppose the success of the cosociational model itself, and the elite co-operation in a given society.[37]

Then, why creating a list of favourable factors, that does not have a predictive, empirical value?

Lijphart here gives logical, although to a certain degree ambiguous argument, as that:

> the favourable conditions ... are helpful but neither indispensable nor sufficient in and of themselves to account for the success of consociational democracy. Even when all the conditions are unfavourable, consociationalism, though perhaps difficult, should not be considered impossible.[38]

Here can also be mentioned that when presenting the first list, the author explains their 'illustrative rather than exhaustive' character.[39]

During the years of his work, Lijphart gives different lists of favourable factors (see Table 1 in Appendix II); however the one that follows is presented by him in one of his later works.

The factors are the following: (one) absence of a majority ethnic group, as there is a possibility for it to turn into majoritarianism; (two) absence of large socio-economic differences among the groups;

37 On the different critiques on this see: M Bogaards 'The favourable factors for consociational democracy: A review' (1998) 33 *European Journal of Political Research* 475 496.

38 A Lijphart *Democracy in plural societies - A Comparative Exploration* (1977) 54.

39 In: M Bogaards 'The favorable factors for consociational democracy: A review' (1998) 33 *European Journal of Political Research* 475 496.

(three) roughly equal size of the groups, as it gives a notion of balance among them; (four) society consisted of not too many groups, in order to make negotiations possible and not very complicated; (five) the total population of the state to be relatively small, as a factor favouring a simple decision-making process; (six) existence of external threats, which will promote unity; (seven) overarching loyalties that can weaken the ethnic affiliations; (eight) geographically concentrated ethnic groups, so the federalisation to be an alternative for group autonomy; (nine) previous tradition of accommodation and compromise.[40]

Another role that Lijphart gives to favourable factors is their impact on the sustainability of the system. Namely, 'a factor that is favourable for the *establishment* of a consociation will also be a positive condition for its *maintenance*.'[41]

At the end what we can conclude is that the role of the favourable conditions should be taken only partially into account as 'a completely favourable configuration of background conditions greatly facilitates but does not guarantee consociational choices or success.'[42]

3 Institutionalisation of the consociational approach in the cases of Bosnia and Herzegovina, Macedonia, and Kosovo

In the aftermath of the dissolution of Yugoslavia, its successor states went through different degrees of conflicts and changes of their political systems. The three cases - subjects of this research have all experienced more or less intensive ethnic conflicts during the last decade. Among the most prominent scholars and practitioners in the field of conflict resolution there is an agreement on the question of managing ethnic conflicts without changing the state borders on one side, but also on the impossibility of the abolition of ethnicity, what gives an argument against the theories or better to say the agendas of ethnic assimilation and ethnic control, on the other side. Therefore, the question of preserving the unitary character of the states, i.e. abolition of laws aiming at secession, was not under question at all, as the principle of multi-ethnic democracy was essential in the concept of the international democratisation strategy.

40 A Lijphart 'The power-sharing approach' in J Montville (ed) *Conflict and peacemaking in multiethnic societies* (1991) 500. Originally developed in A Lijphart 'Power-sharing in South Africa' (1985) 24 *Policy papers in international affairs*

41 A Lijphart 'Power-sharing in South Africa' (1985) 24 *Policy papers in international affairs* 119

42 A Lijphart *Democracy in Plural Societies - A Comparative Exploration* (1977) 54.

The conflict regulation strategy,[43] in Bosnia in that sense was determinant as in a way it introduced the formulas later to be applied in Kosovo, and then Macedonia, as not only violent ethnic conflicts and ex-Yugoslavia pre-history are their common phenomena, but the structure of the societies, their impact on the region and high degree of interdependence among them as well.

> Among the international attempts to stabilise the countries of the former Yugoslavia after the wars, the reconstruction of Bosnia has been the most ambitious project of state and institution building in the region.[44]

Already during the Dayton negotiations, the US Deputy Secretary of State Strobe Talbott introduced the international interests and intentions regarding Bosnia and the region, if regional and international stability is to be achieved:

> If there is to be a post-Cold War peace in Europe – and not a cold peace, but a real one – it must be based on the principle of multi-ethnic democracy ... Hence, it is in our interest that multi-ethnic democracy ultimately prevails.[45]

In all of the three cases of our interest, the international community addressed openly the need to focus on institutional re-design and 'constitutional engineering'. Moreover, the international actors involved in the peace settlements were focused on the re-design of institutional systems within the countries, including new constitutions.[46] The goals were new constitutional frameworks and legal systems that would suit best the structure of the society; actually frameworks that would bridge the divisions between the groups based on a unique combination of ethnicity, religion, and in the case of Macedonia and Kosovo, language as well.

As a consequence, in all the three cases the results were peace agreements reached through international mediation addressing institutional (re)arrangements that are based on the main elements of power sharing in order to transform the inter-ethnic relations.[47] In that sense the international community introduced the power sharing

43 The use of the term conflict regulation will be used referring to the three cases as it happens to be much more realistic than conflict resolution. The former one aims at removing the causes of the conflict, what by most of the scholars in the field is seen as almost impossible, especially in deeply divided societies, as Bosnia and Herzegovina, Macedonia and Kosovo are.

44 F Bieber 'Recent trends in complex power-sharing in Bosnia and Herzegovina' (2003) I 2001/2 *European Yearbook of Minority Issues* 269.

45 As cited in D Chandler *Bosnia – faking democracy after Dayton* (1999) 66.

46 F Bieber 'Institutionalising ethnicity in former Yugoslavia: domestic vs. internationally driven processes of institutional (re-)design' (2003) 2.2 *The Global Review of Ethnopolitics* 3 16.

47 F Bieber *Power sharing after Yugoslavia: functionality and dysfunctionality of power-sharing institutions in post-war Bosnia, Macedonia and Kosovo* http://www.ssc.uwo.ca/polisci/necrg/powersharingdemocracy/papers/FlorianBieberPower.pdf (accessed 15 September 2003)

framework as the most promising solution for the conflict regulation in deeply divided societies, as in most instances the international mediators limited the options on the table to power sharing.[48] Power sharing was seen as the only reliable approach that would give first of all security guarantees to all ethnic groups for the protection of their vital interests, and second would prevent privileges and domination of one group over the other(s). All in one, most international scholars and academicians – advocates of power-sharing believed that including power-sharing institutions will promote moderate and cooperative behaviour among contending groups by fostering a positive-sum perception of political interactions.[49] Overall, 'by dividing and balancing power among rival groups, power-sharing institutions minimise the danger of any one party becoming dominant and threatening the security of others.'[50]

Peace agreements that were bearers of the changes in the three cases studied were The General Framework Agreement for Peace in Bosnia and Herzegovina (DPA), initialed in Dayton Ohio, but signed in Versailles palace on 14 December 1995, the Ohrid Framework Agreement (FA) signed in Ohrid on 13 August 2001, and Kosovo's,[51] Constitutional Framework for Provisional Self-Government (CF) signed 15 May 2001.

The picture would be far from complete if here a delimitation regarding the international involvement in the countries discussed is not set up. First of all, the analyses here are concerning the internal institutions and political systems developed as a result of the consociational arrangements in the post-conflict period in the three cases. What should be mentioned here is that Bosnia and Macedonia are independent states, whereas Kosovo is still (at least technically) an Autonomous Province in Republic of Serbia, and latter is a federative unit of Serbia and Montenegro. Furthermore, the domestic institutions and mechanisms are under the scope, with no ambition to address the issue of the international actors directly involved in running the countries as the time and space provided make impossible such an analyses. In the case of Bosnia they are the Office of the High Representative, Organisation for Security and Cooperation in Europe (OSCE), International Monetary Fund (IMF), Council of Europe (CoE), and, Stabilisation Forces (SFOR) with competencies, the Special

48 T D Sisk *Peacemaking in civil wars: obstacles, options and opportunities* (2001) 12 Columbia International Affairs Online http://www.ciaonet.org (accessed 19 August 2003)

49 C Hartzell & M Hoddie 'Institutionalizing peace: power sharing and post-civil war conflict management' (2003) 47.2. *American Journal of Political Science* 318.

50 Hartzell & Hoddie (n 49 above) 319.

51 In the case of Kosovo, the situation is much more complex than in the other two cases, so in order to follow the developments leading to the signing of the CF a chronology of the international agreements dealing with the case is presented in Appendix III.

Representative of the Secretary General of UN (SRSG), United Nations Mission in Kosovo (UNMIK), OSCE, European Union (EU), and, Kosovo Forces (KFOR) in the case of Kosovo, and, indirectly, in the case of Macedonia - EU, CoE, and OSCE. Of course their impact is of crucial importance when having the results and effects of the institutional changes in mind, as well as their successful implementation. On these issues partial attention will be given in the third chapter.

In the next subchapters, considering the theory presented in the first chapter as a basis, a comparative analysis will be made, by following the basic elements of the consociational approach and their implementation in the cases under the focus of this study.

3.1 Decision making processes in the three cases

3.1.1 Grand coalition

The first and maybe most important condition of consociational arrangements, as it was stated in the first chapter, is 'government by grand coalition of the political leaders of all significant segments of the plural society.'[52]

The need for forming a grand coalition to govern the country according to Lijphart comes as a result of the special conditions and characteristics of the plural, divided societies.

Precisely, by starting from the Riker's 'size principle' based on game-theory presumptions,[53] Lijphart explains that in the types of the societies that we are examining, political stakes are high, so 'it is advisable not to conduct politics as if it were a game: a grand coalition is therefore more appropriate than the government-versus-opposition pattern.'[54] In addition to this, majority rule is highly undesirable, as in an already hostile environment, it places a strain on the unity and peace of the system, concludes Lijphart.[55]

Finally, the last argument that explains the necessity for creating a large coalition as given by Lijphart is exactly as a result of the interdependence between the co-operation among political actors and the process of formation of the coalition itself:

> … The prospects of participating in the government is a powerful stimulus to moderation and compromise, because it minimises the risk of being deceived by the other parties or by one's own undue optimism

52 A Lijphart (n 11 above) 25.
53 The principle is: 'In *n*-person, zero-sum games, where side payments [private agreements about the division of the payoff] are permitted, where players are rational, and where they have perfect information, only minimum winning coalitions occur.' In: A Lijphart (n 11 above) 26.
54 A Lijphart (n 11 above) 25 27.
55 A Lijphart (n 11 above) 28.

> concerning *their* willingness to be accommodating. By being in the government together, parties that do not quite trust each other have an important guarantee of political security. For this it is necessary, of course, to be in the coalition at the same time rather than in a diachronic grand coalition.[56]

The next issue connected with the problem is the formation of grand coalitions. First what can be distinguished here is whether the co-operation of the groups in the society on governmental level is legislated or not. The difference is that in the first case we are dealing with a legal requirement of grand coalitions, and in the second case the groups have established unwritten rule, a tradition of ruling by grand coalition at the executive level. On the question of preference of one over the other way of governmental coalition building criteria one cannot precisely give an answer, as if we go back to favourable conditions of Lijphart, the last one is previous tradition of accommodation, what in a way benefits the co-operation possibilities of the groups. On the other hand, a rule not legally embedded in the system, in hostile intergroup relations very easily can be overthrown.

When discussing on the legal setting of group coalition formation in the executive, Bieber gives three variants. The first one requires proportional representation of the groups on the discussed level, in the second one inclusion is ensured by 'deputy ministers of different group membership in every ministry', and in the third case 'a range of procedural rules can avoid the concentration of power within one community', as rotating prime ministership or presidency.[57]

The differentiations made above, if applied on the cases under examination in this study, easily can be found in Bosnia, now both on state and entity level,[58] as well as in Kosovo, where grand coalition formation by the major groups in the society is a legal requirement, while in Macedonia the situation is slightly different.

In Kosovo there are a precise number of ministerial seats that are reserved for the minority group(s). In the case of Kosovo, where there is an existence of one dominant ethnic group, the Serb Community as

56 A Lijphart (n 11 above) 31.

57 F Bieber *Power sharing after Yugoslavia: functionality and dysfunctionality of power-sharing institutions in post-war Bosnia, Macedonia and Kosovo* http://www.ssc.uwo.ca/polisci/necrg/powersharingdemocracy/papers/FlorianBieberPower.pdf (accessed 15 September 2003).

58 With Constitutional Court of BiH decision known as 'Mrakovica - Sarajevo Agreement on the Implementation of the Constituent People's Decision', signed by the BiH politicians on the 27 of March, 2002, Bosniacs, Croats and Serbs are recognised as 'constituent peoples' in both entities, on the whole territory of BiH. The agreement which is now part of the entities' constitutions, establishes proportional representation of the three groups governmental bodies and public administration as well, which before was case only at the state level institutions. Text of the agreement available at: http://www.oscebih.org (accessed 26 May 2003).

another significant group, and other minority groups, CF gives the legal requirements in the Section Three (The Government) stating that at least two seats in the governing coalition shall belong to the non-dominant groups, and precisely: 'At least one of these Ministers shall be from the Kosovo Serb Community and one from another Community.'[59]

In the Bosnian Council of Ministers, according to DPA, each group holds precise number of ministerial seats, de facto one third of the posts. Two-thirds of the ministers come from the Federation, and one-third from Republic of Srpska, as article 5.4(b) requires: 'No more than two-thirds of all Ministers may be appointed from the territory of the Federation. The Chair shall also nominate Deputy Ministers (who shall not be of the same constituent people as their Ministers)…'.[60] Furthermore, after the decision of the Presidency of BiH, under the supervision of the High Representative, until recently the Council of Ministers had co-chairmanship consisted by one Bosniac and one Serb, on a weekly rotation basis, while the vice-chair was belonging to the Croat community, and now there is a prime minister / chair of the Council of Ministers without weekly rotation.[61]

What can be concluded from the facts above is that both in Kosovo and Bosnia, the consociational arrangements are subject of the constitutional provisions, thus implementing power sharing as a legal framework by requiring participation of the groups in the governmental bodies.

Another issue highly important to be mentioned here is the Presidency of Bosnia as principal state executive organ. Except that it appoints the chairperson of the Council of Ministers (subject of approval of the House of Representatives), who further nominates the ministers and deputy ministers, it has many other important competencies, such as foreign policy, nomination of the diplomatic staff abroad, and in a way limits the power of the government, thus creating a notion of BiH as a semi-presidential state. According to Art. 5(3) its constitutional mandate is to conduct the foreign policy of Bosnia.

By nature, it is a three-person organ, on a rotating principle, with a mandate of four years, with each of them holding the chair eight months. The co-presidents are directly elected with comprehensive veto rights, what makes it extremely similar to the mechanisms implemented in government building, and thus including 'two of the

59 Constitutional Framework for Provisional Self-Government, Section 3: The Government, art 9.3.1. to 9.3.6. Full text of the document available at: www.unmikonline.org (accessed 19 May 2003).

60 Constitution of Bosnia and Herzegovina, article V: Presidency, full text available at: http://www.ohr.int (accessed 10 June 2003).

61 Decision available at: http://www.ohr.int (accessed 26 May 2003).

four classic features of a 'consociational' or group based power-sharing system, ... as well as the third one - central decision making by grand coalition.'[62] What can be underlined here is that the ethnic belonging of the members of the Presidency (Croat, Serb and Bosniac), is not the only requirement, but also each of them should be elected by the respective entity.[63] As a consequence, the Presidency represents not only groups, but also the entities, so it is based on both 'territorial and national representation.'[64]

At the entity level, in the Federation is quite similar to the state one, as the two vice – presidents in the Presidency have to come from the other two ethnic groups[65] and in Republika Srpska the difference is that there is not a presidency, but a president with two vice-presidents.[66] In addition, this rule is a result of the above-explained change in the constitutions of the two entities, as a result of the Constitutional Court decision on the 'constituent peoples' from 2000 and the constitutional changes imposed by the High Representative in 2002 connected with the decision.

Now, if we go back to the formal – informal grand coalition building debate, Macedonia shows a difference in comparison with the cases of Bosnia and Kosovo.

Even with the FA changes to the constitution of Macedonia, a legal obligation for the inclusion of all groups' at the governmental level has not been set up. Yet, from the first democratically elected government after the independence from Yugoslavia Macedonia has grand inter – ethnic coalition at the centre. Prior to the ethnic conflict 2001, Macedonia had three governmental coalitions (from 1992 until the one established after the conflict) all consisted of both Macedonian and Albanian parties, including the principle of each minister having deputy with different ethnic origin. As a matter of fact, the number of the ministers with ethnic Albanian origin exceeded the percentage of the Albanian participation in the Parliament for instance.[67] Even though the conflict 2001 happened, by working together in the government, the political elite created a significant capacity, maybe not in all the spheres of the society, but

62 S Bose *Bosnia after Dayton - nationalist partition and international intervention* (2002) 63.

63 Article V(1) requires that one Croat and one Bosniac should be elected from the Federation, and one Serb from Republika Srpska, by prescribing one voter one vote, meaning that each community electorate votes for the candidate of the respective group.

64 F Bieber 'Governing post-war Bosnia-Herzegovina' in K Gal (ed) *Minority governance in Europe* (2002) 324.

65 Constitution of the Federation of Bosnia and Herzegovina, full text of the document available at: http://www.ohr.int (accessed 10 June 2003).

66 Constitution of Republika Srpska, full text of the document available at: http://www.ohr.int (accessed 10 June 2003).

67 See: Euro-Balkan Institute *Position of Ethnic Minorities in Macedonian Constitution* http://www.euba.org.mk (accessed 16 June 2003).

at least at the top-level, what in some degree promoted accommodation of the groups' differences.

So far we discussed the institutionalisation of the first feature of the consociational approach, grand coalition by the significant groups in the society at the executive level. In the forthcoming sub-chapter the instrument of vital interests' protection or veto rights will be presented, equally in theory and as implemented in the respective cases.

3.1.2 Veto rights

In one of his most prominent studies, 'Democracy in Plural Societies', Lijphart emphasises the first and in many aspects essential element of the consociational model – the grand coalition in one form or another 'is complemented by three secondary instruments: mutual veto, proportionality, and segmental autonomy …and are all closely related to each other.'[68] The second one, the mutual veto represents negative majority rule.[69]

In practice it means that each group is in a position to protect its vital interests or to remove the possibility to be outvoted, by using the opportunity to bloc any or some political decision as a result of its right to veto.[70] The major reason of advocating this tool is promotion, or better, fostering of consensus-building and the capability to compromise.[71]

The interdependence between the main features of the consociational democracy, as mentioned above, can be already recognised at this point. To be exact, a serious difficulty towards the co-operation on executive level can be the so called 'minority tyranny', which can happen as a result of the possibility to veto the decisions in the political bodies of the state. Once again Lijphart response to the critiques of this approach can be used, as he gives three main reasons of this situation as improbable to happen:

> First, the veto is a mutual veto that all minority segments possess and can use...The too frequent use of the veto by a minority is not very likely because it can be turned against its own interests, too. Second, the very fact that the veto is available as a potential weapon gives a feeling of security which makes the actual use of it improbable…Finally, each segment will recognise the danger of deadlock and immobilism that is likely to result from an unrestrained use of the veto.[72]

68 A Lijphart (n 11 above) 36.
69 As above, 36.
70 U Schneckener 'Making power-sharing work – lessons from successes and failures in ethnic conflict regulation' (2002) 39 *Journal of Peace Research* 207 208.
71 U Schneckener (n 70 above) 207 208.
72 A Lijphart (n 11 above) 37.

In addition, couple of differentiations can be made in relation to groups' veto rights.

First, as Scheneckener explains, the right to veto can be absolute or conditional. In particular, an absolute veto rights one group possesses in a situation when all decisions can be blocked unrestrictedly, which rarely exists as it can be easily abused. Respectively, conditional veto rights can only be used in cases when it effects only basic laws, or as later will be shown, decisions which are agreed upon, usually defined as questions of vital interests and often concerning existence and preservation of group(s) identity.[73]

On the other hand, Lijphart on the basis of different countries practices, makes a distinction according to the source of the mutual veto rights, in sense of whether is a question of tradition, or legally based. Basically, veto power can be formally agreed on and set up in the constitution, or it can be an informal and unwritten rule of play between the groups in the society.[74]

An additional distinction, especially in regard to the three cases studied here, made by Bieber, is whether each group in the society holds the right to veto, or just particular group(s) does. For example, when Macedonia and Kosovo are in question, not all the groups have the right to block a political decision, while in Bosnia this is not a case, as each one of the constituent groups can block a law.

In relation to that, in Macedonia only the groups that are not in the majority of the population can veto a decision. Precisely, the right to veto can be exercised according to the Constitution:

> the majority vote of the Representatives attending, within which there must be a majority of the votes of the Representatives attending who claim to belong to the communities not in the majority in the population of Macedonia.[75]

What can be concluded from the article cited above is that not only minorities have the veto right, but all minorities together have the right to veto a decision, i.e. majority of all minority deputies.

Likewise, in the case of Kosovo, only the Serb community is holder of the veto possibilities, as it sets the number of deputies (one deputy plus the support of five others) needed for a decision to be blocked. In a roundabout way, it means that the right belongs only to the Serbs, as no other minority group holds that number of seats in the Parliament.[76] In Kosovo, according to the CF, de facto minority groups cannot veto a decision, but merely change or delay a decision.

73 U Schneckener 'Making power-sharing work – lessons from successes and failures in ethnic conflict regulation' (2002) 39 *Journal of Peace Research* 207 208.

74 A Lijphart (n 11 above) 37.

75 Article 69(2) of the Constitution of the Republic of Macedonia *Constitutional Court of the Republic of Macedonia* http://www.usud.gov.mk/domino/WEBSUD.nsf/UstavE?OpenPage (accessed 10 June 2003).

At this instant if we examine the constitutional set ups in the cases of Bosnia, Kosovo, and Macedonia, in all of them this element of the approach of consociational democracy can be tracked at almost all segments of the political system, parliament, government, even in the case of Bosnia, in the presidential body as well.

Once more, let us take first the case of Bosnia. Since it was mentioned in the part discussing grand governmental coalitions, so far it is nothing new that the three members of the Presidency have comprehensive veto rights. Particularly, Art 5(2) stipulates that all Presidency decisions should be brought by consensus. As the decisions sometimes can be brought by the votes of two members of the organ only, the third one can claim such a decision as destructive towards the vital interests of the group, or better, the entity he/she represents. Under these circumstances, the decision goes to the respective entity's Parliament, where if representative vetoed it, and it is confirmed to be against the interests, the decision will be annulated.

Supplementary, in the legislative body, in the Parliament, veto rights have much bigger impact, as they are 'generally more comprehensive and crucial in regard to legislation.'[77]

In Bosnia, at state level, in both House of Peoples and House of Representatives, each group holds the right to veto, as guaranteed by the Constitution. 'A proposed decision of the Parliament Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb Delegates selected in accordance with paragraph 1(a).'[78] Highly important here is the formula 'destructive of a vital interest', as it does not gives a narrow definition of what vital interest includes. This creates a gap, as first it sounds as a regulation corresponding to the questions of highest importance to group's interests, but then it gives de facto a possibility to veto literally all decisions. As a response to that, the Office of the High Representative decided to limit the term, by imposing to the entities amendments defining what spheres 'vital interests' include.[79] As a result of this, it is limited to the fields of group's identity, education, religion, culture, tradition and heritage, use of languages, adequate representation in legislature, executive and judiciary, constitutional

76 Art. 9.1(36) of the Constitutional Framework for Provisional Self-Government of Kosovo http://www.unmikonline.org (accessed 10 June 2003).

77 F Bieber *Power sharing after Yugoslavia: functionality and dysfunctionality of power-sharing institutions in post-war Bosnia, Macedonia and Kosovo* http://www.ssc.uwo.ca/polisci/necrg/ powersharingdemocracy/papers/FlorianBieber Power.pdf (accessed 15 September 2003).

78 Article IV. 3(e) of the Constitution of Bosnia and Herzegovina http://www.ohr.int (accessed 10 June 2003).

79 Decision of the Constitutional Court of Bosnia and Herzegovina, Definition of Vital Interests, Amendment XXXVII http://www.ohr.int (accessed 10 June 2003).

amendments, organisation of public authorities, equality in decision-making process, territorial organisation, and public information system.[80] However, even if the decision is not a subject of the fields defined as spheres of vital interest, if claimed by two thirds of one of the constituent group as such, can be treated as so.[81]

Further, in Kosovo, again, the regulation of this mechanism is quite likewise to the situation in Bosnia. First, as it was shown before, what differs here, is the threshold introduced, as the CF stipulates that '... any member of the Assembly, supported by five additional members ...'[82] can claim a law as violating the vital interests. But then, the space for manoeuvre is defined as in Bosnia, respectively:

> ... A motion may be made on the grounds that the law or provisions discriminate against a Community, adversely affect the rights of the Community or its members under Chapter 3 or 4, or otherwise seriously interfere with the ability of the Community to preserve, protect or express its ethnic, cultural, religious or linguistic identity.[83]

Moreover, the formula of 'vital interests' in Kosovo is not additionally defined as in Bosnia, what is a serious obstacle not maybe towards the right itself, but the procedure following such a claim. Having in mind the role of the UNMIK and the SRSG, and their competencies, in case of deadlock, these institutions will have the final word.

Finally, in Macedonia, the veto rights of, in this case, minority groups differ from the other two cases examined. So far it was briefly explained that the holder of the right to veto a certain decision belongs only to the minorities, thus introducing a threshold of 2/3 of the present representatives of the minority communities.[84] Second, the type of the decisions that can be blocked is far more limited than in the other two cases, which to a higher degree is a result of the process of institutionalisation of the consociational arrangements themselves in this country, as the situation by both political actors and population was perceived as a change of the legal framework only to extended liberal democracy approach of the interethnic coexistence. Double majority, what will acquire majority of the votes from all the communities represented in the Parliament, is needed only in procedures when laws on identification documents, use of languages, and use of symbols, culture, and local self-government are

80 Decision of the Constitutional Court of Bosnia and Herzegovina (n 79 above).

81 The Amendment XXXVII also stipulates that an issue will be treated of vital interest if 'so claimed by 2/3 of one of the caucuses of the constituent peoples in the House of Peoples', in: Decision of the Constitutional Court of Bosnia and Herzegovina (n 79 above).

82 Constitutional Framework for Provisional Self-Government, article 9.1(39) http://www.unmikonline.org (accessed 10 June 2003).

83 Article 9.1(39) Constitutional Framework for Provisional Self-Government http://www.unmikonline.org (accessed 10 June 2003).

84 Article 69 Amendment X Constitution of the Republic of Macedonia *Constitutional Court of the Republic of Macedonia* http://www.usud.gov.mk/domino/WEBSUD.nsf/UstavE? OpenPage (accessed 10 June 2003).

at stake. This clear limitation of the spheres on which all groups de facto decide, can have both positive and negative impact. As for all other subjects no minority approval is required, groups can easily feel marginalised, even when highly important decisions having influence on them are in question, which in a way gives a notion of a sub-ordinate position in the society. On the other side, it makes much simpler the decision – making process, as no big space for obstruction of it exists.[85]

At the end, after previously mentioning the possibilities of deadlock in the decision-making process, it is surely important to mention that there are regulations dealing with this issue as well. Moreover, it is from a crucial importance who and when regulates the process once veto is imposed, as it can lead to inter-group intolerance and negative impact on the relations.

In Bosnia the mediation is supervised by a body composed from one member from each community convened by the Chair of the House of Peoples, which in situation of failure to reach a decision, transfers the case to the Constitutional Court.[86] Respectively, in Kosovo, the first instance is the Parliament itself, or correctly, the Presidency of the Assembly, as it should at least make an effort to reach a solution. If not successful, than a body, 'a special three-member Panel', consisted of one member of each community and a member who presides appointed by the SRSG brings a proposal to the Assembly.[87] At last, in the case of Macedonia, the Committee for Relations between Communities, founded as provisioned in the FA, is accountable for this procedure or precisely for any dispute of ethnic character.

What can be drawn as a conclusion so far, that in less or higher degree, veto rights are also built in the institutions of the countries in focus. Exactly on the effect they have, whether positive or negative, not much can be commented, as it is a debatable issue. In general, to the extent this study permits, what can be underlined, is that this consociational arrangement thus secures each group with a notion of ownership over issues of 'vital interest', in some of the cases more than in another, but still basically everywhere implemented. Another

85 F Bieber *Power sharing after Yugoslavia: functionality and dysfunctionality of power-sharing institutions in post-war Bosnia, Macedonia and Kosovo* http://www.ssc.uwo.ca/polisci/necrg/powersharingdemocracy/papers/FlorianBieber Power.pdf (accessed 15 September 2003).

86 The Constitution of Bosnia and Herzegovina article IV.3(f) provisions '…the Chair of the House of Peoples shall immediately convene a Joint Commission comprising three Delegates, one each selected by the Bosniac, by the Croat, and by the Serb Delegates, to resolve the issue. If the Commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall in an expedited process review it for procedural regularity'. http://www.ohr.int (accessed 10 June 2003).

87 Constitutional Framework for Provisional Self-Government, article 9.1(40) & article 9.1(41).

positive remark would be that there are mechanisms implemented for preventing blockage of the whole process, so Lijphart answers to the critiques are proven to be so far functioning.

As two of four basic principles were so far elaborated, the next sub-chapter will deal with the proportional representation issue in the discussed cases.

3.2 The principle of proportional representation in the three cases

Proportionality, to use Lijphart's terminology, is the principle of consociational approach, securing power, representation, and influence to minority groups.[88] As it was the case with the veto power, this consociational element is as well closely interconnected with the first - joint government - principle, as Lijphart underlines in couple of his studies on this subject.[89] Precisely, according to the author, it 'serves as the basic standard of political representation, public service appointments, and allocation of public funds.'[90] Moreover, its most important characteristic is fair distribution standard, as 'it facilitates the process of decision making because it is a ready-made method that makes it unnecessary to spend great deal of time on the consideration of alternative methods of distribution.'[91] As a result, all segments of the society are proportionally or adequately represented in the governing of the country, as well as in public administration, police, army, state-owned companies and have access to resources and funds.

Scholars differ two forms of manifestation of the proportionality phenomenon - first as tool securing representation in the decision-making process, of course after introducing appropriate electoral system, and especially with an emphasise on the representation of the groups in the parliament. Respectively, the second one is seen as a mechanism providing allocation of resources by the state, including appointment of civil servants and public spending, too.[92]

88 T D Sisk *Power sharing and international mediation in ethnic conflicts* (1996) 36 37.

89 A Lijphart *Democracy in plural societies - a comparative exploration* (1977) 38; A Lijphart 'The power-sharing approach' in: J Montville (ed) *Conflict and peacemaking in multiethnic societies* (1991) 494-495.

90 A Lijphart 'The power-sharing approach' in: J Montville (ed) *Conflict and peacemaking in multiethnic societies* (1991) 495.

91 A Lijphart (n 90 above) 495.

92 A Lijphart 'Democracy in plural societies - a comparative exploration (1977) 38 41; T D Sisk *Power sharing and international mediation in ethnic conflicts* (1996) 36 37; U Schneckener 'Making power-sharing work – lessons from successes and failures in ethnic conflict regulation' (2002) 39 *Journal of Peace Research* 207 208.

The first function, as Lijphart argues, is even more important, as it broadens the functions of grand coalition principle, by guaranteeing not only representation of the groups in decision-making bodies, but also proportional representation. In this way, 'it removes a large number of potentially divisive problems from the decision-making process and thus lightens the burdens of consociational government.'[93] By using Jurg Steiner's analyses, Lijphart further explains that influencing the decisions in a proportion to one's group numerical strength can only be assured if policy matters are being bargained by the participation of all groups proportionally.[94] With other words, demographic strength, through adequate electoral system, should be translated in adequate representation of the groups in the decision-making bodies, if an adequate influence in policy-making is to be achieved.

Furthermore, the second function of the principle is allocation of 'civil service appointments and scarce financial resources in the form of government subsidies among the different segments.'[95] What is important here is that this feature of proportionality differ diametrically the latter from the majority, winner-take-all principle. Specifically, as one of the driving forces for establishing a minimum winning coalition is surely 'the 'spoils' of government' that can be divided if possible among as small number of participants as possible, the proportionality rule, through allocation ensures minimum winning coalition by less profitable also less probable.[96]

There is also one problem connected with the nature of the principle, of which Lijphart reminds. How proportional influence can be guaranteed in cases when one decision has a dichotomous character? The outcome in a situation without consensus on issues discussed is almost always winning side and losing one, of course. As it is often the case in policy-making, here as well there is no ultimate solution, but rather two alternatives, as described by Lijphart that can alleviate it. One option is 'to link several issues and to solve them simultaneously by reciprocal concessions', usually known as package deal, or logrolling, as common in the EU decision-making.[97] The other one is to relocate the most energy taking and important decisions to the top leaders of the groups, what in a way places the decision-making in the hands of small number of people. As a consequence, the possibility of reaching a solution for a package deal is more likely and chances to use the veto right less, thus giving an advantage to the arrangement.[98]

93 A Lijphart (n 11 above) 39.
94 As above, 39.
95 As above, 38.
96 As above, 38 41.
97 As above, 40.
98 As above, 40.

Moreover, Lijphart examines two variations of the discussed principle, which if implemented, the effect will be even greater contrast from the majority rule. In particular, he refers to the deliberate overrepresentation of small segments, and parity of representation. As a matter of fact, the two variants have opposite outcomes, although the role of both of them is granting extra protection and security to the small groups. Parity, which can be described as maximum extension of the deliberate overrepresentation, especially useful when the society is composed by two groups of unequal size, presupposes overextension to extremely high degree, even representation reaching the size of the majority.[99]

In the first chapter, the importance of the electoral system used in deeply divided societies was mentioned, as it is the case with the ones this study deals with. As the Parliament is a body of dual meaning for the groups in multicultural societies, it is of a crucial significance who will be represented with what strength.[100] Therefore, proportionality in the Parliament is maybe of a high importance for the success of the consociational arrangement. But the question how to assure the role Parliament has effectively, and of course to mirror the diversity, if not completely at least roughly, of the society, can be answered through more analyses, such as how the representation is secured, how much power is concentrated in, and the power different groups have with in, as well.[101] Bieber distinguishes the first aspect as the one describing the element of representation, what is our main interested so far. In regard to it, he gives four usually used instruments directly connected to the question who and how will be represented in the legislative body – (one) electoral systems; (two) electoral districts; (three) thresholds; and (four) reserved seats.[102]

First task, so to say for the election system, is that it should maximally reflect the composition of the society in the legislative organ, as the most basic and commonly used definition of an electoral system is - a set of methods that defines the translation of votes into representatives' seats.[103] That is what actually best distinguishes

99 A Lijphart (n 11 above) 40 41.

100 'Parliaments in divided societies play a dual role. First they are the institutions where laws are passed. Second, they are the principal body of representation for communities' F Bieber *Power sharing after Yugoslavia: functionality and dysfunctionality of power-sharing institutions in post-war Bosnia, Macedonia and Kosovo* http://www.ssc.uwo.ca/ polisci/necrg/powersharingdemocracy/papers/FlorianBieberPower.pdf (accessed 15 September 2003).

101 F Bieber *Power sharing after Yugoslavia: functionality and dysfunctionality of power-sharing institutions in post-war Bosnia, Macedonia and Kosovo* http://www.ssc.uwo.ca/polisci/necrg/powersharingdemocracy/papers/FlorianBieberPower.pdf (accessed 15 September 2003).

102 F Bieber (n 101 above) 3.

103 L Malazogu & I Dugolli *Reforming the electoral system of Kosova* (2003) 6.

majoritarian/plurality, semi-proportional, and proportional systems.[104]

As practice shows both international actors, and domestic politicians in SEE, in the post-conflict societies or not necessary post-conflict but still in a process of transition to democracy, introduced PR system.[105] One of the reasons for this phenomenon is that in plural societies, with strong ethnic cleavages, PR systems are believed to facilitate minority representation, as often minorities are electoral losers in majoritarian system.[106] 'Under PR, minorities should display more positive attitudes towards the political system because no group that can mobilise electoral support is systematically excluded from elected office on a persistent basis.[107]

Again to use Lijphart analysis, the core argument for preferring PR instead of majoritarian, given punctually, is because it: (one) produces a more proportional outcome; (two) this facilitates the entry of smaller parties into parliament; (three) this includes the election of ethnic minority parties; and in turn (four) this produces greater diffuse support for the political system among ethnic minority populations.[108]

Especially interesting critique of the PR electoral system and proportionality as a whole is given by Horowitz in the ongoing debate on consociational vs. integrative approach. He is underlying that cultural autonomy with its application of equality representation, i.e. proportionality, should be a product of the reduction of inter-ethnic

104 F Bieber *Electoral engineering: the Balkan record managing interethnic relations through elections* Paper presented at the Panel 'Ethnopolitics and Elections' of the ASN Convention, (3-5 April 2003) 2.

105 Worldwide proportional electoral systems based on party lists in multi-member constituencies are used in 67 out of 211, from which Poland, Romania, and Czech Republic see: P Norris 'Ballots not bullets: testing consociational theories of ethnic conflict, electoral systems, and democratisation' in A Reynolds (ed) *The architecture of democracy – constitutional design, conflict management, and democracy* (2002) 238; Also PR is used Bosnia and Herzegovina, Croatia, Montenegro, Serbia, Macedonia, and UN Kosovo. See: F Bieber *Electoral engineering: the Balkan record managing interethnic relations through elections* Paper presented at the Panel 'Ethnopolitics and Elections' of the ASN Convention, (3-5 April 2003) 2.

106 P Norris 'Ballots not bullets: testing consociational theories of ethnic conflict, electoral systems, and democratisation' in A Reynolds (ed) *The architecture of democracy – constitutional design, conflict management, and democracy* (2002) 208 216.

107 P Norris (n 106 above) 214.

108 A Lijphart *Electoral systems and party systems: a study of twenty-seven democracies, 1945-1990* (1994) as summarised in: P Norris 'Ballots not bullets: testing consociational theories of ethnic conflict, electoral systems, and democratisation' in A Reynolds (ed) *The architecture of democracy – constitutional design, conflict management, and democracy* (2002) 210.

conflict, and not an ingredient of the conflict regulating mechanisms.[109] Regarding the PR electoral system itself, primarily his critique is that PR and political parties based on ethnicity do nothing to foster compromise on ethnic issues. Therefore, what he offers is electoral rewards, as they can act as an incentive for the politicians to accommodation, and not constraints, as 'the more enduring and effective arrangements to reduce intergroup conflict are fortified by internal incentives, not external constraints.'[110] Incentives, for the already elected political elite can be found in the electoral system, which on the other side is supposed to achieve five possible aims: fragmentation, moderation, coalition, fluidity, and proportionality.[111]

> Where electoral rewards are present, they can provide the motivation ethnic leaders otherwise lack, they can operate even in the presence of ethnocentrism, and they can offset electoral losses that leaders anticipate as a result of making concessions to other groups.[112]

Therefore, the integrative approach suggests vote-pooling arrangements, as a way of assuring these rewards. Addressing the electoral system of single transferable vote - STV or the alternative vote system - AV, the author argues that it is a preferential system in which one candidate's election is dependent very much on the votes outside his/her ethnic group.[113]

Now if we go back to the instruments used to ensure adequate group representation in the Parliament, after the electoral systems, electoral districts were mentioned. Here, due to the space provided, what can be stated briefly is that the size of one district is obviously determined by the electoral system itself, but the location in relation to the population distribution is not. Therefore, the goal would be designing electoral districts that create coherent minority or group based districts.[114]

The next issue is the threshold, as it is one of the most important apparatus in the electoral process. This tool is mainly used for preventing fragmentation of the parliaments, i.e. too many small parties become represented. However, in the case of divided

[109] D L Horowitz 'Constitutional design: proposals versus processes' in: A Reynolds (ed) *The architecture of democracy - constitutional design, conflict management, and democracy* (2000) 15 36.

[110] D L Horowitz *A democratic South Africa? Constitutional engineering in a divided society* (1991) 154.

[111] D L Horowitz *Ethnic groups in conflict* (1985) 628 651.

[112] D L Horowitz 'Constitutional design: proposals versus processes' in: A Reynolds (ed) *The architecture of democracy - constitutional design, conflict management, and democracy* (2000).

[113] D L Horowitz *A democratic South Africa? Constitutional engineering in a divided society* (1991) 167 176.

[114] F Bieber *Electoral engineering: the Balkan record managing interethnic relations through elections* Paper presented at the Panel 'Ethnopolitics and Elections' of the ASN Convention, (3-5 April 2003) 4.

societies, the threshold mechanism has different role. Its height is very important in a multicultural society, as small groups can easily be excluded from any participation in first place in the legislature, and also all other decision-making bodies if the threshold is higher then the number of the minority voters or if more then one minority party is active on the political scene. In that case only coalitions among different minority groups or parties can prevent the exclusion. In order to prevent such an outcome, thresholds for the minority groups are lower or lifted.[115] In the cases under the scope, relatively low thresholds are introduced, thus making very probable diversity in parliaments. Bosnia and Macedonia have three percent thresholds, and in Kosovo there is none.[116]

Finally, the most significant and *de facto* only certain device for ensuring representation of the groups in parliament and the other organs of the state too, is the reserved seats provision. Once more to use Bieber's analysis, the seats set aside for the different groups can be filled (one) by minority representatives, chosen by minority organisations; (two) by holding separate elections for minorities for those seats, or (three) by assigning the reserved seats to the minority parties with the highest votes.[117] In addition, this mechanism is ideal when small minorities are in question, and when the other tools can fail. The distinction presented above by Lijphart regarding the two variations of proportionality can be excellently applied in the reserved seats practice. Whether deliberate overrepresentation or parity will be preferred, depends on the specific function of the institution. The point is that if the goal of the representation is with emphasise on the groups as such, with strong veto rights, the better choice would be parity. In the case of general law-making bodies, proportionality is usually preferred.[118] In addition, the last point regarding reserved seats relevant with the cases later to be discussed is the possibility of introducing them as only the starting point for representation, or as minimum, and the other option – total number with no further opportunities for the groups to gain more places in the respective body.

The argument for PR and proportionality as a principle from great importance for the group representation and inclusion cannot be better supported as by the fact that all the three cases in question

115 F Bieber (n 114 above) 3.
116 F Bieber *Power sharing after Yugoslavia: functionality and dysfunctionality of power-sharing institutions in post-war Bosnia, Macedonia and Kosovo* 4 http://www.ssc.uwo.ca/polisci/necrg/powersharingdemocracy/papers/FlorianBieber Power.pdf (accessed 15 September 2003).
117 F Bieber (n 116 above) 4.
118 F Bieber *Electoral engineering: the Balkan record managing interethnic relations through elections* Paper presented at the Panel 'Ethnopolitics and Elections' of the ASN Convention, (3-5 April 2003) 8.

here have adopted PR, or better different variations of it, as an electoral system.[119]

As it was practice so far, first let us take the case of Bosnia. The first impression from the study of Bose on Bosnia was his comment on the constitution of the state, which here can maybe best show the relevance of the proportionality principle for the political system as a whole. He describes the Constitution of Bosnia as a basic law that 'establishes a fairly skeletal framework of common-state institutions based on equality and parity representation of Bosniacs, Serbs and Croats as collectively defined communities, and limits those institutions to a narrow band of competencies.'[120]

First, if we take a look at the legislative organ of the state, as stipulated by the article 4 of the Constitution, it is a bicameral Parliamentary Assembly.[121] Further, article 4(1) provisions the House of Peoples as a body consisted of 15 Delegates, ten of them from the Federation (five Bosniacs + five Croats), and five Serbs from Republika Srpska.[122] The situation is almost same in the House of Representatives – it is consisted of 42 members, two thirds elected from the territory of the Federation, one third from the territory of the Republika Srpska.[123] The principle of proportionality is evident in the legislature, in both cameras - House of Peoples and House of Representatives. After examining it, Bose concludes that together with veto rights, allocation of seats in a way that takes account of group membership, including a strict parity formula in the House of Peoples, makes two of the four classic features of a 'consociational' or group-based power-sharing system evident in the legislature of Bosnia.[124]

The composition of the Presidency is again on the basis of the proportionality formula, as it is a collective state presidency, applying the principle in a very straightforward way. According to article V of the Constitution of the state, the Presidency 'shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the

[119] For more information please refer to Appendix IV.

[120] S Bose *Bosnia after Dayton - nationalist partition and international intervention* (2002) 61.

[121] 'The Parliamentary Assembly shall have two chambers: the House of Peoples and the House of Representatives', in: Article IV *The Constitution of Bosnia and Herzegovina* http://www.ohr.int (accessed 10 June 2003).

[122] Article IV(1) (n 121 above) Even for the quorum there is proportionality principle, as article IV.1(b) elaborates that nine members of the body shall comprise a quorum, provided that at least three Bosniac, three Croat, and three Serb Delegates are present.

[123] Article IV(2) *The Constitution of Bosnia and Herzegovina* http://www.ohr.int (accessed 10 June 2003).

[124] S Bose *Bosnia after Dayton - nationalist partition and international intervention* (2002) 63.

territory of Republika Srpska.'[125] As in the sub-chapter examining joint government principle, and even veto rights, the functions and competencies of the body was presented, here there is no further need to enter a deep analysis of the latter.

Interesting to mention here is the Constitutional Court of Bosnia, as one the proportional representation mechanism can even be found here. Its structure, competencies, and procedural questions are set up in the article 6 of the Annex 4 of the DPA.[126] It is composed of nine judges, six from Bosnia (4 appointed from the Federation - of course 2 of them Bosniacs, and other 2 Croats -, and 2 by Republika Srpska), and three foreign judges, appointed by the President of the European Court of Human Rights, after consulting the Presidency of Bosnia. In the part of domestic judges - members of the Court, again the proportionality method is introduced, thus showing that even in the organs entailing highly expertise role - group representation matters. In order to make the procedure less obstructive by inter-entities disputes, the foreign judges are participating in the decision-making. Moreover, the decisions are made by simple majority vote, which on one hand shows the lack of sovereignty of the state, but on the other is a way of bringing a decision with practically a combination of the judges of one of the entities plus the foreign ones.[127]

On the other side, the proportionality principle in public administration and civil service is placing extra difficulties in the already not so well functioning Bosnia. The problem of discrimination in employment, most often on the basis of ethnicity, but also on political affiliation or non-affiliation, gender, and, age, even seven years after the signing of the DPA is one of the leading and energy taking one. Still, the biggest problem of it remains the employment and treatment of the ethnic minorities (Roma, Jews, and other really small communities). The homogenisation of Bosnia's population in separate national enclaves during the war, the partition sealed by the DPA and the subsequent electoral victories of the nationalist parties has ensured that municipal administrations, courts, police, schools, and public companies are staffed almost exclusively by members of the locally dominant nation.[128] There can be found brutal examples of this phenomenon in almost every part of the country, with partial exceptions in some cities and professions in the Federation, but Republika Srpska as a whole continues to reflect the success of 'ethnic

[125] Article V *The Constitution of Bosnia and Herzegovina* http://www.ohr.int (accessed 10 June 2003).

[126] Article VI Constitutional Court *The Constitution of Bosnia and Herzegovina* http://www.ohr.int (accessed 10 June 2003).

[127] LJ Mijovic 'Human rights in B-H' in Z Papic (ed) *International support policies to South-East European countries - lessons (not) learned in Bosnia and Herzegovina* (2001) 224.

[128] Global IDP Database, Bosnia and Herzegovina, *Issues of self-reliance and public participation* http://www.db.idpproject.org/ (accessed 14 September 2003).

cleansing'.[129] Even from a great danger is that this problem most affects another hot spot of Bosnia - displaced persons, and refugees.[130] One of the reasons for this for sure is the high degree of political influence to the central institutions and distribution of the positions on the basis of nationality. The central institutions many times are over employed, in order to ensure equal national representation, i.e. proportionality.[131] As a response to these facts the international community present in the country developed a standard set of fair and equal treatment employment principles (FEEPs), as well as Fair Employment Practices Strategy.[132]

In Kosovo, proportionality is again implemented in the top state institutions, with differences in comparison with Bosnia, undoubtedly.

First, the Assembly is the highest representative and legislative Provisional Institution of Self-Government of Kosovo.[133] The Assembly has 120 members, one hundred of which are distributed amongst all parties in proportion with the votes received, and the other twenty are reserved for the non-Albanian Kosovo Communities.[134] Ten of them are allocated to parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing the Kosovo Serb Community, in proportion to the votes gained, and ten other to other Communities as follows: the Roma, Ashkali and Egyptian Communities four, the Bosniak Community three, the Turkish Community two and the Gorani Community one.[135] In addition, these communities can gain seats from the proportionally distributed seats, as well. Interesting fact here, which is the case with Bosnia as well, is that in order to gain the reserved seats, in the legislative bodies, the candidates are obliged to declare their ethnicity.

129 Global IDP Database (n 128 above) 1.

130 According to OSCE reports, until 1999 about 66% of displaced persons and refugees are without jobs, with many of them believing that the refugee status is the reason of discrimination. OSCE BiH *Employment Discrimination in Bosnia and Herzegovina* (1999) http://www.oscebih.org (accessed 14 September 2003).

131 M Weller *et al* 'Power-sharing in Bosnia and Herzegovina: strengthening implementation of the Dayton Peace Accords' (2001) *European Centre for Minority Issues Report # 12* http://www.ecmi.de (accessed 14 September 2003).

132 The initiative organised by the OSCE mission, Human Rights Department, in conjunction with the UN High Commissioner for Human Rights, the UN High Commissioner for Refugees and the Office of the High Representative. For more information: *Prevention and elimination of discrimination in employment* OSCE Human Rights, Economic and Social Rights http://www.oscebih.org (accessed September 16 2003); *International community commitments to the elimination of discrimination and conditionality* UNHCR mission to Bosnia and Herzegovina http://www.unhcr.ba/protection/refugees&dp/offst107.PDF (accessed September 16 2003).

133 Article 9.1(1) *The Constitutional Framework for Provisional Self-Government* http://www.unmikonline.org (accessed 10 June 2003).

134 Articles 9.1.3(a) & 9.1.3(b) (n 133 above).

135 Articles 9.1.3 (i) & 9.1.3 (ii) (n 133 above).

In the Presidency of the Assembly proportionality is present again. Precisely, it is consisted of seven members: two appointed by the party or coalition with highest number of votes in the Assembly elections; other two from the second highest respectively; one from the third highest; one from among the members having previously declared themselves representatives of the Kosovo Serb Community; and the last one is appointed from the representatives of non-Albanian and non-Serb Community. The President of the Assembly is a member of the Presidency from the party with highest votes.[136]

At the executive level, the Government consists of Prime Minister and eleven Ministers.[137] Here as well there is a provision regarding representation of the non-majority groups. First, there is a requirement for appointment of at least two Ministers from Communities other than the Community with majority representation in the Assembly, and then is specified that one of them should be from Kosovo Serb Community and one from another Community.[138]

Even in the articles dealing with judicial branch, there is maybe not really specified, but still a requirement regarding different society group's representation. The article 9.4(7) along with the highest moral character, and adequate qualifications, conditions the memberships of the judiciary to reflect the diversity of the people of Kosovo.[139]

At the highest level of power, Macedonia is quite different in comparison with both Kosovo and Bosnia. First in the Parliament, the representation of the communities is not regulated by reserved seats, as there are no such, but through the electoral system only. After the FA, the electoral system is PR, but important to mention is that before the signing of the FA it was a combination of majoritarianism and PR. As for the executive, as presented above the representation of the communities is not legal requirement, but rather a tradition. As a consequence, only the largest and politically strongest ethnic group so far has held a post in the government.

In Macedonia, the section four of the FA deals with the legal requirements for providing all groups inclusion in the political bodies and civil sphere as well.

First, in the basic principles of the agreement, in Section 1(3) is stated that the multi-ethnic character of Macedonia's society must be preserved and reflected in public life. Then, as mentioned above, in

136 Article 9.1.7 (a), (b), (c), (d), (e) & 9.1(9) (n 133 above).

137 For more information on the structure of the Government please check: http://www.unmikonline.org (accessed 14 September 2003).

138 Article 9.3(4); article. 9.3(5) & article 9.3.5(a) *The Constitutional Framework for Provisional Self-Government* http://www.unmikonline.org (accessed 10 June 2003).

139 Article 9.4(7) *The Constitutional Framework for Provisional Self-Government* http://www.unmikonline.org (accessed 10 June 2003).

section four, named Non-Discrimination and Equitable Representation, the principle is to be applied with respect to employment in public administration and public enterprises, access to public financing.

Precisely, laws dealing with the issue of employment are required to include measures to assure equitable representation of communities in both central and local bodies governing public administration, at all levels of them.[140] Here, an interesting remark is made, saying that the authorities should act in direction to improve present imbalances in the composition of the public administration, and in particular by recruiting members of the 'under-represented communities', with an emphasise on police services.[141] This remark makes clear that so far the issue of group representation was not well embedded in the system, and can be seen as a progress after the FA. As mentioned previously, the proportionality in the police forces is one of the biggest challenges. Section 3(3) of the FA deals with it, and the final compromise was that local police commanders to be appointed by the local authorities from a list drown up by the Interior ministry, while police would remain under the central authority.[142] This change aims at police forces sensitive towards the ethnic composition of Macedonia, so the FA also provisioned all together 1000 new police officers from communities not in the majority to be hired and trained.[143] Practically, the new recruits have been mostly ethnic Albanians, in order to heighten their percentage in the police force (at the time of the signing of the agreement 3%), up to 23%, which is the official group percentage from the total population of the country.[144]

Finally, for the Constitutional Court, there is an obligation one third of the judges to be chosen by the Assembly by a 'double majority' of the total number of Representatives. That condition requests a simple majority of the total number of Representatives claiming to belong to the communities not in the majority of the

[140] Section 4, Section 4(1) and Section 4(2) *The Ohrid Framework Agreement* http://faq.macedonia.org/politics/framework_agreement.pdf (accessed 10 June 2003).

[141] '... The authorities will take action to correct present imbalances in the composition of the public administration, in particular through the recruitment of members of under-represented communities. Particular attention will be given to ensuring as rapidly as possible that the police services will generally reflect the composition and distribution of the population of Macedonia, as specified in Annex C' article 4(2) *The Ohrid Framework Agreement* http://faq.macedonia.org/politics/framework_agreement.pdf (accessed 10 June 2003).

[142] Section 3(3) Development of Decentralised Government *The Ohrid Framework Agreement* http://faq.macedonia.org/politics/framework_agreement.pdf (accessed 10 June 2003).

[143] Annex C, Section 5(2) *The Ohrid Framework Agreement* http://faq.macedonia.org/politics/ framework_agreement.pdf (accessed 10 June 2003).

[144] The Framework Agreement of 13 August 2001 and Its Implementation *European Centre for Minority Issues Report* http://www.ecmi.de (accessed 16 September 2003).

population of Macedonia alongside with the simple majority of all other votes.[145]

The same procedure has to be applied to the Ombudsman (Public Attorney), a position established in 1997, but with limited influence, and now with broadened competences – to safeguard the principles of non-discrimination and equitable representation of communities in public bodies and other areas of public life.[146] The principle was also applied to the election on three of the members of the Judicial Council.[147]

As it was the case with Bosnia, in Macedonia one can noticed that no matter what the type of body we are dealing with, whether entirely political or expert based, group representation matters, as there is a danger of one of the group's permanent exclusion. The difference is in how to ensure, as the top state institutions are legally obliged to the proportionality principle in Bosnia, and in Macedonia before the FA this was result of the ethnic accommodation, and now to a high degree also politically or legally pressured and conditioned.

Many scholars when Bosnia and Macedonia are in question make harsh critiques on the exclusion and discrimination of the other minority group's.[148] As underlined by a scholar, 'the Agreement (FA) does little to redress the existing power asymmetry between all ethnic communities in Macedonia, as the power-sharing provisions set forth do not adequately incorporate the interests of the non-Albanian minorities.'[149] For example the Roma and ethnic Turks, the next two largest communities after the Albanians, 'were especially alienated by a debate over the future of the country involving only representatives of the two largest communities.'[150]

Adding up, the power-sharing elements, and especially proportionality principle as envisioned in both Macedonia and Bosnia, are in fact limited to the constituent peoples in the latter case and to Macedonians and Albanians in the former one, aiming to harmonise the relations among the group's holders of the right and not all the groups composing the society.

In the case of Bosnia, the issue of constituent peoples is legally embedded in regard to the Serbs, Bosniacs, and Croats, and in the

145 Section 4(3) *The Ohrid Framework Agreement* http://faq.macedonia.org/politics/ framework_agreement.pdf (accessed 10 June 2003).
146 Section 4(3) (n 145 above).
147 Section 4(3) (n 145 above).
148 'other groups' – term used to refer in the case of Bosnia to all the minorities except the three constituent peoples, and in the case of Macedonia the non-Albanian minority groups
149 J Engstrom 'Multiethnicity or binationalism? The Framework Agreement and the future of the Macedonian state' in (2003) 1. 2001/2 *European Book of Minority Issues* 347.
150 F Daftary 'Conflict resolution in FYR Macedonia: power-sharing or the 'civic approach'? (2001) 4 *Helsinki Monitor* 310.

case of Macedonia with the FA mostly improving the situation only of the Albanian community is additionally complicating the situation towards the other minority groups by creating concerns of the country becoming binational state.

In that aspect, Kosovo is dealing in different way with the multiculturality of the society. As presented, not only Serb Community is represented at the top political bodies and public administration, but the other groups as well. In respect to the proportionality principle, Kosovo can be described as progressive and ambitious project of the international community responsible for the legal framework, as it challenges the standards of minority issues not only in the province, but in the region and elsewhere, so far only formally, as implementation of the later is different issue. Interesting is the fact that Serbs in Kosovo regardless the history and background of the problem, are not numerically much stronger then the other small minorities in Kosovo like Turks and Roma for example, as is the case with Albanians in Macedonia, resulting in disproportionate power mostly originating from the unresolved status of Kosovo, as a whole.

Finally, on the issue concerning the minorities in the case of Bosnia and Macedonia not addressed in same manner as the larger groups by the respective constitutions or not sharing the power can only be resolved through the minority rights approach. Efforts for adequate representation of non-majority communities in public bodies are a face, however the different strength they have in comparison to the larger groups creates frustrations and can be conflict driving force.

Altogether, the principle of proportionality does address the problem of group's equality at all levels of public life in the three cases, thus securing groups inclusion in both decision-making and civil service sphere. Although critiqued for cementing ethnicity as a principle set forth in the constitutions, and further more ethnicising the public sphere, at this stage it is the lesser evil. Through the implementation of the principle the composition of the legislature and the other decision-making bodies are fulfilling the criteria of representing the population of the respective countries/province. Further, fair distribution of the funds may not be perfect, but still is on the agenda, somewhere less, and somewhere more.

The last sub-chapter will present the solution of the group autonomy and decentralisation principle in the three cases, as set forth by the law.

3.2 The principle of autonomy (self-government) in the three cases

The last, but not least element of the consociational model is the issue of group or segmental autonomy. The simplest definition of the principle, given by Lijphart is 'a rule by the minority over itself in the area of the minority's exclusive concern.'[151] With other words, it is a mechanism for providing the groups decision-making and implementation of all the group's matters, as the common interests of all the segments of the society are to be in the hands of the grand coalition and the rest of the decision-making organs at the state level. In this way Lijphart describes the term as a logical corollary of the grand coalition principle.[152]

The need for transmitting issues of group's exclusive interest in their hands completely, Lijphart explains with the very basic goal of the consociationalism itself. Respectively, the phenomenon of 'delegation of rule-making and rule-application powers to the segments, together with the proportional allocation of government funds to each segment, is a powerful stimulus to the various segmental organisations.'[153] In turn, the formation of such representative organisations follows the direction of segmental or group cleavages, what he reminds - is one of the characteristics of the plural societies. As a result, the already plural society becomes more thoroughly plural, which finally is the idea of consociational democracy, as 'its approach is not to abolish or weaken segmental cleavages but to recognise them explicitly and to turn the segments into constructive elements of stable democracy.'[154]

A special form of group autonomy is federalism, which can be institutionalised only when the society itself is 'federal society', and that would say the groups are territorially concentrated.[155] Basically, federalism as a solution has also few important parallels with consociationalism. The idea is that not just the constituent segments of one society are eligible for autonomy and is the final goal of the model itself, but also overrepresentation of the further subdivisions of the unit in the 'federal chamber'.[156] Therefore, federalism offers a challenging technique for implementing the idea of segmental autonomy, as 'government at the subnational level is in practice always organised along territorial lines.'[157] *Vice versa,* segmental

[151] A Lijphart (n 11 above) 41.
[152] As above, 41.
[153] As above, 41.
[154] As above, 42.
[155] A Lijphart 'The power-sharing approach' in: J Montville (ed) *Conflict and peacemaking in multiethnic societies* (1991) 495.
[156] A Lijphart (n 11 above) 42.
[157] A Lijphart (n 156 above) 43.

autonomy can be perceived as a generalisation of the idea of federalism.

In a situation of intermixed, territorially or geographically dispersed groups, the autonomy principle can be established on personality basis, as 'corporate federalism' – nonterritorial form, or a combination of nonterritorial and territorial forms.[158] Here Lijphart reminds us that although it is technically much easier to transmit governmental and administrative responsibilities to territorially concentrated than to intermixed groups, it is practically proven that autonomy as a mechanism is compatible in both of the cases.[159] This is especially important on the issues of ones group's cultural affairs, *i.e.* education and communication, as highly sensitive areas, and by so it is recommendable an extensive autonomy.[160]

Applying the theory so far presented to the countries discussed, one can easily notice that territorial federalism as a form of the principle previously elaborated can be only seen in the case of Bosnia.

The DPA divides the country into two entities,[161] the Federation of Bosnia and Herzegovina (the Federation), composed of Bosniacs and Croats with 51% of the territory, and Republika Srpska, which both as a result of the war have become to a high degree mono-ethnic areas, while being a part of a weak multi-ethnic state.[162]

The federal division of Bosnia is closely connected with the wartime territorial division of the groups,[163] as a 'provision of security to all ethnic groups in order that their vital interests would be protected.'[164] In that sense, it is clear that only with security guarantees the barriers from the war can be overcome. As it is explained in the well-known statements of the first High Representative of Bosnia Carl Bildt: 'the two entities will probably be the most decentralised state in the world,'[165] and also 'it will be a very loose and highly decentralised state with weak central powers

158 As above, 43; A Lijphart 'The power-sharing approach' in: J Montville (ed) *Conflict and peacemaking in multiethnic societies* (1991) 494; T D Sisk *Power sharing and international mediation in ethnic conflicts* (1996) 37.

159 A Lijphart *Democracy in plural societies - a comparative exploration* (1977) 43.

160 A Lijphart (n 159 above) 44.

161 Article I(2) *The Constitution of Bosnia and Herzegovina* http://www.ohr.int (accessed 10 June 2003).

162 F Bieber 'Consociationalism - prerequisite or hurdle for democratisation in Bosnia? The case of Belgium as a possible example' (1999) 2.3 *South-East Europe Review for Labour and Social Affairs* 79.

163 'On one hand, the current state possesses some elements of continuity with pre-war state and is the legal successor to the Republic of Bosnia and Herzegovina, suggesting a 'federalising state'. On the other hand, none of the pre-war institutions were incorporated in the new state, weakening the connection to pre-war and war-time Bosnia.' F Bieber 'Bosnia-Herzegovina: developments towards a more integrated state?' (2002) 22.1 *Journal of Muslim Affairs* 209.

164 D Chandler *Bosnia – faking democracy after Dayton* (1999) 66.

165 *Office of the High Representative* Bulletin 2, 13 May 1996: D Chandler (n 164 above) 67.

for its common institutions – and thus unlike any other state in existence.'[166]

The central institutions have responsibilities in the following issues: foreign policy, foreign trade policy, monetary issues, customs, international obligations and finances of the institutions, immigration, refugees and asylum seekers, international and inter-entity criminal law enforcement, establishment and operation of common and international communication facilities, regulation of inter-entity transportation and air traffic control.[167] All issues different from the one explicitly given to the State are under the responsibility of the Entities, as article 3.3 stipulates that all other 'governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.'[168] As Bieber concludes, '... the entities constitute the level of primary political power in Bosnia.'[169]

After examining this feature of the state, Bose makes a remark that even the issue of defence, what can be noticed from the description above, is in the hands of the Entities, which is not a case any more as a ministry of defence was established, and a joint staff on the state – level.[170] Additionally, as set forth in the article 1.7 'there shall be a citizenship of Bosnia and Herzegovina ... and a citizenship of each Entity', then article 3.2 allows the entities the right to 'establish special parallel relationships with neighbouring states', thus respecting sovereignty and territorial integrity of Bosnia.[171]

Finally, after presenting the rights and obligations of the federative units of Bosnia and Herzegovina, Bose concludes, 'sovereignty is devolved downwards and outwards simultaneously – the Entities are the repository of all residual powers and functions ...'.[172]

As also Chandler analysis, where possible the 'power was to be shared through being devolved downwards, thereby allowing greater

166 *Office of the High Representative* Bulletin 3, 20 May 1996: D Chandler (n 164 above) 67.

167 Article III(1) & article III(2) *The Constitution of Bosnia and Herzegovina* http://www.ohr.int (accessed 10 June 2003); S Sali - Terzic 'The legal system' in Z Papic (ed) *International support policies to South-East European countries - lessons (not) learned in Bosnia and Herzegovina* (2001) 157.

168 Article III.3(a) *The Constitution of Bosnia and Herzegovina* http://www.ohr.int (accessed 10 June 2003).

169 F Bieber 'Complex power-sharing in Bosnia and Herzegovina' (2003) I.2001/2 *European Yearbook of Minority Issues* 273.

170 S Bose *Bosnia after Dayton - nationalist partition and international intervention* (2002) 62.

171 *The Constitution of Bosnia and Herzegovina* http://www.ohr.int (accessed 10 June 2003).

172 S Bose *Bosnia after Dayton - nationalist partition and international intervention* (2002) 62.

self-government at local level.'[173] Furthermore, with federalising the state, or with the greater self-government at the local level:

> … was intended to secure a level of self-government for each ethnic constituency, preventing the passage of legislation which could be seen as favouring one ethnic constituency over another. This devolution of power was to provide security to all three minorities and therefore provide a crucial mechanism for institutionalising support for a multi-ethnic society.[174]

If we further go in a detailed analysis, of as cited above devolving power downwards, in the case of the Federation where again two ethnic groups live, a cantonisation has been established.[175] Precisely, the Federation is composed of federative units, which are the Cantons – ten all together, five predominantly Bosniac, three predominantly Croat, and two of them with mixed territory, thus proving the argument before and stressing the ethnic line as a division.

By moving to the implementation of this instrument in the other two cases, Macedonia and Kosovo, two other variants of it will be noticed.

In Macedonia the solution is far away from federal one, as the FA at the very beginning of it, in the Section 1 – Basic Principles- states that Macedonia's sovereignty and territorial integrity, and *the unitary character* of the State are inviolable and must preserved. Moreover, it states that there are no territorial solutions to ethnic issues.[176] Why it is so, when it is very much possible, at least technically, territorial federalisation of the state, as the groups (only the two largest – Macedonians and Albanians- are concentrated; Albanians are settled in the western part of the country), are geographically concentrated? As Daftary rightly observed, territorial autonomy was a highly sensitive subject for the Macedonian government, as that both the political elite and the population (ethnic Macedonians) fear that this might be the first step towards secession.[177]

Therefore, the need, in Macedonian case, in practice only for the Albanian community, to have the first word on issues of group's concern, was settled through extended local self-government, aiming decentralisation of the state, by many scholars described only as 'liberal law on local self-governance.'[178]

[173] D Chandler *Bosnia – faking democracy after Dayton* (1999) 67.
[174] D Chandler (n 173 above) 67.
[175] *The Constitution of the Federation of Bosnia and Herzegovina* http://www.ohr.int (accessed 10 June 2003).
[176] Section 1, Basic Principles *The Ohrid Framework Agreement* http://faq.macedonia.org/ politics/framework_agreement.pdf (accessed 10 June 2003).
[177] F Daftary 'Conflict resolution in FYR Macedonia: power-sharing or the 'civic approach'? (2001) 4 *Helsinki Monitor* 305; M O'Hanlon 'NATO must show strength in the Balkans' 2001 *European Affairs.*
[178] R Stefanova 'New Security Challenges in the Balkans' (2003) 34.2 *Security Dialogue* 178.

Precisely, Section three of the FA envisages adoption of revised Law on Local-Self Government, in accordance with Annex A – Constitutional Amendments, so to enhance competencies related to the areas of public services, urban and rural planning, environmental protection, local economic development, culture, local finances, education, social welfare, and health care.[179]

An important step forward with the decentralisation after the signing of the FA, are the constitutional changes made regarding the issues of group's identity. Specifically, article 7(6) of Annex A of the FA, envisions changes related to the minority language use – 'In the units of local self-government where at least 20 percent of the population speaks a particular language, that language and its alphabet shall be used as an official language in addition to the Macedonian language and the Cyrillic alphabet. With respect to languages spoken by less than 20 percent of the population of a unit of local self-government, the local authorities shall decide on their use in public bodies.'[180] A remark on the quota introduced – 20%, again confirms that mostly the Albanian community benefits from the changes in Macedonia, as the Albanian language and its alphabet is the second official language in 24 municipalities and 4 of the municipalities of the capital, while the second most used is the Turkish with only four municipalities having Turkish as a second official language and Roma and Serbian both being third official languages in only one municipality. These differences besides mirroring the different numerical strengths of the groups are also result of the concentration of the Albanian community geographically, while the other minorities, besides the Roma, are mostly dispersed throughout the territory of the country.

Another important element is the provision allowing official personal documents to be issued in minority language and its alphabet, alongside with the Macedonian language, and the right of the members of communities to use their community symbols on local public buildings.[181]

Under a lot of international pressure, finally after prolonging quite long, the Parliament on 24 January 2002 adopted the law on

[179] Section 3 Development of Decentralised Government *The Ohrid Framework Agreement* http://faq.macedonia.org/politics/framework_agreement.pdf (accessed 10 June 2003).

[180] Article 7(6) of the Annex A: Constitutional Amendments *The Ohrid Framework Agreement* http://faq.macedonia.org/politics/framework_agreement.pdf (accessed 10 June 2003).

[181] Article 48 of the Annex A: Constitutional Amendments *The Ohrid Framework Agreement* http://faq.macedonia.org/politics/framework_agreement.pdf (accessed 10 June 2003).

local self-government.[182] The new law followed the requirements as set forth in the FA, previously described.[183]

If a comparison between Macedonia and Bosnia is to be made, one can easily recognise the difference. In the first case, where we are dealing with enhanced local self-government, the groups are granted only the right to decide on questions connected only with identity, culture and education, what as mentioned many times can be perceived as broadening the liberal theory of minority rights. As a contrast, in Bosnia groups are holders of the right to decide on all the issues, except the ones explicitly given to the state organs.

In Kosovo, the situation is more similar to Macedonia in comparison with Bosnia, as minority groups are granted cultural autonomy, on a personal base, and not a territorial one, but still one can claim that in Kosovo the principle of autonomy is present and in Macedonia not. As the society is composed by a lot of small groups, the international community fostered division on smaller sub-units based on the ex-Yugoslav *bashkesia locale / mesna zajednica* (local community) principle.[184]

The issue is regulated in the Chapter 4 called Rights of Communities and Their Members, of the CF.[185]

Precisely, the minority groups in Kosovo have the right to use their language and alphabets freely, including before the courts, agencies, and other public bodies; education, information, and media in mother tongue; use and display symbols of their community, as set forth in the law; provide for education and establish educational institutions, for which financial assistance may be provided.[186]

Overall, the degree of decentralisation in Kosovo can be evaluated positively, as the legal framework dealing with this issue provides a fair basis. Another question is the capacities of Kosovo institutions, as the situation there is much more complex than in the other two cases because of the internationally community competencies. As a matter of fact, the limited competencies of the

182 Law on Local Self-Government *The Official Gazette of the Republic of Macedonia 5/2002*

183 As a whole, the implementation of the FA was very ill-will, as the parliament at the beginning only for the ratification of 15 constitutional amendments needed over three months, and many other important clauses of the agreement were agreed upon even later, with a lot of growing impatience on the both sides. R Stefanova 'New Security Challenges in the Balkans' (2003) 34.2 *Security Dialogue* 178 179.

184 Minority Rights Group International Emerging frameworks of power-sharing in South-East Europe: strengths and weaknesses http://www.minorityrights.org (accessed 16 September 2003)

185 Chapter 4: Rights of Communities and Their Members *The Constitutional Framework for Provisional Self-Government* http://www.unmikonline.org (accessed 10 June 2003).

186 Article 4.4(a) – (p) *The Constitutional Framework for Provisional Self-Government* http://www.unmikonline.org (accessed 10 June 2003).

municipalities as a whole, as a result of the reserved powers of the UNMIK, are a subject of dislike of both Serb and Albanian communities.[187] Regardless of the ethnic composition of the municipality, a transfer of the competencies is what different communities is asking for, as not only political or security issues are at stake, but also the very daily management of the units is limited.[188] Recently, a document by the Serbian Coordination Centre was issued, complaining of law competencies of municipalities, what for sure is in their interest, as they can increase their power in the Serb dominated northern municipalities.[189]

On the other hand, many Kosovo scholars and practitioners claim that at this stage Kosovo may need not decentralisation, as - '... despite global trends of decentralisation, due to low capacities in terms of human resources and finances, one might argue that what Kosovo needs is the opposite, the strengthening of central institutions.'[190]

To conclude, the institutionalisation of the principle of autonomy differs significantly in the three cases, or as stated before, in the case of Macedonia it is not implemented autonomy by definition at all, but enhanced local self-government.[191] Still, that is very much a result on the different conditions apart in the cases, as the segmental autonomy provision is sensitive on demography and territorial placement of the groups for example apart from the political and any open-to-discussion issues.

In Bosnia federalisation is one of the *de facto* solutions to the security situation and very much a precondition for the existence of the multiethnic unitary state itself.[192] In Macedonia the situation differs diametrically, as a possible federalisation of the country is unacceptable and is perceived as a treat for the Macedonian majority, as the changes made in this segment were perceived as a bargaining over the ownership of the state, and in fact prevention of secession. In Kosovo formally and legally the solution addresses the needs, as the post-war conditions of the society requires sensitive approach as a

[187] 'Administration and governance in Kosovo: lessons learned and lessons to be learned' I Blumi (ed). *The rehabilitation of war-torn societies* (2003) 27.

[188] 'Institutionally even three years after the war, minority issues remain the exclusive competence of the SRSG.' I Blumi (n 188 above) 27.

[189] I Blumi (n 188 above) 28.

[190] I Blumi (n 188 above) 28.

[191] 'However, a crucial element which is missing (in Macedonia) is 'segmental autonomy' or the autonomy (territorial or cultural) of the ethnic groups concerned by power-sharing to manage their own affairs in certain areas such as culture, education, security, the economy, health services, etc.' F Daftary 'Conflict resolution in FYR Macedonia: power-sharing or the 'civic approach'?' (2001) 4 *Helsinki Monitor* 305; M O'Hanlon 'NATO must show strength in the Balkans' 2001 *European Affairs* 305.

[192] Whether it is so perceived by all the three constituent groups, or not, is a debatable issue, but in respect to the focus of the study it will not be addressed.

frustration likewise in Macedonia deriving from the different treatment of the groups can undermine the already fragile peace. In Macedonia, the two privileged groups are de facto creating a notion of a bi-national state without transmitting the composition of the society at the local governance.

4 Evaluation of the consociational arrangements in the three cases and future recommendations

4.1 The road to peace or just another illusion?

The thesis so far presented both the theoretical framework and the implementation of the consociational approach in the cases of Macedonia, Bosnia, and Kosovo. A thorough examination of the possibilities for successful consociationalism in the cases would not be possible due to list of reasons however a brief examination on the possible treats to the very success of the introduced mechanisms will be presented.

First, the broad societal acceptance of the changes not only in these cases, but also in general - is a precondition of the success of the new systems introduced. In regard to that, the three cases have certain differences. In the case of Bosnia and Kosovo, extremely violent conflicts took place before the signing of the agreements between the sides to the conflict, while in Macedonia the conflict was of a low intensity, often seen as an incentive for the re-arrangement of the pre-conflict legal frame. Therefore, the discussion is not only connected to the prior to the conflict, but also to the timing of the changes. As one scholar reminds, 'state building after a war will always take years, perhaps decades, and it is disingenuous to suggest otherwise to domestic publics.'[193]

The collapse of the Yugoslav federation was followed by armed conflicts, of which undoubtedly most violent and severe one took place in Bosnia. Liberated from its boundaries in the past, ethnicity once again showed its power in mobilising ethnic groups in brutal and bloody conflicts. For almost four years, between spring 1992 until late 1995, Bosnia was the centre of the world.

In December 1995 the three sides to the conflict, Bosniacs,[194] Croats, and Serbs, were brought to the negotiation table, with one primary goal - to find a solution for the problems that started the war

[193] S Chesterman *Kosovo in limbo* (2001) http://www.ciaonet.org (accessed 19 August 2003).

[194] During the Yugoslav federation period the term Muslims was applicable to this ethnic group, which was changed into Bosniacs at the first Bosniac Intellectuals Congress, in 1993.

- the division of the power among the groups in a future independent state.[195]

When examining and analysing the DPA, one should always have in mind its first aim, which was to stop a brutal war. Its primary goal was to accommodate radically opposed visions of the future state and the incompatible claims of the opposed ethnic groups.[196] Its most positive interpretation would be that it was the best compromise available at that moment of time. In the West, it was widely accepted as a 'triumph of diplomacy' over chaos, agreement over crude warfare, and most important, as a multilateral agreement on the legal existence and viability of Bosnia confirmed by all the parties to the conflict.[197]

Besides all the critics and limitations DPA has, what we have to bear in mind is that it is the 'sole framework that guides the new Bosnia in its post-war phase'.[198] On the other side, it is widely known that one conflict does not ends neither with the cease fire, nor with the peace agreement, only changes its arena, continuing in the state structures.[199] Therefore the process of institution building in this post-conflict society is of crucial importance, as the capability of the state to function in terms of law-enforcement and decision making, is actually the very basis for future development and peace itself.

The situation in Kosovo is almost the same, in sense of the background of the changes, and the inter-group relations prior to the conflict. As described in a report on Kosovo, the interethnic relations nowadays:

> Inherit a ten year legacy of conflict between the state and the Albanian majority in Kosovo that gradually escalated from persecution and massive human rights violations into armed warfare that resulted with over ten thousand persons killed or missing and 600 villages razed to the ground.[200]

The conflict itself has a very deep rooted antecedents, for some date back even to the Ottoman Empire – as most of the different Balkan

[195] It is debatable whether the formulation 'future independent state' is the most proper, as on its independence there are different opinions in the academic community, differing from protectorate to semi-protectorate. Whether independence was a primary goal of all three ethnic groups, is another question, as only in the case of the Bosniacs this was a clear strategy.

[196] D Kofman 'Self-determination in a multi-ethnic state: Bosnians, Bosniacs, Croats and Serbs' in Dz Sokolovic & F Bieber (eds) *Reconstructing multiethnic societies: the case of Bosnia-Herzegovina* (2001) 31.

[197] F N Aolain 'The fractured soul of the Dayton Peace Agreement: a legal analysis', in Dz Sokolovic & F Bieber (eds) *Reconstructing multiethnic societies: the case of Bosnia-Herzegovina* (2001) 63.

[198] F N Aolain (n 197 above) 64.

[199] H Miall *et al Contemporary conflict resolution: the prevention, management and transformation of deadly conflicts* (1999).

[200] 'Administration and governance in Kosovo: lessons learned and lessons to be learned' I Blumi (ed). *The rehabilitation of war-torn societies* (2003) 27.

group's grievances – although the 'officially' main cause for the violence only dates from the beginning of the last decade.[201] After the decade long regime of Milosevic, in 2001 the Constitutional Framework for Kosovo was imposed. The relations between the Albanians and Serbs after the signing of the CF, and the fall of Milosevic cannot expect to bloom over night, and did not indeed.

In that sense the situation in Macedonia is quite different. Fortunately, Macedonia managed to stay out of the worst of the Balkan wars. In the swirl of the 1990s the political elites of the Macedonian and the Albanian community somehow managed to bridge the gap, and indeed Macedonia 'represented an apparently successful model of preventive diplomacy'.[202] Between 1992 and the conflict, as discussed in few occasions within the study, Macedonia has had an informal power-sharing on the executive level as an informal rule of the domestic political actors of the two communities.[203] As a consequence, at the top-level the Macedonian and Albanian side showed continuity in the political dialogue, thus helping to defuse some of the tension between the two communities at least at the political level. Yet, 2001 *'drole de guerre'* deepened the divide between the ethnic groups.[204] Still, the agreement first includes elements of previously accepted practices, second the ethnic cleavages between the groups are far away from the other two cases, and therefore the starting point for the post-conflict institution building is far more progressive.

Second, important issue is connected with the very basis of in general successful consociationalism, co-operation. As Bieber reminds, '... while representation is a prerequisite for participation, it does not necessarily lead to co-operation between representatives of the different communities.'[205] Further, for creating a cooperative environment and accommodation, what is fundamental is not only change of the political elites, but also the political affiliation and choices of the population.

201 On this subject: A Ackermann 'Macedonia and the Kosovo conflict' (1998) XXXIII.4 *The International Spectator*

202 F Daftary 'Conflict resolution in FYR Macedonia: power-sharing or the 'civic approach'?' (2001) 4 *Helsinki Monitor* 291.

203 From 1994 to 1998, the PDP (ethnic Albanian party) had 19 representatives in Parliament, five ministers (including one Deputy Prime Minister), and four deputy ministers. Following the October 1998 elections, the DPA (ethnic Albanian party previously in opposition) obtained 25 seats in the Parliament, five government ministers (including one Deputy Prime Minister), and five deputy ministers. Because of the increase of the total number of ministers, ethnic Albanians claimed to be less represented than in the previous governments. F Daftary (n 202 above) 304.

204 S Troebst 'The great divide' (2002) 2.1 *The Global Review of Ethnopolitics* 69.

205 F Bieber *Power sharing after Yugoslavia: functionality and dysfunctionality of power-sharing institutions in post-war Bosnia, Macedonia and Kosovo* 11. http://www.ssc.uwo.ca/polisci/necrg/powersharingdemocracy/papers/FlorianBieber Power.pdf (accessed 15 September 2003).

In Bosnia the three nationalist parties, the Serb SDS, the Croat HDZ, and the Bosniac SDA are still the most popular in their respective communities. As a result, the ruling elite at the joint state level is composed of the nationalist parties, so the consociational requirement for co-operation of the political elite is impossible. The situation is quite similar in the other two cases as well. By questioning the existence of moderate political parties on either side of the ethnic divide, Engstrom sees non-co-operation as one of the main reasons of the conflict itself: 'The political will required by both Macedonians and Albanians to share power is lacking as both sides have become radicalised since the fighting erupted last year.'[206]

In conclusion, both international actors and the domestic elites should work on the inter-group co-operation through different forms, as different kinds of inter-ethnic initiatives will improve the situation. Otherwise the already cemented ethnic divide will never be abandoned at the political level, but institutions close to average citizens, and of course in the private sphere. When dealing with the power-sharing arrangements imposed in the post-war period, investing and fostering bottom-up initiatives may be taken in consideration as it can prove to be more effective than the so far used method of the carrots and the sticks.

5 Conclusion

Gens una summus

We are all one nation of people

Human history offers many examples proving the destructive side of it. Actually, as many thinkers noted – our history is a history of wars; pre-war, wartime, post-war?! Is it still a survival cliché or a self-destroying tendency we would once need to face?

The Balkans, and especially ex-Yugoslavia, are more then a proof of it. Starting with Bosnia, and finishing with Kosovo and Macedonia, one can really get an impression how far humans can go. Years after the confirmed powerful force of ethnicity and ethnic affiliations, still no single answer can be given on the causes of ethnic conflicts. Even harder is to reach an agreement on the instruments and mechanisms to be applied in the conflict resolution or better to say regulation.

Scholars all over the world tried to give answers to the questions of the political causes of the group hostility and violence, conditions for peaceful settlement of the differences, conditions for building

206 J Engstrom 'Multiethnicity or binationalism? The Framework Agreement and the future of the Macedonian state' (2003) 1.2001/2 *European Book of Minority Issues* 346.

inter - group co-operation and tolerance. Theories of ethnic conflict have been developed; theories that provide some of the answers needed for political institutions building that can manage ethnic conflicts and prevent violence.

During decades of research, it has been understood that in deeply divided societies, people identify themselves with the ethnic groups they belong to, as a shelter in conditions of fear, violence, and insecurity. It has also been agreed that an inclusive system of governance is essential in preventing violence to occur. These political institutions should provide participation of the ethnic groups consisting in the society, as the only path towards democracy. No respect and protection of human rights can be secured by an exclusive system in a divided society.

The power-sharing approach is providing a basis for peace, equality and stability in the multiethnic and multicultural societies while providing the groups possibilities for preserving culture and group identity. Lijphart's consociational model has been in the focus of the mainstream power-sharing in political science for years, as it provides answers to some of the problems presented, with its weaknesses. In this respect, this study is another attempt to highlight the importance of conflict – regulating practices and approaches.

The consociational model, in a higher or lesser degree has been implemented in the three cases in focus. While the first chapter was dealing with the theory to give the necessary background, the second chapter showed not only the mechanisms introduced in the cases, but they were comparatively examined, in order to present the need for flexibility of the theory towards the countries needs.

The consociational approach, like a new wine in old bottles, gives new content to the processes of stabilisation while old grievances are still present. As presented in the last part of the text, the legal frame and political systems changes are not the end goal of the transition for Bosnia, Kosovo and Macedonia especially with no democratic culture, malaise implementation of the arrangements and general societal perception of law only as a hint. The consociationalism in all the three cases is in fact a group's commonly accepted frame for the up-coming reforms, and can only serve as such. Its modifications and changes towards more integrated states is a challenge that the groups, in all the three cases need to face and work on with the help of the international factors involved in the region. Consequently, the international community should re-orient its support from unsustainable fields to spheres of crucial importance, as corruption, judiciary reforms, civil society development and economy sector.

Finally, the consociational approach succeeded in the three cases through guarantees of group's inclusion in the life of the state, in the institutions, in employment and in the social and cultural life. It is the

only model fitting the transition from weapons to talks. The changes to the frameworks established after the conflicts that are needed, will contribute to the better functioning of the systems but will also evaluate the success of the model. In other words, the consociationalism will prove successful only if it generates more integrated states and therefore transform itself. By providing basis for conflict transformation, consociationalism served its function. In that respect, collaboration and co-operation which are possible under the consociational arrangements should lead to changes of the constitutions imposed by the 'imposed, disastrous' peace agreements.

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Appendix I

Table 1: Approaches to Power Sharing [207]

	CONSOCIATIONAL APPROACH	INTEGRATIVE APPROACH
Characteristics	Elites cooperate after elections to form multiethnic coalitions and manage conflict; groups are autonomous; minorities are protected.	Parties encouraged to create coalitions before elections, creating broadly inclusive but majoritarian governments
Principles	Broad-based or 'grand' coalitions, minority veto, proportionality in allocation of civil service positions and public funds, group autonomy	Dispersion and devolution of power, promotion of interethnic competition, inducements for interethnic co-operation, policies to encourage alternative social alignments, managed distribution of resources
Institutions and practices to promote these principles and effects	Parliamentary government, proportional reservation of seats, proportional representation electoral system	Federalism, vote pooling, electoral systems, president elected by 'supermajority.'
Strengths of the approach	Provides groups firm guarantees for the protection of their interests	Provides politicians with incentives for moderation – 'coalitions of commitment.'
Weaknesses	'Coalitions of convenience.' Elites may pursue conflict rather than try to reduce it; communal groups may not defer to their leaders; system relies on constraints against immoderate politics.	Lack of whole-country empirical examples of working systems; assumption that politicians respond to incentives and citizens will vote for parties not based on their own group.

[207] T D Sisk *Power sharing and international mediation in ethnic conflicts* (1996) 35.

Appendix II [208]

Table 1. Lijphart's lists of favourable factors

	1968 (6)	1969 (8)	1977 (9)	1985 (8)
1	Distinct line of cleavage between subcultures	IBID	Segmental isolation and federalism	Geographical concentration of segments
2	A multiple balance of power among the subcultures	IBID	IBID	No majority segment plus segments of equal size
3	External threats	IBID	Small country size	External threats
4	A relatively low load on the system	IBID	Small country size	Small population size
5	Moderate nationalism	-	Overarching loyalties	IBID
6	Popular attitudes favorable to government by grand coalition	Widespread approval of the principle of government by elite cartel	-	-
7	-	The length of time a consociational democracy has been in operation	-	-
8	-	Internal political cohesion of the subcultures	-	-
9	-	Adequate articulation of the subcultural interests	-	-
10	-	-	Moderate multiparty system	Small number of segments

[208] As presented in: M Bogaards 'The favorable factors for consociational democracy: A review' (1998) 33 *European Journal of Political Research* 478.

11	-	-	Representative party system	-
12	-	-	Crosscutting cleavages (in some instances)	-
13	-	-	Tradition of elite accommodation	IBID
14	-	-	-	Socioeconomic equality

Appendix III

Legal Documents and Agreements regarding Kosovo status

Country / Province	Agreement / Body established	Date	Result
FR Yugoslavia / Kosovo	Rambouillet	23 February 1999	Recognizes the need for democratic self-government in Kosovo
FR Yugoslavia / Kosovo	UN Security Council Resolution 1244	10 June 1999	UN Mission in Kosovo (UNMIK) is established - interim administration of Kosovo under which it gains autonomy, and which is in charge to establish and oversee the development of provisional democratic self-government institutions; UNSG appointed Special Representative of the SG (SPSG) as head of UNMIK
Kosovo	Joint Interim Administrative Structure	February, 2000	Established to comprise the political institutions, headed by SRSG, and composed by Kosovo Transitional Council (KTC)-highest level consultative body of Kosovars to UNMIK, Interim Administrative Council (IAC)-acts as an executive body of JIAS, and, 20 Administrative Departments

Kosovo	Constitutional Framework for Provisional Self-Government (CF)	15 May 2001	Establishes four institutions for self-government: the Assembly, President, Government and Judicial System

Appendix IV

Table 1. Electoral Systems in Bosnia and Herzegovina, Macedonia, and Kosovo. [209]

Country	Electoral System	Chambers of Parliament	Reserved Seats	Threshold
Bosnia and Herzegovina (2002)	PR	House of Representatives House of Peoples	House of People (15): reserved seats (5 Bosniacs, 5 Croats, and 5 Serbs)	3%[a]
Macedonia (2002)	PR	Parliament	---	---
Kosovo (2001)	PR	Assembly	Reserved seats: 10 Serbs, 10 Other minorities	---

a. Parties can receive compensatory mandates even with less than 3% of the vote

[209] Shorter version, with the cases of interest only. F Bieber 'Electoral engineering: the Balkan record managing interethnic relations through elections' (3-5 April 2003) *Panel 'Ethnopolitics and Elections' ASN Convention* 4.

The concept of culpable omissions under the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (from 1993 until March 2003)

Natif[1]

1 I would like to thank Judge Carmel Agius, Dr John Pace and Dr James Bussutil for their thoughtful comments. I would also like to thank Adv Andrew Galea, Adv Marieli Stahl and Adv Pablo J Valverde for their invaluable assistance.

Summary

Although the International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute does not explicitly mention omissions as a conduct entailing criminal liability under article 7(1), the ICTY jurisprudence implied from the ICTY Statute that liability for omissions can be imposed on both principal perpetrators and accomplices under article 7(1) of the Statute. Furthermore, the ICTY jurisprudence recognised that omissions can satisfy the *actus reus* of offences that are defined by active verbs.

Despite the wide recognition of culpable omissions, it was rarely applied pursuant to article 7(1) of the Statute. In most cases that accused was found liable for what may seem to be omissions, the liability was a supplement to a guilt that was already established by active acts. Furthermore, most of ICTY judgments did not clearly distinguish between omissions and acts, and did not indicate if the conduct upon the conviction rests is perceived as an omission or act. Cases where omissions were applied failed to establish clear and consistent rules regarding the scope and criteria for imposing liability for omissions, and neither examined, nor explained, the concept of culpable omissions under international criminal law was held.

1 Introduction

The establishment of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (ICTR)[2] was a step forward in the evolvement of International Criminal Law into an effective criminal legal system that governs the

2 ICTY and ICTR are the first ad-hoc tribunals to be established by the Security Council, acting under Chapter VII of the United Nations Charter. S.C. Res. 808, UN SCOR, 48th Sess, UN Doc S/RES/808 (1993); S.C. Res. 827, UN SCOR, 48th Sess, UN Doc S/RES/827 (1993); S.C. Res. 955, UN SCOR 49th Sess, 3453d mtg., UN Doc S/RES/955 (1994).

conduct of individuals with respect to atrocities of main concern to the international community.[3]

The ICTY and ICTR were created after the failed attempts that were taken pursuant to World War I to try the German Emperor and German military personnel,[4] and the World War II trials of Nuremberg and Tokyo ('Nuremberg tribunal' and 'Tokyo tribunal' respectively)[5] that were criticised for being biased and creating positive law.[6]

3 The recognition and credibility that these tribunals gained made the international community more vocal about the establishment of a permanent International Criminal Court ('ICC'). A Cassese, 'From Nuremberg to Rome: From ad hoc international criminal tribunals to the International Criminal Court' in A Cassese et al (eds) *The Rome Statute of the International Criminal Court: a commentary* (Oxford University Press Oxford 2002) 1 16; LN Sadat, 'Symposium issue: The international criminal court: The establishment of the international criminal court: from the Hague to Rome and back again' (1999) 8 MSU-DCL J Intl L 97 112. It also led to further attempts to call to account those responsible for other serious large-scale atrocities, and thus the tribunals for East Timor, Sierra Leone and Cambodia were established. However, unlike the ICTY and the ICTR they were conceived as a joint undertaking between the national government and the United Nations. D Cohen, 'Seeking justice on the cheap: Is the East Timor tribunal really a mode for the future', http://socrates.berkeley.edu/~warcrime/Cohen EastTimor Tribunal.pdf (accessed 10 June 2003).

4 See Sadat (n 2 above), 103; MC Bassiouni, 'International criminal investigations and prosecutions from Versailles to Rwanda' in MC Bassiouni, (ed), International criminal law vol. III. Enforcement (2nd edn Transnational Publishers Inc Ardsley 1999) 31 31-39; TLH McCormack, 'Conceptualising violence: Present and future developments in international law: Panel II adjudication violence: problems confronting international law and policy on war crimes and crimes against humanity: selective reaction to atrocity: war crimes and the development of international criminal law' [1997] 60 Alb L Rev 681 704-706.

5 The Nuremberg tribunal was constituted by an international agreement, the London Agreement, signed by the four allied powers on August 8, 1945. The Charter of the Nuremberg tribunal was annexed to the London Agreement. The Charter of the Tokyo tribunal was proclaimed in January 1946 and modelled after the Nuremberg Charter. See Charter of the International Military Tribunal for the Far East 1946; A Obote-Odora The judging of war criminals: Individual criminal responsibility under international law (Akademitryck Edsbruk 1997) 58.

6 See the dissenting opinion of Judge Pal and Judge Roling of the Tokyo Judgment. The Tokyo Judgment, The International Military Tribunal for the Far East 1946-1948 in BVA Roling and CF Ruter, (eds), The Tokyo Judgment The International Military Tribunal for the Far East vol. II (University Press Amsterdam 1977) 584-605, 1036-1038 and 1045; Sadat (n 3 above) 106-107; K Kittichaisaree *International criminal law* (Oxford University Press Oxford 2001) 18; P Kirsch, 'Introduction' in HAM von Hebel *et al* (eds), *Reflections on the International Criminal Court* (Asser Press The Hague 1999) 1 9; K Ambos, 'Establishing an International Criminal Court and an international criminal code - Observations from an international criminal law viewpoint' [1996] 7 EGIL 519, http://www.ejil.org (accessed 10 May 2003); J Schell, 'War and accountability', The Nation Magazine May 23 2001, http://www.thirdworldtraveler.com (accessed 10 April 2003); C Black, 'An impartial tribunal', http://www.thirdworldtraveler.com (accessed 10 April 2003); SR Ratner and JS Abrams *Accountability for human rights atrocities in international law* (2nd edn Oxford University Press Oxford 2001) 222.

Similarly to Nuremberg and Tokyo tribunals, they imposed individual criminal responsibility to principal perpetrators and accomplices.[7] The concept of individual criminal responsibility aimed at deterring potential perpetrators,[8] and facilitating on the achievement of peace, by not blaming the collective for crimes of individuals,[9] and not allowing offenders to hide behind the seal of the state. However, concentrating on the actual perpetrators of crimes, without looking into the criminal responsibility of those who made these crimes happen, even though they did not physically commit them, is insufficient to promote the goals of international criminal law. Holders of influential positions usually do not physically commit crimes, but either actively organise, plan and/or incite the commissions of crimes, or refrain from preventing them.[10]

Culpable omission is a mode of criminal liability applied for those who refrained from acting where legally they were expected to act. It was applied by post-World War II cases and was also recognised by the jurisprudence of the ICTY and ICTR. Omissions under the ICTY jurisprudence can be divided into two main forms of liability. The first one is the doctrine of superior responsibility under article 7(3) of the

7 Article 6 of the Nuremberg Charter, article 5 of the Tokyo Charter, article 7(1) of the ICTY Statute and article 6(1) of the ICTR Statute. See also A Boss 'The International Criminal Court: Recent developments' in HAM von Hebel *et al* (eds), *Reflections on the International Criminal Court* (Asser Press The Hague 1999) 39 41; K Kittichaisaree, Ibid; MC Bassiouni, 'The sources and content of international criminal law: A theoretical framework' in MC Bassiouni, (ed), *International Criminal Law vol. I Crimes* (2nd edn Transnational Publishers Inc Ardsley 1999) 3 12

8 Http://www.hrw.org/campaigns/icc/understanding.htm

9 *Prosecutor v Tadic*, Decision on the defence motion for interlocutory appeal on jurisdiction, Case no IT-94-1-AR 72, 2 Oct. 1995, para 31 quoting T Meron 'Case for War Crimes Trials in Yugoslavia', 72 Foreign Affairs 122, 134 (1993); A Cassese, 'On the current Trends towards criminal prosecution and punishment of breaches of international humanitarian law' (1998) 9 EJIL 2, http://www.ejil.org (accessed 10 May 2003)

10 Moreover, it should be remembered that holders of influential positions may have the power to eliminate relevant evidence.

Statute,[11] and the second one is the responsibility of principal perpetrators and of accomplishes under article 7(1) of the Statute.[12] Although according to the ICTY jurisprudence when the superior planned, instigated or otherwise aided and abetted in the planning, preparation or execution of crimes (for example when the superior omission encouraged his/her subordinate to commit the crime), responsibility under article 7(1) is more appropriate than responsibility under article 7(3),[13] the ICTY was reluctant to rely on culpable omissions as a conduct entailing such criminal liability for principal perpetrators and accomplices under article 7(1). Most of the ICTY's convictions for omissions were based on the doctrine of superior responsibility, although liability under this doctrine is limited to very particular scenarios and perpetrators.

This article will examine the ICTY jurisprudence on the omissions under article 7(1) of the Statute. It, however, will refer only to the material element, and will not refer to questions arising with respect

11 Article 7(3) of the ICTY Statute and article 6(3) of the ICTR Statute. According to this doctrine a person in authority may be liable for acts committed by his subordinates, if he/she failed to prevent the commission of criminal acts by his subordinates or to punish them after the acts have been committed. Liability under the doctrine arises only where the superior had the material ability to prevent or punish the commission of the principal crimes by his subordinates, i.e. an effective control over his subordinates. The *actus reus* of the doctrine, the inaction, is narrowed by additional requirements of superior-subordinate relationship and knowledge of the crimes, or at least deliberate ignorance. At the ICTY is was applied in several cases such as the *Prosecutor v Delalic et al* (Celebici), Trial Judgment, Case no IT-96-21-T, 16 November 1998 and confirmed by the *Prosecutor v Delalic et al* (*Celebici*), Appeals Judgment, Case No IT-96-21-A, 20 February 2001, *Prosecutor v Blaskic*, Trial Judgment, Case no IT-95-14-T, 3 March 2000, *Prosecutor v Aleksovski* Appeals Judgment Case no IT-95-14/1-A, 24 March 2000, *Prosecutor v Kunarac et al*, Trial Judgment, Case no IT-96-23-T & IT-96-23/1-T, 22 February 2001, *Prosecutor v Kordic and Cerkez*, Trial Judgment, Case No IT-95-14/2-T, 26 February 2001, *Prosecutor v Naletilic* and Martinovic (Tuta and Stela) Trial Judgment Case no IT-98-34-T, 31 March 2003. See also K Ambos, 'Superior responsibility' in Cassese *et al* (n 3 above) 823-825; I Bantekas, 'The contemporary law of superior responsibility' (1999) 93 AJIL 573 575 and 592; M Damaska, 'The shadow side of command responsibility' [2001] 49 Am J Comp L 455 457-458 and 495; P Eberlin and S Junod Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Martinus Nijhoff Publishers Geneva 1987), para 3562; WJ Fenrick, 'article 28 Responsibility of commanders and other superiors' in O Triffterer, (ed), Commentary on the Rome Statute of the International Criminal Court (Nomos Verlagsgesellschaft Baden Baden Auflage 1999) 515 517; WH Parks, 'Command responsibility for war crimes' [1973] 62 Mil L Rev 1 11 and 19; A Obote-Odora, "The statute of the International Criminal Tribunal for Rwanda: Article 6 responsibilities' [2002] 1 The Law and Practice of International Courts and Tribunals: A Practitioners' Journal 343 344; JJ Paust , 'Superior orders and command responsibility' in MC Bassiouni, (ed), International criminal law vol. I Crimes (2nd edn Transnational Publishers Inc Ardsley 1999) 223; GR Vetter, 'Command responsibility of non-military superiors in the International Criminal Court (ICC)' [2000] 25 Yale J Intl L 89 92.

12 Article 7(1) of the Statute provides that: [a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute shall be individually responsible for the crime.'

13 Kordic Trial Judgment (n 11 above) 371.

to the *mens rea*. In all cases dealt by this article it will be assumed that the requirements of *mens rea* have been fulfilled.

2 The concept of culpable omissions under the ICTY jurisprudence

By the time that atrocities were committed in the former Yugoslavia the concept of culpable omissions was already recognized by most, if not all, national legal systems,[14] and incorporated in different international instruments.[15]

[14] Ashworth, 'The scope of criminal liability for omissions' [1989] 105 LQR 424 424. See the criminal codes of many common law countries, which contain specific provisions. For example the Australian Criminal Code Act (1995) Section 4.3; The Bahrainian Penal Code (1976) articles 22, 99 and 102 (the Baharainian legal system is based on both Islamic and English law); the Pakistanian Penal Code (Act XLV of 1860) para 32; the Indian Penal Code (1862) Section 32 (unless a contrary intention appears); the United States Model Penal Code (1985) Section 2.01. In other common law countries, such as Canada and the United Kingdom, the concept of culpable omission was adopted at the judiciary level. Also the criminal codes of many civil law countries contain such provisions. For example, the Austrian Penal Code (1975) Section2; The Bulgarian Penal Code (1968) article 9; The Costa Rican Penal Code (1970) article 18 the Dutch Penal Code (1977) article 1; the German Penal Code (1871) Section 13; the Italian Penal Code (1930) article 40; and the Norwegian Penal Code (1994) Section 4. The Chinese criminal system, which is a complex of amalgam of custom and statute, recognises that a criminal act consists of positive acts and non-acts. I Dobinson, 'Criminal law' in W Chenguang and Z Xianchu, (eds), Introduction to Chinese law (Sweet and Maxwell Asia Hong Kong 1997) 107 114.

[15] For instance, article 11(2) of the Universal Declaration of Human Rights ('UDHR'); article 15(1) of the International Covenant on Civil and Political Rights ('ICCPR'); article 75(4)(c) of the Protocol Additional to the 1949 Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (1977) ('Additional Protocol I'); article 6(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (1977) ('Additional Protocol II'); article 7 of the European Convention on Human Rights; article 49 of the Charter of Fundamental Rights of the European Union, article 9 of the American Convention on Human Rights; article 7(2) the African Charter on Human and Peoples' Rights; article 31(2) of the Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (1984); article 31(2) and article 3a of the Inter-American Convention to Prevent and Punish Torture (1985); article 4 of the UN Commission on Human Rights, 13 August 1980, UN Doc No E/CN.4/Sub.2/NGO/80 (1980) (reprinted in MC Bassiouni, (ed), International criminal caw conventions and their penal provisions (Transnational Publishers New York 1997), 767). Article 11(1) and (4) of Additional Protocol I clearly recognises in culpable omissions, under the circumstances described there, as a grave breach of the protocol. It also recognises in the concept of culpable omissions under article 86, and imposes duties to act under both articles 86 and 87.

Liability for omissions was imposed in post-World War II cases. These cases stipulated the impositions of liability for omissions with a duty to act. [16] The content of the duties to act recognised in post-World War II cases emerged from international law,[17] and, in some

16 Several cases imposed liability on holders of positions and authorities of commanders or civilian superiors, including political leaders, pursuant to their duty to control their subordinates and to take measures within their power and as appropriate in the circumstances to prevent violations of the laws of war. This liability seems to be similar to what is known under the ICTY Statute to be the doctrine of superior responsibility. See *United States v Yamashita*, United States military commission, Manila, 1945 and the supreme court of the United States, 1946, in [1948] IV Law Reports of Trials of War Criminals 1 35; *United States v Brandt et al* (the Medical case) in [1947] 1-2 Trials of war criminals before the Nuremberg military tribunal under Control Council Law no 10 3, 171, 186, 212-213; *United States v List et al* (the Hostage case) United States military tribunal Nuremberg 1947-1948 [1949] VIII Law Reports of Trials of War Criminals 34; *United States v Von Leeb et al*, (the High Command case) in [1950] 11 Trials of war criminals before the Nuremberg military tribunal under Control Council Law no 10 1 462-463, 543; *United States v Pohl et al* (Case no 4) in [1947] 5 Trials of war criminals before the Nuremberg military tribunal under Control Council Law no 10 195, 958, 1054; *United States v von Weizsaecker* (the Ministries case) in [1951] 12-14 Trials of war criminals before the Nuremberg military tribunal under Control Council Law no 10, 308; The Tokyo Judgment (n 5 above) 30, 452-453, 455. See also Ambos (n 11 above) 829; Paust(n 10 above) 232. Other post-World War II cases recognised in the liability for omissions of non-holders of position of superiors or commanders. This was either pursuant to these persons' positions or entrusted or acquired responsibilities. See *United Kingdom v Heyer et al* (Case no 8) British military court for the trial of war criminals Essen 1945 in [1947] I Law Reports of Trials of War Criminals 88-91; Strafsenat, Urt. vom 20 April 1949 g. Sch. u. a. StS 143/48 ('the Synagogue-fire case') in Entscheidungen des Obersten Gerichtshof fuer die britische Zone in Strafsachen (Decisions of the Oberster Gerichtshof (OGH) for the British Zone concerning criminal law) vol. I (Walter de Gruyter & Co Berlin 1949) 11 11 and 14-15; Strafsenat, Urt. vom 22 Februar 1949 g.H. StS 33/48 ('the Fire-Brigade case') in Entscheidungen des Obersten Gerichtshofs fuer die britische Zone in Strafsachen (Decisions of the Oberster Gerichtshof (OGH) for the British Zone concerning criminal law) vol. I (Walter de Gruyter & Co Berlin 1949) 316 316-317; *United Kingdom v Gerike et al* ('the Velpke Children's Home case') British Military Court Brunswick 1946 in [1948] VII Law Reports of Trials of War Criminals 76 76, 80.

17 The responsibility of the commander in the Yamashita case was based on article 19 of the Hague Convention (IX) concerning bombardment by naval forces in time of war (1907), article 26 of the Geneva Convention for the amelioration of the condition of the wounded and sick in armies in the field (1929), and articles 1 and 43 of the Regulations annexed to the Hague Convention no IV of 1907. However, the court also cited two internal provisions that recognise the duty of a commanding officer and that the breach of such a duty is penalised by military tribunals of the United States. In re Yamashita, 327 US 1 15-16 (1945). The Tokyo tribunal based its Judgment on the customary law embodied in the Hague Convention (IV) respecting the laws and customs of war on land (1907) and repeated in the Geneva Convention relative to the treatment of prisoner of war (1929). The Tokyo Judgment (n 6 sbove) 29-30. In the Velpke Children's Home case, the legal basis for the accused's duty to act seems to rest on both international and common law principles. See The Velpke Children's Home case (n 16 above) 78.

cases, also from principles of common law.[18] However, it not always clear whether in all cases that resorted to principles of common law, these principles were used as an independent source of a duty to act, or as a guidance for specifically identifying the accused that were under a duty to act.[19] Moreover, explicit resort to domestic legislation was rejected in one case.[20] The duties to act that were applied were in accordance with the accused's area of responsibility,[21] and when the accused had a factual ability to act.[22] A more demanding approach was applied with respect to government officials who were found by the Tokyo tribunal to be under a collective duty for government responsibilities, even if the issue concerned was not under their direct responsibility.[23] Moreover, a high threshold was also imposed on government officials to discharge from their duty to act, requiring from them to press the concerned matter until resignation.[24]

In the ICTY, although the Statute refers to omissions only under the doctrine of superior responsibility, the jurisprudence recognised that liability for omissions of principal perpetrators and accomplices under article 7(1) can be implied from the ICTY Statute.[25] The ICTY jurisprudence also recognised that omissions can satisfy the *actus reus* of several offences under the ICTY Statute, including those that are defined by active verbs.[26]

18 In the Synagogue-fire case, the court determined that as a person keeping the victim in protective custody the accused was under a legal duty to avoid the mistreatment of his confined person, regardless of whether the custody was unlawful or not. The court found that the accused's duty emanated from the situation in which the victim was left in his hands. In its findings, however, the court referred to provisions of German criminal law. See the Synagogue-fire case (n 16 above) 11, 14-15. In *United Kingdom v Heyer et al*, the duty of a soldier entrusted with escorting prisoners to protect these prisoners was based on the duties imposed on the Power that he represented. However, although the concept of culpable omissions adopted by the British military court seems to have emerged from the common law approach, the court pointed out that this was not a trial under English Law. See *United Kingdom v Heyer et al* (n 16 above) 90-91. In the Velpke Children's Home case the court relied upon both international law and principles of common law. When it used the words 'English law', in fact it relied on principles of common law. The Velpke Children's Home case (n 16 above) 78, 81.

19 See the Velpke Children's Home case, Ibid, 78, 80-81.

20 *United Kingdom v Heyer et al* (n 16 above) 90-91.

21 *United Kingdom v Heyer et al* (n 16 above) 90-91; The Fire-Brigade case(n 15 above) 316-317. See also Ambos (n 10 above) 829; Paust (n 11 above) 232.

22 The Medical case (n 16 above) 171, 186, 212; The Fire-Brigade case (n 15 above) 316-317.

23 The Tokyo Judgment (n 6 above) 30.

24 As above, 447-448, 458, 461.

25 *Prosecutor v Tadic*, Appeals Judgment, Case no IT-94-1-A, 15 July 1999, paras. 187, 188; Kunarac Trial Judgment (n 11 above) para 390; Kordic Trial Judgment (n 11 above) para 376. The ICTY jurisprudence does not clarify whether this reading of the ICTY Statute is based on customary rule, general principles of law or mere interpretation of the Statute. Some cases refer to post-World War II cases, the commentaries to the Geneva Conventions, which stated that the prohibition of murder under common article 3 covers also omissions, and/or to the Additional Protocols.

Despite the wide recognition of culpable omissions, it was rarely applied with respect to principal perpetrators and accomplices pursuant to article 7(1). Cases where omissions were applied raise confusion as to the scope and criteria for imposing such liability and fail to establish any clear and consistent rules.[27] The ICTY jurisprudence with respect to the responsibility of omitters under the different modes of participation enumerated in the ICTY Statute is examined below.

2.1 Instigating

The definition of 'instigating' as the prompting of another to commit an offence was found by the *Blaskic* Trial Chamber to be sufficiently broad for inference that both acts and omission may constitute instigating.[28] *Blaskic* Trial Chamber found that the failure of a superior to punish past crimes, which entails the responsibility under article 7(3), may also be the basis for liability for either aiding and abetting or instigating the commission of further crimes pursuant to article 7(1).[29] *Kordic* Trial Chamber upheld this opinion.[30]

2.2 Ordering

The active character of the verb may imply that responsibility under this mode of participation does not emerge pursuant to omissions. Yet, many national jurisdictions as well as the ICTY jurisprudence[31] recognise that in certain offences an active verb in the definition of the offence can be interpreted as to include also a conduct of omissions.[32] With respect to the mode of liability of ordering,

26 For example, with regard to the crime of torture under article 2 of the ICTY Statue see *Prosecutor v Furundzija*, Trial Judgment, Case no IT-95-17/1-T, 10 December 1998, para 162; Celebici Trial Judgment (n 11 above) para 468; Kunarac Trial Judgment (n 10 above) para 497. With regard to the crime of murder under article 3 of the ICTY Statute see Celebici Trial Judgment Ibid, para 424; Kordic Trial Judgment Ibid, paras 229, 233; *Prosecutor v Krstic*, Trial Judgment, Case No IT-98-33-T, 2 August 2001, para 485. With regard to the crime of enslavement under article 5 of the ICTY Statute see *Prosecutor v Kunarac et al*, Appeals Judgment, Case no IT-96-23-A & IT-96-23/1-A, 12 June 2002, paras 253, 255. With regard to the crime of persecutions on political, racial and religious grounds under article 5 of the ICTY Statute see the *Prosecutor v Tadic*, Trial Judgment, Case no IT-94-1-T, 7 May 1997, para 694.

27 The Celebici Trial Chamber, for example, while examining the doctrine of superior responsibility, clarified that criminal responsibility for omissions incur only where there is a legal obligation to act. It, however, did not provide any guidance on which offences already include a duty to act in their definition and which offences require that in addition to the elements included in the definition of the offence also an external duty to act will be proved. Celebici Trial Judgment Ibid, para 334.

28 *Blaskic* Trial Judgment (n 10 above) para 280.

29 Subject to the fulfilment of the respective *mens rea* and *actus reus* requirements. *Blaskic* Trial Judgment Ibid, para 337.

30 *Kordic* Trial Judgment (n 10 above) para 371.

31 n 8 above.

however, the ICTY jurisprudence is unclear. The *Kordic* Trial Chamber convicted Kordic, *inter alia*, for his association with the orders to detain Bosnian Muslims and the coming into existence of the detention facilities.[33] There was no evidence that *Kordic* ordered that the illegal acts to be committed, and thus it may be questionable whether Kordic's participation in the crime by 'ordering' was through an active act or omission. This also leaves open the question whether a passive member of a group, who abstains from voting when the group adopts decisions ordering the commission of crimes, should be found liable for 'ordering by omission', for aiding and abetting or for

participation in a Joint Criminal Enterprise ('JCE').[34] It also raises question as to the mode of liability which should apply to a superior

[32] See IG Anagnostopoulos and KD Magliveras Criminal Law in Greece (Kluwer Law International The Hague 2000) 50; J Andenaes The General Part of the Criminal Law of Norway (Rothman Co. South Hackensack 1965) 133; Ashworth (n 13 above) 424 434; WB Butler Russian law (Oxford University Press Oxford 1999) 552; S Dando The Criminal Law of Japan: The General Part (Rothman Co. Littleton 1997) 61; Dobinson (n 13 above) 114; M Findlay Problems for the criminal law (Oxford University Press Melbourne 2001) 71-72; WR LaFave and AW Scott Criminal Law (2 edn West Publishing Co. St. Paul 1986) 202-203; LH Leigh and JE Williams, 'United Kingdom (England and Wales)' in R Blanpai, International encyclopedia of laws (Kluwer Law and Taxation Publishers Deventer 1993) 47; J Smith & Hogan Criminal law (9th edn Butterworhs London 1999) 44-45; D Stuart Candian Criminal Law: A Treatise (3 edn Carswell Ontario 1995) 84, 92; S Thaman, 'The German Penal Code as amended as of December 19 2001' [2002] 32 The American Series of Foreign Penal Codes 7; EA Tomlinson, 'The French experience with duty to rescue: A dubious case for criminal enforcement' [2000] 20 N Y L Sch J Intl & Comp L 451 463-464; S Trechsel 'Criminal Law' in F Dessemontet and T Ansay, (eds), Introduction to Swiss Law (Kluwer Law International 1997) 215 222; AN Young, 'Canada' in R Blanpai, International encyclopedia of laws (Kluwer Law International The Hague 1999) 43, 40-41; The Bulgarian Penal Code (1968, amended 1999) article 9; the Costa Rican Penal Code (1970) article 18; the German Penal Code (1871, amended 2001) Section 13; The Russian Criminal Code (1996, amended 1999) article 14(2). For example, courts in both Germany and Costa Rica determined that liability for omissions could be based on existing offences of commission that omissions could be brought within their definition. See Sala Tercera de la Corte Suprema de Justicia, N° 000789-99 de 10 H. 55 de 25 de junio de 1999. Recurso de casación interpuesto por E.R.U.B., R.C.C., J.D.G.M. y L.N.S.A. c/ Tribunal Penal de Juicio, Segundo Circuito Judicial de San José, N° 111-98 de 14 H. de 9 de marzo de 1998, considerando XV; B Schunemann, 'Republique Federale D'Allemagne The principles governing crimes of omissions' [1984] 55 Revue Internationale De Droit Penal 879 881. Courts in the UK recognised that murder can be committed by omissions, but assumed that assault requires an act. See *R v Love* [1973] Q.B. 702 709, 57 Cr.App.R.365 371, C.A; Archbold Criminal pleading, evidence and practice (Sweet & Maxwell Limited London 1997) 1606; Ashworth (n 13 above) 433-434. However, in France courts did not interpret active verbs as to cover omissions, even omissions by a person under a duty to act. Tomlinson Ibid, 463-464.

[33] Kordic Trial Judgment (n 11 above) para 802.

who remains silent in spite of orders given to his subordinates by a higher ranking superior to commit crimes.

2.3 Committing

According to the ICTY jurisprudence 'commission' includes both a physical and personal perpetration of a crime or the engendering of a culpable omission,[35] and entails 'primary or direct liability.'[36]

In the *Celebici* case the Appeals Chamber dealt with the allegation of commission of the crime of unlawful confinement of civilians ('unlawful confinement'). The *Celebici* Appeals Chamber ruled that liability for the commission of this crime is reserved for persons responsible in a direct or complete sense for the unlawful confinement.[37] Mere knowing 'participation' in a general system or operation pursuant to which civilians are confined is insufficient for establishing 'commission' of this crime. Thus, a role in some capacity, however junior, in maintaining a prison in which civilians are unlawfully detained is an inadequate basis for primary criminal responsibility for this crime.[38] The Prosecution argued that the presence of the guards in the camp was the 'most immediate obstacle to each detainee's liberty', and therefore this alone should constitute a commission of the crime of unlawful confinement. The *Celebici* Appeals Chamber rejected this assertion, clarifying that a guard does not have to cease supervising those detained in the camp to avoid

34 JCE is a mode of liability that was recognised by the ICTY jurisprudence to implicitly be included under article 7(1) of the ICTY Statute. The Tadic Appeals Chamber recognised in three categories of JCE which differ from each other in their required mental element. The material element, which is common to the three categories requires: (i) the existence of a plurality of persons involved in the commission of a crime; (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime; (iii) participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. In the first category, however, the participants of the JCE act pursuant to a common design and possessed the same criminal intention. The second category is the camp cases. There common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan. In the 'camp cases', the accused must have the knowledge of the system of ill treatment and the intent to further this common concerted system of ill treatment. The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. The accused must have intended to participate in and further criminal activity or the criminal purpose of a group and to contribute to the JCE or in any event to the commission of a crime by the group. In addition, the accused willingly took the risk that the crime which is outside the common design would be committed. Tadic Appeals Judgment (n 25 above) 196, 202, 204, 227.

35 Tuta and Stela Trial Judgment (n 11 above) para 62.

36 Celebici Appeals Judgment (n 11 above) para 345.

37 As above, para 342.

38 As above, paras. 336, 343.

criminal liability, since among the detainees there may be persons who are lawfully confined.[39] Unlike a guard who has no role in determining who will be detained and who will be released, an accused who holds a position that can affect the continued detention of civilians may be found liable for commission by omission of the crime of unlawful confinement.[40] This can happen, for example, when an accused, that has some powers over the place of detention, accepts a civilian into detention without knowing whether there are reasonable grounds to believe that the civilian constitutes a security risk, or when an accused, that has power or authority to release detainees, fails to do so in spite of knowledge that no reasonable grounds for their detention exist or that any such reasons have ceased to exist.[41] However, a guard cannot be found liable under the crime of unlawful confinement for failure to take unauthorised steps to release prisoners.[42]

The Prosecution in the *Celebici* case asserted that the accused *Delic*, a guard and deputy commander of the camp, had primary responsibility for the commission of the crime of unlawful confinement or, alternately, had responsibility as a participant in a JCE or as an aider and abettor for the commission of the crime of unlawful confinement by the principal perpetrator. With respect to the accused *Delalic*, it alleged that he was a co-ordinator whose primary responsibility was to provide logistical support for the various formations of the armed forces,[43] and that he participated in the commission of the crime as an aider and abettor.[44] Consequently, the *Celebici* judgments had to deal with three modes of liability: commission, participation in a JCE and aiding and abetting. The *Celebici* Appeals Chamber upheld the Trial Chamber finding that *Delic* and *Delalic* did not participate in any significant way in the continued detention of the civilians. Consequently it did not examine *Delic's* and *Delalic's* role neither as principal offenders, nor as accomplishes to the crime of unlawful confinement.[45] The finding with respect to

39 As above.
40 Ibid, Ibid.
41 Celebici Trial Judgment (n 11 above) 342; Celebici Appeals Judgment Ibid, para 343.
42 Celebici Appeals Judgment Ibid, para 342.
43 These consisted of, *inter alia*, supplies of material, equipment, food, communications equipment, railroad access, transportation of refugees and the linking up of electricity grids. Ibid, para 355.
44 In the indictment the Prosecution did not indicate the precise mode of liability under which it charged the accused. The indictment only stated that the accused participated in the unlawful confinement of civilians at the camp. However, from certain submissions, the Appeals Chamber concluded that the Prosecution considered that the doctrine of JCE as the most apposite form of responsibility to apply to *Delic*. Ibid paras. 343-344, 355, 364-365. Regarding participating in a JCE the Appeals Chamber concluded that certain elements required for establishing criminal liability through participation in a JCE, such as the existence of a common plan and the required *mens rea*, were not established. Ibid, aras. 365-366.

Delic's responsibility was based on lack of evidence. The only evidence that the Prosecution adduced was that *Delic* was aware of the unlawfulness detention of some of the detainees and that thus, as a guard and deputy commander of the camp, he thereby participated in the detention of unlawful confinement of civilians.[46] Although there was evidence that *Delic* assisted the camp commander by organising and arranging for detainees to be brought to interrogations before a commission in charge of granting procedural guarantees to detainees, this evidence was found insufficient for imposing criminal liability for unlawful confinement. Celebici Appeals Chamber clarified that the Prosecution failed to show that *Delic* participated in the work of the commission, had responsibility to ensure that the procedural review was conducted, or had the authority or power to release detainees.[47]

With respect to *Delalic*, the Appeals Chamber concluded that his role as a co-ordinator supported the Trial Chamber conclusion that he was not in a position to affect the continued detention of the civilians at the camp, and that he had no authority to release prisoners.[48] Although he was found to be involved in the release of two detainees and to sign orders for the classification of detainees and their release, this degree of involvement was not found sufficient for proving participation that has a substantial effect on the continuing detention of civilians, and consequently fro imposing criminal liability for participation in the crime of unlawful confinement.[49]

The *Celebici* Appeals Chamber, however, upheld the conviction of the camp commander, *Mucic*, by the trial chamber. It clarified that not in all circumstances a position of superior authority in relation to a prison camp should lead to the conclusion that the accused bears direct responsibility for unlawful confinement of civilians in that camp. The determination of responsibility should be done on the basis of evidence as to the particular organisation of duties within a camp.[50] However, in the current case the accused had the authority to release detainees. By avoiding to use this authority to release those whom he knew had not had their detention reviewed and therefore did not receive the necessary procedural guarantees, he failed to exercise his duty to ensure the release of those who were unlawfully detained.[51] He thereby committed the offence of unlawful confinement.[52]

45 n 11 above, paras 346, 360,369.
46 n 12 above, para 364.
47 n 12 above, para 367.
48 n 12 above, paras 355-357.
49 n 12 above, paras 355-358.
50 n 12 above, para 376.
51 n 12 above, para 377.

It seems that the *Celebici* Appeals Chamber inferred the duty to ensure the release of unlawfully detained civilians from the duty to ensure a proper inquiry into the status of the detainees under article 43 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) ('IV Geneva Convention').[53] Article 43 imposes responsibility on the Detaining Power, and *Mucic*, who had the authority to release detainees, was probably found to be a representative of the Detaining Power. The origin of the duty to act upon which the *Celebici* chambers relied is in international law. The determination of the duty's scope seems to be in accordance with what has already been determined in post-World War II cases, that the duty to act should be in accordance with the accused's area of responsibility and ability to act.[54]

The examination of the *Celebici* case shows that *Celebici* chambers did not use the terms 'omission' and 'duty to act' coherently. They mostly referred to 'authority to do X' and 'failure to do X'. One way of understanding the Celebici case is by interpreting the word 'authority' as including the word 'duty'. Another way is by arguing that the crime of unlawful confinement, which can be committed also by continuous unlawful confinement as a result of violation of the requisite procedural safeguards,[55] incorporates conduct of omissions in its definition, and as consequence also a duty to act. If this is the case, there is no need to show an external duty to act in order to impose criminal liability for omissions.

2.4 Participating in a JCE

According to the *Tadic* Appeals Chamber participation in a JCE does not need to involve the commission of a specific crime, but may take the form of assistance in, or a contribution to, the execution of the common plan or purpose.[56]

The *Tadic* Appeals Chamber did not explicitly distinguish between active acts and omissions. Regarding participation as a co-perpetrator in the second category of JCE (the camp cases) the appeals chamber clarified in an *obiter* that in the camp cases of post-World War II accused were found guilty as co-perpetrators because of their

52 This is even if he was not responsible himself for the failure to have their procedural rights respected. Ibid paras 379, 386.

53 The *Celebici* Trial Chamber found Mucic to be under the duties to ensure that a proper inquiry was undertaken into the status of the detainees, which is explicitly mentioned under article 43 of the IV Geneva Convention, and to immediately release those who could not lawfully be detained. The appeals chamber emphasised only the second duty, which seems to be a supplementary duty inferred from the first duty. As above, para 377.

54 See para 7 as above.

55 *Kordic* Trial Judgment (n 12 above) 279.

56 As above, para 227.

objective 'position of authority' within the concentration camp system and because they had 'the power to look after the inmates and make their life satisfactory', but failed to do so.[57] The language used by the *Tadic* Appeals Chamber may indicate liability for omissions. However, the *Tadic* Appeals Chamber concluded that it seems that in these cases the required *actus reus* was the active participation in the enforcement of a system of repression, as could be inferred from the position of authority and the specific functions held by each accused.[58]

Also *Kvocka* Trial Chamber, which dealt with the second category of JCE, the camp situation, recognised that participation in a JCE could be by omission.[59] The *Kvocka* Trial Chamber opined that a person with a significant authority or influence, who knowingly fails to complain or protest, automatically may provide substantial assistance or support to criminal activity by his/her approving silence, in particular if he/she is present at the scene of criminal activity.[60] The Trial Chamber did not find that *Kvocka*, who functioned as the deputy commander of the camp,[61] personally participated in abuses of detainees,[62] but did find that he was present at the camp while crimes were committed. *Kvocka* continued to show up for work and to actively participate in the functioning of the camp although the criminal activity against the detainee was part of the everyday life there. The Trial Chamber thus concluded that *Kvocka's* continued participation in the camp sent a message of approval to other participants in the camp's operation, specifically to guards that were subordinated to him, and was a way of condoning the abuses and deplorable conditions there.[63]

The judgment, however, is unclear as to whether *Kvocka* was found guilty as a co-perpetrator by omission, namely for his failure to fulfil his responsibilities and duties as a deputy commander of the camp, such as the prevention of the crimes. Moreover, it is unclear why *Kvocka* was not charged as a direct perpetrator of the crimes by omission. It may be that the answer to that lies with the lack of evidence as to requisite *mens rea* for imposing direct liability for the relevant crimes. However, this seems unlikely, because under the second category of JCE all that the prosecution has to prove is that

57 As above, para 203.
58 As above.
59 *Prosecutor v Kvocka et al*, Trial Judgment, Case No IT-98-30/1-T, 2 November 2001, para 309.
60 As above, paras. 308, 309.
61 As above, para 415.
62 The Trial Chamber heard evidence that *Kvocka* threatened detainees in two occasions. However the trial chamber did not find it sufficient in order to conclude that *Kvocka* personally participated in the abuses of detainees. As above, n 678.
63 As above, paras 397, 404-405.

the accused had knowledge of the system of ill treatment and the intent to further this common concerted system of ill treatment.[64]

The Trial Chamber found that another accused, Kos, a guard shift leader at the camp, used his power to prevent crimes selectively, while ignoring the vast majority of crimes, such as murder and torture that were committed during his shift.[65] The Trial Chamber concluded that his failure to intervene gave the guards a strong message of approval to their behaviour. Given his position of authority over the guards, his non-intervention encouraged and contributed to the crimes' commission and continuance.[66] Consequently, he was found to incur liability for beatings and harassment of detainees in the camp through his active participation or silent encouragement of the crimes committed in his presence or by his tacit approval.[67] The word 'or' in the sentence emphasises the distinction between his liability for his active acts and his liability for his inaction, and may indicate that the Trial Chamber found Kos guilty of participating in the JCE also by omission. The Trial Chamber, however, did not point on any basis for the 'duty to intervene' imposed on Kos. It may be claimed that such a duty can be inferred from the analysis of the judges of Kos's position at the camp and the determination that he was a guard shift leader. Yet, when the Trial Chamber examined Kos' liability under the doctrine of superior responsibility it found that there was no sufficient proof that Kos had clear authority to prevent or punish crimes committed by his subordinates in the camp.[68] Thus, according to the Trial Chamber, Kos did not have an authority to prevent crimes, but was found liable for his failure to intervene. If Kos' failure to intervene was perceived as a culpable omission, than either that the Trial chamber did not require a duty to act for imposing liability for omissions, or that it did distinguished between 'authority to prevent the crime' and 'a duty to act' with respect to those crimes.

It is unclear why the Trial Chamber did not clarify the criteria for imposing liability on Kos for his omissions. It may be that to convict Kos the Trial Chamber relied more on his active participation in crimes by occasionally beating detainees and not on his omission.[69] This may also imply that the Trial Chamber would have not imposed liability on Kos if he had not actively participated in the beatings.

Similar language 'active participation in or silent encouragement' was also used by the Trial Chamber to describe the liability of Radic.

64 Tadic Appeals Judgment (n 25 above) paras 220, 228.
65 Kvocka Trial Judgment (n 59 above) paras 526, 538.
66 As above.
67 As above, paras 503, 571.
68 With respect to the doctrine of superior responsibility the Trial Chamber also found that Kos did not exercise the required degree of effective control over those guards who committed specific crimes. Ibid para 502.
69 As above, para 497.

The[70] Trial Chamber found that Radic, a guard shift leader in the camp, ignored the vast majority of the crimes committed during his shift and never exercised his authority to stop the guards from committing crimes. The Trial Chamber determined that given his position of authority over the guards, his non-intervention gave the guards a strong message of approval of their behaviour as well as encouraged and contributed to the crime's commission and continuance. Moreover, Radic was found to participate in the commission of crimes without hesitation. However,[71] similarly to the case of Kos, the Trial Chamber did not referred to the Radic's duty to act, but only to his position of authority.

The Trial Chamber also convicted Purcac, an administrative aide to the commander of the camp, as a co-perpetrator in the JCE. Purcac's liability for persecution, murder and torture was based solely on his active acts of participation in the camp routine as an administrative aid.[72] The Trial Chamber, however, did not use any language related to omissions. The reason for that can be that Purcac was not found to have any responsibility for the behaviour of the guards or the interrogators.

In sum, it seems that Kvocka Trial Chamber found that participation in a JCE can be through omission. Although it did not provide clear criteria for imposing liability on co-perpetrators by omission, it seems to have found that one's position of authority is sufficient to impose liability for his inaction. Moreover, it seems that liability for omissions did not play a major role in the convictions of accused who had a lower level of authority.[73] In those cases the Trial Chamber based the convictions mostly on the accused active participation, and the inaction was used only as a supplement. Thus, it is unclear whether the Trial Chamber would have found the accused liable for the crimes, if they had not committed also active acts.

The Kronjelac Trial Chamber, which dealt with a camp case, convicted the accused for aiding and abetting the perpetrators of the offence of unlawful imprisonment, and acquitted him for alleged liability under the doctrine of superior responsibility.[74] The Trial Chamber found that Kronjelac, who held the most senior position within the KP-Dom, allowed civilians to be detained at the KP-Dom knowing that their detention was unlawful. Although the Trial Chamber described the conduct of the accused in a passive language, it did not refer to any duty to act that the accused failed to fulfil. Moreover, while examining the liability of the accused under the

70 As above, paras 517, 571.
71 As above, paras 526, 538, 565.
72 As above, paras 461, 470.
73 Radic and Kos in oppose to Kvocka.
74 *Prosecutor v Kronjelac*, Trial Judgment, Case No IT-97-25-T, 15 March 2002, paras 126-127.

doctrine of superior responsibility, the Trial Chamber determined that Kronjelac did not have the power to refuse to accept civilian detainees nor to unilaterally release them. It also found that Kronjelac did not play any role in securing the detention of any of the non-Serb detainees in the KP-Dom. It clarified that most that Kronjelac could have done as a superior was to report the illegal conduct of others.[75]

The Trial Chamber findings as to the character of the conduct upon which Kronjelac was convicted are unclear. On one hand, the Trial Chamber used passive language such as 'allowing civilians to be detained' and emphasised the position of the accused as the most senior one at the KP-Dom. On the other hand, it found that Kronjelac had no power to refuse accepting detainees or to release them. According to the Trial Chamber most that could have been done by the accused, as a superior, was to report the illegal conduct to those who had ordered it. The Trial Chamber, however, did not recognise in a duty to report. It thus seems that the Trial Chamber either found the conduct upon which it convicted Kronjelac to be active, or that it did not find it necessary to establish a duty to act. It can also be that the Trial Chamber understood the offence of unlawful imprisonment, which share similar elements with the offence of unlawful confinement,[76] to include the conduct of omission in its definition, and thus not to require a proof of an external duty to act.

Kronjelac Trial Chamber also convicted the accused with aiding and abetting the principal perpetrators of the crimes of cruel treatment and inhumane acts that were committed by inflicting inhuman conditions on the detainees.[77] The Trial Chamber found no evidence that Kronjelac personally initiated the living conditions imposed upon the detainees or issued any orders to the guards of the KP-Dom with respect to the imposition of such living conditions. What it did find was that Kronjelac was aware of the participation of his subordinates in the creation of the living conditions at the KP-Dom, omitted to take action to prevent his subordinates from maintaining these living conditions, and failed to punish them.[78] Thus, the accused was explicitly found to incur criminal responsibility for his

75 As above.
76 Kordic Trial Judgment (n 11 above) 298, 301.
77 Kronjelac Trial Judgment (n 74 above) 171.

acts and omissions.[79] Unlike with respect to the crime of unlawful imprisonment, with respect to these crimes the Trial Chamber used the language commonly used with regard to omissions. The reason for that may lay with the fact that under this count for responsibility the accused was convicted as an aider and abettor as well as pursuant to the doctrine of superior responsibility,[80] and the language of omission was used with respect to the doctrine of superior responsibility.

The fact that the Trial Chamber explicitly referred to omissions only when the accused was found liable also under the doctrine of superior responsibility, may indicate that the Trial Chamber was reluctant to base liability only on omissions, and/or that the Trial Chamber was reluctant to determine that the accused had a duty to act when he was not found liable under the doctrine of superior responsibility, namely, when he was not found to have a position of command and/or ability to prevent the crimes. Consequently, the Trial Chamber gave broad interoperation to the notion 'act', and what may be considered as active 'participation' and/or 'aiding and abetting' in a crime.

In the Kordic and Cerkez case, Cerkez, a military commander, was found liable as a co-perpetrator as well as under the doctrine of superior responsibility.[81] The Trial Chamber recognised that omissions incur liability not only under the doctrine of superior responsibility, but also under other modes of liability. According to the Trial Chamber, where an omission of an accused in a position of superior authority contributes to the commission of a crime by a subordinate, for instance, by encouraging the perpetrator to commit the crime, the conduct of the superior may constitute a basis for liability under article 7(1).[82]

78 As above, paras 169-172, 217, 231, 233, 309-310. The Trial Chamber found that there is no evidence that the accused ordered guards to beat detainees. However, the accused was personally told about non-Serb detainees being beaten and mistreated (the accused denied it). According to one witness on one occasion the accused said that he would look into the matter and in another occasion claimed that he had no authority over that part of the building where the detainees were beaten. On another occasion, the accused tried to stop the beating of a detainee who tried to escape, but the beating guard continued to attack the detainee while being taken away by the accused. The detainee was put in an isolation cell, where at some point he was beaten again. Moreover, the accused was also present when the deputy warden told the detainees that because of an attempt of one detainee to escape all food rations would be halved and work and medical treatment would be forbidden. This punishment lasted for at least ten days.

79 As above, paras. 172, 320, 489-492.

80 As above, paras. 172, 320. However, to avoid conviction under both heads of responsibility for the same acts, the Trial Chamber only entered conviction as aider and abettor. Ibid para 173.

81 Cerkez was found liable under the doctrine of superior responsibility for attacks on three locations and the associated crimes, namely killings and injuries, imprisonment and other detention offences, plunder and destruction. Kordic Trial Judgment (n 11 above) 843.

82 As above, para 371.

Although both the Prosecution and the Defence raised the issue of omissions in their arguments,[83] the Trial Chamber abstained from explicit determination on whether the accused was found liable as a co-perpetrator for the commission of active acts, for omissions or for a combination thereof. The Trial Chamber found that:

> Mario Cerkez, as Commander of the Viteska Brigade, participated in the attacks ... This is to be inferred from his presence at the military meeting ..., the documentary evidence concerning events ... and the entries in the Duty Officer's Log…in those cases where Cerkez participated in attacks as Commander ..., he committed the crimes associated with them ... His responsibility as Commander ... was as a co-perpetrator in crimes which he committed. [84]

Cerkez's criminal responsibility for the crimes of destruction and plunder of property was based on his responsibility for the attacks that implicated responsibility for these crimes.[85] His responsibility as a co-perpetrator for the crime of persecution was based on his command over the troops involved in some of the incidents. According to the Trial Chamber, he thus played part in the campaign of persecution.[86]

To establish liability for the crimes of imprisonment and inhumane treatment, the Prosecution adduced evidence that included lists of detainees ordered or sent by Cerkez as well as Cerkez's statements and behaviour. The Trial Chamber accepted that:

> Cerkez was supervising the activities of the police and note[d] that it would not be surprising for a Brigade Commander to take charge of the prisoners detained in his own headquarters ... The Trial Chamber also accept[ed] that a Brigade Commander is responsible for what happens to prisoners in his area of responsibility. [87]

83 As above, paras 830, 833.
84 As above, paras 703, 836.
85 As above, para 809.
86 As above, para 831.
87 The Trial Chamber found that: 'Mario Cerkez, as Commander of the Viteska Brigade, participated in the attacks … This is to be inferred from his presence at the military meeting …, the documentary evidence concerning events … and the entries in the Duty Officer's Log…in those cases where Cerkez participated in attacks as Commander …, he committed the crimes associated with them … His responsibility as Commander … was as a co-perpetrator in crimes which he committed.' As above, paras 703, 788, 801, 809, 831, 836.

The above paragraph shows that Cerkez's position of commander and his responsibilities thereof played a role in the Trial Chamber's finding that he was liable as a co-perpetrator. Cerkez's liability seems to be based on a mixture of both his active acts of commanding and taking part in the attacks themselves[88] as well as his omissions as a commander to prevent the crimes. The judgment, however, does not explicitly distinguish between active acts and omissions.

2.5 Aiding and abetting

Aiding and abetting is a residual mode of participation.[89] The conduct of the accused need not have caused the conduct of the principal offender, but it must have had a direct and substantial effect on the commission of the crime by the principal offender.[90] The ICTY jurisprudence recognised that aiding and abetting can be committed by omission.[91] The omission must have a significant effect on the commission of the crime.[92]

Aleksovski Trial Chamber found Aleksovski, a prison warden, liable for his failure to order his guards to deny entrance into the camp to soldiers of the Croatian Defence Council, who took detainees for trench-digging purposes. He was also found liable for his failure to take measures open to him to stop detainees from going out to work

88 Witnesses gave evidence that Cerkez was present at the military meeting conveyed following a decision taken at the political level. In this meeting an operation which aimed at 'cleansing' certain areas from Muslims was authorised. Moreover, Cerkez threatened to burn Kruscica down because Croats had been killed. Cerkez was also seen visiting the detention area. In one occasion Cerkez told the soldiers that detained the witness and her daughter that, as far as he was concerned, the guard could slay them. However, in fact, these detainees were exchanged that night. Ibid paras 631, 694, 788.

89 *Prosecutor v Akayesu*, Trial Judgment, Case No ICTR-96-4-T, 2 September 1998, paras 473-475.

90 Liability for aiding and abetting incurs where the conduct of the accused provided practical assistance, encouragement, and/or moral or psychological support to the principal offender. Tadic Trial Judgment (n 25 above) 689-692; Celebici Trial Judgment (n 10 above) 326-329; Furundzija Trial Judgment (n 25 above) 232-235; Tuta and Stela (n 10 above) 163; *Prosecutor v Vasiljevic*, Trial Judgment, Case no IT-98-32-T 29, November 2002, para 70; Akayesu Trial Judgment (n 88 above) 546-548.

91 In the ICTR, Akayesu, the bourgmestre of the Taba Commune, namely the local authority of his commune, was found liable for failing to try and maintain the law and order in his commune and for failing to oppose killings and serious bodily or mental harm. His failure was perceived as a form of tacit encouragement, which was compounded by being present to such criminal acts. The liability of Akayesu was based on his responsibility by virtue of his office to take adequate steps to maintain law and public order in the commune and his effective authority over the communal police. This seems to include a duty to act in order to maintain law and order. Thus, Akayesu was found liable for rape, crimes against humanity, genocide and inhumane acts due to his failure to fulfil his duties, when he had the effective ability to do it. Akayesu's conviction, however, was not based solely on his omissions but also on his acts. Akayesu Trial Judgment (n 88 above) 693-694, 704-705, 707.

92 Tuta and Stela Judgment (n 11 above) 163.

in dangerous circumstances. However, similarly to other cases examined above, Aleksovski's liability was not based on omissions only. He also was found to directly participate in the commission of the crimes.[93]

The ICTY jurisprudence recognises that mere presence at the scene of the crime can, in some circumstances, have direct and substantial effect on the commission of the crime by the principal offender.[94] Presence, however, was not found necessary for entailing criminal responsibility. Thus, an accused could be found liable for aiding and abetting the principal offender by simply leaving the scene of the crime. This could happen, for example, when a commander fails to stop criminally inclined soldiers from participating in sensitive attacks, or when a guard leaves his position in order to enable the principal perpetrators to enter the camp.

2.6 Planning

'Planning' means that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[95] Similarly to 'ordering', the active character of the verb of 'planning' may imply that responsibility under this mode of participation emerges pursuant to acts and not omissions. However, many national jurisdictions recognise that an active verb in the definition of the crime can be interpreted as to include also a conduct of omission.[96]

No case specifically dealt with planning by omission. Kordic, who was present at the meetings of politicians who authorised an attack, was found to have participated as the senior regional politician in the planning of a military operation and attack aimed at 'cleansing' the attacked areas from Muslims. The Trial Chamber found that no order to kill all the military-age men, to expel the civilians and to set the houses on fire would have been given without a political approval. Therefore, Kordic was found to be associated with giving the order.[97] Moreover, the Trial Chamber inferred that, as a political leader, Kordic was involved in the plan to subjugate the Bosnian Muslims in areas for which he held political responsibility.[98] However, the Trial

93 Therefore the accused was found liable for aiding and abetting forced labour as well as the use of the prisoners for trench digging in dangerous conditions and as human shields outside the prison. Aleksovski Appeals Judgment (n 11 above) 36, 157, 172.

94 Tadic Trial Judgment (n 26 above) 678-687, 689-692; Furundzija Trial Judgment, (n 26 above) 205-209, 232-235; Tuta and Stela Trial Judgment (n 11 above) 163; Vasiljevic Trial Judgment (n 90 above) 70.

95 Blaskic Trial Judgment (n 11 above) 279 referring to Akayesu Trial Judgment (n 90 above) 480.

96 n 12 above.

97 As above, 631.

98 As above, 802.

Chamber did not elaborate on the degree of Kordic's participation in the planning, including his role and behaviour at that meeting, and did not determine whether his conduct entailed liability for an omission or an active act.

'Planning' raises several additional questions regarding the role of a member of a group of policy makers. Could a member of such a group be found liable for planning by omission when he/she abstains from appearing in the meeting? Could a member of such a group who abstains from voting on a plan or remains silent when policy issues are being discussed be held liable for planning by omission? Does the requirement of 'causation' limit the responsibility only to those whose active participation in the meeting could make a difference by, for example, changing the vote result or convincing other members to restrain from adopting the criminal plan? The answer to these questions may change based on the issue discussed, the body concerned, the expectations from holders of such positions of power, and degree of blameworthy attributed to acts of omission.

2.7 Political leaders - The case of Plavsic

None of the cases examined above dealt with the omissions of a high-level civilian leader. The case of Plavsic could have been an example for such a case if the Prosecution and the Accused did not reach a plea agreement.

Plavsic was a Serbian Representative to the Presidency of the Socialist Republic of Bosnia and Herzegovina, a co-President and a member of the collective and expanded Presidencies of Republika Srpska. She pleaded guilty to count 3 of the indictment, perpetration of persecutions, after reaching a plea agreement with the Prosecution. The Trial Chamber entered a finding of guilt.[99]

Count 3 of the indictment alleged that the accused participated by acts and omissions in the persecutions of non-Serb populations in Bosnia and Herzegovina.[100] Under the plea agreement, it was agreed that her participation was by embracing and supporting the objective of ethnic separation by force and contributing to achieving it.[101] The accused was perceived as supporting this objective by: (a) serving as co-president, thereby supporting and maintaining the government

[99] *Prosecutor v Plavsic*, Trial Sentencing Judgment, Case no IT-00-39&40/1, 27 February 2003, para 5.

[100] The persecutions included the imposition and maintenance of restrictive and discriminatory measures, killings, cruel or inhumane treatment, torture, physical and psychological abuse, sexual violence, forced existence under inhumane living conditions, forced transfer, unlawful detention, inhumane treatment and lack of adequate conditions in detention facilities. *Prosecutor v Plavsic*, Amended Consolidated Indictment, Case no IT-00-39-I, 7 March 2002, paras 19-20 and 23; *Prosecutor v Plavsic*, Trial Sentencing Judgment Ibid para 8.

[101] Plavsic Trial Sentencing Judgment Ibid paras 12-13.

and military at local and national levels through which the objective was implemented; (b) encouraging participation by making public pronouncements that force was justified because certain territories within Bosnia and Herzegovina were Serbian by right and Serbs should fear genocide being committed against them by Bosnian Muslims and Croats; and (c) inviting and encouraging paramilitaries from Serbia to assist Bosnian Serb ('BS') forces in effecting ethnic separation by force.[102] Moreover, the BS leadership, including Plavsic, ignored the allegations of crimes, such as widespread ethnic cleansing, committed by their forces. Plavsic participated in the cover up of the crimes by making public statements of denial for which she had no support, and publicly rationalising and justifying the crimes. When she subsequently had reason to know that these denials were in fact untrue, she did not recant or correct herself.[103] Moreover, she was aware that the key leaders of the Serbian Republic of Bosnia Herzegovina ignored these crimes despite the power to prevent and punish them. Despite her awareness, she continued to support the regime through her presence within the leadership structure, her public praise and defence of BS forces and her denial of their crimes.[104]

The indictment does not state that Plavsic herself ordered the commission of the crimes nor that she promoted the adoption or implementation of such orders. Her liability heavily rests upon her position as part of the leadership. Although she seems to represent a relatively moderate voice within this leadership,[105] she did not fulfil the expectations under international criminal law from a person in her position.

The indictment does not indicate a specific duty to act which Plavsic omitted to fulfil. According to the Tokyo Tribunal, government-officials posses a collective responsibly for issues that are under the responsibility of the government, even if they are not directly in charge of a concerned matter, as long as they have knowledge that crimes are, or were, committed.[106] It may be claimed

102 As above, para 14.
103 As above, para 17.
104 As above, paras 17-18.
105 Plavsic was not accused of initiating the orders or explicitly encouraging and supporting the commission of the crimes. Moreover, the Prosecution accepted that Plavsic, as President of Republika Srpska, demonstrated considerable support for the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina, that is the Dayton Agreement, after the cessation of hostilities. It also accepted that in that position, she also attempted to remove obstructive officials from office, and contributed significantly to the advancement of the Dayton peace process under difficult circumstances. As above, para 85.
106 The Tokyo Judgment (n 5 above) 30. With respect to the Foreign Minister Hirota the Tokyo Tribunal determined that the fact that he approached responsible minister was insufficient. According to the Tribunal the accused could not rely on assurances, which he knew were not being implemented, while atrocities were committed daily. Ibid 447-448.

that Plavsic was under a similar collective duty attached to all members of the BS leadership. The Tokyo Judgment, however, was criticised for imposing such broad liability on people who were not in charge of the subject matter of the crime, and had no effective ability to prevent its occurrence.[107] It is unclear whether Plavsic could be considered as being in charge of the subject matter of the crimes concerned, and having an ability to prevent their occurrence. Plavsic Sentencing Judgment does not refer to the allocation of duties among the BS leadership. It does, however, mention that Plavsic was 'a necessary part' of the leadership, although there were others whose influence and control were greater than hers.[108] It is unclear whether this sentence can be read to imply that Plavsic was not in charge of the subject matter of the crime and it had no effective ability to prevent its commission.

The dissenting opinions of the Tokyo Judgment objected to the high standard of duty to act that was imposed on government members. They, however, seem to be willing to recognise that developments in international law or changes in the functioning of governments may lead to the imposition of such duties on government members.[109] It may be claimed that the judgment endorsing the plea agreement with Plavsic indicates such a change. Increasing signs of readiness among countries to promote international criminal law, and recognition that it is a tool for eradicating conflicts and promoting peace may also indicate that times have changed and there is more openness to imposing wide duties on individual leaders. As previously noted, the ICTY jurisprudence recognises that mere presence at the scene of the crime can provide silent encouragement and support to the actual perpetrators of the crime.[110] This can be alleged to apply *mutatis mutandis* also to participation in government's meeting. As a consequence, hiding behind the curtains of passiveness, lack of words and abstentions in votes, will not be tolerated, if knowledge of the crimes exists. Furthermore, it seems that the flow of timely information to which we are all exposed, together with the power to vote, express opinions in government's meetings, resign in order to press the matter[111] and to influence public opinion, are all tools that provide leaders with effective ability to fulfil their duties. However, the acts needed be taken to fulfil one's duties cannot be detailed in a close list decided in advance. They should be decided on a case-to-case basis, subject to the circumstances, the severity and scale of the atrocities and the level of the functionaries. In deciding on the acts

[107] Ambos (n 11 above) 827, 831; See also the Tokyo Judgment (n 6 above) 1035-1037, 1045-1065, 1115-1143.
[108] *Prosecutor v Plavsic*, Trial Sentencing Judgment (n 99 above) paras 72, 121.
[109] The Tokyo Judgment (n 6 above) 1008-1009, 1064.
[110] n 6 above, 37.
[111] As was determined by the Tokyo Tribunal, with respect to minister of foreign affairs of Japan, Shigemitsu. The Tokyo Judgment (n 6 above) 458.

one has to take to fulfil his duties, a cautious approach should be adopted, to avoid a scenario where these requirements prevent a leader from proper functioning for promoting peace.[112]

The assertion that Plavsic judgment signals a return to the approach adopted by the Tokyo tribunal is, however, controversial. Objection to basing the conviction of Plavsic on the legal duty to act determined by the Tokyo Tribunal can be based on the substantial differences between the Tokyo judgment and the Plavsic case. Plavsic was convicted pursuant to a plea agreement. Consequently, the legal reasons underlying her responsibility were not examined by the Trial Chamber. Furthermore, Plavsic was convicted in the crime against humanity of persecution. The definition of this crime is more policy related, then the definition of the war crimes upon which the Tokyo judgment rendered its convictions of Japanese officials.

2.8 Causation

Some of the definitions of offences under the ICTY Statute include a casual element.[113] In some other offences, as appropriate, the ICTY jurisprudence recognised that the elements of the offence include a casual element. The casual element was also recognised as a criterion for imposing liability under certain modes entailing criminal responsibility.[114] However, the threshold for satisfying the causal element was not examined in all relevant instances.[115] Moreover,

[112] Judge Roling in his dissenting opinion regarding the crime of aggression stated that: 'The judgment should avoid establishing such norms as would tend to create the consequence that individuals that supporting peace would be forbidden to hold high office in a government which is inclined to aggressive war or is in the process of waging an aggressive war.' As above, 1061.

[113] For example, see article 2(c) which enumerates as one of the crimes of grave breaches of the Geneva Conventions the 'wilfully causing great suffering or serious injury to body or health' against persons or property protected under the provisions of the relevant Geneva Convention.

[114] Celebici Trial Judgment (n 11 above) 424, 543; Blaskic Trial Judgment (n 11 above) 154, 339; Tadic Appeal Judgment (n 22 above) 199, 205, 210, 227, 229, 233. With respect to 'instigation' the Blaskic Trial Chamber determined that a causal relationship between the instigation and the physical perpetration of the crime needs to be demonstrated. This requires a proof that the subordinates would not have committed the subsequent crimes if the commander had not failed to punish the earlier ones. Different approach was taken by Kordic Trial Chamber, which determined that although the Prosecution has to show that the contribution of the accused had an effect on the commission of the crime should be proven, it is nevertheless unnecessary to show that the crime would not have been perpetrated without the involvement of the accused. Blaskic Trial Judgment Ibid para 339; Kordic Trial Judgment (n 11 above) 387.

[115] According to the Appeals Chamber in the Tadic case, the casual requirement is fulfilled '… when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate.' Tadic Appeals Judgment (n 26 above) 207.

there was no examination of the difficulties that omissions raise in this respect held.[116]

3 Conclusions

Despite the wide recognition of culpable omissions in the ICTY jurisprudence, it was rarely applied as a criminal liability for principal perpetrators and accomplices. In cases where omissions were applied, the judgments do not clearly distinguish between omissions and acts, and consequently fail to indicate whether the conduct upon which the conviction rests is perceived as an omission or act.

It seems that the ICTY chambers were reluctant to base convictions on omissions. Indeed, in most of the ICTY cases where accused were found liable for what may seem to be an omission, this liability was a supplement to a guilt that was already established by an active act. It may be that the incidents prosecuted before the ICTY consisted mostly of active acts. The ICTY, however, was criticised for having a lenient approach towards the quantity and quality of evidence required to prove the responsibility of accused for crimes.[117] Convicting accused for active acts when there is no indication in the judgments of sufficient evidence of criminal activities may cause loss of public support and belief in the international criminal justice system. In such instances, and when the accused is under a duty to act, reliance on omissions may establish a more reliable legal system.[118]

It may also be that the chambers of the ICTY were concerned that conviction for appalling atrocities based solely on the inaction of the accused would not be accepted by the international community and especially the public. Although the concept of liability for omission is well established in different national legal systems, yet not all legal

116 For examination of the concept that omissions can cause harm see P Smith, 'Legal liability and criminal omissions' [2001] 5 Buff Crim L R 69 102; AA Leavens, 'Causation approach to criminal omissions' [1988] 76 Calif L Rev 547 563.

117 See Damaska (n 11 above) 481-482.

118 This may be relevant especially with respect to holders of positions in the high echelons of the political or military leadership. However, proving liability for either active acts or omissions requires also proof beyond reasonable doubt that the perpetrator possessed the relevant mental element. On recognition in presumption of *mens rea* in cases where a person failed to act despite his/her duty to act, see WA Schabas Genocide in international law (Cambridge University Press Cambridge 2000) 84, 312-313; WA Schabas An introduction to the international criminal court (Cambridge University Press Cambridge 2001) 84; *Salabiaku v France* Series A No 141-A and Pham Hoang Series A No 243, (1992); P van Dijk and GJH van hoof Theory and practice of the European Convention on Human Rights (Kluwer Law International The Hague 1998) 461; article 67(i) of the Rome Statute. On presumptions under the doctrine of superior responsibility see Aleksovski Trial Judgment, Case no IT-95-14/1, 25 June 1999, para 65; Blaskic Trial Judgment (n 11 above) 307; Celebici Trial Judgment (n 11 above) 386; Tuta and Stela Trial Judgment (n 11 above) 71-72.

systems perceive culpable omissions to be as grave as active acts.[119] Thus, the public may expect that the conviction and punishment of those who are responsible for the most serious crimes of international concern be held pursuant to a behaviour of which its blameworthiness is clear to every eye.

On the other hand, many of the decisions of the ICTY base their liability on the accused participation in a JCE. The doctrine of JCE, as it is currently applied, seems to raise doubts and difficulties, especially regarding what seems to be a wide and vague scope. Together with what seems to be a lenient approach towards the burden of proof, there is a risk that the doctrine of JCE will be developed into a tool of convictions that lacks clear borders. If this is the case, it will undermine the credibility of the international criminal legal system and its duty as a guiding and governing tool. Using the concept of culpable omissions instead of JCE, when appropriate, may help establishing a clearer concept of liability.

ICTY judgments, however, failed to establish clear and consistent rules for imposing liability for omissions. The judgments lack examination of the concept of culpable omissions either as a rule of international customary law or as a general principle of law.[120] As a consequence no examination of the concept of culpable omissions under international criminal law or national legal systems is provided.

Similarly to the jurisprudence of states, several ICTY judgments seem to condition liability for omissions in a prior duty to act.[121] Although not all judgments mention the notion of a 'duty to act', most judgments do require proof an additional criterion similar to a 'duty to act', such as authority or influence of the accused, as a criterion for imposing liability for inaction. The ICTY jurisprudence, however,

[119] See MJ Stewart, 'How making the failure to assist illegal fails to assist: An observation of expanding criminal omission liability' [1998] 25 Am J Crim L 385 391-392; Smith (n 32 above) 50.

[120] Not to violate the principle of legality, the Secretary General determined that the ICTY should apply rules of international humanitarian law which are, beyond any doubt, part of customary law. His determination, however, was done with respect to the subject-matter jurisdiction determined at the ICTY Statute and not the notion of individual criminal responsibility (Report of the Secretary General Ibid, paras. 33-35; Celebici Trial Judgment (n 11 above) 419). Consequently, the question whether the ICTY can resort to general principals of law to determine the criteria for imposing liability on omitters is still open. General principles of law are a source of international law used for closing gaps in the international legal system created by lack of law, i.e. custom or applicable conventions covering the point concerned (M Shaw International law (4th edn Cambridge University Press Cambridge 1997) 77-78). The Tadic Appeals Chamber, when dealing with the notion of 'common purpose', recognised that the general principles of law can be applied in international criminal law (*Prosecutor v Tadic*, Appeals Judgment (n 14 above) 225). Similar approach was also held by the scholar Bassiouni, who stated that under international criminal law general principles are usually used in order to supply the elements of the individual criminal responsibility (Bassiouni (n 7 above) 16, 21).

[121] This also seems to be the concept adopted by post-World War II cases.

does not clarify under which circumstances a duty to act is a prior criterion for imposing liability for omissions, and what are the possible sources of such a duty. Consequently, there is also no discussion on the application of a duty to act and the acts that satisfy it. ICTY judgments that did attempt to answer this concern did not do it in a consistent way that enabled inference of clear rules.

Identification of specific duties to act, and determination of their scope and application is important to avoid convictions for moral rather than legal omissions.[122] ICTY chambers, however, seems to be reluctant to recognise in duties to act. It seems that they are concerned that recognition in duties to act, when there is lack of clarity as to the sources and content of these duties, may not put people on sufficient notice that their behaviour is criminal, and thus violate the principle of legality. Despite similar concerns, national legal system did enter convictions for omissions.[123]

The duties to act that were eventually recognised seem to be based either on legal instruments,[124] or on duties to act recognised by national legal systems, such as duties to act pursuant to the position held by the accused;[125] the creation of voluntary assumption of care;[126] and, the creation of danger.[127] It yet remained unclear whether the ICTY jurisdiction confines duties to act to those under customary rules of international law,[128] or allows broadening them to

[122] On the difference between the two see CR Snyman Criminal Law (3 edn Butterworths Durban 1995), 56-57.

[123] For example, unlike the French courts, the German courts understood the principle of legality as prohibiting the imposition of liability for omissions unless it could be brought within the definition of some existing crime of commission. They, thus, developed a large quantity of case law addressing the question of culpable omissions. See B Schunemann (n 32 above) 881; J Bell, S Boyron and S Whittaker Principles of French law (Oxford University Press Oxford 1998) 205; PM. Agulnick and HV. Rivkin, 'Criminal liability for failure to rescue: A brief survey of French and American law' [1998] 8 Touro Intl L Rev 93 106-107.

[124] These are statutory duties.

[125] This duty can be perceived as one of duties recognised by the common law and arising as a result of special relations or assumption of care. On duties to act that arise of special relations see Stewart (n 32 above) 395-404. On duties to act that arise pursuant to a voluntary assumption of care, see Agulnick and Rivkin (n 122 above) 103-104; FB McCarthy, 'Crimes of omission in Pennsylvania' (1995) 68 Temple L Rev 633 636; Tomlinson (n 32 above) 451-452.

[126] n 124 above.

[127] A detention of a person cut his freedom and makes him dependent. Thus it can be alleged to put the detainee in danger. A duty following the creation of danger is recognized under the common law. Stewart (n 32 above) 395-396; Tomlinson (n 32 above) 451-452.

[128] For instance, duties emerging from humanitarian law, such as those included in article 24 of the IV Geneva Convention, and article 39 of the Geneva Convention relative to the treatment of prisoners of war (1949), and duties emerging from the laws of war, such as article 16 of the IV Hague Convention. Yet, it is questionable whether the ICTY will recognise in duties to act that arise from international human rights law, such as articles 7-9 of the ICCPR, and article 4 of the UDHR.

include also duties that most, if not all, national jurisdictions recognise.[129]

It seems that duties to act that are widely recognised and applied under national legal systems can be claimed to evolve into customary rule or, if no sufficient *opinio juris* can be proved, to provide general principles of law. However, while it may be easily agreed that the requirement of a duty to act for imposing liability for omissions is based on a general principle of law,[130] it is highly controversial whether also the content of a duty to act can be based on general principles of law. According to one approach, it may be claimed that general principles of law usually supply the elements of the individual criminal responsibility.[131] A duty to act is not part of the definition of the offence, but an element required for indicating whether the bystander is criminally liable for his inaction. Thus, according to the European Convention on Human Rights ('ECHR') the prosecution of a person for the violation of a prohibition which was criminal according to the general principles of law recognised by the civilised nations does not violate the principle of legality.[132] The formulation used in this article seems to indicate that duties to act are not part of the prohibition, but the elements that criminalise it. Therefore duties to act can be based on general principles of law. A different approach, however, may emphasize that a duty to act is a substitute for the act requirement.[133] As such, it may be claimed to be part of the definition of the act criminalised under the offence. Therefore it cannot be supplied by general principles of law. The latter approach seems to be in accordance with the call of some scholars for a cautious approach in applying the laws of civilized nations, since otherwise people may be hold accountable for failing to observe laws which they were unaware of.[134]

Furthermore, it should be noted that many provisions of international law that impose duties to act are formulated in a general and ambiguous way. If these duties be accepted as a basis for imposing criminal liability there is a risk that the principle of legality will be breached. It thus seems that the duties to act that should be

[129] A duty to act recognised under the national law of the accused, which has not evolved into a customary rule or general principle of law, should not suffice for fulfilling the requirement of duty to act under international criminal law, because such national law is not a source of international criminal law. However, national legislation can and should be used for determining the position and responsibilities of accused and consequently whether a duty to act under international criminal law is applicable to him.

[130] n 122 above.

[131] Bassiouni (n 5 above) 16, 21.

[132] The European Convention on Human Rights (1950), Art. 7; C.A. Ford Judicial Discretion in International Jurisprudence: Article 38(1)(C) and 'General Principles of Law' 5 Duke J. Comp. & Int'l L. 35 (1994) www.real-ale.wcl.american.edu/courts/courts2003/materials/class3.ford.html (accessed 10 June 2004).

[133] Snyman (n 122 above) 49.

[134] Ford (n 132 above).

recognised under international criminal law are only those that are based on provisions imposing clear obligation to act.[135] The scope of these duties should be determined in accordance with the limitations or derogation clauses in the relevant instruments.[136]

Lastly, it should be remembered that imposing criminal liability on individuals based on duties that refer to states requires determination of the individuals in charge of fulfilling the duty concerned. This will have to be decided at the judiciary level, and presumably will rely on national legislation.

[135] For instance, while the ICCPR requires from state parties to respect and to ensure to all individuals the rights recognised in the Covenant (article 2), the International Covenant on Economic, Social and Cultural Rights (1966) ('ICESCR') requires from state parties to take steps to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the Covenant, by all appropriate means, and in particular the adoption of legislative (article 2). Thus, while the ICCPR imposes a clear obligation, the ICESCR includes only a weak and vague requirement. This difference, along with the principle of legality, which is designed to protect a person from being punished for an act that he or she could reasonably believe to be lawful when committed, may indicate that duties to act can emerge from the ICCPR but not from the ICESCR. With regard to the principle of legality see T Meron, 'International criminalisation of internal atrocities' [1995] 89 AJIL 554, 566, 577.

[136] For example, articles 4(1) and 12(3) of the ICCPR. Article 4(1) provides that: 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.' Article 12(3) of the ICCPR refers to the right of liberty of movement and provides that: '…The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.'

International trade and human rights

Philippa Said

Introduction

1 Recognising the interrelation between human rights and international trade

> Trade has the power to create opportunities and support livelihoods; and it has the power to destroy them. Production for export can generate income, employment, and the foreign exchange which poor countries need for their development. But it can also cause environmental destruction and a loss of livelihoods, or lead to unacceptable levels of exploitation. The human impact of trade depends on how goods are produced, who controls the production and marketing, how the wealth generated is distributed, and the terms upon which countries trade. The way in which the international trading system is managed has a critical bearing on all of these areas.
>
> *K Watkins, The Oxfam Poverty Report (1995)*

Abstract

The objective of this dissertation is to demonstrate that there is an inter-relation between the international trade regime and the international human rights regime. This inter-relation derives from the commonality between the objectives of the two regimes, as demonstrated in Chapters one and two respectively. However, as a result of the two regimes being generally viewed as distinct, and as having unrelated mandates, the implementation of certain WTO rules and policies has had human rights implications. Chapter III discusses a selected few of these issues, especially in relation to the realisation of economic and social rights. Chapter IV presents a legal discussion of the possibility of disputes being taken to the WTO Dispute Settlement Mechanism to resolve conflicts between trade rules and (trade) measures undertaken by governments to protect human rights. It also looks at the proposal by some human rights proponents, for extraterritorial enforcement of human rights through the WTO and its Dispute Settlement Mechanism. The latter is also discussed in terms of whether trade sanctions are indeed effective vis-à-vis human rights realisation. The final chapter concludes with proposals for the formalisation of co-operation and consultation between the international trade regime and the UN human rights regime, in view of exploiting the commonality between the objectives of the two regimes in a constructive manner towards ensuring human rights realisation.

Introduction

During the last half century, there has been a tendency in the international sphere to look upon international trade and international human rights as two distinct concepts. Their progressive regimes have been viewed as having distinct roles in the international scene, working towards entirely different goals. With regards to the international trade regime, the general view is that its mandate is to achieve full trade liberalisation. As for the international human rights

regime, the general view is that of achieving universal and effective realisation of fundamental rights, inherent to the equal worth and dignity of every human being. It is this watertight compartmentalisation of the two respective concepts and their regimes that indirectly causes the adoption and implementation of certain substantive international trade rules and policies which are incoherent with the exigencies of human rights realisation, especially the realisation of economic, social and cultural rights.

The scope of this dissertation is mainly to analyse the relationship between the international trade regime and international human rights norms. This is a topic that pertains to a much wider debate about economic globalisation and human rights. The latter has been the subject of a number of resolutions and reports issued by the UN human rights bodies and Special Rapporteurs, which have urged the international economic governance regimes to take international human rights obligations and principles fully into account in international economic policy formulation. The World Trade Organisation features among these, as well as in a number of UN resolutions and reports, which have been produced in view of human rights implications of international trade rules. This dissertation will be making reference to some of these in its argumentation.[1]

The dissertation primarily demonstrates that there is an inter-relation between the international trade regime and the international human rights regime. This is established in the first two chapters, which, together, indicate the commonality and complementarity between the objectives of the two regimes, as laid down in their founding texts.

Chapter I analyses the recognition of this inter-relation from a human rights perspective. A discussion is undertaken of the relevant provisions in the UN Charter and the International Bill of Human Rights, as well as of the manner in which the economic and social dimensions of human rights has evolved throughout the years. The latter is apprehended to the extent that it has implications for the attribution to the international trade arena of a human rights discourse.

The second chapter looks at the text and practice of the World Trade Organization (WTO). It underlines the complementarity of the objectives stated in the Preamble to the *Marrakesh Agreement establishing the World Trade Organisation* (1994), with the economic and social objectives of the founding UN human rights texts, identified in the first chapter. It further demonstrates that while human rights do not feature directly in the WTO text, they may

[1] It should be noted that research in view of this dissertation was carried out till 15 June 2003.

possibly be read into certain WTO provisions, as well as coincide with basic principles of the WTO regime, such as non-discrimination, the rule of law and transparency. However, the manner in which such principles and provisions are implemented and interpreted in the WTO, differs significantly from the interpretation given in the human rights domain. The chapter also briefly looks at the principal liberal normative foundations of the two systems, and the way the latter may explain why the international trade and human rights regimes are generally viewed distinct and, possibly, in conflict.

A present-day challenge constitutes addressing effectively the areas under the WTO umbrella, which have human rights implications. The third chapter focuses on a selected few of such areas and the manner in which affirmative action aimed at the realisation of specific human rights, especially those recognised in the International Covenant of Economic, Social and Cultural Rights, is affected.

Given that current trade rules have human rights implications, there also exists the possibility of disputes being taken to the WTO Dispute Settlement Mechanism (DSM) to resolve conflicts between trade rules and measures taken to protect human rights. A legal discussion is assumed in the fourth chapter, addressing the question how the DSM should interpret WTO law coherently with international human rights law. Chapter IV also looks at the issue of unilateral trade sanctions and extraterritorial enforcement of human rights in view of the WTO regime. The latter is, *inter alia*, discussed in terms of the real effectiveness of trade sanctions in terms of human rights realisation.

The main thrust of this dissertation finds full expression in the last chapter, which addresses the essential question as to how the interconnection between international trade and human rights may be best exploited for the purposes of human well being. Based on the premise of a given commonality between the objectives of the WTO regime and those of the UN human rights regime, I conclude by putting forth the argument for the formalisation of co-operation and consultation between the WTO and the UN human rights bodies.

1 Recognising the interrelation between human rights and international trade

1.1 Introduction

This chapter is aimed to demonstrate the importance, from a human rights perspective, of international recognition of the interconnectedness between the realisation of internationally recognised human rights and the domain of international trade liberalisation. A brief introduction to the wider scenario of economic globalisation and human rights will set forth the context within which the relatively more specific discussion of international trade and human rights features.

1.2 Implications of economic globalisation on international human rights

Trade liberalisation forms part of the process of economic globalisation, and is the element relevant to the subject of this dissertation. However, it is appropriate to first briefly define what is understood as economic globalisation today.[2] The term spells out a growing economic interdependence, deregulation, and dominance of the market system[3] – in a nutshell, a process-driven integration of the world's economy. It represents a reality of prevalent trade in goods, services and financial instruments, facilitated by the spurs of information and communications technology. It is also a symbol of the dominant force of influence being assumed by transnational institutions and corporations in determining international and national policies, alike.

Economic globalisation has implications on universal human rights. From a positive point of view, globalisation contributes directly to the realisation of economic rights, due to the relationship between economic activity and the human freedom and dignity inherent to decisions taken as producers and consumers. Economic globalisation may be said to contribute to the attainment of the economic preconditions for socio-economic rights through the significant increases in global welfare which trade theory predicts as a consequence of globalisation. Participation in the global market is also seen to increase domestic pressure for increased political and

2 Globalisation is not merely an economic process but also has social, political, environmental, cultural and legal dimensions. However, for the purposes of this dissertation, a brief on economic globalisation will suffice.

3 D. Shelton, 'Protecting Human Rights in a Globalized World' (2002) 25 B.C. Int'l & Comp. L. Rev., 274.

social rights at the national level.[4] Finally, some human rights advocates view 'the significant economic power unleashed through transactional globalisation and the interdependent economies it encourages', as facilitating option for economic sanction against human rights violations.[5]

However, from a different perspective, the process of globalisation has also fuelled unequally distributed global welfare gains and economic exploitation, ascertaining the persistent existence of poverty. Globalisation has, in turn, constituted an *indirect* cause of exploitation of that poverty, the latter possibly leading to the impairment of, *inter alia*, the right to life, freedom from cruel, inhuman or degrading treatment, the right to equality and non-discrimination, freedom of association and assembly.[6]

Where the process of economic globalisation is not accompanied by human rights considerations and social safeguards, but is driven solely by market forces, profit and political power, economic globalisation risks having *direct* negative effects on internationally recognised human rights. This is true inasmuch as scarce goods, access to technology, public services and job opportunities are conditioned and affected by trade liberalisation rules. The economic dimensions of human rights, especially rights like the right to work, the right to food, the right to health, the right to education, the right to water and the right to housing, can only be realised through appropriate domestic trade and economic policies. This explains the stand taken by human rights advocates that globalisation is leading to greater problems of state capacity to comply with human rights obligations, particularly economic, social and cultural rights.[7]

1.2.1 Is trade liberalisation 'good' for human rights? General perspectives

Trade theory predicts a significant increase in global welfare stemming from globalisation, *via* a snowball effect enhancing the attainment of economic conditions necessary for economic and social rights. Trade liberalisation is viewed as creating efficiency and wealth, and thus jobs in developing countries and better standards of living. Ease of movement of people, goods, and services, allows for

4 F.J. Garcia, 'The Global Market and Human Rights: Trading Away the Human Rights Principle', (1999) 25 *Brooklyn J Int'l L.*, 59.

5 As above. The question as to whether human rights sanctions are indeed effective in terms of human rights is addressed in Chapter IV of this dissertation.

6 The recent cases of multinational corporations found to be liable for violations of such human rights in, *inter alia*, Burma, Nigeria, and Ecuador, constitute examples of such exploitation.

7 UN Committee on Economic, Social and Cultural Rights, *Statement on Globalization and Economic, Social and Cultural Rights*, 18th Session, 11 May 1998. May be accessed via: www.unhchr.ch/tbs/doc.nsf (accessed June 2003).

increased availability and efficient allocation of resources, competitive production and quality, and improved governance – in sum, faster growth and more rights realised. Advocates of trade liberalisation also contend that free trade and economic freedom are necessary conditions of political freedom, contributing to the rule of law.[8]

However, critics of trade liberalisation, while not perhaps dismissing entirely all the above, point to statistics. They take the example of wealth distribution and of persistent inequality, such as that revealed in the World Bank Development Report 2003, which estimated that, the average income in the richest twenty countries is now 37 times that in the poorest twenty countries, and that this ratio has doubled in the past 40 years, mainly because of the lack of growth in the poorest countries.[9] Such unequal effects of liberalisation are seen as a clear demonstration of how 'leaving it to markets' to achieve economic and social objectives is at odds with human rights principles. 'Human rights priorities protection for the weak and vulnerable, whereas market forces', based on the price-system, 'favour the strong'.[10] Critics emphasize that globalisation, as a process of interaction and negotiation involving multiple powers, should not prioritise the 'law of the market', at any social cost, and especially, over and above humankind's common values, human rights.[11]

1.2.2 A 'clash of globalizations'?

Some academics, like Paul Streeten,[12] draw a distinction between 'globalisation from above' in the form of world markets, multinational corporations, and international capital flows, and 'globalisation from below', in the form of human rights struggles and

8 D. Shelton (2002), *op.cit.*, p 9.

9 World Bank, *World Development Report 2003: Sustainable Development in a Dynamic World*, Washington D.C.: World Bank and Oxford University Press, 2003, Chap. 1, p 2

10 C. Dommen, 'Diverging tracks – The growing incompatibility between the human rights and trade regimes', 2003, p 4 (forthcoming in forthcoming in: C. Dommen, *Trading Rights? Human Rights and the World Trade Organisation*. London: Zed Books, 2004)

11 A. Habbard & M. Guiraud, 'The World Trade Organisation and Human Rights', *International Federation of Human Rights League (FIDH), Position Paper*, November 1999, p 2.

12 P Streeten, 'Globalization and its Impact on Development Co-operation', *Development*, Vol. 42, No 3 1999, p 11 - quoted in: UN Sub-Commission on the Promotion & Protection of Human Rights, 52d Sess, *The realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights*, Preliminary report submitted by J. Oloka- Onyango and D. Udagama, (in accordance with Sub-Commission Resolution 1999/8) E/CN.4/ Sub.2/2000/13, 15 June 2000 - ref. no 16

movements.[13] Inasmuch as the economic globalisation process has become liable for sacrificing internationally recognised human rights for discriminatorily, distributed economic welfare gains, it may be concluded that 'a clash of globalisations' exists. The latter term symbolises the current quest by an increasingly globalised civil society for the vigorous economic regime of international trade and investment to be countered by a human rights approach and more rigorous standards of accountability.[14]

Can it be said that this 'clash of globalisations' is caused by the general perception of a divide between the international trade regime and the human rights regime? Is there commonality between the two regimes upon which co-operation stands a chance?

1.3 Provisions in the UN Charter and the main international human rights instruments relevant to the interrelation between international trade and human rights

1.3.1 Introduction: Beginning of the 20th century

As early as 1919, with the constitution of the International Labour Organisation (ILO), a kind of interdependence between human rights and the economic sphere had already been acknowledged. Social and economic rights began to develop within the tripartite institutional structure of the ILO, constituting of government, labour and business representation and participation at the negotiating and deliberating process.[15]

The development of the United Nations (1945), and thereafter of the Universal Declaration of Human Rights (1948), which occurred within the same period of time as the development of the Havana Charter for the International Trade Organisation,[16] both made explicit the interconnectedness between human rights and economic and social stability.

13 The international human rights system pertains to the process of globalisation, to the extent that it places limits on the sovereignty of the state.

14 E/CN.4/Sub.2/1999/11, *op.cit.*, p 4.

15 F. Francioni, 'Environment, Human Rights and the Limits of Free Trade', in F. Francioni (ed.), *Environment, Human Rights and International Trade*, Oxford: Hart Publishing, 2001, p 5.

16 United Nations Conference on Trade and Employment, held at Havana, Cuba, 2 November 1947 – November 24, 1948, Final Act and Related Documents, Interim Commission for the International Trade Organization, Lake Success, New York, April 1948, UNESCOR, Conf. On Trade & Emp., UN.Doc/E/Conf.2/78. The Havana Charter constituted the predecessor of the multilateral trading system. See Chapter II.

1.3.2 Scope and purpose of human rights in UN system included economic and social stability

Both the multilateral trading system and the UN human rights system formed a response to the Second World War, acknowledging that friendly relations and international co-operation between nations were required to maintain international peace, security and prosperity.[17] Apart from political stability and the rule of international law, social and economic stability were key priorities for *both* international mechanisms.

Chapter 2 of this dissertation shall focus on the World Trade Organisation and its regime, and the way in which social and economic stability features as a key objective of its mechanism. On the other hand, it is the purpose of this section to look at the way in which economic and social stability and well-being formed one of the purposes behind human rights in the founding United Nations texts. This will allow for a better understanding of grounds of commonality between the international human rights regime and the international trade regime.

The United Nations Charter and 'economic and social stability'

The UN Charter[18] forms the foundation of the UN human rights regime. The intentions of the founders of the United Nations for international economic and social co-operation were pronounced in the first paragraph of the Dumbarton Oaks Proposals, adopted in Washington on 4 October 1944:[19]

> With a view to the *creation of conditions of stability and well-being* which are necessary for peaceful and friendly relations among nations, the organisation should facilitate solutions of *international economic*, social and other humanitarian problems and promote respect for *human rights* and fundamental freedoms.[20]

Indeed, article 55 of the UN Charter engaged the objectives of the UN in such spirit:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations ...

17 H. Lim, 'Trade and Human Rights – What's at Issue', *JWT*, Vol. 35 (2), 2001, p 276.
18 The Charter of the United Nations was signed on 26 June 1945, in San Francisco. In force 24 October 1945.
19 Dumbarton Oaks Proposals, Washington, 7 October 1944, *Arrangements for International Economic and Social Cooperation* (7 October 1944), in: United Nations Information Organizations, *Dumbarton Oaks Proposals, Comments and Proposed Amendments*, Documents of the United Nations Conference of International Organization, San Francisco, 1945, Volume III.
20 The UN Economic and Social Council was established by the UN Charter to carry out the said function under the authority of the UN General Assembly.

> the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems ... (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

The UN was thus founded on the premise of the complementarily between human rights and economic and social reality. In turn, the purpose of human rights and fundamental freedoms in the UN Charter included economic and social stability and well-being. Today, States remain tied by these objectives, having pledged, in article 56 of the UN Charter, to take *joint and separate action* in co-operation with the Organisation for the achievement of the purposes set forth in article 55.

The Universal Declaration of Human Rights and the 'economic and social dimension' of human rights

The complementarity between human rights and economic and social reality was ascertained in the Universal Declaration of Human Rights (UDHR), adopted in 1948. The Preamble, *inter alia*, pronounces commitment to the economic and social dimension of human rights, and calls for the promotion of 'better standards of life in larger freedom'.[21] To such end, the UDHR encapsulates (in addition to political and civil rights) economic, social and cultural rights. Furthermore, article 28 UDHR affirms that: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.' In the last paragraph of its Preamble, the UDHR refers to the rights therein as 'a common standard of achievement for all peoples and all nations, to the end that every individual and *every organ of society* […] shall strive […] to secure their universal and effective recognition and observance'.

International perception and the treatment of the economic and social dimension of human rights (1951-1980s)

Despite the emphasis placed on the economic and social dimension of human rights in the founding UN documents, a politically constructed hierarchy of human rights led to and followed a 1952 General Assembly decision[22] for the Commission on Human Rights to draw up two separate covenants. These resulted in what are known today as the International Covenant on Civil and Political Rights (1966), and

[21] H. Lim (2001), *op.cit*,
[22] UN General Assembly Resolution 543 (VI), 1952. (*Decision to separate the Universal Declaration of Human Rights into two covenants*)

the International Covenant on Economic, Social and Cultural Rights (1966).

Thereafter, certain elusiveness was adopted internationally in terms of promotion and implementation of economic, social and cultural rights. This affected the whole make-up of the international legal regime that developed before the 1980s. This is evidenced in the parallel, but distinctly separate ways, that the international human rights regime and the international trade regime developed,[23] with scant reference made to each other and absent effort at co-operation.

A new leaf: 1980s onwards

A new leaf got turned over with the concrete acknowledgement of the right to development in the Declaration on the Right to Development,[24] adopted in 1986. The Declaration states that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised. While reaffirming the right to development, the World Conference on Human Rights, held in Vienna in 1993[25] emphasised that the human person is the central subject of development. In turn, it enunciated, in its Declaration and Programme of Action, the founding principle that human rights are universal, indivisible and interdependent. The latter constituted recognition that it is not possible to realise any one right without also promoting and protecting other rights as well. The Vienna Declaration requires the international community to 'treat human rights globally in a fair and equal manner, on the same footing, and with the same

23 In the international human rights arena, calls were made on the international community to give meaning to the interconnection between realisation of human rights and economic development (see, for example, General Assembly Resolution 1161 (XII); the Proclamation by the International Conference on Human Rights held in Tehran (22 April - 13 May 1968), para 12; also: UN Commission for Human Rights resolution 4 (XXXIII) of 21 February 1977, and UN Commission for Human Rights resolution 4 (XXXV) of 2 March 1979 – the latter having emphasized the importance of the New International Economic Order to development and human rights). However, no express reference seems to have been made to the GATT regime. From the GATT perspective, the Tokyo Round of trade negotiations (1973 –1979) was one of the very few instances where slight possibility existed for the two worlds of trade regulation and human rights norms to coincide in the future. During the Round, the US pressed for the inclusion of a social clause, encapsulating labour standards, in the GATT regime. However, the latter proved unsuccessful.

24 UN General Assembly, *Declaration on the Right to Development*, Adopted by General Assembly Resolution 41/128, 4 December 1986, annex, 41 UN GAOR Supp. (No 53) at 186, UN Doc A/41/53 (1986).

25 Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, A/CONF.157/23, 12 July 1993 - para 5.

emphasis.' Economic, Cultural and Social Rights *and* Civil and Political Rights cannot be practically separated or secluded in watertight compartments. This principle also re-engaged an indirect acknowledgement that human rights are not grounded solely in legal terms, but are also to be facilitated and promoted in the social and economic domain.

The latter dismissed altogether the traditional interpretations of 'progressive realisation' in article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[26] which permitted states to determine how and when to allocate resources for the realisation of economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights has declared that the progressive realisation of rights enshrined in the ICESCR is a binding obligation. It requires states to move expeditiously and effectively towards full realisation of all ICESCR rights. State parties have legal concrete 'core' obligations under the Covenant to achieve, at least, minimum essential standards of the rights set forth in the ICESCR, utilising available resources in an effective manner.[27] The Committee has also specified that some obligations have immediate effect, including ensuring non-discrimination.[28] In turn, the principle of non-retrogression requires that once nations take positive steps to implement such rights, they should strive to advance these gains and not subsequently regress by taking negative steps.[29] The latter should be viewed in light of the undertaking contained in article 2, paragraph 1 ICESCR, which requires each State party to *co-operate internationally* for achieving progressively the full realisation of the rights recognised therein. This would especially seem to imply such obligations when States come together within intergovernmental fora, including the World Trade Organisation.

Such implications became more apparent via the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986)[30] and the Maastricht

26 Article 2 ICESCR, para 1,states: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, 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 adopted of legislative measures.'

27 UN Committee on Economic, Social and Cultural Rights, *The nature of States parties obligations (Art. 2, par.1)*, CESCR General Comment No 3, 14/12/1990, UN ESCOR, Supp. No3, Annex III, UN Doc E/1991/23-E/C.12/1990/8 (1991).

28 UN Committee on Economic, Social and Cultural Rights, *The domestic application of the Covenant*, CESCR General Comment No 9, 19th Sess, 03/12/1998, E/C.12/1998/24.

29 M. Mehra, 'The Intersection of Trade and Human Rights', in D. Barnhizer, *Effective Strategies for Protecting Human Rights*, Hampshire: Darmouth Publishing Company, 2001, p 79.

30 *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Maastricht, June 1986. UN Doc. E/CN.4/1987/17, Annex.

Guidelines on Violations of Economic, Social and Cultural Rights (1997).[31] (Both documents do not have any legal force, but constitute an authoritative summary of the state of international human rights law on the subject of economic, social and cultural rights).

While emphasizing further the immediacy of obligations under the ICECSR, the Limburg Principles, *inter alia*, required that trends in international economic relations should be taken into account, in assessing the efforts of the international community to achieve the Covenant's objectives. This was reaffirmed by the Maastricht Guidelines. The latter took note of the global trend to reduce the role of the State, relying on market forces to resolve problems concerning human welfare, as a result of efforts to attract foreign direct investment or to respond to the conditions generated by international and national financial markets. The Guidelines emphasized that this does not detract the legal obligations of States to respect, protect and fulfil ICESCR rights. They also recognised that the failure of States to take into account their international legal obligations in the field of economic, social and cultural rights when entering into multilateral agreements with other States or international organisations constitutes a violation of human rights.

Civil and political rights obligations – Their economic and social dimension

Finally, the economic and social dimension of human rights obligations is also made explicit through positive obligations by the International Covenant on Civil and Political Rights. The UN Human Rights Committee has interpreted certain ICCPR rights as entailing positive obligations. Taking the example of the right to life, the Human Rights Committee in General Comment No 6,[32] stated that the right to life requires State parties to take positive action, such as reducing infant mortality and taking measures to eliminate malnutrition and epidemics.

31 The Maastricht Guidelines were drafted by a group of experts, including legal academics, lawyers and members of the UN Committee on Economic, Social and Cultural Rights, in Maastricht (Netherlands), 22-26 January 1997. The guidelines are an elaboration and update of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. May be accessed at: http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html *(as at June 2003)*.

32 Human Rights Committee, The Right to Life (article 6 ICCPR), CCPR General Comment No 6, 16th Sess, 30 April 1982.

1.3.3 The scope of international human rights: Who are the bearers of correlative duties?

Notably, the purpose of the UDHR was to assign human rights responsibilities to states, calling on them to construct, progressively and within the community of states, a just social order, national and global, that will need to meet at least the basic needs of human beings.[33] However, the UDHR did not proclaim inalienable rights of all members of the human family only vis-à-vis national governments as the primary bearers of correlative duties,[34] but also vis-à-vis 'every individual and organ of society', as stated in the last paragraph of the UDHR Preamble. The latter clearly obligates international and institutional action. This is indeed resonant in article 30 UDHR which states that nothing in the Declaration may be interpreted as implying *for any State, group or person* any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms therein.

These provisions, together with the nature of customary international law that the UDHR has assumed over the last fifty years,[35] imply that UDHR obligations are in no way estranged from the remits of international and multilateral institutions, including the WTO.[36] How is the WTO regime accommodating to international obligations for the realisation of internationally recognised human rights? This issue will be addressed in Chapters II, III and IV of the dissertation.

1.4 Recognition given by UN human rights bodies of the interrelation between human rights and international trade

During the last decade, the UN Secretary-General, Kofi Annan, has called out to multilateral institutions and multinational corporations to recognise the link between the world of global trade and of human rights realisation (as exemplified by his initiative vis-à-vis the Global

33 U. Baxi, *The Future of Human Rights*, Oxford University Press, 2002, p 139.
34 E.U. Petersmann, 'Human Rights and International Economic Law in the 21st Century, the Need to Clarify Their Interrelationships', *J. Int. Econ. L.* (2001), p 5.
35 B. Summa (ed. *et al*) *The Charter of the United Nations, a Commentary, Second Edition*, New York: Oxford University Press, 2002, pp 926-927.
36 See EU Petersmann, 'Time for Integrating Human Rights into the Law of Worldwide Organizations – Lessons from European Integration Law for Global Integration Law', *Jean Monnet Programme, Working Paper*, 2001, Section 3D. Refer to Chapter IV of this dissertation for discussion on customary international law and WTO law.

Compact).[37] The prominent line of thought adopted by the Secretary General is that trade and investment not only bring economic development, but also bring higher standards of human rights and environmental protection.[38] However, the latter, only comes together 'when countries adopt appropriate policies and institutions'. This stand was taken in his message to the WTO Ministerial Conference in Seattle (1999), when he called for the need to pay heed to the gross inequalities in the global trading regime.[39]

In a working paper by Mr Oloka-Onyango and Ms. Udagama, submitted to the Sub-Commission on the Promotion and Protection of Human Rights in 1999,[40] it was clearly stated that

> liberalization in the global regimes of trade, investment and finance does not, *ipso facto*, lead to more positive impacts on the well-being of human kind in general or to the enhancement of economic development in particular. Nor does such liberalization *necessarily* lead to the greater protection and observation of human rights.[41]

This statement, while not dismissing the interconnection between international trade and human rights, echoes concern about the lack of respect of economic, social and cultural rights in the international market domain, due to 'unchecked' trade liberalisation. Such concern was expressed in a study undertaken for the Sub-Commission on the impact of globalisation on the enjoyment of human rights.[42] The study noted that today's global market operates within politically set

37 See UN Secretary General, 'Secretary-General proposes Global Compact on Human Rights, Labour, Environment, in address to World Economic Forum in Davos', Press Release SG/SM/6881, 1 February 1999. The UN Global Compact was launched officially in July 2000 [May be accessed via the UN Official Website: http://www.unglobalcompact.org *(as at June 2003)*]. The Compact challenges business leaders to promote and apply within their corporate domains nine principles in the field of human rights, labour standards and the environment. It provides a basis for structured dialogue between the UN, business, labour and civil society on improving corporate practices in the social arena.

38 UN Secretary General, *In Address to WTO Ministerial Meeting, Secretary General says, 'Economic Rights and Social Responsibilities are two sides of the same coin*, Press Release, SG/SM/7237/Rev.1, ECO/12/Rev.1

39 *Ibid*.

40 UN Sub-Commission for the Promotion and Protection of Human Rights,., *Human rights as the primary objective of international trade, investment and finance policy and practice*, Working paper submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission Resolution 1998/12, UN ESCOR, 51st Sess, E/CN.4/Sub.2/1999/11, 17 June 1999.

41 *Ibid,* p 2. Italics added

42 UN Sub-Commission on the Promotion & Protection of Human Rights, *The realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights*, Preliminary report submitted by J. Oloka- Onyango and D. Udagama, (in accordance with Sub-Commission Resolution 1999/8), UN ESCOR., 52nd Sess, E/CN.4/Sub.2/2000/13, 15 June 2000. The interconnection between international trade and human rights was also recognized by the same Rapporteurs in *Globalization and its Impact on full enjoyment of human rights*, Progress report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission Resolution 1999/8 and Commission on Human Rights decision 2000/102, E/CN.4/Sub.2/2001/10, 2 July 2001.

boundaries, negotiated between governments in multilateral forums like the WTO, constituting a power game of rules dictated by very few actors, but having an impact affecting the vast majority.[43] The working paper observed that in bringing intellectual property rights, government procurement and investment measures into the purview of the international trade-enforcement regime, broad questions of human rights are brought into the picture. Technological and economic developments, facilitated by these new trade rules, are characterised as marginalizing, discriminatory and systematically denying access to the majority of the world's population to them.[44] The study also looked at the new trade rules as inhibiting the ability of governments to address appropriately domestic development and human rights demands. It emphasized: 'unbridled economic liberalization has the potential to wreak havoc on human rights unless checked in a timely manner'.[45]

The UN Human Rights bodies have emphasized the relevance of human rights in all areas of governance and development, including international trade, investment, policies and practices. [46] In turn, they have requested economic policy forums, like the WTO, to take international human rights obligations and principles fully into account in international economic policy formulation and implementation.[47]

In order to facilitate further understanding of the inter-relation between human rights and international trade rules, the Office of the High Commissioner for Human Rights has carried out a comprehensive analysis of the human rights dimensions of WTO trade agreements. The analysis includes a report on the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights,[48] examining WTO intellectual property rules in the light of the obligations on States under the ICESCR. A second report regards the WTO Agreement on Agriculture,[49] examining ways in which the ongoing reform process of agricultural trade could be directed towards protecting the right to food and the right to development of people in developing countries. A third and last report focuses on the human rights implications of

43 E/CN.4/Sub.2/1999/11, *op.cit.*, p 3.
44 *Ibid.*, p 4
45 *Ibid.*, p 18
46 UN Sub-Commission on the Promotion and Protection of Human Rights, *Human rights, trade and investment*, Resolution 2002/11, UN ESCOR, 14 August 2002. Also see: E/CN.4/Sub.2/2001/10, *op.cit*.
47 *Ibid.*
48 UN Sub-Commission on the Promotion and Protection of Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights*, Report of the High Commissioner for Human Rights, UN ESCOR., 52nd Sess, E/CN.4/Sub.2/2001/13, 27 June 2001.
49 UN Commission for Human Rights, *Globalization and its impact on the full enjoyment of human rights*, Report of the High Commissioner for Human Rights submitted (in accordance with Commission on Human Rights resolution 2001/32), UN ESCOR., 58th Sess, E/CN.4/2002/54, 15 January 2002

liberalisation of trade in services, particularly in the framework of the WTO General Agreement on Trade in Services (GATS).[50]

Likewise, in reports by UN Special Rapporteurs, increasing reference has been made to the world trade regime and its implications on human rights, including the right to education, the right to food, the right to development, and the right to health.[51] The human rights-international trade interrelation has also been subject of recurrent themes during annual sessions of the UN Commission on Human Rights. This is reflected in a number of Commission Resolutions, which, *inter alia*, affirm the unique role multilateral institutions, like WTO, play in meeting the challenges presented by globalisation.[52] The latter corresponds to the approach adopted by the UN Human Rights bodies in general, when acknowledging and affirming the interconnectedness between international trade and human rights. This approach entails the advocacy of increased co-operation between the WTO and the UN Human Rights bodies in view of a human rights approach towards international trade.[53]

1.5 Conclusion

As per conclusion, I shall quote the words of UN Secretary-General, Kofi Annan, in his address to the World Economic Forum, held in Davos, Switzerland, in January 1999:

> We have to choose between a global market driven only by calculations of short-term profit, and one which has a human face. Between a world which condemns a quarter of the human race to starvation and squalor, and one which offers everyone at least a chance of prosperity, in a healthy environment. Between a selfish free-for-all in which we ignore the fate of the losers, and a future in which the string and successful accept their responsibilities, showing global vision and leadership.[54]

The latter quotation reflects the concern of the UN Human Rights bodies regarding the current gap between the integration of the world economy and human rights realisation. This gap is frustrated by a perceptive blockage in the general mind that places a boundary wall

50 UN Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights, Liberalization of Trade in Services and Human Rights*, Report of the High Commissioner, UN ESCOR, 54th Sess, E/CN.4/Sub.2/2002/9, 25 June 2002.

51 Commission, held in March – April 2003 - C. Dommen, 'WTO and Human Rights Bodies Reach Out to Each Other', in *ICTSD Bridges, Between Trade and Sustainable Development*, Year 7, No 3, April 2003.

52 See UN Commission on Human Rights, *Globalization on the full enjoyment of human rights*, Resolution 2003/23, 22 April 2003. Also see: Commission on Human Rights Resolution 2002/28 of 22 April 2002; Resolution 2001/32 of 23 April 2001; Resolution 1999/59 of 28 April 1999.

53 This last point is discussed further in Chapter V of this dissertation.

54 UN Secretary General, 'Secretary-General proposes Global Compact on Human Rights, Labour, Environment, in address to World Economic Forum in Davos', Press Release SG/SM/6881, 1 February 1999.

between the objectives of the international trade regime and the international human rights regime. The next chapter demonstrates that the rationale and the objectives of the WTO are *not* distinct from those of the international human rights regime. An understanding of the latter will facilitate the cause of this dissertation, which is to break the perceptive blockage inhibiting the undertaking of adequate cooperation between the UN Human Rights bodies and the WTO in view of safeguarding fundamental rights of the individual.

2 WTO, international trade and human rights

2.1 Introduction to the origins of the World Trade Organisation (WTO) and its rationale

In its origins, the multilateral trading system was sought to create a trade and welfare-enhancing economic environment, with a view of promoting peace and stability. Alongside the post-war Bretton Woods institutions[55] and the UN Charter, the 1948 Havana Charter for an International Trade Organisation (ITO)[56] - the GATT's founding statute – constituted one of the first attempts to instigate the rule of law at the international level in view of achieving peace and co-operation.

The Havana Charter for an International Trade Organisation was approved in 1948 at a United Nations Conference on Trade and Employment convened by the UN Economic and Social Council. Created in the aftermath of the Great Depression and the protectionism of the 1930s that contributed to the Second World War, the Havana Charter pursued not only economic but also political objectives to prevent another economic and political crisis.[57] It was better to have a rules-based, internationally accepted world trade system, rather then an unpredictable international environment, determined by *ad hoc* economic interests of the most powerful trading countries.[58] This rationale was expressive of a global attempt

55 The World Bank and the International Monetary Fund (IMF).

56 United Nations Conference on Trade and Employment, held at Havana, Cuba, November 2, 1947 –November 24, 1948, Final Act and Related Documents, Interim Commission for the International Trade Organization, Lake Success, New York, April 1948, UNESCOR, Conf. On Trade & Emp., UN.Doc/E/Conf.2/78. [Hereinafter referred to as 'The Havana Charter'].

57 E. Petersmann, 'Human Rights and International Economic Law in the 21st Century, The Need to Clarify their Interrelationships', *J. Int. Econ. L.*, 2001, p 25.

58 M Mehra, 'The Intersection of Trade and Human Rights', in D. Barnhizer, *Effective Strategies for Protecting Human Rights*, Hampshire: Darmouth Publishing Company, 2001, p 77.

to create 'conditions of stability and well-being … necessary for peaceful and friendly relations among nations'[59] – objectives already enshrined in the UN Charter.[60]

The General Agreement on Tariffs and Trade, adopted in 1947, was originally an *ad hoc* arrangement pending entry into force of the Havana Charter. Due to the Charter never coming into force,[61] the GATT continued to exist as the principle forum for multilateral trade negotiation. Its mandate remained essentially limited to international trade, without encompassing any interconnection between trade and non-trade values.[62] Until the early 1990s, the GATT system was essentially self-contained, making no reference to the wider corpus of international law.[63]

In 1994, at the conclusion of a seven-year round of trade negotiations, the GATT Member States adopted the Marrakesh Agreement establishing the World Trade Organisation.[64] It, *inter alia*, provided for the replacement of the *ad hoc* GATT system with the institutional framework of a world trade organisation. The Uruguay Round also extended the application of GATT trade rules from tariffs on merchandise goods to non-tariff barriers on goods and services through the adoption of new multilateral agreements under the WTO umbrella,[65] constituting parts of the single undertaking. [66] The World Trade Organisation (WTO) came into being in 1995 and today, has a current membership of 146 countries.[67]

2.2 What does WTO refer to nowadays?

The term World Trade Organisation has been adopted in every-day language to refer to any one of four distinct parts within the WTO

59 Article 1 Havana Charter.
60 See Chapter I.
61 The Havana Charter never came into force due to the United States administration refusing to submit the Charter to Congress. Without the support of US, the planned establishment of the ITO effectively died.
62 This contrasted sharply with the Havana Charter, which provided, in article 7, for the establishment of a legal rights framework for trade issues, through the incorporation of labour standards in the ITO regime.
63 3D Associates (2002), *Report of the In-Depth Study Session on the World Trade Organisation for Human Rights Professionals*, Chexbres, 1-2 February 2002, p 2. Reference to non-trade issues and law (environment) was made for the first time in 1991, in the Tuna-Dolphin dispute (US-Restrictions on Imports of Tuna (1991), 30 I.L.M. 1594).
64 Marrakesh Agreement Establishing the World Trade Organisation, 15 April 1994, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (1995), *reprinted* in 33 I.L.M 1144 (1994) [hereinafter the WTO Agreement]
65 C Dommen, 'The WTO Today', 2002, p 4. (Draft forthcoming in: C Dommen Trading Rights? Human Rights and the World Trade Organisation, London: Zed Books, 2004): http://www.business-humanrights.org/The-WTO-Today.htm (accessed June 2003).
66 See Annex of dissertation.
67 Referred to WTO website: http://www.wto.org/english/thewto_e/thewto_e.htm (accessed June 2003).

remit. These constitute the WTO Agreement, the WTO as an international organisation, the WTO Secretariat and the WTO Dispute Settlement Mechanism (DSM). Taking note of the distinction between these entities is important for understanding the relevance of each to the discourse of human rights and trade. For this reason, Annex I to this dissertation gives a brief on each one.

2.3 The mandate of the WTO - Is it solely trade liberalisation?

The Preamble to the Marrakesh Agreement does not make free trade an end in itself, implying that the ultimate goal of the WTO is *not* trade liberalisation. Rather, the Preamble states:

Just like the UN Charter was set with one of its priorities as that of finding solutions to international economic problems, the WTO was established with objectives implicitly central to human rights. Such objectives may be noted to correspond with elements of article 55 of the UN Charter, (requiring the promotion of, *inter alia*, higher standards of living, full employment, solutions for international economic, social, health and related problems, and universal respect for human rights).[68] More specifically, the WTO objectives of raising living standards, reaching full employment, and using the world's resources in accordance with the principle of sustainable development, are all conducive to realisation of internationally recognised human rights, such as the right to development, the right to an adequate standard of living, the right to health, the right to education and the right to work.

This does not mean that the WTO was established in view of enforcing human rights, since human rights do *not* feature *directly* as one of the objectives. The third paragraph of the Preamble limits the mandate of the WTO to creating 'reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations'. The term, '*reciprocal and mutually advantageous arrangements*', denotes that the WTO is *a priori* concerned with State-to-State obligations, and a 'meshing of governmental trade policies'.[69] It thus may be inferred that the focus of the Marrakesh Agreement is not on the individual, but rather on 'international trade relations'.[70]

However, it is clear from the WTO Preamble that focus on trade liberalisation is the *means, not* the end, by which the WTO is *meant* to achieve its main objectives. The objectives of the WTO - raising

68 See Chapter I.
69 S. Charnovitz, 'The WTO and the Rights of the Individual', *Intereconomics*, Vol. 36, No 2, March/April 2001, p 98.
70 As above.

living standards, reaching full employment and making optimal use of world resources in accordance with the principle of sustainable development - require that trade policies and issues decided upon within the WTO remit, are instigated, formed, apprehended and examined in their light.

2.4 Current WTO regime: Do human rights feature?

Recognition of human rights does not feature *per se* within the WTO law. However, recognition of individual rights might occur *indirectly*. This is true inasmuch as WTO law gives economic actors entitlement to substantive and procedural rights in domestic law. The GATT Agreement, the Agreement on Aspects of Trade-Related Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS) are three WTO components which, through implementation by governments, accord rights to individuals, including the right to property and the right to non-discrimination.

However, the latter do not constitute the same 'measure' as fundamental human rights require. They do not infer rights to *all* individuals on the basis of their human dignity. Rather, they recognise rights and needs of economic actors and industrial interests. Such recognition has occurs irrespective of human rights of third parties,[71] implying the failure of the WTO regime to observe the doctrine of universality and indivisibility of internationally recognised human rights.

Nevertheless, it may be concurrently observed that there are main underlying principles of the WTO regime, *while not so much practice*, that may share much in common with principles pertaining to the international human rights ambit.

2.4.1 The principles of non-discrimination and of transparency

The WTO Agreement is premised on two key principles: non-discrimination and transparency. Both principles also pertain to today's international discourse of human rights and democracy. However, the meaning attached in the WTO to these principles stands to defer from that of their human rights dimension.

The principle of non-discrimination

The principle of non-discrimination, denoting fair competition, is given effect through the WTO principles of Most-Favoured Nation

[71] See Chapter III of this dissertation.

(MFN) treatment and National Treatment.[72] The principle of MFN Treatment requires that WTO Members do not discriminate between '*like* products' deriving from different WTO Members. The National Treatment principle requires that Member States treat imported products in the same way as domestically-produced '*like* products'.

Until recently, determination of whether products were considered to be '*like*' for means of GATT non-discrimination rules, was based on four criteria: the same physical characteristics, the same end uses, satisfaction of same consumer tastes and habits, and the same tariff classification.[73]

However, as will be discussed further in this chapter, recent case-law indicates other criteria being taken into account in determining the 'likeness' of products for means of determining whether the MFN and the national treatment principles apply. This development is important in terms of discussion on human rights in the WTO. This is due to the key difference in the interpretation of the non-discrimination principle between the human rights regime and the international trade regime.

The principle of non-discrimination under the WTO regime dictates a refusal to discriminate between 'like products' on the basis of how they are produced – in WTO terms, 'Process and Production Methods' (PPMs). This PPM rule is not consonant with the human rights principle of non-discrimination, which obligates positive discrimination to correct human rights violations and promote social justice.[74] Human rights advocates argue that importing countries should be allowed to distinguish between otherwise 'like' products or services, where the latter are produced through, for example, forced labour. Human rights may thus, in some instances, advocate the discrimination between 'like' products on the basis of PPMs – an issue remaining controversial within the WTO.

The WTO principle of non-discrimination is applied not only to trade in industrial goods, but also to trade in agriculture, trade in services, government procurement, as well as other areas that fall under the WTO umbrella. To such extent, the WTO principle, in seeking to engage equal market-access and unconditional free trade, does not only prohibit discrimination on the basis of PPMs. It refutes any discriminatory measures inhibiting trade, even if constituting affirmative action to diminish or eliminate the conditions preventing the enjoyment of human rights of part of a country's population. On the other hand, the application of the principle of non-discrimination, as defined by human rights law, to trade rules, does not simply focus

72 See article I and III GATT. These two principles are also incorporated in other Agreements, including the GATS Agreement and the TRIPS Agreement.
73 3D Associates (2002), *op.cit.*, p 2.
74 M Mehra (2001), *op.cit.*, p 80 .

on minimising trade distortions, but rather requires that the impact of trade rules on individuals, in particular the most vulnerable, is primarily taken into consideration.[75] As observed by the UN High Commissioner for Human Rights:

> While trade law seeks non-discrimination in the application of laws between nationals and non-nationals and between non-nationals of other WTO member States, the human rights principle of non-discrimination is designed to achieve justice and equality between individuals, whatever their status.[76]

The principle of transparency

The principle of transparency, a principle emerging from the doctrine of the rule of law and of democracy, features in a number of WTO provisions,[77] requiring governments to publish their trade measures, as well as notify changes in their trade policies to the WTO.

The WTO Trade Policy Review Mechanism (TPRM) provides a direct means of engaging the principle of transparency both at the national and international level.[78] Its purpose is to provide an analysis of the general impact of the international trade policies on the WTO Member being examined, and on its trading partners and on the global trading system. It thus has the potential of alerting trading partners as well as the public at home of possible costs and benefits of trade policies, encouraging countries to co-operate further for enhanced international welfare.[79]

The mandate of the TPRM is to evaluate an individual member's trade policies and practices 'against the background of the wider economic and development needs, policies and objectives of the member concerned, as well as of its external environment'.[80] Unfortunately, the practice of the TPRM reveals otherwise. Focus is placed solely on a Member's trade liberalisation policies, and the impacts of such policies on *trade* of other Members, but *not* on the policies' impacts on nationals, or on their overall welfare effects. This contradicts the spirit of the WTO Preamble, which places trade liberalisation as a means and not an end.[81] Thus, the principle of transparency as engaged in the TPRM essentially fails to contribute to a system of checks and balances where human welfare is ensured.

75 See E/CN.4/2002/54, op.cit., paras.42 and 43. The importance of human rights affirmative action to prevent marginalisation in societies is further emphasised in Chapter III.
76 E/CN.4/Sub.2/2002/9, *op.cit.*, para 8
77 See, for example, article X GATT and article III GATS
78 3D Associates (2002), *op.cit.*, p 2.
79 C. Dommen (2002), op.cit., p 18.
80 Trade Policy Review Mechanism, Annex III to Marrakesh Agreement establishing the World Trade Organisation, para A(i).
81 See Section 2.3 of this Chapter.

2.4.2 Article XX GATT

Recognition of supervening non-trade public values in the event of conflict with free trade rules is reflected in the actual text of the WTO Agreement.[82] The pivotal provision, article XX GATT, provides for an array of exceptions under which a WTO Member can adopt measures otherwise prohibited or restricted by the WTO regime.[83] Among the grounds for exception listed under article XX, are measures, 'necessary to protect public morals' (Art. XX (a)), 'necessary to protect human, animal or plant life or health' (Art. XX(b)), 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption' (Art. XX(g)), or 'relating to the products of prison labour' (Art. XX(e)).

Notably, the latter may all be interpreted to cover measures engaged to protect internationally recognised human rights, including the right to life and economic and social rights, such as the right to health.[84] Nevertheless, article XX cannot be interpreted as accommodating general social or human rights considerations. Rather, it constitutes a limited and conditional exception from obligations under other GATT provisions, when a sufficient social or economic policy justification, as specified in article XX, exists. It is not a positive rule establishing obligations in itself.[85] Furthermore, article XX requires that measures do not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The latter has created problems vis-à-vis human rights implications of trade issues, since article XX has been historically interpreted very narrowly. The Dispute Settlement Mechanism (DSM), in several decisions, has given priority to free trade over issues having public interest concerns, such as human or animal life and the environment.

The Reformulated Gasoline dispute[86] presents an example. It concerned a US Clean Air Act, requiring refiners to make gasoline less

82 R. Howse & M. Mutua, 'Protecting Human Rights in a Global Economy, Challenges for the World Trade Organisation', *International Centre for Human Rights and Democratic Development, Policy Paper,* 2000, p 7.

83 The bulk of article XX is included also in article XIV GATS (N.B. article XIV GATS also allows for further exceptions including those based on the privacy of individuals and confidentiality of individual records and accounts), and in article XXIII of the Agreement on Government Procurement.

84 CUTS, 'Human Rights and International Trade: Right Cause with Wrong Intentions', *Briefing Paper*, No 3/2001, 2001, p 3.

85 GATT Dispute Panel Report, *United States - Restrictions on Imports of Tuna*, Aug.16, 1991 GATT B.I.S.D. (39th Supp.), at 197.

86 *United States - Standards for Reformulated and Conventional Gasoline*, WTO Report of the Panel, WT/DS2/R, 29 January 1996. (Hereinafter: Reformulated Gasoline dispute)

toxis for air pollution-reduction purposes, but in effect placing higher environmental standards on refiners importing to the US than on domestic refiner.[87] The panel considered that the imported and domestic gasoline constituted 'like products' and that the US could not turn to the environment-related exceptions in article XX to justify foreign and domestic like products (gasoline) differently. The Appellate Body (AB)[88] concurred with the panel and held the Act as unjustifiably discriminatory and a disguised restriction on international trade. Surely this case shows a priority for human rights/ environmental concerns rather than the contrary? What was the outcome of the case? Were the tougher standards applied to both national producers as well as importers?

Environmental groups have looked negatively at this decision, due to the upholding of trade rules over environmental exigencies.[89]

The DSM ruled against public interest concerns once again in the 1998 *Hormones* dispute,[90] concerning an EU ban on both European and imported beef produced with growth hormones, which Canada and the US held as contrary to WTO rules. The AB ruled against the EU, maintaining that the hormone ban was not backed by sufficient scientific evidence that consumption of such beef was harmful to human health. The main human rights concern about this ruling was that the AB indicated that the burden of proof of justifying health regulations that restrict trade rested on those seeking to protect human health. This implied that trade liberalisation was given priority over health concerns until sufficient scientific certainty required otherwise.[91] It contradicted the precautionary principle found in international law,[92] and hampered governments from taking preventive action to protect public interest.

Arguments concerning unjustified discrimination, disguised trade restriction, and protectionism have similarly led panels in other

87 The Act required that gasoline sold in US had to meet certain 'baselines'. However, different refiners/retailers were required to meet different rules. All US producers active in 1990 and all overseas refiners exporting more than 75% of output to USA, were to calculate an *individual* baseline in accordance with *their* 1990 emissions. However, all other refiners exporting to the US were to follow a *statutory* baseline, which was more stringent than the individual baselines. This meant that overseas firms (except US multinationals) were forced to meet stricter restrictions than were the US firms.

88 *United States - Standards for Reformulated and Conventional Gasoline*, Report of Appellate Body, WT/DS2/AB/R(95-1597), 29 April 1996.

89 However, it may be argued that the AB would be willing to accept the imposition of environmental standards (non-trade values) *if* applied *equally* to national and foreign products.

90 *European Communities - Measures Affecting Meat and Meat Producers (Hormones)*, Report of the Appellate Body, WT/ DS26/AB/R; WT/DS48/AB/R, 19 February 1998. (Hereinafter Hormones dispute)

91 C. Dommen (2002,), *op.cit.*, p 15.

92 The precautionary principle requires preventive action to be taken, in spite of insufficient scientific certainty, when a particular policy or action risks causing serious and irreversible consequences.

disputes to reject claims based on article XX. Due to no panel having as yet dealt *directly* with human rights claims vis-à-vis trade rules, it is feared that the WTO adjudicating bodies' bias towards free trade would persevere even in disputes where direct human rights concerns are presented as justifying the adoption of trade-restrictive measures.

The concept of 'necessity', which surfaces notably in article XX (a) and (b), concerning public morals and the protection of life and health, presents further reason for such fear. This is due to GATT practice having evolved around a misconceived idea of necessity as proof, to be given by the state invoking article XX, that no alternative measures are/were available which are/ would have been less trade restrictive.[93] GATT practice has failed to ensure that the disputed measure was necessary for means of public morals, or for health or life, hence constituting a distortion of the ordinary meaning of the terms in article XX. [94]

New hopes for non-trade public interest concerns

A DSB decision in 1998 gave new light onto the issue of non-trade, public interest concerns. In the *Shrimp-Turtle* dispute,[95] the DSB, for the first time, held that trade-restrictive measures to protect endangered species could be compatible with WTO due to justification under article XX(g).[96] The DSB engaged the precautionary principle, referring to international environmental law and indicating that WTO rules should not be read in clinical isolation. The Appellate Body's decision also upheld the public international law principle of 'evolutive interpretation'. It did so by recognizing that the notion of 'exhaustible resources' under article XX (g) was to be interpreted *not* in light of the original intent of the GATT parties, but in light of *present* realities and of the emergent necessity to co-operate in the enforcement of conservation of endangered species.[97]

The *Shrimp-Turtle* decision is viewed as a positive step in view of protecting non-trade public interests and relevant human rights through the article XX exceptions. It is argued that once the DSM found that the survival of sea turtles can justify derogating from GATT rules, it is all the more likely that a derogation from GATT rules will be justified to protect the health of human children.[98] The

93 See *Thai Restrictions on Importation of and Internal Taxation on Cigarettes*, GATT Dispute Panel Report, 7 November 1990, para 74.
94 F. Francioni, 'Environment, Human Rights and the Limits of Free Trade', in F. Francioni (ed.), *Environment, Human Rights and International Trade*, Oxford: Hart Publishing, 2001, p 24.
95 *United-States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of Appellate Body, WTO Doc. WT/DS58/AB/R, 12 October 1998.
96 Exception for measures relating to the conservation of exhaustible natural resources.
97 F. Francioni (2001), *op.cit*, p 23.
98 3D Associates Report (2002), *op.cit.*, p 5.

incorporation of the principle of evolutive interpretation aspires to its application to all other article XX exceptions. Taking the 'public morals' exception (article XX(a)) as an example, the evolutive interpretation principle may eventually require its interpretation as constituting 'international public morality'.[99] Internationally recognised human rights, and their evolution since the adoption of the Universal Declaration of Human Rights in 1948, have played a constitutive role in inspiring what is today's international public morality.[100]

This point of view is enhanced by another benchmark decision in terms of accommodation of non-market criteria. In the recent *Asbestos* decision,[101] the AB found that a French ban on the use and import of asbestos was WTO-consistent, holding that the risk to health of a product should be taken into account when determining whether two products are 'like' or not. The AB held that the burden of proof as to whether a product constitutes a danger to human health lies on the country challenging the health-motivated trade restriction to show that the product in question does *not* pose such risk or danger. This decision thus made a positive turn in view of the earlier decision in the *Hormones* case.[102] The priority placed on human health over free trade in this decision allows for an understanding of how public interest concerns (and fundamental human rights, such as the right to health) in the importing country may be implicitly accounted for within the WTO regime.

2.4.3 Article XXI GATT

Indirect recognition of human rights may further be apprehended in article XXI GATT. The latter allows for measures, otherwise contrary to WTO rules, which a country considers necessary for its essential security interests, concerning fissionable materials or the traffic of arms, ammunition and implements of war. Arguments *for* the control of armaments and ammunition legitimately point to the prevention of situations of large-scale violations of human rights.

99 The concept of 'international public morals' emerged from the evolution of mandatory norms for the protection of human rights – See F. Francioni, *op.cit*, p 19, ref. no 70 – referring to Viviani, 'Coordinamento tra valori fondamentali internazionali e statali: la tutela dei diritti dell'uomo e la clausola di ordine pubblico', in *Riv. Dir. Int. Priv. Proc.*, 1999.

100 R. Howse, in *Back to Court after Shrimp/Turtle: India's challenge to Labour and environmental linkages in the EC Generalized System of Preferences*, (draft 2003?), at p 33, explains: 'In the modern world the very idea of public morality has become inseparable from the concern for human personhood, dignity, and capacity reflected in fundamental rights. A conception of public morals or morality that excluded notions of ... [international] ... fundamental rights would simply be contrary to the ordinary contemporary meaning of the concept.'

101 Report of the Appellate Body, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 5 April 2001.

102 C. Dommen (2002), *op.cit*, p 16.

Article XXI also provides an exception to WTO rules for measures taken in pursuance of a State's obligations under the UN Charter for the maintenance of international peace and security.[103] Inasmuch as this refers to trade sanctions mandated by the UN Security Council, the effectiveness of such measures is dubious in terms of human rights ideology – an issue taken up in Chapter IV of this dissertation.

2.4.4 Special and differential treatment

The Preamble to the Marrakesh Agreement notes 'the need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of economic development'. The latter is conducive to the protection of populations of developing countries from the negative economic and social effects of rapid trade liberalisation. Reflective of notions of affirmative action under human rights law, this principle indirectly and potentially contributes to human rights realisation.

The WTO principle of 'Special and Differential Treatment' (S&DT) for developing countries is *per se* complementary to human rights realisation, especially to the right to development. The right to development perspective recognises preferential treatment for the access of products from developing countries to the industrial country markets, as essential.[104]

Indeed, the WTO has sought to provide transition periods to implement liberalisation, as well as to incorporate rules to improve market access for developing countries through the Generalised System of Preferences (GSP). The concept of non-reciprocity, laid out in article XXXVI, Part IV of GATT on Trade and Development,[105] specifies that developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of less-developed countries.

[103] Article XIV GATS includes the same general exception.

[104] B Hoekman, C Michalopoulos & LA Winters, 'Special and Differential Treatment: Towards a New Bargain', *ICTSD, Bridges*, Year 7 No 3, April 2003.

[105] It should be noted that Part IV of GATT on Trade and Development was added to the GATT text in 1965 in reaction to the creation of the UN Conference on Trade and Development (UNCTAD) in 1961. UNCTAD constituted a response to the call by the UN General Assembly upon states and international agencies with responsibilities in the financial, economic, social fields to pursue policies in conformity with the UN Charter undertaking to promote social progress and better standards of life in freedom. The principle functions of UNCTAD include the promotion of international trade and the formulation of policies relating to international trade and problems of economic development – an aspect that GATT was initially failing to address altogether. Since 1968, GATT, and today the WTO, has been jointly operating the International Trade Centre with UNCTAD, in view of provision of technical co-operation with developing countries vis-à-vis their capacities to engage in international trade, through, *inter alia*, export development.

The Enabling Clause[106] strengthens this concept, allowing for differential and more favourable treatment for developing countries.[107]

Like the GATT provisions, the principle of S&DT runs through a series of other provisions in the different WTO Agreements.[108] In turn, a WTO Committee on Trade and Development (CTD) is mandated to find ways to give meaning to S&DT and further the objectives of trade and development, and a Sub-Committee of the CTD focuses on ways of integrating Least-Developed Countries (LDCs) into the multilateral trading system.

In turn, article XVIII GATT provides for assistance to developing countries, whereby the WTO provides technical assistance programmes and capacity-building programmes. However, the fear is that such technical assistance serves to promote developing countries' compliance with WTO rules, rather than to help facilitate the best trade and economic policy apt for their specific socio-economic conditions.[109] This is the same concern vis-à-vis WTO interpretation of the S&DT provisions as *necessary* for successful trade liberalisation.

Other concerns include the fact that industrialised countries have not implemented their WTO obligations in favour of developing countries. They continue to maintain safeguards and anti-dumping measures,[110] negatively affecting market access for industries of comparative advantage for developing countries (such as agriculture and textiles), and, in turn, human rights and livelihoods of workers in such industries. Another concern is whether substantive provisions of the WTO Agreement are indeed compatible with national developmental priorities and the right to development, given the growing inequality between developed and developing countries.[111] This concern is exacerbated by the fact that the WTO Preamble recognises sustainable development, hence legitimising discussion of social and human rights implications of trade rules.

[106] *Decision on Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries*, adopted in 1979 during the Tokyo Round. This Decision was included in Annex I.A of the Marrakesh Agreement establishing the WTO (1994).

[107] The Enabling Clause provides, *inter alia*, for preferential market access by developing countries to developed-country markets on a non-reciprocal, non-discriminatory basis, as well as for more favourable treatment for developing countries in respect of other GATT rules on non-tariff barriers. It also provides for special treatment of LDCs in the context of specific measures for developing countries.

[108] For example, see articles 5.3a, 15.1 and 19.2 of the General Agreement of Trade in Services, and article 4.10 and 21.2 of the Dispute Settlement Mechanism.

[109] *Ibid*, pp 4-5.

[110] For example, see: *United States – Continued Dumping and Subside Offset Act of 2000*, WTO Doc. WT/DS217/14, WTO Doc. WT/DS234/22, Arbitrator Report, ARB-2003-1/16, 13 June 2003.

[111] See Chapter III of this dissertation.

2.4.5 Rule of law

Both the GATT and the WTO were instituted on the premise that global rules would make international trade predictable and improve conditions for fair economic competition, through the lowering of trade barriers and the prohibition of practices such as subsidies and dumping. To such extent, the entire international trade system is based on the rule of law. This was further ensured through the institution of the Dispute Settlement Mechanism (DSM) to resolve trade disputes between WTO Member States in accordance with WTO law and to enhance greater equality in trade disputes.[112] The imposition of an international rule of law through the WTO regime may thus be perceived to share commonality with the human rights call for the rule of law.[113]

In practice, however, it does not measure up to the human rights principle, the latter being oriented towards good governance at the international and domestic level. The bias in DSU decisions towards free trade and the manner in which they, until recently, disallowed domestic policies in spite of their public-interest objectives and States' human rights obligations, explains the discrepancy in the WTO measure of the rule of law. Additionally, the WTO enjoys minimal civil society support and participation,[114] and tends to act in the interest of powerful economic, corporate interests, which constitute the predominant influence in the organisation,[115] *rather than* in the interest of economic well-being for *all, as mandated by WTO law*.

2.4.6 Balancing trade liberalization with other human interests

Conclusively, while human rights do not feature directly in the WTO regime and do not pertain directly to the WTO mandate, recognition of non-market values, public interest concerns and principles like the rule of law, can be deciphered in the WTO text. It is, hence, the failure to give effective and apt realisation to this recognition that constitutes the issue at hand.

It is nevertheless important to emphasize that the provisions pointed out in this section give solid basis to international demand for a system of checks and balances applicable to the process of trade liberalisation. In the light of the WTO Preamble and its ultimate objectives, such provisions cannot be deliberately read into the scope of free trade, and free trade alone.[116] They need to be apprehended

112 H. Lim, 'Trade and Human Rights – What's at Issue', *JWT*, Vol. 35 (2), 2001, p 277.
113 *Ibid*.
114 See Dommen (2002), *op.cit*, p 7.
115 See R. Normand, 'Separate and Unequal: Trade and Human Rights Regimes', *Background Paper for Human Development Report (HDR 2000)*, New York: UNDP, 2000, pp 24-27.

as a source of ensuring that trade liberalisation is accompanied by measures tailored towards an equitable welfare-enhancing system. Part and parcel with such measures, is/should be the recognition of international human rights and fundamental freedoms.

2.5 Why are trade and human rights regimes viewed as being in conflict?

The general outlook in the international sphere is that the trade and human rights regimes are distinct, and possibly even in conflict with each other. This section looks at what is the underlying source of this perception.

Both the human rights regime and the trade regime are liberal in outlook and based on positive legal freedoms. Despite the common orientation to liberal thinking and to the goal of a *just global order,*[117] there exists a fundamental tension between the principal liberal normative foundations of the international human rights system and international trade system.

The international trade system, premised on economic well-being, is constructed along the lines of neo-liberal, utilitarian economics. Derivative from the 'Washington Consensus',[118] the WTO regime is based on the concept that free trade is necessary for markets to provide the correct price signals, and is thus the best way of ascertaining economic growth.[119]

The utilitarian argument holds that free trade is good because of its consequences of maximisation of aggregate individual welfare from efficiency gains and from the operation of comparative advantage.[120] The pre-eminence of the efficiency model in the trade arena derives from the consequentialist nature of neo-liberal economics which focuses essentially on outcomes, and *not* on procedures or acts in themselves. It sees the economic well-being of

[116] The provisions that limit or balance trade liberalization, protecting other human interests, are as fundamental a part of the international law of trade, as those that support the globalization of markets. They must not be read out or down' R Howse & M Mutua (2000), *op.cit.*, p 12.

[117] F. Garcia, 'Protecting the Human Rights Principle in a Globalizing Economy', in *Effective Strategies for Protecting Human Rights*, Hampshire: Darmouth Publishing Company, 2001, p 86.

[118] The Washington Consensus, a term coined in 1989 by John Williamson, refers to the lowest common denominator of policy advice being addressed by the Washington-based institutions (World Bank, IMF, US government) to Latin American countries as of 1989. This term came to represent the advocacy of neo-liberalism, including trade liberalisation, deregulation, and privatisation, by the Bretton Woods Institutions to developing countries in the 1990s.

[119] C. Dommen (2003), *op.cit.*, pp. 4-5.

[120] F. Garcia (2001), *op.cit.*, p 88. A country has a *comparative advantage* in the production of a good if it can produce that good at a lower opportunity cost relative to another country.

human beings as being enhanced through the facilitation of efficient economic exchanges,[121] and seeks the greatest aggregate benefit for the greatest number of people, without valuing other end goals, such as human rights. It hence overlooks the rights of the minority suffered as an expense for the maximisation of the aggregate welfare of the majority.

Thus, the international trade regime has focused almost exclusively on achieving efficiency through the removal of trade barriers, with other values, such as human rights and other public interests, viewed as being outside the scope of, and sometimes even hostile to, the purposes of trade law. At worst, human rights and environmental concerns are viewed as disguised protectionism, threatening the goal of efficiency.[122] This, in turn, has meant that trade liberalisation and open markets have become ends in themselves.

The international human rights system, on the other hand, is premised on human dignity and worth. It is constructed along deontological lines. Stated otherwise, human rights are ends in themselves, and, unlike trade economics, do not derive their value from a utilitarian calculus of maximising benefits for the majority.[123] Human rights are uneasy about trade-offs of cost-benefit analysis, on the basis that each person is equal in dignity, and human rights are inalienable and inherent to such dignity. Hence, human rights regimes do not look at policies in terms of the promotion of well-being in *aggregate* terms, but at the manner in which a policy is affecting the most vulnerable, and at its discriminatory implications. As one commentator noted:

> It is extremely difficult to reconcile the brutal facts of poverty – millions of children die of hunger and preventable disease every year while the wealth of the richest corporations and individual rises exponentially – with a global trade system that truly maximizes welfare for the greatest number of people ... [However] it is *impossible* to reconcile these conditions with respect for human rights and human development. Even if one argued that economic shock now will lead to welfare maximization down the road, human rights does not permit the sacrifice of this generation of children for the next.[124]

Conclusively, it is not the mandates of the WTO and the international human rights bodies that clash, but rather the separate methodologies and ideologies undertaken by both throughout the years. It is the diametrical tension between international trade's utilitarianism and the deontological theories of human rights that

[121] *Ibid*, p.87
[122] R. Normand (2000), *op.cit.*, p.21
[123] *Ibid.*, p.3
[124] *Ibid*, p. 28. Italics added.

constitutes a problem at any attempt of establishing a productive link between the two regimes.

Trade protagonists argue that the absolute character appropriated to human rights is unrealistic due to the reality of *finite* resources and their unequal distribution. Nevertheless, while the deontological claim of human rights should not be construed as an 'all-or-nothing' demand ignoring fundamental economic realities, it is essential that the priority value of human dignity, and the inherent human rights that go with it, should not be lost.[125] To such extent, international trade needs to be made conducive to human development and human rights.

The success of the global trading system – termed in economic stability and prosperity – cannot rely solely on the free market and the Washington Consensus, which fails to foster development due to its confusion of means with ends.[126] Rather, its success is dependent upon international rules that allow for governance standards that mitigate effectively market failure.[127] Inherent to such governance standards is the realization of human rights, and the emancipation of the individual in society. The latter constitutes the stepping stone upon which a link should be instituted between human rights and the liberal economic regime.

2.6 Conclusion

The challenge currently being faced is to secure an equitable, international rules-based system, focused on the welfare of the individual and working towards social and environmental objectives.[128] Coherent effort is necessitated within and between the international human rights and trade institutions to correct, within the limits of their mandates, the power-based system that continues to exist internationally, to the detriment of human life and dignity.

In turn, explicit recognition of the complementarity of the objectives of human rights and international trade is necessitated in view of creating a stronger human rights conscience in the international trade arena. The exigency for such recognition becomes more apparent in the following chapter of this dissertation, which looks at examples of WTO rules and policies having negative human

[125] *Ibid.*, p.7

[126] Dommen (2003), *op.cit.*, p.10, referring in footnote no 55 to: Stiglitz, Joseph, Towards a New Paradigm for Development: Strategies, Policies and Processes, Prebisch Lecture at UNCTAD, October 19, Geneva, 1998.

[127] J. Said, 'The Washington Consensus and Economic Development in Developing Countries, A Cross-Country Study', *Thesis submitted in Partial Fulfilment of the Requirements for the Degree of B. Commerce (Hons) Economics*, University of Malta, May 2003.

[128] M. Mehra (2001), op.cit., p.83

rights implications. If the world continues to view human rights and international trade as distinct, it will be instigating further decisions and rules at the international trade level that have similar negative repercussions on human rights.

3 Specific issues under the WTO umbrella having human rights implications

3.1 Introduction

The expansion of sectors covered by the WTO multilateral trading agreements has set the stage for the occurrence of economic and social human rights abuses, as yet unsatisfactorily addressed. As implied in Chapter II, a main reason for this is the instrumentalisation of the WTO regime for ascertaining 'open markets' as end results, at the cost of its original goal of improving global standards of living.

Another reason dates back to the Uruguay Round[129] and concerns the manner in which influence by developed countries' export industries and multinational corporations (MNCs), interested in access to foreign markets, played an indirect but strong role in the trade negotiations. The latter resulted in the content of WTO Agreements[130] providing one-sided protection of producer rights.[131]

There is a crucial difference between Transnational Corporations (TNCs) and the WTO:

> TNCs represent only their own interest in profit maximization, whereas the WTO is meant to represent the interests of all member nations, and their populations, in gaining the supposed welfare of trade liberalisation. It stands to reason that TNCs should seek global rules of trade that heighten their comparative advantage, increase their market share, and maximize their profits.[132]

It likewise stands to reason that the WTO, founded in its originality to contribute to economic stability, and mandated to ensure global prosperity, should seek to enforce trade rules in the interests of *all* humanity. The latter entails recognising and respecting the fundamental rights and dignity of individuals, including individuals in the most vulnerable of societies, be it in international economic policy formulation or implementation. This Chapter looks at four of the key policy areas of the WTO regime, which, influenced by economic interests of industrialised countries and MNCs, currently

[129] Uruguay Round of Multilateral Negotiations (September 1986 – April 1994)
[130] See Annex I for list of Agreements.
[131] E.U. Petersmann, 'Human Rights and International Economic Law in the 21st Century, the Need to Clarify Their Interrelationships', *J. Int. Econ. L.* (2001), p. 27
[132] R. Normand (2000), *op.cit.*, p.26

prioritise trade liberalisation, but which today's exigencies require more attention to be given to their implications on human rights.[133]

3.2 TRIPS and access to affordable medicines

The human right to health (article 12 ICESCR), and the inherent right to access to medicines, pertains to an ongoing heated debate in the international ambit. Such debate is directed at the WTO's Agreement on Aspects of Trade-Related Intellectual Property Rights (TRIPS).

While article 27 UDHR and article 15 ICESCR recognise the right to intellectual property protection and the protection of the moral and material interests resulting, *inter alia*, from scientific production of which the right-holder is the author, both articles require the balance of these private interests with public interests. Such a balance is also required *via* article 29 UDHR, para 2:

> In the exercise of rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purposes of *securing due recognition and respect of the rights and freedoms of others* and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[134]

A human rights approach to intellectual property predicates on instigating improvement of human welfare, and *not* the maximisation of economic profits. Thus, an intellectual property regime should not make it more difficult for a State party to comply with its core obligations in relation to fundamental human rights, such as the right to health.[135]

According to the TRIPS Agreement, medicines, and substances upon which they are based, can be patented to the extent that there is a new invention, and that the general conditions of patentability are fulfilled. Such patents protect the owner of the patent right from a third party commercially using the invention without the owner's permission. The TRIPs regime obliges such protection for 20 years from the date of the patent applications.

To such extent, the TRIPS regime has constituted a safety-net for MNCs and their commercial interests ever since its inception. Its 'ideological *raison d'etre*' in the health arena is to instigate further a

[133] Most of the issues addressed in this Chapter have implications on rights recognised in the ICESCR. To date, 114 of the 146 WTO Member States have ratified the ICESCR.

[134] Italics added.

[135] UN Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of The International Covenant on Economic, Social and Cultural Rights, Human Rights and Intellectual Property*, Statement, UN ESCOR, 27th Sess, E/C.12/2001/15, 14 December 2001, para 12. The provision of essential drugs, equitable distribution of health facilities, goods and services, and measures to prevent, treat, and control epidemic and endemic diseases are core human rights obligations.

research-based pharmaceutical industry, through the award of intellectual property rights, hence facilitating health care and treatments. However, the cost of the latter in *real* terms is sky-high prices for patented medicines, and a staggering 90% of health research being directed to the likes of Viagra-substitutes due to promises of profitability. Taking the US as an example, only 10% of its $70 billion budget for health research is spent on diseases that comprise 90% of the world's health burden.[136]

The TRIPS obligation for Member States to establish domestic laws protecting and respecting patents on pharmaceutical products reduces the countries' capacity to produce generic medicines or less costly medicines than patented ones.[137] Implications include the reduction of a government's capacity to secure at *affordable prices* the *availability* and *accessibility* to essential pharmaceuticals – criteria which are inherent to the right to health.[138] This is significant especially for developing countries, such as those of Sub-Saharan Africa, devastated by AIDS and other pandemics, where private out-of-pocket payment exceeds 90 % of total payments for health care and medicines.[139]

The human rights' outcry is justified in view of the enormous discrepancy witnessed in recent years in prices between generic and patented pharmaceuticals:

> Frontieres/Doctors Without Borders (MSF) welcomes the announcement made by generic drug manufacturer Cipla that it will sell its triple-combination therapy for AIDS to MSF for $350 per year per patient … The $350 price is a discount of 96.6% off the price of the same combination in the US, which would cost about $10,400.[140]

Articles 7 and 8 TRIPS affirm that intellectual property rights should be 'conducive' to social and economic welfare and that Members may adopt measures necessitated to protect public health, *however* provided that they are consistent with the provisions of the Agreement. For example, article 30 TRIPS allows for '*limited exceptions*' to patent rights for legitimate interest of third parties, but, on condition that the exceptions do not unreasonably prejudice the interests of the patent holder, are limited and do not conflict with the normal exploitation of the patent. Due to such restrictive

136 UNDP et. al. (2003), *op.cit*, p.210 - referring to the Global Health Forum (2001)
137 C. Dommen, 'The WTO's Impact on Human Rights', February 2001, p. 2 – http://208.55.16.210/Dommen-article.htm (accessed on June 2003).
138 UN Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of The International Covenant on Economic, Social and Cultural Rights, The right to the highest attainable standard of health (Article 12 of the Covenant on Economic, Social and Cultural Rights*, General Comment No 14, 22 nd Sess, UN Doc E/C.12 2000/4, 11 August 2000.
139 UNDP *et al* (2003), *op.cit*., p.209
140 Medecines Sans Frontieres, 'AIDS Triple Therapy for Less than $1 a Day. MSF Challenges Pharmaceutical Industry to Match Generic Prices', Press Release, 7 February 2001.

conditions,[141] the said provision remains ambiguous as to quieting human rights concerns with regards to access to affordable essential medicines, unless its interpretation is widened.

Article 6 TRIPS seems to allow countries to use *parallel importation* to source patented products legally from other countries where they are priced cheaper. However, developing countries have been facing political pressure from industrialised countries, preventing them from implementing what is legally allowed. South Africa's resort to purchasing of cut-price drugs through parallel import measures, led to a lawsuit from thirty-nine pharmaceutical companies in 2001. Although eventually withdrawn, the lawsuit constituted an example of implementation problems under TRIPS.

The TRIPS Agreement allows governments the right to authorise a *compulsory licence* – a non-exclusive licence to produce patent rights that is granted to a third party ... irrespective of the will of the patent owner. The threat of resorting to compulsory licensing acts as a solid tool for getting the patent owner to lower his prices – as seen in the success story of the Brazilian AIDS programme, commenced in 1996.[142] TRIPS, however, conditions the latter, requiring that the resolve to authorise a compulsory licence occurs *only if* either the patent-holder firm does not offer the drug on reasonable commercial terms (despite the government paying compensation), or if it behaves anti-competitively, or if there is a case of a 'national emergency'.

The WTO Doha Ministerial (2001) produced a political Declaration on TRIPS and Public Health,[143] stipulating that while intellectual property protection is important for R&D and the development of new medicines, TRIPS 'does not and should not prevent governments from taking measures to protect public health'. It confirmed government's right to grant compulsory licences in the interest of public health, authorising the domestic manufacture of cheap generic versions. It further explained that it is for countries to determine the 'national emergency' prerequisite for compulsory licences and that it could constitute, *inter alia*, 'public-health crises, including those related to HIV/AIDS, tuberculosis, malaria and other epidemics'. The Doha Ministerial also exempted least-developed countries (LDCs) from applying patent protection to pharmaceuticals in accordance with the TRIPS Agreement until the year 2016.

[141] And also due to the fact that in the only dispute on article 30, the panel followed a very restrictive interpretation of 'limited exception' – See *Canada – Patent Protection of Pharmaceutical Products*, Report of Panel, WTO Doc. WT/DS114/R, 7 April 2000.

[142] M. Osava, Brazil's Successful Anti-AIDS Effort Set to Expand, Inter Press Service, 26 December, 2001. http://www.aegis.com/news/ips/2001/IP011216.html (accessed on June 2003). Also, see: E/CN.4/Sub.2/2001/13, *op.cit.*, para 56

[143] WTO, Declaration on the TRIPS Agreement and Public Health, WTO Ministerial Conference, Fourth Session, Doha 9-14 November 2001, WT/MIN(01)/DEC/W/2, 14 November 2001 (Hereinafter Doha Declaration on TRIPS).

Despite this, there remains the problem of article 31(f) TRIPS, limiting compulsory licensing to those 'authorized *predominantly for the supply of the domestic market* of the Member authorizing such use'[144]. The latter discriminates blatantly against small countries and LDCs whose domestic markets are too small to support manufacture of pharmaceuticals.[145] The Doha Declaration, in fact, mandated the Council to find a solution expeditiously, the latter resulting in discussions as to whether large developing countries like India and Brazil can export their generic drugs to smaller developing countries. However, in December 2002, the US, influenced by the pharmaceutical lobby, blocked agreement on a draft decision issued on 16 December[146] at the WTO to lift restrictions on exports of cheap generics to countries that cannot produce affordable generic versions themselves.[147] The US objected to the draft due to its 'wide' disease coverage definition as 'public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics'. The draft also covered active ingredients used in the manufacture of medicines as well as diagnostic kits needed for their use, as proposed in particular by African countries. The US, insisted on restricting disease coverage to HIV/AIDS, malaria, tuberculosis and similar infectious diseases, so as not to fundamentally undermine patent rights for a broad array of pharmaceutical products.[148]

However, from a right to health perspective, what is the reasoning behind restricting the coverage of public health problems for countries without production capacity, while countries with production capacity are not subject to such limits when dealing with their health problems? This question is legitimate in view of the obligations of State Parties (including US) to the ICESCR to respect the enjoyment of the right to health in other countries and to prevent third parties from violating the right in other countries, by way of

144 Italics added.

145 3D Associates (2001), Report of the In-Depth Study Session on the WTO for Human Rights Professionals, Morges, 27-28 July 2001, p.7

146 *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS agreement and Public Health, Draft Decision*, WTO Council for TRIPS, Job (02/217), 16 December 2002. May be accessed via: http://www.ictsd.org/ministerial/cancun/docs/TRIPs_para6_16-12-02.pdf (as at June 2003)

147 J. Sulston, 'The rich world's patents abandon the poor to die – Non-branded Aids drugs would save a generation in developing countries', *Guardian Unlimited*, The Guardian Comment, 18 February 2003.

148 ICTSD, 'WTO Member still battling over TRIPs and Health', *Bridges Weekly Trade News Digest*, Volume 6, No 43, 20 December 2002.

legal or political means, in accordance with the UN Charter.[149] Similarly, States parties to the ICESCR have an obligation to ensure that their actions as members of international organisations take due account of the right to health.[150]

Following the breakdown of talks in December 2002, the US and other producing countries instituted interim plans (backed by pharmaceutical MNCs) allowing countries to export cheap medicines produced under compulsory license to poor countries.[151] They also *pledged* not to go to the WTO DSB on the issue of patents and access to medicines, till a multilateral solution was decided in the WTO. Nevertheless, despite this interim moratorium, which only covers HIV/AIDS, malaria, tuberculosis, and other infectious epidemic, a coherent long-term solution within the TRIPS ambit is paramount in the near future for effective access to medicines.

3.3 The General Agreement on Trade in Services (GATS) and essential services

The infamous influence of corporate lobbyists, including American Express and Enron, in the negotiations establishing the General Agreement on Trade in Services (GATS),[152] affirms the Agreement as 'first and foremost an instrument for the benefit of big business'.[153] The Agreement provides international trade in services with a multilateral framework of rules which seeks to: provide foreign service providers with increased market access in particular services sectors; eliminate quantitative restrictions to service trade; prohibit discrimination between foreign and domestic services providers; and eliminate or regulate governmental monopolies.[154]

A human rights approach looks to service liberalisation as a source of promotion of economic growth and development. However, it

149 UN Doc E/C.12/2000/4, *op.cit*, at para 39.

150 See UN Commission on Human Rights, *Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria*, Resolution 2003/29, UN ESCOR, 59th Sess, E/CN.4/RES/2003/29, 22nd April 2003. In para 8(b), the Commission calls upon all States 'to ensure that their actions as members of international organisations take due account of the right of everyone to the enjoyment of the highest attainable standards of physical and mental health and that the applications of international agreements is supportive of public health policies which promote broad access to safe, effective and affordable preventive, curative and palliative pharmaceuticals and medical technologies'.

151 ICTSD, 'WTO Fails to Meet TRIPS & Health Deadline due to US Opposition', *Bridges Update*, 2 January 2003.

152 General Agreement on Trade in Services, Annex IB to the Marrakesh Agreement Establishing the World Trade Organisation – May be accessed via: http://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm (accessed June 2003).

153 European Commission, 'Opening World Markets for Services, Towards GATS 2000', *The European Commission "Info-Point" on World Trade in Services* - http://gats-info.eu.int/gats-info/g2000.pl?NEWS=bbb (accessed on June 2003).

154 The Centre for International Environmental Law (CIEL), 'Water Traded', *Issue Brief or 3rd World Forum in March 2003*, Kyoto, March 2003, p.5

recognises that liberalisation of trade in services without adequate governmental regulation can have undesirable effects on human rights.[155] Furthermore, liberalisation rules should facilitate (and not hinder) governments to observe their ICESCR obligations, guaranteeing access and affordability of essential services, including water, education and health.

GATS applies to all measures affecting trade in services and to all services *with the exception* of those provided *in the exercise of governmental authority*. Article 1(3c) GATTS defines the term, 'in the exercise of governmental authority' very narrowly as any service that is supplied neither on a commercial basis, nor in competition with one or more service suppliers. This means that GATS covers a significant degree of essential services, like health and education, since nowadays many (of such essential services) are delivered through a mix of public and private service. If a service is supplied in the exercise of governmental authority but on a 'commercial basis' or 'in competition with one or more service suppliers' - i.e. private sector competitors in the domestic market - the WTO Member is obliged to comply with GATS obligations with respect to that service.[156]

The Preamble to GATS recognises the right of States to regulate and introduce new regulations on the supply of services within their territories in order to meet national policy objectives. The latter is however qualified in accordance with the general principle of MFN treatment, which requires that domestic regulations do not discriminate between foreign services or between foreign service providers.[157]

GATS also mandates the creation of new disciplines in the area of technical standards, licensing and qualification requirements, ensuring that such regulations do not constitute unnecessary barriers to trade. It requires, *inter alia*, that they are not more burdensome on trade than necessary to ensure the *quality* of the service. However, regulation directed towards effective accessibility of an essential service is arguably not directly related to the 'quality' of the service in question. This means that a regulation designed to meet

[155] UN Sub-Commission on the Promotion and Protection of Human Rights,., *Economic, Social and Cultural Rights, Liberalization of Trade in Services and Human Rights*, Report of the High Commissioner, UNESCOR, 54th Sess, Doc. E/CN.4/Sub.2/2002/9, 25 June 2002, p.19

[156] V. Yu, 'Human Rights and the WTO General Agreement on Trade in Services', Friends of the Earth International, Doc. FOEIWTOPO/5/2May 01/, 2 May 2001, p.1

[157] Article XXVIII GATS defines measures falling under the GATS regime as, 'any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form'.

human rights standards could be deemed 'unnecessarily burdensome'.[158]

Current pressure in WTO talks is aimed to apply a 'necessity test', whereby domestic regulations, even if taken to protect human rights, are to be least trade restrictive. This implies the subordination of public interests and human rights obligations to trade rules,[159] challenging the prerogative that governments have in regulating services and the conduct of private companies in the public interest.

Specific obligations in GATS apply only to those services identified by a Member State through its commitments for liberalisation of selected service sectors – a system that may be said to be development-pro. Commitments are made in relation to 'market access'[160] and 'national treatment',[161] and are made on a voluntary basis, through a combination of positive and negative lists based on four modes of service supply (cross-border supply, consumption abroad, commercial presence, and temporary entry).[162]

Despite this voluntary characteristic, article XIX GATS mandates successive rounds of negotiations aimed at achieving a progressively higher level of liberalisation. WTO Members have been issuing requests for liberalisation in new sectors since July 2002, and are currently presenting offers in response to the requests.

The US proposal, presented in March 2003, includes sectors like telecommunications, energy services, healthcare, and higher education. The EU, in its initial offer tabled in April 2003, included water for human use and wastewater management.[163] Human rights advocates fear the possibility of commitments in such areas, especially health care, education, and water supply, which are essential for human welfare and development. Although international human rights law does not oblige States to be the sole providers of essential services, States are obliged to guarantee, *inter alia*, the availability, accessibility, affordability and quality of such essential services, especially taking into account the needs of the poor and marginalised.[164] Commitments made in these sectors vis-à-vis the supply mode of commercial presence – i.e. allowing foreign investors

158 Castan Centre for Human Rights Law, *Submission to the Senate Foreign Affairs, Defence and Trade Committee, Inquiry into the General Agreement on Trade in Services and the Australia/US Free Trade Agreement*, March 2003, p.4 http://www.law.monash.edu.au/castancentre/submissions/gats.html (accessed on June 2003).

159 E/CN.4/Sub.2/2002/9, *op.cit.*, p.26

160 I.e. the degree of access to domestic markets provided to foreign services and service suppliers.

161 I.e. non-discrimination between national and non-national services identified and service suppliers.

162 E/CN.4/Sub.2/2002/9, *op.cit.*

163 ICTSD, 'EU Puts Forward Cautious Services Offer', *Bridges Weekly Trade News Digest*, Vol. 7, No 16, 7 May 2003.

164 E/CN.4/Sub.2/2002/9, *op.cit*, p.21

of multinational companies to set up shop in the domestic market – will likely pose challenges to governments to guarantee, *inter alia*, the right to health, the right to education, the right to water and the right to development. This is especially the case for developing countries, where the introduction of user fees, the development of two-tiered service supply to rich and poor, and the repercussions of brain drain in essential services as possible results of liberalisation in essential service sectors, will be detrimental to the poor and marginalised.[165] The case of the American water company Bechtel and the provision of water in Cochabamba (Bolivia) facilitates an example, where privatisation of the public water system, as required by structural reforms advocated by the IMF and World Bank, led to the raising of water rates by over 50%.[166]

Exceptions to GATS provisions covering measures to protect public morals, as well as human, animal and plant life and the protection of the privacy of individuals are provided in article XIV GATS. However, the trade bias in DSB interpretations (as seen in Chapter II) undermines the efficacy of such exceptions in view of sanctioning as WTO-compatible human rights affirmative action, otherwise contrary to the WTO principle of non-discrimination.

Therefore, once a WTO Member makes commitments on market access and national treatment with respect to 'commercial presence', the government's ability to react rapidly and effectively to any negative impacts of foreign investments on their peoples and environment, is restricted. Unless quantitative, financial, human resource staffing, legal, or foreign capital participation limitations or restrictions are expressly specified in a WTO Member's commitments with respect to market access, such restrictions will not be allowed. This has significant implications since retaining regulatory flexibility with respect to foreign investments is crucial, especially in light of recent cases of MNC investments in natural resources extraction and development projects, leading to massive human rights violations by the MNC subsidiaries against the host local communities. Examples are the fairly recent controversial accusations against Shell regarding human rights violations committed in view of exploitation of Nigeria's oil riches, as well as the situation of the Philippines and commercial mining MNCs on territories of indigenous communities.[167]

[165] E/CN.4/Sub.2/2002/9, *op.cit.*, p. 22. The degree of such challenges is exacerbated by the fact that withdrawal or reversal of commitments of liberalisation of trade in given services currently entails a huge burden for governments, since GATS, *inter alia*, requires that modifications of schedules need to be compensated by the State's commitments in other areas. This requirement acts as a detriment to States taking affirmative action.

[166] *Ibid*, p. 23

[167] V. Yu (2001), *op.cit.*, p.5

3.4 The Agreement on Government Procurement and human rights

The Agreement on Government Procurement (GPA), signed in Marrakesh in April 1994, is plurilateral and not incorporated into the 'single undertaking'.[168] Today the GPA has 27 signatories, *none* of which are developing countries. It commits signatory States to provide national treatment and non-discrimination to goods, services and suppliers of the other signatories, thus creating fair conditions for international competitive tendering and government contracts. In so doing, however, the GPA also prohibits signatories from withholding government contracts on the basis of labour and human rights standards. Both companies that violate human rights and companies deriving from countries that have serious human rights violations records cannot be discriminated against in procurement.[169] The AGP also prohibits the application of procurement policies discriminating between companies on the basis of legitimate policy goals of the government concerned such as fair employment and encouraging local businesses in poor regions.[170]

Article XXIII GPA lists exceptions that Parties may apply to the WTO procurement rules. These constitute the protection of public morals, order or safety, human, animal or plant life or health or intellectual property, or relating to handicapped persons, philanthropic institutions or prison labour. Disputes have however not produced the opportunity of applying exceptions vis-à-vis human rights. In the Massachusetts/Burma case,[171] the EU and Japan attacked a Massachusetts state law on selective purchasing as WTO-illegal. The law was a reaction to the brutal dictatorship in Burma, and required of suppliers not to have dealings with Myanmar (Burma). Both the EU and Japan held that the Massachusetts stipulation would have prevented their companies doing business with Myanmar from bidding on government contracts in Massachusetts. They hence

168 Refer to Chapter II (p. 38). This means that WTO States may opt not to be signatories of the GPA.

169 World Trade Organisation, 'What's wrong with the WTO? You must subordinate human rights to free trade', WTO website: http://www.speakeasy.org/~peterc/wtow/wto-hrs.htm (accessed on May 2003). Article VIII (b) GPA provides that any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question. The latter may *seem* to allow the imposition of qualifications based on human rights performance *if* made a condition of the contract itself. However, this is speculative, since article VIII (b) GPA lists conditions of participation as entailing, *inter alia*, financial guarantees and technical qualifications. Furthermore, the wording of article VIII (b) dismisses the possibility of qualifications being based on the practices of the company's home State government.

170 *Ibid.*

171 *United States - Measure Affecting Government Procurement*, Request for the Establishment of a Panel, WTO Doc. WT/DS88 (by European Community) (Sept. 9, 1998); WT/DS 95 (by Japan) (Sept. 9, 1998)

commenced dispute settlement proceedings against the US at the WTO, which were, however, soon after suspended, when the US Court of Appeals found constitutional defects in the Massachusetts statute.[172] The unconstitutional character of the Massachusetts law ultimately resulted in closure of the matter at the WTO level.

The WTO challenge to the Massachusetts' law created a chilling effect on other domestic human rights policies, including Maryland's consideration of a selective purchasing law targeted at Nigeria, in reaction to which the Clinton administration warned of another WTO suit were such legislation to come into force. It is thus no wonder that human rights activists remain sceptical about the human rights implications of the GPA and the interpretation of article XXIII.

Currently, there is a build up to the next WTO Ministerial Conference in Cancun in September 2003 for an explicit consensus to extend negotiations on transparency in government procurement. Despite assertion in the Doha Declaration that negotiations will be limited to transparency, concern remains that the negotiations would automatically lead to 'market access' issues. Such issues entail making the domestic procurement business more accessible to foreign firms, and the application of the principle of national treatment to suppliers regardless of affiliation, human rights practices and origin of products or services. The fear from a development and human rights perspective is that ultimately, this would mean the 'multilateralisation' of the GPA – making the agreement obligatory rather than voluntary. It will hence mean that developing countries will have to become signatories and that they will lose their reins vis-à-vis the exclusion of TNCs from tender on the basis of their human rights practices. This will be contradictory with other regimes that require a linkage between labour standards or human rights and government contracts.[173] It would also restrict government policy choices aimed at supporting small and medium-sized enterprises and addressing unemployment, making it harder to optimise the implementation of development policy.[174]

[172] R. Howse & M. Mutua, *op.cit.*, p.11

[173] For example, International Labour Organisation Convention No 94, concerning labour clauses in public contracts. – C. McCrudden, 'International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement', *J. Int. Econ. L.*, Vol. 2, 1999.

[174] United Nations Development Programme, Heinrich Boll Foundation, Rockefeller Brothers Fund, Rockefeller Foundation and Wallace Global Fund, *Making Global Trade Work for People*. United Nations Development Programme (UNDP), 2003, p. 299.

3.5 WTO and developing countries - Substantive concerns with inherent human rights implications[175]

The WTO *text* recognises the given tension between the establishment of universal international trade rules, on the one hand, and the space necessitated by developing countries to design policies apt for their specific economic situation, on the other.[176] Various special and differential treatment (S&DT) provisions in the WTO Agreements aim at improving market access in developed countries; require WTO members to safeguard the interest of developing countries; allow flexibility to developing countries in rules governing trade measures; allow longer and more flexible transition periods to implement obligations; and include provisions for technical assistance.[177]

As noted by the High Commissioner for Human Rights, the WTO S&DT could potentially operationalise the international co-operation commitments under the ICESCR and the Declaration on the Right to Development.[178] However, the scope of S&DT has evolved from an instrument for making trade liberalisation *supportive* of development to one that is geared to facilitating developing countries' domestic reforms *towards* trade liberalisation as an end result.[179]

The Doha Ministerial Declaration (2001)[180] reaffirmed the integral role that S&DT plays in the WTO regime, and called for their review by the Committee on Trade and Development, in view of strengthening them and making them more effective and operational.[181] However, negotiations on how to strengthen S&DT

[175] Due to the limitations of this dissertation, I have chosen to focus on substantive issues and development. However, in addition to substantive issues, there are also procedural issues that have implications on human rights principles including internal transparency and governance within the WTO, negatively affecting developing countries. Among such issues are concerns about the 'green room' process of consultation, often substituting full-fledged negotiating processes in the WTO, as well as the Dispute Settlement Mechanism and the limited resources of developing countries, which often inhibit them from resorting to the DSM. For further discussion, reference may be made to UNDP et.al (2003), *op.cit*.

[176] *Ibid*., p. 63

[177] H. Lim (2001), *op.cit*, p.295

[178] UN Commission for Human Rights, *Globalization and its impact on the full enjoyment of human rights,* Report of the High Commissioner for Human Rights submitted (in accordance with Commission on Human Rights resolution 2001/32), UN ESCOR, 58th Sess, E/CN.4/2002/54, 15 January 2002, p. 10

[179] W. Corrales, Preserving and Creating Spaces for Development Policy: The Real Challenge for Cancun, *ICTSD Bridges*, Year 7, No 3, April 2003.

[180] Doha Ministerial Declaration, WTO Doc. WT/MIN(01)/DEC/W/1, 14 November 2001 (adopted following The Fourth Ministerial Conference, held November 9-13, 2001 in Qatar).

[181] This call was warranted by the fact that S&DT obligations were not explicitly detailed regarding its implementation in previous WTO agreements.

have failed to respect deadlines set by the Doha Work Programme.[182] S&DT remains a contentious area between developed and developing countries, unable to agree on what constitute fair conditions and concessions.[183]

What is essential from a human rights point of view, apart from S&DT, is that developed countries make a binding commitment to abolish export subsidies, decouple agricultural support and reduce MFN tariffs on labour-intensive products of export interest to developing countries.[184] Such commitment is central to the right to development, which requires that both national and international policies eliminate obstacles to development.[185] Market access is of key importance to the right to development, enabling developing countries to reach a level of development at which they can compete on an equal basis. The persistence of elements of 'reverse S&DT' – provisions benefiting interest groups in industrialised countries at the expense of livelihoods in developing countries – has hindered the fulfilment of human rights inherent to development.[186]

Brief reference to the *agricultural industry* provides an example. 'Agriculture remains the economic mainstay for the world's poorest people, providing employment for more than 70 per cent of the population in developing countries'.[187] However, as a result of the level of domestic support and subsidies kept by developed countries, abusing of the 'blue'[188] and 'green box'[189] exemptions in the WTO's Agreement on Agriculture (AoA), developing countries have been grossly disadvantaged. OECD members as yet provide about $1 billion

[182] Doha Ministerial Declaration, Work Programme, WT/MIN(01)/DEC/W/1, 14 November 2001 (Hereinafter Doha Work Programme) Also referred to as, Doha Development Agenda.

[183] Centre for International Development at Harvard University, Global Trade Negotiations HomePage, 'WTO Public Symposium 2003: Fulfilling the Doha Agenda, 2003' http://www.cid.harvard.edu/cidtrade/geneva/doha.html (accessed on June 2003).

[184] B Hoekman *et al* 'Special and Differential Treatment: Towards a New Bargain', in *ICTSD Bridges*, Year 7 No 3, April 2003.

[185] UN Commission on Human Rights, *Study on the Current State of Progress in the Implementation of the Right to Development, submitted by A.K.Sengupta, independent expert, pursuant to Commission Resolution 1998/72 and General Assembly Resolution 53/155,* 56th Sess, UN ESCOR, UN Doc. E/CN/4/1999/WG.18/2, 27 July 1999, p.10

[186] B. Hoekman *et al* (2003), op cit.

[187] UNDP *et al* (2003), op cit, p 8

[188] 'Blue Box' – Exemption from the general rule in the AoA that all subsidies linked to production must be reduced or kept within defined minimal levels. It covers payments directly linked to acreage or animal numbers, but under schemes which also limit production by imposing production quotas or requiring farmers to set aside part of their land. These subsidies were scheduled to decline throughout the implementation period; however, this has been delayed by developed countries.

[189] 'Green Box' – Exemption of domestic farm programs causing minimal trade distortions.

a day in domestic agricultural subsidies.[190] These subsidies, and dumping of agricultural exports by industrial countries, have serious pernicious implications for developing countries, especially for employment and subsistence means. The associated import surge in developing countries has put significant pressure on their rural sector.[191] As a result, food processing and marketing structures in these developing countries, vital for their national economy and food supply, have been hampered. The result has been threatened food security and increased poverty in rural areas. As an African representative noted to *The Economist* at the Doha round, 'issues that may lose elections in France are life and death in Tanzania'.[192]

In June 2003, four West and Central African (WCA) countries put forward a sectoral initiative at the WTO to eliminate cotton subsidies worldwide. Over ten million people in WCA countries currently depend directly on cotton production.[193] In some countries of the WCA region, cotton accounts for up to 90% of export earnings.[194] Development policies and poverty reduction programmes in this region are however grossly undermined due to extensive cotton subsidies in rich countries, especially the US, which provided $3.9 billion in subsidies to its 30,000 cotton farmers in 2002 (60% more than the GDP of Burkina Faso).[195]

Similar stories tell of the negative situation of rice farmers in Haiti, and dairy producers in Kenya due to industrial country subsidisation and dumping.[196] Furthermore, LDCs have been disadvantaged due to supply-side constraints, and difficulties encountered in meeting stringent food safety norms applicable in developed countries. Additionally, preference-receiving countries, like the ACP states, have witnessed erosion of preferential access due to liberalisation rules.[197]

Despite the Doha round commitment to cut trade-distorting farm subsidies, trade negotiators failed to agree by March 2003[198] on how to do so. Industrialised countries, like France and Japan, remain reluctant to decrease subsidies and domestic support to their own

[190] United Nations Development Programme, *Deepening Democracy in a Fragmented World,* Human Development Report 2002, p. 8
[191] E/CN.4/2002/54, *op.cit.*, p. 13
[192] The Economist, 'Seeds sown for future growth', London: The Economist Newspaper Ltd., November 15, 2001.
[193] ICTSD, 2 June 2003, 'African countries take plight of cotton farmers to WTO', *Bridges, Trade BioRes*, 2 June 2003.
[194] ICTSD, 'Cotton Subsidies: Could More be gained through Negotiations than Litigation?, *Bridges*, Vol.7, No3, April 2003.
[195] ICTSD, 'Elimination of Cotton Subsidies: A Development Deliverable for Cancun', *Bridges*, Year 7, No4, May 2003
[196] See Oxfam International , *Time To Make Trade Fair in 2003*, January 2003, p.3 - http://www.oxfam.org/eng/pdfs/MakeTradeFair-Englisih-Final.pdf (accessed June 2003).
[197] 3D Associates (2001), *op.cit.*, p.9
[198] Deadline set by Doha Work Programme, *op.cit.*

farmers. Although an EU Commission proposal for a temporary suspension of rich nations' subsidies on farm exports to African countries was made at the G8 Summit on 2 June 2003, the G8 countries did not it take up in their action plan.[199]

From the point of view of traditional net food importing developing countries, small-island developing states, and LDCs with substantial protection of agriculture, there is the concurrent concern that export subsidy reduction by developed countries will increase import bills. Further to the AoA provisions of emergency food aid[200], developing countries are demanding that a reviewed AoA should provide for a 'development box',[201] securing domestic food production, food security and livelihoods.

The latter would correspond with article 20 of the AoA, which sets out the scope of the agriculture negotiations, stating, *inter alia*, that 'non-trade concerns' should be taken into account. Mauritius had invoked the right to food[202] in its support of its interpretation of article 20 before the Committee on Agriculture,[203] claiming that AoA policy reform ought to be undertaken in a way that is consistent with other multilateral commitments. Mauritius held that such commitments include, *inter alia*, the International Covenant on Economic, Social and Cultural Rights (ICESCR) which emphasizes the importance of adequate food supply and continuous improvement of living conditions.[204] To such extent, both problems of food-importing and food-exporting countries ought to be taken into account.[205]

Developing countries also continue to face extremely high tariff and non-tariff barriers (quotas) in textiles and clothing, footwear, leather and leather goods, among other industrial goods that are of economic interest to them. The overspecialisation of certain developing countries in such labour intensive, low technology goods, has as a result signified the vulnerability of domestic producers in the

199 R. Graham *et al* 'Leaders paper over cracks on WTO talks', *Financial Times*, June 2, 2003.

200 Article 10(4) AoA and Annex II to AoA, para 4

201 The Development Box would constitute a package of exemptions from WTO rules designed specifically to allow developing country governments to protect their poorest farmers, and to guarantee the production of key staple food, in view of food security.

202 Article 11(2) ICESCR

203 WTO Agricultural Negotiations, WTO Doc. G/AG/NG/W/36/Rev.1

204 The Committee on Economic, Social, and Cultural Rights defined the Right to Food as constituting, *inter alia*, the imposition of obligations on the international community to ensure that vulnerable States *have access to food*, and on States, to ensure that persons under their jurisdiction have access to adequate food. See UN Committee on Economic, Social and Cultural Rights, *The Right to Adequate Food, General Comment No 12 (1999)*, UN Doc. E/C.12/1999/5, 12 May 1999. See also article 11 ICESCR(2)(b).

205 G. Marceau, 'WTO Dispute Settlement and Human Rights', in *EJIL*, Vol. 13, No4, article 1, Part 3, 2002, p. 6.

world market.[206] The Doha commitment to reduce trade barriers on *industrial goods*, particularly 'peak tariffs' – top rates used to protect sensitive industries – should further the degree of market access for developing country producers. The Doha Work Programme engages commitment to a 'less than full reciprocity' in the tariff reduction commitments by developing countries, and systematically aims at reducing tariffs on products of export interest to developing countries in particular. The Doha Declaration also mandates the clarification and improvement of *rules of anti-dumping*, ensuring that such measures are not used as spontaneous tools of naked protectionism by developed countries. This is essential, since the proliferation of anti-dumping[207] and safeguards continues to facilitate the particular vulnerability of employees in developing countries due to the unpredictable shifts in market access that such measures cause.[208]

Implementation of the outcome of the Uruguay Round was implemented has been inherently skewed against developing countries' interests, preventing them from adopting economic policies, such as investment strategies that promote the use of local resources and skills, for means of improving their economy.[209] Difficulties encountered by developing countries also include engaging in export diversification and in technological transfer, due to rules like the TRIPS regime. Are not these factors, stimulating economic growth, inherent to the human right to development? The neo-liberal rules of multilateral trade need to effectively recognise that developing countries need the space, once afforded to developed countries, to achieve national development priorities. The latter entails allowing for export orientation with pervasive use of active policies on the supply-side of the economy to stimulate productive investment, technology transfer, enterprise development and the consolidation of productive chains.[210]

This explains the precariousness of developing countries in view of the decision on the liberalisation of the 'Singapore issues' (competition, investment, trade facilitation and transparency on government procurement),[211] at the up-coming WTO Ministerial

[206] Centre for International Development at Harvard University, Global Trade Negotiations Homepage, 'Development Summary', 2003: http://www.cid.harvard.edu/cidtrade/issues/development.html (accessed on June 2003).

[207] The number of anti-dumping cases reached the record high of 328 in 2001.

[208] Centre for International Development at Harvard University, Global Trade Negotiations Homepage, 'Anti-Dumping Summary', 2003 http://www.cid.harvard.edu/cidtrade/issues/antidumping.html (accessed on June 2003).

[209] Dommen (2002), *op.cit.*, p. 19

[210] W. Corrales, 'Preserving and Creating Spaces for Development Policy: The Real Challenge for Cancun', *ICTSD, Bridges Between Trade and Sustainable Development*, Year 7, No 3, April 2003.

[211] See WTO Singapore Ministerial Declaration, adopted 13 December 1996, WTO Ministerial Conference, Singapore, WTO Doc. WT/MIN(96)/DEC/W.

Conference in Cancun. For example, there remains ambiguity as to whether developing countries will be enabled to apply the 'domestic content' requirement, presently prohibited under the WTO Agreement on Trade-Related Investment Measures (TRIMs). This requirement obliges investors to use at least a specified minimum amount of local labour and resources – a tool that is central to ensuring that FDI is tuned towards domestic development priorities.

Human rights advocates are pressing for the establishment of structures that bias multilateral trade agreements towards development. The Doha Development Agenda produced a good kick-start to such an approach, incorporating S&DT and capacity building clauses in most major areas. Promise for a more developmental conscience is also reflected in the Doha establishment of a working group on Trade, Debt and Finance, as well as the Doha declarations on problems of small economies, LDCs and technical co-operation. However, upon the negotiations at the next WTO Ministerial Conference in Cancun (September 2003), rest the human rights of millions of people in developing countries. It is for this reason that it is discouraging to note that a few months before Cancun, disagreement continues on issues of interest to developing countries, particularly on S&DT, agriculture, and TRIPS and public health. Trade needs to be orientated towards development,[212] ascertaining concrete commitment to achieving the UN Millennium Development Goal of eradicating extreme poverty by halve by the year 2015.

3.6 Conclusion

While WTO advocates maintain that the WTO is not a 'trade-plus' organisation and hence has no responsibility for adverse social effects of trade liberalisation, a brief look at a few of the most contentious issues within the WTO regime has shown that human rights are inherently affected. Although the call on the WTO is not to take on a re-distributive role, it remains coherent with its mandate if it facilitates global economic and social stability *via* rules that allow governments to take affirmative action to protect human rights effectively. Ultimately, the exigencies of human rights demand

[212] This was earlier affirmed by a WTO representative at the 2nd session of the UN Working Group on the Right to Development (29 January - 2 February 2001), stating that the WTO process of multilateral negotiations was an effort to operationalize the right to development. (See E/CN.4/Sub.2/2001/10, *op.cit.*, para 60) The UNDP Human Development Report 2000, entitled, 'Human Rights and Human Development', also calls on the WTO to ensure coherent policies with development and human rights.

accountability not only of States, but also of non-State actors and international organisations.[213]

4 A call for human rights 'enforcement' through WTO?

4.1 Introduction

In Chapters 1 and 2, it was established that there is an interconnection between international trade and human rights, and in Chapter III, a brief overview and discussion was given of some of the contingent human rights implications that arise from specific areas under the WTO regime. This chapter looks to the option of human rights 'enforcement'[214] through the WTO, and analyses whether the latter constitutes the appropriate response in terms of best exploiting the recognised interconnection between international trade and human rights.

4.2 Enforcement of human rights through the WTO Dispute Settlement Mechanism

Once trade rules have human rights implications, there exists the possibility of disputes being taken to the WTO Dispute Settlement Mechanism (DSM) to resolve conflicts between trade rules and measures taken to enforce or protect human rights. Two provisions in the current WTO regime which recognise the need to balance non-trade values with trade values are article XX and article XXI GATT, as seen in Chapter II. However, the bias in favour of trade values in dispute rulings[215] has left ambiguity as to how the WTO Dispute Settlement Bodies (DSB) might deal with human rights issues, once an explicit conflict between WTO law and human rights law is presented in a dispute. Such a conflict could arise where a Member State, complying with WTO law, violates international human rights law, or

[213] UN Committee on Economic Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Human Rights and Intellectual Property*, Statement, UN ESCOR, 27th Sess, E/C.12/2001/15, 14 December 2001, para 10

[214] The term 'enforcement' of human rights is here understood to entail the compelling of governments, through international legal measures, and measures like economic sanctions, to implement and observe human rights. This is distinct from the term, 'realization' of human rights, which refers to the adoption of policies, both internationally and nationally, which are aimed at the materialization and enjoyment of human rights by all individuals to whom such rights belong.

[215] Somewhat mitigated by the recent DSB decisions in the *Shrimp-Turtle dispute* and the *Asbestos dispute*. See Chapter II, pp. 47 - 48.

where a Member State violates WTO law in view of complying with international human rights law.

Such conflicts could occur despite the general principle of good faith in international law, which requires that states negotiate and implement international treaties, including the WTO texts, *in good faith* with regards to their relevant international obligations under international human rights treaties.[216] This is exemplified by the issue of TRIPS and access to medicines, referred to in Chapter III, which has presented a potential area where WTO rules (article 31 (f) TRIPS) fail to be coherent with human rights law (right to health).

4.2.1 Ways in which WTO adjudicating bodies could resolve conflicts between WTO law and human rights law

Article 103 UN Charter provides that in the event of a conflict between the obligations of UN Members under the said Charter and their obligations under any other international agreement, their obligations under the UN Charter are to prevail. The UN structure of human rights obligations is founded in its originality on the basis of the UN Charter.[217] Thus, article 103 requires the prevalence of universally recognised human rights obligations over commitments ensuing from other international treaty law, including WTO law.

Nevertheless, inasmuch as trade law constitutes a *lex specialis*,[218] it can escape the article 103 presumption.[219] The WTO regime is a *lex specialis* inasmuch as it constitutes a specific subsystem of international law, focused on trade, with 'specific rights and obligations, specific claims and causes of action, specific violations, specific enforcement mechanisms and specific remedies in case of their violation.'[220] The principle of *lex specialis* in public international law states that if all parties to a treaty conclude a more

216 Article 26, Vienna Convention of the Law of Treaties, 1969, UN Doc.A/CONF.39/27 (hereinafter: VCLT) lays down the rule, *Pacta sunt servanda*, requiring that every treaty in force is performed by the parties in good faith. The principle of *good faith*, which governs the creation and performance of all legal obligations by governments, is of crucial importance to the implementation and observance of international human rights law. On the basis of trust by the international community, it is ultimately in the hands of governments, as sovereign entities, to take measures to protect and promote human rights in the domestic sphere. It is also ultimately governments, sitting at international negotiating tables (like the WTO Ministerial Conference), which ought to ensure coherence of international rules thereby being adopted, with international human rights law.

217 See Article 55 & 56 UN Charter.

218 *Lex specialis derogat legi generali*, *Lex posterior derogat legi posteriori* (a more specific treaty or a treaty later in time prevails) are principles derived from article 30, 41 and 59 VCLT. Also article 55 of the Draft Articles on State Responsibility for intentionally wrongful acts adopted by the International Law Commission, UN GAOR, 56th Sess, Supp. No 10, at 43, UN Doc./A/56/10, chp.IV.E.1. (2001).

219 3D Associates (2001), *op.cit.*, p.3

220 G. Marceau,(2002), *op.cit.*, at: Introduction, p.1

specialised treaty, the provisions of the latter prevail over those of the former. To such extent, it could be argued that WTO law will prevail over the article 103 UN presumption.[221]

However, public international law recognises that certain core human rights qualify as *jus cogens* principles of customary international law.[222] This means that such human rights prevail over all competing principles of treaty and customary international law. *Jus cogens* norms are peremptory norms, meaning that they cannot be overridden by any treaties, (even *lex specialis*), and that they invalidate *ab initio* any treaty provision which is in violation of such norms.[223] *Jus cogens* norms include the prohibition against aggression, as well as human rights and humanitarian law norms such as the prohibition of genocide, slavery/slave trade, racial discrimination, crimes against humanity and torture and the right to self-determination.

While not all human rights obligations enjoy a peremptory status, certain core international human rights, and the obligation to respect them, are *erga omnes,* and therefore binding on all states.[224] *Erga omnes* obligations are considered as owed to all members in the international community, and all members have a general interest in ensuring their observance. The dictum of the International Court of

[221] However, from a different perspective, it may be argued that the general principle of *lex specialis derogat legi generali* is not applicable in the case of conflicts between the UN Charter and other treaties (WTO) concluded by Member States. This is provided in article 30(1) VCLT, '*Subject to Article 103 of the Charter of the United Nations*, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined with the following paragraphs.' Similarly, article 30 of the Convention on Treaties between States and International Organizations and between International Organizations (1986) emphasizes the prevalent character of the UN Charter, if conflict between obligations under the Charter and obligations under a treaty arises. – See B. Simma *et al* (eds.) *The Charter of the United Nations. A Commentary*, Vol. 1. New York: Oxford University Press, 2002, p. 1294

[222] Customary international law: article 38 of the Statute of the International Court of Justice defines 'international custom' as 'evidence of a general practice accepted as law.' Customary international law refers to international law that has acquired general recognition among States as obligatory – See I. Brownlie, *Principles of Public International Law,* 5th Edition, New York: Oxford University Press, 1998, p. 4. Jus Cogens Norms constitute the higher part of customary international law.

[223] Article 53 VCLT defines *Jus Cogens* norms as a peremptory norm: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

[224] It should be noted that there is no agreed enumeration of rights and obligations *erga omnes*. The law in this area is still developing. However, reference is sometimes made to fundamental rights included in the Universal Declaration of Human Rights, to define this concept.

Justice in the Barcelona Traction case[225] stated that obligations *erga omnes* in international law include those derived from 'the principles and rules concerning the basic rights of the human person'.

The relevance of *erga omnes* norms becomes apparent when viewed with article 3.2 of the DSU, which requires WTO agreements to be interpreted in light of customary rules of interpretation of public international law. In *Reformulated Gasoline,*[226] the Appellate Body held that 'customary rules of interpretation', for the purposes of article 3.2 DSU, include article 31 of the Vienna Convention on the Law of Treaties (VCLT). Article 31(3)(c) VCLT requires that in interpreting a treaty, account must be taken not only of the treaty itself (in this case, the WTO treaty), but also of 'any relevant rules of international law applicable in the relations between the parties.' Therefore, WTO agreements are not to be interpreted in clinical isolation of customary international law. In the *Korea-Government Procurement* dispute,[227] the DSU explained:

> Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.[228]

Accordingly, the *erga omnes* character of fundamental human rights, as designated by customary international law, requires that where relevant to a dispute, such human rights are applied by the DSM when interpreting WTO law.

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225 See The Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application 1962) (*Belgium v Spain*), [1970]I.C.J.Rep.4 (hereinafter: Barcelona Traction)

226 *United States- Standards for Reformulated and Conventional Gasoline*, WTO Appellate Body Report, AB-1996-1, WT/DS2/AB/R (95-1597), 29 April 1996.

227 *Korea - Measures Affecting Government Procurement*, WTO Dispute Panel Report, WT/DS163/R, 19 June 2000.

228 *Ibid.*, para 7.96. *Referred to*: J. Pauwelyn, 'The role of Public international law in the WTO: How far can we go?', *AJIL*, Vol. 95, 2001.

4.2.2 Implications of article 23 DSU

Article 23 of the Dispute Settlement Understanding (DSU)[229] specifically requires that if a dispute involves an allegation of a violation of WTO law, recourse shall be had to the WTO Dispute Settlement Mechanism (DSM). Article 23 makes such recourse compulsory and exclusive, hence excluding the possibility of referral to any other jurisdiction when WTO rules are at stake – even if other international laws, like human rights, could be concurrently affected.[230] The WTO has exclusive jurisdiction to provide remedies for violation of WTO law. Thus, if a WTO Member seeks redress for a violation of human rights before a human rights court or commission, article 23 seems to preclude the possibility of such a court ordering remedies which have trade-related impacts inconsistent with WTO law.[231]

The implications of article 23 are exacerbated by the limited jurisdiction and incapacity of WTO adjudicating bodies to interpret and enforce norms other than those of WTO.[232] The specific mandate and jurisdiction of the DSB is to apply and enforce applicable WTO law – the law that is binding on states *as WTO members*.[233] Thus, the DSB seems not to have the competence either to reach any formal conclusion that a non-WTO norm (human rights law) has been violated, or to require positive action pursuant to a non-WTO treaty (human rights treaty) or any conclusion that would enforce a non-WTO norm over WTO provisions.[234] Neither does it seem to have the capacity to determine a WTO treaty provision as null and void due to a violation of *jus cogens*. This is due to article 3.2 DSU, which states that, 'recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the [WTO] covered agreements'.[235]

Therefore, reliance by a WTO panel on provisions of general international law and universally recognised human rights would be assumed only to the extent necessary to interpret WTO provisions and to assess compliance with WTO law. It may be argued that in applying customary international law, including human rights, to fill the gaps of the WTO text, the DSB would *not* be adding or diminishing the

[229] Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Marrakesh Agreement Establishing the World Trade Organisation, 1994.
[230] 3D Associates (2001*), op.cit.*, p. 3
[231] G. Marceau (2002), *op.cit.*, Part II, p. 3
[232] G. Marceau (2002), *op.cit*, Part I, p.1
[233] *Ibid.*
[234] *Ibid*, p. 2
[235] WTO 'covered agreements' constitute all the WTO multilateral trade agreements (except the Trade-Related Review Mechanism), the plurilateral agreements, WTO decisions and WTO secondary legislation.

obligations of WTO Member States (as forbidden in article 3.2 DSU). This is because 'the obligations arising from customary international law are, at the same time, previous, coexistent and possibly *superviniens* to the treaty'.[236]

In any case, although the WTO adjudicating bodies are not courts of general jurisdiction, they should refer to rules of the legal system of which they are part, and hence interpret WTO provisions consistently with human rights law.[237]

4.3 Enforcement of human rights through trade

For the purposes of this dissertation, the term 'enforcement of human rights through trade' is understood as referring to the use of trade measures (sanctions) in response to breaches of human rights obligations. Trade sanctions restrict imports and exports to and from a targeted country, and such restrictions could be either comprehensive or selective.

Sarah Cleveland[238] makes a distinction, between tailored, semi-tailored and non-tailored sanctions, which may facilitate a better understanding of the types of trade sanctions possible. Each of the three categories of sanctions is defined in accordance with the degree of nexus between the trade measure employed and the human rights violation.

Tailored sanctions target human rights violations arising directly from the production *or* use of the sanctioned products. Bans on goods produced through the use of exploitative child labour or a hypothetical ban on exports of chemicals for lethal injection to USA on grounds of capital punishment, would constitute examples of production/process based and use-based tailored sanctions, respectively.

Semi-tailored sanctions ascertain a nexus between the restricted goods or services and the targeted human rights violation, but in a less

236 M. Garcia -Rubio & E.U. Petersmann, *On the Application of Customary Rules of State Responsibility by the WTO Dispute Settlement Organs, A General International Law Perspective*. Geneva: Graduation Institute of International Studies, 2001, p. 72

237 The latter is also important in view of the parallel question as to whether the WTO, having its own international legal personality and being bound by *jus cogens* and general international law, could be held responsible in a case where a Dispute Settlement Panel decision resulted in human rights violations. See 3D Associates (2002), *op.cit.*, p.6 Emphasis on the human rights responsibilities of the WTO (institution) due to its international legal personality was made in, Sub-Commission on the Promotion and Protection of Human Rights, *Globalization and its impact on the full enjoyment of human rights*, Progress report submitted by J. Oloka-Onyango and D. Udagama, in E/CN.4/Sub.2/2001/10, 2 August 2001.

238 S Cleveland, 'Human Rights Sanctions and the World Trade Organization', in F. Francioni (ed.), *Environment, Human Rights and International Trade*, Oxford: Hart Publishing, 2001, pp. 213 - 225

direct manner. The scope of semi-tailored sanctions is to deprive the government in question of a critical source of capital that directly impacts the government itself, but not the general economy. Hence, semi-tailored sanctions cover, for example, the bans on diamond imports from Angola, and Sierra Leone till recently, the revenue of which financed rebels.

General sanctions, on the other hand, have no direct link between the targeted product and the human rights violation. Their objective is to have an economic impact on the sanctioned state, thus placing increasing pressure on the governments concerned to remedy the human rights situation. The US conditional MFN treatment for trade from China on the basis of its human rights practices in the early 1990s, and the USA trade embargoes on Iraq and Cuba during the last decade, constitute concrete examples of general trade sanctions.

4.3.1 Does international law allow for the resort to unilateral trade sanctions to promote human rights compliance by a foreign state?

Article 2(7) of the UN Charter prohibits interference by States into another State's domestic jurisdiction. However, since respect for human rights at the domestic level is a matter of international concern, the protection of fundamental human rights may call for intervention by the international community.[239] This may be implied from the International Court of Justice dictum by in the *Barcelona Traction* case ,[240] which stated that *all* States have a *legal interest* in the protection of human rights.

Nevertheless, a State's obligation under international human rights law does not necessarily imply another State's right to enforce that obligation by *unilateral* counter-measures in the form of trade measures.[241] This is even more so due to the current state of international law, which seems uncertain as regards unilateral countermeasures taken in the general or collective interest.[242] The ILC Draft Articles on the Rules on State Responsibility (2001)[243] do not specifically provide for the legality of unilateral countermeasures taken in the collective interest. They only focus on countermeasures

239 S Cleveland (2001), *op.cit.*, p.209
240 *op.cit.*, para 34
241 L. Bartels, 'article XX of GATT and the Problem of Extraterritorial Jurisdiction, The Case of Trade Measures for the Protection of Human Rights', *JWT*, Vol. 36 (2), 2002, p. 362
242 J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*. Cambridge: Cambridge University Press, 2002, p.305
243 Draft Articles on State Responsibility for intentionally wrongful acts adopted by the International Law Commission, UN GAOR, 56th Sess, Supp. No 10, at 43, UN Doc./A/56/10, chp.IV.E.1. (2001) (hereinafter: ILC Rules on State Responsibility).

taken by *injured States*.[244] A State is 'injured' if the obligation that is breached is directly owed to it, or if the breach of obligation, owed to a group of States including that State, or to the international community as a whole, specially affects that State.

Thus, the ILC Draft Articles do not provide for unilateral countermeasures by a State that is not injured or specially affected. Stated otherwise, the ILC Draft Articles fail to provide for the international legality of a State (not injured or specially affected) imposing unilateral trade sanctions in response to another State's breach of *erga omnes* law. Article 54 provides that the Chapter on Countermeasures does not prejudice the right of any State, entitled under article 48(1) to invoke another State's responsibility,[245] to take *lawful measures* against the responsible State to ensure cessation of the breach and reparation in the interest of the beneficiaries of the obligation breached. It remains unclear, however, whether the term 'lawful measures' encompass unilateral economic sanctions for means of human rights enforcement, even if imposed in reaction to consistent breaches of *erga omnes* human rights by a State. Even if the term does cover unilateral economic measures, such measures are to be delimited by international human rights and humanitarian law, as well as *jus cogens* norms.[246]

4.4 Does the current WTO regime allow for the enforcement of human rights extraterritorially through unilateral trade sanctions?

It remains unclear as to whether unilateral trade sanctions for purposes of human rights enforcement in another state's territory could be considered WTO-legal in spite of the trade discriminatory nature of such sanctions.[247] As seen in Chapter 3, a dispute[248] concerning Massachusetts legal measures qualifying Government Procurement rules on the grounds of human rights practices in Burma, was eventually suspended, without chance for the WTO adjudicating bodies to comment on the measure's compatibility with WTO law. The

[244] See article 42 ILC Rules of State Responsibility.
[245] Article 48(1) allows any State (not injured) to invoke responsibility of another State, in the case of a breach of an obligation owed to the international community as a whole. It also allows any member of a group of States to invoke responsibility of another State, in the case of a breach of an obligation established for the protection of the collective interest of the group. Invocation should be understood as taking measures of a relatively formal character, for example, presenting a claim against another State or commencing proceedings before an international court or tribunal. – See J. Crawford (2002), *op.cit*, p. 257
[246] Article 50 ILC Rules of State Responsibility.
[247] 3D Associates (2002), *op.cit*., p. 5
[248] *United States - Measure Affecting Government Procurement*, Request for the Establishment of a Panel by Japan, WTO Doc. WT/DS88/3, (Brought by EC); WT/DS95/3 (Brought by Japan), 9 September 1998.

same is true of another dispute,[249] concerning an EU challenge against U.S. trade sanctions against Cuba (imposed on grounds of human rights practices), as WT-illegal. The dispute was eventually suspended by the EU in exchange for US assurances that it would withhold enforcement of certain of the Act's provisions.

Despite this, a couple of ways of human rights enforcement through trade may be deemed as positively sanctioned by the WTO. The current WTO regime, for example, allows for the 'stick and carrot' approach of human rights conditionality clauses in preferential trade relations and agreements. The WTO Enabling Clause, allowing WTO Members to accord differential and more favourable treatment to developing countries, does not therefore forbid the setting of conditionality for GSP import preferences to developing countries on human rights compliance.

The current WTO regime also provides for an exception to WTO rules for measures taken pursuant to a State's obligations under the UN Charter for the maintenance of international peace and security (Article XXI (c)). Thus, it allows for Member States to implement *multilateral* trade sanctions as mandated by the Security Council.[250]

Finally, the WTO waiver procedure, availed in article IX.3 and IX.4 of the WTO Agreement, has allowed for temporary derogation from WTO obligations to facilitate semi-tailored trade sanctions taken in pursuance to UN supported/multilateral schemes, such as the Kimberley Process Certification Scheme for rough diamonds.[251]

In contrast, problems persist with regards to the question of WTO-compatibility of *unilateral* trade sanctions, imposed in the name of human rights. Practically all unilateral human rights trade measures violate the anti-discrimination requirements in article I and III GATT, or the article XI prohibition against non-tariff barriers. Few, if any, human rights trade measures discriminate on the basis of physical characteristics of the sanctioned product. Except for use-based tailored sanctions, unilateral human rights sanctions (tailored, semi-tailored and general sanctions) are generally either based on the production process of products, or are not based *at all* on a nexus between the sanctioned product/trade and the aim of the sanction (correction of human rights practices). The refusal of WTO practice to allow for discrimination in MFN and national treatment between

[249] *United States - The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. WT/DS38, 13 May 1996.

[250] Article 41 UN Charter (Chapter VII) provides for the Security Council as having the exclusive authority within the UN to impose economic sanctions. Member States are obligated to apply such measures.

[251] This scheme seeks to ensure that no 'conflict diamonds' (used by rebel movements to finance wars against legitimate governments) are traded. The WTO waiver given on 15th May 2003 allows participants to the Kimberley process to take the necessary measures to prohibit the import and export of such diamonds until 31 December 2006. See http://www.kimberley process.com

products on the basis of production and practice methods (PPMs)[252] thus implies the reliance of unilateral sanctions on the exceptions listed in article XX and XXI GATT. Only in such manner would they achieve clearance by the WTO adjudicating bodies.

Can a WTO DSU panel accept human rights justifications for unilateral trade measures, when there are no *explicit* references to human rights in articles XX and XXI GATT?

4.4.1 Article XXI GATT

Measures relating to trade in nuclear and military technology are allowed under the national security exception of article XXI (b) GATT. Article XXI could therefore potentially support human rights measures barring sales of weapons, once the state claims essential national security interests (even if such measures are adopted on the basis of allegations of human rights violations that are unrelated to the weapons importation).

The potentiality of article XXI providing a locus for human rights unilateral sanctions is also possible if the sanctions constitute measures adopted in response to war or international emergency (article XXI (b)(iii)) – once the sanctioning state claims a national security justification. However, it remains unclear as to what extent this provision is accommodating of unilateral sanctions. In relation to the term, '*in time of war*', should the sanctioning state be a party to the war, or can it impose sanctions against warring states, threatening the sanctioning state's security interests? '*International emergency*': What constitutes an 'international emergency' for the purposes of article XXI? Must such emergency entail a direct threat to the territory and people of the sanctioning state?[253] Or does the term, for purposes of article XXI, take on the parallel meaning ascertained by the international community, recognizing *jus cogens* human rights atrocities, like the genocide in Rwanda, as matters threatening international security and warranting intervention?

4.4.2 Article XX GATT

In Chapter 2, it was seen how grounds for exception in article XX GATT could be construed to accommodate measures taken to protect human rights. While tailored measures relating to goods produced by prison labour are expressly covered by article XX (e), the *Asbestos*

[252] See Chapter II, p. 42
[253] S. Cleveland, *op.cit.*, p. 231

decision[254] demonstrated that certain *tailored* trade sanctions that advance legitimate human rights concerns may be potentially embraced as WTO legal by the other parts of the said article, especially by article XX(a) [public morals] and article XX(b) [human health and life].

Would the DSM consider the national human rights policy of a State invoking one of the article XX exceptions?

The DSM considers non-trade policies that are directly related to one of the specific exceptions listed in article XX. Article XX contains an exhaustible list of such policies, which however are to be interpreted in an evolutionary manner.[255] Nevertheless, the DSM has so far allowed for the application of such non-trade policies inasmuch as they constitute 'shared policy values'.[256] On this basis, it seems that, *if* extraterritorial action is WTO compatible (see 4.2.2 (c) below), only 'shared policy values', denoted for example from *erga omnes* norms, may facilitate any advocacy of trade sanctions in accordance with article XX exceptions. Thus, it is doubtful as to whether sanctions based on the national human rights policy of the sanctioning State may be justified under article XX.

Does the DSM authorise the consideration of a non-trade policy even if unrelated to the sanctioned trade?

The DSM places a proportionality test to any national measure affecting trade. This test is placed in view of the chapeau of article XX, which requires that measures adopted in accordance with the article XX exceptions must not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade. The test seeks to ensure a balance between the right of a Member to invoke an exception under article XX and the duty of that same Member to respect the treaty rights of other WTO Members.[257] Thus, if human rights sanctions would be permissible under the WTO regime, the DSM, in applying the proportionality test, would require that the nexus between the trade-restricting measure and the non-trade policies invoked would be strong. Hence, it is questionable, whether

254 WTO Doc. WT/DS135/AB/R, *op.cit*. - See Chapter II, p. 48. The Asbestos decision upheld health hazard concerns over trade rules, but the measure upheld did not have an extraterritorial character. Therefore, it did not concern a tailored sanction, but had implications for the potential of article XX exceptions allowing for a tailored sanction to be WTO compatible.

255 The WTO adjudicating bodies have taken on an evolutionary approach to legal interpretation of article XX exceptions, as evidenced by the *Shrimp-Turtle dispute* WTO Doc. WT/DS58/AB/R, *op.cit*. - See Chapter II, p. 47

256 G. Marceau (2002), *op.cit*, Part 5, p. 3. In the Appellate Body Report to the *Shrimp-Turtle dispute*, (*op.cit.)*, the AB emphasized the fact that the policy of protecting and conserving endangered sea turtles was a shared policy by all participants in the appeal, and by the vast majority of countries, para 135. It held that such policy reflected 'the contemporary concern of the community of nations', *para* 29.

257 *Shrimp - Turtle dispute*, *op.cit.*, p.60

under the current regime, general sanctions, which have the least direct relationship between the sanction and the human rights values advanced, could ever be justiciable under WTO law.[258]

This is also due to the application of the 'necessity' requirements under article XX (a) and (b), which require that a measure be the least trade restrictive measure available.[259] Trade sanctions are generally one of many possible mechanisms that can be used against human rights violating states,[260] and thus are not easy to prove as *necessary* for means of article XX. Using WTO terminology: Were the US trade embargoes on Iraq, Cuba or Uganda *necessary*, the only reasonably available remedy, or the least trade restrictive means to protect human rights in those states?

Can Member States act extraterritorially under WTO law?

Availability of article XX exceptions for means of unilateral sanctions depends on their interpretability for 'outward-oriented' measures designed to influence human rights practices of another state's jurisdiction.[261] Article XX(e) GATT explicitly recognises some extraterritorial scope, due to its general prohibition on trade in goods produced with prison labour. However, it remains unclear whether the same is true under article XX (a) and (b).

A parallel may be drawn with the contemporary discussion on extraterritoriality and article XX(g). In the *Tuna/Dolphin II* decision, regarding application of article XX(g), the Panel held that GATT did not absolutely proscribe 'measures that related to things or actions outside the territorial jurisdiction of the party taking the measure'.[262] The Panel held that measures for the protection of the environment could be adopted when consistent with customary international rules regarding extraterritorial jurisdiction. However, it dismissed the implication that article XX could be interpreted to mean that parties could compel other states to alter practices within their own jurisdiction.

In the *Shrimp-Turtle Dispute*, the Appellant Body gave a progressively broader interpretation, stating:

> It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies ... prescribed by the importing country, renders a measure a priori incapable of justification

[258] S. Cleveland (2001), *op.cit.*, p. 245
[259] The necessity test applied for purposes of both article XX(a) and XX(b) currently implies the substitution by a less effective human rights measure, in place of a more effective human rights measure, on the basis of the measure's least-trade restrictiveness. See Chapter II, pp. 46-47
[260] States could revert to UN human rights mechanisms, or to diplomatic means.
[261] F. Garcia (2001), *op.cit.*, p.93
[262] *United States - Restrictions on Imports of Tuna*, GATT Dispute Panel Report, WTO Doc. DS29/R, 16 June 1994. Referred to S. Cleveland (2001), *op.cit.*, p. 235

> under article XX. Such an interpretation renders ... the specific exceptions of article XX inutile.[263]

However, it contemporarily stated that it was not deciding the issue of jurisdiction in WTO law, hence failing to give an assertive statement as to the legality of invocation of article XX exceptions for extraterritorial purposes. The AB rested on the fact that the foreign fishing practices (in reaction to which the US had instituted trade measures on the basis of article XX (g)) had *effects* in US territorial waters due to the migratory nature of sea turtles.[264] It could thus be argued that the AB's approach of an 'effects' test, upholding a State's jurisdiction to adopt measures in reaction to foreign activity having effects *within* that State's territory, could be said to limit the application of article XX exceptions for human rights purposes having extraterritorial purposes. (Genocide in a distant third country, for example, does not create a territorial effect in the complaining state, lest through migration of refugees).

On the other hand, it could be argued that the application of international legal notions of *universal jurisdiction* and *universal legal interest* engaged in *jus cogens* and *erga omnes* values,[265] may have stronger implications for a DSM acceptance of trade measures (compatible with article XX exceptions) having an extraterritorial purpose.

4.5 Incorporation of provisions in WTO text allowing for extraterritorial enforcement of human rights through unilateral trade measures

Some NGOs and human rights proponents[266] have called for the incorporation of 'human rights' provisions into the WTO text, availing WTO Members with the option to resort to trade sanctions for means of human rights enforcement, without the possibility of being WTO-illegal.

Such proposals are analogous with the pressure experienced in the last three decades for inclusion of a *social clause* in the WTO text[267] - a concept originally rejected with the demise of the International Trade Organization in the 1940s. The WTO Ministerial declaration

[263] WTO Doc. WT/DS58/AB/R, *op.cit*.

[264] The AB held there was a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of article XX (g).

[265] See Section 4.2.1 of this Chapter.

[266] For example, P. Stirling, 'The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A proposal for Addition to the World Trade Organization', *AM.U.J.Int'l L. & Pol'y*, Vol. 11, 1996.

[267] As early as the 1970s, during the Tokyo Round (1973 –79), the WTO witnessed tentative discussion on labour standards and trade liberalisation.

adopted in Singapore, 1996,[268] stated the Membership's commitment to core labour standards, simply identified the ILO as the appropriate body to set and enforce such standards, dismissing suggestions that the WTO has responsibility in this area. Thereafter, contention between developed and developing countries regarding an overt trade-labour linkage in the WTO text resulted in the absence of labour standards and conditionality from the Doha agenda. US and EU insistence on an explicit trade-labour linkage is perceived by developing countries as an aspiring source of protectionism against their own industries having a competitive advantage due to cheap labour. An implied ambiguity, as a result, perseveres from a human rights perspective: Would the insertion of a social clause facilitate labour standard improvement in developing countries, or would it harm the societal structures and individuals employed in sweatshops or child labour, as a result of hypothetically imposed retaliatory sanctions?

Despite the problems encountered regarding discussion of a social clause, certain human right proponents still propose the insertion of a *human rights* clause into the WTO text. Proposals put forward have included the interpretation of article XX(e) (measures relating to products of prison labour) as a broad human rights exception; the modification of the WTO agreements to add a core list of recognized human rights; and the creation of a specialised human rights body within the WTO framework, with authority to hear human rights related complaints and to impose trade sanctions.[269] However such proposals go beyond the WTO mandate, which does not envisage in any manner jurisdiction over questions of human rights enforcement. To do so would create an overlap of jurisdictions with international human rights institutions and the UN Security Council.

Other suggestions focus on the drafting of a new exception in the WTO text that excludes WTO review of any national measure taken in response to violations of treaty-based or customary human rights.[270] Such proposals, however, raise the same legitimate concerns about protectionist abuse, as did the hypothetical insertion of a social clause.

However, as seen in Section 4.2 of this Chapter, internationally recognized human rights are to be taken into account when interpreting WTO law. To such extent, modification is required of the necessity test in articles XX (a) and XX (b), towards increased

[268] WTO Singapore Ministerial Declaration, WTO Doc. WT/MIN(96)/DEC/W, 13 December 1996.

[269] P. Stirling, 'The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A proposal for Addition to the World Trade Organization', *AM.U.J.Int'l L. & Pol'y*, Vol. 11, 1996, p.1.

[270] F. Garcia, 'Building a Just Trade Order for a New Millenium', *Geo. Wash. Int'l L. Rev.*, Vol. 33, 2001, p. 1060

deference to relevant human rights values. A rights-based interpretation requires that a less trade-restrictive alternative to a given State measure must be equally effective in terms of protecting public morals, human life and health.[271]

Further steps may be necessitated to allow WTO Member States to take trade measures in view of obligations under international human rights treaties. This is due to the expanding agenda of the WTO into areas like investment, government procurement, and possibly essential services, which, as seen in Chapter III, could stifle governments' capacity to protect economic and social rights. WTO Members may thus need to adopt a set of 'guidelines', contributing to a mutual understanding of how certain human rights issues affected by trade liberalisation should be resolved. Such guidelines would assist the DSM in clarifying existing WTO obligations vis-à-vis internationally recognised human rights. Alternatively, the WTO General Council could provide a formal interpretation of article XX and XXI, defining in greater detail the appropriate balance between market access rights under GATT rules and the right of Member States to take unilateral action to protect human rights *within* their jurisdiction. Another alternative could constitute an amendment of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), introducing, for example, new consultation obligations between the WTO adjudicating bodies and UN human rights bodies, when human rights issues arise.[272]

A human rights approach to WTO law, while possibly encapsulating the above-mentioned approaches, however, *does not* and *should not* mean the legalisation of unilateral trade sanctions to enforce human rights *extraterritorially*. The WTO is not institutionally competent to oversee and adjudicate the appropriateness of trade sanctions for human rights purposes. The mandate of the WTO adjudicating bodies is not the interpretation of human rights instruments, nor the provision of a human rights enforcement mechanism. Nor do the adjudicating bodies have the capacity to ensure the applicability and respect of non-derogable human rights and humanitarian law delimiting trade sanctions in international law.

It is correct to argue that the DSM, through the application of article 31(3) VCLT and hence of the ILC Rules of State Responsibility,[273] may eventually recognise the right of States to act extraterritorially in view of enforcing *jus cogens* and *erga omnes* norms. However, it is likewise essential to emphasize the fact that

[271] S. Cleveland (2001), *op.cit.*, pp.255-256
[272] G. Marceau, 'A Call for Coherence in International Law: praises for the Prohibition against 'Clinical Isolation' in WTO Dispute Settlement, Issues and Proposals for Trade and Environment disputes', *JWT*, Vol. 33, No5, 1999, p. 43
[273] *Op.cit.*

international human rights treaties do not recognise the enforcement of human rights through economic sanctions. While multilateral sanctions imposed by the Security Council (acting under its Charter mandate to address threats to international peace and security) act as one of the last resorts to pressurize governments to conform with their UN obligations (including human rights), *unilateral* trade sanctions fail to feature in any international human rights text as justifiable or mandated. It does not make sense to advocate explicit WTO legalisation of trade sanctions for human rights purposes, when such measures remain contentious in terms of effectiveness, many-a-time being counteractive and negatively affecting economic and social rights of people in the sanctioned state.

4.6 Are trade sanctions effective in terms of human rights realization and principles?

It is ironical to note that certain human rights arguments have been put forth in view of incorporating a human rights proviso in the WTO regime, so as to allow for trade sanctions invoking extraterritorial human rights enforcement, when the UN human rights bodies have simultaneously issued several resolutions condemning unilateral coercive sanctions.[274] The UN Sub-Commission on Human Rights, for instance, has categorically spoken against the use of trade sanctions, declaring that sanctions and negative conditionalities that directly or indirectly affect trade, are not appropriate ways of promoting the integration of human rights into international economic policy.[275]

Experience, like that of Iraq, tells of the ability of elites in targeted countries to turn trade sanctions to their own advantage. Such elites benefit from black markets that are created as a result of comprehensive sanctions, and simultaneously exploit the civilian hardship caused by the sanctions as a pretext for eliminating domestic sources of political opposition and for inciting extreme nationalism.[276]

Thus, even multilateral economic sanctions are far from perfect in achieving human rights realisation. How effective, in terms of human rights, were the multilateral economic sanctions imposed on

[274] For example, UN Commission of Human Rights, *Human Rights and unilateral coercive measures*, Draft Resolution, UN ESCOR, 59th Sess, E/CN.4/2003/l.15/rev.1, 11 April 2003 ; and, UN Commission on Human Rights, *Human Rights and unilateral coercive measures*, Res. 2003/47, UN ESCOR, 59th Sess, UN Doc. E/CN.4/2003/47, 16 December 2002.

[275] UN Sub-Commission on the Promotion and Protection of Human Rights, *Trade Liberalization and Human Rights*, Res. 1999/30, UN ESCOR, 51st Sess, UN DocE/CN4/Sub.2/Res/1999/30.

[276] United Nations Department of Public Information, Millenium Report of the Secretary-General of the United Nations, *'We the Peoples': The Role of the United Nations in the 21st Century*, New York, 2000, p.50.

Iraq throughout the 1990s? The share of responsibility for the severe deprivations and widespread pauperisation facing Iraqis today cannot be shrugged away by those countries that sought the imposition of economic sanctions in the first place, in the name of human rights. Despite the proviso for 'humanitarian exemptions', such as the infamous 'oil-for-food' programme in Iraq, the overall economic recession resulting from the sanctions is never really mitigated. The disproportionate impact that sanctions have on the most vulnerable sectors of society leaves to wonder the purpose of such economic sanctions in the face of wide violations of human rights, when the sanctions are instigating further deprivations of ICESCR rights.[277]

The Sub-Commission for the Promotion and Protection of Human Rights notes, 'the efficacy of a sanctions regime is in inverse proportion to its impact on civilians'.[278] The repercussions caused by the long-standing unilateral sanctions against Cuba by the United States, exemplifies this.

> The United States embargo, combined with the pressure on other countries not to do business with Cuba, has hit the citizens of Cuba hard ... As it has no access to nearby United States markets, Cuba is forced to look further afield for sources of imports and for buyers for sugar ... Health and nutrition have been two of the primary victims of the sanctions ... the embargo caused 'malnutrition, poor water quality, and the denial of access to medical equipment and drugs'.[279]

Unilateral comprehensive economic sanctions, as the kind imposed on Cuba, essentially hinder the right to development of people in developing countries, exacerbating a vicious circle of poverty – itself a human rights violation.[280] Furthermore, as the relationship between the sanctioned goods and the targeted conduct becomes less direct, the effectiveness of the sanction is further diluted and diffused,[281] since it fails to address the actual causes of human rights violations, and instead only scratches the surface of much deeper issues. The presumption that trade sanctions will be effective in enforcing human rights is therefore wrong, especially in view of the ontological principle behind human rights, the indivisibility of human rights, and

277 See UN Committee on Economic, Social and Cultural Rights, , *The relationship between economic sanctions and respect for economic, social and cultural rights*, General Comment 8, UN ESCOR, 17th Sess, UN Doc E/C.12/1997/8, 4 December 1997.

278 UN Sub-Commission for the Promotion and Protection of Human Rights, *The adverse consequences of economic sanctions on the enjoyment of human rights*, Working paper prepared by Mr Marc Bossuyt, ESCOR,52nd Sess, UN Doc E/CN.4/Sub.2/2000/33, 21 June 2000, p. 13

279 E/CN.4/Sub.2/2000/33, *op.cit*, p. 23, making reference to American Association of World Health, 'Denial of food and medicines: the impact of the US embargo in health and nutrition in Cuba', (1997).

280 CUTS, 'Human Rights and International Trade: Right Cause with Wrong Intentions', *Briefing Paper*, No 3/2001., 2001, p. 2

281 S. Cleveland, *op.cit*., p.224

the lives of the people that such measures would be negatively effecting.

Indeed, even where economic sanctions are *tailored*, there is the potential of sanctions to backfire. Taking the example of child labour, where import sanctions were imposed on the carpet industry employing child labour in South Asian Countries, children were as a result thrown out of the industry, and ended up working in hazardous situations, as thieves and prostitutes.[282]

4.7 Conclusion

The relevance of universally recognised human rights to trade, and *vice versa*, should not be exploited to the extent of advocating the WTO legality of unilateral human rights enforcement through trade measures. Such an approach is counter-productive to the scope of human rights, as well as incoherent with the mandate of the WTO. A hypothetical proviso in the WTO text, allowing for 'unilateral' trade sanctions for means of human rights enforcement extraterritorially, would contradict the purpose of the human rights movement, which is to lift the problem of enforcement from the level of states (usually having ulterior motives) to that of *competent* international organisations.

It is my thesis that the interconnection between international trade and human rights rather warrants increased co-operation between the human rights institutions and the WTO, in view of developing existing and future trade policies more consistently with human rights. This approach will be expanded on in the following chapter.

5 WTO/UN human rights bodies interrelations a call for cooperation 'for' the common denominator

5.1 Introduction: The common denominator

The State-to-State character of trade liberalisation constitutes the means, and not the end, by which the WTO is to achieve its objectives. As seen in Chapter II, these objectives include the raising of living standards, reaching full employment, and making optimal use of world resources in accordance with the principle of sustainable development. These are ultimately all objectives that are consistent with the objectives of the realisation of international human rights norms.

[282] CUTS (2001), *op.cit.*, p. 5

The commonality that exists between the WTO objectives and, specifically, the economic and social dimension of human rights implies the existence of a common denominator – the individual. The 'individual' constitutes the ultimate subject of any rules-based system. It is for this reason that the universality, inalienability, and indivisibility of human rights should find expression through enhancement of the interconnection between international trade and human rights, focusing primarily on the individual and his freedoms.[283]

5.2 Cooperation, consultation, dialogue

Once it is established that there is a common denominator between the objectives of the WTO and the international human rights bodies, it should likewise be established that dialogue and co-operation should exist between the two regimes:

> The universalization of human rights and WTO law offer mutually beneficial synergies that require increased cooperation between human rights activists, the WTO and the world trade community for the benefit of the citizens and their human rights.[284]

It is indisputable that the periodic review mechanisms of the UN human rights treaty bodies, and their individual complaints' procedures, should be used more often to raise human rights concerns arising from international trade rules and policy.[285] However, these procedures tend to provide a *post facto*, reactive remedy, being resorted to only once WTO trade liberalisation rules are adopted and their implications become apparent.

On the other hand, formalized modes of co-operation and consultation between the two regimes facilitate an *a priori*, constructive approach, ensuring that the adoption of WTO trade rules is done in a coherent manner with the exigencies of realisation of human rights and fundamental freedoms. It also entails a proactive approach that should instigate demand for increased human rights accountability from the WTO and from States when sitting at the WTO negotiating table.

The establishment of formal co-operation, consultation and dialogue between the WTO and the UN human rights fora does not mean the changing of areas of the respective institutional

[283] Freedom from discrimination, freedom from want, freedom from fear, freedom to develop and realize one's human potential, freedom for decent work without exploitation, and freedom of future generations to sustain their lives on earth: See UNDP Human Development Report 2000.

[284] E.U. Petersmann, 'Human Rights and International Economic Law in the 21st Century, The Need to Clarify their Interrelationships', *J. Int. Econ. L.*, 2001, p.4

[285] 3D Associates (2002*), op.cit.*, p. 12

competences, but rather facilitates coherence where human rights and trade rules coincide.[286]

5.3 Does an effective dialogue exist between the WTO and UN human rights bodies?

The Marrakesh Agreement establishing the World Trade Organization states in article V that the 'General Council *shall* make appropriate arrangements for *effective* co-operation with other intergovernmental organisations that have responsibilities related to those of the WTO'.[287] WTO Member States may also, through article XXIII(2) GATT, permit intergovernmental organisations, including the UN Economic and Social Council, into the WTO processes for means of consultation.

Despite these legal provisions, formalized consultation, co-operation and dialogue is lacking between the WTO and the UN Human Rights Bodies, hence engaging the accusation against the WTO of institutional isolationism and insular approach.

Discussions on 'coherence' that do take place within the WTO are limited to the links between the World Bank, the IMF, and the WTO itself, in terms of international economic policy-making.[288] Co-ordination with other international entities, addressing human rights and development issues, is sparse[289] - a fact which contrasts sharply with the system of economic governance envisaged by the Havana Charter,[290] which, *inter alia*, viewed the International Trade Organization *as part of* the UN framework, and the International Labour Organization (ILO) as participating in the decision-making on trade.[291]

> The fact that the ITO never came into being and that GATT existed by default for so long meant that GATT never became a UN specialized

[286] M. Mehra, *Human Rights and the WTO: Time to Take on the Challenge*, (?) p. 4 May be viewed at: http://www.wtowatch.org/library/admin/uploadedfiles/HUMAN_RIGHTS_AND_THE_WTO_TIME_TO_TAKE_ON_THE_C.htm (accessed on June 2003).

[287] Italics added.

[288] C. Dommen (2002*), op.cit.*, p.11 These links were established following the adoption by the WTO Trades Negotiations Committee of the '*Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policy-Making*', 15 December 1993. See http://www.wto.org/english/thewto_e/coher_e/coher_e.htm (accessed on June 2003).

[289] C. Dommen (2003), *op.cit.*, p. 3

[290] See Chapter II, pp. 35 - 36

[291] The ILO has no observer status in any WTO Council, nor does it have any institutionalized coherence links with the WTO, as do the IMF and the World Bank.

> agency. GATT's relationship with the UN was … 'unrigid': it occasionally reported to the UN Economic and Social Council (ECOSOC), but relations were not further formalized. [292]

Only eight international organisations (IGOs) have observer status at the WTO's General Council. These constitute: United Nations (UN); United Nations Conference on Trade and Development (UNCTAD); International Monetary Fund (IMF); World Bank; Food and Agricultural Organization (FAO); World Intellectual Property Organization (WIPO); and, the Organization for Economic Co-operation and Development (OECD).

Although the Office for the High Commissioner for Human Rights (OHCHR), as a secretariat organisation could technically sit in the observer status seat reserved for the UN Secretary-General in the General Council, the UN Secretary-General has never requested the OHCHR to represent him.[293] Otherwise, no UN human rights body has, as yet, applied for observer status in such an important decision-making body.[294]

Certain IGOs have observer status also with specific WTO Councils[295] and Committees.[296] While the United Nations and UN organisations like UNDP, UNEP, UNCTAD, WHO, and FAO have observer status in some of these bodies, or have applied for such status, none of the UN human rights bodies has as yet applied for or enjoyed observer status - despite obvious human rights implications arising from many issues discussed and negotiated within these WTO Councils and Committees.[297]

Relations between the WTO and the UN Human Rights Bodies have experienced cold periods. In 2000, for example, the report on

[292] C. Dommen (2002), *op.cit.*, p.10 In 1952, an exchange of letters between the then Executive Secretary of GATT and the UN Secretary-General, established that there was no need for a formal agreement between the GATT Members and the Economic and Social Council relating to the work of GATT. (Attached to UN.Doc. E/5476/Add.12, 24 May 1974) - See UN General Assembly Doc. A/AC.179/5, 9 March 1976. While this exchange of letters defined the relationship between GATT and the UN, GATT was never formally recognised as a specialised agency. When the WTO was established in 1995, it was still not recognised as a specialised agency. However, the WTO Secretary-General or his deputy participates in all ECOSOC meetings and in meetings of other UN organs, together with representatives of UN specialised agencies. However, the WTO does not submit annual reports and the UN does not issue recommendations to the WTO organs. The relationship is not formalized. – B. Simma *et al* (eds.) *op.cit.*, p. 947-948 The UN and the WTO also collaborate through the joint subsidiary organ of the WTO and UNCTAD – the International Trade Centre UNCTAD/WTO.

[293] Interview by the author of this dissertation with one of the staff of the Office of the High Commissioner for Human Rights (OHCHR), Geneva.

[294] Verified through correspondence by author of this dissertation with staff from External Relations, World Trade Organisation. (June 2003)

[295] For example, the Council for TRIPs, the Council for Trade in Services (CTS), the Council for Trade in Goods (CTG).

[296] For example, the Committee on Trade and Development (CTD). Having observer status in one ambit does not in itself allow participation as observers in any other WTO body.

globalisation and human rights by two members of the UN Sub-commission for the Promotion and Protection of Human Rights[298] caused tense exchanges of letters between the WTO and the OHCHR, due to its having referred to the WTO as being a 'veritable nightmare' for developing countries.[299] However, since the adoption of the Doha Development Agenda[300] in 2001, the landscape for relations between the two entities has ameliorated.[301]

Increased awareness of the need to insert a human rights perspective into trade negotiations resulted in a slow-developing, but consistent informal relationship between the UN Human Rights Bodies and the WTO Secretariat. The OHCHR has informal but cordial contacts with the WTO Secretariat, whereby the WTO Secretariat gives feedback on draft reports to the OHCHR. Co-operation between the two institutions has been witnessed especially in view of the OHCHR's work in drawing up reports on the implications of WTO policies on human rights.[302] Special Rapporteurs of the UN Commission on Human Rights have sought to engage in visits to the WTO, in view of apprehending the context of WTO rules and their implications on the specific right being reported on.[303] Staff of the WTO Secretariat also attend and participate in meetings of the Sub-Commission for the Protection and Promotion of Human Rights, as well as in Days of Discussion of treaty bodies, and in certain working groups, such as the one on the right to development.

297 The Sub-Commission for the Protection and Promotion of Human Rights has been encouraging the request of observer status by the High Commissioner with the WTO Council for Trade in Services and the Council for TRIPs. See UN Sub-Commission for the Promotion and Protection of Human Rights, *Human Rights, Trade and Investment*, Resolution 2002/11, 14 August 2002.

298 E/CN.4/Sub.2/2000/13, *op.cit*.

299 C. Dommen, *No Sell-Out on Trade in the Human Rights Commission*, April 2003: http://.208.55.16.210/Trade-Human-Rights-Commission.htm (accessed June 2003).

300 Doha Declaration and Work Programme, *op.cit*.

301 C. Ochoa, 'Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse', B. C. Third World L. J., Vol. 23 (1), 2003

302 E/CN.4/Sub.2/2001/13, *op.cit.*; E/CN.4/2002/54 *op.cit.*; E/CN.4/Sub.2/2002/9 *op.cit*. (See Chapter I of dissertation, pp. 34-35)

303 For example, in July 2003, the Special Rapporteur on the right to health, Mr Paul Hunt, is expected to visit the WTO Secretariat, with a view to monitor and examine trade rules and policies as they concern the right to health.

This notwithstanding, the general perception is that the WTO seems to view correspondence with international human rights bodies through a 'public relations' lens.[304] The WTO (Secretariat) is perceived to respond to queries of human rights bodies in view of quieting pressure from civil society and human rights advocates. More formalized links with the UN Human Rights bodies are looked upon by WTO Members as undesirable, since they fear that improved links would entail a dilution of the WTO's focus on international trade and the introduction of political issues into the Organisation's regime.[305]

The latter is reflected in the non-involvement of the WTO in UN human rights and socio-economic initiatives like the UN Global Compact.[306] This, despite the strong influence that corporations have in the WTO and the subordination of public interest values and human rights to business interests in several of the WTO's policies. The fact that the WTO does not feature in the Global Compact, alongside the ILO, the United Nations Environmental Programme, and the UN High Commissioner for Human Rights, hence needs to be addressed. The objective of dialogue between businesses, civil society and these agencies concerning labour, environmental protection and human rights, would have been more effectively realised if the world of trade had been officially included.

5.4 Calls for more effective dialogue and cooperation between the WTO and the UN human rights bodies

The importance of co-operation and dialogue between the WTO and the UN Human Rights bodies has become even more apparent after the success of the U.S. – Brazil patent law dispute.[307] The dispute concerned a US challenge in front of the DSM of a Brazilian patent law, allowing for the issuing of compulsory licenses for the production of

[304] Interview by the author of this dissertation with one of the staff of the Office of the High Commissioner for Human Rights (OHCHR), Geneva. The same perception has been adopted with regards to NGOs. The WTO is the only intergovernmental organisation that has no formal arrangement with NGOs. Informal and ad hoc co-operation with NGOs is preferred by the WTO to institutionalised participation. Article V.2 Marrakesh Agreement, states that the General Council may make appropriate arrangement for consultation and co-operation with NGOs. Following the adoption of the WTO Guidelines for Arrangement on Relations with Non-Governmental Organisations (WT/L/162, 23 July 1996), the Secretariat created a NGO unit within its External Relations Division, as well as an annual symposium for NGOs on WTO-related issues. However, NGOs have perceived the NGO symposia as a public relations tactic, rather than a coherent attempt by the WTO to address WTO issues of public concern. Furthermore, accreditation of NGOs to WTO Ministerial Conferences has been overwhelmingly biased towards business initiated NGOs, and not human rights NGOs. (See Dommen (2002), *op.cit.*, p.8)

[305] Dommen (2002), *op.cit.*, p. 10

[306] The UN Global Compact (launched July 2000). See UN Website: http://www.unglobalcompact.org

[307] *Brazil - Measures Affecting Patent Protection*, Request for the Establishment of a Panel by the United States, WT/DS199/3, 9 January 2001.

affordable drugs for the treatment of AIDS, as TRIPS incompatible. The resort by the Brazilian ministry of health to take up a co-ordinated strategy in bringing the issue to the attention of the UN Commission on Human Rights, the World Health Organisation (WHO) and the WTO led to the settlement of the case. This co-ordinated strategy resulted in increased co-ordination and dialogue between trade officials and governmental and non-governmental non-trade actors in the different international fora in view of the issue of TRIPS and health.[308] The latter, together with pressure from civil society and developing countries, resulted in the significant adoption of the Declaration on TRIPS and Public Health at the Doha Ministerial in 2001, 'an outcome that was almost unimaginable a few months prior to Doha'.[309] Co-operation between the WHO and the WTO also led to a joint study being issued in summer 2002 on public health and trade,[310] which contributed to contemporary discussions and negotiations on the said issue in the TRIPS Council.

This case constitutes a reflection of the fact that the WTO's *raison d'etre* today is not simply avoiding arbitrariness, protectionism and discrimination in international trade of goods.[311] This was seen in Chapters II and III. Its remit has expanded to sectors like intellectual property, agriculture, environment, services, and it seems it might expand further into investment, government procurement, trade facilitation and competition policy. These developments *alone* warrant co-operation and dialogue with UN human rights bodies, especially due to human rights implications engaged through liberalisation in these sectors. Warrant for dialogue and co-operation derives further from recognition that 'the realm of trade, finance and investment are in no way exempt from human rights obligations and principles, and that international organisations in those areas should play a positive and constructive role to human rights'.[312]

The latter was declared by the Committee on Economic, Social and Cultural Rights (CECSR), calling on the WTO, as one of the prime contributors to global governance reform, to ensure that such reform

[308] See: 3D Associates (2002), *op.cit*. International awareness about the issue was also instigated through a number of Resolutions and Declarations adopted at special sessions of the United Nations General Assembly, (June 2001), the UN Economic and Social Council, the World Health Assembly (20 May 2000), and other international for a, which insisted on co-ordinated international action particularly in the context of public health and the implementation of trade agreements. – See N.B., Zafari, Access to Medicine for All: A Major Human Rights Issue, *ICTSD Bridges*, Year 6, No 5, June 2002.

[309] 3D Associates (2002), *op.cit.*, pp.6 - 7

[310] UN Non-Governmental Liaison Service (NGLS), *Go Between (News Letter)*, No 93 August-September 2002, UN Update http://www.unsystem.org/ngls/documents/text/go.between/gb93c.htm (accessed on June 2003).

[311] C. Dommen (2001), *op.cit*.

[312] *Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization*, UN Doc. E/C.12/1999/9, 26 November 1999.

is driven by a concern for the *individual* and *not* by purely macroeconomic considerations alone. The CESCR has held that it would welcome the opportunity to collaborate with the WTO, thereby being active partners towards realisation of all the rights in the International Covenant on Economic, Social and Cultural Rights.[313]

Other UN human rights fora, including the Sub-Commission for the Promotion and Protection of Human Rights, have similarly called for co-operation and dialogue with the WTO in a number of reports and resolutions.[314] In turn, in view of increased coherence between trade-policy making and human rights, the UN High Commissioner for Human Rights has encouraged greater consultation between national delegates to the WTO, and delegates representing the same country as members or observers in the Commission on Human Rights.[315]

The provision of the High Commissioner's reports on human rights analysis of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS);[316] the WTO Agreement on Agriculture[317]; and liberalisation of trade in services,[318] to the WTO in June/July 2003, should mark a significant step in terms of co-operation. It is hoped that such reports will positively contribute to discussions at the 5th Ministerial Conference to be held in Cancun, Mexico, in September 2003, especially in terms of the human rights approach to international trade which they advocate. The Cancun Ministerial will also be witnessing for the first time the presentation of a submission by the Office of the High Commissioner for Human Rights.[319] The Sub-Commission on the Promotion and Protection of Human Rights is also to present a comprehensive submission on human rights, trade and investment.[320]

5.5 Proposals towards improved coherence between international trade and human rights

More formalized modes of co-operation and consultation between the human rights and WTO regimes are required in view of ascertaining an

313 *Ibid*.
314 See Sub-Commission for the Protection and Promotion of Human Rights, , *Trade Liberalization and Human Rights*, Resolution 1999/30, UN ESCOR, 51st Sess, UN Doc E/CN4/Sub.2/Res/1999/30. Also: Sub-Commission on the Promotion and Protection of Human Rights, *Globalization and its impact on the full enjoyment of all human rights*, Resolution 2001/5, 15 August 2001.
315 E/CN.4/Sub.2/2002/9, *op.cit.*, p. 5
316 E/CN.4/Sub.2/2001/13, *op.cit*.
317 E/CN.4/2002/54, *op.cit*.
318 E/CN.4/Sub.2/2002/9, *op.cit*.
319 Interview held by author of dissertation one of the staff, UN Office of the High Commissioner for Human Rights.
320 C. Raghavan, 'WTO must consider human rights implications of GATS', *TWN*, August 2002: http://www.twnside.org.sg/title /twe287b.htm (accessed on June 2003).

effective and co-ordinated human rights approach to international trade. This section puts forth a few proposals towards this end.

The same governments

The classical reaction to the negative implications of certain WTO policies, such as the TRIPS and the GATS, on human rights is to state the fact that it is the same governments whose representatives act in the WTO and in the international human rights bodies, simultaneously. This reflects a reality where ministries within the same governments are incoherent and uncoordinated. The strong influence of commercial interests and economic considerations in one ministry fails to tally with public interest concerns expressed through other ministries.

However, this does not in anyway diminish the legal concept that:

> States which are parties to human rights covenants have obligations to ensure that the policies which they formulate and the agreements they enter into, in other international fora, are in keeping with their human rights obligations.[321]

There is thus strong need for UN Human Rights bodies to raise human rights issues that are trade related with WTO delegates and ministry officials. Furthermore, NGOs concerned with human rights and social justice ought to work at pressing for enhanced links between domestic trade and human rights officials.[322] In turn, current developments in the field of corporate social responsibility[323] are also paramount in gearing companies and industry representatives to direct their existent influences in national and international trade policy formulation more favourably towards human rights observance.

Recognition of human rights in text

R Normand[324] adds to the internationally recognised typology of human rights duties to respect, protect and fulfil rights, the duty to *recognise* human rights. The duty to *recognise* does not only impose an obligation on states to ratify human rights treaties, but also imposes an obligation on non-state actors, like the WTO, to accept human rights responsibilities.

[321] Hoe Lim (2001), *op.cit.*, p. 280. This has been repeatedly emphasized in Resolutions adopted by the UN Commission on Human Rights and the Sub-Commission for the Protection and Promotion of Human Rights. See for example: Commission Resolutions 2003/23 of 22 April 2003, 2002/28 of 22 April 2002, 2001/32 of 23 April 2001, and Sub-Commission Resolutions 2000/7 of 17 August 2000, 2001/21 of 16 August 2001, 2001/4 of 15 August 2001, and 2002/11of 14 August 2002.

[322] Dommen (2001), *op.cit.*, p.3

[323] See *UN Global Compact Website*: http://www.unglobalcompact.org and *Business for Social Responsibility Website*: http://www.bsr.org/ (accessed on June 2003).

[324] R. Normand (2000), *op.cit.*, p. 5

It is my view that recognition of human rights is warranted in the trade arena, especially due to the implications that trade policies have on economic and social rights and the individual. Formal recognition of human rights should thus be made in the WTO text. Human rights could be included as one of the preambular end objectives of the organisation.[325] Commitment to internationally recognised human rights could otherwise feature in a statement in the Preamble to the WTO text, effectively constituting recognition by the World Trade Organization of the international obligations of its Member States to promote and protect human rights.

The formal recognition of obligations under international human rights law in this manner would facilitate institutional efforts at ensuring coherence between international trade rules adopted by WTO Member States and international human rights norms. It would also emphasize the exigency that international trade rules ought to contribute to a system of governance, both internationally and nationally, which is conducive to human rights realisation. Finally, the formal recognition of international human rights in the WTO text would ensure that the interpretation of WTO law by the WTO adjudicating bodies is consistent with international human rights law.

Away from 'exceptions' approach

The current WTO 'exceptions' approach towards non-trade issues has meant ad-hoc developments vis-à-vis acknowledgement of public interest concerns in decisions by the WTO adjudicating bodies.[326] The 'exceptions approach' implies negative applicability of public interest values to international trade rules. Listing human rights as an additional exception in article XX or XXI GATT would engage a similar ad hoc approach. It would also encourage perceptions that human rights and international trade constitute separate issues with a degree of overlap suggesting only conflict between the two regimes.

For these reasons, internationally recognised human rights should not entail an '*exception*' to WTO trade rules. On the contrary, international trade rules should be complementary to international human rights norms. Ensuing from the complementarity between the objectives of the WTO regime and the objectives of human rights realisation (and the common denominator – the individual) a consistent human rights approach ought to be applied to the adoption and interpretation of international trade rules.

Human rights impact assessment

The High Commissioner for Human Rights, whilst advocating a human rights approach to trade law and policy, has many-a-time encouraged

[325] M. Mehra (n 29 above) 5.
[326] See Chapter II of Dissertation, pp.44-49.

the WTO to institutionalise human rights impact assessments of its rules.[327] The aim of a human rights impact assessment of trade liberalisation rules is to avoid the implementation of any retrogressive measure that reduces the enjoyment of human rights. To such extent, a human rights assessment of WTO law and policies should be undertaken prior to negotiations, during the negotiation period, and after negotiations when a WTO rule/ policy is adopted.

Assessments could be carried out by gauging trade policies on a set of outcomes according to specific human rights, such as the right to food security, the right to work, the right to an adequate standard of living or the right to education.[328] These assessments could also be employed vis-à-vis the right to development, focusing on the effects of current and proposed WTO trade rules on human development, especially in developing countries. The latter would also facilitate better indication of the exigencies for technical assistance, phased implementation and greater market access.[329]

The WTO Trade Policy Review Mechanism could conduct such human rights impact assessments. However, it would need to provide for the participation of human rights experts in the assessment process, availing of material sourced by the UN human rights bodies, the UNDP and civil society, and not simply information forwarded by the Member States, as is currently the practice of the TPRM.

Otherwise, the conduct of such assessments could be carried out by a designated body, paralleling the practice of the International Confederation of Free Trade Unions (ICFTU). The ICFTU currently prepares reports for core labour standards in each country being reviewed by the WTO Trade Policy Review Mechanism, and distributes the latter to WTO delegations and the Secretariat.[330]

Guidelines, linking WTO activities to human rights obligations

Both the UN Development Programme (UNDP)[331] and the World Bank[332] have adopted guidelines, linking their activities to human rights obligations. Likewise, the WTO should adopt a set of guidelines, linking its activities to human rights principles and establishing

327 E/CN.4/2002/54, E/CN.4/Sub.2/2002/9, and, E/CN.4/Sub.2/2001/13, *op.cit*.
328 E/CN.4/Sub.2/2002/9, *op.cit*., p. 11
329 UNDP et. al. (2003), *op.cit*., p.68
330 C. Dommen, 'Raising human rights concerns in the World Trade Organization – actors, processes and possible strategies', *H.R.Q.*, Vol. 24, 2002, p. 32
331 In 1998, the United Nations Development Programme (UNDP) adopted a policy on human rights and Sustainable Human Development (SHD). That same year, the UNDP adopted a Memorandum of Understanding with the OHCHR, defining areas and modalities of co-operation between the two entities for human rights. The HURIST (Human Rights Strengthening) joint programme, adopted in 1999, aims at strengthening national capacities in human rights protection.
332 The World Bank, *Development and Human Rights: The Role of the World Bank*, Washington, 1998, See http://www.worldbank.org/html/extdr/rights/hrtext.pdf (accessed on June 2003).

greater clarity about the interpretation of trade liberalisation rules vis-à-vis international human rights obligations. As suggested in Chapter IV, such guidelines may be of assistance to Dispute Settlement Panels, when, and if, conflict arises between international human rights law and WTO law.

The Dispute Settlement Mechanism (DSM) and consultation with human rights experts

The fact that the DSM consists of trade experts without the benefit of expertise from human rights panellists gives further reason for advocacy of increased cooperation and consultation between experts of the two regimes.[333] While article 13 of the DSU establishes a mechanism by which dispute panels may seek expert advice on international principles beyond WTO expertise, reference to human rights bodies has been non-existent. The WTO adjudicating bodies have employed the expert review mechanism in disputes implicating intellectual property questions, scientific evidence and health.[334]

The Appellate Body's interpretation of WTO law, in the Shrimp-Turtles dispute[335], permitting the submission of *amicus* briefs by non-governmental organisations and entities with expertise at both the panel and appellate levels of the WTO dispute settlement, constituted an encouraging development.[336] Human Rights bodies, including the UN Commission on Human Rights, should facilitate of such *amicus* intervention in WTO proceedings with human rights implications. This would allow for further co-operation among the international bodies.[337]

Co-operation agreements

The WTO Secretariat has entered into co-operation agreements with certain intergovernmental organisations (IGOs), such as IMF, World Bank, WIPO and the International Organization for Standardization, most of which on a very technical level.

It would be appropriate for such co-operation agreements to be drawn between the WTO and the UN OHCHR, or UN human rights treaty bodies, in view of consultation on issues being negotiated or

[333] Such advocacy also finds legitimacy through the recognition by the WTO adjudicating bodies that the WTO DSM must not interpret international law in clinical isolation. See Chapter IV, pp.81-82

[334] See United States-Section 110(5) of the US Copyright Act, Dispute Panel Report, WT/DS160/R, 15 June 2000, where the Panel requested advice from the World Intellectual Property Organisation (WIPO). The Asbestos Case also witnessed the panel asking the World Health Organisation (WHO) advice (see: European Communities- Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, WT/DS135/AB/R, 5 April 2001).

[335] WTO Doc. WT/DS58/AB/R, *op.cit*.

[336] R. Howse & M. Mutua (2000), *op.cit.*, p. 9

[337] As suggested in Chapter IV, it may be required to make an amendment to the DSU, introducing new consultation obligations between the WTO adjudicating bodies and the UN human rights bodies, when human rights issues arise.

laws implemented at the WTO level, which have human rights implications.

Human Rights Liaison Office

A final option could entail establishing a human rights office at the WTO.[338] This office could be staffed by representatives from the OHCHR, engaged primarily in ensuring a human rights approach to international trade. The office could facilitate relations between the WTO and UN Human Rights bodies, as well as make provision for human rights expertise to the TPRM for the proposed human rights impact assessments, and to the DSM, when trade rules have human rights implications in a dispute.

5.6 Conclusion

This chapter has constituted an attempt to demonstrate that the interconnection between international trade and human rights can be best exploited if the two international regimes governing these two areas give solid recognition of such interconnectedness through formal steps towards co-operation, consultation and dialogue. Such steps would reflect commitment by States and the two regimes to enhance international economic policy that contributes especially to the realisation of economic, social and cultural rights. The cornerstone upon which such steps should be founded *is* the individual and his well-being.

6 Conclusion

Full cognizance of the relationship between the international trade regime and the international human rights norms is essential in view of the positive role such cognizance could play in ensuring that WTO policy formulation and implementation are coherent with, and conducive to, human rights realisation.

The WTO regime may be said to have been a source of economic freedom, contributing to the liberal ideas of individual liberties. This is due to the regime's provision of a rules-based multilateral framework for international trade, based on the liberalisation of international trade, the elimination of discriminatory treatment in international trade relations, and the settlement of trade disputes through the rule of law.

[338] P. Stirling (1996), *op.cit*. Stirling's proposal for a WTO human rights office is aimed at engaging human rights enforcement through the WTO. This differs from the proposal put forth in this dissertation, which is based on the premise of co-operation and a human rights approach to international trade policy-formulation and analysis.

However, these principles ought to be consistently directed towards the realisation of the social and economic objectives established in the Preamble to the Marrakesh Agreement establishing the WTO. The objectives of raising living standards, ensuring full employment, and allowing for the optimal use of the world's resources in accordance with the principle of sustainable development, need to be placed at the forefront of any decision taken at the WTO level.

Chapters 1 and 2 demonstrate that these objectives correspond with the objectives of economic and social stability set forth in the UN Charter, which is the source of the international system for the promotion and protection of human rights. In turn, they correspond with a significant number of provisions in the International Bill of Human Rights, most notably the International Covenant of Economic, Social and Cultural Rights.

This notwithstanding, the implementation of certain WTO rules, including the TRIPS regime, the GATS Agreement, as well as the Agreement on Agriculture, have had, and continue to have, implications on human rights, especially economic, social and cultural rights, as well as the right to development. As concluded in Chapter III, there is need for international trade rules to allow for governments to take affirmative action to protect human rights effectively in all sectors, including, *inter alia*, health systems, education, water supply, and food security. This is required in the light of human rights exigencies that demand accountability of States and also of international organisations, like the WTO.

The question is how international trade rules having human rights implications should be approached. This dissertation establishes that a human rights approach to international trade is called for – a stand that has been adopted by the main UN human rights bodies, as seen throughout this text.

A human rights approach, however, does not, and should not, entail the insertion of a proviso in the WTO text or for measures within the WTO remit, allowing for the imposition of unilateral trade sanctions for means of extraterritorial enforcement of human rights. As seen in Chapter IV, this does not fall within the mandate of the WTO. Furthermore, the raising of human rights in the international trade context to allow for the imposition of unilateral trade sanctions on countries with weak human rights records, constitutes an approach, which is ultimately counter-productive to the very scope of human rights. This is especially due to their dismissal of the indivisibility of human rights, often seriously and negatively affecting economic and social rights of citizens.

On the contrary, a human rights approach to international trade advocates the recognition of the interconnection between

international trade and human rights, by the regimes governing these two international areas. It further requires co-operation between the WTO and the UN human rights bodies in view of ensuring that negotiation and implementation of WTO law and policy ultimately contribute to an international economic and legal environment that enhances, and not inhibits, affirmative action towards the realisation of human rights. To such extent, the undertaking of formalised steps towards co-operation and consultation between the WTO and the UN Human Rights Bodies, as proposed in the last chapter of this dissertation, would entail a positive development in view of exploiting best the interconnection between international trade and human rights. Such an undertaking would emphasize the centrality of the individual as the ultimate subject of any decision taken at the level of the international trade regime.

Annex

The WTO Agreement:[339]

The WTO Agreement constitutes a single undertaking – a package of agreements, declarations, decisions, and understandings, which together define the obligations pertaining to WTO members.

> Single Undertaking
>
> In the Uruguay Round (1986-94) participants agreed on a "single undertaking" approach. Each country signed on, with a single signature, to all the agreements (except for a handful of "plurilateral" agreements).

Among these agreements, are those which today constitute the three 'main pillars' of the WTO:[340] trade in goods, trade in services and intellectual property. These are the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). A list of some of the main texts may be seen below (produced in alphabetical order):

- Agreement Establishing the WTO (Marrakesh Agreement)
- Agreement on Agriculture (AoA)
- Agreement on Implementation of article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping)
- Agreement on Rules of Origin
- Agreement on Safeguards
- Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)
- Agreement on Subsidies and Countervailing Measures
- Agreement on Technical Barriers to Trade (TBT Agreement)
- Agreement on Textiles and Clothing (ATC)
- Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)
- Agreement on Trade-related Investment Measures (TRIMS)
- General Agreement on Tariffs and Trade 1994 (GATT)
- General Agreement on Trade in Services (GATS)
- Trade Policy Review Mechanism

339 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, *reprinted in* 33 I.L.M. 1144 (1994)

340 3D Associates (2001) *Report of the In-Depth Study Session on the WTO for Human Rights Professionals*, Morges, 27-28 July 2001, p.2

- Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, DSU)
- Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade
- Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking
- Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net – Food Importing Developing Countries

Plurilateral Agreements (not part of single undertaking)

- Agreement on Government Procurement
- Agreement on Trade in Civil Aircraft

(For a full list of all the WTO Agreements and Decisions, you may consult http://www.wto.org/englihs/docs_e/legal_e/final_e.htm)

The 1994 Marrakesh Agreement also sets out the WTO's main functions as an organisation. In brief, these entail: the facilitation of implementation, administration and operation of the WTO Agreements; the provision of a forum for further multilateral trade negotiations; and the administration of the Dispute Settlement Mechanism and the Trade Policy Review Mechanism.

The WTO as an International Organisation:

Essentially, the WTO is a 'member-driven' organisation. In the WTO, States retain full control of the decision-making and finance of the organisation.

The Ministerial Conference is the Organisation's highest decision-making body, having power to act on all matters under any of the multilateral trade agreements, ultimately making all final decisions. The Ministerial Conference is held every two years, and since the WTO came into operation in 1995, there have been four of such Conferences. These were held in *Singapore* (December 1996), *Geneva* (May 1998), *Seattle* (Nov-Dec 1999) and *Doha* (November 2001). The next WTO Ministerial Conference is to be held this year's in September 2003, in *Cancun*.

The General Council, attended by senior representatives of member countries, is responsible for overseeing the WTO's day-to-day business and management, and takes decisions on such everyday issues. The General Council meets on average twelve times a year.

The WTO, as an organisation also encapsulates a number of committees and councils, attended by technical specialists and officials, and which deal with specific issues, including environment, investment, sanitary and phytosanitary measures, and so forth. The member-driven nature of the WTO means that all members can participate in all of such Councils and Committees.

The Secretariat:

The function of the Secretariat, situated in Geneva, is not to make policy or take decisions, but rather to facilitate and apply the rules compounded and decided by the States through consensus. Thus, due to the WTO's member-driven nature, the secretariat has no supranational powers, and cannot propose new initiatives or policies or elaborate on existing ones. Rather, the Secretariat's role 'is to service members' needs in the implementation of the WTO Agreement, mainly through providing technical and logistical support, including organising meetings of Committees and Councils and preparing the background documentation.'[341]

The Dispute Settlement Mechanism:

The Dispute Settlement Mechanism, emanating from the Uruguay Round, is binding on all WTO members and applies to the whole of the WTO Agreement. The DSM is clearly judicial in nature, based on rules and procedures emancipated in the legal text, the Dispute Settlement Understanding (DSU), which forms an integral part of the WTO Agreement. Article 23 of the DSU specifies that any alleged violation of a WTO rule must be taken to the WTO, and not any other judicial tribunal. Additionally, the DSM can only rule on whether a specific measure undertaken by a WTO Member is a violation of WTO provisions in the specific case before it. It cannot issue general rules or make pronouncements as to whether *other* international legal norms have been infringed.[342] Furthermore, the DSM cannot 'add or diminish' the obligations of Members under the WTO.

Only a Member State can bring a dispute to the DSM, and it does so when it maintains that another Member is violating the WTO Agreement and rules therein. The dispute is ruled upon its WTO-consistency by a dispute settlement Panel. If the decision is appealed, a final ruling is made by the Appellate Body. Both Panel and Appellate Body are composed of independent legal experts. When a Member

[341] C. Dommen, 'The WTO Today', 2002 (*Draft forthcoming in*: C. Dommen (2004) *Trading Rights? Human Rights and the World Trade Organisation*, London: Zed Books), p.12

[342] 3D Associates (2002) *Report of the In-Depth Study Session on the World Trade Organisation for Human Rights Professionals*, Chexbres, 1-2 February 2002, p.5

does not comply with a dispute settlement ruling, the DSM allows for the imposition of trade sanctions by the complaining party. The latter is termed in WTO language as 'compensation and suspension of concessions' and is the main means of enforcement characterising the DSM. The DSM rulings, due to their binding and judicial nature, are the only part within the WTO framework which constitute a divergence from the member-driven characteristic of the organisation.

Reference was mainly made to **C. Dommen, 'The WTO Today', 2002 (Draft forthcoming in: C. Dommen (2004) Trading Rights? Human Rights and the World Trade Organisation, London: Zed Books),** in view of compilation of this Annex.

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http://www.icstd.org – Official Website of the International Centre for Trade and Sustainable Development

http://www.unglobalcompact.org - UN Global Compact Website

http://www.bsr.org/ - Business for Social Responsibility Website

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- General Agreement on Trade in Services (1994)
- Agreement on Government Procurement (1994)
- Understanding on Rules and Procedures Governing the Settlement of Disputes (1994)
- Understanding in Respect of Waivers of Obligations under the GATT (1994)
- Trade Policy Review Mechanism (1994)
- Singapore Ministerial Declaration (1996)
- Doha Ministerial Declaration and Work Programme (2001)
- Doha Declaration on TRIPS and Health (2001)

List of abbreviations

AB – *Appellate Body*

AoA - *Agreement on Agriculture*

CESCR – *Committee for Economic, Social and Cultural Rights*

CTD - *Committee on Trade and Development*

Doha Declaration – *Doha Ministerial Declaration (adopted 14 November 2001)*

Doha Work Programme – *Work Programme attached to the Doha Ministerial Declaration (2001)*

Doha Development Agenda - *Work Programme attached to the Doha Ministerial Declaration (2001)*

DSB – *Dispute Settlement Body*

DSM – *Dispute Settlement Mechanism*

DSU – *Understanding on Rules and Procedures Governing the Settlement of*

Disputes

EC – *European Community*

EU – *European Union*

FAO – *Food and Agricultural Organization*

GATS - *General Agreement on Trade in Services*

GATT – *General Agreement on Tariffs and Trade*

GATT 1994 – *The General Agreement on Tariffs and Trade, as incorporated into the WTO Agreement in 1994.*

GPA – *Agreement on Government Procurement*

GSP - *Generalised System of Preferences*

ICJ – *International Court of Justice*

ICCPR – *International Covenant on Civil and Political Rights*

ICESCR – *International Covenant on Economic, Social and Cultural Rights*

IGO – *Intergovernmental Organisation*

IMF – *International Monetary Fund*

IPRs – *Intellectual Property Rights*

ILC – *International Law Commission*

ILO – *International Labour Organisation*

ITO – *International Trade Organization*

LDCs – *Least Developed Countries*

Marrakesh Agreement – *Agreement establishing the World Trade Organisation*

MFN – *Most Favoured Nation (Treatment)*

MNCs – *Multinational Corporations*

NGOs – *Non-Governmental Organisations*

OECD - *Organization for Economic Co-operation and Development*

OHCHR – *United Nations Office of the High Commissioner for Human Rights*

PPMs - *Process and Production Methods.*

R&D – *Research and Development*

S&DT – *Special and Differential Treatment*

SPS – *Sanitary and Phyto-Sanitary*

TNCs- *Trans-national Corporations*

TPRM – *Trade Policy Review Mechanism*

TRIMS- *Agreement on Trade-Related Investment Measures*

TRIPS – *Agreement on Trade-Related Aspects of Intellectual Property Rights*

UDHR – *Universal Declaration of Human Rights*

UN – *United Nations*

UNCTAD – *United Nations Conference on Trade and Development*

UNDP – *United Nations Development Programme*

UNEP – *United Nations Environment Programme*

VCLT – *Vienna Convention on the Law of Treaties*

WCA – *West and Central African Countries*

WHO – *World Health Organisation*

WTO – *World Trade Organisation*

WTO Preamble – *Preamble to the Marrakesh Agreement establishing the World Trade Organisation*

ABBREVIATIONS (JOURNAL TITLES)

A.J.I.L. – *American Journal of International Law*

AM.U.J.Int'l L. & Pol'y – *American University Journal of International Law & Policy*

B.C. Int'l &Comp. L. Rev. – *Boston College International & Comparative Law Review*

B.C. Third World L.J. - *Boston College Third World Law Journal*

Brooklyn J Int'l L - *Brooklyn Journal of International Law*

EJIL – *European Journal of International Law*

H.R.Q. - *Human Rights Quarterly*

Geo. Wash. Int'l L. Rev –*The George Washington International Law Review*

J.Int.Econ. Law – *Journal of International Economic Law*

JWT – *Journal of World Trade*

Intereconomics - *Intereconomics Review of European Economic Policy*

Minn. J. Global Trade - *Minnesotta Journal of Global Trade*

Riv.Dir.Int.Priv.Proc. - *Rivista di diritto internazionale privato e processuale*

OTHER ABBREVIATIONS

CUTS - *Centre for International Economics & Environment*

ICTSD- *International Centre for Trade and Sustainable Development*

TWN – *Third World Network*