EXPANDING THE HORIZONS OF HUMAN RIGHTS LAW

THE RAOUL WALLENBERG INSTITUTE
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EXPANDING THE HORIZONS OF HUMAN RIGHTS LAW

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INTRODUCTION

By resolution 49/184 of 23 December 1994, the General Assembly of the United Nations proclaimed a Decade on Human Rights Education, commencing on 1 January 1995. The Decade and its accompanying Plan of Action are thoroughly rooted in a series of human rights instruments.[*]

A classical formulation of human rights education is contained in Article 26(2) of the *Universal Declaration of Human Rights* (UDHR):

> "Education shall be directed to . . . the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups and shall further the activities of the United Nations for the maintenance of peace."

Article 13(1) of the 1966 *International Covenant on Economic, Social and Cultural Rights* contains a similar formulation, adding references to human dignity, participation in a free society, and ethnic groups.

Under Article 7 of the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination,*

> "States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups . . ."

The 1978 UNESCO *Declaration on Race and Racial Prejudice* has detailed provisions about human rights education. It is stated in Article 5(2) that

> "States as well as all other competent authorities and the entire teaching profession, have a responsibility to see that the educational resources of all countries are used to combat racism, more especially
>
> - by ensuring that curricula and textbooks include scientific and ethical considerations concerning human unity and diversity; . . .
>
> - and by taking appropriate steps to remedy the handicaps from which certain racial or ethnic groups suffer with regard to their level of education and standard of living and in particular to prevent such handicaps from being passed on to children."

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[*] For detailed discussion of the right to human rights education, see G. Alfredsson, "The Rights to Human Rights Education", in A. Eide, C. Krause and A. Rosas (eds.) *Economic, Social and Cultural Rights. A Textbook*. 2nd rev. ed. (Dordrecht: Martinus Nijhoff Publishers; Finish and Norwegian Institutes of Human Rights), pp. 273-288.

Several other instruments and conference reports adopted by or in cooperation with UNESCO address human rights education.

According to Article 29(1) of the 1989 *Convention on the Rights of the Child*, the education of the child shall, *inter alia*, be directed to:

> "(b) the development of respect for human rights and fundamental freedoms . . .
>
> (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin . . ."

Reference can also be made to Principle VI of the 1965 *Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples*.

The ILO *Convention concerning Discrimination in Respect of Employment and Occupation* (No. 111) of 1960, in Article 3(b), requires States "to promote such educational programmes as may be calculated to secure the acceptance and observance" of national policies aimed at equality of opportunity and treatment in the work place.

According to Article 4(4) of the UN *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*,

> "States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole."

The ILO *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (No. 169) of 1989 stipulates in Article 31:

> "Educational measures shall be taken among all sections of the national community . . . with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples."

Human rights education is thus considered one way of overcoming the ignorance which often causes discrimination. For individuals and groups to expect and to demand respect for their rights and freedoms, knowledge is necessary.

On the road to the Decade, the 1993 World Conference on Human Rights reaffirmed the right to human rights education and the corresponding duties of States. Paragraph 33 of the *Vienna Declaration* reads in part:

> "The World Conference on Human Rights reaffirms that States are duty-bound . . . to ensure that education is aimed at strengthening the respect of human rights ... education on human rights and the dissemination of proper information, both theoretical and practical, play an important role in the promotion and respect of human rights with regard to all individuals . . ."

In paragraph 34, governments and the UN system-wide organizations "are urged to increase considerably the resources allocated to . . . human rights awareness through training, teaching and education . . .". In paragraphs 79 and 82, the *Vienna Programme of Action* calls on States to include human rights as subjects in the curricula of all learning institutions. Furthermore,

> "the . . . United Nations system should be able to respond immediately to requests from States for educational and training activities in the field of human rights as well as for special education concerning standards as contained in international human rights instruments . . ."

Human rights education is also anchored in instruments adopted by regional organizations. In the 1981 *Declaration regarding Intolerance – A Threat to Democracy*, adopted by the Council of Europe, it is decided in operative paragraph IV(iii)

> "to promote an awareness of the requirements of human rights and the ensuing responsibilities in a democratic society, and to this end, in addition to human rights education, to encourage the creation in schools, from the primary level upwards, of a climate of active understanding of and respect for the qualities and cultures of others."

In the 1982 *Declaration on the Freedom of Expression and Information,* it is resolved in operative paragraph III(b) to intensify cooperation in order "to promote, through teaching and education, the effective exercise of the freedom of expression and information".

The *European Charter for Regional or Minority Languages*, adopted by the Council of Europe in 1992, in Article 7(3), calls for the promotion of "respect, understanding and tolerance in relation to regional or minority languages among the objectives of education and training . . .". The Charter also contains interesting provisions (Articles 7 and 8) on the use of such languages in education, including "arrangements to ensure the teaching of the history and the culture which is reflected by the regional or minority language". Similar references are contained in the 1994 *Framework Convention on the Protection of National Minorities*.

Several documents and reports adopted under the auspices of the Organization on Security and Cooperation in Europe (OSCE) address human rights education, such as the *Concluding Document of the Vienna Meeting* in Principle 13(6); and the *Document of the Copenhagen Meeting on the Human Dimension* in paragraph 26 concerning "the teaching of democratic values, institutions and practices in educational institutions". References can also be made to Article 25 of the *African*

Charter for Human and Peoples' Rights and Article 13(2) of the 1988 *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights* (the San Salvador Protocol).

The preceding survey establishes that States have for good reasons committed themselves to provide human rights education. States have undertaken the legal commitments, but the teaching profession, researchers, scientists, universities and other institutions of higher education also carry moral and political obligations to the same end. This approach is recognized in the UNESCO *Declaration on Race and Racial Prejudice* which lists duties for individuals and organizations.

The subjects to be covered in human rights education should include equal rights and equal opportunities across the spectrum of civil, cultural, economic, political and social rights, including dignity, identity, liberty, elimination of racial and ethnic discrimination, human rights in the development process, and so on.

Human rights education should be provided at all school levels, that is in primary education, secondary education and institutions of higher learning. It should encompass theoretical dimensions, practical application, adult education and formal and non-formal education. At the different levels, human rights should be incorporated in a variety of school disciplines, such as history and the social sciences.

Among the targets of human rights education should be judges, prosecutors, defence attorneys, police, other officials engaged in the administration of justice, members of armed forces, politicians and journalists, but human rights education should not be limited to them. The decision-makers are of particular concern since in a democratic and rule of law governed State most decisions involve human rights considerations.

While States have the primary responsibility for implementation, international organizations have contributions to make as indicated by Article 2(1) of the *International Covenant on Economic, Social and Cultural Rights* about the role of "international assistance and cooperation". Referring to human rights education as "a universal priority", UN bodies have in a series of resolutions recommended that international agencies for financial and technical cooperation should include support for programmes of human rights education as a priority in educational policies.

States do not always live up to their obligations under the international human rights instruments. For this reason, international organizations monitor State performance. The available methods include examination of State reports, scrutiny of complaints submitted by individuals and groups, fact-finding and investigative procedures, and public debates with the threat of embarrassment. Unfortunately, few monitoring mechanisms are in place for human rights education.

An examination of State reports under human rights treaties is an effective method for keeping an eye on the issue, but the treaty bodies are yet to be fully utilized to this end. In General Comment No. 10 from 1998 on the role of national human rights institutions, the Committee on Economic, Social and Cultural Rights has included the "promotion of educational and information programmes" in an indicative list of activities. Other monitoring methods have not been effectively

employed to further human rights education. It is to be hoped that human rights education will become an important issue for monitoring.

The right to human rights education is clearly established in the international instruments. We also have plenty of action plans. The problem is national implementation and international assistance as well as international monitoring.

Despite the lack of a systematic and comprehensive approach to the issue at national and international levels, the attention to human rights education is gradually growing in the world at all school levels, including degree programs at universities as demonstrated by the master students who have produced the theses in this book.

Human rights education is an important element of the empowerment of individuals and groups as well as an important guarantee for the right decisions in a rule of law governed State. The launching of this volume is an example of the achievement of human rights education and a contribution to its strengthening.

The Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University is pleased to introduce the first volume in the new The Raoul Wallenberg Institute New Authors' Series', as part of its publications within the Raoul Wallenberg Institute Library. The Institute together with the Law Faculty in Lund offers two Master Programmes: Master in International Human Rights Law and Master in International Human Rights and Intellectual Property Law. The Institute and its teachers are also involved in the Venice-based European Master in Human Rights and Democratisation, the Mediterranean Master in Human Rights and Democratisation at the University of Malta, and the Master Program with a Human Rights Research Direction at the Law School of the University of Beijing.

As a result of this involvement, professors at the Raoul Wallenberg Institute have the opportunity and the pleasure to supervise many thought provoking student theses. Most of the time, this work of master students does not reach a wider audience. To address this shortcoming the decision was made to create this new series for which annually a selection of the best theses will be nominated by the supervisors.

This first volume contains seven theses that have been defended by master students in Lund and Venice in 2000, 2002 and 2003. Prior to publication, the authors have been asked to update and shorten their texts. The themes that have attracted the interest of our new authors reflect topical issues which have been high on international agendas during these years. The spectrum of topics is truly wide.

The concerns about respect for human rights by the United States in its treatment of detainees in Guantanamo Bay are reflected on in a study by *Filipa Marques Júnior* and questions surrounding the consequences of the fight against terrorism for the respect of human rights are researched by *Dominic Laferrière*, both are significant contributions to the debate concerning one of the most controversial international problems after 9/11.

The theses by *Kajsa Öbrink* and *Annette Lyth* focus on persistent grave problems that women face in different situations. The authors question the adequacy of the available theoretical approaches to the determination of these problems and

thus of the limitations that existing legal frameworks have for providing adequate remedies.

The additional two contributions in this book take a very critical look at two phenomena, that is minimum wage regulation and behaviour of transnational corporations in the developing world, which in a more globalised world have the potential to either assist in the eradication of poverty or, on the contrary, to worsen the situation even further.

Mona Ressaissi draws a sombre picture of disparities that have grown, in part because minimum wage regulation has been left to market forces rather than being seen as linked to human rights, in particular the right to an adequate standard of living. She shows how the lack of State regulation of minimum wages has affected the enjoyment by poverty-stricken individuals and groups of the rights to education, family and several other human rights.

Malin Käll introduces the case of oil explotation in Nigeria by foreign transnational companies. Even if many of the violations that companies either commit themselves or encourage governments to do are reported in the world media, the lack or the shortcomings of the legal remedies available to the victims of these violatons at national and international levels present themselves. As a result, the international responsibility of transnational corporations in a globalised world stands prominently on the agenda for the international normative process.

Finally, an example of a master thesis from the International Human Rights and Intellectual Property Programme is also included in the book. *George Jokhadze* examines the practices of five multinational entertainment conglomerates of the music industry from the points of view of copyright protection and human rights. The author concludes that there are important human rights considerations that apply to the music industry and that it is becoming more difficult for the conglomerates to ignore the societal demands which have been enlightened in part through the freedom of expression as it should be applied in the field of copyright protection.

At least one feature unites the contributions chosen as best examples for publication in this volume. They all note limitations and the inadequacy of current theoretical approaches in international human rights law, as reflected in existing legal regulations and their application, to the complexities of the world in which we live. The new authors demand the revision of these approaches, in the service of human dignity, through the demonstration of flexibility of solutions and the bringing down of unnecessary barriers between theories and areas of legal regulation.

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FAIR TRIAL IN DEATH PENALTY CASES: A CASE STUDY ON THE NEW MILITARY COMMISSIONS IN THE USA*

Filipa Marques Júnior•

CONTENTS

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* The paper presented is based on a Master's thesis presented by the author as part of the European Master's in Human Rights and Democratisation program, academic year 2001–2002: "Fair Trial in Death Penalty Cases: a Case Study on the New Military Commissions in the USA". The research and studies for the Master's thesis were carried out in collaboration with the Lund Faculty of Law and Raoul Wallenberg Institute (RWI), Sweden, and under the guidance of Prof. Dr. Ineta Ziemele, visiting Professor at RWI. The thesis was discussed in September 2002 in Padova. The original thesis undertakes an analysis of Laws and Orders creating the Military Commissions in the USA, following the events of the September 11, as a case study on the topic of the relationship between fair trial and the death penalty. In order to better analyse the Military Commissions, chapters on the applicable human rights standards and humanitarian law were included. What is now presented corresponds mainly to the thesis' chapters relating to the analysis of the Military Commissions themselves. As a result the paper does not go into detail into the applicable international law instruments and only refers to those directly applicable and to the exact extent that they are applicable. Moreover, as a result of the original thesis topic, it is evident that there are concerns related to the relationship between fair trial and the death penalty, which was the basis for choosing the case study. However, in the latter part of the paper the author also refers to some updates, in relation to developments on this topic that were made public or happened after September 2002, the date the thesis was presented. For a more detailed view on this topic please refer to the original thesis, which can be found at the Raoul Wallenberg Institute Library.

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1. CASE STUDY: MILITARY COMMISSIONS IN THE USA

> "The USA claims to be a progressive force for human rights. Military commissions have not been used for more than half a century in the United States – a period which has seen the reinforcement of a broad framework of fair trial guarantees in international human rights law and standards and in international humanitarian law. Executive military commissions have no place in 21st century criminal justice systems."[1]

Military Commissions (MCs) have existed in the United States of America (USA) since before the beginning of the Republic with power to try persons that otherwise would not be subject to military law, for the violation of laws of war and other offences committed in territory under military occupation. They derive their authority from the USA Constitution (Articles I and II).

After the events of the 11 September 2001 new issues were raised as for the tactics and means used by the USA in the so-called war against terrorism.

One of this new issues is the way people suspected of international terrorism are to be tried. On the 13 November 2001 President Bush of the United States issued a Military Order dealing with Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.[2]

On 18 September 2001, the US Congress enacted a Joint Resolution[3] to authorize the President to:

> "use all necessary and appropriate force against those nations, organisations, or persons he determines, planned, authorised, committed or aided the terrorists attacks on 11th September 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the USA by such nations, organisations or persons".

The Joint Resolution gave authority to the President to issue this Military Order.

With this authority, President Bush of the USA issued the 13 November 2001 Military Order (MO) establishing the main features of the MC and delegating authority on the Department of Defence to issue the orders and regulations necessary to carry out the MO.[4] On March 21, 2002 the Department of Defence announced the Military Commission Order No. 1 establishing the Procedures for Trials by Military

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[1] Amnesty International, 'Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantanamo Bay', <web.amnesty.org/library/Index/eng AMR510532002>, 15 April 2002.

[2] Military Order, 13 November 2001, in Federal Register, Part IV, 16 November 2001.

[3] Public Law 107-40, 115 Stat. (224), 18 September 2001.

[4] "As a military function and in light of the findings in Section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section." (Military Order 13 November 2001, section 4 (b)).

Commissions of Certain Non-United States Citizens in the War Against Terrorism (MC Order No.1).

2. THE ORDER AND RELEVANT DEVELOPMENTS

According to the Military Order, the so-called MCs were created with the power to try non-American citizens suspected of international terrorism and empowered to pass death sentences.

The Military Order establishes in Section (2)(a) that the "individual subject to this order" shall be any non US citizen who:

- Is or was member of the Al Qaeda;
- Has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- Knowingly harbored those persons, . . .

In addition to the criteria outlined above, other individuals subject to the Order are those whom the President makes a determination that it is in the interest of the USA that the individual shall be subject to the Military Order, that is, that the individual should be tried by a MC.

There is a discretionary power given to the Executive to decide who will be prosecuted, and it is up to the President to decide and determine who is within these categories, on a case-by-case basis.

The MCs have the power to try people for any offence that can be tried by a MC and prescribe the punishment in accordance with the penalties provided under 'applicable law', including life imprisonment or death (Sec. 4(a) MO). Any conviction shall have the concurrence of two thirds of the members of the commission (Sec. 4(6) and (7) MO).

As for the evidence admitted, the Military Order gives the power to the Presiding Officer of the MC to decide which evidence shall have probative value (Sec. 4(c) (3) MO).

There is no provision for review of the convictions and sentences by a high court; this power lies only in the hands of the executive (either the President or the Secretary of Defense) that can review the conviction or sentences and have a final decision on the matter (Sec. 4 (8) MO).

In Section 7 the Military Order allows the detention or trial of any person who is not an individual subject to this Order if so authorized by the Secretary of Defense or any military commander or other officer or agent.

Finally, an individual subject to this Military Order shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any

such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any state thereof, (ii) any court of any foreign nation, or (iii) any international tribunal (Section 7 (b)(2) MO).

However, according to some Non Governmental Organizations (NGOs)[5] what is most striking in this Military Order of 13 November is not what is written, but what is lacking:

- Lack of recognition of the rights of detainees to be afforded access to legal counsel;
- Lack of recognition of the right for detainees to be informed of the charges against them;
- Lack of recognition of the right of detainees to be brought before a judicial authority in order to determine the lawfulness of their detention;
- No requirements that the trial and other proceedings will be open and public;
- Lack of recognition of the right of accused persons to be provided with the evidence against them;
- The accused does not necessarily enjoy the presumption of innocence;
- No evidentiary standard, such as a 'proof beyond a reasonable doubt' is necessary to secure convictions;
- There is no role provided for the judiciary in any phase of the process;
- No notice as to the particular offences to be covered by the Executive order. Only 'acts of international terrorism', without specifying in what the particular acts may consist are mentioned.

This Presidential Military Order was regulated by the Department of Defense, on 21 March 2002, following what was stated in Section 4[6] of the Presidential Military Order. The Department of Defense issued the Military Commission Order No. 1 dealing with the Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (MC Order No.1)[7].

This governmental regulation of the procedure of the MC took into consideration some of the criticisms that were made and provided for some of the

[5]International Commission of Jurists, 'Letter to President George Bush', <www.icj.org/press/press01/english/bush12.htm>, 6 December 2001. See also Amnesty International, 'USA: Presidential order on military tribunals threatens fundamental principles of justice',<www.amnesty.org>, 15 November 2001; Human Rights Watch, 'U.S.: New Military Commissions Threaten Rights, Credibility', < www.hrw.org>, 15 November 2001.

[6] *Supra* note 4.

[7] DoD MCO No. 1, 21 March 2002.

guarantees that were lacking in the 13 November 2001 Presidential Military Order, referred to above.

The guarantees introduced in the MC Order No.1 include making trials public-only with some exceptions related to national security (Chapter 5(O)); requiring proof beyond reasonable doubt for conviction (chapter 5(C)); establishing the presumption of innocence (Chapter 5(B)); providing access to a defense attorney (chapter 4(C)); permitting the defendant to see the prosecution's evidence (Chapter 5(E)(I)) and to cross-examine witnesses (Chapter 5(G)(I)) as well as requiring unanimity before the Commission can impose the death penalty (Chapter 6(F)).

However there are still some guarantees lacking and provisions that violate human rights law and as it states in Chapter 7(B) MC Order n.1:

> "In the event of any inconsistency between the President's Military Order and this Order . . . the provisions of the President's Military order shall govern."

3. ANALYSIS OF THE MILITARY ORDER

In this Chapter I will analyze the Presidential Military Order of 13 November 2001 already taking into consideration the Procedures for Trials by Military Commissions of Certain Non-United States citizens in the War Against Terrorism of the Department of Defense from 21 March 2002.

I will make this analysis in light of international human rights and humanitarian law, showing that some international rules are binding on the USA and give rise to legal obligations to respect, protect and fulfil certain rights.

3.1. Status

The debate on the persons subject to this Order gains special relevance under humanitarian law as it leads to the applicability of the Geneva Conventions.

Under humanitarian law, if a person is entitled to Prisoner Of War (POW) status, such a person shall be tried by regular military courts, with the same procedure that the forces of the detaining power would be entitled to. Therefore, if one talks about combatants to whom POW status should be afforded , the MCs would not be able to try these persons as MCs are special Commissions which do not follow the same rules as the U.S General Courts-Martial (one basic difference being the right to appeal[8]).

In accordance with this, only unlawful combatants and civilians[9] could be under this Orders' provisions and in this case, one would also have to apply the 1949

[8] Human Rights Watch, 'A comparison between the proposed US Military Commissions and US General Courts-Martial', < www.hrw.org/press/2001/12/miltribchart1217>, 17 December, 2001.

[9] The possibility of trying civilians in military courts was affirmed by the HRC in its General Comment no.13 where stated that "[w]hile the Covenant does not prohibit such categories of

Geneva Convention relative to the Protection of Civilian Persons in Time of War and Article 75 of the Additional Protocol 1 to the Geneva Conventions in order to ensure a fair trial (at least in terms of international customary law as the USA are not part to it).

How does this apply to the detainees from the war in Afghanistan? Taleban fighters cannot be subjected to these Commissions. In fact, if we consider Taleban fighters as combatants to whom the status of POW is afforded, according to Article 4(1) of the *Geneva Convention relative to the Treatment of Prisoners of War*[10] because they belonged to the armed forces of a Party to the conflict, these persons will have to be tried by the US Military Courts (Articles 82 and 84 of the 3rd Geneva Convention).[11]

As for the Al Qaeda members, the question remains open. It seems that these MCs could try them. But what if they can also be afforded POW status? It is an ongoing debate, but it seems that in some cases they could be afforded this protection. If Al Qaeda members were acting under the same command as the Taleban armed forces, they would fall within the scope of Article 4 (A)(1) of the 3rd Geneva Convention and therefore be entitled to POW status. Otherwise, they would have to fulfil the four conditions enumerated in paragraph 2 of the same Article before POW status could be afforded.

Although is claimed that they don't comply with the requirement of behaving accordingly to the laws and customs of war (Article 4(2)(d) of the 3rd Geneva Convention) and therefore would not qualify for POW status, it could also be argued that Additional Protocol 1 to the Geneva Conventions is a part of international

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courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14".

[10] Article 4 of the 3rd Geneva Convention sets the requirements for POW status. POWs are captured individuals that fall into the power of the enemy and belong to one of the categories enounced in numbers (A)(1) to (6). Additional Protocol I (PI) to the Geneva Conventions broadens this concept. According to Article 44, a violation of the laws of war doesn't deprive a combatant of his status and of being considered a POW if he falls in the power of the enemy as long as he carries his arms openly (Article 44 (2) and (3) PI) and a combatant that falls to meet these requirements shall nevertheless be afforded protection equivalent to that afforded to the POW, including the protection afforded by the 3rd Geneva Convention on the trial and punishment of any offences committed (Article 44(4) PI). In any case, any doubts in relation to the status of the detainee, must be determined by a 'competent tribunal' accordingly to Article 5 of the 3rd Geneva Convention. The reason to refer Protocol I in this context is exactly because this Protocol broadens the concept of POW of the 3rd Geneva Convention and that has importance for the assessment of the Taleban and Al Qaeda status. However, the USA is not part of the Additional Protocol I and unless one determines that this rule is an international customary rule, it will not be applicable to the war in Afghanistan.

[11] The lack of recognition of the Taleban by the US would not appear to deprive Taleban fighters of POW status. Article 4 A/3 includes "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power".

customary law,[12] and that the criteria would then be that of Article 43(1) and 44(2) of Protocol 1, entitling them to POW protection. Even though the USA is not a party to this Protocol, it is bound by international customary law to consider its provisions. However, Article 44 doesn't seem to be international customary law.[13]

Even if there are doubts, these doubts should be decided by a court, in accordance with Article 5 of the 3rd Geneva Convention. Until their status is determined by a competent tribunal, 'such persons shall enjoy the protection of the Convention'.

Even an individual, who is determined by a competent tribunal not to be POW, would still have the legal protection of the 4th Geneva Convention that includes some minimum rights.[14]

The USA has already recognized the application of the principles of the Geneva Conventions to the Taleban Guantanamo detainees (although not to the members of

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[12] *See infra* note 25.

[13] In determining which rules of humanitarian law can be considered customary rules of international humanitarian law, the International Committee of the Red Cross (ICRC) affirmed that although the Protocol is not universally adopted, customary international law couldn't be determined only by the behaviour of 54 States that are not bound by it. However, if a State expressly rejects a norm, it will be more difficult to affirm that is bound by it. This provision of Article 44 was expressly rejected by the USA and one can say that most likely does not represent customary international law, following the persistent objector principle as established in the Fisheries case. One can see that the State practice in relation to this Article is not strong enough in a way to enable us to affirm its customary character (to afford POW status to combatants that do not comply with those requirements is not universally accepted). Moreover, the *opinio iuris* is not well established as one can see in the discussions on the adoption of this Article. Despite further considerations on the customary character of other norms of Protocol I, Article 44 broadening the concept of POW doesn't seem to qualify as international customary law. The same conclusion was reached in the Report of the Swedish International Humanitarian Law Committee that affirms the view of which are the customary rules under Protocol I and although it refers to various Articles of this Protocol, Article 44(2) is not referred to. In fact, only the rule of POW status for regular combatants is affirmed. However, the ICRC is preparing a study on customary rules of international humanitarian law and it will be interesting to see its conclusions under Protocol I.

[14] Article 4 of the 4th Geneva Convention defines protected persons as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or an occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". This is very important as individuals to whom one cannot afford POW status but that fall under the definition of this Article shall be considered protected persons and will qualify for the protection of the 4th Geneva Convention. The protected persons under the 4th Geneva Convention are entitled to the protection of Articles 71 to 76 of this Convention. These guarantees include the right to a regular trial (Article 71), the right to be informed of the charges against them and be brought to trial as rapidly as possible (Article 71), the right of choosing one's own counsel that will be free to visit the accused and will be provided with all the necessary facilities to prepare the defence (Article 72), the right of appeal "provided for by the laws applied by the court" (Article 73), the right to petition or pardon in case of death sentence (Article 75).

Al Qaeda).[15] However, applying the Geneva Conventions requires more than professing belief in its principles. There is an obligation of undertaking a process involving individual determination of the status of the detainees. As Amnesty International affirmed:

> "Substantial doubt about the status of the detainees plainly exists, in the form of opinion from bodies other than the US administration – including the ICRC, the UN High Commissioner for Human Rights, the international humanitarian law experts surveyed by the War Crimes Project, and the International Commission of Jurists. The US Government should respect this expert opinion and demonstrate that it does indeed 'strongly support' the Geneva Conventions, as its officials have stated. It should ask a competent, independent and impartial court, affording all the necessary guarantees for a fair trial recognized in Article 14 of the International Covenant on Civil and Political Rights, Article 75 of the First Additional Protocol and other international law and standards, to make individual determinations of the status of each detainee." [16]

Until that moment, they shall be considered as POW and be treated as such.

The Crimes of War Project released the findings of a survey it had conducted among leading world experts in international humanitarian law. It reported that:

> "Most of the experts surveyed by the Crimes of War Project believe that the Taliban should be granted POW status, citing Article 4 of the Third Geneva Convention, which defines prisoners of war as 'members of armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces'. Although there was disagreement about the legal status of Al Qaeda who have been captured, most agreed that the Administration had not taken necessary steps under international law to determine their status."[17]

3.2. Discrimination

The Order is, in first instance, discriminatory,[18] by giving foreigners a lower level of protection than that afforded to US citizens. Only foreigners are subject to this Order, even if they are accused of less serious crimes than US citizens, who are tried in civilian courts where the guarantees of due process are stronger. This issue has been stressed by the USA Administration: every time that the question is asked about the possibility of an American citizen being tried by military commissions, it is expressly said that they will not permit that to happen.

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[15] White House Fact Sheet, 'Status of detainees at Guantanamo', <www.whitehouse.org>, 7 February 2002.
[16] Amnesty International, *supra* note 1.
[17] Crimes of War Project, 'Terrorism and the Laws of War', <www.crimesofwar.org>, 21 February 2002.
[18] Amnesty International, *supra* note 1; B. Olshansky, 'American Justice on trial: who looses in the case of Military Tribunals?, <www.asil.org>, p. 2.

The difference between these courts is recognized in Section 1(f) of the 13 November 2001 Presidential Military Order:

> "Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with Section 836 of Title 10, United States Code, that it is not practical to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

It seems as if President Bush's administration is saying that foreigners and suspected terrorists do not deserve the protections of due process.

This discrimination will include legal permanent residents of the USA and people who may be entitled to citizenship but have not yet been officially granted that status (an example would be people that have applied for political asylum whose request has not yet been decided).[19]

This difference between citizens and non-citizens is rather surprising in a country like the USA where the principle that not only citizens benefit from the constitutional guarantees has always been affirmed.[20]

The difference in treatment can be said to be discriminatory, as there is no reasonable and objective criteria[21] for it, violating Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) that prohibits discrimination on the basis of national origin and Article 14 ICCPR that recognizes the right for everyone to be equal before courts and tribunals and is a basic principle for the protection of human rights: "Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights".[22]

This discriminatory treatment is also against the *Convention on the Elimination of All Forms of Racial Discrimination*[23] (Articles 1 and 5), Principle 5 of the *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment*[24] and Rule 6/1 of the *Standard Minimum Rules for the Treatment of Prisoners.* Although these last two documents don't have a legally binding character, they help to show the way the United Nations regards the issue of

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[19] B. Olshansky, *ibid,* p. 2.

[20] Just recently, in *Zadvydas* v. *Davis* case (121 S. Ct. 2491, 2500 (2001)) the Supreme Court affirmed that "due process clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent".

[21] Human Rights Committee, General Comment no 18, 1989, admits that not all differentiation of treatment is discrimination, depending on being reasonable and objective and if the aim is to achieve a purpose permitted under the Covenant.

[22] Human Rights Committee, *ibid.*

[23] UN General Assembly Resolution No.2106 A (XX), 21 December 1965.

[24] UN General Assembly Resolution No. 43/173, 9 December 1988.

discrimination and enforce the idea that the prohibition against discrimination should be binding on all States as part of customary international law.

Also Article 75(1) of the Additional Protocol 1 to the Geneva Conventions, which the USA did not ratify but that is seen as customary international law,[25] provides:

> "Persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour ... national or social origin ..."

The USA issued an Understanding related to Article 26 and with the prohibition of discrimination where it declares:

> "That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status – as those terms are used in article 2, paragraph 1 and article 26 – to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination, in time of public emergency, based 'solely' on the status of race, colour, sex,

[25] In assessing the notion of an international customary rule (formed by State practice and *opinio iuris*), I base my views on the definition of the International Court of Justice (ICJ) in the *Nicaragua* case, where the Court ruled that: "The Court does not consider that for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of States conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of recognition of a new rule" (ICJ, *Nicaragua* v. *USA* case, 1986). In determining which rules of humanitarian law can be considered customary rules of international humanitarian law, the International Committee of the Red Cross (ICRC) affirmed that although the Protocol is not universally adopted, customary international law couldn't be determined only by the behaviour of 54 states that are not bound by it. Article 75 of Additional Protocol 1 is considered as being part of customary international law, taking into consideration the State practice and *opinio iuris*. In fact, the ICRC said in its commentary to this Article that Article 75 is regarded as elaboration of fair trial provision of common Article 3 and the customary nature of this one is well established. Also the Report of the Swedish International Humanitarian Law Committee and in a study of the Protocol I for the US Joint Chiefs of Staff (Theodoron Meron, *Human Rights and Humanitarian Norms as customary law*, Oxford, Clarendon Press, 1989, p. 64), Article 75 is recognised as part of customary international law.

> language, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status."[26]

Does this mean that this Article doesn't bind the USA if it can argue that the Military Order pursues a 'legitimate governmental objective', the war against terrorism?

I would argue that this Understanding does not allow the USA to disregard its obligations under Article 26 of the ICCPR because the prohibition of discrimination is part of customary international law. Therefore, the USA will always be bound by this obligation of non-discrimination.

The Human Rights Committee (HRC) welcomed the fact that the US government assured that that the Understanding 'is constituted by the Government as not permitting distinctions that would not be legitimate under the Covenant'.[27] It seems like this would apply to the case in question.

Concerning the differentiation between citizens and non-citizens, Article 2(1) of the ICCPR demands all States Parties to ensure the enjoyment of human rights for everyone within their territories and subject to their jurisdiction. The main rule is that citizens and non-citizens should enjoy most of the civil rights contained in the Covenant without any distinction.[28]

3.3. Lack of Independence of the Judiciary and the Executive

The MCs lack independence from the Executive, a violation of one of the basic principles contained in the UN *Basic Principles on the Independence of the Judiciary States*.[29] The Executive will have the power to (according to the MC Order No.1):

- Name whom the military commissions will try (Chapter 3(A));
- Appoint military officers to be members of the commissions, and to remove them (Chapter 4 (A) (1));
- Determine how large the 'jury' of commissioners will be in any particular trial (Chapter 4 (A) (2));
- Designate which member will serve as 'judge' to preside over the proceedings (Chapter 4 (A) (4))

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[26] United Nations Treaty Collection, Chapter IV.3, <www.unhchr.ch/html/menu3/b/treaty5_asp>.

[27] UN Doc. CCPR/C/79/Add, / April 1995.

[28] A. Eide, 'Citizenship and international human rights law', in *Citizenship and the State in the Middle East* N. A. Butenschon, et al (eds.) (Syracuse, N.Y.: Syracuse University Press 2000) p. 104.

[29] General Assembly Resolutions No. 40/32, 29 November 1985 and No. 40/146, 13 December 1985.

- Appoint the Chief Prosecutor, a judge advocate (lawyer) of the US armed forces (Chapter 4 (A) (4));
- Appoint the Chief Defense Counsel, a judge advocate of the US armed forces (Chapter 4 (C) (1));
- Revoke the eligibility of any official to appear before the commissions (Chapter 4 (A) (3));
- Approve the charges prepared by the prosecution (Chapter 4 (B) (2) (a));
- Approve plea agreements (Chapter 6 (A) (4));
- Vet the level of investigative or other resources to be made available to the Defense (Chapter 5(H));
- Decide which parts of the proceedings should be held *in camera*, (Chapter 6 (B)(3)) and decide whether open proceedings may include attendance by the public and accredited media;
- Pick the panel of three military officers (or civilians temporarily appointed as military officers) who would review the trial record (Chapter 6 (H) (4));
- Make the final decision in any case, including in death penalty cases whether a condemned defendant will live or die (Chapter 6 (H) (6));
- Amend the operating procedures of the commissions at any time, within the scope of the Military Order of 13 November 2001.[30]

The powers that the Executive will have under this Order are in clear violation of Article 14 of the ICCPR (requiring the trials to be conducted by a competent, independent and impartial tribunal established in accordance with law). The demand to have a competent, independent and impartial court established by law is an absolute right. How can one ensure the impartiality of the members of the MC (an executive body set up by a Presidential order) with these powers in their hands?

In its General Comment 13, the HRC said, in relation to military tribunals, that:

> "While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14."[31]

The Executive is thus the prosecutor and judge.

[30] Amnesty International, *supra* note 1.
[31] Human Rights Committee, General Comment No.13, 13 April 1984, paragraph 4.

3.4. Lower Standard of Evidence

Also, a lower standard for evidence is admissible,[32] including hearsay testimony and use of secret evidence and anonymous witnesses. Even worse, it doesn't exclude statements extracted under torture or other coercive methods, which is especially troubling as the MCs have the power to pass death sentences.

The MC Order No.1 states that the defendant shall not be required to testify during trial (Chapter 5, F) in what seems to be a provision in accordance with Article 14(3)(g) of the ICCPR, but 'doesn't preclude the admission of evidence of prior statements of the Accused'. If one bears in mind that most of the times coercive methods may be used in order to obtain these statements, the lack of prohibition of using those methods gains new significance. The methods by which prior statements of the Accused are obtained do not expressly exclude the use of torture and the fact that these previous statements are not prohibited and can be used as evidence makes their danger even more relevant.

Under the ICCPR, according to the General Comment 20:

> "It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[33]

With this lower standard of evidence the danger of miscarriage of justice with the possibility of passing a death sentence, with no right to appeal to an independent and impartial court, is even greater. It must also be kept in mind that in a country like the USA, the judicial system is somehow influenced by the racial bias and the arbitrary nature of the death penalty system.

3.5. Right of Appeal

On the issue of appeal there is no right of review to an independent and impartial court (chapter 6(H) MC Order No.1) but only a possible review of the sentence by a three member panel of military officers appointed by the Secretary of Defense. This panel will be able to review the trial and make a recommendation that will be seen by the Secretary of Defense and the President will make the final decision.

The fact that the Order doesn't provide for a right of review to an independent and impartial tribunal is in clear violation of Article 14(5) of the ICCPR, a provision applicable to all courts and tribunals. According to this Article, everyone convicted of a crime shall have the right to have the sentence reviewed by a higher tribunal according to law. However, the Order only provides for the power of the President to appoint civilians as temporary military officers to be judges on a review panel in lieu of an appeals court. In the end, the President will have final review of the cases

[32] Amnesty International, *supra* note 1.
[33] Human Rights Committee, General Comment No. 20, 3 April 1992.

(amounting to a violation of separation of powers between the judiciary and executive).

The right of *habeas corpus* is not provided as well. In accordance with this Order, there is no right of *habeas corpus*, or other right to seek a determination concerning the legality of the detention.[34] There seems to be a contradiction introduced by a statement of the President's counsel, Alberto R. Gonzalez saying:

> "The order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court."[35]

It seems that since the Department of Defence did not change these rules, allowing for an appeal to a federal court, there is a disagreement in the Administration on this issue. Either that or Mr. Gonzalez recognizes that, whatever the Order says, such remedy cannot be constitutionally denied by the President.

This is not only against the US constitutional law but also international human rights law, as Article 9 of the ICCPR provides that anyone who is detained has the right to have the lawfulness of the detention determined by a court. Even in times of national emergency the right to challenge the lawfulness of the detention cannot be suspended.[36] The situation is even more serious taken together with the fact that the MC can pass death sentences.

In the event that a MC tries people who ought to be afforded POW status, it can first be argued to be in violation of Articles 82 and 102 of the 3rd Geneva Convention. In this case then, the Order would not only violate provisions of international human rights law but also international humanitarian law as it would be against the 3rd Geneva Convention requirements for the trial of POW.

In fact, that would violate the standards of Article 106, which gives prisoners of war the right to appeal in the same manner as the members of the armed forces of the State that is trying him. Under the *Uniform Code of Military Justice*, applicable to courts-martial of US soldiers, convicted defendants have the right to seek review by the Civilian Court of Appeals for the Armed forces and by the US Supreme Court. The same or comparable independent, judicial appellate court, with final authority, must be available for those tried by MCs.

Also, there are violations of Article 84 and 105 that provide for 'essential guarantees of independence and impartiality' that are lacking (as previously shown in the analysis of the Order in the light of the right to a fair trial) and Article 87 the right not to be 'sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed

[34] B. Olshansky, *supra* note 18, p.4; Amnesty International, *supra* note 1; Lawyers Committee for Human Rights, *supra* note 1; Human Rights Watch, *supra* note 1.
[35] A. R. Gonzalez, 'Martial Justice, Full and Fair,' *The New York Times*, 30 November 2001.
[36] Human Rights Committee, General Comment No. 29, 31 August 2001.

forces of the said Power who have committed the same acts'. This last right, of course, sets an important limit on the use of the death penalty.

3.6. Legality of Detention

The Military Order also allows for indefinite detention without trial:

> "It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with Section 3, and, if the individual is to be tried, that such individual is tried only in accordance with Section 4."[37]

Under Articles 9(3) and 14(3) (c) of the ICCPR, criminal proceedings must be started and completed within a reasonable time. Indefinite detention without trial seems to be a clear violation of these Articles. Although the 3rd Geneva Convention allows for detention until the end of hostilities, the end of the conflict in Afghanistan, the Secretary of Defense seems to allow this detention until the end of the so called war against terrorism:

> "I think that the way I would characterize the end of the conflict is when we feel that there are no effective global terrorist networks functioning in the world that these people would be likely to go back to and begin again their terrorist activities."[38]

The possibility of indefinite detention is against human rights law and the requirement of effective judicial review of detention.

In order to prevent the possibility of indefinite detention without trial in violation of the fundamental right to liberty (Article 9 of the ICCPR), the Order should make clear that the detained person will have the right to have charges filed against him within a reasonable time following the detention, and the trial by the commission shall not be delayed unnecessarily.

Moreover, the reasons to arrest a person under this Order are very broad as they include the President having a 'reason to believe' that the individual took part in acts of 'international terrorism'. By not defining what international terrorism is, the Order constitutes a violation of Article 9 of the ICCPR that prohibits arbitrary arrest and detention. The same applies to the authorization of MCs to hear violations of laws of war and 'other applicable crimes', that will allow the Executive to try persons for virtually any criminal offence.

[37] Section 2 (b) of the 13th November 2001 Military Order.
[38] US Department of Defence, News Briefing, <www.defenselink.mil>, 28 March 2002.

3.7. Legal Assistance

As for legal assistance, the Department of Defense's guidelines seem to afford some insurance (Chapter 4(c) MC Order No.1) but still, if the defendant chooses to opt for a civil lawyer it will be at his own expense and the lawyer will not have full access to all the information considered classified. Even if the defendant makes this choice, a US military lawyer, will still represent the defendant.

The limited legal assistance provided for in the Order and the fact that the defendant cannot really opt for a civil lawyer (only at his own expense and without full access to all the information) is in violation of Article 14(3) of the ICCPR that establishes the right of defence through legal representation of one's choice.

The fact that at all relevant times defendants shall be represented in any case by their military lawyers could be interpreted as meaning that the defendants who retain civil lawyers, and have to use in any case their military counsel, will not have the possibility of confidential communications with their attorney of choice, which would violate Article 14(3)(b) of the ICCPR on the right to communicate with the counsel of one's own choosing.[39]

The military lawyer is therefore an imposition and the defendant is left no choice, or a limited choice, being a clear violation of his rights.

3.8. State of Emergency

It has been argued by the Bush Administration that a state of emergency is present, which would allow for a derogation of some rights under international law (Article 4, ICCPR).

The Order of 13 November, section 1 b) says that:

> "In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, it proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks)."

However, it remains unclear if the Government considers itself under a state of emergency within the meaning of Article 4 of the ICCPR. No notification to the UN Secretary-General has been made and it would have to be proven that the situation of emergency threatens the life of the nation. Also, any derogation would have to be strictly required by the exigencies of the emergency situation.

And even in this situation, the HRC has stated in its General Comment 29:

> "Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law

[39] Amnesty International, *supra* note 1.

> inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."[40]

3.9. Fair Trial

Fair trial guarantees are one of the basic principles within the jurisprudence of nations of the world and the reason is to protect accused individuals in any circumstance and ensure that they have access to a fair hearing.

The following is a brief comment on the question of the possible location of these MCs. It has been said that a probable site will be the USA Naval Station at Guantanamo Bay, Cuba. This would have the effect of shielding the MCs from the jurisdiction of US courts and would afford the military the most control and prevent federal courts from intervening in death penalty cases.[41]

However, the ICCPR will always be applicable as Article 2(1) states that 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without discrimination of any kind . . .'. This means that States have to respect rights of all individuals subject to their jurisdiction and comply with the ICCPR obligations in relation to these individuals.

Article 130 of the 3rd Geneva Convention makes clear that depriving POWs of the right to a fair and regular trial, as results from the Convention, constitutes a war crime.

As for the persons not afforded POW status, the trial would always have to meet common Article 3 of the Geneva Conventions, Article 75 of Additional Protocol I and the 4th Geneva Convention.

The Military Order doesn't provide for a regular trial (Article 71 of 4th Geneva Convention), the right of choosing one's own counsel (Article 72 of 4th Geneva Convention) is somehow limited by the fact that the choice for a civil lawyer will be at the defendant's own expense, the right of appeal (Article 73 of 4th Geneva Convention) to a court is non-existent.

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[40] Human Rights Committee, General Comment No. 29, *supra* note 36.

[41] New York Times, 'Rumsfeld gives details of rules for military war tribunals', 21 March 2002.

If the individuals don't benefit from the protection of these Articles, Article 75 will apply and then, all the guarantees of the right to a fair trial will be applicable.[42] This Article contains all the guarantees of a fair and public hearing as determined in international human rights instruments. In this case, the Military Order while violating Article 14 of the ICCPR also violates Article 75 that demands an "impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure".

Common Article 3 of the Geneva Conventions, which constitutes part of international customary law,[43] also demands in any case a regularly constituted court where all the judicial guarantees are afforded.

3.10. Death Sentence

The use of the death sentence, although not prohibited through international human rights instruments, is against the trend towards abolition (seen in relevant human rights instruments such as the Second Optional Protocol to the ICCPR, the Second

[42] Individuals failing to qualify as POW or as protected persons, still benefit from the protection of Article 75 of Additional Protocol I. This Article is considered as being part of customary international law. The individuals not benefiting of the protection of these Conventions, shall be entitled to the protection of Article 75 of Protocol I to the extent its provisions are customary law that include *inter alia*, the right to be tried before an impartial and regularly constituted court, the right to have all necessary means of defence, to be presumed innocent, freedom from self incrimination, right to be advised of remedies available, principle of *ne bis in idem*. These provisions follow and develop the guarantees already applicable in general terms to civilians under Articles 71 to 75 and 132 of the 4th Geneva Convention, although the guarantees are explained in a greater detail. In fact, Article 75 contains all the guarantees of a fair trial as provided under the general principles of international law and jurisprudence, as well as by Article 14 of the ICCPR, Articles 5 and 6 of the ECHR and Article 7 and 8 of the ACHR.

[43] In the *Nicaragua* case (*supra* note 25) the Court affirmed that common Article 3 to the Geneva Conventions contains rules to be applied in a non international conflict but that those rules constitute a minimum yardstick to be applicable also in international armed conflict (in addition to more elaborated rules which are also to apply to international conflicts). These rules are, according to the ICJ, elementary considerations of humanity, and applicable as international customary law to any conflict independently of a State being or not part to the Geneva Conventions or having presented some reservation to the jurisdiction of the ICJ. Thus, in any conflict of any character, there are always minimum rules that will always apply even if there exist other more elaborated rules governing the same situation. These rules state that everyone taking no active part in a conflict (including member of the armed force who have laid down their arms and hors de combat) shall be treated humanly and that are acts always forbidden such as violence to life, cruel treatment, torture, taking of hostages, outrages upon personal dignity and the "passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples". Therefore, in any armed conflict these principles (or at least the due process guarantee) will always be applicable.

Protocol to the *American Convention of Human Rights*, the Sixth and the Thirteenth Protocol to the *European Convention on Human Rights* and the jurisprudence of international bodies like the Human Rights Committee and the European Court of Human Rights). When the danger of a miscarriage of justice is present due to the lack of guarantees afforded by these MCs, this question is even more problematic. As the HRC concluded in *Reid* v. *Jamaica*:

> "The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6, the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the Defence, and the right to review of conviction and sentence by a higher tribunal."[44]

In the event that these MCs will try someone according to the procedures so far publicised and the death sentence is imposed on someone, then clearly there will be not only a violation of Article 14 of the ICCPR on the right to a fair trial but also a violation of Article 6 of the ICCPR on the right to life.

3.11. Jurisdiction

In addition, the fact that the Order is open ended as to the personal jurisdiction and the offences that can be tried undermines the requirement of the necessity of a jurisdiction defined by law. [45]

The offences that can be tried by these MCs are, according to Section 3 (B) of the Military Order, violations of laws of war and other offences.

As Human Rights Watch (HRW) published in a letter sent to the US Secretary of Defense on the 14 December 2001, this open end about 'other applicable crimes' is problematic and allows people to be tried for almost any offence, well beyond the violation of laws of war for which military commissions have historically been used. HRW urged the Secretary of Defense to clarify this jurisdiction. This has not yet been done.

Moreover, the broaden formulation of 'violations of the laws of war' and 'other applicable laws by military tribunals'[46] could be used by the Executive to permit the use of:

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[44] Human Rights Committee, *Reid* v. *Jamaica* case, Communication No. 355/1989, U.N. Doc. CCPR/C/51/D/355/1989 (1994).
[45] Human Rights Watch, *supra* note 1; B. Olshansky, *supra* note 18, p. 3.

> "military commissions to try people accused of committing state and federal crimes that have no relationship whatsoever to any terrorist activity. The Order thus appears to permit governmental prosecutions for common crimes in which our civilian criminal justice system with all of its constitutional guarantees are completely bypassed. No justification is given for this exemption of state and federal common criminal cases from our criminal justice system."[47]

As for the personal jurisdiction, different issues can be raised. In an effort to include in the personal jurisdiction members of Al Qaeda, the Order ends up reaching a much broader group of people.[48] For instance, people that harboured other persons subject to the Order (not a military-like terrorist act) may be tried. Moreover, as the Order doesn't define what international terrorism[49] consists of, it leaves the determination of the type of conduct that will be held to violate the law and subject an individual to prosecution by a MC up to the President.

3.12. Credibility

There is an issue about the credibility of these MCs. They seem to have called even more attention to the way the USA deals with suspected terrorists and have been widely criticized. Taking into consideration the reputation of the USA in Europe, where it is criticized for violating human rights and the imposition of death penalty, the MCs do not help the reputation of the USA judiciary system.

International cooperation may also be an issue related to the functions and credibility of MCs.[50] In order to work and function well they will depend upon the cooperation of other countries. An example is the issue of extradition. It is likely to be very difficult for any European country to allow extradition of suspects to the USA if they were to face these commissions and the death penalty. According to the Spanish Judge Balatasar Garzon concerning the possible extradition of eight suspects of the 11 September attacks that were arrested in Spain: 'No country in Europe could extradite detainees to the United States if there were any chance they would be put before these military tribunals.'[51]

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[46] Military Order 13 November 2001, Military Order, section 1(e). In the Procedures developed by the Department of Defense, the jurisdiction over offences is said to include the violations of "laws of war" and "all other offences triable by military commissions" (Chapter 3 (B) MC Order No.1) which retains the same broad formulation.

[47] B. Olshansky, *supra* note19, p.3.

[48] B.Olshansky, *ibid*, p.2.

[49] Even if the definition of international terrorism could be the one used under the Anti-Terrorism and Effective Death Penalty Act (use of any force or violence to achieve a political aim), almost any conduct could be said to be terrorism.

[50] A. Neier, 'The Military Tribunals on Trial', *The New York Review of Books*, 14 February 2002.

[51] S. Dillon and D. G. McNeil Jr., 'Spain Sets Hurdle for Extraditions', *The New York Times*, 24 November 2001.

This undermines the objective of the Order as suspects arrested in European countries will unlikely be extradited to the USA.

Furthermore, the legitimacy of these judgements will likely be ineffective, specially in countries that the USA has declared as 'harbouring terrorists', as it would be difficult to convince them that the verdicts are just when so many judicial guarantees are missing. The USA will have no more credibility to criticise the use of military tribunals in countries like Peru, Cuba and Turkey if they themselves follow the same path.

Other possibilities should have been considered, such as prosecution in US civilian courts, the establishment of an international ad hoc court or a trial in the court of another country. Another possibility would be for these MCs to adhere as close as possible to the rules governing general courts martial under the Uniform Code of Military Justice and the Rules for Court-Martial.[52]

What is the reason to use MCs when the ordinary courts seem to be working and available to try suspects of terrorism? In the USA itself, those suspected of involvement in the bombing of US embassies in Tanzania and Kenya in 1998 were tried in ordinary courts and the same was happening to Zacarias Moussaoui, a French national arrested in USA prior to the attacks of the 11 September.

Amnesty International has stated that:

> "The prospect of the USA carrying out executions after unfair trials by these executive bodies threatens to deepen the divide between the USA and the international community on this fundamental human rights issue. There is an ever-growing body of evidence of the arbitrary, discriminatory and error-prone nature of the USA's ordinary death penalty system, with many death sentences overturned on appeal on the basis of issues such as inadequate legal representation and prosecutorial misconduct. Since 1976, more than 90 prisoners have been released from death rows around the country after evidence of their actual innocence emerged."[53]

Amnesty International has further stated in relation to MCs that:

> "The potential for irrevocable miscarriages of justice in the case of death sentences handed down by military commissions admitting lower standards of evidence and lacking genuine independence from the executive or right of appeal, can only be even greater. The USA's continuing resort to the death penalty, and now its insistence on trying selected foreign nationals by military commission, will undermine international law enforcement cooperation and deter many countries from extraditing suspects to the United States."[54]

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[52] Pub. L. No. 81-506, 1950.
[53] Amnesty International, *supra* note 1.
[54] Amnesty International, *ibid.*

4. CONCLUSIONS

The Military Order of President Bush taken together with the Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against terrorism of the Department of Defense doesn't afford essential fair trial guarantees. Under international human rights law and humanitarian law, the right to a fair trial is one of the most fundamental rights in order to ensure the fairness of the judicial proceedings. That is the reason why even under humanitarian law special attention is paid to this individual right while the main feature of this branch of law has to do with the behaviour of States in an armed conflict.

In not ensuring fair trial guarantees to the defendants tried under these MC, the Military Order not only violates applicable human rights standards but also relevant humanitarian law. Even if humanitarian law doesn't add much in itself to the already recognized fair trial guarantees under human rights law, the fact that they have a role to play in humanitarian law shows how important these guarantees are. The Geneva Conventions have, in any case, a role in the treatment of detainees.

As for the risk of MCs passing death sentences, they will have to comply with the Geneva Conventions and international human rights law. Moreover, the imposition of capital punishment upon conclusion of a trial that did not fulfil the guarantees of fair trial will amount to a violation of the right to life.

FIGHTING TERRORISM AND RESPECTING HUMAN RIGHTS, A CASE STUDY OF INTERNATIONAL HUMAN RIGHTS JURISPRUDENCE

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CONTENTS

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FIGHTING TERRORISM AND RESPECTING HUMAN RIGHTS, A CASE STUDY OF INTERNATIONAL HUMAN RIGHTS JURISPRUDENCE

1. INTRODUCTION

When States fail to effectively eliminate terrorism or when a proper institutional response to stop terrorism is lacking, different responses can emerge, all with implications on human rights. An initial response is one of revenge, which is "undoubtedly a primitive form of justice . . . [and] it has an altogether different foundation from justice: an implacable logic of hatred and retaliation".[1] Another response is to use the excuse of fighting terrorism to pursue hidden political agendas, such as eliminating political dissent. Impunity can also emerge as a response to terrorism, which results in further injustice for the victims of terrorism violence: first physically, then when they are lost in a gap of international justice.

Fighting terrorism is an obligation that international law imposes on all States.[2] However, international law also dictates through various instruments that States cannot use terrorism as a carte blanche to discount human rights. This article will demonstrate how international human rights jurisprudence has developed in relation to the balance between fighting terrorism and respecting human rights.[3] The first part of this paper will cover the jurisprudence concerning the *European Convention of Human Rights* (ECHR) from the European Court and Commission of Human Rights. The second part will cover the treaty body of the *International Covenant on Civil and Political Rights* (ICCPR), the United Nations Human Rights Committee (HRC).

The core part of this text will contrast the cases of the ECHR and the ICCPR to illustrate not only differences and similarities, but also to highlight and define existing international human rights framework within which States are compelled to fight terrorism. It will be demonstrated that the cornerstone of the case law of international human rights law on terrorism is that countering terrorism and respecting human rights are complementary obligations. As the Inter-American Commission of Human Rights reports: "the very object and purpose of anti-terrorist initiatives in a democratic society is to protect democratic institutions, human rights and the rule of law, not to undermine them".[4]

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[1] A. Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2003) p. 5.

[2] Security Council Resolution, S/RES/1373 (2001), para. 1.

[3] This article solely deals with cases where the legal body, the Government or the applicant explicitly referred to terrorism, counter-terrorism or groups recognized as having resolved to terrorism by the ECtHR and HRC.

[4] Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L./V/II.116, Doc. 5 rev. 1corr., 22 October 2002, <www.cidh.oas.org/Terrorism/Eng/toc.htm>, visited on 8 February 2004.

2. CASE LAW ON TERRORISM IN THE EUROPEAN COMMISSION AND COURT OF HUMAN RIGHTS

2.1. Introduction

Since its very first case in *Lawless* v. *Ireland*, the European Court of Human Rights (ECtHR) has gained extensive experience and expertise in evaluating the counter-terrorism measures adopted by the Member States of the Council of Europe.[5] As of today, the case law of the ECtHR, and that of the Commission, consists of a substantial compilation of cases defining the framework in which States can operate to fight terrorism while respecting human rights.

The absence of a universally, or European as far as the Council of Europe (COE) is concerned, accepted definition of terrorism does not prevent the Court from addressing the question of terrorism-related violence. The Court will not fall in the trap of having to define terrorism in order to develop legal standards applicable to each provision of the ECHR. Instead, the Court will refer to terrorism only when the Member State or the applicant invokes the involvement of terrorism or counter-terrorism.

2.2. Obligation to Secure to Everyone within the State's Jurisdiction with the Rights and Freedoms within the ECHR, Article 1 of the ECHR

Article 1 of the European Convention imposes the duty on Member States to secure the protection of the rights provided by the ECHR to everyone within their jurisdiction.

The *Öcalan* v. *Turkey* judgment,[6] now being sent to the Grand Chamber,[7] developed several new aspects of the Convention's application in the fight against terrorism. Mr. Öcalan was arrested as the leader of the PKK (Workers' Party of Kurdistan), now renamed Kadek, and the circumstances of his arrest were the subject of extensive media coverage. What developed following his expulsion from Syria reveals how political the handling of a terrorist can become among different States. Therefore, as it will be the case with many judgments mentioned in this article, it is useful to provide an account of the facts surrounding the case, before underlining the legal principles adopted by the Court.

In 1998, Öcalan was expelled from Syria in an attempt to seek asylum in Greece where he was refused. However, the Greek secret services managed to help Öcalan reach Russia where he also made a claim for asylum, which was first accepted by the Russian Parliament, but ultimately refused by the Russian Prime Minister. From that point, Öcalan travelled to Italy, Russia and back to Greece. Again, the Greek

[5] *Lawless* v. *Ireland*, 01 July 1967, 332/57.
[6] *Öcalan* v. *Turkey*, 12 March 2003, 46221/99.
[7] Greffe de la Cour européenne des droits de l'homme, Press release of 11 July 2003, 'Renvoi de l'affaire *Öcalan* c. *Turquie* devant la Grande Chambre', <press.coe.int/cp/2003/387f (2003).htm>, visited on 11 July 2003.

authorities transported Öcalan to another country, this time to Kenya where they set him up in the Greek Ambassador's residence.

Shortly after Öcalan's arrival in Kenya, the Kenyan authorities became aware of his presence. Kenya had been the subject of terrorism in recent times and felt that Öcalan's presence represented a risk to security. Meanwhile, the Netherlands was ready to accept Öcalan, but on the same day the Kenyan authorities enforced the transportation of Öcalan from the Greek Ambassador's residence to the airport. The transportation was organised in a convoy, which included the Greek ambassador, but at one point the car transporting Öcalan left the convoy and took Öcalan to an aircraft with Turkish authorities waiting for his arrival. Öcalan was then arrested by Turkish security forces inside the aircraft in the international zone of Nairobi Airport.

For the purpose of Article 1 of the Convention, the main issue is to determine the moment when Öcalan fell within the jurisdiction of the Member State. In its judgment, the Court decided that: "[d]irectly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the jurisdiction of that State for the purposes of article 1 of the Convention, even though in this instance Turkey exercised its authority outside the territory".[8] Until the *Öcalan* case, the leading authority in the matter of jurisdiction outside the territory was the case of *Banković and Others*, which stressed that "the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention".[9] The Court explained that the circumstances of the Öcalan case were substantially different from the *Banković* case in that "the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following their arrest and return to Turkey".[10]

These findings leave no doubt that the Court will hold States accountable for their actions against alleged terrorists abroad as soon as their authorities physically intervene to bring these individuals back to the Council of Europe State. As counter terrorism operations become more international, this case illustrates how the Court may impose extraterritorial obligations on States when fighting terrorism.

2.3. The Right to Life, Article 2 of the ECHR

The duty of States to protect the right to life is of the utmost importance in the Convention system. The right to life in the context of terrorism is particularly relevant in two complementary aspects, namely: a State's positive obligation to

[8] *Öcalan* v. *Turkey*, *supra* note 6, para. 93.
[9] *Banković and Others* v. *Belgium and 16 Other Contracting States*, Admissibility Decision of 12 December 2001, 52207/99, para. 67.
[10] *Öcalan* v. *Turkey*, *supra* note 6, para. 93.

protect its population from terrorism, and the limits to the use of lethal force by State agents during counter-terrorism operations.

2.3.1. The Conduct and Planning of Counter-Terrorism Operations

A notorious case relating to the use of lethal force in counter-terrorism operations is the case of *McCann and Others* v. *the United-Kingdom*.[11] This case dealt with the attempt to prevent a terrorist act, which resulted in the killing by British soldiers of three IRA members suspected of preparing a bomb explosion in Gibraltar. The British, Spanish and Gibraltar authorities knew about the terrorist plan, but decided to wait and intervene only when the three suspects reached a particular car in Gibraltar. Still, they considered the IRA members to be dangerous terrorists who would probably be armed and, if they had to encounter the security forces, would be ready to use their weapons or detonate the bomb.

On 6 March 1988, one of the suspects parked a car in Gibraltar and later was seen with the two other suspects observing the space where the car had been parked. At that moment the security forces intervened to arrest the individuals, but the three IRA members made 'threatening moves' and were shot to death by the soldiers who thought that one or the other suspects could push a button or a remote control, thereby detonating the car bomb. McCann received five bullets, Mrs Farrell eight and Mr Savage 16. All four soldiers admitted that they shot to kill the individuals.[12]

No weapon or detonator was found on the suspects' bodies. The car in place did not contain any explosive or bomb. However, the Spanish police later found a car containing an explosive device in Marbella that had been rented to Mrs. Farrell under a false name.

In its decision, the Court observed the difficult dilemma of balancing the necessity to fight terrorism and the need to respect human rights. Here, the authorities knew about the terrorist attack and had to protect the population of Gibraltar, while resorting to use the minimum lethal force required against the suspected terrorists. Moreover, the authorities were dealing with IRA members who had been convicted for bombing offences, as well as one explosive expert. The Court also raised the past history of the IRA and its disrespect for human lives, even those of its members.[13]

The Court concluded that a violation of paragraph two of Article 2 of the ECHR had occurred in regard to the conduct and planning of the operation. A violation was found due to the fact that: the suspects were not arrested at the border before their entry in Gibraltar (the danger to the population in not preventing the entry of the suspects outweighed the Government's argument that it might have had insufficient evidence to detain or prosecute them), it was not considered that information might have been erroneous, and the automatic shoot to kill recourse.[14] It is also interesting

[11] *McCann and Others* v. *UK*, 27 September 1995, 18984/91.
[12] *Ibid.*, para. 199.
[13] *Ibid.*, para. 193.
[14] *Ibid.*, para. 213.

that the Court found that even though there was a violation of the right to life under Article 2 of the ECHR, the Court rejected the applicants' claims for damages under Article 50 of the ECHR, because the three suspects who were killed had the intention to plant a bomb in Gibraltar.

The finding in this case noticeably demonstrates the sensitivity and the set of difficulties in cases involving the question of terrorism and human rights, as the violation of Article 2 of the ECHR was the result of a ten to nine vote and the Commission finding no violation.

As regards the conduct of ambushing terrorists, in the *Ergi* v. *Turkey* case,[15] the Court emphasised that an ambush on terrorists has to be planned and executed to avoid as much as possible risks to civilians, including possible counter-fire by the terrorists.[16] Thus in this case, the planning of the ambush proved to be inadequate and in violation of Article 2 as a civilian was killed in a crossfire provoked by the ambush.

2.3.2. The Failure to Investigate the Circumstances of Deaths occurring in the Context of Terrorism or Counter-Terrorism

Numerous cases have considered the alleged failure of authorities to carry out effective investigations into the circumstances of deaths occurring in the context of terrorism and counter-terrorism. In the *McCann* case, the Court established that Article 2 in conjunction with Article 1 required from States "by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State".[17]

Following the case of *Kaya* v. *Turkey*,[18] numerous cases in the context of the terrorism situation in Turkey have produced a series of findings of failures by the authorities to investigate allegations of wrongdoing by the security forces, both in the context of the procedural obligations under Article 2 of the Convention and the requirement for effective remedies imposed by Article 13 of the Convention.[19] In all

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[15] *Ergi* v. *Turkey*, 28 July 1998, 23818/94.
[16] *Ibid.*, paras. 79–81,
[17] *McCann and Others* v. *United Kingdom*, *supra* note 11, para. 161.
[18] *Kaya* v. *Turkey*, 19 February 1998, 22729/93.
[19] *Ergi* v. *Turkey*, *supra* note 15; *Yaşa* v. *Turkey*, 2 September 1998, 22495/93; *Çakici* v. *Turkey*, 8 July 1999, 23657/94; *Tanrikulu* v. *Turkey*, 8 July 1999, 23763/94; *Mahmut Kaya* v. *Turkey*, 28 March 2000, 22535/93; *Kiliç* v. *Turkey*, 28 March 2000, 22492/93; *Ertak* v. *Turkey*, 9 May 2000, 20764/92; *Timurtas* v. *Turkey*, 13 June 2000, 23531/94; *Taş* v. *Turkey*, 14 November 2000, 24396/94; *Çicek* v. *Turkey*, 27 February 2001, 25704/94 ; *Avşar* v. *Turkey*, 10 July 2001, 25657/94; *Irfan Bilgin* v. *Turkey*, 17 July 2001, 25659/94; *Semse Onen* v. *Turkey*, 14 May 2002, 22876/93; *Orhan* v. *Turkey*, 18 June 2002, 25656/94; and concerning Article 13 of the Convention, *see Aksoy* v. *Turkey*, 18 December 1996, 21987/93; *Aydin* v. *Turkey*, 25 September 1997, 23178/94; *Mentes and Others* v. *Turkey*, 28 November 1997, 23186/94; *Selçuk and Asker* v. *Turkey*, 24 April 1998, 23184/94 and 23185/94; *Kurt* v. *Turkey*, 25 May 1998, 24276/94; *Tekin* v. *Turkey*, 9 June 1998, 22496/93; *Tepe* v. *Turkey*, 4

of these cases, a finding was made that the public prosecutor had failed to pursue complaints by individuals claiming that the security forces were involved in an unlawful act, like not interviewing or taking statements from members of the security forces implicated, accepting at face-value the reports of incidents submitted by members of the security forces, and attributing incidents to the PKK on the basis of minimal or no evidence.

Furthermore, in May 2001 the Court released four judgments concerning the Northern Ireland situation in the United Kingdom and the investigation procedure in the killing of suspected terrorists by either security forces or loyalist paramilitaries: the *McKerr*,[20] *Kelly and Others*,[21] *Shanaghan*,[22] and *Hugh Jordan* judgments.[23] In all four cases, the Court found that the UK Government had violated Article 2 of the ECHR in respect of failings in the investigative procedures concerning the deaths of the individuals. Moreover, in *Funicane* v. *The United Kingdom*[24] the Court found that the investigation failed to address serious and legitimate concerns of collusion by the security forces and loyalists in the killing of a solicitor in front of his family, who was known for representing clients from both sides of the conflict in Northern Ireland.[25]

2.3.3. The Responsibility of States in the Disappearance or Unacknowledged Detention of Suspected Terrorists

Cases in relation to disappearances and unacknowledged detention of suspected terrorists emerged before the Court in respect of the terrorism context in Turkey. First in *Kurt* v. *Turkey*, under Article 2 the Court found no concrete evidence that the missing person could have been killed by the security forces and decided that the duty to protect the missing person's life would be considered under Article 5.[26] However, in the cases against Turkey of *Çakici*,[27] *Taş*,[28] *Akdeniz and Others*,[29] *Orhan*[30] and *Ipek*, the Court adopted another approach and observed that very strong inferences might be drawn from the Government's claims and the Court considered that it had sufficient evidence to conclude beyond reasonable doubt that the

May 2003, 27244/95; *Tekdağ* v. *Turkey*, 15 January 2004, 27699/95; *Ipek* v. *Turkey*, 17 February 2004, 25760.

[20] *McKerr* v. *United Kingdom*, 4 May 2001, 28883/95.

[21] *Kelly and Others* v. *United Kingdom*, 4 May 2001, 30054/96.

[22] *Shanaghan* v. *United Kingdom*, 4 May 2001, 37715/97.

[23] *Hugh Jordan* v. *United Kingdom*, 4 May 2001, 24746/94.

[24] *Funicane* v. *United Kingdom*, 1 July 2003, 29178/95.

[25] *Ibid*., para. 78.

[26] *Kurt* v. *Turkey*, *supra* note 19.

[27] *Çakici* v. *Turkey*, *supra* note 19.

[28] *Taş* v. *Turkey*, *supra* note 19.

[29] *Akdeniz and Others* v. *Turkey*, 31 May 2001, 23954/94.

[30] *Orhan* v. *Turkey*, *supra* note 19.

suspected terrorists had died following their detention and apprehension by security forces.[31]

Moreover, the Court gave substantial consideration in some Turkish cases to the 'unknown perpetrator killing' phenomenon. This phenomenon emerged form the terrorism and counter terrorism context in southeast Turkey in 1993. Due to the conflict, speculations existed to the effect that counter guerrilla fractions took part in targeting individuals under suspicion of supporting the PKK. In the Court's own words, "[i]t is undisputed that there were a significant number of killings which became known as the 'unknown perpetrator killing' phenomenon and which included prominent Kurdish figures and journalist".[32] The effect of this phenomenon was that the Court would view this context as adding support to an applicant's allegations of a violation of Article 2 of the ECHR by the authorities in cases of disappearances.[33] However, the Court requires proof 'beyond reasonable doubt' to further assess a violation of Article 2, otherwise the phenomenon will not suffice.[34]

2.3.4. The Obligation to Protect the Population from Terrorism Violence

In the decision of *Mrs W.* v. *the United Kingdom*,[35] the Commission decided that Article 2 of the ECHR does not include the positive obligation for States to stop any possible violence and it is not the task of European human rights monitoring to examine in detail if the measures taken by a State to combat terrorism are appropriate and sufficient.[36] On the matter of individual protection against terrorism, the Commission had decided that there is no obligation on the State to offer individual protection against terrorism.

However, the Court revised this general legal principle in the judgment of *Akkoç* v. *Turkey*.[37] In this case, an 'unknown killer' killed the applicant's husband and it was argued that, prior to the killing, the applicant and her husband faced terrorist threats by the PKK. The facts revealed that she and her husband were threatened either by security forces or terrorists. The main question was to determine if the authorities failed to protect her husband from a known danger to his life. In its interpretation, the Court considered a series of cases concerning the southeast region of Turkey revealing that the Turkish authorities had failed on numerous occasions to respect the procedural obligations under Article 2 and the need for effective remedies under Article 13.[38] For the Court, these defects "undermined the

[31] *Ipek* v. *Turkey*, *supra* note 19.
[32] *See Mahmut Kaya*, *supra* note 19, para. 89 and *Yaşa*, *supra* note 19.
[33] *Tepe*, para. 173, and *Tekdağ*, para. 74, *supra* note 19.
[34] *Ibid*., para. 174 and para. 75 respectively.
[35] *Mrs W.* v. *United Kingdom*, Comm. Dec. 28 Feb. 1983, DR 32, pp. 190-210.
[36] *Ibid.,* p. 200, para. 14.
[37] *Akkoç* v. *Turkey*, 10 October 2000, 22947/93 and 22948/93.
[38] First, the Court recalled the general rule that Article 2 (1) requires states to take appropriate steps to safeguard the lives of those within its jurisdiction (para. 77). This results in an

effectiveness of criminal law protection in the southeast region during the period relevant to this case . . . this permitted or fostered a lack of accountability of members of the security forces for their actions which . . . was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms".[39] As a result, these defects deprived the victim of the protection he was entitled to receive by law. The Turkish Government argued that they could not have effectively protected the victim from the attacks to his life. The Court rejected this argument as the Government had several measures at its disposal and, furthermore, it did not take any steps to investigate, even when the victim and the applicant alerted the authorities of the threats they received. In the end, the Court decided that the Turkish authorities violated Article 2 by failing to take "reasonable measures available to them to prevent a real and immediate risk to the life" of the applicant's husband.[40]

2.3.5. The Death Penalty and Terrorism in the Context of Article 2 of the ECHR

Turkey sentenced Öcalan, an alleged leader of a terrorist organization, to death for "carrying out acts designed to bring about the secession of part of Turkey's territory and of training and leading a gang of armed terrorists for that purpose".[41] Öcalan argued that Article 2 of the Convention had developed to outlaw the death penalty.

Ultimately, the Court found no violation of Article 2, but stated that it would be contrary to the ECHR "even if Article 2 were to be construed as still permitting the

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obligation on states to protect the right to life by establishing efficient provisions of criminal law "to deter the commission of offences against the person backed by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual" (para. 77). The Court observed that not every alleged risk to life would legally oblige the state to take preventive measures. Consequently, "[f]or a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk"(para. 78). In the given case, the Court determined that the Turkish authorities were aware of the risk to life of the victim.

[39] *Akkoç* v. *Turkey*, *supra* note 37, para. 91.

[40] *Ibid.*, para. 94.

[41] *Öcalan* v. *Turkey*, *supra* note 6, para. 42. As the result of an amendment to the Turkish Constitution, the death penalty was restricted to be imposed in times of war or imminent threat of war and for acts of terrorism. Subsequent to a law abolishing the death penalty in peacetime, the Turkish Government issues a letter stating that Öcalan was no longer subjected to the death penalty. Hence, the Ankara Security Court changed the sentence to life imprisonment, however this was appealed and the proceedings were still pending at the time of the Court's decision, so the Court maintained its interim measures requiring the Turkish authorities not to implement the death penalty.

death penalty, to implement a death sentence following an unfair trial".[42] In its conclusion, the Court came short of declaring Article 2 to actually prohibit the imposition of the death penalty in peacetime, but it did stress that "the capital punishment in peacetime has come to be regarded as unacceptable, if not inhuman, form of punishment which is no longer permissible under Article 2".[43] To arrive at this statement, the Court considered the *de facto* abolition of the death penalty, Protocol 6 having 41 ratifications, and the policy of the Council of Europe to require all new Member States to abolish capital punishment as a condition of admission.

2.4. Conclusion on Article 2 of the ECHR and Terrorism

In sum, the Court stood firm on the principle that the positive obligation to protect the population from terrorism, and the limits to the use of lethal force by State agents during counter-terrorism operations are complementary obligations underlying the fundamental nature of Article 2 in protecting the right to life. As the Court stated in the *McCann* judgment: "[i]t must also be borne in mind that . . . Article 2 ranks as one of the most fundamental provisions in the Convention . . . [t]ogether with Article 3 . . . of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe".[44] Thus, infringing this basic value would contribute to the purpose of terrorists to attack and destabilise the foundations of democratic societies.

2.5. The Prohibition of Torture, Inhumane and Degrading Treatment, Article 3 of the ECHR

Article 3 of the ECHR is particularly pertinent in analysing counter-terrorism measures, such as the conduct of interrogations and the conditions of detention. As Article 3 "enshrines one of the most fundamental values of democratic societies", the Court emphasised the absolute prohibition to resolve to torture or inhuman or degrading treatment or punishment in numerous cases regarding terrorism.[45] The Court is fully aware of the huge difficulties faced by States when fighting terrorist-related violence, but even in terrorism-related circumstances, the ECHR absolutely prohibits torture or inhumane or degrading treatment or punishment, irrespective of the victim's conduct.[46] Furthermore, the Court adds that "Article 3 admits of no exceptions to this fundamental value and no derogation from it is permissible under

[42] *Ibid.*, para. 198.
[43] *Ibid.*, para. 196.
[44] *McCann and Others* v. *United Kingdom*, *supra* note 11, para.147.
[45] *See e.g. Chahal* v. *United Kingdom*, 15 November 1996, 22414/93, para. 79; *Labita* v. *Italy*, 6 April 2000, 26772/95, para. 119; *Aksoy* v. *Turkey*, *supra* note 19, para. 62; *Aydin* v. *Turkey*, *supra* note 19, para. 81.
[46] *Chahal* v. *United Kingdom*, *supra* note 45, para. 79. *See also Ireland* v. *UK*, 18 January 1978, 5310/71, para. 163; *Tomasi* v. *France*, 27 August 1992, 12850/87, para. 115; *Aksoy* v. *Turkey*, *supra* note 19, para.62; *Aydin* v. *Turkey*, *supra* note 19, para. 81.

Article 15 even having regard to the imperatives of a public emergency threatening the life of the nation or to any suspicion, however well-founded, that a person may be involved in terrorist or other criminal activities".[47]

2.5.1. Detention Conditions

In the early case law, the threshold for treatment to amount to a breach of Article 3 appeared to be stricter, as was the case in two of the Commission's early decisions concerning the treatment of alleged terrorists. The decision of *G. Ensslin, A. Baader and J. Raspe* v. *FRG* was a Red Army Fraction case where exceptional circumstances occurred and had to be taken into account by the Commission.[48] All three applicants died in prison prior to the decision, apparently having committed suicide. They were convicted and given life sentences and subjected to restrictive measures in custody including periods of intense social isolation. The conditions were tightened when different 'terrorist acts' occurred in Europe. This social isolation, together with the other restrictive conditions and the possibility that they might have lead to the suicide of the applicants was not found to amount to a violation of Article 3 of the Convention. However the Commission warned that complete sensory and social isolation cannot be justified by security reasons as it destroys the personality and would be a breach of Article 3 of the ECHR.[49]

In *G. Kröcher and C. Möller* v. *Switzerland*, again strict conditions were imposed on the applicants in custody, but they were relaxed during the detention on remand.[50] The conditions included a strong form of social isolation, constant artificial lighting and the strict control of visits from lawyers. The Commission granted that the terrorism situation in the autumn of 1977 had to be highlighted and it recalled the fatal circumstances of G. Ensslin, A. Baader and J. Raspe with the controversy that it created and the attempt by the Swiss authorities to prevent such a situation from recurring.[51] The sole objective of these conditions was security and not punishment.[52] The Commission expressed "serious concerns with the need for such measures, their usefulness and their compatibility with Article 3", and yet it found no violation of Article 3 of the ECHR since it considered that the minimum level of severity to involve a breach of this provision was not reached.[53]

The first major decision as regards the prohibition of Article 3 and terrorism was the second judgment regarding IRA terrorism and the long-standing crisis in Northern Ireland in the interstate complaint of *Ireland* v. *United-Kingdom*.[54] The Irish Government complained that the UK had violated the ECHR in Northern

[47] *Aydin* v. *Turkey*, *supra* note 19, para. 81.
[48] *G.Ensslin, A.Baader & J.Raspe* v. *FRG*, Comm. Dec. 8 Jun. 1978, DR 14, pp. 64–116.
[49] *Ibid.,* pp. 109–110, para. 5.
[50] *G.Kröcher and C.Möller v. Switzerland*, Comm. Rep. 16 Dec. 1982, DR 34, pp. 24–59.
[51] *Ibid.*, p.54, para. 63.
[52] *Ibid.*, p.56, para. 73.
[53] *Ibid.*, p.57, paras. 75–77.
[54] *Ireland* v. *United Kingdom*, *supra* note 46.

Ireland by ill treating individuals detained under its special measures, that those special measures themselves were in breach of the ECHR, and that their application constituted discrimination based on political opinion. By March 1975, it was reported that over 1,100 people had been killed, over 11,500 injured and more than GBP 140,000,000 worth of property had been destroyed because of the recent violence in Northern Ireland, in part due to terrorism.[55] The Court referred to the Government's definition of terrorism as "organized violence for political ends".[56] When taking into account the facts, the ECtHR did a comprehensive study of what constituted IRA and Loyalist terrorism, often comparing both of their activities. It also stressed reasons why violence and terrorism emerged in the region and why terrorist groups even received support at times by parts of the population.[57]

The Court considered four issues in regard to the allegations of ill treatment. The first one was the unidentified interrogation centre or centres and the 'five techniques' used to aid interrogation. Those techniques included the combined application of: wall standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink. The Court found that those 'five techniques' were a breach of Article 3 and constituted inhumane and degrading treatment. As regards the case's second issue, Place Barracks, the Court found that the repeated violence used on individuals held in custody in order to extract confessions, names of others or information was inhuman and degrading treatment and violated Article 3 of the ECHR. In the third issue, referred to as 'the other places' by the Court, despite the fact that the Court described the practice followed as discreditable and reprehensible, no violation of Article 3 was found in the treatment of those detainees who had experienced detention in extreme discomfort and were forced to perform irksome and painful exercises.[58] As for the fourth issue, the Irish Government was asking the Court to address a consequential order to the UK, including prosecuting the members of security forces who had committed, condoned, or tolerated acts contrary to Article 3. The Court denied this request.

The position of the Court against the use of ill treatment on suspected terrorists was strengthened in 1992 with the *Tomasi* v. *France* judgment.[59] In this case, the French Government attempted to convince the Court that the terrorist circumstances of the case should be taken into account when interpreting Article 3. The Court

[55] *Ibid.*, para. 12.
[56] *Ibid.*
[57] For instance, in March 1966, shortly after the beginning of a campaign for 'civil rights' by the Catholic Community in order to eliminate the discrimination it faced, several petrol bombs were thrown at Catholic schools and property. In May of the same year, Catholics were murdered or wounded. Then in August 1969, lots of houses and licensed premises mostly owned by Catholics were burned, destroyed or damaged.
[58] It can be argued that under the ICCPR, this would have constituted a violation of Art. 10 ICCPR. However, the ECHR does not provide the same protection of dignity for detained persons.
[59] *Tomasi* v. *France*, *supra* note 46.

rejected this approach and insisted that the "undeniable difficulties inherent in the fight against . . . terrorism" could not create the imposition of limits on the Convention's protection of the physical integrity of persons.[60] Therefore, Article 3 had been violated.

Concerning the specific component of torture in Article 3, *Aksoy* v. *Turkey* was the first judgment regarding terrorism in which the Court concluded that the alleged ill treatment amounted to torture.[61] In this judgment, a man was detained for 14 days during which he was subjected to 'Palestinian hanging', following his arrest in Turkey on suspicion of terrorism.[62] The Court again observed, "even in . . . the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment".[63] In the end, the Court concluded that the use of the 'Palestinian hanging' could only been described as torture in violation of Article 3 of the ECHR.[64]

In *Dikme* v. *Turkey*,[65] the first applicant was detained under suspicion of being a member of the terrorist organisation *Devrimci Sol*.[66] He alleged that he was assaulted causing both physical and mental pain or suffering, all aggravated by the fact that he was in total isolation and blindfolded. The Court stressed that "the requirements of an investigation and the undeniable difficulties inherent in the fight against terrorist crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals".[67] Then, the Court reaffirmed that the victim's conduct or, in the case of detainees, the nature of the offence, is irrespective to the absolute prohibition of Article 3.[68] The Court recalled that the Convention is a "living instrument which must be interpreted in the light of present-day conditions", thus "certain acts which had previously been classified as 'inhuman and degrading treatment' as opposed to 'torture' might be classified differently in [the] future".[69] Therefore, the Court concluded that the treatment inflicted amounted to torture in violation of Article 3. Furthermore, the Court found that there was a lack of a thorough and effective investigation into the allegations of ill treatment, which resulted in a violation of Article 3 on that count as well.

In 2001, the treatment of suspected terrorists was again a question in the case of *Akdeniz and Others* v. *Turkey*. The facts accepted by the Court stressed that "the applicants were detained in the open at Kepir . . . and that during this time, they

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[60] *Ibid*., para. 115.
[61] *Aksoy* v. *Turkey*, *supra* note 19.
[62] 'Palestinian hanging' is a torture technique in which the person has her arms behind her back and is then suspended by her arms.
[63] *Aksoy* v. *Turkey*, *supra* note 19, para. 62.
[64] *Ibid.*, para. 64.
[65] *Dikme* v. *Turkey*, 11 July 2000, 20869/92.
[66] Name commonly used to refer to the extreme left-wing armed movement '*Türkiye Halk Kurtuluş Partisi/Cephesi-Devrimci Sol*'.
[67] *Dikme* v. *Turkey*, *supra* note 65, para. 90.
[68] *Ibid.*
[69] *Ibid.*, para. 92. *See* especially *Selmouni* v. *France*, 28 July 1999, 25803/94, para. 101.

suffered significant privation . . . [s]ome beatings [also] occurred. The evidence showed that they suffered not only from cold [environmental conditions] but from fear and anguish as to what might happen to them".[70] The threshold of inhuman and degrading treatment was reached and Article 3 of the Convention was violated.

Öcalan case addressed complaints on the fact that he was being detained on the island of Imrah, where he was the sole prisoner and had restricted contacts with his lawyers and relatives. To begin with, the Court accepted that detaining the applicant raised exceptional difficulties for the Government, as Öcalan was the leader of a large terrorist organization and he was considered "the most dangerous terrorist in Turkey". The Court further observed that the cell in which the applicant was detained did not raise any issue under Article 3 of the ECHR. As for the fact that the applicant was the sole prisoner on an island, the Court did not consider this as being detention in sensory isolation or solitary confinement since, even if his only contact was with prison staff, he had access to books, newspapers and a radio. Moreover, he received daily visits from doctors and weekly visits from his lawyers. While the Court did share the concern of the European Committee for the Prevention of Torture (CPT) about the long-term effects of this detention, "the Court finds the general conditions in which he is being detained at Imrali Prison have not reached the minimum level of severity necessary to constitute inhuman or degrading treatment".[71]

The case of *Elci and Others* v. *Turkey* concerned the mistreatment of Turkish lawyers who had represented alleged terrorists in the past and who had been engaged in human rights related activities.[72] The Court reached the conclusion that, during their detention, five of the applicants had suffered from physical and mental violence amounting to torture, while five others suffered from ill treatment serious enough to be inhuman and degrading according to Article 3 of the ECHR.[73] Moreover, the Court found that there had been "total inactivity" to investigate the alleged ill treatment.[74]

In *Çolak and Filizer* v. *Turkey*, the applicants were arrested and detained on suspicion of belonging to the PKK.[75] They alleged to have suffered from various forms of ill treatment. No explanation was given by the Government and "the symptoms noted in the prison doctor's reports were the result of treatment for which the Government bore responsibility".[76] Consequently, a violation of Article 3 of the ECHR was found. Even if the alleged responsible police officers were acquitted in domestic courts, "the Court considers that the acquittal of the police officers

[70] *Akdeniz and Others* v. *Turkey*, 31 May 2001, 23954/94, para. 98.
[71] *Öcalan* v. *Turkey*, *supra* note 6, para. 236.
[72] *Elci and Others* v. *Turkey*, 13 November 2003, 23145/93 and 25091/94.
[73] *Ibid*., paras. 642 and 647.
[74] *Ibid*., para. 649.
[75] *Çolak and Filizer* v. *Turkey*, 8 January 2004, 32578/96 and 32579/96.
[76] *Ibid*., para. 34.

suspected of inflicting ill-treatment cannot absolve the State of its responsibility under the Convention".[77]

2.5.2. The Transfer of Alleged Terrorists to Detention Facilities

Öcalan complained about the condition of his transfer from Kenya to Turkey. During this transfer, he was handcuffed and blindfolded. Taking into account all the facts circumstances of the case, the Court concluded that "it has not been established 'beyond reasonable doubt' that the applicant's arrest and the conditions in which he was transferred from Kenya to Turkey exceeded the usual degree of humiliation that is inherent in every arrest or attained the minimum level of severity required by Article 3".[78]

2.5.3. Disappearances in the Context of Terrorism

In *Kurt* v. *Turkey*, the facts concerned the disappearance of the applicant's son whom the Government argued had been kidnapped by a terrorist organization. Most interesting is the finding of a violation of Article 3, under the circumstances of this case, in relation to the applicant herself. The Court observed that the authorities gave no serious consideration to the applicant's complaint, even though she had faced anguish and distress. Her suffering was endured over a prolonged period of time and therefore was categorised as ill treatment under Article 3.[79] In *Taş* v. *Turkey* and *Ipek* v. *Turkey*, the Court once more found a violation of Article 3 concerning a family member in a disappearance case involving terrorism.[80] However, in another disappearance case linked to terrorism in Turkey, the Court insisted that the *Kurt* case does not establish any general principle that a family member of a 'disappeared person' is thereby a victim of treatment contrary to Article 3.[81] The circumstances of the case and the attitude of the authorities towards the family member are very relevant.

2.5.4. Sexual Violence by State Authorities in Counter-Terrorism Operations

The *Sevtap Veznedaroğlu* v. *Turkey* judgment is particularly relevant as regards the procedural aspects of Article 3 in relation to suspected terrorists.[82] The applicant was a public law research student and married to a lawyer who had been the provincial president of the Diyarbakır Human Rights Association in 1990. The applicant argued that the police constantly followed her on account of her husband's professional position. She was arrested at her home on suspicion of membership of the PKK. In her application, she claimed that she was subjected to torture and that

[77] *Ibid*., para. 33.
[78] *Ibid*., para. 228.
[79] *Kurt* v. *Turkey*, *supra* note 19, paras. 133–134.
[80] *Taş* v. *Turkey*, para. 79, and *Ipek* v. *Turkey*, para. 183, *supra* note 19.
[81] *Çakici* v. *Turkey*, *supra* note 19, para. 98.
[82] *Sevtap Veznedaroğlu* v. *Turkey*, 11 April 2000, 32357/96.

"[t]he interrogators, while threatening her with death and rape, told her not to work on human rights matters".[83] Although the Court could not establish if the applicant was tortured as claimed, it considered that in the circumstances the applicant had an arguable claim that she had been tortured and that the authorities failed to investigate the torture complaint as the procedural obligations under Article 3 require.[84]

In the case of *Aydin* v. *Turkey*, the applicant and her family were put in detention on account of counter-terrorism and the need to elicit information.[85] The applicant was 17 years old at the time of her detention when she suffered from multiple forms of sexual violence, including rape and forced nudity. The Court had to repeat one more time that Article 3 "prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Article 3 admits of no exceptions to this fundamental value and no derogation from it is permissible under Article 15 even having regard . . . to any suspicion, however well-founded, that a person may be involved in terrorist or other criminal activities".[86] Considering the background of the case before it, the court concluded that the "accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately".[87]

2.5.5. The Expulsion of Alleged Terrorists to Countries where Ill Treatment is Imminent

As for the question if a State could expel an alleged terrorist to a country in which there was a risk that he would face ill treatment, the leading judgment is the case of *Chahal* v. *the United Kingdom*.[88] The background of this case was the conflict in Punjab, India. The main applicant was suspected by the Government of being involved in Sikh terrorism, which had as its goal the separation of Punjab. A decision had been taken to deport Mr Chahal for security reasons, including the international fight against terrorism. In response to that decision, the applicant made an application for asylum based on a well-founded fear of persecution within the meaning of the United Nations 1951 *Convention on the Status of Refugees*. One of the Government's arguments relied partly on Article 33(2) of the 1951 UN Refugee Convention. The argument was that there should be a balance between the risk of an individual to be subjected to torture if expelled to another country and the risk of the

[83] *Ibid.*, para. 12.
[84] *Ibid.*, para. 35.
[85] *Aydin* v. *Turkey*, *supra* note 19.
[86] *Ibid*., para. 81.
[87] *Ibid*., para. 86.
[88] *Chahal* v. *United Kingdom*, *supra* note 45.

host State's security if the person was allowed to remain. The Court rejected this in a 13 to 7 vote.

The Court recalled the right of States under international law and their treaty obligations to control the entry, residence and expulsion of aliens.[89] Nevertheless, the case law of the Court establishes that an expulsion may be in contradiction with Article 3 of the ECHR and engage the responsibility of the expelling State if there exists a real risk of ill treatment in the receiving State.[90] The Court made a statement that it is aware of the huge difficulties faced by States when fighting terrorist violence, but even in terrorism circumstances, the ECHR absolutely prohibits torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.[91] The fact that a person is perceived as a terrorist is not a material consideration for assessing whether there exists a real risk of treatment in breach of Article 3 in expulsion cases. The protection offered by Article 3 is therefore wider than that of Articles 32 and 33 of the 1951 Geneva Convention.[92] In this case, the Court concluded that the execution of the order to deport the suspect to India would be a violation to Article 3 of the ECHR.

In 2004, the Court gave two decisions regarding the Netherlands in the cases of Thampibillai[93] and Venkadajalasarma.[94] The Court had to determine whether the applicants faced a real risk, if expelled to Sri Lanka, of suffering from treatment contrary to Article 3. The background of the case involved the situation in Sri Lanka and the conflict between the Government and the Tamil tigers, or LTTE, which in the facts of the cases was described as "a Tamil terrorist organisation, engaged in an armed struggle for independence".[95] The Court stressed that "[e]ven though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive".[96] The court considered, that even if the applicants were to be apprehended by authorities in Sri Lanka, "in the current climate in Sri Lanka, it is unlikely that [they] . . . would run a real risk of being subjected to ill-treatment".[97] In support to this assessment, the Court addressed the considerable improvement of the security situation. Moreover, even if the Court agreed that the situation is not yet stable, "the fact that peace negotiations have not yet been successfully concluded does not preclude the Court from examining the individual circumstances of the applicant in the light of the current general situation".[98] Both cases emphasise that there must be substantial grounds to believe that an "applicant, if expelled, would be exposed to a real risk of

[89] *Ibid*., para. 73.
[90] *Ibid.*, para. 74.
[91] *Ibid.*, para. 79.
[92] *Ibid*., para. 80.
[93] *Thampibillai* v. *Netherlands*, 17 February 2004, 61350/00.
[94] *Venkadajalasarma* v. *Netherlands*, 17 February 2004, 58510/00.
[95] *Ibid*., para. 10 and *Thampibillai* v. *Netherlands*, *supra* note 93, para. 11.
[96] *Ibid*., para. 63 and *Thampibillai* v. *Netherlands*, *supra* note 93, para. 61.
[97] *Ibid*., para. 66 and *Thampibillai* v. *Netherlands*, *supra* note 93, para. 64.
[98] *Ibid*., para. 67 and *Thampibillai* v. *Netherlands*, *supra* note 93, para. 65.

being subjected to torture or inhuman or degrading treatment within the meaning of Article 3 of the Convention".[99]

2.5.6. The Unjustified Destruction of Property

The judgments of *Selçuk and Asker* v. *Turkey*,[100] *Bilgin* v. *Turkey*[101], *Dulaş* v. *Turkey*[102], *Yöyler* v. *Turkey*,[103] *Ayder and Others* v. *Turkey* established that the destruction of homes and property carried out during an anti terrorism operation in a brutal manner and leading to suffering of sufficient intensity can be interpreted has inhuman treatment and can engage State responsibility under Article 3.[104] Even if such destruction had been to prevent terrorists from using those homes or to discourage others, this would still not justify the ill treatment.[105]

2.5.7. The Death Penalty and Terrorism in the Context of Article 3

In the *Öcalan* case, the Court examined the question of the legality of the death penalty imposed on an alleged terrorist in relation to Article 3 in the same way as it did with Article 2: in the context of the fairness of the trial. In this case, the Court concluded that:

> "to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention. Having regard to the rejection by the Contracting Parties of capital punishment, which is no longer seen as having any legitimate place in a democratic society, the imposition of a capital sentence in such circumstances must be considered, in itself, to amount to a form of inhuman treatment."[106]

The Court found a violation of Article 3 as Öcalan's death penalty was the result of an unfair trial according to Article 6 and the consequences of this deprivation went on for three years.

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[99] *Ibid*., para. 69and *Thampibillai* v. *Netherlands*, *supra* note 93, para. 68.
[100] *Selçuk and Asker* v. *Turkey*, *supra* note 19.
[101] *Bilgin* v. *Turkey*, 16 November 2000, 23819/94.
[102] *Dulaş* v. *Turkey*, 30 January 2001, 25801/94.
[103] *Yöyler* v. *Turkey*, 24 July 2003, 26973/95.
[104] *Ayder and Others* v. *Turkey*, 8 January 2004, 23656/94.
[105] *Selçuk and Asker* v. *Turkey*, *supra* note 19, para.79.
[106] *Öcalan* v. *Turkey*, *supra* note 6, para. 207.

2.6. Conclusion on Article 3 of the ECHR and Terrorism

To sum up, it is a fact that some States and their agents have resorted to severe beatings, Palestinian hanging, sexual violence in the form of rape and threat of rape, violence on a child, threats of death, total isolation and sensory deprivation, detention in a cold outdoor environment, brutal destructions of property, and unfairly imposing capital punishment. One can justifiably not only claim that these methods were illegal, but even more they prove to be useless and counter-productive in the States' fight against terrorism. The Court has emphasized that Article 3 "enshrines one of the most fundamental values of democratic societies".[107] Overall, this case law proves that European monitoring is essential in the fight against terrorism, because otherwise there is no one left to protect the individuals and democracy from terrorism and State intimidation. As of today, the Court has fully assumed its role in protecting the democratic heritage of the Council of Europe's States by firmly standing by its position that "[e]ven in the most difficult circumstances, such as the fight against terrorism . . . the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment".[108]

2.7. Right to Liberty and Security of the Person, Article 5 of the ECHR

Article 5 of the ECHR prohibits arbitrary arrest. In particular, it includes permissible grounds for deprivation of liberty, the right to be informed of the grounds for arrest, the right to judicial control of arrest and detention. In its case law regarding terrorism, the Court has emphasised the importance of Article 5 by affirming that "any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness".[109]

2.7.1. Definitions of Terrorism and the Requirement of a Specific Offence under Article 5(1) of the ECHR

One of the difficulties of not having a universal definition of terrorism is that a State's definition can be alleged to be not specific enough to constitute an offence under Article 5(1) of the ECHR. The applicants in the *Brogan and Others* v. *the United-Kingdom* judgment presented such an argument.[110] Under section 12 of the UK's 1984 *Prevention of Terrorism Act*, terrorism was defined as "the use of violence for political ends", which includes "the use of violence for the purpose of

[107] *See e.g. Chahal* v. *United Kingdom*, *supra* note 45, para. 79; *Labita* v. *Italy*, *supra* note 45, para. 119; *Aksoy* v. *Turkey*, *supra* note 19, para. 62; *Aydin* v. *Turkey*, *supra* note 19, para. 81.
[108] *Labita* v. *Italy*, *supra* note 45, para. 119.
[109] *Kurt* v. *Turkey*, *supra* note 19, para. 122. *See* also *Çakici* v. *Turkey*, *supra* note 19, para. 104; *Timurtas* v. *Turkey*, *supra* note 19, para. 103; *Çiçek* v. *Turkey*, *supra* note 19, para. 162; *Orhan* v. *Turkey*, *supra* note 19, para. 367.
[110] *Brogan and Others* v. *United Kingdom*, 29 November 1988, 11209/84, 11234/84, 11266/84 and 11386/85.

putting the public or any section of the public in fear". Nevertheless, the Court excluded this claim as it already had recognized in its case law the same domestic definition of terrorism to be "well in keeping with the idea of an offence".[111]

2.7.2. The Reasonableness of Suspicion and the Elements of Terrorism

One of the fundamental issues in the detention of suspected terrorists is the matter of 'reasonableness of suspicion' under Article 5(1) of the ECHR. In the judgment of *Fox, Campbell and Hartley* v. *the United Kingdom*, the applicants complained about their arrest and detention under legislation aimed at countering terrorism.[112] They argued that their arrest and detention was aimed at information gathering, rather than for the purpose of charging them. Two of the applicants had been convicted in the past for explosives offences; one of them had also been convicted of belonging to the IRA. It also gave the methodology in examining complaints related to terrorism. First, the Court will "take into account the special nature of terrorist crime and the exigencies of dealing with it, as far as is compatible with the applicable provisions of the Convention in the light of their particular wording and its overall object and purpose".[113]

Second, when addressing the question of Article 5(1) of the ECHR and the 'reasonableness' of a suspicion, the Court observed that a terrorist crime belongs to a special category. The first reason for special category classification involves the risk to life and human suffering and, secondly, the difficulty of disclosing information without endangering the source of the information.[114] However, there is no justification to stretch the 'reasonableness' in such a way as to impair the safeguard of Article 5(1) of the ECHR.[115]

Third, the Court acknowledged that Article 5(1) should not be interpreted in such a way as to make it impossible for the Governments to counter terrorism. Therefore, States do not have to prove their reasonable suspicion by "disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity".[116] Nonetheless, the Court has to approve if Article 5(1) is respected in terrorism situations with at least some facts or information which will satisfy the Court that the arrest was conducted under a reasonable suspicion.[117] Consequently, some objective evidence has to back up the subjective suspicion of terrorism.

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[111] *Ibid.*, para. 51. *See Ireland* v. *United Kingdom*, *supra* note 46, para. 196.
[112] *Fox, Campbell and Hartley* v. *United Kingdom*, 30 august 1990, 12244/86, 12245/86 and 12383/86.
[113] *Ibid.*, para. 28.
[114] *Ibid.*, para. 32.
[115] *Ibid.*, *see also* the case of *Brogan and Others* v. *United Kingdom*, *supra* note 110, para. 59.
[116] *Fox, Campbell and Hartley* v. *United Kingdom*, *supra* note 112, para. 34.
[117] *Ibid.*

In the end, the Court conceded that the arrest of Mr. Campbell and Mrs. Campbell was based on a *bona fide* suspicion that they were terrorists. Nevertheless, the ECtHR affirmed the legal principle that the sole fact that individuals had previous convictions of terrorist acts is not enough to justify a suspicion. Neither is the fact that the interrogations were on the subject of specific terrorist acts.[118] In conclusion, the Court found a breach of Article 5(1) of the ECHR.

A similar complaint was at the centre of *Murray* v. *the United Kingdom*.[119] The facts mainly concerned Mrs. Murray who was arrested, questioned and released without charge, while personal information concerning her and her family was kept on record. Before the arrest, two of Mrs Murray's brothers were convicted in the United States for offences of purchasing arms for the Provisional IRA.

The Court reiterated the principle that the "use of confidential information is essential in combating terrorist violence and the threat that organised terrorism poses to the lives of citizens and to democratic society as a whole".[120] Nonetheless, this will not leave the authorities with carte blanche under Article 5 of the ECHR simply because they assert the possible involvement of terrorism.[121] In contrast to the *Fox, Campbell and Hartley* case, the Court was satisfied with the evidence provided that a reasonable suspicion existed.

Once more, an applicant raised the issue of the reasonableness of the suspicion under Article 5(1)(c) of the ECHR in the case of *O'Hara* v. *the United Kingdom*.[122] The applicant was arrested in relation to a murder, which the Provisional IRA had claimed responsibility for. The arrest of the applicant was motivated by intelligence the authorities received. The Court recalled the test of the objective observer established in the *Fox, Campbell and Hartley* case and added that the terrorist crime causes special problems, especially with regard to the safety of the informant.[123] No confidential sources of information are to be disclosed by Contracting States when it comes to establishing the reasonable suspicion of a suspected terrorist; but even then, some facts or information have to be furnished in order to satisfy the Court of the reasonable suspicion.[124] In the end, no breach of Article 5(1)(c) was found on the basis of a change in domestic law regarding the standard of suspicion, which was different from the *Fox, Campbell and Hartley* and *Murray* cases.[125]

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[118] *Ibid.*, para. 35.
[119] *Murray* v. *United Kingdom*, 28 October 1994, 14310/88.
[120] *Ibid.*, para. 58. *See also Klass and Others* v. *Germany*, 6 September 1978, 5029/71, para. 48.
[121] *Ibid.*
[122] *O'Hara* v. *the United Kingdom*, 16 October 2001, 37555/97.
[123] *Ibid.*, paras 34-35. *See also Fox, Campbell and Hartley*, *supra* note 112, para. 32.
[124] *O'Hara* v. *United Kingdom*, *supra* note 122, para. 35.
[125] *Ibid.*, para. 38.

2.7.3. The Length of Detention of Suspected Terrorists without Judicial Control

As for how long a suspected terrorist can be detained without being brought before a judge in respect of the protection of Article 5(3) of the ECHR, the *Brogan and Others* v. *the United-Kingdom* judgment is the leading authority in the application of this provision in cases regarding terrorism.[126] The case dealt with the arrest and detention of four individuals suspected of terrorism. The periods of detention were six days and 16.5 hours and, five days and 11 hours, four days and 11 hours, and four days and six hours. None of the suspects was brought before a judge or another official authorized to exercise judicial power, nor were any charges laid against them after their release.

The Court took into account the growth of terrorism and recognised the "need, inherent to the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights",[127] here then echoing its principle from the *Klass and Others* judgment.[128] It should be noted that the Government had withdrawn their derogation of Article 15 in 1984. So this case would be decided with the full application of the Convention, nevertheless the background related to terrorism was to be taken into account.

On the alleged violation of Article 5(3), the ECtHR first accepted the fact that terrorism brought special problems for investigation of such acts and that the "context of terrorism in Northern Ireland has the effect of prolonging the period" during which the Government may detain a suspected terrorist without violating Article 5(3).[129] However, to attach too much importance to the terrorism features as a justification for such a length of detention without judicial control would be a disrespectful interpretation of the word "promptly".[130] The very general legitimate aim of protecting the population from terrorism is not enough for Article 5(3) to be disrespected. Therefore, there was a violation of this provision regarding all four applicants.

The Court and the Commission had different views on this case. Under Article 5(3), the Commission granted a longer period of detention in the given context than in normal cases, allowing both detentions of four days, but not the ones of five days or more.[131] The Commission's flexible approach resembled that of the Court's in *Klass and Others* as regards Article 8 in the context of terrorism. However, in the *Brogan* case the Court blocked this more expansive approach to Article 5, which did not contend 'claw back clauses' like Article 8, in this way establishing the legal

[126] *Brogan and Others* v. *United Kingdom*, *supra* note 110.
[127] *Ibid*., para. 48.
[128] *Klass and Others* v. *Germany*, *supra* note 120.
[129] *Brogan and Others* v. *United Kingdom*, *supra* note 110, para. 61.
[130] *Ibid.*, para. 62.
[131] *Ibid.*, para. 57.

framework to which states must adjust to combat terrorism or otherwise introduce judicial control of detention or resort to Article 15.[132]

Following the *Brogan* judgment, a series of cases in relation to suspected terrorists detained over the *Brogan* limit of four days resulted in a violation of Article 5(3), as it can be found in the cases of *Sakik and Others* v. *Turkey*,[133] *Dikme* v. *Turkey*, *O'Hara* v. *the United Kingdom*, *Iğdeli* v. *Turkey*,[134] *Filiz and Kalkan* v. *Turkey*,[135] and *Öcalan* v. *Turkey*.[136]

2.7.4. Detention on Remand

Furthermore, the case law extends to the aspects of Article 5(3) and the detention on remand of suspected terrorists or its prolongation. First, the Commission's decision in *Ferrari-Bravo* v. *Italy* was a case related to the assassination of Also Moro by the Red Brigade.[137] The applicant was a university professor detained on remand for four years and eleven months under the suspicion of having helped to establish and direct a terrorist organisation. The Commission conceded that the provisional release of the applicant was not possible because of the special features of the case. It found the danger of the applicant absconding to be inherent to the terrorist offences that he was accused of, which were "part of an overall plan to provoke civil fear and armed insurrection against the authority of the State".[138] Also, the Commission considered the strong possibility that the applicant would leave the country if released and the specific problem linked to extradition and terrorism offences: "many countries refuse to extradite persons accused of them – and this has happened in the case of some of the applicant's co-accused".[139] In the end, the case was declared inadmissible.

The European supervision appeared stricter in the case of *Tomasi* v. *France.* The applicant was arrested and detained on remand for five years and seven months,

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[132] A. Tanca, 'Human Rights, Terrorism and Police Custody : The Brogan Case', *European Journal of International Law*, <www.eijl.org/journal/Vol1/No1/art16.html>, visited on 26 March 2002.

[133] *Sakik and Others* v. *Turkey*, 26 November 1997, 23878/94, 23879/94, 23880/94, 23882/94, 23883/94 and 23881/94. The applicant argued that the dissemination of separatist views did not constitute 'terrorism' and the Court seemed to agree with them as it concluded by saying in para. 45 of the case: "even supposing the activities of which the applicants stood accused were linked to a terrorist threat . . ." it was not necessary to detained them for twelve or fourteen days without judicial supervision.

[134] *Iğdeli* v. *Turkey*, 20 June 2002, 29296/95.

[135] *Filiz and Kalkan* v. *Turkey*, 20 June 2002, 34481/97.

[136] *Öcalan* v. *Turkey*, *supra* note 6, para. 110. In this case, it took seven days for the authorities to bring Öcalan before a judge and the ECtHR did not accept the Government's argument that the rough weather conditions were mostly responsible for this delay (para. 109).

[137] *Ferrari-Bravo* v. *Italy*, Comm. Dec. 14 March 1984, DR 37, pp.15–41.

[138] *Ibid.* p. 39, para. 14.

[139] *Ibid.* p.39, para. 15.

thus claiming a violation of Article 5(3) of the ECHR, which the Court granted since the seriousness of terrorism cannot justify detention without trial forever. The Court found that even if there might have existed a risk for public order justifying the detention at first, "it must have disappeared after a certain time".[140]

This interpretation was confirmed in the case of *Debboub alias Husseini Ali* v. *France*.[141] The ECtHR reaffirmed that, even with terrorism as a justification, the maintenance of reasonable grounds of suspicion was a *sine qua non* for the detention to continue.[142] In conclusion the Court found a violation of Article 5(3), holding that more convincing justifications should have justified the length of the present detention, since the initial motives lost their relevance after a period of time.[143]

This stricter application was also reaffirmed in *Erdem* v. *Germany*.[144] The applicant had refugee status in France and was arrested at the German border under suspicion of belonging to a terrorist organisation. The detention on remand lasted five years and eleven months. The Court agreed that there existed a risk that the applicant would escape, but this argument alone was no longer sufficient after such a long period of time. Consideration was given to the fact that the decisions only repeated what the previous ones had said without stressing any new element. Without undermining the difficulties linked to a trial on the ramification of the PKK terrorism in Europe, the Court considered the length of the detention not to be justified by the complexity of the case, the number of people involved or the conduct of the defence.[145] More convincing justifications should have been brought to avoid a violation of Article 5(3).

2.7.5. Judicial Review of Deprivation of Liberty, Article 5(4) of the ECHR

As for Article 5(4) in cases regarding terrorism, an evolution concerning *habeas corpus* and the UK counter-terrorism measures can be demonstrated from the Commission's decision of *McVeigh and Others.* v. *United Kingdom* and the *Chahal* case.[146] In the *McVeigh* decision, the Commission found that in the case of arrest under counter-terrorism legislation that *habeas corpus* constituted an effective remedy.[147] Then, in the *Chahal* case, the Court took a different stance. First, it observed that because of the involvement of national security, *e.g.* terrorism, domestic jurisdictions were not in a position to review the decision to detain the

[140] *Tomasi* v. *France*, *supra* note 46, para. 91.
[141] *Debboub alias Husseini Ali* v. *France*, 9 November 1999, 37786/97.
[142] *Ibid.*, para. 39.
[143] *Ibid.*, para. 47.
[144] *Erdem* v. *Germany*, 5 July 2001, 38321/97.
[145] *Ibid.*, para. 46.
[146] *McVeigh and Others.* v. *the United Kingdom*, Comm. Dec. 18 march 1981, D.R.25, pp.15–59.
[147] *Ibid.*, pp.47–48, paras. 217–218.

applicant and to keep him in detention in accordance with Article 5(4).[148] The Court once again recognized that special measures might be necessary with respect to national security issues, nonetheless it recalled its principles set out in its case law that: "[t]his does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved".[149] The Court used a 'less restrictive means' test and comparative law to illustrate how the UK measures failed to respect Article 5(4), particularly by according "significance to the fact that . . . in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns regarding the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice".[150] Considering all this and the serious length of detention, the *habeas corpus* guarantee, the domestic judicial review of the detention decision and the advisory panel procedure did not meet the requirements of Article 5 (4).

Moreover, the *G.B.* v. *Switzerland*[151] and *M.B.* v. *Switzerland* cases concerned more than 30 days of detention on remand of the applicants who were under urgent suspicion of having participated with the 'Carlos' terrorist group in different attacks.[152] In the alleged violation of Article 5(4) of the European Convention, the Court noted the terrorism circumstances of the cases, and thus it also observed that none of the parties argued that the cases revealed features of complexity.[153] The conclusion was that there was an infringement of Article 5(4), since the proceedings were not done 'speedily' according to this provision.

Also, in *Iğdeli* v. *Turkey*, the Court considered that "where a detained person has to wait for a period to challenge the lawfulness of his custody, there may be a breach of Article 5 § 4 . . . the period in question [up to 15 days] sits ill with the notion of 'speedily' under Article 5 § 4 of the Convention".[154]

2.7.6. Disappearances and Unacknowledged Detention of Suspected Terrorists

A number of disappearances and unacknowledged detention cases related to the terrorism situation in Turkey were brought to the Court in connection with Article 5.

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[148] "Although the procedure before the advisory panel undoubtedly provided some degree of control, bearing in mind that Mr Chahal was not entitled to legal representation before the panel, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed . . . the panel could not be considered as a 'court' within the meaning of Article 5 para. 4", *Chahal* v. *United Kingdom*, *supra* note 45, para. 130.
[149] *Ibid*., para. 131. *See also Fox, Campbell and Hartley* v. *United Kingdom*, *supra* note 112, para. 34, and *Murray* v. *United Kingdom*, *supra* note 119, para. 58.
[150] *Chahal* v. *United Kingdom*, *supra* note 45, para. 131.
[151] *G.B.* v. *Switzerland*, 30 November 2000, 27426/95.
[152] *M.B.* v. *Switzerland*, 30 November 2000, 28256/95.
[153] *G.B.* v. *Switzerland*, *supra* note 151, para. 34.
[154] *Iğdeli* v. *Turkey*, *supra* note 134, para. 34.

From the first case on this matter, *Kurt* v. *Turkey,* the Court's position has been firm that the unacknowledged detention of suspected terrorists is "in the complete absence of the safeguards contained in Article 5 and . . . a particularly grave violation of the right to liberty and security of person guaranteed under that provision".[155]

2.8. Conclusion on Article 5 of the ECHR and Terrorism

To sum up, the case law on Article 5 has shown that the Court will take into account the grave nature of the terrorist crime when interpreting and applying Article 5 of the Convention, but not to the extent of impairing the protection guaranteed by it. As it will be described in the sub-paragraph about Article 15, even when a State derogates from Article 5 there are limits to the measures that can be adopted. Therefore, the protection against arbitrary and excessive arrest and detention remains strictly supervised even in a terrorism context.

2.9. Right to a Fair Trial, Article 6 of the ECHR

The right to a fair trial is an essential element of the European Convention system and to the rule of law, which is part of a common heritage according to the Preamble of the Convention. It remains that terrorism and counter-terrorism measures have lead to significant challenges on this important provision, mainly with the issues of presumption of innocence, special courts, length of proceedings, right to silence, restrictions on the correspondence between a terrorist suspect and his legal representative, and the access to legal representation.

2.9.1. The Presumption of Innocence

In *G. Ensslin, A. Baader & J. Raspe* v. *FRG*, the applicants were complaining of the virulent press campaign describing them as grave criminals, which in their opinion affected the fairness of the trial and the presumption of innocence protected under Article 6 of the ECHR. The Commission observed that even if a press campaign can affect the fairness of a trial, the press and the authorities "cannot be expected to refrain from all statements, not about the guilt of the accused persons but about their dangerous character where uncontested information is available to them" like previous convictions or the use of firearms on arrest.[156]

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[155] *Kurt* v. *Turkey*, para. 128. *See also Çakici* v. *Turkey*, para. 107; *Timurtas* v. *Turkey*, para. 106; *Taş* v. *Turkey*, para. 87; *Çiçek* v. *Turkey*, para. 168; *Orhan* v. *Turkey*, para. 374; *Ipek* v. *Turkey*, para. 191, all at *supra* note 19; and *Akdeniz and Others* v. *Turkey*, *supra* note 29, para. 108.

[156] *G. Ensslin, A. Baader and J. Raspe* v. *FRG*, *supra* note 48, pp.112-113, para. 15.

2.9.2. Resorting to Special Courts for Trying Terrorism

It is not the task of the Court to decide if special courts are necessary in fighting terrorism. However, it is the task of the court to ascertain if the manner in which a special court functions infringes on the right to a fair trial. The Court dealt with this issue in the *Barbèra, Messegué and Jabardo* v. *Spain* case.[157] The facts of this case concerned a murder that was considered a terrorist act by the Spanish authorities and, in Spain, the *Audienca Nacional* had been granted jurisdiction in terrorist cases since 1977. The applicants were transferred from Barcelona to Madrid, a 600 kilometres journey, the night before the hearing. In addition, there was an unexpected change in the court's membership just before the hearing with no notification to the applicants. The new presiding judge had to rule within three days over this complex case, so the briefness of the trial was a factor for the Court, but most significantly important pieces of evidence were not adduced and discussed in an adequate manner at the trial, resulting in the Court finding a violation of Article 6(1).

In the case of *Incal* v. *Turkey*, the applicant, a member of the opposition party, was convicted by a National Security Court for his participation in the preparation of a leaflet containing virulent remarks about the Turkish Government and calling for Kurds to unite in their political demands.[158] A violation of Article 6 was established in relation to the presence of a military judge on the bench of the national security court. The argument for such a presence was the expertise of the military in dealing with terrorist crimes. In this case like in a series of others, the Court found that the applicant could reasonably fear a lack of independence from the judge and an appeal to the Court of Cassation could not solve this problem, since it had only a limited jurisdiction in such appeals.[159]

2.9.3. Lengths of Proceedings

The case of *Zana* v. *Turkey* mostly dealt with the subject of freedom of expression in circumstances involving terrorism, but the applicant also complained about being unable to appear at the hearing and of the length of the proceedings (two years and five months).[160] First, "[i]n view of what was at stake for Mr Zana, who had been sentenced to twelve months' imprisonment, the National Security Court could not, if the trial was to be fair, give judgment without a direct assessment of the applicant's

[157] *Barbèra, Messegué and Jabardo* v. *Spain*, 6 December 1988, 10590/83.
[158] *Incal* v. *Turkey*, 9 June 1998, 22678/93.
[159] The same conclusion about a lack of independence was found in following Turkish cases: *Çiraklar,* 28 October 1998, 19601/92; *Ükünç and Güneş* v. *Turkey*, 18 December 2003, 42775/98; and all these cases of 8 July 1999 against Turkey, *Gerger*, 24919/94; *Karataş*, 23168/94; *Baskaya and Okçuoglu*, 23536/94 and 24408/94; *Sürek* (No.1), 26682/95; *Sürek* (No.2), 24122/94; *Sürek* (No.3), 24735/94; *Sürek* (No.4), 24762/94; *Sürek and Özdemir*, 23927/94 and 24277/94. In June 1999, legislation was passed by the Turkish parliament to remove the military representation on National Security Courts.
[160] *Zana* v. *Turkey*, 25 November 1997, 18954/91.

evidence given in person".[161] Therefore, the Court found a violation Article 6(1) and 6(3)(c) since "such an interference with the rights of the defence cannot be justified, regard being had to the prominent place held in a democratic society by the right to a fair trial within the meaning of the Convention".[162] Then, the Court found a violation of Article 6(1) on account of the length of the proceedings, particularly because there were no complex issues at stake.

The length of proceedings of five years and ten months were also disputed in the case of *Tomasi* v. *France*. The Court found a violation of Article 6(1) as there was no complexity in the case and the delays were only attributable to the judicial authorities.

2.9.4. The Right to Silence

Concerning the right to silence of suspected terrorists, in *John Murray* v. *the United Kingdom*, the applicant was arrested in a house where it was suspected that an alleged informer was being threatened by the IRA.[163] The applicant never explained his presence in the house. According to the 1988 *Criminal Evidence (Northern Ireland) Order*, it was allowed to make inferences from the applicant's failure to answer certain questions. Firstly, the Court accepts that the right to silence and not to incriminate oneself guaranteed by Article 6(1) are not absolute rights.[164] In the Court's decision, "having regard to the weight of the evidence against the applicant . . . the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide an explanation for his presence in the house was a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances".[165] Therefore, the Court found no violation of 6(1) on that point.

Furthermore, the right to silence of suspected IRA members was once more an issue in both cases of *Heaney and McGuinness* v. *Ireland*[166] and *Quinn* v. *Ireland*.[167] The two cases had in common the fact that during their questioning, all applicants refused to answer some questions. Section 52 of the 1939 *Offences against the State Act* was then read to them. According to this 1939 Act either the suspect provided the information requested or he would face about six months of imprisonment. All applicants still refused to answer and were later convicted. The Court decided that the "security and public order concerns of the Government cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against

[161] *Ibid.*, para. 71.
[162] *Ibid.*, para. 73.
[163] *John Murray* v. *United Kingdom*, 8 February 1996, 18731/91.
[164] *Ibid.*, para. 47.
[165] *Ibid.*, para. 54.
[166] *Heaney and McGuinness* v. *Ireland*, 21 December 2000, 34720/97.
[167] *Quinn* v. *Ireland*, 21 November 2000, 36887/97.

self-incrimination guaranteed by Article 6 § 1 of the Convention".[168] In this way, there was a violation of Article 6(1) and also of Article 6(2), which guarantees the presumption of innocence because of the close link between the two provisions.

2.9.5. The Monitoring of Correspondence

As regards to, the monitoring and censorship of a suspected terrorist's correspondence while in custody, in the *Domenichini* v. *Italy* case, the applicant had been in custody for suspicion of having been active within the 'Prima linea' terrorist organisation.[169] The monitoring of the correspondence to the applicant's lawyers was a breach of his fair trial rights in Article 6(3)(b) of the ECHR, because the applicant had ten days to submit grounds for an appeal to the decision regarding his case and the authorities only sent the correspondence to his lawyer after this ten day period had expired.

2.9.6. The Access to Legal Representation

On another aspect of Article 6, the *Brennan* v. *the United Kingdom* case focused on the question of if a police officer within hearing range can be present during a suspected terrorist's first consultation with his solicitor without violating Article 6 of the ECHR.[170] The Court did find a violation of Article 6(3)(c) read in conjunction with Article 6(1) of the ECHR regarding the presence of the police officer within hearing range during the first consultation between the applicant and his solicitor, which affected his right to an effective exercise of his defence rights.

In *G. Ensslin, A. Baader & J. Raspe* v. *FRG*, the applicants also complained that they were not represented by their choice of lawyers. On this matter, the Commission mentioned that the lawyers excluded were strongly suspected of supporting the criminal association and that this did not affect the applicants chance of receiving an effective defence since the applicants were still represented on average by ten defence lawyers, some of whom were even chosen by them. In the end, no violation of Article 6 of the ECHR was found.

In *John Murray* v. *the United Kingdom* a violation of 6(1) in conjunction with 6(3)(c) was found for the denial of access to a lawyer within the first forty-eight hours of detention.[171]

2.10. Conclusion on Article 6 of the ECHR and Terrorism

To conclude on this part, one must be reminded of the importance the ECtHR attributes to unfair trials when assessing the illegality of the death penalty, as this has been observed in the Öcalan case mentioned above. In that case, numerous

[168] *Heaney and McGuinness* v. *Ireland*, *supra* note 166, para. 58; *Quinn* v. *Ireland*, *supra* note 167, para. 59.
[169] *Domenichini* v. *Italy*, 15 November 1996, 15943/90.
[170] *Brennan* v. *United Kingdom*, 16 October 2001, 39846/98.
[171] *John Murray* v. *United Kingdom*, *supra* note 163.

violations of Article 6 were found on the basis of: the applicant was not tried by an independent and impartial tribunal, he had no access to legal representation while in police custody, he was denied the opportunity to privately communicate with his lawyers out of the hearing range of third parties, and he was only granted access to the case file at a late stage in the proceedings. Also, there were restrictions on the number of lawyers he could access and to the length of their visits, and they were not given access to the case file until late in the day. The Court concluded, "that the overall effect of these difficulties taken as a whole so restricted the rights of the defence that the principle of a fair trial, as set out in Article 6, was contravened".[172]

2.11. Freedom from Retroactive Criminal Legislation, Article 7 of the ECHR

In the judgment of *Ecer and Zeyrek* v. *Turkey*, the applicants alleged a violation of Article 7 because the 1991 *Terrorism Prevention Act* was applied to them for acts that occurred in 1988 and 1989.[173] Relying on its case law, the Court recalled that Article 7 of the Convention consists of the general principle that "only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and prohibits in particular the retrospective application of the criminal law where it is to an accused's detriment".[174] The indictment referred to acts in 1988 and 1989 only and the Government's argument that the applicant continued to be involved in the PKK until 1993 did not reverse that fact. Therefore, the Court concluded that a violation of Article 7(1) of the ECHR had occurred.

2.12. Right to a Private Life and Family, Article 8 of the ECHR

The right to private life is primarily at risk of suffering from some form of interference when it comes to fighting terrorism. Especially, since the Court recognized in *Klass and Others* v. *FRG* that democratic societies were confronted by sophisticated terrorism requiring the use of secret surveillance as a counter-measure in the interest of national security and crime prevention. However, the Court added that States cannot "in the name of the struggle against . . . terrorism, adopt whatever measures they deem appropriate".[175] Legally, the Court must be satisfied with the existence of "adequate and effective guarantees against abuse".[176]

2.12.1 Secret Surveillance and Information Gathering

The question of special measures to gather information was addressed in the Commission's decision of *McVeigh and Others* v. *the United Kingdom*. The

[172] *Öcalan* v. *Turkey*, *supra* note 6, para. 169.
[173] *Ecer and Zeyrek* v. *Turkey*, 27 February 2001, 29295/95 and 29363/95.
[174] *Ibid*., para. 30; *See e.g., Kokkinakis* v. *Greece* judgment of 25 May 1993, 14307/88, para. 52.
[175] *Klass and Others* v. *FRG*, *supra* note 120, para. 49.
[176] *Ibid.*, para. 50.

Commission considered necessary for public safety the questioning, searching, fingerprinting and photography, and the retention of such records after a counter-terrorism check-up at the border. However, the fact that during the detention the authorities refused to allow the detained persons to contact their wives was considered interference not necessary pursuant to Article 8(2).[177]

Similar special measures of information gathering were disputed in the Court's judgment of *Murray* v. *the United Kingdom*.[178] Mrs Murray was arrested, questioned and released without charges, while personal information concerning her and her family were kept on record. When analysing the complaint under Article 8 of the ECHR, the Court echoed once more the obligation of States to prevent terrorism and the special problems linked to the arrest and detention of suspected terrorists. These two factors affect the establishment of a fair balance between the individual rights protected under paragraph 1 of Article 8 of the ECHR and the necessity under the second paragraph of the same article to effectively prevent terrorism.[179] Under the circumstances and background of this case (before the arrest, two of Mrs Murray's brothers were convicted in the United States for offences of purchasing arms for the Provisional IRA), the entry and search of the applicants' home were found to be legitimate and proportionate, so was the gathering of personal information from the person arrested or the from the other people who were present at the time and place of the arrest.

In *Elci and Others* v. *Turkey*, lawyers who had represented alleged terrorists had their homes and/or offices searched and some files in relation to the PKK or Kurdish interests were seized, even if these files were subject to the lawyers' obligation of confidentiality. The operation by security forces was done "without any, or any proper, authorization or safeguards".[180] Accordingly, these actions were not in accordance with the law and therefore resulted in a violation of Article 8 of the ECHR.

2.12.2. Restriction to the Private Life of Detained Terrorists

In the Commission decision of *Baader and Others* v. *FRG*, the four applicants were suspected of belonging to the Red Army Fraction and were detained under restrictive measures, which included censoring their correspondence and limited visits.[181] The applicants were claiming to be 'political prisoners' and as such, to have been subjected to the torture of isolation and other difficulties related to a fair defence. The Commission denied the allegation that the applicants were 'political prisoners' relying on the facts that they were charged with grave offences dangerous to the community and therefore not in custody because of their political opinions.[182]

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[177] *McVeigh and Others.* v. *United Kingdom*, *supra* note 146, p. 52, paras. 234–239.
[178] *Murray* v. *United Kingdom*, *supra* note 119.
[179] *Ibid.,* para. 91. *See Klass and others*, *supra* note 120, para. 59.
[180] *Elci and Others*, *supra* note 72, para. 699.
[181] *Baader and Others* v. *FRG*, Comm. Dec. 30 May 1975, DR 2, pp.58-67.
[182] *Ibid.*, p.62.

The Commission considered that the applicants were particularly dangerous, so the restrictive measures were permissible under Articles 8 and 10 of the ECHR, especially since the tough conditions had been relaxed. In the end, it declared the application inadmissible.

As regards to the monitoring and censorship of a suspected terrorist's correspondence while in custody, in the *Domenichini* v. *Italy* case the applicant had been in custody for suspicion of having been active within the *Prima linea* terrorist organisation. His correspondences, as well as those of other prisoners in a special unit of a prison, were censored for six months. The reasons given for the censorship were, firstly the discovery of differences of opinion among the former terrorists, and secondly, the danger of using the correspondences against public order or safety. However, it was not contested that two letters addressed to his lawyer had been inspected. The Court found a breach of Article 8 in that the Italian law was not clear enough in its scope and the way discretion was granted to the authorities, in other words the applicant did not enjoy the "minimum degree of protection which are entitled under the rule of law in a democratic society".[183]

In *Erdem* v. *Germany*, a judge had controlled the correspondence between a suspected terrorist and his lawyer. In regard to the terrorist threat in all its forms, the safeguards surrounding the present interference and the margin of appreciation of the Contracting States, which was not disproportionate in contrast with the above case, the Court found no violation of Article 8.[184]

2.12.3. Destruction of Property in Counter-Terrorism Operations

The unjustified destruction of property during anti-terrorism operations by Turkish forces was declared in violation of Article 8 of the ECHR in the Turkish cases of *Akdivar and Others*,[185] *Mentes and Others*,[186] *Selçuk and Asker*, *Bilgin*, *Dulaş*, *Orhan, Ayder and Others*, and *Yöyler*.

2.13. Conclusions on Article 8 of the ECHR and Terrorism

The case law on Article 8 demonstrates that terrorism can develop the need for more measures of protection, therefore leaving a wide margin of appreciation to the State and a wide interpretation of the concept of private life. Thus, it remains that even if the Court has recognized special measures such as secret surveillance as essential in the fight against terrorism, safeguards must exists.

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[183] *Domenichini* v. *Italy*, *supra* note 169, para. 33.
[184] *Erdem* v. *Germany*, *supra* note 144, para. 69.
[185] *Akdivar and Others* v. *Turkey*, 16 September 1996, 21893/93.
[186] *Mentes and Others* v. *Turkey*, *supra* note 19.

2.14. Freedom of Expression, Article 10 of the ECHR

The maintenance and development of democracy crucially depends on freedom of expression. Proportionally, it might be necessary to prohibit the incitement to violence related to terrorism in order to protect the same democracy and the population. However, when States impose limits on freedom of expression in the name of fighting terrorism, one must keep an eye open on the real political motive behind the restriction, so that terrorism may not be invoked in order to criminalize political dissent.

2.14.1. Basic Legal Principles Applied

The overall development of the ECtHR jurisprudence in this matter essentially comes from issues related to terrorism in Turkey.[187] In a number of cases the impugned statements were made in books or newspapers. The crucial legal question, to determine if restraining the freedom of expression was legitimate or not, was if the impugned words were an incitement to violence. Consequently, the Court found a violation of Article 10 ECHR in all the cases where the words did not result in incitement of violence, such as simple references to part of the Turkish territory as 'Kurdistan' and a part of the population as 'Kurds'. However, when the words consisted of an incitement to violence against individuals or a public official or part of the population, the Contracting State benefited from a wide margin of appreciation, as long as it could prove that there was a link between the expression and the problems related to terrorism. The Court will have particular regard to the exact words used and the context in which they were made or published. Another factor considered is the problems linked to the prevention of terrorism. Additionally, the duties and responsibilities of the professionals in media will be even more important in the situations of conflict and tension.

2.14.2. Punishing the Defence or Justification of Terrorism

The Court has developed further principles. The case of *Zana* v. *Turkey* shows that it is possible to punish someone simply for defending a terrorist organisation or justifying the acts of terrorism that such an organisation commits.[188] In this case, the applicant had made the following statement to a journalist: "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres.

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[187] *Ceylan*, 23556/94; *Arslan*, 23462/94; *Polat*, 23500/94; *Erdogdu and Ince*, 25067/94 and 25068/94; and at *supra* note 159: *Gerger*; *Karataş*; *Baskaya and Okçuoglu*; *Sürek (No.1)*; *Sürek (No.2)*; *Sürek (No.3)*; *Sürek (No.4)*; *Sürek and Özdemi*; *Okçuoglu v. Turkey*; all of 8 July 1999. *See also*, *Öztürk* v. *Turkey*, 28 September 1999, 22479/93. A violation of Article 10 ECHR was found in each of those cases, except *Sürek (No.1)* and *Sürek (No.3). See also Şener* v. *Turkey,* judgment of 18 July 2000, 26680/95.

[188] I. Cameron, *National Security and the European Convention on Human Rights*, (Kluwer Law International, The Hague, 2000) p. 393. *See also Sürek (No.1)* and *Sürek (No.3), supra* note 159.

Anyone can make mistakes, and the PKK kill women and children by mistake".[189] For his words, the applicant received a prison sentence imposed by a national security court in front of which he never appeared.

On the alleged violation of Article 10, the Court observed that the fundamental principles, which emerged from its judgments applicable to Article 10, also apply to cases regarding terrorism. In this matter "it must, with due regard to the circumstances of each case and a State's margin of appreciation, ascertain whether a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations".[190] The Court clearly expressed that the PKK was a terrorist organisation that uses violence to achieve its ends and that to declare supporting the PKK, but not violence, was a contradictory choice of words.[191] To say that the PKK was a national liberation movement by the former mayor of the most important city in southeast Turkey, in an important national journal could "exacerbate an already explosive situation in that region".[192] It follows, that no violation of Article 10 resulted from the State's interference.

2.14.3. Right of the Public to Know the Motivation and Objectives of Terrorists

An important principle emerged from the case of *Sürek and Özdemir* v. *Turkey*.[193] According to this decision the Court also accepts that there exists a right for the public to know the objectives and motivation of terrorists, as "the domestic authorities in the instant case failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them".[194]

2.14.4. Artistic 'Call to Violence'

As the Court explained in the *Karataş* v. *Turkey* judgment, a difference may be found in the form of expression, for instance when it comes to artistic expression.[195] In this case, the applicant used poetry in a book to express his political ideas. He was convicted under the 1991 *Prevention of Terrorism Act*. The Court stressed the importance that this case involved a private individual who expressed his views in a book of poetry rather than mass media, a fact that substantially limited any impact on national security. "Thus, even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that

[189] *Zana* v. *Turkey*, *supra* note 160, para. 12.
[190] *Ibid.*, para. 55.
[191] *Ibid.*, para. 58.
[192] *Ibid.*, para. 60.
[193] *Sürek and Özdemir* v. *Turkey*, *supra* 159.
[194] *Ibid.*, para. 61.
[195] *Karataş* v. *Turkey*, *supra* 159.

the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation."[196] Moreover, the Court noted that the applicant was convicted not for his incitement to violence but for separatist propaganda. In finding a violation of Article 10, the Court was also struck by the severity of the sentence, more than thirteen months imprisonment.

2.15. Conclusion on Article 10 of the ECHR and Terrorism

Article 10 of the ECHR allows freedom of political discourse, which is fundamental in a democratic society. Without proper supervision there is a serious risk to the stagnation of the democratic society. The freedom of debating ideas goes together with the freedom of association, which brings pluralism to a society. As it shall be demonstrated below, the Court has been called to prevent the criminalization of political dissent in the name of fighting terrorism. The case law shows that States are not free to use terrorism as an excuse to punish those critical of the countries political situation just because a terrorist crisis exists on its territory.

2.16. Freedom of Association and Assembly, Article 11 of the ECHR

The question of banning political parties for reasons linked with the crisis of terrorism in Turkey, as claimed by the authorities, was brought up on three occasions to the Court. Regarding political parties, the margin of appreciation left to States under Article 11 is very limited and submitted to rigorous European supervision.[197] The Court took into consideration the situation involving terrorism in Turkey. Each time, the test applied by the Court was to determine if the political party was responsible for the terrorism in Turkey. If the Court found that there was no responsibility to be borne by the dissolved political party, the Court would find the dissolution in breach of Article 11 of the ECHR.

The first case involving dissolution of a political party was the *United Communist Party of Turkey and Others* v. *Turkey*; the political party in this case was dissolved before it even started its activities, simply on the basis of its constitution and programme.[198] In the second case, *Socialist Party and Others* v. *Turkey*, one of the reasons for the dissolution was that it had aims similar to terrorist organizations.[199] For the Court, it is not a problem for a party to refer to the self-determination of part of the population through peaceful means, such as a federal State or a referendum. Finally, in *Freedom and Democracy Party (ÖZDEP)* v. *Turkey*,[200] a violation of Article 11 occurred following the dissolution of another political party allegedly because its programme sought to undermine the territorial

[196] *Ibid*., para. 52.
[197] *Ibid.*, para. 46.
[198] *United Communist Party of Turkey and Others* v. *Turkey*, 30 January 1998, 19392/92.
[199] *Socialist Party and Others* v. *Turkey*, 25 May 1998, 21237/93.
[200] *Freedom and Democracy Party (ÖZDEP)* v. *Turkey*, 8 December 1999, 23885/94.

integrity and secular nature of the State and the unity of the nation, its stance was also similar to that of a terrorist organization.[201] The only danger would have to come from the party's programme, but once more the Government failed to establish that the programme could be regarded as having exacerbated terrorism in Turkey.[202]

2.17. Right to an Effective Remedy, Article 13 of the ECHR

Article 13 guarantees the provision of an effective remedy for anyone who has an arguable complaint that one of the rights and freedoms of the Convention has been infringed. The scope of States' obligations under this provision will vary depending on the complaint, thus the remedy must be effective in practice as in law.[203]

2.17.1. Article 13 and Terrorism in the Context of Article 8 of the ECHR

The Court's interpretation of Article 13 in regard to terrorism appeared to be very weak in the *Klass and Others* v. *FRG*. In this case, the Court accepted that terrorism requires the use of secret surveillance as a counter measure in the interest of national security and crime prevention, which in this case respected Article 8. With regard to Article 13, the Court recognized that the secret measures made it almost impossible for the individual to seek any remedy while he was under surveillance, but then the Court additionally applied Article 13 with Article 8 stressing: "The Court cannot interpret or apply Article 13 so as to arrive at a result tantamount in fact to nullifying its conclusion that the absence of notification to the person concerned is compatible with Article 8 in order to ensure the efficacy of surveillance measures".[204] Therefore, Article 13 could not be interpreted in a way to invalidate measures of secret surveillance already recognized as necessary under Article 8.[205] The Court concluded by observing that a remedy under Article 13 only needs to be as 'effective as it can be'.[206]

2.17.2. Article 13 and Terrorism in the Context of Article 3 of the ECHR

In *Chahal* v. *the United Kingdom*, a violation of Article 13 in conjunction with Article 3 ECHR was found. The right to appeal a deportation order under national security reasons, *e.g.* terrorism, did not lie with a court, but instead with an advisory panel. The procedure of this panel did not provide for the right to legal representation for the individual. The UK argued that in *Klass* v. *RFG*, Article 13 only required a remedy to be as 'effective as it can be' in the circumstances.

[201] *Ibid.*, para. 38.
[202] *Ibid.* para. 46.
[203] *See e.g. Aksoy* v. *Turkey*, para. 95, and *Aydin* v. *Turkey*, para. 103, *supra* note 19; *Kaya* v. *Turkey*, *supra* note 18, para. 107.
[204] *Klass and Others v. FRG*, *supra* note 120, para. 68.
[205] *Ibid.*
[206] *Ibid.*, para. 69.

However, the Court considered that this *Klass* principle was suitable for Articles 8 and 10 of the Convention, but not for a provision such as Article 3 of the ECHR since the "requirement of a remedy which is 'as effective as can be' is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial."[207]

2.17.3. Article 13 and Terrorism in the Context of Article 2 of the ECHR

As it was already mentioned in the sub-paragraph regarding Article 2 and as exemplified by the case of *Kaya* v. *Turkey*, numerous cases in the context of terrorism in Turkey have produced a series of findings of failures by the authorities to investigate allegations of wrongdoing by the security forces, both in the context of the procedural obligations under Article 2 of the Convention and the requirement for effective remedies imposed by Article 13 of the Convention. Moreover, the *Kaya* judgment went further in asserting that "the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure".[208] Consequently, the Court concluded that "seen in these terms the requirements of Article 13 are broader than a Contracting State's procedural obligation under Article 2 to conduct an effective investigation".[209]

Furthermore, in *Akkoç* v. *Turkey,* the Court decided that the Turkish authorities violated Article 2 of the ECHR by not taking "reasonable measures available to them to prevent a real and immediate risk to the life" of the applicant's husband.[210] Subsequently, there was a violation of Article 2 on the ground that there was no effective investigation into the death, which also resulted in a violation of Article 13 for the lack of effective remedy to the applicant.

2.17.4. Article 13 and Terrorism in the Context of Article 1 of Protocol 1 to the ECHR

The lack of investigation following the brutal destruction of property by security forces during an anti-terrorism operation was found in violation of Article 13 in the Turkish cases of *Mentes and Others*, *Selçuk and Asker*, *Dulaş*, *Ayder and Others*, *Yöyler*, and *Ipek*.

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[207] *Chahal v. United Kingdom*, *supra* note 45, para. 150.
[208] *Kaya* v. *Turkey*, *supra* note 18, para. 107.
[209] *Ibid*., *see e.g. Ülkü Ekinci* v. *Turkey*, 16 July 2002, 27602/95, para. 159; *Tanrıkulu* v. *Turkey*, para. 119, and *Avşar* v. *Turkey*, para. 431, *supra* note 19.
[210] *Akkoç* v. *Turkey*, *supra* note 37, para. 94.

2.18. Conclusion on Article 13 of the ECHR and Terrorism

It is hard to establish specific rules concerning Article 13 and cases in relation to terrorism. In the cases of *Klass* v. *FRG* the interpretation of the Court was very restrictive on Article 13, but this position seems to have changed in the most recent cases, particularly in regard to alleged violations of rights where the terrorism concern is immaterial. Thus, the important legal criterion remains the 'arguable claim' of a violation of the convention.

2.19. Prohibition of Discrimination, Article 14 of the ECHR

2.19.1. The Northern Ireland Context

In *Ireland* v. *the United Kingdom*, the Irish Government alleged that there was a violation of Article 14 combined with Article 5 of the ECHR. The argument was that in February 1973 special powers were used only against those suspected of terrorism who belonged to the IRA or suspected of having information related to it. Later on, those special powers were also applied against Loyalist terrorists, but to a lesser extent. The Court found no violation and explained that there were profound differences between the two terrorist groups, essentially with regard to the fact that at that point in time the vast majority of violent acts were linked to the IRA. In the end, the Court stated that the aim of eliminating the most formidable terrorist organization first was legitimate and the measures taken did not appear disproportionate.[211]

In the *Mckerr*, *Kelly and Others*, *Shanaghan*, and *Hugh Jordan* judgments, the applicants argued with statistical support that the killings disclosed discrimination under Article 14 of the ECHR, because of the fact that the majority of victims in Northern Ireland were coming from the national minority, therefore there was a discriminatory use of lethal force and lack of protection vis-à-vis this minority. Even if the applicants had statistical support, the Court rejected those arguments by stating that there was no substantial evidence to establish a practice that could be classified as discriminatory within the meaning of Article 14 of the ECHR.

2.19.2. The Turkish Context

In numerous Turkish cases it has been argued that the Kurdish civilian population in southeast Turkey generally did not received the same human rights protection as persons of non-Kurdish origin and that that no distinction was made between terrorists and ordinary civilians belonging to minorities. However, these alleged violations of Article 14 with other provisions of the convention were never

[211] *Ireland* v. *United Kingdom, supra* note 46, para. 230.

successful, as the Court never considered them as substantiated[212] or that it was necessary to analyse the case under Article 14.[213]

In *Gerger* v. *Turkey*, the applicant alleged a violation of Article 14 in that he was discriminated against because of his detention conditions as a terrorist.[214] The Court stressed that the purpose of the Turkish law was to penalize "people who commit terrorist offences and that anyone convicted under that law will be treated less favourably . . . the distinction is made not between different groups of people, but between different types of offence, according to the legislature's view of their gravity".[215] Accordingly, the Court found no violation of Article 14.

2.20. Conclusions on Article 14 of the ECHR and Terrorism

At the time of writing this article, the protection of Article 14 of the ECHR in cases regarding counter-terrorism measures remains doubtful. The problems of fact finding and obtaining substantial evidence of discriminatory practices in terrorism cases might be one explanation. Nonetheless, fact-finding should not constitute too much of an excuse as counter-terrorism measures are often aimed at minorities or foreigners, especially subsequent to the events of 11 September 2001. It should be recommended that all jurisdictions, including the ECtHR, pay special attention to racial, ethnic and religious profiling in counter-terrorism measures and absolutely prohibit it.

2.20.1. Rights of States to Derogate, Article 15 of the ECHR

The purpose of the derogation clause in Article 15 of the ECHR is to allow the exceptional suspension of some rights, which is necessary to counter threats to democratic society and the rule of law, rather than to normalize the law of exception and therefore weaken and destroy democracy and the rule of law.

From the case law described above, if the factual circumstances of a case are linked with terrorism, the Court will "take into account the special nature of terrorist crime and the exigencies of dealing with it, as far as is compatible with the applicable provisions of the Convention in the light of their particular wording and its overall object and purpose".[216] Nonetheless, in certain instances, when a crisis

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[212] *See e.g. Ergi* v. *Turkey*, *supra* note 15; *Kaya* v. *Turkey*, *supra* note 18; *Avşar* v. *Turkey*, *Kurt* v. *Turkey*, *Mentes and Others* v. *Turkey*, *Selçuk and Asker* v. *Turkey*, *Ipek* v. *Turkey*, *Tekdağ* v. *Turkey*, *Tepe* v. *Turkey* supra note 19; *Bilgin* v. *Turkey*, *supra* note 101; *Akdivar and Others* v. *Turkey*, *supra* note 185; *Yöyler* v. *Turkey*, supra note 103.

[213] *See e.g. Mahmut Kaya* v. *Turkey, Orhan* v. *Turkey*, *Yaşa* v. *Turkey*, *supra* note 19; *Okçuoglu* v. *Turkey*, *supra* note 159; *Arslan* v. *Turkey*, *supra* note 187; *Freedom and Democracy Party (ÖZDEP)* v. *Turkey*, *supra* note 200; *Ülkü Ekinci* v. *Turkey*, *supra* note 209.

[214] *Gerger* v. *Turkey*, *supra* note 159.

[215] *Ibid.*, para. 69.

[216] *Fox, Campbell and Hartley* v. *United Kingdom*, *supra* note 112, para. 28. *See e.g. Murray* v. *United Kingdom*, *supra* note 119, para. 47.

involving terrorism threatens the life of a nation, States have the possibility to 'water down' the application of the Convention by derogating from it in accordance with Article 15 of the Convention.

The question of whether terrorism could constitute a public emergency threatening the life of a nation was addressed for the first time in the judgment of *Lawless* v. *Ireland*. G.R. Lawless was arrested under the suspicion of belonging to the IRA.[217] He was detained without trial for almost five months in 1957. The Court proceeded to declare the detention contrary to the provisions of Article 5(1)(c) and 5(3), prior to finding justification for the detention in Article 15. The ECtHR acknowledged that terrorism could amount to a state of public emergency justifying derogation under Article 15. It also noted in its judgment that the terrorist character of a group and the fear it creates among the population could cause great difficulties in the finding of evidence, therefore sometimes ordinary law would not suffice in stopping the danger.[218]

The interstate complaint of *Ireland* v. *the United Kingdom* dealt with the Irish Government alleging that the UK derogation was abusive. First, the Court found that the special powers of detention that were used were contrary to Article 5 on a variety of points, but because of the derogation under Article 15 those special powers were considered necessary and proportionate in the present circumstance. The Irish Government argued that the special measures taken by the UK failed to stop terrorism and even had the effect of increasing it, therefore the derogation of the UK was not necessary *a posteriori* because of the ineffectiveness of the measures. The Court rejected this argument declaring that it was not its function to substitute itself for the national Government on what is the most efficient way to combat terrorism. It can do no more than "review the lawfulness, under the Convention, of the measures adopted by that Government".[219] Interestingly, the Commission made the statement concerning Article 15(1) that "Article 3 common to all four Geneva Conventions of 1949 was . . . not directly applicable here".[220]

In response to the *Brogan* case, the United Kingdom Government resorted to Article 15 of the ECHR with regard to Article 5(3) of the ECHR. In the case of *Brannigan and McBride* v. *the United Kingdom*, two individuals were arrested under section 12 of the '1984 Act' and detained respectively for six days, fourteen hours and thirty minutes, and four days, six hours and twenty-five minutes.[221] The detention occurred shortly after the introduction of the derogation and the Government conceded that the detentions were longer than the shortest period in the *Brogan* case that violated Article 5(3), therefore affirming that there was a breach

[217] *Lawless* v. *Ireland*, *supra* note 5.
[218] *Ibid.*, para. 36.
[219] *Ireland v. United Kingdom*, *supra* note 46, para. 214.
[220] Commission Report, 25 January 1976 (B series), vol.23-1, p.379.
[221] *Brannigan and McBride* v. *United Kingdom*, 26 May 1993, 14553/89 and 14554/89.

again of the same provision.[222] However, the derogation required the Court to examine its validity in the present case.

The Court reaffirmed that States are granted a wide margin of appreciation to determine if a situation of emergency exists and what measures (including derogations) are necessary to overcome it, thus acknowledging that the national authorities are in a better position to evaluate and respond to a situation than the international judge.[223] Nonetheless a European supervision accompanies this national margin of appreciation, since States do not have unlimited power in this matter.[224] In the present case and with regard to the evidence of terrorist violence in Northern Ireland, the Court finds no doubt that such an emergency situation existed.

When deciding if the measures were strictly required by the exigencies of the situation, the Court mentioned that it is not its "role to substitute its views as to what measures were most appropriate or expedient . . . for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism . . . and respecting individual rights".[225] The Court observed that the margin of appreciation had not been exceeded when considering the terrorist situation, the limited scope of the derogation and the reasons for it, and also the existence of safeguards.[226]

As regards the obligation to respect international law in paragraph 1 of Article 15 of the ECHR, the applicants presented for the first time the argument that no valid derogation from Article 4 of the ICCPR had been made (it had been only stated in the Parliament). In this respect, the Court first observed that it was not its role to define the requirements of derogation under the ICCPR, but it accepted to inspect the basis of the applicants' argument.[227] Then, the Court rejected the argument, since the statement made for the derogations in the Parliament, which was formal and public, constituted an official declaration.[228] In conclusion, the derogation satisfied the requirements of Article 15 of the ECHR, so no violation of Article 5(3) was found.

Following this judgment, an evolution in the European Court's case law occurred with the cases of *Aksoy* v. *Turkey* and *Demir and Others* v. *Turkey*.[229] In the *Aksoy* judgment, a man was detained for 14 days following his arrest in Turkey on suspicion of terrorism. The Court accepted Turkey's derogation under Article 15 of the ECHR considering that the particular PKK terrorist activity in southeast Turkey had created a "public emergency threatening the life of the nation".[230] A

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[222] *Ibid.*, para. 37.
[223] *Ibid.*, para. 43.
[224] *Ibid.*, para. 43.
[225] *Ibid.* para. 59. *See e.g. Ireland* v. *United Kingdom*, *supra* note 46, para. 214 and *Klass and Others* v. *FRG*, *supra* note 120, para. 49.
[226] *Brannigan and McBride* v. *United Kingdom*, *supra* note 221, para. 66.
[227] *Ibid.*, para. 72.
[228] *Ibid.*, para. 73.
[229] *Demir and Others* v. *Turkey*, 23 September 1998, 21380/93, 21381/93 and 21383/93.
[230] *Aksoy* v. *Turkey*, *supra* note 19, para. 70.

reference was made to the case of *Brannigan and McBride*, however, even if the Court accepts that the investigation of terrorist offences creates special problems, it does not find necessary to detain a terrorist suspect for fourteen days without judicial review.[231] In opposition to the *Brannigan and McBride* case, the Court considered that no sufficient safeguards were available. So, even if the serious problems involving terrorism in Turkey were taken into account, the Court was not satisfied with the necessity of the measures, therefore Article 5(3) of the ECHR was violated.

In the case of *Demir and Others*, the detention occurred in a region also subject to a Turkish derogation under Article 15 of the Convention. However, the sixteen days *incommunicado* detention, without any judicial intervention, was not required by the terrorism crisis existing in Turkey. Even if the suspect was subsequently convicted, this has no impact on the legal question of whether there was a situation necessitating his *incommunicado* detention for so long.

A similar conclusion was reached in the case of *Elci and Others* v. *Turkey* as the Court concluded that the detentions varying from 7 to 25 days were not required by the "exigencies of the situation envisaged by Article 15(1)".[232] Also, in *Nuray Şen* v. *Turkey*, a detention of 11 days was found unjustified by the terrorism crisis relied on by Turkey.[233]

On a more formal aspect of Article 15, the *Sakik and Others* v. *Turkey* judgment set the standard that a derogation made by a State because of terrorism could not apply to part of the State territory that was not explicitly named in the derogation notice. It followed that the derogation was inapplicable *ratione loci* to the present case.

The events of 11 September 2001 had an impact on the European Human Rights system as the United Kingdom delivered a notice that it would derogate from Article 5 in order to detain individuals of foreign origin considered a risk to the State, but where it is almost impossible to ascertain that risk. Thus, it is the first time that terrorist attacks outside the European continent have ever resulted in such a derogation. One controversial aspect of this derogation notice is that the derogation is aimed at the detention of individuals of foreign origin only. Consequently resulting in racial, ethnic or religious group profiling, something that should be absolutely prohibited by Article 14 applied in conjunction with Article 5 of the ECHR. The important legal factor is that when a State derogates from the ECHR it must restrict itself to what is absolutely necessary; otherwise the Court will find the State in violation of the Convention.

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[231] *Ibid.*, para. 78.
[232] *Elci and Others* v. *Turkey*, *supra* note 72, para. 684.
[233] *Nuray Şen* v. *Turkey*, 17 June 2003, 41478/98.

2.21. The Prohibition of Using the Convention to Justify Acts Contrary to It, Article 17 of the ECHR

The question of whether being a terrorist makes any difference in regards to the application of the Convention can be associated with the origin of the principle enshrined in Article 17 in the old French expression *pas de liberté pour les ennemis de la liberté*. Unsurprisingly, some States have claimed that, under the basis of Article 17, the engagement in terrorist activities preclude the alleged terrorists from benefiting from the rights and freedoms of the Convention.

In the first case regarding terrorist related acts presented to the Court, the Irish Government attempted to prevent a suspected terrorist, who alleged violations of Articles 5 and 6, from relying on Article 17. In *Lawless* v. *Ireland*, the Court denied the Government's argument on Article 17, stating that this provision shall not be interpreted *a contrario* as denying the fundamental rights of an individual to the protection of Articles 5 and 6 of the Convention. In this case, the presumed terrorist did not use the Convention in an attempt to justify acts contrary to its fundamental rights and freedoms, instead he was complaining of being refused, because of the counter-terrorism measures, the protection of Articles 5 and 6 of the ECHR.[234] Consequently, from the first Court's case it was established that even if an individual is suspected of being involved in terrorism this does not deprive him of the protection of the rights and freedoms of the Convention.

The Turkish Government also attempted to oppose the application of Article 17 to political parties that it had dissolved for reasons partly linked to terrorism in Turkey. In *United Communist Party of Turkey and Others* v. *Turkey*, *Socialist Party and Others* v. *Turkey*, and *Freedom and Democracy Party (ÖZDEP)* v. *Turkey* the Court considered the aims and objectives of each political party taking into consideration the terrorism that exists in Turkey and concluded that there is no need to apply Article 17 "as nothing . . . the conclusion that it relied on the Convention to engage in activity or perform acts aimed at the destruction of any of the rights and freedoms set forth in it".[235]

2.22. Right to Property, Article 1 of Protocol 1 to the ECHR

The cases against Turkey of *Akdivar and Others*, *Selçuk and Asker*, *Bilgin*, *Ayder and Others*, *Yöyler*, and *Ipek* all concerned anti-terrorism operations by security forces, in which they destroyed the homes and property of the applicants. The deliberate destruction of the homes, with no justification presented by the

[234] *Lawless* v. *Ireland*, *supra* note 5, 'The Law' para. 7.
[235] *United Communist Party of Turkey and Others* v. *Turkey*, *supra* note 198, para. 60; *Socialist Party and Others* v. *Turkey*, *supra* note 199, para. 53; *Freedom and Democracy Party (ÖZDEP)* v. *Turkey*, *supra* note 200, para. 47.

Government, was judged in each case as contrary to both Article 8 of the ECHR and Article 1 of Protocol 1.[236]

2.23. Conclusion on the ECHR and Terrorism

The ECtHR has strong case law on terrorism, not only because of the number of cases on the subject, but particularly because of its scrupulous examination of the cases and the weight of its arguments. Traditionally, the Member States of the Council of Europe have benefited from a rather wide margin of appreciation, when applicable in cases regarding terrorism. However, the Court has gained experience and expertise in the field of terrorism and its relation to human rights. The Court has been less lenient to States, mostly after 1990, and it remains to be seen what impact, if any, the events of 11 September 2001 and 11 March 2004 will have on the development of European human rights law.

The new terrorism legislation that emerged in Europe following these events will eventually be challenged before the Court. In addition, it is not out of the question that cases concerning alleged Al Qaeda members might be brought to Strasbourg after the conviction in Germany of Mounir al-Motassadek, the first terrorist suspect anywhere in the world to be convicted for his part in the 11 September 2001 tragedy, and the charges being brought against other suspects in connection to these events and the attacks that occurred in Madrid in March of 2004.

Moreover, as addressed in the final remarks of this article, new challenges lie ahead for the Court with the flow of cases now coming in relation to the conflict in the Chechen Republic.

3. THE CASE LAW OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

The United Nations Human Rights Committee (HRC) has also considered cases in relation to terrorism or counter-terrorism measures. Though, only a small number of cases in this area exist.

3.1. Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment, Article 7 of the ICCPR

In the case of *Polay Campos* v. *Peru*, the HRC found two different violations of Articles 7 and 10(1).[237] Firstly, displaying to the media an alleged and detained terrorist being transferred in a cage was found to be degrading treatment and also contrary to inherent and individual dignity. Secondly, the Committee decided that

[236] *Akdivar and Others* v. *Turkey*, *supra* note 185, para. 88; *Selçuk and Asker* v. *Turkey*, *supra* note 19, para. 87; *Bilgin* v. *Turkey*, *supra* note 101, para. 109; *Ayder and Others* v. *Turkey*, *supra* note 104; *Yöyler* v. *Turkey*, *supra* note 103; *Ipek* v. *Turkey*, *supra* note 19.
[237] *Polay Campos* v. *Peru*, 9 January 1998, No. 577/1994.

these two provisions had been violated regarding the general conditions of detention of an alleged terrorist who was in solitary confinement in a two metre cell and could not see sunlight for more than ten minutes a day.

Four communications were considered together in the cases of *Domukhovsky,*[238] *Tsiklauri*,[239] *Gelbakhiani*,[240] and *Dokvadze* v. *Georgia*.[241] Except for the second one, each of the authors was convicted for the preparation of terrorist acts. Each author claimed to have been subjected to torture and ill treatment resulting in a concussion for Domukhovsky, scarring for Gelbrakhiani and torture and threats to the lives of Dovkaze's two daughters. Since no investigation before a court occurred and no medical reports were provided by the State, the Committee considered the torture and cruel and inhuman treatment to be facts in violation of Articles 7 and 10(1).

3.2. Liberty and Security of Person, Article 9 of the ICCPR

In the cases of *Domukhovsky* and *Gelbakhiani* v. *Georgia*, Domukhovsky and Gelbakhiani both claimed to have been kidnapped from Azerbaijan by Georgian forces, which the Government denied on the basis that it had a cooperation agreement with Azerbaijan concerning criminal matters. However, the Committee was not provided with any specific information regarding such an agreement or how it could have been applied to the authors. Therefore, the arrests were in violation of Article 9(1) of the Covenant.

In the case of *Arredondo* v. *Peru*, Ms. Arredondo was sentenced to fifteen years of imprisonment for terrorism offences.[242] However, the Committee found a violation of Article 9(1) and (3) as the State did not reply adequately to the allegations of the arrest without a warrant for Ms. Arredondo and that she was not brought promptly before a judge after being taken in custody.

In *J.R.C.* v. *Costa Rica*, the Costa Rican authorities arrested an illegal alien in possession of a terrorist plan to attack the Guatemalan Embassy.[243] For security measures, linked to the author's background in terrorism, he was detained pending deportation. The Committee concluded that he had been lawfully arrested and detained. Moreover, "it is not for the Committee to test a sovereign state's evaluation of an alien's security rating".[244] The case was repeatedly declared inadmissible.

[238] *Domukhovsky* v. *Georgia*, 29 may 1998, No. 623/1995.
[239] *Tsiklauri* v. *Georgia*, 29 May 1998, No. 624/1995.
[240] *Gelbakhiani* v. *Georgia*, 29 May 1998, No. 626/1995.
[241] *Dokvadze* v. *Georgia*, 29 May 1998, No. 627/1995.
[242] *Arredondo* v. *Peru*, 14 August 2000, No.688/1996.
[243] *J.R.C.* v. *Costa Rica*, 3 April 1989, No. 296/1988.
[244] *Ibid.*, para. 8.4.

3.3. Rights of Detainees to be Treated with Humanity and Dignity, Article 10 of the ICCPR

In addition to the interdiction of displaying a convicted terrorist in a degrading manner mentioned earlier, the HRC found violations of Article 10(1) in the following cases involving terrorism.

The case of *Cabreira Estradet* v. *Uruguay* involved the ill treatment and detention in inhuman prison conditions of the author's son.[245] The Government claimed that the author's son was not a political prisoner as he took part in terrorist activities, which the author denied arguing that he was never charged with terrorism.[246] The Committee did not address this issue but concluded that there was a violation of Article 10(1) as the State Party never justified that the treatment and living conditions of the prisoner met the requirements of that provision of the Covenant.

In *Polay Campos* v. *Peru*, Mr. Polay Campos was convicted of terrorism and from 22 July 1992 to 26 April 1993, Mr. Polay Campos was detained *in communicado,* was prohibited to talk to anyone, and was kept in an unit cell twenty-three and half hours a day and in freezing temperatures.[247] The HRC observed that those conditions resulted in a violation of Article 10(1) of the Covenant.

In the case of *Arredondo* v. *Peru*, when considering the conditions of detention, the Committee took into account the Government's argument that it considered the detention conditions to be "justified by the seriousness of the offences committed by the prisoners and by the serious problem of terrorism which the State party has experienced".[248] However, even by recognizing the need for security restrictions, the HRC found the conditions to be excessive and unjustified. On this account, the Committee found a violation of Article 10(1).

3.4. Freedom of Movement, Article 12 of the ICCPR

The case of *Celepli* v. *Sweden* involved a suspected terrorist who received an expulsion order in 1984.[249] The expulsion was never executed because of the possible persecution he would face in Turkey if returned. Instead, he was subjected to limitations and conditions of his freedom of movement. Originally, the author could not leave his town of residence or change employment without police permission and had to report to the police three times a week. The author complained that he never could challenge those restrictions as the grounds of suspicion were never disclosed to him and that no right existed under Swedish law to appeal a decision to expel a suspected terrorist. In 1989, the 1989 *Alien Act*

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[245] *Cabreira Estradet* v. *Uruguay*, 21 July 1983, No. 105/1981.
[246] *Ibid.*, paras. 4–5.
[247] *Polay Campos* v. *Peru*, *supra* note 198.
[248] *Ibid.*, para. 10.4.
[249] *Celepli* v. *Sweden*, 2 august 1994, No. 456/1991.

replaced the Act under which the measures were taken. Under this amendment, it is impossible to prescribe an alien to a place of residence. In August 1989, a decision was taken to soften the restrictions on the author and two years later the expulsion order was revoked. The Committee decided to examine this decision solely on the basis of Article 12. The Committee considered the restrictions on the author were compatible with Article 12(3) and took into account that Sweden had invoked national security reasons to justify its restrictions. The HRC also noted that Sweden had reviewed the restrictions it imposed and finally revoked them. Thus, no violation was found.

The case of *Karker* v. *France* concerned the co-founder of the movement known as 'Ennahdha'.[250] He was granted refugee status by France for political reasons but later faced an expulsion order because of suspicions he was involved in terrorism. However, the expulsion was never enforced and instead Mr. Karker's freedom of movement within France was restricted with such measures as compulsory residence and reporting to the police once a day. The State Party argued that those restrictions were justified for reasons of national security. The HRC considered the case under Article 12. The national security reason was invoked and evidence in this matter had been produced under domestic jurisdiction. Also, the compulsory residence was subjected to a reasonably wide area. Furthermore, those restrictions of movement were submitted to review in domestic courts and they were upheld on the basis of national security. In addition, only the original order on restrictions was challenged, none of the following restriction orders were reviewed. Considering all of this, the Committee concluded that France did not act contrary to Article 12(3).

3.5. Protection of Aliens against Arbitrary Expulsion, Article 13 of the ICCPR

In 1977, many arrests were made in Sweden in connection with a plan to abduct a former member of the Swedish Government. It was alleged that the plan originated from Norbert Krocher from the Federal Republic of Germany, an alleged terrorist who was at the time staying in Sweden illegally. Consequently, he was expelled along with other arrested foreigners. These events further lead to the Human Rights Committee's first case dealing with terrorism. In *Maroufidou* v. *Sweden*, the author of the communication was a legal resident in Sweden and was also arrested and expelled since she had been working with some of the alleged terrorists in relation to those events.[251] The Swedish Government based its decision on its *Alien Act's* provisions on terrorism. The applicant argued that mere knowledge of planned terrorist acts was not enough to justify her expulsion. She alleged a violation of Article 13 ICCPR because her expulsion was not 'in accordance with the law' and that the Swedish *Alien Act* had not been correctly interpreted. The HRC rejected that claim stressing that the interpretation of domestic law is a matter of the national jurisdictions concerned. Unless the domestic law was not interpreted and applied in

[250] *Karker* v. *France*, 30 October 2000, No. 833/1998.
[251] *Maroufidou* v. *Sweden*, 8 April 1981, No. 58/1979.

good faith or that an abuse of power is evident, the HRC will not evaluate if the "authorities of the State Party in question have interpreted and applied the domestic law correctly in the case before it under the Optional Protocol".[252] Thus, no violation of Article 13 of the ICCPR was found.

In *Karker* v. *France*, Mr. Karker was not originally allowed to submit arguments against the expulsion order because of urgent reasons of national security. However, he had the chance to have his case reviewed by two domestic jurisdictions with the help of legal counsel. Therefore, the HRC found no violation of Article 13.

3.6. Right to a Fair Trial, Article 14 of the ICCPR

In *Polay Campos* v. *Peru*, the Committee addresses the issue of the 'faceless judges'. Such a system is meant to allow judges to cover their faces and remain anonymous to prevent them from the harm of terrorists groups. The HRC opinion was that such a system "fails to guarantee a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant: that the tribunal must be, and be seen to be, independent and impartial".[253] There exists a serious risk that such a tribunal might include military judges. Moreover, the presumption of innocence is not protected under such a system. Therefore, the HRC concluded there were violations of paragraphs 1, 2, 3(b) and (d) of Article 14 of the ICCPR.

In the case of *Arredondo* v. *Peru*, the HRC recalled its decision of *Polay Campos* v. *Peru* and reiterated that such tribunals were contrary to Article 14(1).[254] Furthermore, the HRC considered unacceptable and in violation of Article 14(3)(c) the delays to the appeal of the reopened case.

In *Vivanco* v. *Peru*, the applicant had been sentenced to 20 years of prison for a terrorist offence by a special terrorism court composed of 'faceless judges'.[255] The HRC once more declared this practice to be in contravention of Article 14(1) of the ICCPR. However, it is worth noting that the views were given following the events of 11 September 2001 and one can question if these events had any influence on the individual opinion that followed the decision in this case. One of the Committee members expressed the opinion that the Committee was not condemning the practice of 'faceless judges' in itself, nor in all circumstances. He opined that such a practice "may become a necessity for the protection of judges and of the administration of justice" because of the serious threats caused by terrorism.[256] Even if he continued by saying that in such circumstances States should take steps to properly derogate from their obligations in accordance with Article 4 of the ICCPR, such an opinion represents a development never foreseen in the practice of the HRC regarding 'faceless judges' in cases regarding terrorism; notwithstanding the fact that this

[252] *Ibid.*, para. 10.1.
[253] *Ibid.*, para. 8.8.
[254] *Polay Campos* v. *Peru*, *supra* note 198.
[255] *Vivanco v. Peru*, 15 April 2002, No. 678/1996.
[256] *Ibid.*, "Individual opinion of Committee member Mr. Ivan Shearer . . .", p. 10.

opinion was given after the events of 11 September 2001.[257] This approach is highly questionable from a human rights and international law perspective.

In the cases of *Domukhovsky, Tsiklaur*, *Gelbakhiani and Dokvadze* v. *Georgia,* each author was facing the death penalty in his trial and Georgia did not assure the continued presence of the authors at their trials nor did it allow the authors on every occasion to be defended by a lawyer of their choice. This failure was in violation of Article 14(3)(d). Furthermore, it was not possible for the authors to appeal their convictions and sentences but only to review it. In conclusion, this was considered in violation of Article 14(5) by the HRC.

3.7. Conclusion on the HRC Jurisprudence on Terrorism

Because of these few cases on terrorism, it may be argued that the HRC established by the Covenant will necessarily have to develop its practice in order to secure the protection of the rights set forth in the ICCPR in the context of terrorism. Of particular importance is the need to refrain from undermining the credibility of its own case law by adopting favourable positions on practices that it was traditionally against, such as the 'faceless judges', to now recognizing that terrorism might be a justification to resort to such practices.

The jurisprudence of the HRC is complementary to that of the ECtHR and develops other important aspects, such as the prohibition of 'faceless judges'. The reference to the HRC jurisprudence by the ECtHR in the *Öcalan* case also demonstrates how important its impact is in international human rights law and the aspects of counter-terrorism.

4. FINAL CONCLUSIONS AND ANALYSIS

The paradigm of human rights and protecting democracy has been challenged since the events of 11 September 2001 and the emergence of a so-called 'war on terrorism'. International law can be partly responsible in this matter as the UN Security Council acting under Chapter VII of the UN Charter made it an international obligation to all States to adopt special measures on terrorism, without advising or requesting them to respect human rights in doing so. Moreover, States have the obligation to report to the Counter-Terrorism Committee (CTC) established pursuant to Security Council resolution 1373, and one can be instructed by the fact that by 10 January 2002 "in the first 90 days of its operations, the Counter-Terrorism Committee had received reports from 117 countries. Around the same time there were 1334 overdue reports to the human rights Treaty Bodies".[258] Considering these facts and the absence of a human rights expert on the CTC, international human

[257] *Ibid.*

[258] I. Khan, 'Human Rights Challenges Following the Events of September 11 and Their Impact on Universality and Human Rights Movement', Conference paper from *Terrorism & Human Rights After September 11*, (ed.), Ashlid Kjok, (Cairo Institute for Human Rights Studies, Cairo, 2002) p.36.

rights monitoring is all the more important as is the knowledge of its jurisprudence on terrorism.

One aspect of the 'collateral damage' of 9/11 was that as Russia allied itself to the 'war on terrorism', the conflict raging in Chechnya sank into oblivion. The tragic events that took place in the Moscow theatre hostage situation on 23 October 2002 brutally reminded the world of the forgotten conflict. Fifty Chechen rebels took 750 civilians hostage, which resulted in the Russian authorities opting to use a massive dose of gas in order to allegedly free the hostages. This tragic counter-terrorism operation presents strong legal challenges regarding the substantial use of gas that lead to the death of 50 terrorists and 117 hostages. This is particularly the case from the ECHR's perspective as Russia is subjected to the competence of the European Court and strong indications suggest that this case will end up in Strasbourg.[259]

To begin with, the 1979 *International Convention against the Taking of Hostages* considers "all acts of taking of hostages as manifestations of international terrorism".[260] This Convention imposes a positive obligation upon States, requiring that if a hostage situation takes place in the territory of a State Party, that State "shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release".[261]

However, as it has been mentioned before in the ECtHR's case law, within the European human rights system a counter-terrorism operation has to be planned carefully in order to avoid the loss of lives. The interpretation of Article 2 in the past has been more in favour of the State rather than the hostages, but the scope of the counter-terrorism operation this time might bring a new dimension with the main question being whether the gas attack was proportional and in conformity with human rights law.[262] From this author's point of view, whatever debate might be

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[259] *See* M. Gorshkov, 'Moscow terror victims fight ruling', BBC News, 28 July 2003, <news.bbc.co.uk/2/hi/europe/3104467.stm>, visited 28 July 2003.

[260] *International Convention against the Taking of Hostages*, Preamble.

[261] *Ibid.,* Article 3(1).

[262] Decision of 16 October 1977, Europäische Grundrechtezeitschrift, 1977, p. 426: The Constitutional Court of Germany has delivered a decision in which it states that Article 2 of the ECHR cannot be interpreted to force states to free detained terrorists in order to save the life of a hostage held by accomplices. In the ECHR case of *Andronicou and Constantinou* v. *Cyprus,* 9 October 1997: the facts concerned a domestic fight that turned into a hostage situation, which ended with the killing of both the hostage-taker and the hostage herself by a special police unit that used machine guns during the rescue operation. The Commission expressed the opinion that there had been a violation of Article 2 of the Convention. The Court did not agree and found no violation in a five votes to four decision. The main factors were, first, that the planning and control of the rescue operation, even if machine guns were involved, was reasonable if any risk to life existed. Second, although it was regrettable that such a level of firepower was employed, the Court cannot substitute its own assessment for that of the officers present at the scene of the situation and the use of force was ruled not to exceed what was absolutely necessary to save lives. Judge Jungweirt issued an opinion, dissenting in part, raising the questioning of "using machine guns in a small confined space

held on the strategy employed, one thing is clear: the Russian Federation acted in breach of the right to life when it refused to reveal the nature of the gas used, as such information was vital to help saving badly injured hostages still suffering from the attack.

The human rights violations occurring in Chechnya promise to give the European Court a chance to open a whole new dimension to the paradigm of fighting terrorism and respecting human rights. At the moment of writing this article, a number of cases regarding alleged killings and torture of civilians by Russian military forces in Chechnya have already been declared admissible.[263] It will take some time to evaluate the effect the Court can have on the actions taken in Chechnya. The question has been raised if the individual remedy of the ECtHR can provide a significant impact over a massive scale of human rights violations.[264] At the same time, the Council of Europe's approach to the conflict is tightening and the Parliamentary Assembly adopted a resolution demanding to bring to justice those responsible for abuses in the Chechen conflict, including a call for States to have recourse to interstate complaints before the ECtHR, the creation of an international ad hoc tribunal for the Chechen Republic, and urging the Russian Federation to ratify the Rome Statute of the International Criminal Court without delay.[265] Furthermore, the creation of a public prosecutor at the European Court of Human Rights may be necessary in such situations of human rights violations on a massive scale.[266]

The political follow-up to the tragic events in Madrid on 11 March 2004 is a reminder of how politics when used to fight terrorism (as in the determination of whether ETA or Al-Qaeda was responsible for the Madrid attack) can have a significant impact on the elections that followed in a country where the population rejected the participation of Spain in the war in Iraq.[267]

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without proper lightning and knowing that the very person to be rescued was next to or in front of the person being aimed at . . . seems to me more than irresponsible".

[263] On 19 December 2002, the Court declared admissible under Articles 2, 3, 13 ECHR and also Article 1 Protocol 1 ECHR the cases of: *Isayeva, Yusupova and Bazayeva v. Russia*, 57947/00, 57948/00 and 57949/00; *Isayeva v. Russia*, 57950/00; *Khashiyev and Akayeva* v. *Russia*, 57942/00 and 57945/00. The decision of *Shamayev and Others* v. *Georgia and Russia* (16 September 2003, 36378/02) is also relevant, but it concerns the extradition from Georgia of individuals considered terrorists by Russia for having participated in the Chechen conflict.

[264] C. Francis, 'La Guerre en Tchétchénie: Quelle efficacité du Conseil de l'Europe face à des violations massives des droits de l'homme?', 57 *Revue Trimestrielle des Droits de l'Homme* (2004) p. 97.

[265] Council of Europe, Parliamentary Assembly Resolution 1323 (2003), 'The human rights situation in the Chechen Republic', <assembly.coe.int/documents/adoptedtext/ta03/eres1323.htm> visited on 16 September 2003.

[266] Council of Europe, Parliamentary Assembly Recommendation 1606 (2003), 'Areas where the European Convention on Human Rights cannot be implemented', <assembly.coe.int/Documents/AdoptedText/TA03/EREC1606.htm>, visited on 12 May 2004.

[267] E. Sciolino and L. Alvarez, 'Leadership attempts to show Spain it didn't lie', *International Herald Tribune*, 19 March 2004, pp. 1 and 8.

The history of the ETA has to be considered in such a situation, but it cannot be ignored that these events featured all the typical characteristics of Al-Qaeda movement attacks, which was eventually confirmed by evidence and arrests. The Government's insistence on rejecting any suggestion that someone else but ETA was involved led to the troubling fact that within hours of the bomb explosions the UN Security Council resolution condemning those attacks affirmed that the terrorist bombings were "perpetrated by the terrorist group ETA".[268]

Further disrespect to the right to life emerged when it was reported in December 2002 that US President George W Bush authorized the Central Intelligence Agency to kill terrorist leaders secretly named in a document prepared by the White House.[269] Such an inflammatory rhetoric of counter-terrorism cannot be equated to a rational fight in the name of democracy as one can strongly argue by comparing "how much more healthy it is for democracy that Milosevic be judged by an international court rather than murdered by a cruise missile aimed at his home".[270]

For one, protecting democracy demands respect for some of the most fundamental human rights all civilians should have, the right to life and the right not to be tortured. The 'war on terrorism' does not create a silent derogation to the international human rights instruments nor to international humanitarian law. The 'rational' of the 'war on terrorism' and its impact on humanitarian law and human rights eventually led to the substantial media coverage in May 2004 of reports and images of US soldiers torturing, ill-treating and sexually abusing detainees at Abou Ghraib's prison in Iraq.[271] Ironically, these human rights abuses that occurred for the purpose of interrogations that were 'meant' to prevent further attacks have now become propaganda material for the Al-Qaeda movement and there is no telling what 'collateral damage' might result from these inhumane acts.

Fear or terror plays an important role, both in the experience and in the perpetuation of human rights abuses in counter-terrorism. Naturally, fear can be assumed to be oppressive and traumatizing, especially for the innocent victims of terrorists acts. In contrast, terror is also what triggers authorities to respond with irrational action in violation of some of the most fundamentals human rights, such as freedom from torture. The solution is not to respond with legislation that pushes the limit of what our societies have achieved in human evolution and therefore exposes

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[268] Security Council Resolution, S/RES/1530 (2004) para. 1.

[269] BBC News, <news.bbc.co.uk/2/hi/americas/2576949.stm>, 15 December 2002, visited on 21 August 2003.

[270] W. Schabas, 'Human Rights and Terrorism', *Human Rights Internet* – the Human Rights Databank, Fall 2001, Vol.8, No.2, <www.hri.ca/tribune/viewArticle.asp?ID=2639>, visited on 19 august 2003.

[271] ICRC, 'Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation' (2004), made public by derStandard.at, 'Der Bericht des Roten Kreuzes taz veröffentlicht Auszüge in deutscher Übersetzung', 11 May 2004, <derstandard.at/?id=1661565>, visited on 11 May 2004.

our shame of being terrified by terrorists. Rational justice must be sought not revenge.

Despite its hard-earned and important achievements, the international human rights cases about terrorism have been hampered by the inability to secure the prohibition of discrimination in counter terrorism legislation. Minority groups are often the targets of such terrorism legislation and these are barely contested since it seems to serve the opinion of the majority of the population in its stereotypes and fears after a terrorist act. The policy-makers who are responsible for the drafting of such legislation have to seriously address the possible counter-effect of strong terrorism legislation limiting civil liberties.

The late Swedish Minister of Foreign Affairs, Ms. Anna Lindh, once made a statement before the General Assembly of the United Nations in which she said that terrorism could not prevail, "nor can we tolerate the suppression of political opposition, or the persecution of religious or ethnic minorities, under the guise of anti-terrorism. In fact it is by ensuring global respect for international law, for human rights and social justice, that terrorism loses much of its fertile ground".[272]

The current trend in the anti-terrorism legislation implemented since 11 September 2001, exposes a serious lack of human right education for policy-makers, the legal community, law enforcement authorities and the civilian population.[273] At the end of this decade of human rights education, one can express serious disappointment towards the commitment of States. In reaction to the numerous excessive counter-terrorism measures adopted by States and the lack of human rights protection in the measures adopted by the UN Security Council in the year following 11 September 2001, the author of this article recommends the strengthening of human rights education at all levels of education and Governmental positions. This need for 'balance' between fighting terrorism and respecting human rights has to be not only known but also understood in order to maintain the common heritage of humanity and international peace and security.[274] Fighting terrorism exceeds the complex question of national security, as it is also a fight to defend and strengthen the fundamental values and heritage of human rights both at the domestic and international level. In a democracy respectful of human rights, the

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[272] Statement by H.E. Ms. Anna Lindh, Minister for Foreign Affairs of Sweden, In the General Debate of the 57th Regular Session of the General Assembly of the United Nations, 19 September 2002, <www.swedenabroad.com/pages/general_13130.asp>, visited on 16 September 2003.

[273] For references to repressive actions of states in the name of fighting terrorism since September 11 2001, *see* 'Opportunism in the Face of Tragedy', *Human rights Watch*, <www.hrw.org/campaigns/september11/opportunismwatch.htm>, visited on 16 September 2003.

[274] "it must be also understood that international law requires the observance of basic human rights standards in the struggle against terrorism", *Report of the Policy Working Group on the United Nations and Terrorism*, UN GA, A/57/273 - S/2002/875, 6 August 2002, Annex, para. 26.

total absence of risks of terrorism does not exist.[275] Though, in States where human rights and freedoms are respected and a hope for justice exists, it is less likely that movements will emerge with the aim of using the mass murders of innocent people as a political or ideological tool.

Overall, the slender reed upon which human rights, and international justice, will flourish or fail since 11 September 2001 depends on two elements: the strong enforcement of human rights by national and international jurisdictions, as well as a strengthening of human rights education at all levels, so that gross violations of human rights, such as torture or detaining children without granting them access to legal representation may never be tolerated by anyone as they are right now.

[275] O. De Schutter, 'La Convention euopéenne des droits de l'homme à l'épreuve de la lutte contre le terrorisme', in E. Bribosia and A. Weyembergh (dir.), *Lutte contre le terrorisme et droits fondamentaux* (Nemesis, Bruylant, Bruxelles, 2002) p.92.

MULTIPLE DISCRIMINATION AND THE SYSTEM OF INTERNATIONAL HUMAN RIGHTS LAW: THE EXAMPLE OF HAITIAN WOMEN IN THE DOMINICAN REPUBLIC

Kajsa Öbrink[*]

CONTENTS

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[*] This is a shortened version of the author's master thesis, written and defended at the Lund University in 2002 and supervised by Dr. Gregor Noll. The author is today the Regional Expert on Gender Equality at the County Administrative Board in the region of Skåne, Sweden.

1. INTRODUCTION

The international system of human rights has long fought against discrimination. New grounds for discrimination have been discovered along the way. Today, we speak not only of discrimination against minorities or women, but also against homosexuals and person with disabilities. Recently, scholars have started to recognize that some of these grounds for discrimination may exist at the same time. Many people are, e.g., not only members of a minority but at the same time burdened by being women and poor. These cases of multiple discrimination need to be detected in order to be remedied appropriately. As the international system has focused on one ground of discrimination at a time, cases of multiple discrimination have gone undetected. If we focus on only one aspect of discrimination at a time, other discrimination grounds may be rendered invisible. Indeed, such a system is likely to benefit those who are the most advantaged in the disadvantaged group, such as black men or white women. Lately, various UN bodies have recognized the problem. In this article, I will show some examples of how international judicial bodies have failed to address the problem of multiple discrimination. I will argue that these failures are due to the structure of the system of international human rights law, which treats the various grounds of discrimination as separate issues. The treaty structure and the separation of the monitoring bodies make a holistic view difficult, if not impossible.

As an illustration of the problem of multiple discrimination, I will use Haitian women in the Dominican Republic. I will first describe the situation of all Haitians in the country, and thereafter the situation of all women. The reader will discover how the racism, anti-Haitianism and the patriarchy in the Dominican Republic disadvantage the Haitian women. They are Haitian, black, women and poor, all of which work against them in their daily life. To detect various grounds of discrimination, I will propose a method of comparisons. To discover discrimination, a comparison is always needed. Discrimination can be established when two similar cases, e. g. a man and a woman, are treated differently. To discover multiple discrimination, e. g. in the Dominican Republic, we need only to continue such comparisons between different but similar groups in the Dominican society, i. e. Haitians and Dominicans, women and men, and blacks and whites. In doing so, the whole pattern of discrimination will appear. This article will show that it is impossible for the international organs of the UN to take such a holistic view on the problem, since they are tied down by the structure of the system they belong to.

In the following chapter on the theoretical framework, I will elaborate on the concepts of discrimination and multiple discrimination, or intersectionality. I will argue that the international system has not dealt with such cases successfully, which has led to the fact that certain grounds of discrimination have not been detected and at times even rendered invisible.

Various UN bodies have expressed a growing awareness of the problem of multiple discrimination. In Chapter 3, I will go through various UN reports,

recommendations and conclusions, in which the reader will find support for the need for a holistic approach and for a method to detect intersectional discrimination.

To illustrate the failure of the international system to detect and deal with multiple discrimination, I will in the next chapter (entitled "Case law") describe how three international judicial or quasi-judicial bodies have dealt with cases of multiple discrimination.

Chapters 5 and 6 are a description of the situation of, respectively, Haitians and women in the Dominican Republic. I will use this as a concrete example when I propose, in Chapter 7, a method of comparisons for detecting multiple discrimination. In the concluding chapter I will sum up the article and my main points.

2. THEORETICAL FRAMEWORK

2.1. Discrimination

In the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),[1] discrimination against women is defined in Article 1 in the following way:

> "For the purpose of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

The European Court of Human Rights (ECtHR) and the Human Rights Committee (HRC), which deal with discrimination issues connected to the European Convention[2] and the *International Convention on Civil and Political Rights* (ICCPR)[3] respectively, have elaborated on the core elements of discrimination. There is a violation of the right not to be discriminated against if there is a) differential treatment of b) comparable and equal or similar cases, without there being c) an objective and reasonable justification and when d) proportionality between the aim sought by the measure and the means employed is lacking.[4]

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[1] 18 December 1979, GA res. 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, EST No 005.

[3] 19 December 1966, GA res. 2200 A (XXI), 999 UNTS 171.

[4] A. Spiliopoulou Åkermark, 'Minority Women: International Protection and the Problem of Multiple Discrimination' in Hannikainen and Nykänen (eds.), *New Trends in discrimination law – international perspectives*, (Publications of Turku Law School, Vol 3, No 1/1999) p. 98.

2.2. The Relationship Between Material Rights and Discrimination

Human rights are universal. No matter what features or characteristics a human being may have, they cannot affect that person's entitlement to a number of material human rights, such as the right to life, liberty, food and education. Ever individual is thus protected. From that perspective, non-discrimination provisions should not be necessary. However, many violations of human rights take place precisely because of a person's accidental or irrelevant features – be it sex, colour, religious belief or something else. Therefore, there is a need to emphasize the illegitimacy of discrimination.

Moreover, even if a person's material human rights have not been violated at all, he or she may well have been discriminated against because he or she has not been treated like his or her fellow citizens. The principle of non-discrimination is linked to the concept of equality.[5] The idea that we are equal and should be treated as such is the basis for the idea that no one should be discriminated against. The very first article of the *Universal Declaration of Human Rights* (UDHR)[6] asserts that "all human beings are born free and equal in dignity and rights". Unequal treatment is only accepted in certain circumstances, which differ over time and from culture to culture. To treat women differently from men is, for example, still accepted in many parts of the world. Non-discrimination is thus a way to safeguard or achieve equality. The State has a duty not only not to violate its citizens' material rights, but also to treat them equally. In Ronald Dworkin's words, a government owes everyone "equal concern and respect".[7]

The right not to be discriminated against is different from material rights. Unlike material rights, non-discrimination provisions never include any independent material norms about how people should be treated. A non-discrimination provision always refers to other material norms, and makes sure that those are not applied in a discriminatory way. If all women in a country are paid less than their male colleagues, a non-discrimination provision will not guarantee a higher salary for all women. The violation could just as well stop through reducing the salary of the men. A non-discrimination provision thus presupposes an underlying right to equality.

2.3. Multiple Discrimination

The term multiple discrimination is used to describe discrimination on several prohibited grounds at the same time, such as gender, class, race, religion etc. This is the main understanding of the term. As Sia Åkermark points out, the term may also

[5] Some scholars even argue that they are positive and negative statements of the same principle. *See e.g.*, A. Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law', 1 *Human Rights Law Journal* (1990) .
[6] UN GA res 217 A (III), 10 Dec 1948.
[7] R. Dworkin, *Taking Rights Seriously* (1977) p. 180.

be used to describe discrimination in relation to several different rights, or discrimination by various actors (e.g. the State, the husband and the employer).[8]

2.4. Intersectionality

The term intersectionality (or intersectional discrimination) is used to describe the interaction between different forms of discrimination and thus includes a structural element. It describes how different discriminatory systems, such as racism, patriarchy and economic disadvantages, create "layers of inequality that structures the relative positions of women and men, races and other groups".[9] The phenomenon can perhaps be better understood through the following metaphor.

> "In this metaphor, race, gender, class and other forms of subordination are the roads that structure the social, economic or political terrain. It is through these thoroughfares that dynamics of disempowerment travel. These thoroughfares are sometimes framed as distinctive and mutually exclusive avenues of power. But these thoroughfares often overlap and cross each other, creating complex intersections at which two, three or four of these avenues meet. Marginalized groups of women are located at these intersections by virtue of their specific identities and must negotiate the 'traffic' that flows through these intersections to avoid injury and to obtain resources for the normal activities of life. This can be dangerous when the traffic flows simultaneously from many directions. Injuries are sometimes created when the impact from one direction throws victims into the path of oncoming traffic, while on other occasions, injuries occur from simultaneous collisions. These are the contexts in which intersectional injuries occur – when multiple disadvantages or collisions interact to create a distinct and compound dimension of disempowerment."[10]

In this article, I will use the terms multiple discrimination and intersectionality interchangeably. To understand the phenomenon of intersectionality or multiple discrimination it is necessary to consider a person's multiple identities.

2.5. Multiple Identities

Each one of us belongs to different categories. I can identify myself, e. g., as a white middle class woman. I could add that I am Swedish, unmarried, protestant and heterosexual. All of these parts of me are integrated. Some of the identities may privilege me, such as being white and middle-class, while others may discriminate

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[8] Åkermark, *supra* note 4, p. 98 *et seq*.

[9] Gender and racial discrimination, Report of the Expert Group Meeting, 21–24 November 2000, available at <www.un.org/womenwatch/daw/csw/genrac/ report.htm>, visited on 31 October 2001.

[10] *Ibid.*

against me, such as being female. Everyone has such multiple identities. The Haitian women that we are going to meet later in this article can be described as black, poor, female Haitian immigrants. All of these identities happen to be grounds for discrimination in the Dominican Republic. Existing at the same time, they may intensify or in other ways affect each other.

To examine the situation of a person from the perspective of only one of these categories would give us a very limited, and thus inaccurate, picture. To assist women, who face discrimination, in an appropriate way, it is necessary to assess all of these identities. Various scholars, such as Adrien Katherine Wing[11] and Kimberlé Crenshaw,[12] have pointed this out. To focus only on the discrimination women face because of their gender will obscure other power relations, such as discrimination suffered on grounds of ethnicity or class. Dealing with racial discrimination or poverty without noticing gender-specific violations will mean that such problems will remain unsolved.

2.6. Over-inclusion and Under-inclusion

The consequences of the traditional one-eyed approach to discrimination may be that specific problems of discrimination are rendered invisible. This can be illustrated through the concepts of over-inclusion and under-inclusion.

The notion of over-inclusion refers to the situation when a racial aspect of discrimination is ignored, while a gender aspect is addressed. For example, as Pragna Patel points out, trafficking of women is often perceived as an example of gender subordination.[13] This being true, it is, however, often the case that specific groups are targeted. It is almost always poor women and girls that are recruited. As the socio-economic position in many countries, such as the Dominican Republic, is reflected in the colour of your skin, there is often also an element of racial discrimination.

The notion of under-inclusion refers to the opposite situation, when the gender aspect of discrimination is underplayed while the racial aspect is underlined. An example of this is forced sterilizations, such as in Sweden, in the 1930's, of among others Roma women. Such practice is often perceived as being racist, not taking into account that it is also a flagrant violation of a women's body.

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[11] 'A Critical Race Feminist Conceptualisation of Violence: South African and Palestine Women' in A. K. Wing (ed.), *Global Critical Race Feminism, An International Reader* (2000) p. 332.

[12] 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color' in K. Crenshaw *et al* (eds.), *Critical Race Theory, The Key Writings That Formed the Movement* (1995) p. 357.

[13] P. Patel, 'Notes on Gender and Racial Discrimination: An urgent need to integrate an intersectional perspective to the examination and development of policies, strategies and remedies for gender and racial equality', available at <www.un.org/womenwatch/daw/csw/Patel45.htm>, visited on 31 October 2001.

2.7. Dealing with Discrimination

Traditionally, cases of discrimination have been dealt with on the basis of only one ground for discrimination. Bodies like the HRC, the ECtHR and the Committee on the Elimination of Racial Discrimination (CERD) have failed to deal with the problem of multiple discrimination appropriately.[14] Similarly, UN instruments on discrimination target only one aspect of discrimination. CEDAW focuses on equality between the sexes, while the subject matter of the *International Convention on the Elimination of Racial Discrimination* (ICERD)[15] is race. Only recently have UN bodies started acknowledging the problem of multiple discrimination.[16] Consequently, the data collected in connection with discrimination has so far not focused on the whole situation of the persons affected.

The very treaty structure and the separation of the monitoring bodies leads to the fact that multiple sources of discrimination are not detected. The international system fails to address the complexity of the world.

In fact, a system which only deals with one aspect of discrimination at a time is likely to benefit the already privileged in the disadvantaged group, such as non-white men and white women. Kimberlé Crenshaw has described this problem in the following way:

> "Imagine a basement filled with people who are disadvantaged on the basis of race, sex, class, sexual preference, age and or physical ability. These people are stacked on top of each other – feet standing on shoulders – with those on the bottom being disadvantaged by the full array of factors, up to the top, where the heads of all those disadvantaged by a singular factor brush up against the ceiling. Their ceiling is actually a floor above which only those who are not disadvantaged in any way reside. In effort to correct some aspects of domination, those above the ceiling admit from the basement only those, who can say that 'but for' the ceiling, they too would be in the upper room. A hatch is developed through which those placed immediately bellow can crawl. Yet this hatch is generally available only to those who – due to the singularity of their burden and their otherwise privileged position relative to those below – are in the position to crawl through. Those who are multiply burdened are generally left bellow unless they can somehow pull themselves into the groups that are permitted to squeeze through the hatch."[17]

Fair-skinned and rich Dominican women may sometimes reach high positions in the society. When meeting discrimination on grounds of their sex, national and

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[14] *See* Chapter 4 below.
[15] 21 December 1965, GA res 2106 (XX), 660 UNTS 195.
[16] *See* Chapter 3 below.
[17] K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' in D. K. Weisberg (ed.), *Feminist Legal Theory Foundations* (Philadelphia, 1993) p. 387 *et seq*.

international instruments against sex discrimination are relevant for them. 'But for' their sex, they would be in Crenshaw's upper room and, therefore, they have a possibility to crawl through the hatch. The problem is that the instruments which target only one aspect of discrimination fail to reach the people further down in the basement, who are multiply burdened.

3. UN BODIES

In recent years, various UN bodies have increasingly recognized the problem of multiple discrimination and the failure to deal with it. The problem has been highlighted in connection with gender issues. The importance of taking all forms of discrimination into account has been underlined, and some of the bodies have also stressed the need for a method to identify various layers of discrimination.

3.1. The Beijing Platform for Action

The problem of double discrimination is mentioned in the *Beijing Declaration and Platform for Action*,[18] which was the outcome of the Fourth World Conference on Women (1995). The document clearly states that women often are faced with various barriers to full equality in addition to their gender. It is also acknowledged that indigenous women and women that are members of minority communities are particularly vulnerable.[19]

3.2. Committee on the Elimination of Racial Discrimination

CERD issued a general recommendation on gender-related dimensions of racial discrimination[20] in March 2000. The Committee notes that racial discrimination does not affect men and women equally or in the same way. It may affect primarily women, or affect men and women in different ways. Thus, the different life experiences of men and women have to be recognized. The Committee further argues that certain forms of discrimination may be directed towards women specifically because of their gender, such as sexual violence or abuse of illegal women workers. This form of discrimination will sometimes only have consequences for women, such as pregnancy as a result of rape. Women may also have specific problems with getting redress for racial discrimination, due to gender bias in the legal system.

The Committee concludes that since racial discrimination may have a unique impact on women, there is a need to take gender factors, as well as other issues that may be interlinked with racial discrimination, into account when monitoring racial discrimination. It also asserts a need for a method to evaluate and monitor racial

[18] A/CONF.177/20, 15 September 1995.
[19] Platform for Action, paras. 31–32, 46, 225, 256c.
[20] Fifty-sixth session, 2000, UN Doc.A/55/18, annex V.

discrimination against women and the difficulty women encounter because of violations of their human rights on various grounds.

3.3 Women 2000: Gender Equality, Development and Peace for the 21st Century

In June 2000, during its 23rd special session, the General Assembly reviewed and assessed the progress achieved in the implementation of the Nairobi Forward-looking Strategies for the Advancement of Women (adopted in 1985) and the above-mentioned Beijing Platform for Action. It also considered future actions.

The General Assembly adopted a resolution on further actions and initiatives to implement the *Beijing Declaration and Platform for Action*.[21] It noted that barriers to full equality for women still remain and that further implementation was needed.[22] It further stated that women increasingly are involved in labour migration, which exposes them to inadequate working conditions, increased health risks, economic and sexual exploitation, risk of trafficking and racism.[23]

3.4 Report of the Expert Group Meeting

In November 2000, an expert group meeting on gender and racial discrimination was held in Zagreb, Croatia. The meeting was organized by the Division for the Advancement of Women (DAW), in collaboration with the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Development Fund for Women (UNIFEM).

Similarly to the CERD recommendation, the report[24] asserts that various categories of discriminations do not affect men and women in the same way. Some problems may be unique to particular groups of women or affect some women disproportionately. The acknowledgement of different life-experiences of men and women is thus necessary to ensure detection of all forms of discrimination and thereby securing an appropriate remedy.

It is further stated that multiple discrimination often is considered to consist of separate and mutually exclusive forms of discrimination, which may lead to the situation where victims of multiple discrimination are not recognized as such and thus do not have access to redress. The report further argues that the UN approach to discrimination is to address specific categories of discrimination, rather than taking a holistic approach. Thus, consequences of intersectionality may remain unaddressed by today's human rights approaches because they tend to focus on one category of discrimination. The report finally stresses the need to develop a method to identify intersectional discrimination and its effects on women and girls.

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[21] A/RES/S-23/3, available at <www.un.org/womenwatch/daw/followup/ress233e.pdf>, visited on 31 October 2001.
[22] Paras. 6 and 27.
[23] Para. 41.
[24] Gender and racial discrimination, *supra* note 9.

3.5. Commission on the Status of Women, 45th Session

The 45th session of the Commission on the Status of Women (SCW) was held in March 2001. The agreed draft on conclusions on gender and all forms of discrimination[25] acknowledged that it has been increasingly recognized that gender analysis of all forms of discrimination is needed to ensure that violations of human rights of women is detected and remedied. Thus, consideration of all forms of discrimination is important when addressing gender discrimination.

The Commission underlines the importance of a holistic approach to multiple discrimination of women and girls. It further asserts the need for developing methodologies to identify the ways in which various forms of discrimination affect women, and for collecting and analysing data on multiple discrimination.

3.6. World Conference Against Racism

In preparation for the World Conference Against Racism, Mary Robinson issued a document on the intersection of racial and gender discrimination.[26] She quotes the Beijing Platform for Action and states that it is important since it speaks of double discrimination. She recognized that the problem is more complex than that; "there are, in fact, multiple potential forms of discrimination".

In an official document on the United Nations website, parts of Mary Robinson's statements are repeated.[27] Mary Robinson recognized that factors such as race, colour and ethnicity can create unique problems for certain groups of women, or affect them disproportionately. Examples of problems for these groups of women are given, such as illiteracy, poverty, problems in the labour market, trafficking and race-based violence. As the problems have been seen as manifestations of one form of discrimination only, the full scope of the problems have escaped analysis and lead to ineffective/inadequate remedies.[28]

4. CASE LAW

International judicial and quasi-judicial bodies are frequently faced with cases of discrimination. Their findings are important for victims of discrimination. Not only may they lead to reform of the legislation or practice of the State concerned but, even more importantly, the findings will also be of relevance for many other States when they review their systems.

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[25] Available at <www.un.org/womenwatch/daw/csw/draftacrace.htm>, visited on 31 October 2001.

[26] M. Robinson, United Nations Office of the High Commissioner for Human Rights, *Gender Dimensions of Racial Discrimination*, available at <www.unhchr.ch/pdf/wcargender.pdf>, visited on 30 October 2001.

[27] World Conference Against Racism, 'At the crossroads of Gender and Racial Discrimination', available at <www.un.org/WCAR/e-kit/gender.htm>, visited on 30 October 2001.

[28] At the time of writing, the final declaration of the conference was not available.

In the following section, I will describe how three international bodies (HRC, ECtHR and CERD) have dealt with clear cases of multiple discrimination.

4.1. HRC Sandra Lovelace v. Canada[29]

Sandra Lovelace was born and registered as a Maliseet Indian, in Canada. When she married a non-Indian, she lost her Indian status, pursuant to Canadian law. When she ceased to be a member of the band, she also lost other rights, such as her right to reside on a reserve. The law affected only women; when an Indian man married a non-Indian, he did not lose his Indian status.

Sandra Lovelace filed a complaint to the HRC, claiming that the law was discriminatory on the grounds of sex and contrary to some of the provisions of the ICCPR. The HRC gave its views in 1981. Although Sandra Lovelace had invoked several provisions of the ICCPR, the Committee considered that the one, which was "most directly applicable"[30] to the complaint, was Article 27, which protects minority rights[31]. As a member of a minority, Sandra Lovelace had the right to her native language and culture in community with other members of the group. Since she had been denied the right to reside on her reserve, Article 27 had been breached. The Committee did not consider it necessary to examine whether other rights had been violated or the discrimination claim. Article 27 was, however, "construed and applied" in the light of some of the other articles invoked, including the provisions against discrimination.[32] The finding of the breach of Article 27 made it unnecessary to examine the other rights invoked and the general provisions against discrimination.[33]

It is clear from the facts of the case that Sandra Lovelace had not only suffered from a violation of her rights as a member of an Indian community. It is just as obvious that she had also been discriminated against on grounds of her sex. A comparison between male and female Maliseet Indians clearly shows that a person's sex would determine whether or not he or she would lose Indian status when marrying a non-Indian. Nevertheless, the HRC confined itself to comment upon minority rights.

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[29] Communication No 24/1977, Views of the Human Rights Committee in CCPR/C/13/D/24/1977, available at <www.unhchr.ch/tbs/doc.nsf/FramePage/TypeJurisprudence?OpenDocument>, visited on 31 October 2001. *See also* Åkermark, *supra* note 4, 109 *et seq*.

[30] Para. 13.2.

[31] Article 27 states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".

[32] Para. 16.

[33] Para. 18.

The views of the HRC led the Canadian government to give Sandra Lovelace the right to reside on a reserve. The problem that only women faced the risk of losing their Indian status was not, however, addressed. Thereby, the views of the HRC are not complete. It is not sufficient, in this case, to determine a breach of Article 27 – the sex discrimination must be determined as well. By not commenting upon the issue of sex discrimination, part of the problem remained unsolved.[34]

In an individual opinion, Mr Néijib Bouziri found that several other rights had similarly been violated and that Sandra Lovelace was "still suffering for the adverse discriminatory effects of the Act in matters other than that covered by Article 27".

4.2. ECtHR Airey v. Ireland[35]

Johanna Airey was an Irish woman who tried to separate from her abusive husband and could not receive legal aid to do so.

In Irish law, divorce does not exist. However, it is possible to annul a marriage or to obtain a judicial separation on certain grounds. The cost for such a proceeding is very high, and legal aid was not available for such a case or any other civil matters.

Johanna Airey complained to the ECtHR and claimed that the State had not protected her from physical and mental cruelty from her husband. She further claimed that her right of access to a court, her right to respect for her family life and her right to an effective remedy were violated. Moreover, she claimed to be discriminated against in comparison with those who have financial resources to pay for the proceedings for a judicial separation (i. e. discrimination on the grounds of property or socio-economic position).

The Court found in 1979 that Johanna Airey had not enjoyed an effective right of access to a court, and that there had been a breach of the European Convention. Regarding her discrimination claim, the Court stated that the article on discrimination (Article 14) did not have an "independent existence". Only if the Court does not find a separate breach of one of the other articles that has been invoked does it have to examine the case under Article 14. When a material right has been violated, an examination under Article 14 is only necessary if "a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case". As this did not apply to Johanna Airey's case, no examination under Article 14 was necessary. Similar arguments have been used in other cases, e. g. *Dudgeon* v. *UK*,[36] in which the Court states "[o]nce it has been held that the restriction gives rise to a breach of Article 8 there is no useful legal purpose to be served in determining whether he has in addition suffered discrimination as

[34] Even though it was not required in the views of the HRC, Canada did change its legislation so that it no longer discriminated on the basis of sex.
[35] Judgment of the ECtHR of 9 October 1979, A32 (1980).
[36] 22 October 1981, A45. *See also e.g.,* Johnston, 18 December 1986, A112 and Philips, 27 August 1991, A209.

compared with other persons who are subject to lesser limitations on the same right".[37]

Article 14 states as follows: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 14 only protects the citizens from discrimination against the rights and freedoms in the Convention – it does not create a general 'right to equality'. This is what the Court means when they state that the Article does not have an 'independent existence'. However, the Article does have an autonomous meaning. It is not only applicable when a Convention right has been *violated*; as soon as any of the rights are at all affected, the restriction must be made in a non-discriminatory way. If this had not been the case, the only effect of the discrimination would be to aggravate another violation.

The Court does not find it necessary to consider the discrimination claim, as soon as they have discovered that a violation of Johanna Airey's right of access to a court has been violated. As Asbjørn Eide and Torkel Opsahl put it: "[i]f a violation of a Convention right is established as such, the added claim that there was also a case of prohibited discrimination has at times been deliberately left aside."[38]

This interpretation of the Court has been criticized by various scholars. Van Dijk and Van Hoof[39] assert that in cases when a violation of one of the articles is found, "article 14 is not treated as an autonomous and complementary, but only as a subsidiary guarantee". They continue: "[i]t cannot be appreciated why article 14 should have another character in cases where a violation of another article of the Convention has been found than in cases where there is no question of a violation of any of these articles as such". In their opinion, the argument of the Court ignores the fact that its judgements have far-reaching effects, which have implications of a general character. Sia Åkermark argues[40] that the Court seems to assume that issues of discrimination are of secondary importance if another right also has been violated. She fears that such a practice will lead to instances where discriminatory practices in a State will pass uncommented by the Court, and thus remain unsolved.

The reasoning of the Court is, indeed, unfortunate if one wishes to make visible and remedy all different discrimination-grounds behind a violation of a human right. It may seem like the Court presupposes that the discrimination claim has already been dealt with as soon as a violation of a material right has been found. A violation of a material right does indeed always include an element of discrimination. But

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[37] Para. 69.
[38] A. Eide and T. Opsahl, 'Equality and Non-Discrimination', Publication No 1, *Norwegian Institute of Human Rights* (1990) p. 21.
[39] P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998) p. 716 *et seq*.
[40] Åkermark, *supra* note 4, p. 100.

why then does the court take the time to consider the discrimination element in cases of "clear inequalities" which are a "fundamental aspect of the case"? [41]

The reasoning is probably due to procedural considerations. When the Court concludes that Johanna Airey's right of access to a court has been violated, that makes the discrimination claim less interesting. When the discrimination claim is linked to the material right, it might very well seem superfluous to the Court to go into that claim. Since the Court does not decide on the sanction for the State, it might be less inclined to pin down all discriminatory effects, on top of the material rights violations.

4.3. CERD Mrs A Yilmaz Dogan[42]

Mrs A Yilmaz Dogan was a Turkish national, residing and working in the Netherlands. When she got pregnant, her employer requested permission from the relevant Dutch authority, the Cantonal Court, to terminate her employment contract. Such permission was needed since Dutch law in principle forbid termination of contracts during the pregnancy of the employee. The request included the following passage.

> "When a Netherlands girl marries and has a baby, she stops working. Our foreign women workers, on the other hand, take the child to neighbours or family and at the slightest setback disappear on sick leave under the terms of the Sickness Act. They repeat that endlessly. Since we all must do our utmost to avoid going under, we cannot afford such goings-on."[43]

The employer was given the permission he requested. Mrs Yilmaz Dogan tried in vain to get the decision of the Cantonal Court annulled and to get her former employer prosecuted.

Mrs Yilmaz Dogan filed a complaint to the CERD and the Committee found in 1984 that she had not been afforded protection in respect of her right to work.

It is fair to assume that Mrs Yilmaz Dogan was in fact subject to a combination of racial and gender discrimination. It is not probable that any Turkish men risked being dismissed because they were to become fathers. The Committee was, however, silent on this gender issue, probably at least partly because of the construction of the treaty, which focuses strictly on race discrimination. Sixteen years later, the Committee stressed in a general recommendation the importance of taking gender factors into account.[44]

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[41] *Airey* v. *Ireland*, *supra* note 35.
[42] CERD/C/36/D/1/1984, Communication No 1/1984.
[43] Para. 2.2.
[44] *See* Chapter 3 above.

5. HAITIANS IN THE DOMINICAN REPUBLIC

5.1 Background

The Dominican Republic is situated on the eastern part of the island Hispaniola. The island is found in the West Indies, between Cuba and Puerto Rico. Columbus reached it in 1492 and was the one who gave it its name. Soon after his arrival the Indian population was almost exterminated and replaced by slaves from Africa. In the mid 17th century, the West part of the Island was given to France. After a slave mutiny in the French colony, the Republic of Haiti emerged in 1804.[45] In mid 19th century, the Dominican Republic, still a Spanish colony, was invaded by Haiti. Dominican independence occurred as a separation from Haiti 22 years later.[46]

With the development of the sugar industry at the end of the 19th century, Haitians started immigrating to the Dominican Republic to work in the cane fields. The industry still depends on this cheap foreign labour force.[47] During the Trujillo dictatorship (1930-1961), anti-Haitianism and racism was part of the leadership's ideology.[48] In 1937, at least 20,000 Haitians or Dominicans of Haitian origin (both groups hereinafter referred to as Haitians) were killed by government troops in an attempt to "clean the race".[49] In 1997, 15 per cent of the Dominican population is white, 15 per cent black and the rest mulattos. The upper class still consists of the white minority, while the blacks are to be found among the poorest part of the population.[50] In Haiti, where the French colonials never mixed with the local population or the slaves, 90 per cent of the population is black and does not speak French.

5.2. Living Conditions

Haitians still come to the Dominican Republic to work during the sugar harvest every year and many of them remain there. Gradually, they have also started working in other agricultural areas, as well as in various types of work in the urban sector.[51] The State Sugar Council (Consejo Estatal de Azúcar – CEA) that was used to contract them has to a large part been privatized, and foreign companies now own many of the camps. The Haitians still live with their families in the special work

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[45] The country was thus the first in the Americas to free their slaves, *Etapas del anti-haitianismo en la República Dominicana*, Union Latinoamericana de Juventudes Ecumenicas (ULAJE) (Santo Domingo, 1990) p. 28.
[46] *Dominikanska Republiken* (Utrikespolitiska Institutet, Stockholm, 1997) p. 3.
[47] S. Jansen and C. Millan, *Género, Trabajo y Etnica en los Bateyes Dominicanos* (Santo Domingo, 1991) p. 37.
[48] Etapas del anti-haitianismo, *supra* note 45, p. 51.
[49] *Solidarity with the struggle of the Dominican minority of Haitian descent for citizenship and justice*, (MUDHA, august, 2001), p. 5.
[50] Dominikanska Republiken, *supra* note 46, p. 4 *et seq*.
[51] Jansen and Millan, *supra* note 47, p. 37.

camps once established by the CEA – the bateyes.[52] Police and military forces participate in the recruiting of the workers. The workers receive very low wages and live under extremely difficult conditions.[53] The housing, mostly barracks, is inadequate, without electricity or sewerage. There is overcrowding and a lack of hygiene, drinking water, medical facilities and latrines.[54] Health centres are often located far away from the bateyes, roads are in bad condition and transport and medicines are expensive. Fifteen per cent of the Haitians are HIV positive or have AIDS.[55] The children are often suffering from malnutrition[56] and illnesses such as diarrhoea and fever.[57] Many of them do not go to school since they are not allowed by the government or needed at home.[58] About one third of the Haitians are illiterate, which is more than double the national level.[59] Some of them do not speak Spanish.[60] Armed guards are present in the cane fields. Violence is part of the daily life. Men fighting, men beating women, parents beating children and children beating each other are all common features of the bateyes.

In its concluding observations on the third periodic report of the Dominican Republic, the Human Rights Committee expressed its concern over the lack of protection afforded to Haitians in the Dominican Republic and over the degrading living and working conditions of Haitian labourers.[61] They even called their situation a "slave-like exploitation".[62]

5.3. Prejudice Against Haitians and Blacks

There is a strong prejudice against Haitians and other blacks in the Dominican Republic, which disadvantages all foreigners of African descent. Race and class are closely tied together. Whites (descendants of the Spaniards) tend to be wealthier and to form the elite and the middle class is in general mulatto (about two-thirds of the population). The urban and rural working classes are in general black or dark mulatto, descendants of the original slaves or arrivals from Haiti. The Haitians are

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[52] There are also many Dominican families in the bateyes. They tend to live under slightly better circumstances than their Haitian neighbours.

[53] The medium income per month in the bateyes is around 40 US dollars. A.T. Yangüela, *Bateyes del Estado, Encuesta Socioeconomica y de salud de la población materno-infantil de los bateyes agrícolas del CEA Diciembre 1999* (Resumen Ejecutivo, Santo Domingo, 2001)p. 26.

[54] *Ibid.*, p. 13 *et seq*.

[55] *Ibid.*, p. 29.

[56] Around 40 per cent of the children suffer from malnutrition. *Ibid.*, p. 39.

[57] *Ibid.*, p. 34 *et seq*.

[58] 20–25 per cent of the children never reach any educational level. Those who do have often been born on Dominican territory. *Ibid.*, p. 9.

[59] *Ibid.*, p. 8.

[60] The official language in Haiti is French and most Haitians speak Creole.

[61] Concluding observations of the Human Rights Committee: Dominican Republic, 05/05/93. CCPR/C/79/Add. 18.

[62] Para. 9.

believed to have an inferior culture, and violence and calls for a lessening of Haitian emigration have emerged.[63]

Despite the majority of colour, almost everybody on television or in magazines is white. The beauty ideal is clearly occidental and most Dominican women make efforts to appear more European. Pupils are encouraged not to wear plaits in school (which is the preferred hairdo for black girls and women) and children are often distinguished by their colour.[64] When getting married, it is preferred to find a partner of lighter skin.

Dominican scholars, such as Dr Carlos Andújar[65], think that the origin of this prejudice is to be found in the history of the island. The roots of the racism can be found in the colonial time. A system of differentiation between ethnic groups was a way to justify the social inequality.[66] The anti-Haitianism did not appear until the Haitian occupation, during which the Dominican/Spanish culture was oppressed and Haitian leadership harsh.[67] The Dominican sense of nationality developed in opposition to Haiti. Even very dark-skinned Dominicans today define themselves as white or of Indian origin, as opposed to the black Haitians. The Haitian people are seen as black, barbaric, voodoo practising, illiterate and of African descent, as opposed to the white, mestizo, and catholic Dominican people of Spanish or Indian origin.[68] In the 19th century, the Haitians were even accused of being cannibals.[69] After the occupation, there were constant border disputes between the two countries, until 1936.[70] The relationship between the two countries is still very tense. There is still a fear of Haiti, and Haitian immigration is by many Dominicans regarded as a passive invasion.[71] Ever since the 19th century, blacks and dark mulattos have often been accused of being pro-Haitian.[72] When the black leader Peña Gómez ran for president in the 1990's, his political opponents underlined that he originated from Haiti and implied that he might allow Haiti to "take over" the country. Naturally, the ethnic stigma of being Haitian stands in the way of finding a descent job or moving upwards in society.[73]

During the World Conference Against Racism in Durban, the President of the Dominican Republic[74] repeatedly stated in the national newspapers that the

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[63] H. J. Wiarda and M.J. Kryzanek, *The Dominican Republic A Caribbean Crucible* (1992) p. 5 *et seq*.
[64] *E.g.*, '*el negrito*' (the little black) or '*la morenita*' (the little brown).
[65] Carlos Andujar is sociologist and the director of Museo del Hombre Dominicano.
[66] Etapas del Anti-haitianismo, *supra* note 45, pp. 5–6.
[67] *Ibid.*, p. 19.
[68] Jansen and Millan, *supra* note 47, p. 38.
[69] Etapas del Anti-haitianismo, *supra* note 45, p. 37.
[70] F. Moya Pons, 'Las tres fronteras: Introducción a la frontera dominico-haitiana', in W. Lozano (ed.), *La cuestión haitiana en Santo Domingo* (1992) pp. 19–20.
[71] Jansen and Millan, *supra* note 47, p. 37.
[72] Etapas del Anti-haitianismo, *supra* note 45, p. 29.
[73] Jansen and Millan, *supra* note 47, p. 152.
[74] Hipoliot Mejía.

Dominican Republic is not a racist country and that the Haitian immigrants are well respected. In its eighth periodic report to CERD, the Dominican Republic denied that any racial prejudice exists in the Republic, and emphasized that there is no discrimination against Haitians living in the country.[75] CERD has expressed its concern over this denial and over the existence of racial prejudices, not only against Haitians but also against darker-skinned Dominicans.[76]

5.4. Haitian Women

About five per cent of the cane cutters are women, who are paid half of what the men receive, the same as what the children get. The CEA does not keep any record of the female workers. Since the women are not acknowledged, they have no access to any documentation, benefit or service that the CEA provides. If there is no man in the household, e.g. if the husband dies or is deported, the rest of the family does not get any of the previous protection that that man received. The women have the responsibility for the household and the children, and it is the girls who help their mother in this task.[77] Around 40 per cent of the women in the bateyes are unemployed, in contrast to ten per cent of the men.[78] While the women spend their entire income on their family, buying e.g. food and medicine, the men spend at least part of theirs on alcohol and cigarettes.[79] The majority of the women who work are found in the informal sector, e.g. selling food in the streets or working as domestic servants.[80] Since they often have children, they have to choose between staying at home or trying to find work and leave their children alone or with a neighbour. The average income for women in the bateyes is half of that of the men's.[81] A single mother heads a high percentage of the households in the bateyes.[82] The Haitian women are often reluctant to seek medical assistance by fear of being badly treated by the doctors. This fear seems not unfounded, since in 1999, a law was proposed to the Congress, which sanctioned doctors giving medical attention to Haitian women who give birth without proper documentation.[83] Even though the law did not pass, it is not uncommon that Haitian women are refused help when arriving to a hospital at the time of delivery. The Haitian women are also victims of sexual exploitation by various agents, such as the camp guards and the migration agents. Prostitution is

[75] Eighth periodic report of State Parties due in 1998: Dominican Republic. 11/02/99. CERD/D/331/Add. 1, para. 6.
[76] Concluding observations of the Committee on the Elimination of Racial Discrimination: Dominican Republic. 26/08/99, A/54/18, paras. 504–522.
[77] Jansen and Millan, *supra* note 47, p.33 *et seq*.
[78] Yangüela, *supra* note 53, p. 19.
[79] Jansen and Millan, *supra* note 47, p. 123 *et seq*.
[80] *Ibid.*
[81] Yangüela, *supra* note 53, p. 22.
[82] *Ibid.*, p. 4.
[83] Solidarity, *supra* note 49, p. 21.

widespread and there are many racist and sexist stereotypes of the women in the bateyes.[84]

5.5. Permanent Illegality

There are at least 500,000 Haitians in the Dominican Republic, which represents five per cent of the whole population.[85] Only around half of them have identification documents.[86] According to the Dominican law on Migration of 1939,[87] all immigrants have the right to a residence permit. However, the law states expressly that temporary day-workers and their families are not considered as such.[88] Instead, the agricultural industries that need workers during the harvest may apply for permission to import such labour for a certain time.[89] Undocumented immigrants that enter the country 'by land', i.e. from Haiti, may be arrested without express authorization.[90]

Article 11 (a) of the Constitution defines Dominicans as the following: "All persons born in the territory of the Republic, with the exception of the legitimate children of foreigners resident in the country as diplomatic representatives or foreigners in transit through the country."

To avoid the consequences of this article, authorities regard the Haitian workers as being 'in transit', even though a period of transit is supposed to be no longer than ten days.[91] The government refuses to recognize and document as Dominican citizens individuals of Haitian ancestry born in the country. When babies are born, the authorities often refuse to issue birth certificates, especially if the parents do not have proper documentation. Without a birth certificate, the Haitian children will not receive an identity- and electoral card when they turn 18, which would give them the same rights as all other Dominicans.[92]

It is thus very difficult for the Haitians to receive legal status, even when they have lived 30 or 40 years in the country or have been born there. Without documentation, they are not allowed to vote, work, own land, get married or even open a bank account. Their children cannot go to school. Their medium income is much lower than that of persons with documents.[93] Officially, they do not exist. On top of that, they constantly face the risk of being deported, which restricts their

[84] Jansen and Millan, *supra* note 47, p. 116.
[85] *La República Dominicana, 1998, Visión del Sistema de las Naciones Unidas sobre la situación del País desde la perspectiva de los Derechos Humanos* (Santo Domingo, 1999), p. 40.
[86] Yangüela, *supra* note 53, p. 6.
[87] Ley Número 95.
[88] Article 2(4).
[89] Article 7.
[90] Article 108 (b).
[91] Law on migration, Article 5.
[92] Yangüela, *supra* note 53, p. 6.
[93] *Ibid.*, p. 23.

freedom of movement. During the 1990's, massive and violent expulsions of persons of Haitian origin took place. Between January 2000 and April 2001, 20,121 Haitians were deported against their will.[94] A case is pending before the Inter-American Court of Human Rights concerning deportations and expulsions of a number of Haitian men. The Court has found the case grave enough to take provisional measures. In various resolutions,[95] the Court has urged the Dominican Republic to protect the lives and the personal integrity of the men in question, and of the two witnesses that have appeared before the Court and later been victims of harassment.[96]

The unprotected status of the Haitians in combination with the anti-Haitianism in the country helps to keep salaries low and is beneficial for the industries that employ them.[97]

5.6. National and International Obligations

Article 8 of the Dominican Constitution contains several human rights, which apply to all persons on Dominican territory. The Article establishes the principle that the law is equal for all and includes the right to education (primary school is free and obligatory) and the protection of mothers. The State also takes upon it to provide food, clothes and housing to the poor, to the extent possible. The right to vote and to be elected are confined to citizens.[98]

Article 3 of the Dominican Constitution States that the Dominican Republic recognizes and applies all norms of international law that the country has adopted.[99]

The *American Convention on Human Rights*,[100] which was adopted by the Dominican Republic in 1993,[101] lays out the right to a nationality and to a name in Articles 18 and 20. The right to a nationality is also laid out in the UDHR[102] and in the ICCPR[103], adopted by the Dominican Republic in 1978.[104] The right to

[94] Solidarity, *see supra* note 49, p. 17.
[95] 18 August 2000, 12 November 2000 and 26 May 2001.
[96] Resolución de la Corte Inter-Americana de Derechos Humanos de 26 de mayo de 2001. Medidas Provisionales solicitadas por la Comision Inter-Americana de Derechos Humanos. Caso de Haitianos y Dominicanos de origen haitiano en la República Dominicana.
[97] La República Dominicana, *supra* note 85, p. 40.
[98] Article 13.
[99] "*La República Dominicana reconoce y aplica las normas del Derecho Internacional general y americano en la medida en que sus poderes públicos las hayan adoptado . . .*".
[100] American Convention on Human Rights, Nov 22 1969, 1144 UNTS 123.
[101] Organization of American States, American Convention on Human Rights, Signatories and Ratifications, available at <www.oas.org>, visited on 30 October 2001.
[102] Article 15, p. 1: "Everyone has the right to a nationality".
[103] Article 24, p. 2: "Every child shall be registered immediately after birth and shall have a name". Article 24, p. 3: "Every child has the right to achieve a nationality".
[104] Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal Human Rights Treaties as of 22 Oct 2001, available at <www.unhchr.ch/pdf/report.pdf>, visited on 31 October 2001.

recognition as a person before the law is laid out in Article 16 of the ICCPR. Article 13 of the same covenant lays out rights that are connected to expulsions.

Economic, social and cultural rights are ensured in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),[105] adopted by the Dominican Republic in 1978.[106]

The definition of racial discrimination in CERD, adopted by the Dominican Republic in 1983,[107] includes discrimination based on "race, colour, descent, or national or ethnic origin".[108] The States Parties undertake to pursue a policy of eliminating racial discrimination, promote "understanding among all races" and "to engage in no act or practice of racial discrimination".[109]

The rights referred to above in the American Convention, the UDHR, the ICCPR and the ICESC are all to be exercised without discrimination of any kind.[110]

When refusing to register the children of Haitian descent, the Dominican Republic violates the right of these children to acquire a name and a nationality. The right to be recognized as a person before the law is breached when the State Sugar Council does not acknowledge female workers as bearers of rights and obligations. When Haitian immigrants are being immediately deported, the rights to submit reasons against the expulsion and to have their case reviewed, ensured in Article 13 of ICCPR, are breached. The rights to an adequate standard of living, to the highest attainable standard of health, to special protection to mothers in connection with childbirth and to be free from hunger, are all violated. The denial of the Dominican Republic of the existence of racial prejudice in the country goes to show that it does not live up to their obligation to seek to eliminate racial discrimination.

6. WOMEN IN THE DOMINICAN REPUBLIC

6.1. Background

As in many Latin American States, male dominance is apparent in the Dominican Republic. The machismo is obvious; groups of men giving sexual comments to passing women are part of the street life. A condescending attitude towards women is the norm, respect the exception. The Dominican authorities do not respect the laws designed to protect women and discrimination of women is a serious problem.

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[105] UN GA res 2200 A (XXI), 3 Jan 1976.

[106] Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal Human Rights Treaties as of 22 Oct 2001, available at <www.unhchr.ch/pdf/report.pdf>, visited on 27 December, 2001.

[107] *See* <www.unhchr.ch>, visited on 30 October 2001.

[108] Article 1.

[109] Article 2.

[110] The American Convention, Article 1, UDHR, Article 2, ICCPR, Article 2, ICESCR, Article 2.2.

Women have lower salaries than men,[111] are much more often unemployed[112] and have difficulties reaching positions of power in all levels of society.[113] They work mainly in the sectors of the labour market that are most poorly paid, such as domestic services.[114] Representation of women at top political and economical levels is extremely low. Mass media and the educational system reinforce stereotypes of women and conserve a traditional role for women in society.[115] Adolescent pregnancies are widespread and there are many poor single mother households.[116] In recent years, sex tourism has emerged. Poor women turn to prostitution to support their families, and they are exposed to physical violence, rape, and trafficking. The Dominican Republic is the fourth biggest exporter of female prostitutes in the world.[117] There are more than 50,000 Dominican women working abroad as prostitutes.[118] Poor women often have to choose between working as a domestic servant or in the export zones (‘*zonas francas’*), both of which are paid very poorly, or become prostitutes.[119]

Domestic violence is a huge problem. Physical violence is the second greatest cause of death for Dominican women.[120] Within one year of the adoption of the law on domestic violence, a department for protection of women was created, which soon thereafter received 60–90 complaints a day.[121] Authorities, from the police to the judges, tend to discourage reports from abused women and neglect such cases. Women who report their husbands are sent back with the summons addressed to their abusers. There is no mechanism to guarantee the safety of the women who do receive a ban on visitors. No reliable statistics are available on domestic violence.[122]

In its concluding observations on the second, third and fourth periodic reports of the Dominican Republic, the Committee on the Elimination of Discrimination against Women expressed concern over women’s poverty, their susceptibility to sexual exploitation, the lack of creation of jobs for women in growth sectors, the persistence of machismo, women’s low participation in public life and decision-making, stereotypical portrayal of women’s role in society and the segregated labour

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[111] C. Báez, *Estadísticas para la Planificación Social con Perspectiva de Género* (Santo Domingo, 2000) p. 52.
[112] *Ibid.,* p. 49.
[113] *Acción para la igualdad, el desarrollo y la paz, Plataforma de Acción para el Avanze de la Mujer Dominicana, 1995–2000* (1995) p. 1.
[114] *Análisis de situación de la niñez y la mujer en la República Dominicana* (UNICEF, Santo Domingo, 1996) p. 13.
[115] Acción para la igualdad, *supra* note 113, p. 1.
[116] *Ibid.*
[117] The top three are Thailand, Brazil and the Philippines. *Trabajo, Salud y Sida, Centro de Orientación e investigación Integral* (COIN, Santo Domingo, 1998) p. 55.
[118] *Ibid.*
[119] *Ibid.*, p. 56.
[120] La República Dominicana, *supra* note 85, p. 21.
[121] La Ley 24–97 Una mirada crítica a su implementación, Quehaceres, Centro de Investigación para la Acción Femenina, Noviembre 2000.
[122] *Ibid.*

market. It also noted that no measures had been taken to support women's efforts to break the cycle of poverty and that no public awareness and information campaigns had been undertaken. Other areas of concern mentioned were the considerable discrimination in income and benefits, the high unemployment rate for women, the insecure situation of domestic workers and the high rates of single mothers and maternal mortality.[123]

6.2. Black Women

Black women in the Dominican Republic do not consider themselves as black, but as Indian or mulatto. Similarly, there is no official statistics that target this group, which is thus rendered invisible. In many countries, blacks are portrayed as being more sexual than others. This is also true in the Dominican Republic. For black women, this sexualized image may discriminate against them in two ways. It makes them more vulnerable to unwelcome sexual invitations or even rape, and it may make them less credible in the legal system.

6.3. National and International Obligations

The Dominican Constitution includes a non-discrimination provision in Article 100. "The Republic condemns all privilege and any situation that tends to break down the equality of all Dominicans, among whom no differences should matter other than those that result from talent or virtue."

Article 12 of the Constitution states that all Dominicans, of both sexes, that have reached the age of 18, are citizens.[124]

Sexual harassment of women workers is prohibited in Article 47 of the Labour Code. "It is prohibited for employers to take actions against the worker that may be considered sexual harassment, or support, or not intervene if such actions are taken by their representatives."

There is a specific law against domestic violence.[125] In the preamble, reference to CEDAW and the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*[126] is made and it is stated that domestic violence is a violation of human rights. The law, which is mainly a modification of the Penal Code, defines violence against women, increases the penalties for sexual violence, and introduces the possibility to issue bans on visitors.

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[123] Concluding observations of the Comittee on the Elimination of Discrimination against Women: Dominican Republic. 14/05/98. A/53/38, paras. 312–353.

[124] '*Son ciudadanos todos los dominicanos de uno y otro sexo que hayan cumplido 18 años de edad . . .*'.

[125] Ley Número 24–97.

[126] 33 ILM 1534 (1994).

By adopting CEDAW in 1980,[127] the Dominican Republic has agreed to "pursue by all appropriate means and without delay a policy of eliminating discrimination against women" and "to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination".[128] The Republic has also undertaken to "take all appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women".[129]

The Republic has also in 1996[130] adopted the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, which expressly includes violence in the private sphere.[131] According to the convention, women have the right to be free from violence in both the public and the private sphere,[132] and States agree to "pursue policies to prevent, punish and eradicate violence against women".[133]

Considering the low salaries that women receive, their high rate of unemployment, the high level of prostitution and the amount of violence against women, it is apparent that the Dominican Republic has failed to live up to their international obligations.

7. METHOD TO IDENTIFY MULTIPLE DISCRIMINATION

7.1. The Example of the Haitian Women in the Dominican Republic

The Haitian women in the Dominican Republic are obvious victims of multiple discrimination. The discrimination they face is at least four-fold; they are black, poor, Haitian and female. All these factors interact and disadvantage them in various ways. Some of their problems are shared by Dominicans of colour, others by poor Dominicans, by all Haitians in the country and by the Dominican women.

Deprived of the right to a Dominican nationality, they have no right to work or to put their children in school. They are confined to the informal sector, where they are badly paid and met with suspicion. They live in barracks or sheds and are often illiterate. When they are beaten or abused sexually, they get no protection from the society, as they often have no documents. Language barriers, sexualized images of black women, high legal costs and fear of State authorities (agents of which, indeed, may be the abusers) are all obstacles to escaping violence. Health centres are located far away from where they live, medicines are expensive and they face the risk of being badly treated by the medical personnel.

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[127] *See* <www.unhchr.ch>, visited on 30 October 2001.
[128] Article 2.
[129] Article 6.
[130] Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, UN Registration, available at <www.oas.org>, visited on 30 January 2002.
[131] Articles 1–2.
[132] Article 3.
[133] Article 7.

7.2. Comparisons

To identify situations of multiple discrimination such as the case of the Haitian women, an holistic approach is necessary. One way of gaining understanding of the inequalities may be to compare the situation of the group in question with other members of society. Using comparisons is the usual way of detecting cases of discrimination and we need only to continue such comparisons with several groups. In cases involving discrimination, a comparison must always be made between the alleged victim of discrimination and equal or at least analogous cases. To determine whether two cases are analogous, a comparability test must be made. Since different cases are bound to be equal in some respects and unequal in others, criteria that relate to the rights in question must be used. When two cases have been found analogous, the next step will be to consider if the different treatment is legitimate.

For example, when comparing the situation of the Haitians in the Dominican Republic with citizens of the Republic (as well as other immigrant groups) discrimination against Haitians is discovered. The fact that Haitian children are not granted citizenship is an apparent discrimination, in breach of the Dominican constitution as well as several international conventions on human rights.[134] Other material rights are similarly violated, such as the right to recognition as a person and the rights in connection with expulsions. Moreover, the Dominican Republic is breaching the non-discrimination provisions of the UDHR, the ICCPR and ICESCR, as the rights to, e.g., a nationality, education and health are exercised differently depending on the ethnicity of the person concerned. Both material rights and the right to non-discrimination are thus breached. When comparing the men with the women within the Haitian group, gender-specific violations appear. For example, Haitian men suffer a greater risk of being beaten up while working in the fields, while Haitian women risk being raped or sexually harassed. So far, our comparisons have revealed *ethnic* discrimination, and gender differences within the group.

If we take the process one step further, we can compare the situation of all women living in the Dominican Republic with that of the men. This shows us that the whole female community in fact shares some form of the discrimination suffered by Haitian women. They all have lower salaries, work to a greater extent in the informal sector and face a greater risk of being subject to violence. Apparently, the Dominican Republic does not take all appropriate measures to suppress exploitation of prostitution or to ensure equal rights in the field of employment. The right to be free from violence is very far from their reality. Women and men are not treated equally and thus the right to non-discrimination is breached. Part of the discrimination is thus related to *gender*, which partly can explain the gender differences within the Haitian community (such as the risk of sexual violence).

[134] The American Convention on Human Rights, Article 18 and 20, the Universal Declaration of Human Rights, Article 15, and the International Covenant on Civil and Political Rights, Article 24.

If we then compare the black population with the white population in the Republic, we find that all blacks face racial prejudice, which disadvantages them in all areas of their lives, such as education and career. The Dominican Republic denies the existence of racial prejudice and thus does not live up to its international obligations to eradicate such discrimination. Since blacks are treated differently from whites, the right to non-discrimination is not respected. Part of the problem Haitian women face it thus due to *racial* discrimination, or discrimination because of the colour of their skin.

Finally, we can compare all poor people on the island with middle-class people, and discover that they all suffer from bad housing and lack of medical and legal assistance. Their right to an adequate standard of living is not respected. We have found discrimination on grounds of *class* or socio-economic position.

We could continue such comparisons to discover other discrimination grounds. For example, we could compare different religious groups, such as Catholics and voodoo-believers and probably find discrimination on grounds of religion. Heterosexuals could be compared with homosexuals, disabled with healthy and so forth. Only when all grounds of discrimination are realized do we get a whole picture of the situation of the person who we want to help and only then can the help be appropriate. As more and more grounds of discrimination are being considered, a more and more comprehensive picture of the society and its differences will emerge.

A different sort of comparability test has been proposed by Sia Åkermark in connection with the case of *Abdulaziz, Cabales and Balkandali* v. *the UK*,[135] dealt with by the ECtHR in 1985. Abdulaziz, Cabales and Balkandali were all women with permanent residence permits in the United Kingdom and they were all denied to have their spouses join them. If they had been men, it would have been easier for their family members to get a residence permit. The Court chose to compare the women concerned with men in a similar position (non-citizens with permanent residence permit), and concluded a violation on the grounds of sex. This is, perhaps, the most obvious ground for discrimination in the case. As Sia Åkermark points out, there are, however, other possible comparable categories.[136] If the women in the case were to be compared with women who were citizens of the country in question, discrimination on grounds of birth might appear. Sia Åkermark further suggests a comparison between the women concerned with men who are citizens, to take into account both criteria (sex and birth). She draws the conclusion that an alleged victim of discrimination must be compared with the most privileged group in a comparable situation. The problem with that comparability test is that it will not tell us the specific grounds of discrimination. We will quickly be able to assess discrimination, but we will not know if it was citizenship or gender or both that was the reason for the different treatment.

[135] Judgement of the ECtHR of 28 May 1985, A94.
[136] Åkermark, *supra* note 4, p. 101 *et seq*.

7.3. Haitian Women and International Human Rights Law

How can international human rights law help the Haitian women in the Dominican Republic? To get their children registered as Dominicans, they can turn to the HRC. The Committee on the Elimination of Discrimination against Women can criticize the lack of measures taken to combat discrimination against all women in the country. The problem of finding adequate jobs due to the colour of their skin may be dealt with by the CERD.

None of these bodies will, however, take all the discrimination factors into account. None of them will go through the different comparisons described above. The whole life situation of these women and the multiple burdens of discrimination they are subject to will not be considered by any international organ. All their identities will not be assessed. In fact, whichever international organ that deals with the case, it is bound to render some parts of the problem invisible. The structure of the system of international human rights law makes it impossible for the organs to take all discrimination factors into account. The Haitian women are too deep down in Crenshaw's basement to get help with getting through the hatch. The international system of human rights law is simply inadequate when facing such, not unusual, fates.

8. CONCLUSION

The phenomenon of multiple discrimination is not new. Millions of people around the world have lived their lives suffering from multiple burdens. Now, the international community is beginning to recognize the problem and will have to find a way to deal with it. To recognize multiple discrimination is to recognize the complexity of the world. Only when all aspects of a person's existence are considered will we be able to help even those who face several disadvantages in their daily lives. To focus on only one aspect of a person's identity, such as gender, will obscure other kinds of discrimination, e.g. on the grounds of race. To deal only with one ground of discrimination will benefit those who suffer only from one aspect of discrimination, such as white women.

Several UN bodies have recently addressed the problem of multiple discrimination. In documents such as the *Beijing Platform for Action* and the report of the Expert Group Meeting the fact that women often face various barriers to equality and that the UN system may be inadequate to deal with such cases have been underlined. Bodies like the CERD and the Commission on the Status of Women have asserted the need for a method to monitor multiple discrimination. Most recently, in Durban, the life at the crossroads of gender and racial discrimination was specifically addressed.

The UN system has concentrated on one issue of discrimination at a time, which has led to the fact that cases of multiple discrimination have not been detected. In this article, I have shown how three international judicial and quasi-judicial bodies have failed to deal with the question of multiple discrimination appropriately. In the

case of Sandra Lovelace, the HRC only considered the discrimination against the Indian minority and failed to address the gender issue. The ECtHR treats discrimination issues in an unfortunate, step motherly way, as it will not consider them if one of the Convention rights has been violated. The CERD only considered the racial discrimination against Mrs Yilmaz Dogan and overlooked the gender issue.

The Haitian women in the Dominican Republic are a good example of a group suffering from multiple burdens. Their living conditions, their undocumented status, the prejudice against them and the situation of women in the country all contribute to their vulnerable existence. Their path to a better life is constantly being blocked, the obstacles being their colour, their sex, their origin and/or their poverty. Using the intersection metaphor, they are constantly being hit by the traffic, which, coming from four different directions, endangers their lives. Indeed, many of the problems for vulnerable groups of women that are specifically mentioned in the document from the World Conference Against Racism in Durban, such as illiteracy, problems in the labour market, and poverty, are directly applicable to the situation of the Haitian women in the Dominican Republic.

As a way to identify and deal with cases such as the one of the Haitian women, I have proposed a procedure of comparisons. Indeed, detecting cases of discrimination always includes a comparison between a disadvantaged group and an advantaged one (e.g. women with men). To discover multiple discrimination, one needs only continue such comparisons with other advantaged groups in the society. This more holistic approach will reveal that several discrimination grounds in fact often interact and exist at the same time. Only when all such grounds are assessed will we be able to remedy the situation for those who are the most disadvantaged in society.

Today's system of international human rights law is not adequate when it comes to dealing with cases of multiple discrimination, such as the case of the Haitian women in the Dominican Republic. The system is simply not built for dealing with such multi-faceted cases. The one-eyed approach of the system and the way it has grown one step at a time has led us to a situation where our instruments are too blunt to deal with the complex reality.

WHERE ARE THE WOMEN? - A GENDER APPROACH TO REFUGEE LAW[1]

Annette Lyth

CONTENTS

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[1] This thesis was defended on 5 February 2002 in Lund. The author wishes to express her sincere gratitude to the supervisor of this master thesis, Dr. Gregor Noll, whose challenging and critical comments were invaluable. The author also wishes to thank the opponent, Kajsa Öbrink. The author is currently working as Deputy Head of the Human Rights Section in the OSCE Office of Democratic Institutions and Human Rights in Warsaw, Poland. Before entering this Masters Program she worked in the Swedish Section of Amnesty International, in the HCHR field operation in Rwanda and in the OSCE Mission to Kosovo.

INTRODUCTION

> "The Magna Charta of international refugee law…did not deliberately omit persecution on gender…it was not even considered."[2]

In 1989, Cynthia Enloe asked the subversive question: "[w]here are the women?" in her groundbreaking work on gender and international relations.[3] Her work forms part of an attempt at a reconstruction by feminist scholars who seek to make visible both 'women' and different kinds of masculinity and femininity necessary "to make the world go round".[4] The question has become known as 'the woman question' and has continued to be asked in many other areas where women have been invisible for too long.[5]

This paper applies the same feminist methodology as it consciously seeks to place women and their experiences into the framework of human rights law and refugee law. Refugee law is particularly interesting to examine from a gender perspective, as women constitute a majority of the refugees in the world.[6] However, as most refugees are fleeing hunger and poverty, they are disqualified from the definition in the 1951 *Refugee Convention*, which limits the notion to specific cases of persecution.[7] Some would argue that the historical focus on civil and political rights, of which the above is an example, in international law is a consequence of the gender bias that flows through the historical development of human rights.[8]

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[2] J. Kumin, commenting on the fact that gender is not enumerated among the grounds of persecution in the 1951 Refugee Convention, UNHCR's webpage < www.unhcr.org> visited on 23 November 2000.

[3] C. Enloe, *Bananas, Beaches and Bases* (University of California Press, Berkeley and Los Angeles, California, 1989), p. 7.

[4] J. J. Pettman, *Worlding Women, Towards a Feminist International Politics* (Routledge, Australia, 1996), p. ix.

[5] That it is still a highly relevant question can be illustrated with the following quote. In 2001, a female Swedish journalist wrote a book describing her experiences during the wars in the Balkans. Commenting on the book, a high ranking (male) Swedish military official writes *". . . It feels a bit strange for an officer, that it is a woman that describes this world, the most male of worlds, the every-day-life of war, so thoroughly and with such insight"* (author's translation). Apparently, this man has over-looked the fact that women are very much involved in the every-day-life of war, in particular as part of the civilian population.

[6] UNHCR Executive Committee Conclusion No. 39 (XXXVI) on Refugee Women and International Protection. UN Doc. HRC/IP/2/Rev. 1986 (8 July 1985).

[7] Convention relating to the Status of Refugees, 1951:189 UNTS 137.

[8] *E.g.,* C. Bunch, 'Transforming Human Rights from a Feminist perspective', in J. Peters and A. Wolper (eds.), *Women's Rights, Human Rights* (Routledge, Great Britain, 1995) p. 14.

There are circumstances which give rise to women's fear of persecution, that are unique to women. However, the existing bank of jurisprudence on the meaning of persecution is based on, for the most part, the experiences of male claimants. Aside from a few cases of rape, the definition of persecution has not widely been applied to such female-specific experiences, as bride-burning, forced marriages, domestic violence, forced abortion, or compulsory sterilisation.[9]

As Maja Kirilova Eriksson has pointed out, the division of international law in human rights, humanitarian law and refugee law can be classified as a result of traditional fragmentary thinking. By this fragmentation, certain 'grey' zones have appeared in the international legal framework to the disadvantage of women.[10] A feminist methodology must, therefore, strive for a more holistic approach, which this paper aspires to do by using ideas and concepts from a number of different disciplines, ranging from international relations and international law to philosophy and psychology.

The paper is divided into three parts,

- The first part describes the feminist methodology and to some degree also different forms of feminism. It describes certain terms and areas that have been and continue to be vital to the feminist legal discourse. This approach aims to give a fuller picture and understanding to the mechanisms behind the issues that are being treated in the other two parts.

- The second part looks closer at international refugee law, making use of the feminist methodology as described in the first part. In particular, it examines the fact that gender is absent from the enumerated grounds of persecution in the 1951 *Refugee Convention* and the consequences of this omission.

- Finally, the third part studies refugee law and practice at the domestic level, where the example of Sweden serves as a case study. In 1997, a new article was introduced in the Swedish *Aliens Act*, which aimed to *inter alia* encompass cases of gender-based persecution as a basis for granting asylum. The third part applies the methodology and the theories elaborated in the preceding parts to the Swedish legislation and its practical application.

[9] A. Macklin, 'Refugee Women and the Imperative of Categories', 17 *Human Rights Quarterly* (1995), p. 225.
[10] M. Kirilova Eriksson, 'Att gå på två ben eller ett, betraktelsesätt på mänskliga rättigheter', *Feminstiskt perspektiv* 1/00, p. 9.

1. METHODOLOGY AND NOTIONS

1.1. Feminist Jurisprudence

The appearance of autonomy in law is maintained by a methodological framework called 'legal reasoning', which purports to derive objective rules and principles. However, as this 'objectivity' is based on a presumption in which the male role has been taken as a norm for society as a whole, there is a gender bias embedded in the policies and structures that stem from traditional legal thinking. For this reason, feminist critiques of law have centred on how legal discourse through its expertise and organisation has served to silence voices of experience of women.[11] Feminist jurisprudence has focused on the ways law legitimises, maintains, and serves the distribution of power in society. Catherine MacKinnon has defined it as "an examination of the relationship between law and society from the point of view of all women".[12] Some feminists have adopted the metaphor 'gender lenses' to describe an approach to feminist analysis which brings into view the different dimensions of power and gender inequality.[13] In that regard it has links to 'critical legal studies'.[14]

Feminist jurisprudence thus consists of two discrete projects;

- The first is to unmask and critique the patriarchy behind purportedly ungendered law.

- The second step consists of what can be called 'reconstructive jurisprudence'.

For strategic reasons, many feministic law reforms during the last twenty years, have been achieved by categorising women's injuries as analogous to, if not identical with, injuries men suffer. This can, however, be seen as a misconceptualisation as it maintains the original presumptions and does not challenge the basis for these presumptions. Instead, reconstructive feminist jurisprudence should set itself the task of reconceptualising new rights in such a way as to reveal, rather than conceal their origin in women's distinctive existential and material state of being.[15] With regards to refugee law, this may translate into the discussion concerning the scope of the five grounds for persecution in the 1951 *Refugee Convention*. The fundamental

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[11] C. Romany, 'State Responsibility goes Private', in R. J. Cook (ed.), *Human Rights of Women, National and International Perspectives* (University of Pennsylvania Press, 1994), p. 88.

[12] Quoted in H. R. Wishik, 'To Question Everything: The Inquiries of Feminist Jurisprudence', in D. Kelly Weisberg (ed.), *Feminist Legal Theory, Foundations* (Temple University Press, Philadelphia, 1993), p. 22.

[13] J. Steans, *Gender and International Relations* (Polity Press, 1998) p. 4.

[14] Wishik, *supra* note 12, p. 22.

[15] R. West, 'Jurisprudence and Gender', in D. Kelly Weisberg (ed.), *Feminist Legal Theory, Foundations* (Temple University Press, Philadelphia, 1993), p. 88.

question here is whether women's experiences can be interpreted so that they may be included into the already existing grounds or whether it is necessary to add a sixth ground (gender), in order to encompass all forms of gender-based persecution.

Heather Ruth Wishik has expressed the purpose of feminist jurisprudence as:

> "We risk promoting women's oppression if we attempt only to change the law and its impacts on women's lives and neglect to ask the questions suggested by feminist jurisprudence. Without such inquiries, reforms which may appear positive due to their short-term availability to ameliorate women's oppression may strengthen patriarchy in the long run. Feminist jurisprudence can help enable women to see such dual effects and to make conscious decisions about whether or which way to proceed."[16]

This insight has gained ground also beyond the feminist circles as the Council of Europe has stated that:

> "There is a growing awareness that gender has to be considered also at a political and institutional level . . . Gender is not only a socially constructed definition of women and men, it is a socially constructed definition of the relationship between the sexes. This construction contains an unequal power relationship with male domination and female subordination in most spheres of life. Men and their tasks, roles, functions and values contributed to them are valued – in many aspects – higher than women and what is associated with them. It is increasingly recognised that society is characterised by this male bias. Policies and structures often unintentionally reproduce gender inequality."[17]

In order to avoid continuing existing bias it is necessary to question the reality behind the presumptions. For the purpose of a feminist inquiry into the relationship between law and society, the following questions may be asked:

What have been and what are now all women's experiences of the 'life situation' addressed by the doctrine, process, or area of law under examination?[18]

- What assumptions, descriptions, assertions and/or definitions of experience – male, female, or ostensibly gender neutral – does the law make in this area?

- What is the area of mismatch, distortion, or denial created by the differences between women's life experiences and the law's assumptions or imposed structures?

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[16] Wishik, *supra* note 12, p. 25.
[17] The Council of Europe, *Gender Mainstreaming, Conceptual Framework; Methodology and Presentation of Good Practices* (Strasbourg, 1988).
[18] For more on the feminist debate on the concept of 'woman', *see below*, Chapter 1.4.

- What patriarchal interests are served by the mismatch?

- What reforms have been proposed in this area of law or women's life situation? How will these reform proposals, if adopted, affect women both practically and ideologically?

- In an ideal world, what would a woman's life situation look like, and what relationship, if any, would the law have to this future life situation?

- How do we get there from here?[19]

As the Council of Europe so rightly has pointed out, so called 'gender neutral' texts often reproduce inequalities as it is the male that is taken as the format. In order to correct this inherited, discriminatory practice, it is rather unequal than equal treatment that is required.[20] It is, therefore, needed to apply a feminist methodology when looking at gender aspects of legislation and implementation. "We will not have genuinely ungendered jurisprudence . . . until we have a legal doctrine that takes women's lives as serious as it has taken men's".[21]

1.2. The Public/Private Dichotomy

Central to the gendered critique of international law, including refugee law, has been an analysis of the public/private dichotomy.[22] In domestic law the division can be seen between the public world of work and commerce, and the private world of home and family. These two spheres are based on different principles of association. Participation in the (male) public sphere is governed by universal and impersonal criteria such as rights, equality and property. Participation in the (female) private sphere is determined by ties of blood and affection, and by the status of inequality and vulnerability of women in the family.

The division between the public and private spheres clouds the fact that the domestic arena is itself created by the political realm where the State reserves the right to intervention.[23] When women are denied their human rights in private, their human rights in the public sphere also suffer, since what occurs in 'private' shapes their ability to participate fully in the public arena.[24] Thus, the real questions are: Who defines legitimate human rights issues and who decides where the State should enter and for what purpose?

As a consequence of the public/private dichotomy, intimate violence remains on the margin: it is considered different, less severe and less deserving of international

[19] Wishik, *supra* note 12, pp. 26–29.
[20] The Council of Europe, *supra* note 17.
[21] West, *supra* note 15, p. 88.
[22] H. Crawley, *Refugee and Gender, Law and Process* (Jordan 2000) p. 17.
[23] Romany, *supra* note 11, p. 94.
[24] Bunch, *supra* note 8, p. 14.

condemnation and sanction than officially inflicted violence. But when stripped of privatisation, sexism and sentimentalism, gender-based violence is no less grave than other forms of inhumane and subordinating official violence, which have been prohibited by treaty and customary law and recognised by the international community as *jus cogens*, or peremptory norms that bind universally and can never be violated.[25]

Feminist scholars have stressed that the very jurisdiction of international law is divided along these same public/private lines.[26] As international law has evolved as a set of rules intended to regulate relations among States and as it remains centred on the State, women's experiences tend to get lost from the agenda. For instance,

- Many abuses against women have not been acknowledged as human rights violations because they are committed by private persons rather than by agents of the State.

- Civil and political rights hold a privileged position in human rights law despite formal recognition by the international community of their interdependence and indivisibility with economic, social and cultural rights.

- International norms concerning the life of the family call on States to protect the institution of the family and enshrine the right of privacy in the family.[27]

Refugee law suffers from the same defect. Whilst the refugee definition does not intrinsically exclude women's experiences, in practice the public/private distinction is used in such a way that what women do and what is done to them is often seen as irrelevant to refugee law. In order to include women's experiences into refugee law, it is necessary to move from conventional notions of the exercise of power as something that has to be within a formal institutional framework.[28]

1.3. Legal Equality

Much debate in the feminist discourse has focused on the concept of legal equality, and there are a number of different responses to this issue. One response has been to attempt to equate legal treatment of sex with that of race and deny that there are in

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[25] R. Copelon, 'Intimate Terror: Understanding Domestic Violence as Torture' in Rebecca J. Cook (ed.), *Human Rights of Women, National and International Perspectives* (University of Pennsylvania Press, 1994) p. 117.
[26] K. Knop, 'Re/Statements: Feminism and State Sovereignty in International Law' (1993), *Transnational Law and Contemporary Problems*, p. 330.
[27] D. Sullivan, 'The Public/Private Distinction in International Human Rights Law' in J. Peters and A. Wolper (eds.), *Women's Rights, Human Rights* (Routledge, Great Britain 1995), pp. 126–127.
[28] Crawley, *supra* note 22, p. 24.

fact any significant natural differences between women and men. Christine A. Littleton calls this response the 's*ymmetrical*' approach. A competing '*asymmetrical*' approach rejects this analogy and instead holds that women and men are, or may be, different and that women and men are often asymmetrically located in society.

There are two models of the symmetrical vision:

- '*Assimilation*' is based on the notion that women, given the chance, really are or could be just as men.

- *'Androgyny*' also posits that women and men are, or at least could be, very much like each other, but argues that equality requires institutions to pick some golden mean between the two and treat both sexes as androgynous persons would be treated.

Asymmetrical approaches, on the other hand, take the position that differences should not be ignored or eradicated. Asymmetrical approaches include 's*pecial rights*', '*accommodation*', and '*acceptance*':

- The 's*pecial rights model*' affirms that men and women are different, and asserts that cultural differences, such as childrearing roles, are rooted in biological ones, such as reproduction. Therefore, it states that society must take account of these differences and ensure that women are not punished for them.

- The *'accommodation model*', even though it agrees that treating biological differences is necessary, argues that cultural and hard-to-classify differences should be treated under all-equal-treatment or the androgynous model.

- A third asymmetrical model would be '*acceptance*'. It asserts that eliminating the unequal consequences of sex differences is more important than debating whether such differences are 'real', and even more important than trying to eliminate these differences altogether. It is thus the consequences of gendered difference, and not its source that equal acceptance addresses. The focus of equality as acceptance is not on the question of whether women are different, but rather on the question of how the social fact of gender asymmetry can be dealt with so as to create some symmetry in the actual experiences of all members of the community.[29]

[29] Based on C. A. Littleton, 'Reconstructing Sexual Equality' in D. K. Weisberg (ed.), *Feminist Legal Theory, Foundations* (Temple University Press, Philadelphia, 1993), pp. 248–263.

However, at this stage it must be held that concepts of equality and non-discrimination can only partially explain gender subordination and may even risk to trap women's rights within legal confines that do not adequately capture the nature of such subordination.[30]

1.4. The Concepts of Women and Gender

The definition of women as well as the question of whether it is possible to generalise the experience of women into one common, is crucial for the argument in this paper. The notion of a 'woman', as she is presently constructed by male society, differs according to different schools of feminist theory. Liberal feminism sees 'women' defined primarily as someone confined to the private sphere; Radical feminism sees her as a man's sexual object; Cultural feminism sees her as caring and connected to others; Post-modern feminism sees her so overly determined that she is an absence, not a presence.[31]

The definition of 'woman' is, as stated above, crucial, but self-definition for women has not been explored enough yet. It is important that feminists are more explicit about their understanding of what 'woman is' and what 'woman should be'. Patricia Cain suggests that in order to achieve this, consciousness can serve as a cornerstone in the feminist method. Consciousness is about giving a voice to the unknown in women's experiences and it brings new understanding by making known the unknown. Feminist legal theories, which support the telling of the individual truths, should therefore be built, as well as theories that protect the space that is shared with others as women construct their identity.[32]

There has been an evolving recognition by most feminist scholars that women's lives can only be fully understood when studied in terms of prevailing gender relations.[33] Gender is a socially constructed definition of women and men. It is the social design of a biological sex, determined by a conception of tasks, functions and roles attributed to women and men in society and in public and private life. As it is a culturally specific definition of femininity and masculinity, it varies in time and space. The construction and reproduction of gender takes place at the individual level as well as at the societal level. Individual human beings shape gender roles and norms through their activities and reproduce them by conforming to expectations.[34] The understanding of gender as both an aspect of personal identity and an integral part of social institutions and practices, avoids the pitfalls of *voluntarism*, that is, the idea that people exercise free choice over their actions, and various forms of

[30] Romany, *supra* note 11, p 99.
[31] P. A. Cain, 'Feminism and the Limits of Equality' in *Feminist Legal Theory, Foundations*, D. Kelly Weisberg (ed.), (Temple University Press, Philadelphia, 1993), p. 244.
[32] *Ibid.*
[33] Steans, *supra* note 13, p. 4.
[34] The Council of Europe, *supra* note 17.

determinism, which suggest that human behaviour is wholly conditioned by constraints.[35]

However, it is necessary to clarify that on one hand, gender was developed and is still often used as a term contrasting to sex, in order to depict what is socially constructed as opposed to what is biologically given. Following this distinction, gender is typically thought to refer to personality traits and behaviour while sex refers to the physical body, hence gender and sex are understood as antonymous. On the other hand, gender has increasingly been used to refer to any social construction relating to the female/male distinction, including those constructions that separate 'female' bodies from 'male' bodies. This latter usage has emerged when many came to realise that society not only shapes personality and behaviour, it also shapes the ways in which bodies appear. Hence, if the body itself is always seen through social interpretation, then sex is not something that is separate from gender but is, rather, subsumable under it.[36] Consequently sex-based and gender-based persecution should be seen as integral parts of the same phenomenon, and when gender is used throughout this paper, it is with this latter understanding.

1.5. Universal Human Rights for Whom?

Human rights law excludes women's experiences in many ways by an inherent male bias. When the *Universal Declaration of Human Rights* (UDHR) was prepared, the original draft referred to "all men are brothers". It was thanks to the lobbying of women's organisations and the president of the working group, Eleanor Roosevelt, that the text was changed to "all humans are born equal" and sex was included in the non-discrimination clause.[37] When the *Refugee Convention* was drafted in 1951 no women participated and this may be part of the reason why gender-based persecution was overlooked. The consequences of this will be described in the next chapter in this paper.

The UDHR has, despite the efforts of Mrs Roosevelt, received criticism for being too male oriented. As the first who advanced the cause of human rights were Western-educated, propertied men, who mostly feared the violation of their civil and political rights in the public sphere, this area has been privileged in human rights work. They did not, however, fear violations in the private sphere of the home as they were the masters of that territory, and this area was consequently ignored for a long time from the human rights discourse.[38] The public/private dichotomy did not, however, prevent them from readily pressuring States to prevent other forms of abuse that occur in the private sphere at the hands of private actors, such as slavery and racial discrimination. [39]

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[35] Steans, *supra* note 13, p. 13.
[36] L. Nicholson, 'Interpreting Gender', 20:1 *Signs: Journal of Women in Culture and Society* (1994) p. 79.
[37] Kirilova Eriksson, *supra* note 10, p. 9.
[38] Bunch, *supra* note 8, p. 13.
[39] Macklin, *supra* note 9, p. 258.

Whereas there is almost a complete consensus that the prohibition of discrimination on the basis of race has become *jus cogens*,[40] very few authors have argued that the same should be valid for discrimination on the grounds of sex or gender, even though it affects half of the population in the world.[41] Those norms that are considered *jus cogens* get universal acclaim by virtue of their protection of interests which are not limited to a particular State or groups of States, but which belong to the community as a whole. If human rights are truly universal, it is difficult to see how, when it involves white supremacy, it constitutes a violation of *jus cogens*, whereas male supremacy is considered to be an internal affair of any individual State.[42]

Two different doctrines have evolved to include domestic violence, probably the most common and widespread drastic human right violation women suffer, in the human rights discourse:

- Through the theory of accountability the State can be held responsible under international human rights law for its action as well as its inaction. This theory finds its bases in the non-discrimination clauses in the International Convention on Civil and Political Rights. It provides justification for the demand that the State's efforts to combat domestic violence should at least be on par with its efforts to fight comparable forms of violent crime.

- An alternative theory claims that unlike other common crimes, domestic violence is inherently an issue under international human rights law because it systematically subordinates women. The aim is to maintain male supremacy and to deprive women of a range of political, social and economic benefits. Because of this systematic subordination domestic violence is seen as constituting a violation of international human rights law in and of itself.[43]

2. REFUGEE LAW

International refugee law occupies a legal space that is characterised by, on the one hand, the principle of State sovereignty and, on the other hand, competing humanitarian principles deriving from general international law and from different treaties.[44] Historically, refugee law has been linked less firmly to human rights than

[40] I. Brownlie, *Principles of International Law* (Oxford University Press, 1998) p. 515.
[41] K. Eriksson, *supra* note 10, p. 9.
[42] Romany, *supra* note 11, p. 89.
[43] K. Roth, 'Domestic Violence as International Human Rights Issue', in R. J. Cook (ed.), *Human Rights of Women, National and International Perspectives* (University of Pennsylvania Press, 1994), p. 332.
[44] G. S. Goodwin-Gill, *The Refugee in International Law*, (Oxford University Press Inc, New York, 1996), p. v.

to general principles of public international law, which has enabled States to pursue their own interest in a global context.[45] However, over the years there has been a development of rapprochement to human rights law. One obstacle to linking refugee law and human rights, are the different terminology in the two fields, e.g. discrimination and human rights violations do not necessarily amount to persecution, the notion of State responsibility may have different implications in the two fields, etc, and it is thus necessary that the meaning and scope of different notions are diligently defined and explored.

The central document in refugee law is the 1951 *Convention relating to the Status of Refugees*, hereafter referred to as the *Refugee Convention*.[46] It defines who is a refugee and provides for certain standards of treatment to be accorded to refugees. However, it says nothing about procedures for determining refugee status and leaves to the States the choice of means as to implementation on the national level. Signatory States, although bound by the refugee definition in the Convention, are free to enact their own laws and regulations concerning the determination of refugee status.[47]

The United Nations High Commissioner for Refugees (UNHCR) is considered the highest authority to interpret the Convention. For this reason the UNHCR Handbook is quoted several times below. The refugee definition in the UNHCR statute and in the Convention contains very similar definitions of the term 'refugee'. It is for the UNHCR to determine status under its Statute and any relevant General Assembly resolutions, and for States Parties to the Convention and the Protocol to determine status under those instruments.[48]

In the *Refugee Convention* a refugee is defined as someone who:

> "owing to a *well founded fear* of being *persecuted* for reasons for *race, religion, nationality, membership of a particular social group or political opinion*, is outside of his country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the *protection* of his country . . ."[49] (emphasis added)

As can be seen above the refugee in the *Refugee Convention* has been defined in a gender-neutral way. However, just as the construction of the civil and political character of human rights was criticised for stemming from a patriarchal construction of the public and private spheres in the first part of this paper, the same could be said for the refugee definition.[50] When the drafters of the *Refugee*

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[45] R. Marx, 'Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims', 3 *International Journal of Refugee Law*, p. 394.
[46] The Refugee Convention, *supra* note 7.
[47] P. Goldberg, 'Where in the World is There Safety for Me?: Women fleeing Gender-Based Persecution', in J. Peters and A. Wolper (eds.), *Women's Rights, Human Rights* (Routledge, Great Britain 1995), p. 346.
[48] Goodwin-Gill, *supra* note 44, p. 7.
[49] The Refugee Convention, *supra* note 7, Article 1 A.2.
[50] Romany, *supra* note 11, p. 106.

Convention congregated in Geneva not a single woman was to be found amongst the plenipotentiaries. What was in the mind of the drafters was the archetypal image of a political refugee, someone who is fleeing persecution resulting from his direct involvement in political activity. This definition does not often correspond with the reality of women's experiences. "The law has developed within a male paradigm which reflects the factual circumstances of male applicants, but which does not respond to the particular protection needs of women."[51] Until recently, the way these gender neutral instruments were interpreted, both at an international and national level, reflected and reinforced gender biases.[52] The discussion concerning gender-based persecution signifies a first move away from this biased thinking.

2.1. Persecution

The concepts of 'persecution' and 'well-founded fear of persecution' have not been expressly defined in any of the UN human rights or refugee conventions. Instead the UNHCR's Handbook can give some guidance:

> "it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution."[53]

The traditional view of what constitutes persecution reflects a male consideration of 'normal' or acceptable conduct. However, over the past 15 years, there has been an increased recognition of the need to interpret the notion of persecution in a manner, which is sensitive to issues of gender. One of the first efforts to recognise the legitimacy of gender-based persecution claims occurred in 1984 when the European Community admitted that such claims might be recognised under the category of membership in a particular social group.[54] In 1985, the European Parliament called on States to grant refugee status "to women who suffer cruel and inhuman treatment because they have violated the moral or ethical rules of their society".[55] During that same year, the Executive Committee of UNHCR issued a recommendation, in which it acknowledges that States may recognize claims of gender-based persecution under the 'particular social group' category.[56] In 1991, the UNHCR adopted *Guidelines on the Protection of Refugee Women*.[57] These guidelines confirmed the need to address

[51] N. Kelly, quoted in *ibid.*
[52] *Ibid.*
[53] UNHCR, *Handbook on Procedures and Criteria for determining Refugee Status* (Geneva, 1979), para. 51.
[54] Goldberg, *supra* note 47, p. 347.
[55] UNHCR, 'Box 5.2 Gender-related persecution', in *The State of the World's Refugees, A Humanitarian Agenda* (Geneva, 1997).
[56] UNHCR Executive Committee Conclusion No. 39, *supra* note 6.
[57] UNHCR, *Information Note on UNHCR's Guidelines on the Protection of Refugee Women*, 42nd Sess., UN Doc. ES/SCP/67 (1991).

gender-based persecution and the need for States to recognise claims for asylum and refugee status for women fleeing persecution on account of gender. At a later stage, the Executive Committee of UNHCR issued a *Conclusion on Violence Against Women* that calls for the "development by States of appropriate guidelines on women asylum seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men".[58]

The definition of persecution in refugee law can be seen to contain two elements. The first is whether the harm apprehended by the claimant amounts to persecution. The second is whether the State can be held accountable, in some measure, for the infliction of the harm. Thus, when a female applicant wants to demonstrate that, as a woman, she has a well-founded fear, she can firstly use evidence of her own past persecution. Secondly, she can point to other 'similarly situated' women who have been subject to persecution. E.g. an Iranian woman who is subject to a law requiring her to wear a veil in public. If the law is persecutory, a woman will certainly be unable to show that she has been uniquely singled out by that law (it applies to all women), yet she can still argue that she has a well-founded fear of being persecuted by the application of the law to her.[59]

Gender-based violence constitutes a type of harm that is either particular to the person's sex or gender, such as female genital mutilation, forced prostitution, rape and other sexual abuses that affect women disproportionately.[60] Gender-based persecution can take many forms. It can range from the forced marriage of an underage Zimbabwean woman to a man many years her senior, to a woman in China who fears being forced to undergo an abortion and perhaps even sterilisation because she already has one child, to an Iranian woman who flees her country because she cannot follow the restrictive religious and social practices mandated by law and fears severe punishment should she return.[61]

Gender-based persecution includes:

- When a woman is persecuted *because* of her gender, it addresses the causal relation between gender and persecution, her gender is the reason for why she is persecuted.

- When a woman is being persecuted *as* a women, it is the *form* of persecution that is sex/gender-specific. Understanding the ways a woman is persecuted *as* a woman is critical to categorizing things that are done to women and not to men as persecution.

[58] UNHCR Executive Committee, 44th Sess. *Refugee Protection and Sexual Violence*, Conclusion 2, A/AC.96/XLIV/CRP.3 (1993).
[59] Macklin, *supra* note 9, p. 238.
[60] United Nations *Declaration on the Elimination of Violence Against Women*, A/C.3/48/1.5, 23 February 1994.
[61] Macklin, *supra* note 9, p. 348.

- When gender can be considered to be a *risk factor* that makes a woman's fear of persecution more well-founded than that of a man in similar instances.

Though one or more of these links between gender and persecution may be present simultaneously in a given case, they are not synonymous. For example, a woman may be

- persecuted *as* a woman (e.g. raped) for reasons unrelated to gender (e.g. membership in an opposition political party);

- not persecuted *as* a woman but still *because* of gender (e.g. flogged for refusing wearing a veil);

- and persecuted *as* and *because* one is a woman (e.g. genital mutilation).

All three of these cases present examples of gender-based persecution. But it does not necessarily mean that they should all be classified as persecution on grounds of gender, regardless whether gender is propounded as a separate group of persecution or as a particular social group.

The scheme above may help clarify that not all persecution of women should framed as 'persecution *because* of gender', as that would only reinforce women's marginalisation. It would imply that only men have political opinions, only men are activated by religion, only men have racial presence. In that way it would create and sustain the stereotype that men 'own' the categories of oppression that are not explicitly 'gendrified'. But in the cases where gender is the discrete basis of persecution, it is critical that it is named as such, since it otherwise would mask the specificity of women's oppression.[62]

2.1.1. Persecuting Laws and Customs

Gender-based discrimination is practised universally and is enforced through law, social custom, and individual practice. In 1990, the UNHCR Executive Committee affirmed the linkage between a violation of the rights guaranteed under the *Convention on Elimination of Discrimination Against Women* (CEDAW)[63] and persecution for purposes of the *Refugee Convention*, stating that severe discrimination prohibited by CEDAW can form the basis for the granting of refugee status.[64]

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[62] Based on *supra* note 9.

[63] United Nations Declaration on the Elimination of Violence Against Women, A/C.3/48/1.5,23 February 1994.

[64] UNHCR Executive Committee, 'Note on Refugee Women and International Protection', EC/SCP/59 (28 Aug. 1990), p. 5.

In the UNHCR Handbook it is stated that discrimination amounts to persecution if:

> "the measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his *(sic!)* rights to earn his livelihood, his rights to practice his religion, or his access to normally available educational facilities . . . In order to determine whether prosecution leads to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with adopted human rights standards".[65]

In 1993, Canada was one of the first countries in the world to issue guidelines on how to handle asylum applications resulting from gender-based persecution. They provide the following clues to the extent that discrimination may be sanctioned unofficially as 'policy' or formally in law:

> "A woman's claim to Convention refugee status cannot be based solely on the fact that she is subject to a national policy or law to which she objects. The claimant will need to establish that:
>
> the policy or law is inherently persecutory; or
>
> the policy or law is used as a means of persecution for one of the enumerated reasons; or
>
> the policy or law, although having legitimate goals, is administered through persecutory means; or
>
> the penalty for non-compliance with the policy or law is disproportionately severe."[66]

Thus, it appears that if the law discriminates by selectively abrogating fundamental human rights of designated groups, the *law itself* persecutes. In principle, it should not matter whether it would be relatively 'easy' for a woman to obey the law (and thus avoid persecution), e.g. by wearing a veil, if in so doing she must forsake a protected freedom. Another example of legislated discrimination that can be construed as inherently persecutory are Pakistan's Hudood laws. The Hudood Ordinances are Islamic Penal Laws which criminalize, among other things, adultery, fornication and rape, and prescribe punishments for these offences that include stoning to death, public flogging and amputation.[67] These laws affect all citizens of Pakistan, but are applied to women with particularly disastrous effects. A discriminatory policy with a legitimate goal but pursued through persecutory means, might be the one child policy in the People's Republic of China. A scenario where

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[65] UNHCR Handbook, *supra* note 53, paras. 54 and 59.

[66] The Canadian Immigration and Refugee Board, Guidelines issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, 1993, para. 8.

[67] For more on Hudood laws, *see* Human Rights Watch *Double Jeopardy, Police Abuse of Women in Pakistan*, (New York 1992).

the penalty for non-compliance with a discriminatory law might be disproportionately severe, might be illustrated by the Iranian law that makes a women's failure to wear a chador a criminal offence punishable by seventy-five whiplashes.[68]

2.1.2. Violence Against Women

The UN *Declaration on the Elimination of Violence Against Women* defines violence against women as:

> "any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty".[69]

A recent report by Amnesty International on violence against women has eloquently described violence against women and its roots:

> "Torture of women is rooted in a global culture which denies women equal rights with men, and which legitimises the violent appropriation of women's bodies for individual gratification or political ends . . . Violence against women feeds off this discrimination and serves to reinforce it. When women are abused in custody, when they are raped by armed forces as 'spoils of war', when they are terrorized by violence in the home, unequal power relations between men and women are both manifested and enforced . . . There is an unbroken spectrum of violence that women face at the hands of men who exert control over them."[70]

As Amnesty International points out, the fundamental reason for violence against women lies in the global culture of inequality. However, the reasons for why individual women are singled out for violent treatment can vary. It may be because of her sex and gender, because of her relationship to a man or because of the social, religious or ethnic group she belongs to or a combination of these.[71]

Violence against women is often connected to certain misconceptualisations of the notion of 'honour', honour as it is being conceptualised by families and whole communities in terms of the chastity of 'their' women.[72] It has been stated by the Special Rapporteur on Violence Against Women that:

> "A key component of community identity, and therefore the demarcation of community boundaries, is the preservation of communal honour. Such

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[68] Macklin, *supra* note 9, p. 230. She further makes some useful comparisons to non-gendered cases.
[69] UN Declaration on Violence Against Women, *supra* note 60, Article 1.
[70] Amnesty International, *Broken bodies, shattered minds. Torture and ill-treatment of women*, ACT 40-001-2001
[71] Women, Law & Development International, *Gender Violence: The Hidden War Crime*, (Washington D.C., 1998), p. 20.
[72] *Ibid.*

> honour is frequently perceived, by both community members and non-community members, as residing in the sexual behaviour of the women in the community."[73]
>
> "If attitudes towards female sexuality are often the cause of violence against women, it becomes important for society to 'protect' its women from the violence of 'the other'."[74]

Protecting the honour of the woman, and in turn the honour of the nation, therefore, gains political significance, and will be enforced either directly through the State, as seen in legislated discrimination and laws regulating women's behaviour, or through a woman's family and community.[75] International law has not been immune from these discriminatory notions of honour either, as until lately international humanitarian law has addressed sexual assaults in terms of women's honour, as is elaborated below.

2.1.2.1. In Armed Conflicts

The deconstruction of a culture can be considered one of the primary goals of warfare, because only through its destruction – which involves destruction of people – can a decision be forced. Women are targeted because of their cultural position and their important role within the family structure.[76] Moreover, cultural biases toward women in peacetime serve to exacerbate the exploitation of women during wartime. E.g. the kind of gender-specific concepts of honour that is described above, finds its ultimate expression in times of war where women are considered to be the vessels of the community honour, and men its protectors. Sexual violence is and continues to be an effective weapon as the men who belong to the same group as the raped women, often exacerbate and perpetuate the crime by rejecting the women that have been sexually abused and by placing the blame on the women.[77]

The persecution of women by State agents in their homes has powerful symbolic motives. It is often intended to demonstrate that the State does not recognise 'boundaries' between public and private spheres, and that nowhere is sacred. There are clear parallels between family torture, where women are being tortured or raped in front of their children or husbands, and the way in which rape has been used as an instrument of war, as a means to terrorise the (male) enemy and brutalise the whole community through violation of 'its' women.[78]

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[73] Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, E/CN.4/1997/47, para. 8.
[74] Preliminary Report submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences, E/CN/.4/1995/42, para. 61.
[75] Crawley, *supra* note 22, p. 108.
[76] R. Seifert, *War and Rape, Analytical Approaches*, Publication by the Women's International League for Peace and Freedom, (1993).
[77] Women, Law & Development International, *supra* note 71, p. 20.
[78] Crawley, *supra* note 22, p. 87.

As indicated above, one obstacle against the recognition of gender-based violence in international law has been that, until recently, international humanitarian law has addressed sexual violence in terms of women's honour, separate from other crimes of violence, such as murder, mutilation, cruel treatment and torture. This definition makes sexual violence a moral crime instead of the violent physical crime it actually is. It also represents biased thinking, implying that only 'pure' women can be raped. Where rape is treated as a crime against honour, the honour of women is called into question and virginity and chastity is often a precondition for rape to qualify as a crime. Honour implies the loss of status or respect; it reinforces the social view, internalised by women, that a raped woman is dishonourable.[79]

Rape and sexual abuse in connection with armed conflicts have proven to be a very effective propaganda tool, which can further stigmatise the abused women. In war propaganda women are portrayed as victims and the abuses are blamed on the enemy and used to instil anger and hate.[80] The Zagreb-based Centre for Women War Victims have expressed their fears as follows:

> "we fear that the process of helping raped women is turning on a strange direction, being taken over by governmental institutions . . . and male gynaecologists in particular. We fear that the raped women could be used in political propaganda with the aim of spreading hatred and revenge, thus leading to further violence against women and to further victimisation of survivors."[81]

2.1.2.2. By Family Members

The UN Report on Violence Against Women in the Family states that:

> "There is no simple explanation for violence against women in the home. Certainly, any explanation must go beyond the individual characteristics of the man, the woman and the family and look to the structure of relationships and the role of society in underpinning that structure. In the end analysis, it is perhaps best to conclude that violence against wives is a function of the belief, fostered in all cultures, that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate."[82]

Feminist scholars have argued that domestic violence equals torture. Rhonda Copelon bases her argumentation responding to four critical elements that are generally defined in binding instruments: (1) severe physical and/or mental pain and

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[79] R. Copelon, 'Surfacing Gender: Re- Engraving Crimes Against Women in Humanitarian Law', 5:2 *Hastings Women's Law Journal* (1994) p. 249.
[80] Women, Law & Development International, *supra* note 71, p. 20.
[81] M.Belic and V.Kesic, in C. Chinkin, 'Rape and Sexual Abuse of Women in International Law', 5:3 *European Journal of International Law* (1994).
[82] UN Centre for Social Development and Humanitarian Affairs, *Violence Against Women in the Family*, U.N. Sales. No E.89.IV.5, New York, United Nations 1989.

suffering; (2) intentionally inflicted; (3) for specified purposes; (4) with some form of official involvement, whether active or passive.

In response to the argument that torture is different because its purpose is to elicit information she writes:

> "This distinction, which harks back to the original nature of torture, ignores the contemporary understanding of torture as an engine of terror . . . It may also reflect a gender-biased identification with the victims of state torture as opposed to domestic violence – the torture victim resisting the giving of information is heroic, whereas the battered woman somehow deserves it."[83]

Understanding domestic violence as torture would have drastic implications on refugee law, as the principle of *non-refoulement* prohibits States to return an asylum seeker to a country where he/she faces torture.[84] Another interesting aspect is that violence against women within their homes is not limited to countries of the so-called 'developing' world but also exists in the countries in which women seek asylum.[85] Many women have been forced to leave their countries, normally seen as democratic and respecting human rights, because the State has not been able to protect them from violent husbands or boyfriends.

2.2. State Responsibility

2.2.1. In Human Rights Law

For a long time, there was an assumption that States were not responsible for violations of women's rights in the private or cultural sphere. The underlying presumptions behind this reasoning have been described in the first part of this paper.

As already established above, this assumption largely ignores the fact that such abuses are often condoned and even sanctioned by States even when the immediate perpetrator is a private person.

However, as the human rights discourse developed and began to take the experience of women into account, two routes were distinguished to hold States responsible for systematic 'private' male violence against women:

- By systematically failing to provide protection for women from 'private' actors who deprive women of their right to life, liberty and security, the State becomes complicit in the violation.

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[83] Copelon, *supra* note 25, p. 130.

[84] 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) p 91, U.N. Doc. A/10034 (1975), Article 3.

[85] Crawley, *supra* note 22, p. 130.

- The State can be responsible for failing to fulfil its obligation to prevent and punish violence against women in a non-discriminatory fashion, a failure denying women equal protection of the law.[86]

In the procedure of determining State complicity in 'private' violations against women, it is not enough to point to random incidents of non-punishment of perpetrators of violence against women. Thus, it is when the State fails to arrest, prosecute, and imprison perpetrators of violence against women, that it can be interpreted as acquiescence in or ratification of the private actor's conduct. It can be described as the verifiable existence of a parallel State with its own system of justice; a State sanctioned by the official State, which protects male power through embodying and ensuring existing male control over women at every level.[87]

2.2.2. In Refugee Law

There is an important difference between a failure of State protection under international refugee law and the notion of State responsibility in human rights law. Under refugee law it needs to be established that there has been a failure of State protection and not necessarily that the State is accountable or culpable for the harm sustained or feared, as described above. By way of example, an applicant will need to show that a policy or law is inherently persecutory, that the policy or law is used as a means of persecution for one of the enumerated reasons, that the policy or law, although having legitimate goals, is administered through persecutory means, or that the penalty for non-compliance is disproportionately severe. In this context, the existence of certain laws or social policies or the manner in which they are implemented, may themselves constitute or involve a failure of State protection.[88] Thus, the turning point when a 'common crime' becomes persecution depends on the role of the State in systematically failing to protect the claimant from the feared harm.[89]

The failure to recognise violence against women as a violation of human rights for which a State is accountable, as described above, also has implications in refugee law for female asylum seekers. The problem for many female asylum seekers may not lie so much in the demonstrating that the abuse constitutes a 'serious harm', but instead to show that the State is implicated in, or has failed to protect from, that harm.[90]

It should, therefore be considered persecution for the purpose of refugee law, when the government is passively encouraging and legitimising the abuse of women by refusing to intervene to protect against human rights violations, to investigate

[86] Romany, *supra* note 11, p. 99.
[87] *Ibid.*, p. 100.
[88] Crawley, *supra* note 22, p. 48.
[89] Macklin, *supra* note 9, p. 233.
[90] Crawley, *supra* note 22, p. 52.

charges, or to prosecute and punish perpetrators of harmful acts.[91] The same applies if a State pays inadequate attention to prevent one particular form of violence in relation to other comparable forms of violence.[92] Furthermore, statues and laws which are enforced by the government can be gender-neutral albeit discriminatory and applied in a manner that targets women and also in these cases the State involvement is clear.[93] In situations of domestic violence, State inaction may take the form of official condoning (e.g., marital rape exemptions in law). However, it is more often the case of a lack of police response to pleas for assistance, refusal to investigate or prosecute individual cases, and a reluctance to convict or punish. This indicates that, while violence against women may be legally proscribed, it is socially accepted.[94] The UNHCR Handbook takes the position that "acts by private citizens, when combined with state inability to protect, constitute persecution".[95]

In order to respond to the experiences of women as asylum seekers, the assessment within the determination process of whether there has been a failure of State protection must reflect existing international obligations to protect against systematic abuse based on gender.[96] The duty imposed on the State to prevent and punish should be one of due diligence. Due diligence requires the existence of reasonable measures of prevention that a well administered government could be expected to exercise under similar circumstances.[97]

2.3. The Grounds for Persecution

Some of the most difficult issues in current jurisprudence arise over whether a gender-related asylum claim involves persecution 'on account of' one of the five enumerated grounds which are norms of non-discrimination.[98] While race, religion, nationality, member of a particular social group and political opinion appear in the 1951 *Refugee Convention*, persecution and well-founded fear of persecution on the basis of gender are not included as an explicit category.

2.3.1. Race

In the UNHCR's Handbook it is stated that racial discrimination amounts to persecution if:

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[91] T. Stewart Schenk, 'A proposal to Improve the Treatment of Women in Asylum Law: Adding a "Gender" Category to the International Definition of 'Refugee', *Indiana Journal of Global Legal Studies* (1995), and *supra* note 47.
[92] Roth, *supra* note 43, p. 334.
[93] Crawley, *supra* note 22, p. 48.
[94] Macklin, *supra* note 9, p. 234.
[95] UNHCR Handbook, *supra* note 53, para. 65.
[96] Crawley, *supra* note 22, p. 50.
[97] Romany, *supra* note 11, p. 102.
[98] Crawley, *supra* note 22, p. 62.

> "a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregards of racial barriers is subject to serious consequences . . . There may . . . be situations where due to particular circumstances affecting the group, such membership will in itself be sufficient ground to fear persecution."[99]

Women are often not only targeted because of their own race but also because they are perceived as propagating a racial group or ethnic identity through their reproductive role.[100] One example of how race and gender interact can be found in the propaganda against the Tutsi women in Rwanda in the early 1990s in the prologue to the genocide in 1994 where rape of Tutsi women was widespread. The targeted use of sexual violence against Tutsi women was fuelled by both ethnic and gender stereotypes. Tutsi women were targeted on the basis of the genocide propaganda which portrayed them as calculating seductress-spies bent on dominating and undermining the Hutu. They were also targeted because of the gender stereotype which portrayed them as beautiful and desirable, but inaccessible to Hutu men whom they allegedly looked down upon and were 'too good' for. Rape was hence used to shatter these images by humiliating, degrading, and ultimately destroying the Tutsi women.[101]

2.3.2. Religion

Persecution on religious grounds may take various forms. According to the UNHCR Handbook it may consist of:

> "e.g. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community".[102]

There is a considerable degree of overlap between the grounds of religion and political opinion which in many cases involve social norms. For instance the imposition of a dress code may signify a battle between women and the State over the control of the individual's body and personal space, rather than an expression of religion.[103]

In many cases, being deemed as fearing persecution on the basis of religion may be too simplistic. At least to the extent that this may not comport with the claim that it is not religion *per se*, that is the problem, but rather the interpretations and the

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[99] UNHCR Handbook, *supra* note 95, para. 69 and 70.
[100] Crawley, *supra* note 22, p. 64.
[101] Human Rights Watch, *Shattered Lives, Sexual Violence during the Rwandan Genocide and its Aftermath*, (September, 1996).
[102] UNHCR Handbook, *supra* note 95, para. 72.
[103] Crawley, *supra* note 22, p. 86.

discursive uses of a particular religion, e.g. Islam, by the State.[104] In order to understand the experiences of women from countries such as Iran, Afghanistan, Pakistan and the Sudan, it is necessary to see that the repression does not stem from the fact that Islam is inherently more oppressive to women than other religions, but rather from the fact that the regimes use women as a way of signalling their agenda.[105]

2.3.3. Nationality

"The term 'nationality' in this context is not to be understood only as 'citizenship', it also refers to membership of en ethnic or linguistic group and may occasionally overlap with the term 'race'."[106]

As stated in the UNHCR Handbook, the term nationality and race may in many cases overlap. The dynamics between gender and nationality are much the same as described above with regards to race. Furthermore, as with race, the nature of the persecution in many cases takes a gender-specific form, most commonly that of sexual violence including rape in particular, although not exclusively, against women and girls.[107]

A gender-related claim of fear of persecution may also be linked to reasons of nationality in situations where a law causes a woman to lose her nationality (i.e. citizenship) and the protection combined therewith, because of marriage to a foreign national.[108]

2.3.4. Member of a Particular Social Group

One possibility of qualifying gender-based persecution into the five grounds that are enumerated in the *Refugee Convention*, is to characterise persecuted groups of women as a 'particular social group'. This is the solution that UNHCR itself has been advocating:

> ". . . States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention."[109]

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[104] Macklin, *supra* note 9, p. 255.
[105] Crawley, *supra* note 22, p. 85.
[106] UNHCR Handbook, *supra* note 95, para. 74.
[107] Crawley, *supra* note 22, p. 67.
[108] Macklin, *supra* note 9, p. 240
[109] *E.g.* Conclusion No. 39 (XXXVI), Refugee Women and International Protection, UN Doc. HRC/IP/2/Rev. 1986 (8 July 1985).

This solution makes it possible to e.g. analyse the Saudi dress code by considering the plethora of rules, policies, customs, and laws circumscribing the lives of Saudi women. Women are not allowed to drive, must sit in the back of buses, are limited in their educational and employment opportunities, and may not travel without the consent of a male relative. Thereby, the restriction on dress may be understood as one strand in a web of oppression that cumulatively amounts to persecution of Saudi women, as a particular social group. The various restrictions lead to "consequences of a substantially prejudicial nature for the claimant"[110] in terms of her ability to access educational facilities, to earn a livelihood, and to function as an autonomous and independent individual.[111]

2.3.5. Political Opinion

> "Holding opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicants hold opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant."[112]

Women who are imprisoned for political reasons run the risk of 'double punishment', as they are not only punished because they oppose the regime in some way, but also because they shirk the traditional role of women, by being politically active at all.[113] A woman may also suffer harm on the basis of an imputed political opinion as a result of the perception that her political views are aligned with those of a dominant family or community members.[114]

Political opinion is often interpreted as only encompassing traditional 'public' political activity. This is, however, only a reflection of gender bias and should be replaced by a broad interpretation of the ground. A broader interpretation would make it possible to include activities that are not so publicly visible, e.g. providing food, clothing, medical care, hide people, pass messages and so forth.

2.3.6. Gender

The initial omission of gender is understood by many as a reflection of post-World War II thinking.[115] Unfortunately, this omission has had severe implications for many female asylum seekers all over the world, which we can see by the discussion

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[110] The Canadian Immigration and Refugee Board, *supra* note 66.
[111] Macklin, *supra* note 9, p. 231.
[112] UNHCR Handbook, *supra* note 95, para. 80.
[113] Crawley, *supra* note 22, p. 82.
[114] *Ibid.*
[115] Schenk, *supra* note 91

on how to include gender-based persecution into the already existing grounds for asylum in the Convention.

While there are differences between women across the world, there are also many commonalities; and while the pattern of gender inequalities varies around the regions, it is nevertheless a global phenomenon.[116] There is a number of international reports that have pointed out the global nature of violence against women and that also indict States for their complicity in perpetuating its invisibility and privatisation.[117] It must, therefore, be acknowledged that in addition to basic needs shared with all asylum applicants, female asylum applicants have particular needs that reflect their gender and their position within society. These unique needs of females are a function not of innate gender differences, but of pervasive gender discrimination and the resulting inferior positions women hold in most societies.[118]

Obviously, it is not the case that every time a woman is persecuted, she is persecuted for reasons connected to her gender. Even though a sixth category of gender should be introduced, every application would still have to be considered on an individual basis in order to determine what is the actual ground for the persecution. In some cases women will be able to make claims for refugee status on one of the existing five grounds in the Convention, as has been described above. But for many, the persecution experienced or feared is of a type not traditionally recognised under the Convention or under most countries' asylum eligibility laws.[119]

2.4. Misconceptualisation or Reconceptualisation?

As a consequence of the omission of gender among the grounds of persecution in the 1951 *Refugee Convention*, the discussion has focused on whether women's experiences can and should be interpreted so that they may be included into the already existing grounds or whether it is instead necessary to add a sixth ground (gender), in order to encompass all forms of gender-based persecution. The issue at stake is whether interpreting women's special experiences into the existing grounds should be considered a misconceptualisation, as was discussed in the first part of this paper – a misconceptualisation that serves to maintain the original presumptions and does not challenge the basis for these (biased) presumptions. Can the introduction of gender as a sixth ground bring about a reconceptualisation that would reveal, instead of conceal, the persecution that has its origin in women's distinctive existential and material state of being?[120]

UNHCR and the European Parliament have recommended that gender-based persecution claims be understood to fall within the category of 'member of a particular social group'. However, with this recommendation they fail to

[116] Steans, *supra* note 13, p. 4.
[117] *E.g., supra* note 82.
[118] Schenk, *supra* note 91.
[119] Goldberg, *supra* note 47, p. 348.
[120] *See above* 1.1. Feminist jurisprudence

acknowledge other potential bases for establishing gender-based persecution.[121] Furthermore, this option, although it may produce socially desirable results, does not recognise the importance and significance of the issue of persecution on account of gender. Gender as a social category might be an appropriate remedy if the persecution of women were isolated or temporary, but that approach does not afford women enough protection within the context of society's recognised, widespread, and institutional persecution of women worldwide.[122] It must also be acknowledged that the grounds of race, religion and nationality are no less socially constructed than gender.[123]

To define gender-based persecution as holding a political opinion does not share the same partiality as religion or race in the way that the latter is addressing only one single aspect of the persecution experienced by the woman claimant. Instead, by equating resistance to gender oppression with a political opinion, one seizes the language of liberal democratic rights discourse and refashions it for feminist use. However, the same defect of covering the structural basis behind the persecution can be held against it.[124] Moreover, by using this language there is a risk of getting caught in the trap of voluntarism, the idea that people exercise free choice over their actions. For instance, if a woman who escapes a situation of domestic violence is deemed to have done so on the ground of persecution of her political opinion, rather than her gender, it may imply that other women who have not escaped (or have not tried to) do *not* have the political opinion that they have the right to live without violence. Such a logic appears even more questionable as it is well-established in the research on domestic violence that one of the mechanisms behind it is that this kind of violence becomes part of the every day life of the woman – it becomes the normality. The trap of perceived normality is one of the reasons why it is so difficult for a battered wife to leave her abusing man.[125] In that regard gender as a sixth ground would provide for a better recognition of the dynamics behind the construction and reproduction of gender.

3. THE SWEDISH EXAMPLE

Having looked at gender and refugee law from an international perspective, we now turn to domestic legislation and application. The way gender-based persecution is dealt with in national refugee legislation differs considerably between countries. This chapter will focus on the Swedish example. The choice of Sweden is for two reasons; firstly, the author is herself Swedish and is therefore more familiar with the situation in this country, and secondly, the fact that Sweden prides itself of being among the most advanced States in the world with regard to equality between sexes.

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[121] Goldberg, *supra* note 47, p. 231.
[122] Schenk, *supra* note 91.
[123] Macklin, *supra* note 9, p. 261.
[124] Macklin, *supra* note 9, p. 260.
[125] M. Eliasson*, Mäns våld mot kvinnor*, (Natur och Kultur, Stockholm, 1997).

It is, therefore, interesting to analyse how Sweden deals with issues of gender and sex equality when it comes to citizens of other countries, in particular refugees.

A new clause for gender-based persecution was introduced in the Swedish legislation in 1997, but since its introduction it has been used to grant residence permits only in some very few cases and they all involved female genital mutilation. In order to find plausible causes for the rare use of this clause, this section will examine the practice of the Swedish immigration authorities and attempt to establish on which basic assumptions and understandings that practice is based. The sources for this section are the Swedish Migration Board's (*Migrationsverket*) Guidelines on Gender-based Persecution, which include a survey and case studies,[126] and a report from the Swedish Refugee Advice Centre that analyses 80 Swedish asylum cases from a gender perspective.[127]

3.1. Legislation

3.1.1. On Gender in General

The Swedish model for gender/sex equality has long been based on what has been called a symmetrical vision (*likhetsprincipen*). Thus, in the eyes of the law, men and women are equal. It is the almost complete absence of any mentioning of gender in the legislation that is the most striking feature of the Swedish model. Hence, gender neutral legislation is the norm in the Swedish legislation and the law is not allowed to differentiate between women and men except for in two cases, i.e. military service and measures to increase equality at work.[128] Yet, another step outside of the gender neutral norm was taken in 1998 when a special provision on domestic violence was introduced.[129] This provision clearly recognises the asymmetrical position of men and women in the society and the gender dimension of this violence.[130]

Traditionally, Swedish laws pertaining to the situation of women have primarily had an empirical focus, i.e. they have first and foremost been practical-concrete and were seen as an active strategy to improve the position of women in society.[131] This has not prevented that progressive legislative changes which are aimed at enhancing equality between sexes have normally not been used very offensively by the Swedish courts.[132] Over time, it has become obvious that the very view on the law,

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[126] Migrationsverket, *Förföljelse på grund av kön – grunder för uppehållstillstånd*, SIV-129-2000-5900, 2001-03-28.
[127] M. Bexelius, *Kvinnor på flykt, en analys av svensk asylpolitik ur ett genusperspektiv 1997-2000*, (Rådgivningsbyrån för asylsökande och flyktingar, Nykopia, Stockholm 2001).
[128] E. Svensson, *Genus och rätt, en problematisering av rätten*, (Iustus Förlag AB, Uppsala, 1997), pp. 14–16.
[129] Gross violation of a woman's integrity, (*Grov kvinnofridskränkning*) Article 4 § a in the Penal Law.
[130] Proposition 1997/88:55 Kvinnofrid, p. 21.
[131] Svensson, *supra* note 128.
[132] E. Svensson, *Genusforskningen inom juridiken*, (Högskoleverket, juni 2001).

its structures and its principles and the interpretations of different basic legal institutions seem to stop or at least hamper more fundamental changes.[133]

The innovation of introducing a specific gender clause in the Swedish refugee legislation can thus be viewed as an anomaly in traditional Swedish legislation, in that it emphasizes gender in legislation that otherwise is silent on the issue, with the few exemptions mentioned above. On the other hand, it may also form part of an effort to remedy underlying imbalances in the same spirit as the legislation on domestic violence. For now, however, one can only speculate on the actual origins of the gender clause, because, whereas the preparatory work on the revision of the legislation on violence against women was very ambitious and profound, the same can hardly be said about the preparatory work to the new gender clause in refugee law. (More on this below!)

3.1.2. On Asylum Issues

Before 1997, an asylum seeker could get a Swedish residence permit as a convention refugee, as a *de facto refugee* or on humanitarian grounds.[134] *De facto* refugee status was granted to asylum seekers who, without being a refugee in the meaning of the *Refugee Convention*, were unwilling to return to their countries of origin on account of the political situation there and were able to plead very strong grounds in support of this. In 1983, a proposal to also include persons fleeing gender-based persecution in this category was rejected with the argument that persons fleeing gender-based persecution should instead be granted residence permits on humanitarian grounds.[135] Yet, in cases where applicants are granted residence permits on humanitarian grounds, there is no right to such protection, as it is granted discretionally in cases where the conditions of removal would make a deportation inhumane.[136]

In 1997, a new structure and a new terminology were introduced in the Swedish *Aliens Act* (*Utlänningslagen*).[137] The term '*de facto* refugee' was taken out and a new category was introduced to cover what the law terms "persons otherwise in need of protection". In this category a new protection ground was introduced which covers persons who "have a well-founded fear of persecution on account of his gender (kön) or sexuality". At the same time the Swedish parliament rejected the idea of including gender under the category of 'member of a particular social group' in the 1951 *Refugee Convention*, claiming instead that this type of persecution would, through the special article, get a stronger protection than before.[138]

The new Article 3(3) reads as follows:[139]

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[133] Svensson, *supra* note 128.
[134] K. Folkelius and G. Noll, 'Affirmative Exclusion? Sex, Gender, Persecution and the Reformed Swedish Aliens Act', 10:4 *International Journal of Refugee Law*, p. 616.
[135] Migrationsverket, *supra* note 126.
[136] Proposition 1996/97:25, Svensk migrationspolitik i globalt perspektiv.
[137] Utlänningslagen (SFS 1989:529) as amended by SFS 1996.
[138] *Supra* note 135.
[139] *Supra* note 137, Chapter 3, Section 3, author's translation.

> "In this law, the term 'persons otherwise in need of protection' refers to aliens who, in cases other than those referred to in section 2[140] [i.e. cases covered by the 1951 Refugee Convention], has left the country of which he is a citizen because he
>
> has a well-founded fear of being sentenced to death penalty or corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment, [141]
>
> needs protection on account of an external or internal armed conflict or cannot return to his country of origin on account of an environmental disaster or
>
> has a well-founded fear of persecution on account of his gender (kön) or homosexuality."[142]

In the preparatory work to the new article it is explained that the article is written with the 1951 *Refugee Convention* in mind, i.e. the level of persecution and fear should be equivalent to that required by the Convention to qualify for refugee status. It is also expressed that a combination of different harassments and restrictive measures may constitute a ground for asylum, even though each separate action may not.[143]

However, the preparatory work does not provide much guidance concerning the interpretation and implementation of the gender clause. The major confusion arises over the interpretation of the notion of '*kön*', as has already been described above. But also a more thorough investigation of the gender dimension of persecution, as was provided in the preparatory work on the law on violence against women, would be needed.

3.1.3. The Confusion of Gender

As a consequence of the fact that there is no explanation of the notion of '*kön*' in the preparatory work, there has been some discussion whether it should be understood as encompassing both the aspect of 'sex' and 'gender', or only one of them. Kristina Folkelius and Gregor Noll argue that the term '*kön*' is equivalent to the term sex and *'genus*' should be used in Swedish for gender, and consequently only the sex-dimension is covered by the new clause.[144] Whereas this distinction has been adopted to a certain degree in academic discussions in Sweden, this is not the case when it comes to legislation. *'Genus'* in Swedish is a highly academic term used mostly for purely scientific reasons, while the traditional meaning of *kön* covers both sex and gender. Furthermore, Swedish legislation has solely used the term *kön*

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[140] Hereafter the refugees article.
[141] Hereafter the torture clause.
[142] Hereafter the gender clause.
[143] Proposition 1983/84:144, author's translation.
[144] *E.g., supra* note 134.

throughout its history on issues concerning gender equality.[145] Likewise, the official Swedish translation of 'gender-based violence' is *könsbetingat våld.*[146]

Thus, when the preparatory work is silent on the interpretation of *'kön'* the conclusion must be that it should have the same meaning as it had in previous legislation. The restrictive interpretation of gender-related legislation by implementing organs should not be mistaken for a limitation *of the law* to (biological) sex, setting aside cases based on (social) gender. There is no indication that this was the intention of the law when it was introduced but instead the current practice indicates a misinterpretation of the legislation by the implementing authorities.

There are several statements in the gender guidelines that support the perception that the Migration Board has misunderstood the gender aspect of '*kön*';

- *"women who have been exposed to gender-based persecution demand special attention in the same way as men who have been tortured or otherwise exposed to severe abuses . . . "*[147]
- This statement can of course be explained with the symmetrical vision that has long been the basis of Swedish legislation, men and women are just the same and therefore require identical treatment. However, the Board thereby overlooks the dynamics behind gender-based persecution and ignores that gender guidelines are needed just *because* gender-based violence is different and has other consequences for the female victim than torture has for a male victim.

- *"other (forms of persecution) are completely gender specific, i.e. they only concern women, e.g. forced abortion or feminine genital mutilation."*[148]
- The examples provided for 'completely gender specific' persecution support the theory that '*kön*' should be interpreted '*sex*', as they both concern the female body. Apparently, according to the Migration Board, persecution is completely gender specific when it concerns body parts which only exist on women. Thus, as men are the norm, it is when specifically female body parts are attacked that persecution becomes gender-specific.

- *"when there is a risk of honour killing . . . the gender clause is less relevant as the tradition of honour killings is in the nearest gender neutral; it is an act that can be done to whoever has broken a social norm . . . A similar*

[145] *E.g.* Equal Opportunities Act (*Jämställdhetslagen*), SFS, 1991:433 and for more on the use of '*kön*' in the law *see* A. Dahlberg 'Jämställdhetslagen som paradox och dekonstruktion', in G. Nordborg (ed.), *13 Kvinnoperspektiv på rätten* (Iustus Förlag, Uppsala 1995).
[146] *See e.g.,* FN:s deklaration om avskaffande av våld mot kvinnor, Swedish translation of the UN Declaration on the Elimination of Violence Against Women.
[147] *Supra* note 126, author's translation.
[148] *Ibid.*, author's translation.

reasoning can be applied in cases where a woman risks to be punished by the authorities in an inhuman way, i.e. through flogging or stoning. Such inhuman punishments are most often not gender-specific."[149]

- Also with this statement the Migration Board overlooks the gender dimension of notions of social norms and honour killings. (More on this below!) It also fails to acknowledge that even though the method of punishment may be gender neutral, it may nevertheless be a component of gender-based persecution if it is used in a gender specific way, e.g. for crimes that only women are sentenced for or as punishments that are implemented in a different way for women and men.

- *"Also in the case of less severe phenomenon such as risk of social outcasting the same argumentation is valid."*[150]
- The argumentation referred to is the one above, i.e. social outcasting should be considered as gender neutral, as it may in theory apply to both gender. Of course this statement completely neglects that social norms often are different and harder for women, as are the punishments for breaking them, which clearly makes social outcasting a highly gendered phenomenon. It gets yet another gender dimension, as it is virtually impossible for a woman to survive without the support of her family and community in some countries. From a female point a view social outcasting can therefore be a question of life and death, which contradicts the classifying as 'less severe' by the Migration Board.

3.2. Practice

It is difficult to draw any clear conclusions from looking at statistics that are made available from the Migration Board. The obstacles are several:

- Even though data has been collected concerning female applicants, the corresponding data is not available for male applicants.

- In cases where external researchers obtained access to case files, the selection of the case files is still made by the Migration Board.

- The motivations in the decisions are often very short and often do not provide enough information to clarify on which basis and reasoning the decision has been based on.

Since the gender article was introduced in 1997 the following statistics concerning residence permits given to female asylum seekers have been collected. The figures

[149] Migrationsverket, *supra* note 126, author's translation.
[150] *Ibid.*

show the numbers of women granted asylum and indicates on which articles in the Swedish *Aliens Act* the decisions were based.

Year	Art 3:2 (Convention Refugees)	Art 3:3 p1 (Torture)	Art 3:3 p3 (Gender)	Humanitarian grounds[151]
1997	551	211	5	3051
1998	444	247	2	2099
1999	299	244	15	1532
2000	223	374	7	3314

The Migration Board claims that the actual number of applicants that claim gender-based persecution is relatively small compared to the total number of applications.[152] During the years 1997–1999, a mere 22 women were given residence permits under the new gender clause and they all concerned female genital mutilation. No other form of claimed gender-based persecution has resulted in a successful application.[153] As the torture clause provides better protection than the gender clause, in cases where they both can be claimed, preference is given to the torture clause.

The Migration Board estimates that the number of cases of gender-based persecution is limited to approximately five per cent of all women seeking asylum in Sweden.[154] It is difficult to assess the relevance of this figure, as the Migration Board does not explain which information or conclusion this estimate is made on. For instance, is it limited to cases where the gender clause has been used so far, i.e. female genital mutilation, or does it purport to include also other forms of gender persecution?

In order to find plausible causes for the rare use of the gender clause, the focus will now turn to the practice of the Swedish immigration authorities. Such an analysis is, however, bound to be rather indicative and inconclusive as the material available is so sparse and uninformative. Thus, an exhaustive account of the Swedish asylum practice cannot be expected. However, it is nevertheless possible to establish some indications of how gender-based persecution is dealt with by the Swedish immigration authorities.

3.2.1. Gendered Customs and Laws

The report by the Swedish Refugee Advice Centre states that a claim of gender-based persecution most often involves different kinds of gender-discriminating customs and laws.[155] However, in no such case was a residence permit granted based on the gender clause.[156] This may seem counter-intuitive, as one would imagine that

[151] Migrationsverket, *supra* note 126.
[152] *Ibid.*
[153] Bexelius, *supra* note 127.
[154] Migrationsverket, *supra* note 126.
[155] *Ibid.*
[156] Migrationsverket, *supra* note 126.

it was for these types of cases that the gender clause was introduced. A closer look at the preparatory work and the Migration Board's guidelines provides some clues to explain the meagre use of the clause.

In the preparatory work to the new article it is stated that:

> "As some referral instances have pointed out it is hardly so that anyone risks persecution solely on the ground of belonging to a certain gender/sex *(kön)*. It has to be that the person concerned at the same time is breaking the laws or customs of the country."[157]

This statement implies that it is not the fact women are born women that make the them oppressed and persecuted but solely their actions when they refuse to comply with the gender role that society prescribes them. This statement not only overlooks the fact that there are, without any doubt, societies in the world today where the mere fact that you are born as a women means that you are under such a strict and complex set of societal rules and with such severe consequences in the case of disobedience with these rules, that it amounts to persecution, but also a number of other objections can be made:

- The same argument could be made for persecution on the grounds on race and nationality. Are minorities and ethnic groups persecuted because they are born into these groups or is it because they resist the role that society assigns to them?

- Is it possible to distinguish so definitely between gender and sex? Even though they may express different aspects of a personality, they are still intertwined and are constantly interacting with each other, as was described in the first part.

- There is hardly any parallel discussion in this respect in the international human rights discourse. Instead efforts are made to distinguish when women are discriminated or when their rights are violated for biological reasons and when it is based in perceptions of gender. Thus if a women can be discriminated against *because* she is a woman according to human rights law and it is possible that discrimination may amount to persecution as is stated in the UNHCR Handbook, the conclusion must be that she can be persecuted because she is a women.

- Are minorities and ethnic groups persecuted because they are born into these groups or is it because they resist the role that society assigns to them? In the latter case, they could as well be said to express a political opinion when they object to this assignation.

[157] *Supra* note 143, author's translation.

Moreover, it is also stated in the preparatory work that:

> "Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give raise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all circumstances . . ."[158]

The Migration Board used the statement in the preparatory work as an argument to reject the idea that general customs and legislation in a country, e.g. the dress code in Iran, may constitute gender-based persecution.[159] In this regard it is interesting to recall the discussion in the first part concerning the development of *jus cogens*.[160] Would it be possible for the Migration Board to have a similar position regarding the race discriminating laws under the former apartheid regime in South Africa?

The activity requirement in the statement in the preparatory work raises other concerns; does it imply that a woman must already have broken these laws and customs before she has a right to seek asylum? It seems rather unreasonable to expect of a woman in e.g. Taliban-ruled Afghanistan to walk in the streets of Kabul without a *burqua*,[161] before she can be considered to be persecuted on the base of her gender by the regime. Most likely, she would not even have survived long enough to seek asylum. Yet, if an action is *not* needed and it is sufficient for the asylum seeker to state that she is opposed to the customs or the law, the reference in the preparatory work seems unnecessary, as it must be considered established that the asylum seeker opposes the laws and the customs she is fleeing from in this case.

Furthermore, in the UNHCR Handbook persecution on the ground of political opinion demands that "the applicant's opinions not tolerated by the authorities have come to the notice of the authorities or are attributed by them to the applicant".[162] Racial discrimination amounts to persecution if "a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences".[163] In light of the statements above in the preparatory work, this would imply that the Swedish authorities demand more activity of a woman who is persecuted on the base of her gender than of a person that is persecuted on the base of his/her race, where it is enough that his/her dignity is affected to a certain extent. Could it be so that women's dignity is considered worth less to protect than that of a man of colour? This must be the conclusion because when a woman wants to exercise her basic human rights and freedoms she is adopting a certain political opinion, while men of a certain race, nationality or religion have inherent universal

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[158] UNHCR Handbook, *supra* note 95, para. 55.
[159] Migrationsverket, *supra* note 126.
[160] *See above* 1.4. Human rights for who?
[161] Full body and face cover.
[162] UNHCR Handbook, *supra* note 95, para. 80.
[163] *Ibid.*, para. 69.

human rights and get their rights violated by their mere fact that they belong to that race, nationality or religious group.

In none of the cases that were studied in the report by the Swedish Refugee Advice Centre, was there a discussion concerning the will or ability of the State to protect the women, not even when it came to States having gender-discriminating legislation.[164]

3.2.2. Rape and Other Forms of Sexual Violence

Among the 42 cases concerning sexual violence that were examined in the report from the Swedish Refugee Advice Centre, a residence permit based on the 'gender-clause' was not granted in a single case. In 18 cases the applicant was given a residence permit on humanitarian grounds.

In the guidelines from the Migration Board, there is no reference to the social consequences of rape and other forms of sexual violence that the victims of these crimes face in many countries. This is highly unfortunate, which has been described in the second part of this paper, for a victim of sexual violence because the societal consequences may themselves constitute an ever bigger threat for her life and security than the crime itself. The stigmatisation and ostracising of the victim form part of the gender dimension of sexual violence.

3.2.3. Domestic Violence

Of all cases involving domestic violence, examined in the report by the Swedish Refugee Advice Centre, all but one applicant was rejected. The applicant in the one case that resulted in approval, was allowed to stay on humanitarian grounds. In several cases information on a husband's record of violence or a threat of murder was commented on by wordings such as "problems of a private nature, marital problems, problems of a family nature". This phrasing can be contrasted with the statements in the preparatory work on legislative reforms on violence against women in Sweden which states that:

> "in many areas there is an imbalance in the power division between sexes. The most extreme example of this imbalance is violence that men use against women whom they have or have had a close relationship to . . . Men's violence against women, therefore, constitutes a serious *societal* problem."[165]

Thus, when women are being beaten by their husbands in another country it is to be considered as a private matter, whereas when Swedish women are being beaten it is classified as societal issue.

In none of the cases examined in the report was there any discussion concerning the background information on gender-discriminating customs and laws in

[164] Bexelius, *supra* note 127.
[165] Regeringens proposition Kvinnofrid 1997/88:55, author's translation.

connection with domestic violence. This fact is most remarkable as it is, as has been explained in the previous parts in this paper, just from this angle that it is possible to determine whether a domestic violence case constitutes persecution.

It is further stated in the report that in most cases a claimed risk to be physically and sexually abused by a husband was connected to other forms of gender-related risks, such as getting sentenced for a husband's adultery accusations, honour killings, etc. There was, however, no discussion in these on the possibility that the accumulation of these risks put together could constitute persecution.[166]

The guidelines treat the issue of domestic violence with complete silence.

3.2.4. Honour Killings

The guidelines address the phenomenon of so called honour killings, it is defined as "extreme violence that in most cases can be connected to the private sphere". As was described above, the Migration Board claims that the gender clause is not relevant in cases where the risk of an honour killing exists, as they can be considered as gender neutral. It may, theoretically, be executed against whoever violates a norm or custom in the society.

This extremely formalistic way of interpreting the crime of honour killing is a clear contradiction with how the phenomenon is viewed by the international human rights community. One does not need very strong gender lenses in order to see that even though the word honour killing may appear gender neutral, in practice it almost only concerns women and is a highly gendered concept. It is the different social norms for women and the gendered notion of honour in connection with the low status of women that creates the basis for this crime.[167] Honour killings have been condemned in several international reports that confirm the gender dimension of this crime, including *inter alia* the United Nations Rapporteur on Extrajudicial, Summary or Arbitrary Executions[168] and the UN Security Council.[169]

Furthermore, the guidelines claim that the practice of 'blood feud' should be included among honour killings. The institution of the 'blood feud' can be considered as a male counterpart to 'honour' killings of women. The aim is not punishment of a murderer, but satisfaction of the blood of the person murdered or, initially, satisfaction of one's own honour when it has been maculated.[170] Although it can be established that honour killings and blood feuds both treat notions of honour, it does not mean that the mechanisms behind these practices are the same. Neither does it mean that by lumping the two together, the crimes become gender neutral.

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[166] Bexelius, *supra* note 127.
[167] Crawley, *supra* note 22, p. 109.
[168] *E.g.*, E/CN.4/2001/9.
[169] Working towards the Elimination of Crimes Against Women Committed in the Name of Honour, A/RES/55/66, 31 January 2001.
[170] Gendercide Watch Honour Killings and Blood Feuds <www.gendercide.org/case_honour.html> 25 May 2003

The Migration Board states that if the home country cannot or is not willing to provide protection, it may be possible to grant asylum under the torture article. [171] It is again difficult to see why a threat to life should be classified as torture because it has a gendered dimension. Also, take note of the reference to the report of the United Nations Rapporteur on Extrajudicial, Summary or Arbitrary Executions (e.g. killings/murders) above.

3.2.5. Female Genital Mutilation (FGM)

As stated above, the only category of cases that have led to the granting of residence permits based on the new gender clause, are cases where women fear to be subjected to female genital mutilation. In the Migration Board's guidelines it is stated that the torture clause may also be used to give asylum to women who fear FGM since it is to be considered an "inhuman act". [172] Again, a gender based act of persecution is not labelled torture, but is circumscribed with other expressions.

The cases involving FGM are the only cases which involves a discussion of the surrounding social context according to the report by the Swedish Refugee Advice Centre. Even though an applicant cannot show that her *personal situation* is such that it could be said for certain that she would be mutilated, the knowledge about the *general conditions* in the country gives her a right to a residence permit. The general conditions include e.g. the existence of FGM and difficulties to resist the social pressure and forced FGM. [173] Consideration has also been taken of whether there are known cases where women have sought protection against FGM and if the local authorities believe that they should not interfere with traditional customs.[174]

The example of FGM shows that there is a possibility to take into consideration the wider context and how the particular act of persecution is regarded. Unfortunately, these considerations and discussions are lacking from the other cases of gender-based persecution, which may be part of the reason why those applicants were not allowed to stay.

3.3. Critique of the Swedish Legislation

The gender clause in the Swedish *Aliens Act* has been criticised because it gives women less protection than if they are claiming asylum as Convention refugees or according to the torture article. In this regard, it has even been claimed that the Swedish law can be seen as discriminatory against women.[175]

By comparison to the gender clause the Convention refugee category gives access to the following benefits:

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[171] Bexelius, *supra* note 127.
[172] Migrationsverket, *supra* note 126, author's translation.
[173] Bexelius, *supra* note 127.
[174] *Ibid.*
[175] Folkelius and Noll, *supra* note 134.

- Mandatory family reunion after recognition according to Article 4 of the 1990 *Dublin Convention*.[176]

- A shorter delay in naturalisation and a potentially more favourable status under domestic law.

- A travel document in accordance with Article 28 of the 1951 *Refugee Convention*.

- Compared to the gender clause, the torture clause offers the benefit of an absolute protection from removal.[177]

Some author's have warned that Sweden has set a dangerous precedent by introducing a special category for cases with a gender aspect. They fear that this solution may to easily be misunderstood as exclusion of these cases from the framework of international law by other countries.[178]

3.3.1. Remedies

As has already been stated at the beginning of this chapter, the Swedish legislation is based on a symmetrical vision and gender has generally been absent from legislative texts. The introduction of a clause specifically referring to gender in the *Aliens Act* can, therefore, be seen as a novelty in the Swedish legislation. The recognition that a person (a woman) may be persecuted on account of her gender must stem from an understanding of the asymmetrical positions of women and men in society. Given the fact that this is a new concept in Swedish law, it would be natural to expect that extra efforts had been put into the preparatory works on clarifications in order to avoid mistakes in the acts implementation. It is, thus, quite remarkable that the preparatory works are so silent on the new gender clause. When a new criminal provision on "gross violations of a woman's integrity" was introduced a year after the gender clause in the *Aliens Act*, it was accompanied by detailed preparatory work which describe in detail the mechanisms behind male violence against women, an analysis of effects on society, etc. Similarly detailed research should also have preceded the introduction of the gender clause in the *Aliens Act*. At the same time, it is important to keep gender explicitly mentioned as a ground for persecution as it flows from the official Swedish policy that recognises the imbalance of power between the sexes on a domestic level. It should, therefore, also do so in its relationship with aliens, i.e. refugees.

Although clarifying preparatory work would aid in remedying the situation it would not be sufficient. It would have to be followed up with extensive training of

[176] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Members States of the Community, (Dublin, 15 June 1990).
[177] Migrationsverket, *supra* note 126.
[178] Folkelius and Noll, *supra* note 134, p. 634,

the personnel in the immigration authorities. To distinguish the gender dimension demands a certain change of mind, as officials would have to develop what has been described as 'gender lenses' earlier in this paper. Clearly, this is something that does not happen automatically through a change of the law.

One of the few things expressly stated in the preparatory work is the legislators desire to strengthen the protection for gender-based persecution. Practical experience so far has shown that this objective has clearly failed, as has been explained above. In order for the gender clause to have the effect the legislator (presumably) intended, a number of measures would have to be taken:

- First and foremost, the protection accorded by the gender clause must be strengthened and give the same level of protection as the 1951 Convention.

- It should be clarified that the gender clause ought to be seen as complementary to the five grounds in the 1951 *Refugee Convention* but not as exclusive, as persecutions on other grounds also may have gender dimensions.

- Detailed and extensive research should be undertaken by the legislator on gender-based persecution and the mechanisms behind it, so that it can be clarified which cases the clause is designed for.

4. CONCLUSION

The first part of this thesis described the feminist methodology and its 'gender lenses' that this paper has strived to apply. The question then arises: how can one make women and their experiences visible and how does one adjust existing systems and structures so that they take account of these experiences? It has been argued that many feminist-inspired legislative reforms during the past twenty years were achieved by categorising women's injuries as analogous to injuries men suffer. This method should be regarded as a misconceptualisation as it maintains the original (male-biased) presumptions and does not challenge the basis for these presumptions. Instead, reconstructive feminist jurisprudence should set itself the task of reconceptualising new rights in such a way as to reveal, rather than conceal their origin in women's distinctive existential and material state of being.

In the second part, this discussion was translated into the debate of international refugee law on how to include gender-based violence into the grounds of persecution, as gender was omitted when the *Refugee Convention* was created in 1951. Some argue that gender-based persecution should be interpreted into the already existing grounds, i.e. race, religion, nationality, member of a particular social group or political opinion. They say that it is not the omission of gender as a ground for persecution that is the problem. Instead, they argue that the problem is that women's experiences have been interpreted as to not fit into the existing categories and it is, therefore, the interpretations on these grounds that need to

change. The UNHCR and the European Parliament have argued that gender-based persecution should be subsumed under the ground of being a member of a particular social group. Some have advocated that resistance to conform with gendered norms and customs should be classified as a political opinion. Yet, others have argued that where gender is the discrete basis of persecution, it is critical that it is named as such, since one would otherwise mask the specificity of women's oppression. This paper has argued for the latter position.

The third and last part of this paper examined the Swedish example, where gender-based persecution was introduced as a new concept in the *Aliens Act* in 1997. This was a new concept in that it for the first time named gender as a ground of persecution, but also as it may be seen as a step away from the symmetrical vision that has traditionally been the basis for Swedish legislation. Unfortunately, the new gender clause suffered from a number of defects that have hampered its significance and implementation. The most important defect is that it does not give the applicant the same protection as that given to an applicant who is granted a residence permit on the grounds listed in the *Refugee Convention* or under the risk of torture. Also, the lack of research into the notion of gender-based persecution and its dynamics in the preparatory work has paved the way for a misunderstanding of the term *'kön'* in the implementation of the clause. It has, however, also been stressed that, as the official Swedish policy recognises the imbalance of power between the sexes on a domestic level, the same recognition should characterize its relationship with aliens, i.e. refugees. Thus, it is important to name gender-based persecution for what it is, but its status should be strengthened and equalised with the five grounds already mentioned in the *Refugee Convention*.

As the journalist Linda Hossie criticises the Canadian gender guidelines, she also eloquently formulates the argumentation in favour of explicitly enumerating gender among the grounds for asylum:

> "The problem with the draft guidelines, meanwhile, is that they treat women's refugee problems as a subtle variation of men's. But the situation of women is unique. Forced abortion, forced pregnancy, ritual and (disabling) clitoridectomy – all of which are appallingly common – are forms of persecution that have no parallel in men's experience. To oblige women seeking asylum to prove that such treatment is just a variation of the oppression faced by men is illogical and – when you get right down to it – discriminatory. Even when women face routine political, religious or ethnic persecution, it is compounded by their almost universal second-class status. Women draw the ire of sexist cultures much more readily than do men, and for much less provocative actions."[179]

There may be a fear among some that strengthening the protection for gender-based persecution might result in floods of new asylum seekers. The reality is that permanent resettlement or asylum in a remote country will never be a viable or even desirable option for the overwhelming majority of displaced women. As the refugee

[179] Quoted in Macklin, *supra* note 9, p. 257.

scholar James Hathaway has stated "[w]e are not going to see a flood of female claimants. Most women can't get out of their countries, and when they can, they're lucky to make it to the next country".[180] For many women, however, the ability to remain outside their homeland and to find refuge is of crucial importance, as forced return can mean persecution in the form of abuse, extreme ridicule, ostracism, and even death.

[180] *Ibid*., p. 220.

MINIMUM WAGE REGULATION: AN EXTENSION TO THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

Mona Ressaissi[*]

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[*] This thesis (originally 86 pages) was first written as a required research project for the Master's in International Human Rights Law programme at the Raoul Wallenberg Institute, at the Faculty of Law at Lund University, in Lund, Sweden, Fall 2000. The author's goal was to research the area of economic rights especially related to the worker, and with the help of her mentor this thesis evolved. The author's experience researching and writing this was rewarding, eye-opening and depressing, as well as very challenging. The author believes this exercise to be her most valuable learning experience during her master program, since it allowed her to conduct individual research and to process international human rights law materials. The author's mentor on this thesis was Professor Göran Melander but gratitude must also be extended to Professors Gudmundur Alfredsson and Michelo Hansungule, as well as Dr. Shane Fitzpatrick of Centenary College and Professor Alan Hyde of Rutgers Law School-Newark. The author's family, of course, deserves many thanks for helping her stay sane throughout this process, especially her mother, Nancy and husband, Devon.

MINIMUM WAGE REGULATION: AN EXTENSION TO THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

INTRODUCTION

The primary concern of this essay is the individual 's access to the elements of *the human right to an adequate standard of living*; food, shelter, clothing and medicine. It is clear that this right will demand the existence of several different policies but this thesis will focus on one such legal policy/mechanism, an international minimum wage regulation. As the market becomes more globalised so must regulation to ensure that, once market forces are introduced as an effort to enrich a nation, they do not leave it impoverished instead. From this perspective there is an urgent need for global policy and a framework to follow market globalisation to ensure that the economic human rights of all citizens are protected.

The most significant impact of deregulation is how it changes the economic well being of individuals. A natural result of deregulation is a lesser dependency on government subsidies and a greater dependency on individuals' ability to provide for themselves. In light of this transition of dependencies, the access to an adequate standard of living becomes conditional on purchasing power. In globalisation 'the wage' is the real mechanism for purchasing power and thus one may draw a link between the wage and the ability to access an adequate standard of living and wages. Therefore, a mechanism that may ensure that individuals are paid a wage which will ensure the access to an adequate standard of living becomes pertinent.

It is also important to note that the right to have an adequate standard of living was largely meant to be implemented by the individuals themselves, keeping human dignity in mind. However if people are to fulfil their basic needs through an exchange of labour for wages, which they then use to purchase their necessities, then the State, as a part of its obligation to protect or secure the right to an adequate standard of living, must either supplement or create an atmosphere in which the individual can provide for him/herself. The legal measure of wage regulation, aiming to avoid extremely low wages, which cannot grant the worker the ability to fulfil his/her needs, must be part of this atmosphere.

The first part of this thesis will define the actual problem, underscoring some important definitions in the discussion, and evaluate relevant international law and obligations on the subject. The second part will deal with the various problems that minimum wage regulations have and will face, but also provide some concrete recommendations.

1. DEFINING THE PROBLEM

1.1. Poverty

The problem is essentially the status of living conditions around the world. Many people still live beneath the adequate standard of living. Currently 1.2 billion people around the world sustain themselves on less than $1 per day, which leaves them living in conditions far below those imagined through the human right to an adequate standard of living. 400 million live on less than $2 a day. This result is the

stifling numbers which indicate that one out of every five people live on less than a $1 and 1 in every seven people suffer from chronic hunger.[1] 2.6 billion, which includes half of the developing world population, lack adequate sanitation facilities. 1.3 billion are without safe water resources.[2] In the past five decades 400 million have died from hunger and inadequate sanitation.[3]

Although the number of people living in poverty did decline in the middle of the 1990s, (concentrated in East Asia) the progress is at a halt. In many countries the progress to battle poverty has stagnated and in some countries it has even reversed. Population growth has influenced the increase in the number of poor around the world. Through the United Nations (UN), Organisation for Economic Co-operation and Development (OECD), the International Monetary Fund (IMF) and the World Bank's (WB) program "2000 A Better World for All", the goal for the year 2015 is to cut the percentage of poor in half.

The 1.2 billion people living in extreme poverty in 1998, were divided into these regions: Latin America and the Caribbean (78 million), Sub-Saharan Africa (291 million), the Middle East and North Africa (6 million), Europe and Central Asia (24 million), South Asia (522 million) and in East Asia and Pacific (278 million). In terms of demographic proportions, the rural areas suffer from the greatest poverty, however, the urban poor are rapidly increasing. Women are more likely to be found in the poor percentages than are men, due to their lack of access to several assets, such as land and credit.[4]

1.2. Globalisation

Coexisting with this reality of extreme poverty is globalisation. Globalisation has had an immense influence on the disparities of people around the world. Although globalisation offers a tremendous opportunity for economic growth, this economic growth has not benefited all of the populations;

> "The ratio between the richest and poorest country in 1820 was 3 to 1; by 1992, this ratio had climbed to 72 to 1; United Nations Development Programme (UNDP) figures show that in 1960, the 20% of the world's population living in the richest countries were thirty times richer than the poorest 20%; by 1997, they were 74 times richer and in the 1990s, the richest 20% of the world's population has 95% of all commercial lending, 94% of all research and development, 86% of world gross national product, 82% of world trade, 81% of all domestic investment, 81% of all

[1] A Better World For All--Poverty. <http://www.paris.org/betterworld/poverty.htm> pp. 1–3, 9, visited on 24 September, 2000.
[2] *Ibid.*
[3] International Facts on Hunger and Poverty. Bread for the World 2000. <http://www.bread.org/hungerbasics/international.html > visited on 21 September 2000.
[4] *Ibid.*

> domestic savings and 68% of all Foreign Direct Investment (FDI). In contrast, the poorest 20% has only 1% of world GDP and 1% of FDI."[5]

These ridiculous numbers indicate that there are certainly enough resources for all, but that the distribution of those resources lacks any sense of equality. The unequal distribution of wealth was recognised by the International Labour Organisation through its Philadelphia Declaration, which states: Labour is not a commodity. It was established that labour would not be a market force of commodity, and that money wages would eventually become a lesser part of the total income. This trend has, however, reversed in the past century. The efforts to "decommodify" labour have turned into "recommodification".[6]

1.3. Trade Agreements

In promoting global trade countries are asked to sign trade agreements that ask for deregulation rather than sound regulation. This results in a coercive market arrangement, in which many workers suffer.

The *North American Free Trade Agreement* (NAFTA) can be used as one such example. I will allow Bruce Campbell to express it more clearly:

> "NAFTA in essence codifies a shift in the balance of power in favour of capital and away from governments (the kind that intervene in markets) and labour. By weakening public policy instruments and labour's power at the bargaining table it increases the pressure to level down employment conditions, wages and standards. These changes are being observed globally and as such are key elements of the process of globalisation. NAFTA is not a separate phenomenon, but rather the concrete expression of globalisation on the North American continent. Thus when the ILO director General said several years ago that globalisation is eroding government policy instruments 'which have such a decisive impact on the level as easily and quality of employment and on domestic policies for social progress' (ILO, 1994: 90-94) he could just as easily have substituted NAFTA, which is in effect, continental globalisation."[7]

These types of trade agreements, as well as globalisation in general, create competitive atmospheres that can be detrimental to wage standards. Most workers

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[5] Friends of the Earth International. "The Citizens' Guide to Trade Environment and Sustainability'. Equality and Fairness. Last updated 24 January 2001. <http://www.foei.org/trade/activistguide/equality.htm> visited on 16 November 2003.

[6] G. Standing, 'From Labor to Work: the Global Challenge. Essay: The End of Labor', World of Work No. 31 September/October 1999, International Labour Organization, 12 November 1999. <http://www.ilo.org/public/english/bureau/int/magazine/31/essay.htm> visited on 25 October 2000.

[7] B. Campbell, 'CUFTA/NAFTA and North American Labour Markets: A Comparative Inquiry.'Labour Market Effects under CUFTA/NAFTA, in Bruce Campbell (Ed.), (Ottawa: Canadian Center for Policy Alternatives, 1999), p. 9.

are currently confined to the national borders but capital becomes boundless under these agreements. This means that workers bargaining power decreases and workers are forced to agree to lower wages in order to attract investment. Campbell presents a survey on 455 senior corporate executives, made by the *Wall Street Journal*, which found that 25 per cent used the NAFTA agreement to bargain down wages, and 40 per cent moved at least part of their production to Mexico. Researcher Kate Brofenbrenner at Cornell University found that 62 per cent of manufacturing and transportation employers under NAFTA jurisdiction threatened to close their plants rather than negotiate with the Union. It is obvious that this has a negative effect on wages.

With these trade agreements comes an immense pressure on fiscal capacity. Again Campbell explains:

> "The competitive drive to attract and maintain investment increases the pressure to reduce taxes and increase subsidies to capital. The resulting fiscal pressure tends to crowd out social spending: from unemployment and disability insurance, welfare pensions, to education, training and health care. The pressure to compress worker' wages and reduce their purchasing power also weakens the income and consumption tax bases."[8]

In other words, globalisation has required governments to decrease their activities and spending, which results in lesser efforts by States to supplement wages. This produces a condition in which the elements to fulfil an adequate standard of living depends on personal income. Although income may take on several forms, monetary wages are certainly predominant.

1.4. Migrant Workers

Another aspect to the current problem are migrant workers. Migrant workers offer the world economy a great resource in mobile labour, and have individually benefited from their work. The truest of market forces – when supply increases the price falls, comes into play allowing the migrant workers to push wage levels down in the countries affected.[9]

One example of wage deflation is in the Middle East, where a flood of migrant construction workers from Asia have negatively affected the labour standards in the Middle East and caused a decline in wages. In addition, an upsetting trend has been established which holds workers to different wage standards depending on their origin; for instance, a Malaysian construction worker can earn up to USD 536 per moth, but a Sri Lankan worker must make due with USD 37.60.[10]

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[8] *Ibid*., p. 11.
[9] ILO/96/4 'Migrant Construction Workers Facing Pressure on Wages and Working Conditions', 6 March 1996 <http://www.ilo.org/public/english/bureau/inf/pr/1996/4.htm> visited on 15 November 2003, p. 1–4.
[10] *Ibid.*

This trend of migrant workers causing a downward shift is common in other parts of the world, such as in East Asia and Western Europe.[11] The negative impact by migrant workers cannot be blamed on the migrant workers themselves, but instead on national and international labour systems being too flexible to satisfy business forces. International wage standards must remain strong to have any impact on the lives of the populations around the world, including transient labour.

It is important to point out that even though globalisation provides opportunities and increased standards around the world, those standards may not be enough, and may be fulfilled by depriving others of rights. The author is aware of the benefits of globalisation but is concerned with the international obligations that States do not adhere to by throwing themselves carelessly to the "global market".

1.5. The Poverty Line

The poverty line should be discussed in these circumstances. The World Bank has established a poverty line, which is meant to indicate the level of expenditure needed to fulfil several necessities including nutrition and the expense for participating in the everyday life of society.[12]

This is where wages come into the question. The expenditure that the World Bank is referring to is in monetary terms, or perhaps at best bartering, and it directly affects the ability to access food, clothes, housing and medicine. The key component in this argument is access. If the market is to turn most countries into a plethora of shops in which I need money to access anything, and in turn I can only gain access (only considering legal ways of attaining funds) to money through working, then what my wages are becomes a major issue. Wage levels can either exploit me or deliver me a fair wage on which I can supply myself with the necessities to live adequately.

1.6. Purchasing Power

In contrast to the poverty line, purchasing power is an important concept in this discussion. Purchasing power could very well reflect the ability to fulfil the right to an adequate standard of living by one's own means, without governmental subsidies. It is important and telling to review the purchasing power distribution around the world.

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[11] *Ibid.*

[12] A. Eide, 'The Right to an Adequate Standard of Living Including the Right to Food', in Eide A., Krause C. and Rosas A. (eds.), *Economic, Social and Cultural Rights, A Text Book.* (Dordrecht: Martinus Nijhoff Publishers, 1995), pp. 89–90.

	Percentage of GDP Purchasing Power In the World	Purchasing Power/ in USD	Number of Countries in Region	Percentage of the World Population
ADVANCED ECONOMIES	55.3	25.890	28	15.7
G7	44.3	28.510	7	11.7
EU 15	19.8	23.450	15	6.4
ASIA	23.1	970	27	52.3
LATIN AMERICA	8.8	3.940	33	8.4
EAST EUROPE	4.8	2.310	28	7.0
MIDDLE EAST	4.6	2.070	17	5.1
AFRICA	3.3	510	51	11.5

The chart clearly indicates that purchasing power is concentrated in a few regions. A parallel can be drawn between living standards and purchasing power, since the top six nations in terms of high living standards are also in the top ten with the highest purchasing power. Similarly, the ten lowest ranking nations in terms of living standard also rank in the lowest 15 in purchasing power.[13]

If wages are the most influential force in the ability to fulfil the right to an adequate standard of living, then recognition must be placed on the impact wages have on the human right to an adequate standard of living. Concurrently, the right to an adequate standard of living must be further recognised as a fundamental and essential human right, which bridges any division between human right categories. To further clarify the link between wages and the right to an adequate standard of living this chapter will designate a section to each element encompassed in the term itself (i.e. food, housing, medicine and clothes). First, three other essential terms will be defined; wage, minimum wage and adequate.

2. DEFINITIONS

2.1. Wage

The meaning of this word clearly depends on the context in which it is used. The term becomes controversial when combined with words like income and remuneration. Essentially, the definition of wages either refers specifically to monetary gain from labour or service, or it refers to any payment, whether fiscal or not, made for labour output. In addition to this dilemma ILO Convention 109 (Wages, Hours) offers another definition, "basic pay or wages means the remuneration of an officer or rating in cash exclusive of the cost of food, overtime,

[13] World in Figures. The Economist. 9th ed. (London: Profile Books Ltd. 1999), pp. 38–41.

premiums or any other allowance either in cash or kind".[14] Although the ILO *Minimum Wage Fixing Conventions* do not specifically make reference to a definition on wages, their interpretation could be understood to be non-inclusive of such remuneration as bonuses and benefits.

2.2. Minimum Wage

As just stated, the ILO Conventions 26, 99, 131 do not define the term 'wages' or 'minimum wage' and in addition Conventions 26 and 99 are not consistent in their use of the terms, they also use the terminology: minimum rates of wages, minimum wage rates and minimum rates. A definition was reached during a meeting of Experts, which were gathered under the auspices of the Governing Body in 1967, to discuss the problems and future revisions of the ILO *Minimum Wage Fixing Conventions*. According to the Experts, minimum wage,

> "represent[s] the lowest level of remuneration permitted, in law or fact, whatever the method of remuneration or qualification of the worker . . . is the wage which in each country has the force of law and which is enforceable under threat of penal or other appropriate sanctions."

Minimum wages fixed by collective agreements made binding by public authorities are included in this definition.[15] This strong definition of the minimum wage manifests the legal and protectionist character of the minimum wage. It was to display the threshold beneath which no wage should exist.

Showing the spectrum of policy and legislative instruments needed to truly fulfil the right to an adequate standard of living, many refer to the 'minimum living wage', rather than simply the minimum wage.

National legislators around the world will also assign different names to 'minimum wage', according to perception of the term; "minimum living wage" in Argentina, "basic minimum wage" in Botswana, "basic wage" in Gambia, "minimum regulatory remuneration" in Myanmar, and in the former Yugoslavia it was referred to as "guaranteed personal income".[16]

If the assessment of the minimum wage favours a social position it might be called "minimum income" as in Chile or "minimum social wage" like in Luxembourg. A special reference should be made to France, which has chosen to view the minimum wage as a part of economic development and therefore calls it "minimum growth wage". These perceptions grow out of the necessity for workers to have enough purchasing power to allow the economy to grow sufficiently.[17]

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[14] International Labour Conference, 79th Session 1992. Minimum Wages. Wage-Fixing Machinery, Application and Supervision. (International Labour Office Geneva), p. 9.
[15] *Ibid*., pp. 10–11.
[16] *Ibid*., pp. 11–12.
[17] *Ibid*., pp. 12–13.

In conclusion, the minimum wage has several definitions. However, three characteristics on wages can be identified as having a significant impact on the definition of minimum wages: 1. wages are payment for labour output; 2. wages ensure the workers subsistence, 3. wages are a production cost and part of consumer expenditure.[18]

2.3. Adequate

The essential question that must be answered is: What is adequate? Adequate seems to mean that within ones given social setting, one should be able to participate in society with an adequate standard of living. In other words, without any feeling of inferiority and without unreasonable obstacles one should be able to engage in normal social activity.

Eide argues that this is as close to a definition as is attainable, because adequacy will depend on the cultural setting. Eide therefore links the word "adequate" to "dignity." If an individuals only way to survive is to degrade himself, then the standard of living is not adequate. He continues by referring to the poverty line because the eradication of poverty is a major step in realising many human rights and was the goal of the "Four Freedoms Address in 1941, the UDHR and many human rights instruments".[19]

The requirement of being able to participate in the everyday life of society reflects that economic and social rights are progressive ones. As any country develops, the quality of everyday life will improve and it must be accessible to all. In other words, a lower standard of living in a society is unacceptable and any State that has recognised this right has committed themselves to continuously advance the standard of living. I believe the word adequate must be seen as a living term, which expands with the development of societies.

3. THE LINK

The link between wages and the right to an adequate standard of living is only as strong as each element of that right can be linked to wages. The next step in this examination will be to introduce each element of the right and to link each element to wages/purchasing power. How do we link these? There is much evidence that materials such as food and clothing exist,[20] so this is not the implication of inadequate food or clothing standards. Rather it is the access to food, clothes, housing and medicine which is the problem.

[18] *Ibid*., p. 14.
[19] *Supra* note 12.
[20] International Facts on Hunger and Poverty. Bread for the World.2000. 21 September 2000. http://www.bread.org/hungerbasics/international.html.

3.1. Food

1.3 billion people lack safe water.[21] In the town in which I currently reside, a small rural town in New Jersey, USA, the water which is accessible to me is neither healthy nor tasteful. However, I have the means to buy spring water in my local grocery store, which in turn supplies me with my needs. This rather simple solution is not available to many people.

In terms of food, approximately 800 million persons are malnourished, this includes 200 million children. The food supply is not a real hurdle, at least according to the Food and Agricultural Organisation of the United Nations (FAO). The threshold for calorie intake per person is currently calculated at 2350 calories per day and, by calculation, 2720 calories per person would be possible with the resources we hold today. This leaves us with a problem of distribution rather than a lack of resources.[22]

The term adequate food entails several components: Adequacy of the food supply, culturally acceptable food, nutritional needs, stability of the supply and the access to food. It is the latter component that interests this study. Policymaking that protects and allows for access to food is essential in protecting the right to adequate food. These policies include, according to Eide: "economic and social sustainability in terms of conditions and mechanisms securing food access. Economic and social sustainability concern a just income distribution and effective markets . . .".

These policies include a monitoring of wage levels, so that they do not fall below the level needed to survive and live in dignity and also, that they increase with the productivity of the society to ensure 'just income distribution'. It is also important to note that adequate food, is what not only enables us to survive, but also, according to the World Bank enables us to participate in "the everyday life of society".[23]

Amartya Sen has made several ventures into the phenomenon of starvation and found that the lack of food is not the primary problem as is the lack of access to food. Sen and his theories are essential to the discussion of access and food. He views the problem of starvation and famine as an 'acquirement problem'. He states that,

> "We cannot begin to understand the precise influences that make it possible or not possible to acquire enough food, without examining the conditions of these exchanges and the forces that govern them."

[21] World Summit for Social Development and Beyond: Copenhagen +5. UNICEF. <http://www.unicef.org/copenhagen5/factsheets> visited on 22 September 2000.
[22] *Supra* note 20.
[23] *Supra* note 12, pp. 90–91.

Sen has developed a theory which is based on entitlements.[24] This is a broad scheme with various types of entitlements such as, trade based entitlements, production-based entitlements and labour entitlements. Amongst the entitlements that Sen refers to, he includes the ability to earn enough to be able to eat, i.e. if one cannot earn enough to eat, one starves and so it becomes starvation.[25]

'Production based' and 'own labour' entitlements are most relevant to this discussion. Production based entitlements are based on the notion that, one is entitled to own what one gets by arranging production using one's own resources, or resources hired from willing parties meeting the agreed conditions of trade.[26] This entitlement is important to the argument that wages effect the allocation of food because it establishes that working to gain resources to access food is achieved using ones own resources or others. Thereby recognising that others will contract their personal resources. Following in the line of this argument is the, own-labour entitlement argument, which states: "one is entitled to one's own labour power, and thus to the trade-based and production-based entitlements related to one's own labour power . . .".[27]

These two entitlements are obviously linked to each other since the former argues that one is entitled to keep what one earns and the latter argues that there is an entitlement to use ones own labour force to gain access to food and other necessities.

Most persuasive of Sen's theories is that many policies in the past have focused on starvation or the lack of food in terms of lack of supply of food, when this is simply not true. In fact, food output has steadily risen. These policies have, according to Sen, cost the lives of millions of people. To avoid the loss of more lives and to eradicate starvation, policies must instead take the view that the access to food is what must be guaranteed. As we have seen, maintaining wages at a decent level is one such policy. [28]

3.2. Housing

The United Nations estimates that 100 million people are homeless and that 1 billion are inadequately housed. UN Fact Sheet 21, on the *Human Right to Adequate Housing*, is a useful resource to the right to housing. It states that housing is commonly viewed as one of the most essential human needs.[29]

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[24] A. Sen, 'Food Economics and Entitlements', in Dreze, Sen and Hussain (ed.), *The Political Economy of hunger, Selected Essays*. (Oxford: Oxford UP, 1997), p. 52.
[25] C. Thomas, *In Search of Security: The Third World in International Relations* (Worcester: Harvester Wheatsheaf, 1987), pp. 95–96.
[26] *Ibid*.
[27] *Ibid*., pp. 50–53.
[28] *Ibid*.
[29] United Nations Fact Sheet No. 21. The Human Right to Adequate housing. United Nations High Commissioner on Human Rights (Geneva, Switzerland, 1997), p. 4.

There are several components to this right: legal security of tenure; availability of service; materials and infrastructure; affordability; habitability; accessible housing; location and culturally adequate housing. If affordability, meaning reasonable cost, is an essential part in terms of housing, the reverse relationship must exist in which wages offered also reflect the ability to provide shelter for oneself and one's family.[30] Accessibility, again, is also related to income and wages.

3.3. Medicine and Care

Medical Care is part of the right to an adequate standard of living but this component is far harder to link to individual wages. You may build a house, grow food, and even sew clothes, but curing cancer is of another dimension. The issue of care is, however, still relevant because of the upswing of service fees. If, in order to gain medical attention by professionals, one is asked to pay a service fee, then a lack of funds will deny treatment. As long as service fees are charged or insurance payments are required in order to receive medical attention, then wages will be relevant to the fulfilment of the right to an adequate standard of living.

Not only is the medical field increasingly difficult to access, the entire field has become one other industry in the global market, seeking profit from medical care. This in terms makes the need for wages increasingly important. Quoting Mrs Indira Ghandi:

> "drug manufacturers have become a powerful industry, subject to the same driving considerations of other big industry, that is, concentration on profit, fierce competition and resource to hard-sell advertising."[31]

3.4. Clothing

The right to clothing is rarely addressed by commentators on human rights issues. The term is, however, specifically included in the right to an adequate standard of living.[32] There is a sense that the right to clothing is a field in which the State can not act, nor is it of great importance. In a world highly influenced by material things, clothing may indeed be very important. Access to clothing may mean the difference between life and death in some places in the world. In those places in which clothes are not essential for survival, they still play a significant role in terms of dignity. The argument is not that all have the right to wear dignity, but all have the right to

[30] Proceedings of an International Workshop. Economic, Social and Cultural Right: Fifty Years After the Universal Declaration._University of British Columbia & Department of foreign Affairs and International Trade. Vancouver, Canada, October 8–10, 1998, p. 50.
[31] *Supra* note 25, pp. 106–07.
[32] Universal Declaration of Human Rights. Adopted by the General Assembly of the United Nations, Resolution 217 (III) Of 10 December 1948, Article 25.

participate in society without compromising their dignity.[33] Also keep in mind that this is considered a progressive right.

3.5. Conclusion

When discussing the human right to an adequate standard of living it becomes obvious that without enough wages and government resources it is quite difficult to fulfil the standard. Linking the wage monitoring mechanism of minimum wage systems to the right to an adequate standard of living is too link it to the world of human rights. The main objective of this thesis is to allow the minimum wage policy to be seen as a measure in which the right to an adequate standard of living can be realised in accordance with the economic system of the evolving global economy. The next step towards that objective is to introduce the existing regional and international human rights standards to show how the minimum wage system fits in that genre of international laws.

It now becomes clear that work is an instrumental part in ensuring the right to an adequate standard of living and according to Eide: "work is the most common way of assuring an adequate standard of living."[34] For these theories to work, however there are several components that must be recognised and respected. Eide writes:

> "this can only be the case, [assuring an adequate standard of living through work] however, when there is access to work under conditions of human dignity and when the income derived from work is sufficient to ensure an adequate standard of living."[35]

So working is not enough to ensure the realisation of the right, unless the wages of the work rise to a sufficient level. Wages must be high enough to ensure an adequate housing standard, and only then can one claim that the dignity of man has been preserved.[36]

4. INTERNATIONAL AND REGIONAL STANDARDS

4.1. Customs and Traditions

In investigating a practice, it is of the essence to uncover its cultural and social history. In other words, to investigate whether the practice of a minimum wage is novel or whether it is more deep-rooted.

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[33] M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford UP, 1998).
[34] *Supra* note 12.
[35] *Ibid.*
[36] Proceedings of an International Human Rights Workshop. 49.

4.1.1. Australia and New Zealand

Some researchers have claimed that one can trace the practice of a minimum wage to the Code of Hammurabi in 2000 BC, but there seems to be a consensus which recognises the first establishment of a minimum wage in Australia and New Zealand around the end of the 19th century. The practice was initially used to settle disputes, but later also developed into a strategy to avoid "extremely low wages" being paid to workers. In 1896, legislation was passed in the State of Victoria, which set up six wage boards to monitor wages for six different trades. Later, additional wage boards were established and, in 1911, all but one State of Australia had wage-boards. Two acts by the Legislature in New Zealand are proof of direct legislative action by the country; the Employment of Boys and Girls without Payment Prevention of 1888 and the Shops and Office Act of 1904. These acts allowed for unorganised workers to enjoy wage protection.[37]

4.1.2. Europe

Britain was the next country to follow the Australians and New Zealanders, and in 1909 it decided to eliminate 'sweating' (exceptionally low wages) through legislative action. The result of this effort was a minimum wage legislation act that included only four trades.[38] In 1918 the Trade Boards Act extended the protection to about 40 trades and 1.25 million workers.[39] The initial minimum wage legislation throughout Europe only extended protection to certain categories of workers. Some legislation was aimed towards home workers such as in France (1915), Norway (1918), Austria (1918), Czechoslovakia (1919), Germany (1923), Spain (1926) and Belgium (1934). Others, like Hungary aimed their protection at agricultural workers.[40]

4.1.3. The United States

In the United States, the original minimum wage laws targeted females and minors. Nine States had adopted such legislation by 1913 and by 1923 it had risen to 17 States. Canada followed the same objective to protect the wages of female workers and by 1920 only two provinces had failed to adopt minimum wage legislation.[41]

4.1.4. Asia and Africa

Following the lead of other countries, even the developed countries limited the scope of their minimum wage legislation to certain parts of the population. In Sri

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[37] G Starr, *Minimum Wage Fixing* (Geneva: International Labour Organization, 1981), p. 1.
[38] *Ibid.*
[39] *Ibid.*, p. 2.
[40] *Ibid.*
[41] *Ibid.*

Lanka the concern was for the Indian plantation workers and the Minimum Wages (Indian Labour) Ordinance was adopted in 1927. The indigenous workers were of most concern in Africa, since the abuses were extensive under "forced labour arrangements". Local governors in the Belgian Congo were issued decrees in 1922 to allow them to establish minimum wages in their territories. The Minimum Wage Fixing Machinery Convention was established in 1928, but the British Colonial Office advocated that the colonial governments adopt legislation which would enable the governments to intervene in cases where "unduly" low wages were paid. This trend was reaffirmed in the 1930's when several minimum wage acts were issued in British Colonies in Africa as well as in the Caribbean.[42]

4.1.5. Latin America

Latin America was not far behind the Australians in acting on the need for minimum wage standards.[43] In 1918 the Argentinean government adopted the Home Work Act. Also, it is essential to recognise the reference to minimum wages in the Federal Constitution of Mexico, which was adopted in 1917. It states in Article 123, VI:

> "The minimum wage to be received by a worker shall be that which is considered sufficient, according to the conditions of each region, to satisfy the normal needs of his living, education and honest pleasures, considering him as the head of the family . . ."

This clause eventually led to the establishment of a National Minimum Wage Board in 1937, which set a national minimum wage, which covered all workers. Costa Rica, Cuba (both in 1934) and Brazil (1938) followed that trend and enacted legislation with a broader scope and protection.

It should be added that there is a tradition of government regulation of conditions of employment in Latin America, as well as economic intervention, such as the minimum wage fixing machinery. There also exists a traditional concept of a living wage in areas of Latin America influenced by Roman Catholicism. The Papal Encyclicals Resum Novarum in 1891 and Quadragesimo Anno in 1931 are general documents that codify Roman Catholic social and humanitarian laws. Labour codes were also inherent in Roman law.

4.1.6. Ideas of Free Market

As this discussion takes part in the light of economic globalisation and free market policymaking it is useful to consult one of the fathers of capitalism and ideas of the free market, Adam Smith. Smith recognised the acquirement problem and even Smith was concerned about access to food. He wrote:

[42] *Ibid.*
[43] *Ibid.*, p. 2.

> "Many who had been bred in superior classes, not being able to find employment in their own business, would be glad to seek it in the lowest. The lowest class being not only overstocked with its own workmen, but with the over-flowing of all the other classes, the competition for employment would be so great in it, as to reduce the wages of labour to the most miserable and scanty subsistence of the labourer. Many would not be able to find employment even upon these hard terms, but would either starve, or be driven to seek subsistence either by begging, or by the perpetration perhaps of the greatest enormities. Want, famine, and mortality would immediately prevail in that class and form thence extend themselves to all superior classes."

Smith recognised the dependency of access to food on the wage level. Thus, managing the wage level is essential in the free market to avoid violations of the right to an adequate standard of living and other human rights.[44]

In 1822, classical economist David Ricardo attacked the view that there could be starvation in Ireland since there was a super abundance of food in Ireland. In this quote he discusses starvation as a function of access rather than of supply

> "But say the honoble gentn. the people are dying for want from food in Ireland, and the farmers are said to be suffering from superabundance. In these two propositions the honorable gentn. thinks there is a manifest contradiction, but he Mr R could not agree with him in thinking so. Where was the contradiction in supposing that in a country where wages were regulated mainly by the price of potatoes the people should be suffering the greatest distress if the potatoes crop failed and their wages were inadequate to purchase the dearer commodity corn? From whence was the money to come to enable them to purchase the grain however abundant it might [be] if its price far exceeds that of potatoes. He Mr Ricardo should not think it absurd or contradictory to maintain that in such a country as England where food of the people was corn, there might be an abundance of grain and such low prices as not to afford a remuneration to the grower, and yet that the people might be in distress and not able for want of employment to buy it, but in Ireland the case was much stronger and in that country there should be no doubt there might be a glut of corn, and a starving people."[45]

4.1.7. Conclusion on Customs and Traditions

This activity, so early in the past century, supports the argument that wage protection is not a novel idea but one which is as old as the monetary wage itself. It should also be noted that most activities on minimum wage were for the most part

[44] *Supra* note 24, pp. 54–55.
[45] *Ibid*., p. 54.

intended to protect the rights of vulnerable workers, not to satisfy an economic strategy in the country in question.[46]

The Mexican example, of course, supports this thesis to the fullest by recognising the obligation of the State to ensure a minimum wage in order to protect the adequate standard of living of its population. By establishing that minimum wage regulations are not new to the world, or to governments is to plead to the sense of tradition and customs.[47]

Even economists recognised early that exceptionally low wages were not acceptable in our civil societies. This should lead to a smooth recognition by today's governments and organisations to the purpose and effect of the minimum wage, to protect the workers and their right to an adequate standard of living, as part of the overall population.[48]

4.2. Standards and Provisions

This thesis has asserted that in an orchestrated effort to fulfil their obligations, States must come together and establish an international, or at the very least a regional, wage monitoring mechanism, so that no State violates human rights by using wage levels as a political or economical tool. Imperative to the discussion are the tools that already exist to support these views. In other words, it is not necessary to reinvent instruments and standards, since they already exist. What has prevented them from being realised is instead, the perception of them and the implementation mechanisms.

4.3. International Standards

4.3.1. International Standards on Wages

According to, Article 23 of The Universal Declaration on Human Rights

> "(1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.
>
> (2) Everyone, without any discrimination, has the right to equal pay for equal work.
>
> (3) Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

[46] *Supra* note 37, p. 3.
[47] *Ibid.*
[48] *Ibid.*

> (4) Everyone has the right to form and to join trade unions for the protection of his interests."

Four rights can be identified in this Article, the right to work, the right to equal pay, the right to just remuneration and the freedom of association. This discussion is more concerned with the third right, a right to just remuneration.

The *travaux preparatoire* for the *International Covenant on Economic, Social and Cultural Rights*, (ICESCR) is obviously linked to this but some points could still be mentioned. The "Four Freedoms" address by United States President Franklin D. Roosevelt inaugurated the birth of several drafts to a Declaration that would later result in the final document. The American Law Institute, the government of Cuba, and The American Federation of Labour, were among those who constructed different drafts.

Article 7 of the *International Convention on Economic, Social and Cultural Rights*:

> "(a)(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
>
> (a)(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
>
> (b) Safe and healthy working conditions;
>
> (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
>
> (d) Rest, leisure and reasonable limitations of working hours and periodic holidays with pay, as well as remuneration for public holidays."[49]

Article 7 was a product of the 218th–222nd and 279th–281st meetings of the Commission on Human Rights. Although these meetings address the Article in its entirety there were several discussions on provision 7(i) and the issue of fair wages and minimum remuneration. The Commission had several concerns about this subject.[50] One fear was that a minimum wage standard would stagnate the wage levels and create a ceiling of wages. This would enable the employer and contractors to maintain the wage level at minimum wages and reduce the competition for workers, which, according to the market system, would have pushed the wage levels

[49] International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature ratification and accession by the General Assembly of the United Nations, Resolution 2200 XXI of 16 December 1966. Entry into force: 3 January 1976.
[50] *Supra* note 33, p. 227.

higher.[51] A second dilemma was the definition of the terms 'worker', whether it would include anyone who worked, as a general term or only wage earners, as a specific term. The Commission chose to follow the ILO example and use the term in its most general form.[52]

In terms of fixing wages a discussion arose about whether they should be fixed in terms of profit sharing and the cost of living. The argument that wages should be fixed according to profit was unacceptable, especially because this might lead to a legitimate reduction of wages when profits are low. The fixing scheme, which took into account that cost of living, was also rejected but by a small margin.[53]

The Committee differentiates between the terms fair wages and minimum wages. Fair wages refers to placing a social value on the work and consideration of the nature of the work. The criteria used in determining if the wages are fair or not are: level of skill, responsibility, disruption of family life, health and safety risk, and the value of output. In other words if the work involves a higher degree of health risk then the wage should reflect a compensation for that risk, if it is to be considered fair.

Article 7 uses the term remuneration rather than wages. The reason seems to be that 'wages', following the ILO Interpretation, is a narrow concept and does not include other aspects of payment for services such as bonuses and benefits. This becomes a significant factor in calculating whether the compensation allows for a decent living or not. In wage fixing bonuses and benefits would not be included in the calculation, but would in terms of remuneration.[54]

According to its reporting guidelines, the Committee foresaw the need for a minimum wage system, with several qualities, in order to bring Article 7(a) to life. It must be supervised and enforceable by law or sanction. The functions of this system would be to fix, monitor and adjust the minimum wage. It was also recognised that the system must in adjusting the minimum wage take the national economies into account, especially in terms of cost of living and inflation.

The Committee felt that worker participation must be prevalent in adjusting these standards. It was suggested that rather than trade unions participating, that an independent entity be set up to participate in the fixing, monitoring and adjusting of the minimum wage.

Article 7 makes specific reference to the link between remuneration and living standards in section a(ii). A decent living should follow the remuneration given to workers, for his or her family. Reference is made to other provisions of the convention and of course this would include Article 11, the right to an adequate standard of living. Craven makes the interesting insight that the reference made to the other provisions in the convention refers to those rights that can only be fully

[51] *Ibid*., p. 228.
[52] *Ibid.*
[53] *Ibid*., p. 229.
[54] *Ibid.*, p. 233.

realized through "personal income". This is a recognition that there are rights that can only be fully realized through adequate personal income.[55]

4.3.2. International Standards on the Adequate Standard of Living

Article 25 of the *Universal Declaration on Human Rights* states:

> "1. Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social service, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
>
> 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

Article 25 was a product of several draft articles produced by the Secretariat.[56] The primary focus of the article was the right to health. This was later understood to include access to medial attention, but also the access to adequate food, housing and clothing.

Article 11 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) states:

> "1. The State Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.
>
> 2. The State Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

[55] *Ibid*., p. 235.

[56] Those with most impact are: Article 35, right to medical care, including State promotion of health and safety, Article 39, the right to equitable share of the national income, according to the need for the individual's work and the contribution it makes to the common welfare, Article 40, the right to such help as may be necessary to make it possible to support a family, Article 41 the right to social security, including unemployment prevention and insurance, and insurance against accident, disability, sickness, old age, and other involuntary or undeserved loss of livelihood, and Article 42, the right to good food, housing, and pleasant and healthy surroundings.

> a. To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition…
>
> b. Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food."

This article differs from the original provision for an adequate standard of living, Article 25 of the UDHR, in that it is narrower in scope. The ICESCR addresses the issue of medical care[57] and special protection in motherhood.[58]

4.3.3. Human Dignity

It seems undisputable that paying a wage below the amount needed for basic existence is to deny that worker his/her human dignity. Most human rights documents regard human dignity as the basis of any ideas on human rights.[59]

4.3.4. Equal Remuneration

The principle of equal remuneration[60] could also be considered in the argument for a wage standard. The principle states that work performed of equal value should be rewarded equally. This is clearly to avoid discrimination between men and women, as well as other social groups in society. As the global economy is creating a global market and global workforce, it would seem credible that this principle would still holds a valid argument. The argument in support of a minimum wage standard or at least a wage standard, is that if there is no international recognition of decent wage levels, then workers, globally, as well as their work will be valued differently, although it may be equal in all other characteristics. The question whether remuneration is equal becomes insignificant if the wage at hand is not enough to sustain a decent life, or even inadequate to sustain life at all. It should also be recognised that equal remuneration is a reflection of the fundamental belief in equality such as the minimum wage should be a reflection of the fundamental concept of dignity.

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[57] *Supra* note 49, Article 12.
[58] *Ibid*., Article 10.
[59] The Preamble of the UDHR, ICESCR, ICCPR and the CRC state, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world. Other provision referring to the dignity of all humans are: Article 3, ECHR, 1950, Article 5, Afr.CHPR, 1986, Article 5(1), AmCHR, 1969, Preamble in the Convention Against Torture, 1984, Preamble of the Convention for the Elimination of All Forms of Racial Discrimination, 1965, Preamble of CEDAW, 1979.
[60] This right is recognized in several instruments, Article 23(2) UDHR, 1948, Article 7(a)(ii) CESCR,1966, Article 3(g) Article 11(d), and in CEDAW, 1979.

4.4. Obligation of State Parties

The argument of this thesis is the need for an international wage monitoring system, whether in terms of an international minimum wage or not, in order to uphold the rights of people to an adequate standard of living. It is in this light important to recognise the international obligation of States. In traditional international law, State Parties are the holders of legal capacity and are those which can be accused of violating international law. Although this thesis will challenge this view, but in a later chapter. At this point, the obligations of State Parties will be the focus of study.

4.4.1. State Obligations under the UDHR and ICESCR

Article 2(1) of the ICESCR expresses the state obligation:

> "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 realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

There are several parts of this obligation which relate to establishing an international monitoring system which would supervise the levels of wages as a part of the right to an adequate standard of living.

First, the ICESCR clearly states:

> "full realisation of the rights recognised in the present Covenant [shall be accomplished] by all appropriate means, including particularly the adoption of legislative measures."[61]

In that sense the Article argues that these are rights that require some allocation of resources, but for them to be fully realised they also require a legal system that supports their realisation. With no monitoring system of wages, allowing market forces to predict the minimum wage, workers will be used as just another commodity and wages can fall below the wage which could maintain their living, i.e. the continuous violation of the right to an adequate standard of living. Thus, not monitoring wages could, in the global setting that exists today, create a converse condition than originally intended.

However, if any provisions are to ever be realised they must address present conditions and the present requires that international steps be taken to establish a monitoring system that prevents countries from violating human dignity and rights by lowering their standards or not properly developing them. International action

[61] *Supra* note 49, Article 11.

that calls on States to take steps through international assistance and co-operation is not contrary to the Convention.

Although many rights may require resources, and the speediness of the action will depend on the resources allocated by the States, there are several steps that can be taken immediately. One such step is legal measures. In terms of the State obligations under ICESCR, Article 11, it is viewed to be of a progressive nature, including a sense of urgency. It has been argued that all social and economic rights depend on resources . This might be so, but one could argue that some of the rights depend on the distribution of the resources at hand, not necessarily the lack or excess of resources.

Establishing a legal framework in which any employer, State or private person, must respect the dignity of a worker and his/her right to an adequate standard of living, is pertinent to the realisation of the rights.

The UDHR and the ICESCR are part of what is commonly known as the International Bill of Rights. This assembly of human rights provisions is probably the most influential international human rights source. It is often referred to in other instruments created for purposes of promoting human rights and often the inspiration for new declarations. It is the international "standard of achievement for all peoples and all nations". It has become accepted as authoritative in most States whether they have ratified all conventions or none of them. Although the UDHR stood alone for almost 20 years, its influence has not diminished, but is now considered customary law and the Covenants strengthened its influence in 1966.[62]

4.4.2. Domestic Application

The Economic and Social Council dealt with domestic application of provisions in the *International Covenant on Economic, Social and Cultural Rights* in their General Comment 9. It identifies a central obligation by the State to "give effect to the right recognised therein". The Council feels that through the wording "by all appropriate means", in Article 2(1) of the ICESCR State Parties are provided with flexibility to incorporate the provision into their specific legal and administrative systems.

General Comment 9, however, points out two principles of international law which underlines the need for domestics application. The first is Article 27 of the *Vienna Convention of the Law of Treaties*, specifically the following provision:

> "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

This means that, when ratifying a treaty, the State Party is under a general obligation to give it effect under domestic law. This is an obligation which most States are well

[62] United Nations Fact Sheet No. 2 (Rev.1) The International Bill of Human Rights. United Nations High Commissioner on Human Rights. Geneva, Switzerland, June 1996, p. 11.

aware of. The second principle comes from the *Universal Declaration of Human Rights*. In Article 8 of the UDHR it states that:

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[63]

A counterpart to this Article can be found in the *International Covenant on Civil and Political Rights*, in Article 2, paragraph 3(b). This provides, according to the Economic and Social Council, that the only way of justifying the lack of domestic remedies is that such remedies are either unnecessary or not inclusive in "appropriate means".[64] Some instruments have special clauses for domestic application.[65]

4.4.3. International Obligation

Membership in the United Nations offers another source of obligations on States individually, as well as a group of nations. These obligations manifest themselves through Chapter IX, International Economic and Social Co-operation, of the UN Charter in which the nations of the United Nations, shall promote: higher standard of living, full employment, and conditions of economic and social progress and development.[66] Article 56 clearly states the co-operative mission: All members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purpose set forth in Article 55.[67]

This obligation includes several preventative steps such as the obligation to not allow wages to fall below the quantity needed to live adequately.

4.4.4. Moral Argument

Those who suffer from the lack of an adequate standard of living are the weakest in terms of being able to claim these rights. Those who cannot claim their rights should not be disregarded because they cannot do so. Such a mentality would be counter to the argument of human rights as universal and indivisible. Evident failure to respect

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[63] *Supra* note 32, Article 8.
[64] General Comment 9. E/C.12/1998/24 The Domestic Application of the Covenant:. 03/12/98 Committee on Economic Social and Cultural Rights. Nineteenth Session, Geneva, 16 November – 4 December,1998.
[65] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"). Adopted by the Organization of American States on 17 November 1988, San Salvador, Article 2.
[66] Charter of the United Nations. Signed on 26 June 1945, San Francisco. Entry into force: 24 October 1945, Article 55.
[67] *Ibid*., Article 59.

the human rights of any person or people must be claimed by those who are witnesses to it, or they are also guilty of human rights violations.[68]

5. ILO STANDARDS

5.1. ILO Minimum Wage History

There was an early concern by ILO Member States to monitor wages in order to secure 'an adequate living wage', for workers around the world. Establishing fair wages was to be part of improving "conditions of work" and was included in both the preambles, to part XIII of the *Peace Treaty of Versailles*, and the ILO Constitution as well as Articles 427 (Peace Treaty) and 41 (Constitution of ILO). In 1921, the ILO made an inquiry into the standards in existence of wage-fixing machineries. This inquiry enabled the ILO to engage in discussions on the subject and subsequently adopt the *Minimum Wage Fixing Machinery Convention*, No 26 and Recommendations, No 27.[69]

As the ILO affirmed its objectives in the *Declaration of Philadelphia*, it reaffirmed its apprehension about wages, as expressed in the following summation:

> "the conference recognises the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve . . . a minimum living wage [for] all employed and in need of such protection."

The *Minimum Wage-Fixing Machinery (Agriculture) Convention*, No 99 and Recommendation, No 89 were adopted in 1951 after a 1948 resolution by the Permanent Agricultural Committee and the Governing Body's request to include the issue of minimum wages into the Conference agenda. Just as agriculture was included in a special convention, so developing countries received separate attention. A separate Convention, which addressed both minimum wage fixings as well as other specific problems relating to developing countries, was adopted and named *Minimum Wage Fixing Convention,* No 131.

There are several other instruments that refer to minimum wage.[70] In addition to giving the issue of minimum wages attention in several instruments, the ILO also did so in several resolutions.[71]

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[68] *Supra* note 12, pp. 93–96.
[69] *Supra* note 14.
[70] Social Policy (Basic Aims and Standards) Convention, 1962, No 117, Labour Clauses (Public Contracts) Convention, No 94, Recommendation, No 84, 1949, The Protection of Wages Convention, No 95 and Recommendation 85, 1949, The Equal Remuneration Convention, No 100 and Recommendation, No 90, 1951, the Employment Promotion and Protection against Unemployment Convention, No 168 and Recommendation, No 176, 1988.
[71] In particular those resolutions which concerned: relations between international trade and employment, employment, income distribution, social progress and the international division of labour, industrialization, the guarantee of employment and the protection of the income of

5.2. Conventions 26 and 99

5.2.1. Objectives

Creating minimum wage machinery is an obvious objective of Convention 26, but the purpose of this machinery is clearly stated in Article 1(1):

> "[State Parties] undertake to create or maintain machinery whereby minimum rates of wages can be fixed for workers employed in certain trades or part of the trades (and in particular home working trades) in which no arrangements exist for the effective regulation of wages, be collective agreement or otherwise, and wages are exceptionally low."

Three particular characteristics of this Convention are in other words: to prevent exceptionally low wages, to protect certain trades and to provide aid to the areas of the workforce where no effective minimum wage system exists. The trades in question are referred to, in paragraph 2, as manufacturers, but not as agricultural workers. Convention 99 complements Convention 26 by specifically referring to agricultural workers in Article 1(1):

> "to create or maintain adequate machinery whereby minimum rates of wages can be fixed for workers employed in agricultural undertakings and related occupations."

Agriculture received its special convention from the fact that wages were typically lower than wages in industry and the desire to make agriculture a lucrative field of business made this provision necessary. A third reason for designing this Convention was the necessity to ensure a higher standard of living for the workers in agriculture.

5.2.2. Scope

The objective of Convention 26 hints towards the scope of the Convention. The scope depends on two criteria: one, there must be a lack of an operative system of wage regulation; secondly, the scope includes situations in which exceptionally low wages exist. The purpose of the convention is therefore to establish a legislative vehicle, which includes a legislative tool, but also a mechanism that moves to effectively set living wage rates for workers.

Because of the different character of Convention 99, it only covers agricultural workers and the scope is not conditional on certain criteria as is Convention 26. In

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workers, development, foreign debt and the social objectives of the ILO, rural employment promotion, structural adjustment, industrial relations and economic and social development.

terms of scope both conventions recognise the need to consult with both workers and employers organisations when establishing the mechanisms. [72]

5.2.3. Binding Force

The minimum wage rates which are established through theses conventions are binding on employers and workers. Wages paid may not be lower than that established in the minimum wage mechanism, unless a competent authority has granted it in connection with a collective agreement. No individual contracts, however, can be made to justify a lower wage level, according to Convention 26.[73]

Convention 99 differs in terms of exceptions. In Convention 99, exceptions can only be made, by a competent authority, on a case by case basis, as an effort to "prevent curtailment of opportunities of employment of the physically or mentally handicapped". As a ratifying State, an obligation exists to provide monitoring and sanctioning provisions in the minimum wage fixing machinery.

5.3. Convention 131

5.3.1. Objectives

Apart from the general obligation to establish a minimum wage fixing system, this convention specifically expresses its purpose to provide wage earners with "the necessary social protection in terms of minimum permissible level of wages". Convention 131 does not replace the previous conventions, rather its objectives are to strengthen and complement them. An underlying purpose of the convention is to allow for wage monitoring to become an active part in social policy and a catalyst for social and political development. The message it is sending is that a minimum wage system is both a tool of social protection and a requirement for economic development.

5.3.2. Scope

In the efforts to strengthen the previous conventions, the protection afforded by Convention 131 covers all wage earners. This is stated in Article 1(1): "all groups of wage earners whose terms of employment are such that coverage would be appropriate". Since the Committee of experts has acknowledged that the machinery in place may be adapted to national needs, it seems that any exception to the scope would have to fall under this criteria.

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[72] ILO Convention 26, Minimum Wage-Fixing Machinery Convention, 1928. Adopted by the 11th Session of the Conference, June 16, 1928. Entry into force: June 14, 1930, Article 2 and ILO Convention 99 Minimum Wage Fixing Machinery (Agriculture) Convention, 1951. Adopted by the 34th Session June 28, 1951. Entry into force: August 23, 1953, Article 1(2).
[73] Supra note 72, Article 3(3).

5.3.3. Binding Force

In Article 2(1) the Convention affirms that minimum wage levels should have legal character. Convention 131 does not provide any clause for exceptions to the established minimum wage level, as did the previous conventions. The obligations bestowed onto the State Parties include crafting a practice of sanctions, "penal or other", as a response to any violation of the minimum wage standard. The Convention states:

> "Under the same Covenants, [ICESCR] a State party in which any significant number of individuals is deprived of basic shelter and housing is, prima facie, failing to perform its obligations under the Covenant."[74]

This could be translated into the entire right of an adequate standard of living. If a State does not provide an environment in which everybody can access their minimum requirements for survival, without depriving them of their dignity, then they are not fulfilling their obligation.

6. IMPLEMENTING PROBLEMS AND COMMENTS: COMMITTEE OF EXPERTS REPORTS

In a report made by the Committee of Experts on Minimum Wage Fixing Conventions, the ratifying States identified several obstacles to the realisation of these conventions. This next section will recite some of those statements, made by ratifying States to the Committee of Experts, and then address the issue identified. Each concern will list the countries that put them forward.

6.1. Economic and Social Conditions

> "Difficulties encountered in applying the instruments in certain countries result, according to the governments, from the economic and social conditions of the country, caused either by depression in their economies, which they are taking steps to redress through structural reforms, or by changes under way towards a market economy."[75]

The countries claiming this problem were Angola, Brazil, Burkina Faso, Czechoslovakia, Mauritius, Pakistan, Romania, and Trinidad and Tobago. Another related problem according to the report was:

> "Other governments have referred to problems caused by the lack of adequate human and material resources to ensure effective application of

[74] United Nations Fact Sheet No. 21. The Human Right to Adequate housing. United Nations High Commissioner on Human Rights. Geneva, Switzerland, 1997.
[75] *Supra* note 14.

> minimum wage legislation, especially in connection with labour inspection."[76] (The governments are Nigeria and Pakistan).

As nations are opening their doors to the market economy, they will soon open their doors to the international market. When they do their labour force will become part of the international labour force. Although called labour force, it is still comprised by humans, who hold certain rights. These rights include a right to an adequate standard of living, and indirectly a right to make a wage, which may allow them to enjoy that right. The economic situation of the world today forces attention to this subject, however the economic stigma placed on this right is its weakness.

These comments made by countries, are the basis of a fundamental struggle between economic development and legal structures. Which comes first? If you are a student of international human rights law, then the legal structure must be in place before nations venture into plans of economic gains and development.

The lack of human and material resources would be critical if we looked upon the minimum wage as an economic strategy, and not as a human right. We would then be concerned about the financial situation and the profits that could be gained or not. If we view minimum wage as human rights, then resources are not a comparably relevant issue.

A fresh look on the minimum wage is needed. Minimum wage is about human rights and legal logic. The human rights purpose is to establish the right of the individual and laws are the instruments to create that scenario. The laws must reflect the rights of the individual and seek to protect those rights.

This is not to say that resources and legislative measure are not interdependent, rather that they are not interchangeable. Human rights are not interchangeable with efforts to increase resources. Since it is rather the distribution of resources that bears the fault of weak worker protection, these rights must still be claimed in an effort to shift this trend.

The minimum wage is a law, just like any other, not a tool which liberals can use to reach their ideals while conservatives, in retaliation, reach their goals by abolishing such legislation. When we call human rights universal, we do not only intend to speak of geographical areas but to claim that human rights break the boundaries of political ideals and morals. The nations of the world took a step in 1948 to create uniformity at least in regards to certain basic human rights. If a human right is used as a political or economic tool then it is worthless, because even though supplied at the moment it could be withdrawn at any given political shift in the future.

The minimum wage is one of many other institutions that must be legally in place for any country to benefit from the global market economy as well as to avoid vastly violating human rights. In addition, the legislative means of the minimum wage allow nations to implement it immediately, regardless of the developmental stage of their economy.

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[76] *Ibid.*

Any law should support the value of human life and dignity. It then follows that a minimum wage law, which is inconsistent and weak, and promotes a low standard, which could never cover an adequate standard of living, reflects a low value of human worth. This is clearly destructive to any nation in a multitude of ways. If there is one thing that any legal system should portray it should be the worth of human life and dignity. If this is a rational argument then it would not matter in what economic stage of development the country is for them to establish this law.

The Committee has not expressed a precise standing on this point, although it has recognised that the general economic status should be taken into consideration, such as inflation and cost of living. This does not mean that the Committee would support the argument to lower the wages to which basic needs could not be covered, to satisfy the economic conditions.[77] Human rights and labour standards do not exist to assist economies to reach their most productive state, rather they exist to protect humans from the negative effects such ventures can have on humans, and on workers especially.[78] This is why the Philadelphia Declaration clearly states, "labour is not a commodity".[79]

In conclusion, reality must set in while dealing with these issues. As millions are starving due to a lack of means, governments express they have "difficulties" implementing the conventions which they have ratified. The question is who hurts more from this difficulty?

6.2. Willingness of Market Players

> "Other governments have reported that the problems stem from the workers' acceptance of wages below the established rates or from a tendency on the part of the employer to pay less than the established minimum."[80]

Czechoslovakia, Honduras, Pakistan, Trinidad and Tobago supported this view.

The reason for the trend of lower wages is high unemployment. As unemployment rises many employers use the situation to lower wages, due to the surplus of the labour force (It is unlikely that wages are lower because workers rejected higher wages). This movement is counter to any human rights standard. Firstly, it violates the idea of protecting the most vulnerable in the community. Secondly, it violates the workers right to a wage that can satisfy their needs. Women, who have faced adversity in job-seeking for a long time, were unfortunately the first to accept lower wages. This was the start of a destructive

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[77] *Supra* note 33, p.236.
[78] P. Leisink, *Globalization and Labour Relation* (Northampton, Edward Elgar Publishing Co, 1999), p.13.
[79] Declaration of Philadelphia. Declaration Concerning the aims and purposes of the International Labour Organization. Adopted by the General Conference of the International Labour Organization, 26 Session. Philadelphia. 10 May 1944.
[80] *Supra* note 14.

cycle. The women accepted lower wages in fear of not being able to meet the needs of the household due to male unemployment. This, however, forced men to compete with women, and accept lower wages.[81] Now, all workers face a dual challenge, unemployment as well as low wages.

The point is that labour cannot be used as a commodity, in terms of cutting costs through lowering wages down to a standard below the cost of living. This would constitute a violation of a human right to an adequate standard of living, as well as to basic dignity. It is the government's job to protect humans from human rights violations, and by enforcing the minimum wage standard it may do so effectively.

In terms of employers paying less, the international community must recognise that in globalisation, corporations hold as much, if not more power than do the States. One could argue that corporations, especially Multinational Corporations (MNC) have an obligation to stop the negative developments of globalisation.

Universal human rights standards are traditionally part of international law, in which States are the primary subjects. In the case of wages and the standard of living the universal standard demands to be recognised at both the regional and national level. Even further, they must be recognised by each part of society, whether it be in the formal or informal sector. In other words there is a need to establish a norm.

With this comes a new view on international law in which, an adaptation to new realities and boundaries of subjects is gaining acceptance. Rosalyn Higgins, a judge at the ICJ, argues that international law is not a fixed phenomenon but a dynamic one that will adapt to the influences of decision making. The influences, whether they are States or cross the boundaries of States, are what determine the characters of international law. The actors in international decision making are also the actors of international law. Higgins believes that the distinction between subjects and objects has become irrelevant.[82]

This is also suggested in the preamble of the UDHR, in which the General Assembly calls for:

> "a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive . . . to promote respect for these rights and freedoms . . . to secure their universal and effective recognition . . ."[83]

Realising human rights is not simply a task for NGOs and international courts, but for all parts of society that effect the lives of people, the UDHR has established a general standard.

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[81] E/C.12/1998. 6. Background paper submitted by Mirta Teitelbaum, American Association of Jurists: 24/04/98 Committee on Economic, Social and Cultural Rights 18th Session, Geneva 27 April–15 May 1998.

[82] Brochure from Amnesty International. Dutch Section and Pax Christi International. *Multinational Enterprises and Human Rights*, p. 25. May be found at <http://paxchristi.nl/mne.html>.

[83] *Supra* note 32, Preamble.

In terms of MNCs, they have the obligation to conform to the national legislation of any State in which they exist. The obvious problem is when the national legislation is not compatible with international standards. If more actors were recognised in international law then more obligations could be placed onto them. In other words, MNCs could no longer justify their human rights violations by simply stating that they complied with the national legislation.

One could also imply that this argument is simply based on the inability to police their States. If a minimum wage law is established and people are breaking it then it is up to the State to identify them and proceed with sanctioning. The argument, that people are breaking the law is not a sign of an ineffective law, but might rather be a product of the government itself reducing importance of the law through political or administrative tools.

6.3. Understanding of the Law

> "In another case it has been stated that the problems originate in the political, social and economic changes taking place in the country which have entailed the adoption of a considerable number of laws, including one on minimum wage fixing, and that the workers may be having difficulties in understanding these laws."[84]

The country referred to is Romania.

It is a fair argument that structural change results in confusion of the applicable law which makes the implementation of the law difficult . This is not a indication that a minimum wage law is of no use, but that education of the law is part of the obligation of a State towards its citizens.

In this discussion it should also be pointed out how essential human rights education is for the victim's sake, as well as for the violators understanding. We are all holders of human rights, but we are also all potential human rights violators. If we accept a wage lower than the prescribed minimum wage, then we use ourselves and, eventually, the entire labour force, as a commodity, which is against any purpose of human rights.

There are several elements referring to education which I would like to comment on. The first comment is the call for a "definition transformation", because what is needed is a fresh healthy perception of wage regulation. It must be viewed as a necessity to ensure human rights rather than an economic policy. More often than not, those who propose wage regulation in the global economy are union leaders or socialistic advocates. Rather if the role of wage regulation was in the hands of human rights advocates, then perhaps the policy could be more productive.

This transformation of meaning can only come about through utilising the reference to human rights when addressing the problem of wage regulation. An

[84] *Supra* note 14.

increase of literature that approaches minimum wage in this way could much improve the catalyst for change.

The transformation of the definition must include the deletion of certain concepts. Certain concepts are incompatible with both human rights and the right to a minimum wage. Such a concept is relative poverty. The American Enterprise Institute for Public Policy Research speaks of poverty as a function of income inequality.[85] On that point I support them. However, they argue that if the middle class were to be taxed more heavily then the standard of living for this class would decrease, and so would the overall standard of living which would in relative terms leave the nation with less poor, although their actual situation would have not changed one bit. This type of perception of poverty and income as functions of economic strategies is fundamentally hurtful to human rights. Human rights are progressive and cannot be adapted to fulfil the mathematical calculation and conscience of profit hungry lobbyists.

Education of workers is the most important aspect of education of the right to a decent wage. Rights can have a life of their own if there are continuous claims to them. But if there are no claims the right is hard to establish and ensure. It is therefore important that workers are well aware of both fundamental human rights and the right to earn a wage which can supply an adequate standard of living. Local, national and international remedies to this must be clearly presented to all workers, as well as employers.

6.4. Lack of Reliable Statistics

> "One government has stated that the lack of reliable statistics on the various economic factors that should be taken into consideration is an obstacle to minimum wage fixing. Nevertheless, the Government states that the necessary measures are being taken to set up relevant technical department."[86] (Referring to the government of Equatorial Guinea).

This is a reasonable dilemma, which the ILO should assist to rectify. However there are still some comments that can be made in this area.

Criteria for calculating the minimum wage must be developed, so that all States use the same system of calculation. It is not inconceivable to construct a calculation that takes national cultural and social differences into account. If the same criteria is not used then it becomes difficult to make a true evaluation of the monitoring of international minimum wage standards and efficiency of protection. In addition there should exist a central resource base in which this criteria can be found.

There is one controversial subject concerning the current criteria recommended. ILO Briefing Note 14, breaks the criteria down into four concepts: the need of

[85] Comparing Poverty: The United States and other Industrial Countries. McKinley Blachlam. May 1997. American Enterprise Institute for Public Policy Research. <http://www.aei.org/cs/cs7721.htm> visited on 2 September 2000.
[86] *Supra* note 14.

workers, the capacity to pay, comparable wages and incomes, and requirements of economic development.[87]

Since this thesis argues that the right to a wage which can provide an adequate standard of living is a human right and therefore the minimum wage policy must be required in order to show compliance with this basic human right, two of these criteria are controversial. Both the criteria, "the capacity to pay" and "requirement of economic development" do not generate a sense of universality as most human rights do.

Another problem with this criterion is that the necessity of it is not expressed clearly. The criteria permits ratifying States to consider the ability for employers to pay their workers and even the economic situation of the State. This in reality means that this is a right dependent on circumstances, not universal and subject to wavering definitions of humanitarianism. States must be required to find solutions that best fit their capability to pay and their economic situation, but can never be given the loophole of establishing a minimum wage that is contrary to human rights. This is one of the amendments needed to the Convention in order for the ratifying States to view this convention as a labour standard and human right. It should not be forgotten that one of the cornerstones in the ILO is the right to just pay.

There have been many references made to the disastrous effects a large increase in the minimum wage could have. The immediate problem, however, is not a large increase in the minimum wage, rather it is the lowering of the value of the minimum wage which indirectly or directly occurs around the world, in the face of fierce competition for investments.

The low minimum wage standards sometimes depend on actual efforts by the government to lower wages in order to attract investment. There are also circumstances in which the minimum wage is exceptionally low in value because the adjustment of it is inadequate and untimely. Ratifying States must be pushed to establish a sound and effective adjustment system of the wage levels. The cost of this should be borne by workers, government and employers.

6.5. Informal Employees

> "The Government of another country has reported difficulties in applying the Conventions under review, caused by the small size of country's agricultural enterprises and the fact that these rarely employ paid labour since the are essentially run by family members."[88] (This country was Greece).

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[87] 'Minimum wage fixing: a summary of selected issues', Briefing Note No. 14. Last update: 15.07.1999.
<http://www.ilo.org/public/english/dialogue/govlab/legrel/papers/brfnotes/minwages/issues3.htm> visited on 15 November 2003.

[88] *Supra* note 14.

This is indeed a problem of magnitude. Self-employed work and work from home is growing rapidly throughout the world. These workers are mainly women, 90–95 per cent in Germany, Greece, Ireland, 93.5 per cent in Japan and 97 per cent in Algeria. Most of these women are paid far below the accepted average and any minimum wage standard that exists. These are the most vulnerable workers in the labour force. They live on the brink of extreme poverty and would probably not mobilise or unite to collectively fight for an increase in wages and working conditions in the fear of loosing the employment they currently hold. Asking a worker to risk losing even the lowest paying job, in fear of starvation is to violate human dignity.[89]

It has been established that any social or economic right is realized through an orchestrated effort by several policies and laws, so the fact that it would not touch everyone directly is not significant. What is significant, however, is how far-reaching a minimum wage standard could be if fundamentally implemented. If a government/State establishes a minimum wage as a right connected to the human right to an adequate standard of living then it is also taking the first steps of creating a norm.

Although popularity for government and politics is dying out, government plays a great part in human lives. I believe that because of the expertise and diversity of individuals working for governments, the governments should be the primary institutions to establish norms. This would result in the ability for any worker, whether informal or not, in the public sector or not, to claim their rights to an adequate wage, simply because of the precedent of the law on the minimum wage standard. If such a standard does not exist, then even the most informal worker does not have a threshold to compare his/her living standard against. This becomes an even greater issue as unions are losing in power many third world countries.

The argument has also been orally presented to me that many people are not formally employed or are even wage earners in the sense that I am referring to. This is a fact of the world's labour force at the moment, but it is not a counter argument to the request for a minimum wage. This gap could be bridged with the recognition that a minimum wage is an implementation policy for the right to an adequate standard of living, which is accorded to all whether a formal or an informal worker. Also, the ability to claim a minimum wage should only be conditioned to present a working relationship. It is the idea of the worker and wages that is of relevance. This relationship is a longstanding concept and is familiar to most. What is not familiar to most, is the idea that human rights includes the right to an adequate standard of living and a wage that can supply just that.

[89] *Supra* note 81.

6.6. Trade Unions

Another argument is that when countries maintain a low minimum wage it becomes useless for the worker and therefore should be deleted.[90] With this opinion follows the idea that a minimum wage may be an obstacle to collective bargaining.

This is not true. Collective bargaining is an essential part of workers' rights, but it demands a collective effort. This means that if no collective effort exists then rights are not protected, which is contrary to the idea of individual human rights, in which being born entitles you to demand certain rights, whether in a collective association or not. Again, the workers whom would most benefit from a minimum wage regulation are those which are most likely not able to organise.

As mentioned above humans also carry a negative right to association, which requires government to protect even those who are not in unions.

6.7. Government Subsidies

This is the argument that the rights discussed, in the broad right to an adequate standard of living, can be satisfied through government programs and subsidies. Government intervention has its time and place and it is clear that government must be active in fulfilling its human rights obligations. In terms of wages, however, this can be problematic. The rights in question, clothes, food, housing and care, are items which in today's free market can be attained by the individual, as long as the means are provided.

The government could step in and provide these services but one runs the risk of violating the fundamental dignity of man. As the free market and the welfare systems battle over government subsidies, the individual should at least be able to take care of his/her own basic needs. Any societal system which requires only citizens to fight for basic wages is not a sound or moral system and one with perhaps a disproportionate distribution of wealth.

6.8. National Legislation

> "The obligations arising from the right to an adequate standard of living depend, therefore, on contexts and have to be spelled out for greater precision in those different contexts. To some extent this can be done through international standard setting, but the main burden falls on the state to adopt legislation for the different situations and groups in their society, in line with existing conditions and based on appropriate assessments and indicators."[91]

[90] O. Owiti, *The Rights of an Employee in Kenya.* Series, You and the Law. Ed. Waiyaki, Nyoike. (Nairobi: Oxford UP, 1990).
[91] *Supra* note 12, p. 105.

Eide has a valid point on the primary responsibility of the State but it is exactly the difference between the treatment of workers internationally which causes the human rights violations in question.

The global market has created the international worker. If one State allows their workers to be mistreated or underpaid this effects the living standards of the actual worker, but also effects the standing and possibly the living standards of workers around the world. This ripple effect can also occur domestically, so that even if you are not an employee of an international company you will be affected by low standards. Domestic competition has its birth in international competition. So although there are domestic differences between countries world wide, the worker has become a relevant product, costing less in some countries, and more in others. This relevant context can only be bridged through an international standard on the levels of wages.

The international standards affect the national standards, which in turn affect norms in people's lives. The goal should be to establish a norm in which the minimum wage is a protector of the dignity and living standard of man. Once the norm is established through law and policy-making, men and women can rely on those norms if they are violated.

Craven criticises the minimum wage standard through the argument that it is "indirect and impartial".[92] Although this may be true, it does not have to be an argument against the establishment of a minimum wage, rather it is a fact about economic and social rights in general. Being impartial is the strength of any human right.

Most economic and social rights require the fulfilment of several sub-rights and polices to become fully realized. The right to an adequate standard of living is no different. There are several other policies and rights that must be set in motion for this right to be complete, such as subsidies for housing, agricultural policies and the right to health. Although this is the characteristic of these rights, it should not imply that simply because a measure is partial, it is not effective.

7. RECOMMENDATIONS

There are several resources to be used in order to improve the current status of international wage regulation policy. Since another thesis could be written on the various efforts which could be made to improve the status of a minimum wage system, I will constrain the recommendation to those which I feel are most reasonable and effective.

7.1 United Nations

Making the serious connection between the human right to an adequate standard of living, and the right to a wage adequate to supply that, is a task for the United Nations. All human rights channels at the United Nations must begin to recognise

[92] *Ibid.*

this as a sub-right, in order to push countries to supply their people with the ability to claim the right. The development of labour laws, such as the *Minimum Wage Fixing Conventions*, has been a task of the ILO. There is a tremendous need, since life and dignity many times depend on it, that it becomes a more serious matter for international human rights law. This can be done through the work of the United Nations.

A universal language on the subject must be developed. Concrete terms must be agreed on, which express this right as one included in human rights protection. There are arguments that the words minimum wage does not reflect the progressiveness of this right and the term "a living wage", has been debated. Whether a wage should be adequate, decent or fair is another issue that the UN should tackle.

Regardless what the words are, there must be clarity in the terms. Once the language of general wage regulation is established and used it can transform into a universal norm. I call on the Economic and Social Council, UN High Commissioner on Human Rights as well as the General Assembly to take the challenge and to include the right to a just wage into their human rights rhetoric.

7.1.1. International Human Rights Declarations on the Subject

There also needs to be a call for the inclusion of the recognition of this right in international documents in the areas of both human rights and labour relations. The Global Compact, which was a collaboration between the UN, Kofi Annan, and the business community, encourages the adherence by all private institutions to nine core principles. The principles are divided into three areas: human rights, labour principles, and the environment. Principles 3–6 include those on labour,[93] but do not mention the right to a decent wage.

This is not uncommon. Very few international texts on the subject refer to the right to a decent wage. It seems that this right simply has been drowned by diplomacy. Asking to uphold wage regulation has, as mentioned earlier, been viewed upon as an economic tool over which nations have total sovereignty. It therefore becomes essential that a push towards greater international recognition of a worker's right to a decent wage occurs and that support for it is expressed in texts such as the Global Compact. The only link to the right, which could be made through the Global Compact, is the call to respect human rights and not to be

[93] Global (Citizens) Compact, on the United Nations and Corporations. Social Watch, 23 March 1999. <http://www.socialwatch.org> visited on 4 August 2000. Principles 3-6 call businesses to uphold: freedom of association and the effective recognition of the right to collective bargaining (Principle 3); the elimination of all forms of forced and compulsory labour (Principle 4); the effective abolition of child labour (Principle 5); and the elimination of discrimination in respect of employment and occupation (Principle 6).

complicit in human rights violations, as found in principles 1 and 2.[94] The recognition for this right must be as a labour standard, as well as a fundamental human right.

7.2. International Labour Organization

7.2.1. Conventions

The efforts of the ILO should be concentrated around one single Convention. I suggest this Convention be No. 131 for three reasons. Firstly, it was created in an environment far closer to human rights ideas than the other two conventions. Its only motive is to assure wages are never below the estimated amount to live in dignity and adequacy. The other Conventions were also of this opinion, however, they had other motives.

Secondly, the Convention provides protection of a general nature or scope. There are several different definitions of scope: general scope from a single national rate, regional minimum wages, multilevel minimum wages, occupational minimum wages and industry minimum wages.[95] These can all exist alone or in combination. Following the line of argument in this thesis it is important to note that some kind of general protection should exist to signify that it is a right accorded to all, as a human right. Then, if it can be used to raise the minimum wage, alternately, according to for instance industry, that should be left to each State, under monitoring. Any exceptions, should be instituted under a time limited mandate, and be well justified. The Committee of Experts must clarify what circumstances would justify exceptions.

For this right to be recognised as a human right it must be universal, not simply a special measure which is extended temporarily or to certain groups of the population. Conventions must cover any type of worker, whether informal or formal. Simply recognising the relationship should be enough for the individual to recognise the right to a decent wage.

Lastly, the strong emphasis on the legal nature of the minimum wage is beneficial to securing effective implementation. The language in this Convention is more prone to adopt a human rights perception than the other two conventions.

As mentioned earlier, the Committee of Experts on Minimum Wage should draw up clear and precise criteria for minimum wage determination. This criteria must, again, be conducive to a human rights perspective, rather than to a labour market policy. It should not be based on the ability of employers to pay nor on the

[94] Global (Citizens) Compact on the United Nations and Corporations. Social Watch, 23 March 1999. <http://www.socialwatch.org> visited on 4 August 2000. Global Compact. The Secretary General asked world businesses to: 1. Support and respect the protection of international human rights within their sphere of influence; 2. Make sure their own corporations are not complicit in human rights abuses.

[95] *Supra* note 87.

economic status of the State. These implications can be dealt with under the implementation mechanism rather than in the formulation of the right itself.

7.2.2. Evaluation Process

Although there are several types of wage regulation, there must be an evaluation process of those policies. It seems that the most important part of making the minimum wage most effective is to adjust it and do so in a periodic manner. The main challenge for the ILO is then to supervise adjustments.

In a global economy, and for global institutions like the ILO, to detect any violations it seems important to have an international system, which unifies a certain amount of criteria, which all countries must follow when establishing their minimum-wage. The difference between countries should be represented in these criteria, and while making a uniform number is of course close to impossible, supervising standards are essential to detect any international violations.

7.2.3. Regional Monitoring

Global monitoring and assistance is difficult. The Multidisciplinary Advisory Teams, which have been set up by the ILO in 14 regions of the world, are perfect tools to utilise for the monitoring of minimum wage laws. The Multidisciplinary Advisory Team for Central and Eastern Europe (CEET) is a team of experts established by the ILO for:

> "promoting the development of democratic labour institutions and tri-partism in Central and Eastern Europe, and assisting in the adoption and implementation of policies that can steer the transition towards market economies into socially desirable directions. Particular emphasis is placed on the development of labour legislation through the ratification and implementation of ILO Conventions and Recommendations."[96]

The task for these working groups are set out as providing advise on wages and income policy and wage payment systems, and supporting the collection and dissemination of information, including translation of ILO publications into the languages of the region.[97]

Although 14 other Advisory Teams exist, few have followed the format of the CEET. CEET offers clear and valuable information on the status of minimum wages in their region. Approaching the minimum wage monitoring regionally, and inclusive of support for educating the populations of the region, as well as

[96] Welcome to ILO-CEET. Multidisciplinary Advisory Team for Central and Eastern European, International Labour Organization 12 November 1999. 25 October 2000. <http://www.ilo.org/public/english/bureau/int/magazine/31/essay.html>
[97] *Ibid.*

monitoring the progress or perhaps regress, is instrumental for the realisation of the right to an adequate wage and living. I recommend this type of monitoring format.

7.2.4. Central Resources

The ability for any person or group to identify their country's protection of the right to an adequate standard of living is essential in finding support for the policy. Consumers can choose not to support countries that do not provide economic rights and support those that do. This precise information, however, is not easily accessible or even existent today. The ILO should put forward an effort to establish a universal source (using the web perhaps), in which the individual can research the standing of his/her wage in an international perspective. This would increase the attention to these rights by employers who ignore them. The ILO has already begun such an effort through its *InFocus Programme on Socio Economic Security.* This program is devoted to respond to problems for workers created by globalisation. This program has created reports on the experience of several States with the minimum wage and is planning on securing more relevant easy access information about the status of income security around the globe.[98]

Lastly, the International Labour Organisation should have a larger role in the international economy and should work along side the World Bank, the International Monetary Fund and the World Trade Organisation to create norms respecting human rights in the global economy.[99]

7.3. States

There is a responsibility for Intergovernmental Organisations, such as the UN and ILO, to ensure compliance with their Conventions and Declarations, however, there is obviously still much that the individual States must commit to do.

The realisation of the right to an adequate standard of living calls for individuals being able to claim those rights. Most often this is done when they are denied or violated. But the complex nature of the right leaves the individual with no real outlet from which to demand the right. Through establishing so-called sub-rights that are more easily identified and easier to claim. One such sub-right is the right to a decent wage.

If a worker is paid a sum that cannot satisfy his/her needs, then the employer must be held as violating those individual human rights and must be held accountable. This, however, can only be done when a minimum wage level is legally

[98] InFocus Programme on Socio-Economic Security. InFocus Programme Home Page. International Labour Organization and Cornell University <http://www.ilo-mirror.cornell.edu/public/english/ptotection/ses/about/index.htmorg/public/english/dialogue/infocus/IFP/DIALOGUE> visited on 28 October 2000.

[99] E/C.12/1998/4. Background paper submitted by the International Confederation of Free Trade Unions (ICFTU):.19/03/1998. Committee on Economic, Social and Cultural Rights. 18th Session, Geneva, 27 April–15 May, 1998. Agenda Item 7.

established through national legislation. The primary focus is to ensure the right to a minimum wage through their legal systems. The right to a minimum wage should be ensured either through the Constitutions or the ordinary law of ratifying States. The Committee of Experts on Minimum Wage Fixing, actually suggests that all States of the world should be called to apply a minimum wage for their population because "the objective is universal in character . . . and, as already seen constitutes a fundamental principle . . ."[100] to establish accessible remedies for the worker which have their rights violated. It has been mentioned that these workers in question are reluctant to put their jobs at risk, however, the mechanism for remedy is an obligation under international treaty law, for those who have ratified the minimum wage conventions, as well as the ICESCR.

A second major influence the States could have on the process of strengthening the right to a decent wage is for countries to affirm their obligation to human rights by allowing human rights lawyers to be part of the construction of any trade agreements, and to ensure that they do not violate human rights to any degree.

The first step is for States to affirm their intentions and second to realise those intentions. The Economic and Social Council addresses the role of human rights institutions in its General Comment 10. It is clear that the Council is a strong supporter of establishing national institutions on human rights. Institutions, which enjoy autonomy must also have, influence on the administrative State. These Institutions can be used to educate the public, conduct research on the conditions of the State, monitor compliance, as well as examine complaints[101].

7.4. Human Rights Offices

Human Rights must not be monopolised by Human Rights Organisations, but they should have as many advocates as there are people in the world. Following this concept, there is tremendous need for all international organisations and private or public, to have human rights offices.

Although an internal monitoring system might not seem preferable, I believe it would be beneficial. Firstly, it creates a habit of acknowledging human rights as a part of everyday life, not only when CNN is outside the door. Secondly, I think it is more effective to deal with an organisation's human rights office, rather than for instance the marketing planners of a company. This recommendation demands that States require corporations and organisations to include human rights offices in their ventures. This is not new to the Human Rights world, which recognises the call for "all organs of society" to strive for the realisation of human rights.[102]

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[100] *Supra* note 14.

[101] General Comment 10. E/C.12/1998/25. The Role of National Human rights Institutions in the Protection of Economic, Social and Cultural Rights.

[102] *Supra* note 34, Preamble. (calls for all organs of society to be part of the realization of human rights around the world).

8. SUMMARY

To sum up, I find it imperative to urge my readers to view personal wages and personal income in a broader perspective. Take a moment and evaluate its influence on life in the 21st Century. Can we survive and truly develop as a civilisation and as democracies without adequate income for all those who work. All aspects of life are affected by personal income. There are a multitude of questions that could be asked in this area: Are parental abilities diminished when wage levels are so low that parents are forced to work 80 hours weeks to sustain family needs? What happens to the development of the child? In a worse scenario the parent cannot supply enough labour to provide for his/her family and the child is now required to work to help provide for the family. I ask what happens to that child's right to education? In turn, what is the cost to society because of the lack of parental influence and lack of education on younger generations? These and many other questions must be asked and continued to be asked until we can come to an 'adequate' solution.

OIL-EXPLOITATION IN NIGERIA: PROCEDURES ADDRESSING HUMAN RIGHTS ABUSES

Malin Käll[*]

CONTENTS

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[*] This article is based on a graduate thesis entitled "Oil-Exploitation in Nigeria – Procedures Addressing Human Rights Abuses" written for the Law Faculty of Lund University in Sweden. For writing her thesis the author was awarded a scholarship by the Swedish International Development Agency to perform a minor field study in Nigeria. The thesis in full length can be accessed through the web-page of the Faculty: <www.jur.lu.se>. The author is presently working at the District Court of Malmö, Sweden. She would like to thank Ebaye Ntan and Funmi for all their support and help given to her during her time in Nigeria. Without their help she would not have been able to write the thesis.

1. INTRODUCTION

Globalisation of the market has a major impact on human rights and the environment. Transnational corporations are often accused of human rights abuses and environmental pollution, but they are rarely able to exploit natural resources and the local population without the co-operation or at least approval of the Government of the State that is being exploited. Oil-exploitation in Nigeria is an example of this. Human rights have been violated through environmental pollution, insufficient monetary compensation and the use of force. These violations were the concerted acts of transnational corporations and the Nigerian Government. The Nigerian Government was and still is obliged to respect a number of fundamental rights under the Constitution[1] and under international law.[2]

Pollution of the environment violates the right to a clean environment specifically protected in Article 24 of the *African Charter on Human and Peoples' Rights* (ACHPR).. Living in a degraded environment also deprives the individual of the right to a life in dignity. Another violation of the right to a dignified life is extreme poverty caused by the Government though inadequate compensation for pollution and oil extraction. Severe poverty that is not serious enough to violate the right to life may still violate the right to an adequate standard of living, which entails adequate food, clothing and housing. Poverty and environmental pollution deprives individuals of their health. Article 24 (2)(c) of the *Convention on the Rights of the Child* (CRC) provides that a child is to be given "adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution".

Pollution rendering land economically useless means in practice that the individual is deprived of property and their means of subsistence. Taking oil from a people and destruction of their homes and crops are direct forms of deprivation of property. The right to property is protected in Article 14 of the ACHPR. . The ACHPR also protects the right to wealth and natural resources in Article 21. Common Article 1(2) of the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) also provides the right of all peoples to "freely dispose of their natural wealth and resources". They specifically state that "[i]n no case may a people be deprived of its own means of subsistence".

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[1] The 1979 Constitution and the 1999 Constitution have very similar human right chapters.

[2] Since April 1991 it has been bound by the *Convention on the Rights of the Child* (CRC). In October 1993 Nigeria became bound by the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic Social and Cultural Rights* (ICESCR). The *Convention Against Torture* (CAT) did not become binding on the Nigerian Government until July 2001, but there is a prohibition against the use of torture also under customary international law. The Nigerian Government has not ratified the optional protocols of the ICCPR or the CAT allowing individual petitions.

Several cases of torture and injuries have been reported. The use of force within the region has also led to several deaths and thus there have been a number of direct violations of the right to life.

The emphasis in this article is on the outcome and efficiency of the different procedures that have been used by victims of these human rights abuses. Oil-exploitation in Nigeria is very interesting to look at from that perspective. In order to bring these human rights abuses to the attention of the public and remedies to the victims many different procedures have been used. These procedures have not only been invoked within Nigeria, but also internationally.

Questions to be answered in this article are:

1. What was the effect of oil-exploitation on the oil-producing States surrounding the Niger-Delta?
2. Which Nigerian procedures have been used for addressing human rights abuses in these States?
3. Which international procedures have been used for addressing human rights abuses in these States?

2. OIL-EXPLOITATION IN NIGERIA

2.1. The Influence of Oil Companies within the Region

The importance of the oil-corporations to Nigeria cannot be underestimated. Nigeria has suffered severe and persistent regression since the mid-1980s. Between 1975 and 2000 it consistently had a negative real per capita GDP growth rate of 1.39 per cent. In 1980 Nigeria was ranked 20th in the world in terms of the size of its GDP. In 2000/2001 it ranked 57th.[3] Excessive dependence on oil export has made Nigeria's economy extremely vulnerable. 1994 oil production in the Niger Delta accounted for over 95 per cent of foreign exchange rate earnings and 80 per cent of Government revenue.[4] In 2001 more than 90 per cent of the nation's revenue was derived from oil-exploitation.[5]

When talking about oil-production in Nigeria it is often said that it takes place in the Niger-Delta. Those living in the area would however react to such a statement. They consider it wrong to classify any State that is oil producing under the Niger-Delta. The Niger-Delta is a specific geographical location with a peculiar terrain and therefore the denomination "oil-producing states surrounding the Niger-Delta" is more appropriate. Nine States situated around the Niger-Delta are oil-producing:

[3] 'Human Development Report, Nigeria, 2000/2001, Millennium Edition' (United Nations Development Programme, Lagos) pp. iii, vi, 10, 12, 17.

[4] Amnesty International. *Nigeria Military Government clampdown on opposition*, (London, 11 November 1994) p. 6.

[5] C. v Nwankwo, *Nigeria Human Rights Report 2000*, (Constitutional Rights Project, Nigeria, 2001) p. 6.

Abia State, Akwa-lbom State, Bayelsa State, Cross River State, Delta State, Edo State, Imo State, Ondo State, and Rivers State.

The Nigerian National Petroleum Corporation (NNPC) is the national oil corporation operating within the area. The major transnational corporations within the area are Shell, ExxonMobil, Chevron, Texaco, Agip, TotalFinaElf, Esso and Conoco. It is mandatory for these corporations to operate in joint ventures with the Government. The Government holds a majority share of between 55 – 60 per cent through the NNPC. Shell Petroleum Development Company of Nigeria, Ltd (SPDC) is an operator of one of these joint ventures, and the company that has been criticised the most. SPDC is entirely owned by the Shell Petroleum Company Ltd. Shell Petroleum Company Ltd is owned by the holding companies Royal Dutch Petroleum Company (the Netherlands) and Shell Transport and Trading Company (the United Kingdom). The two European companies jointly control and operate the Royal Dutch/Shell Group, a vast, international network of affiliated but formally independent oil and gas companies.

SPDC was forced to withdraw from the region due to local resistance during the 1990s. SPDC has now resumed their activities. In 2002 the joint venture accounted for over 40 per cent of Nigeria's oil production in 2002.[6] Business is expanding. To improve its relationship with the locals SPDC has initiated a series of stakeholders' workshops. Over 750 participants attended the 2002 Stakeholders' workshop. Among the participants were NGOs, community representatives, government officials, experts, SPDC staff and journalists. Mr Mitee claims that the workshops are just for show. According to him Shell has not changed and the relationship between Shell and Movement for the Survival of the Ogoni People (MOSOP) could not have been worse.[7]

3. THE EFFECT OF OIL-EXPLOITATION

3.1. Environmental Damage

Oil-exploitation has had a direct and negative impact on the environment. A report submitted by the Rivers Chiefs to the World Conference of Indigenous Peoples on Environment and Development at the Rio's Earth Summit in June 1992 stated that "we have widespread water pollution and soil/land pollution that respectively result in the death of most aquatic eggs and juvenile stages of life of fin-fish and shell-fish and sensible animals".[8] The flaring of gas and spillage of oil caused the most dramatic impact. Other sources of environmental problems were the construction of canals, roads and pipelines.

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[6] '2002 People and Environmental Annual Report' (Shell Petroleum Development Company, Nigeria, 2002) p. 52.

[7] Ledum Mitee, tried by the Ogoni Civil Disturbances Tribunal (OCDT), legal practitioner, president of MOSOP. Interview in Port Harcourt on 15 July 2003.

[8] 'Shell-Shocked – The environmental and social costs of living with Shell in Nigeria', *Greenpeace Report*, (Greenpeace International, Amsterdam, July 1994), pp. 11–13.

One way oil companies respond to demands for increased environmental protection has been to deny that the degree of environmental deterioration is as bad as claimed. Shell has declared "the Delta is not and never will be an area devastated by the Industry".[9] To prove that this is the case SPDC frequently flies journalists and others over the area.[10] This method for proving that there is no environmental destruction is criticised. It is not visual pollution that is the major threat posed by oil activity, but rather toxicity. That cannot be detected from the air. The company claims that the effects on the landscape are limited because SPDC facilities only cover a small share of the total area of Ogoni land. Shell has also implied that even if the environment was devastated, the devastation may not be due to oil-operations but due to other causes such as population increases and the construction of dams. For example Shell has claimed that there is no evidence supporting claims that gas flaring causes acid rain.[11]

It is however not possible to claim that oil-exploitation does not have any impact on the environment and Shell has made a large number of public statements that it will improve environmental protection. Shell promised that if it was allowed to resume its activities within Ogoniland its environmental practices would improve.[12] People living in the area say however that it is mostly the level of propaganda that has changed. There is still constant pollution caused by oil spillage, gas flaring, leakage and other discharges into the environment.[13] Companies may even have become more careless.[14] At the 2002 Stakeholders' workshop participants demanded more resources dedicated to environmental impact assessments, a stop to gas flaring, surveillance and maintenance of oil pipelines, and improved waste management.[15]

Another way of avoiding responsibility for environmental damage is to place responsibility of the spills on the communities themselves. Shell maintained that spills occurring after the withdrawal of the company in 1993 were due to threat of violence from the communities. Shell staff was not able to safely shut down and secure the 96 wells in the area before leaving. SPDC staff had also been unable to clean-up oil spills or to monitor local contractors hired for clean-up works.[16]

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[9] 'Human Rights and Environmental Operations Information on the Royal Dutch/Shell Group of Companies', *Independent Annual Report* (Shell International, 1996–1997) p.2.
[10] Funmi Elesha, Public Affairs, Shell Petroleum Development Company of Nigeria Ltd. Interview at the Eastern Division, Port-Harcourt on 16 July 2003.
[11] "Final Draft for discussion with the World Council of Churches, Comments by Shell to the WCC Report "Ogoni – the struggle continues"", (Shell International, London) pp. 2, 4–5, 14.
[12] 'Shell Nigeria offers plan for Ogoni' (Shell International Ltd, News Release, 8 May 1996).
[13] Legbersi Saro Pyagbara, Programme Officer, Movement for the Survival of the Ogoni People, Interview in Port Harcourt on 14 June 2003.
[14] Lucius Nwosu, legal practitioner specialised in cases for compensation for environmental pollution. Interview in Port-Harcourt on 17 July 2003.
[15] 'Stakeholders Workshop Report' (Shell Petroleum Development Company, 2002) p. 10.
[16] *Supra* note 11, pp. 9–10.

Another common excuse for oil spills is vandalization by the communities. There are several examples of this and there is no doubt that it is taking place. In June 2003 15 people suspected of vandalism were arrested.[17] Without doubt much of the spills are however due to bad maintenance. Shell admits that about 50 per cent of the oil spilled is due to corrosion of ageing facilities.[18] Shell has however found a way of also defending damage evidently caused by its operations. According to Shell much of the criticism relates to old practices. Most of the production infrastructure was installed in the 1960s and 1970s when requirements were not so high. Nigerian regulations on environmental standards, based on the standards in the US at the time, were not introduced until 1992. Not satisfied with that explanation critics have accused Shell of racism due to their differing standards between production in developed and developing countries.[19] Shell has replied that different standards depend on where the operations take place: "Countries may aim for similar environmental standards, but at any time they will be at different stages of development. Companies operating in such a setting will be similarly affected." [20] Consequently people should not expect a company to operate above the standard.

Shell admits that there is no use to "pretend all is perfect in Nigeria", but points out that important improvements have been made and that SPDC is more protective of the environment than other companies in the region. I believe that there is some truth in this. In 2002 SPDC achieved 19 new ISO 14001 certificates covering 85 facilities and three major operations and services.[21] In July 2003, SPDC put together a team to monitor and ensure compliance with international standards and announced that the company would soon start ISO 9001 auditor training for field staff.[22] Eleme Petrochemical Company Ltd on the other hand reported that audits during 2002 had shown major deficiencies and shortfalls in the ISO9000QMS installation and eventual certification. [23]

SPDC points out that both oil spills and gas flaring have been reduced. In 2002 there was a 13 per cent reduction in number of spills and a 74 per cent reduction in volume compared to 2001.[24] Measures taken for reducing the number oil spills included improving the equipment, educating staff and improving response capability.[25] In July 2003 SPDC announced that it had invested about USD 5 million

[17] K. Ebiri, 'Navy arrests 15 suspected oil pipeline vandals in Rivers', *The Guardian*, 26 June 2003, p. 7.
[18] *Supra* note 11, p. 7.
[19] 'Unedited text of Ken Saro-Wiva's statement to the Ogoni Civil Disturbances Tribunal', in *Ogoni Trials and Travails*, (Civil Liberties Organisation, Lagos, 1996) p. 79.
[20] *Supra* note 11, p. 23.
[21] S*upra* note 6.
[22] L. Iba, 'Shell raises health, safety team', *The Punch*, 24 July 2003, p. 38.
[23] *Petrochem News* (in-house magazine of Eleme Petrochemical Company Ltd, April 2003) p. 16.
[24] S*upra* note 6, pp. 42–43.
[25] S*upra* note 15, pp. 24–25.

on replacing the old pipelines.[26] Gas flaring has decreased rapidly. There is a drive to end all routine gas flaring by 2008.[27]

3.2. Distribution of Benefits

The region has generated significant financial resources. But who has benefited from this profitable business? Much has gone to the Federal Government of Nigeria. First of all the Government has been the official owner of all oil and gas since 1969.[28] Secondly, the Nigerian National Petroleum Corporation (NNPC) was holding an equity interest in joint ventures with all the transnational corporations exploiting oil. Shell has estimated that from when it first started its operations in 1958, to until the mid-1990s, about 79 per cent of the profits of the oil produced has gone to the Nigerian Government in taxes, royalties and equity stake.[29] In 2002 the private companies received a fixed margin within an oil price range of USD 15 to USD 19 a barrel. At USD 19 per barrel the Government took in taxes, royalties and equity share USD 13,78 per barrel.[30]

There are different ways of channelling money to the communities. Communities can be given a fixed share in the oil revenue, compensation for land acquired by oil companies, compensation for environmental pollution, employment or contracts to local businesses, and development projects.

The 1979 Constitution simply gave the National Assembly the right to freely decide on revenue allocation to the States from the federation account. For many years the oil-producing States had no right to a share of the revenue accrued from mineral operations. In 1992 however it was decided that "[a]n amount equivalent to 1 per cent of the Federation Account derived from mineral revenue shall be shared among the mineral producing States based on the amount of mineral produced from each State" whether onshore or off-shore. Three percent was to be paid into a fund for the development of the mineral producing areas.[31]

Today more money flows from the Federal Government to the Delta region than during the military regime. Two measures have been taken. Firstly, the *Niger Delta bill* was adopted reserving a share of the profit for the region of origin; secondly, the Niger Delta Development Commission (NDDC) was created.

Section 162(1) of *the Constitution of the Federal Republic of Nigeria 1999* provides that revenues collected by the Federal Government shall be paid into the

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[26] L. Iba, 'Shell spends $5m on crude oil pipelines', *The Punch*, 24 July 2003, p. 36.
[27] S*upra* note 6, pp. 24–25, 39.
[28] The Petroleum Act 1969. The Constitution of the Federal Republic of Nigeria 1979 para. 40(3).
[29] *Supra* note 11, pp. 3, 7.
[30] 'Memorandum of Understanding 2000', *supra* note 6, pp. 6–7.
[31] Para. 6 Allocation of Revenue (Federation Account, etc.) (Amendment) Decree No. 106 of 1992. This decree was an amendment to the Allocation of Revenue (Federation Account, Etc.) Act, Chap 16. Laws of the Federation of Nigeria.

Federation Account. From the account, money is distributed to the States. Subsection (2) of section 162 of the 1999 Constitution empowers the National Assembly to determine the formula used for distribution of the Federation Account. The formula must however comply with one condition: "[T]he principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources." This principle means that when parts of the revenue to the Federation Account come directly from oil-production, at least 13 of this revenue is to be directed back to the oil-producing State. The National Assembly has enacted a formula through the *Niger Delta bill* which provides that the principle of 13 per cent derivation allocation to the mineral producing States, as provided for in the Constitution, shall be enforced in relation to the oil-producing States.

Of the 13 per cent of the oil-revenue that goes back to the region, 15 per cent is reserved for the NDDC.[32] In addition to the contribution from the Government any oil producing or gas processing company operating in the Niger-Delta Area must contribute with 3 per cent of their total annual budget to the NDDC.[33] The Commission was created to formulate policies and implement projects in the field of environmental protection and economic and social development in the nine oil-producing States surrounding the Niger-Delta. The Commission is under direct control of the President.[34]

NGOs are however very critical of the NDDC claiming that they do not achieve any meaningful results. Too much administration has made it highly inefficient. It is even questioned if the Commission was ever even intended to function.[35] The NDDC replies that many are disappointed because they expected rapid change. The NDDC has however only been operative for the last two years. During this limited period of time many projects have been completed.

The NDDC admits that there are some administrative problems, for example co-ordination between the NDDC and the State and local governments. It is believed that with the expected arrival of the German Gesellschaft fur Technische Zusammenarbeit plan (GTZ-plan) co-operation will improve. The GTZ-plan is a comprehensive plan for development of the region being drawn by the German Gesellschaft fur Technische Zusammenarbeit. The NDDC and the State and local governments will then decide who will be responsible for implementing which part of the plan and overlapping will be avoided. There is however not yet any agreement on the allocation of projects or how the actual implementation of the plan will be executed.[36]

Shell has been criticised for being unwilling to ensure that money distributed from the Government to the region is effectively used. In response to this criticism

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[32] O.J. Goehwa, Manager of Corporate Affairs at the Niger Delta Development Commission. Interview at the NDDC office in Port-Harcourt on 14 July 2003.
[33] Niger-Delta Development Commission Act, No. 2 1999, para. 14.
[34] *Ibid.*, para. 7.
[35] *Supra* note 7.
[36] *Supra* note 32.

Shell replied: "The distribution of royalties and taxes is clearly a matter for the Nigerian Government and the Nigerian people."[37]

During the 1990s there were complaints that oil companies did not pay sufficient compensation for land, crops and environmental pollution. The people complained that they were only paid for the crops growing on the fields and not for the land itself when Shell acquired the land in the Delta. Shell argued that all compensation for land was to be paid to the Government, the owner of all land since 1978.[38] Shell claimed that additional compensation was still being paid to the original owners.[39] In 2001 it paid over NGN 537 million as compensation for land acquisition, tenement rates, ground rental and different fees.[40] Many are still disappointed. In July 2003 the Ijaw group in the Burutu Local Government area of the Delta State claimed that Shell has yet to pay for the property and accrued arrears totalling NGN 200 million. Instead of paying this money Shell is alleged to have paid NGN 5,8 million to the former Burutu Council Chairman.[41] During the 2002 Stakeholders' workshop participants demanded increased compensation for environmental pollution.[42]

Locals demanded that they were to be employed within the oil-companies and their firms offered contracts. Employment and contracts were instead often offered to foreigners or Nigerians from other parts of the country. Most of the contracts are still awarded to businesses coming from outside the region, but the situation is improving.[43] When Shell Petroleum Development Company of Nigeria, Ltd (SPDC) in June 2003 announced that the crude oil production capacity of the Kokori Flow station had been increased a local contractor performed the required work.[44] Awarding contracts to locals is however creating conflicts between and within communities. Some claim that this is the intention of oil companies. Oil companies admit the existence of conflicts, but deny that this is their aim.[45]

The most critical point seems to be the issue of employment. Employment is not given to the locals but to friends coming from other parts of Nigeria. Promises by the company to employ locals are persistently made and broken.[46] A representative of the peoples of Abonchia stated: "However we appeal that qualified members of

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[37] *Supra* note 11, p. 3.
[38] Land Use Decree of 1978.
[39] *Supra* note 11, p. 11.
[40] S*upra* note 15, p. 32.
[41] C. Okafor, 'Ijaw group ends feud with Shell', *The Guardian*, 21 July 2003, p. 6.
[42] S*upra* note 15, p. 10.
[43] Oronto Douglas, legal practitioner, Deputy Director of Environmental Rights Action (Friends of the Earth Nigeria). Interview in Port-Harcourt on 14 June 2003.
[44] L. Iba, 'Kokori's flowstation capacity increases to 90 000 barrels', *The Punch*, 12 June 2003, p. 35.
[45] Amechi Nwafw, Eleme Petrochemical Company Ltd (a subsidiary of NNPC). Interview at the Eleme refinery, Port-Harcourt, on 16 July 2003.
[46] *Ibid*. and George Ohindo, security staff at Eleme Petrochemical Company Ltd.. Interview at the Eleme refinery, Port-Harcourt, on 16 July 2003

the Host Communities be considered for recruitment into vacancies in middle level and management positions as against the present practice whereby recruitment into such positions is secretly done to the disadvantage of members of the Host Communities . . .".[47]

Shell claimed that in 1995 it had paid USD 25 million for development projects in Ogoni communities alone. The communities on the other hand claimed that projects embarked upon by Shell in 1995 were not worth as much.[48] When SPDC left the Niger Delta it presented a plan of action with development projects that would be implemented if it was allowed to resume its activities.[49] At its return SPDC started several initiatives promoting community health, education, micro credit and business development. In 2002 SPDC spent USD 67 million on community development programmes.[50] In 2003 SPDC announced a contribution of USD 50 million in the provision of social infrastructure in the Niger Delta.[51] Even if international oil companies have increased the amount of money spent on projects, they are accused of poorly monitoring the actual implementation of the projects. SPDC did not want to comment this criticism.[52] Staff at NNPC rejected the allegation that projects were not implemented.[53]

3.3. Local Movements

Loss of sources of income, environmental degradation and knowledge of the unjust distribution of the revenue derived from oil-exploitation gave birth to local movements fighting against oil-corporations and the Government. The first and the most well known movement arose in the Ogoni area. The Movement for the Survival of the Ogoni People (MOSOP) was founded in 1990 with the intention of uniting the Ogoni people. The first president of MOSOP was the Nigerian writer and poet Ken Saro-Wiwa. Demands by the Ogoni people were outlined in the Ogoni Bill of Rights (OBR). The three key demands were autonomy, the right to use a fair proportion of the economic resources derived from their land and the right to control their environment.

What the OBR underlined with its demand for autonomy, that they wanted their own State and not only to be administered in the local government, which has little power.[54] Later development moved towards making the local governments even less powerful. In July 2003 Obasanjo suggested restructuring the local governments by replacing the system of public voting of local government representatives with a system of civil servants appointed by the State governments. Publicly the

[47] *Supra* note 23, p. 8.
[48] *Ogoni Trials and Travails* (Civil Liberties Organisation, Lagos, 1996) p. 14.
[49] *Supra* note 12.
[50] S*upra* note 6.
[51] D. Soni, 'Shell invests $50m in Niger Delta, *The Punch*, 30 June 2003, p.11.
[52] Elesha, *supra* note 10.
[53] Nwafw, *supra* note 45.
[54] *Supra* note 19, pp. 76–77.

Government claims that the people of oil-producing States are involved in the decision-making. Before the Niger Delta Development Commission (NDDC) was formed MOSOP suggested a fund, to which each Niger Delta People could turn for financing of projects, instead of creating a whole new institution with high administrative costs. The Federal Government refused to accept the proposal. Now that the NDDC has been created it has launched a master plan for public participation. Saro at MOSOP maintains that such participation does not take place.

Other demands were: compensation for the taking of land, just and retrospective compensation for all victims of environmental and human rights abuses, employment of indigenous in the oil companies, the release of Ogoni detainees and demilitarisation, and funding and completion of an independent environmental assessment and audit which was to be used as the basis for an environmental restoration. Finally, they demanded release of all internal files pertaining to the relationship between Shell and the military and all documents relating to payments, gifts, or contracts to different individuals within Ogoni.

3.4. Use of Force

Violent clashes took place between the communities on one side and army, police and security staff on the other. Violent conflicts also occurred between communities and even between groups within the communities. The violence eventually forced Shell to withdraw from Ogoniland in 1993. The role of the Government and the oil corporations in these conflicts is very much disputed.

Allegedly the Mobile Police Force, the local police, and soldiers have been killing people and destroying houses to protect the facilities of oil-corporations and to strike down protests. In December 1993 there were disturbances in the areas around the Ndoki Waterfront, Port-Harcourt. Thousands were rendered homeless and over 100 people were killed. Government authorities claimed that is was an ethnic clash between the Ogonis and the Okrikans, but military precision and use of sophisticated weapons is evidence of Government involvement.

A Commission of Inquiry that was set up reported in part: "[E]vidence before the Commission suggests a situation in which one well prepared party caught the other unsuspecting party sleeping in a series of attacks co-ordinated with military expertise and precision . . . The disturbances should not be described as a communal clash as it was nothing of the sort." [55] The attackers had "planned and executed with brutal thoroughness the actions".[56] Concerning weapons used it stated: "The evidence before the Commission leaves none of the members in doubt that dangerous weapons were freely and expertly put into use . . . explosive guns and petrol bombs were used in an manner suggestive of long practice . . ."[57] The removal

[55] Lt-Colonel Komo set up a Commission of Inquiry headed by Major Paul Taiwo. The Commission was inaugurated 22 December 1993. Main Report p. 9.
[56] *Ibid.* p. 67.
[57] *Ibid.* p. 8.

of all police from the area prior to the attacks also implies that the attacks were instrumented by the military. In the end however the Commission came to the conclusion that the clash was rather a result of the Government not acting than a result of Government acts. It was the apathy of the Government towards the disputes around land ownership and discrimination that had started the conflict.

It should be noted that there have also been conflicts within the communities living in the Niger Delta. In 1993 MOSOP became divided between the youths (who declared their support for Ken Saro-Wiwa), on the one hand, and the traditional rulers, on the other. On 21 May 1994, four conservative Ogoni leaders were murdered in Gokana Kingdom. Ken Saro-Wiwa, Ledum Mitee and a number of other Ogoni leaders were arrested and accused of being involved in the murders. The human rights situation deteriorated considerably after the murder of the Ogoni leaders.[58]

In February 1995, after being arbitrarily detained eight months without official charges, Ken Saro-Wiwa and the other Ogoni leaders accused of killing the four conservative Ogoni leaders were tried by the Ogoni Civil Disturbances Tribunal (OCDT), a special military tribunal. It was created by the Rivers State authorities through the *Special Tribunal (Offences Relating to Civil Disturbances) Edict 1994*, on the basis of the *Civil Disturbances (Special Tribunal) Decree No 2 1987*. The pre-conditions for creating the Tribunal were not fulfilled. The Tribunal convicted the accused on the basis of a definition of murder that was not consistent with the Nigerian Criminal Code. It further denied the accused the right to appeal, the right to a defence and ignored the presumption of innocence.

Late October 1995 they were sentenced to death and shortly thereafter they were executed. Following the execution of Ken Saro-Wiva 3000 policemen and over 1000 security operatives were deployed to boost the men of the Internal Security Force of Rivers State. More then ever before the human rights of the Ogonis were violated.[59] The struggle of the Ogonis did not stop with the death of their leaders, but continued.

People living in the Niger Delta region hoped that the transition to democratic rule in 1999 would end their suffering. This was however not the case. People have become aware of their rights, but they still lack the means to enforce them. In spite of the removal of the Rivers State Internal Security Task Force from Ogoniland in 1998 protests are still at times met with arbitrary arrests, beatings and sometimes killings by the State governments. [60] The Shell Petroleum Development Company of Nigeria, Ltd (SPDC) reports that community incidents have increased lately, from 245 in 2001 to 282 in 2002. There has also been an increase in rig blockades and the

[58] S*upra* note 4, p. 5.
[59] *Supra* note 48, p. 21.
[60] Mr. Ufuoma J Efemuai grew up in the Niger Delta area and now lives in Port-Harcourt. He works as a project engineer working for oil corporations in the Niger Delta. Interview in Port-Harcourt on 14 June 2003.

shutdown of flow stations. There were 24 hostage-taking incidents and 74 violent incidents against SPDC staff in 2002.[61]

Mr. Efemuai claims that the Government not only chooses to not prevent or stop conflicts between groups, but even supports these conflicts. This because if unity was created between these clashing groups the share of oil revenue flowing to the pockets of members in the Government would decrease.

The level of involvement of the SPDC in the conflicts is disputed. It is alleged that SPDC has used their financial power to create conflicts in the region, armed a private military force, supplied weapons and financial support to the Nigerian military and police force and in other ways co-operated with Governmental authorities. Violence has served Shell in two ways. First violence was used to protect its facilities. Secondly conflicts between and within communities made it more difficult for the locals to demand compliance with international norms protecting the environment and fair distribution of benefits.

National and international observers claim that Shell's practice of payments through the awarding of contracts to traditional chiefs in communities, their payments of compensation for environmental pollution, and the distribution of development projects are deliberately aimed to corrupt chiefs and divide communities. Even if the actual aim of Shell is disputed it is clear that violent conflicts did occur between groups who benefited from Shell's operations and those who did not. [62] The Ijaws claim that Shell paid money due to them to the former Burutu Council Chairman with the aim of instigating internal fights.[63] On 21 January 2000, in Ughelli, Community leader Chief O Fashe was killed by the police. Prior to this incident the youths from Ughelli had requested NGN 4.2 million from Shell as compensation for pollution. Shell claimed that the money had been paid to the chief. When the chief refused to release the money a violent clash erupted and the traditional ruler was killed. The Divisional Police Officer in charge decided to revenge his death and shot Chief Fashe.[64]

In response to community resistance Shell armed a standing security army of over 1000 men between 1993–1995.[65] Shell admits that 107 Beretta pistols were purchased for the police assigned to SPDC for guarding its people and property. Shell stated that due to violent crimes involving the use of arms in Nigeria unarmed men would not adequately be able to protect SPDC people and property. Shell claimed that the use of pistols by those police officers was common practice in Nigeria and subject to strict supervision. The guns had not been used by anyone other then the SPDC police.[66] Men interviewed by NGOs maintained that not only Beretta pistols had been used, but also "pump action shotguns, automatic rifles, and

[61] S*upra* note 6, pp. 4, 12.
[62] *Supra* note 9, p.8.
[63] Okafor, *supra* note 41.
[64] Nwankwo, *supra* note 5, p. 14.
[65] *Supra* note 48, p. 7.
[66] *Supra* note 11, pp. 17–18, 25.

revolvers". An interviewed police constable maintained that there was no account of bullets. Other constables maintained that bullets were recorded, but that Shell had more bullets than registered.[67]

There are several instances when SPDC has been accused of using the Nigerian police force and army for protecting its operations. Shell has denied that it has armed, paid or in any way supported the Nigerian military or police. One instance when Shell support to the army has been claimed is in the attacks which took place in September 1993 against Ogoni villages on the Adoni border. It was claimed that the troops used boats belonging to Shell and Chevron. Witnesses also stated that on the days of the attacks helicopters which Shell often chartered were seen flying over the area.[68] Shell claims that the identification of the helicopters as Shell helicopters was impossible. The only distinguishing mark on such helicopters was a small mark on the fuselage that was not possible to detect from the ground.[69]

Shell continuously denied its involvement in the violent clashes. Instead the company agreed with the Nigerian Government that the outbreaks of violence were ethnic clashes.[70] Shell however later admitted to two instances in which it made payments to the military but disputed the claim that the soldiers were paid or directed to suppress dissent.[71] Shell also later admitted that the security forces had been accompanied by Shell staff in SPDC helicopters.[72]

Shell also denied that SPDC was involved in Nigerian policies promoting the use of violence. It claimed that multinational corporations should not interfere with national politics, but rather adapt to the legal and political framework that is offered: "While it is not the place of multinational company to interfere in the legal or political processes of any country we will continue to promote humanitarian values and may on occasion feel it helpful to intercede, as in this case, either privately, or publicly."[73] Shell further stated "it is not for a multinational group of companies such as Shell to interfere in the legal processes of any sovereign nation". [74]

4. NIGERIAN PROCEDURES ADDRESSING THE HUMAN RIGHTS VIOLATIONS

After this presentation of oil-exploitation in Nigeria, its effects and human rights violations of the Nigerian Government connected to oil-exploitation, I will now start

[67] *Supra* note 9, p.9.
[68] *Supra* note 19, p. 56.
[69] *Supra* note 11, pp. 17–18.
[70] 'Operations in Nigeria' (Shell International Petroleum Company, Briefing Note, May 1994).
[71] This statement was made in a letter dated 6/11/96 from Eric Nickson, Head of Media Relations Shell International, to Paul Brown and Andy Rowell. *See supra* note 9, p. 9.
[72] *Supra* note 9, p. 10.
[73] Mr. Herstroter, 'Shell Reaffirms Support for Human Rights and Fair Trial' (Shell International Ltd, News Release, 30 January 1996).
[74] Mr. Herstroter, 'Call for Reconciliation at Shell AGM' (Shell International Ltd, News Release, 15 May 1996).

looking at Nigerian procedures that have been used for addressing these human rights violations within the area.

First I will look at cases in Nigerian courts. It is not possible to successfully initiate cases against the Nigerian Government for excessive use of force within the region as long as the judiciary and the police are not independent. There have however been a large number of cases concerning compensation for environmental pollution and some of these will be analysed. So will also an important case concerning compensation for oil taken from the region. Secondly, in this chapter I will look into the use of national inquires and commissions initiated by the Nigerian authorities.

5. NIGERIAN COURT CASES

5.1. Cases Concerning Use of Force

With the exception of a brief period of civilian rule from 1979 to 1983 different military regimes were in power from 1966 until 1999 when democracy was formally installed. With the judiciary and the police under the control of the alleged perpetrators there can be no prosecutions of those responsible for the use of force and destruction of property.

In 1993 General Abacha took power. Abacha signed the Constitution (Suspension and Modification) Decree No 107 of 1993 restored the 1979 Constitution, but suspended and modified the Constitution to further ensure the General's control over legislative and executive powers. Decree 107 provided absolute immunity from judicial review of any decree issued after 1983, including Decree 107 itself. *The Federal Military Government (Supremacy and Enforcement of Powers) Decree No 12 1994* stipulated that no civil proceedings should be instituted in any Court with respect to any step taken by the Federal Military Government. It further stated that no Court could decide on whether human rights guaranteed under the 1979 Constitution had been contravened.

The military influence of the Ogoni Civil Disturbances Tribunal was obvious and a number of human rights violations were committed during the detention and trial of Saro-Wiwa and the other Ogoni leaders accused of murder. The difficulties with using the national courts for seeking protection of fundamental rights were clearly revealed. The defence counsel filed several applications at the Federal High Court of Port-Harcourt and also made appeals to the Court of Appeal of Port-Harcourt, without success. Instead of preventing the trial the courts tended to delay their judgements until it was too late. One example of such a delay is the treatment of an application brought under the Fundamental Rights (Enforcement Procedure) Rules, 1979, claiming arbitrary detention of the accused.[75]

[75] For a more detailed description see my graduate thesis in full length accessible through the webpage of the Law Faculty of Lund, <www.jur.lu.se>.

Upon Abacha's sudden death in June 1998, General Abdul-Salami Abubakar became Head of State. He committed himself and his government to a transition programme that would lead the country to democracy. Under the transition regime, human rights violations decreased, but continued. In 1999 democratic rule was formally installed. With Obasanjo in power the human rights situation continued to improve.

A necessary step in democratisation was to abolish the Constitution (Suspension and Modification) Decree No 107 1993, signed by Abacha and a new Constitution was adopted in May 1999. Many decrees prohibiting courts from issuing any rulings with respect to steps taken by the Federal Military Government or any allegation of violations of human rights guaranteed under the Constitution were repealed in 1999.[76]

Section 6 of the *Constitution of the Federal Republic of Nigeria 1999* vests judicial power in the courts created by the Constitution. Even if the judiciary is formally independent the reality of the situation can be a different matter. In practice the executive and the judiciary are still very connected and those working within the Government do not always respect decisions by courts.[77] Evidence of the dependence of the judiciary on the Government is shown by the length of the trials, which seems to depend on the interests involved.[78] Even if problems remain independence of the judiciary has improved lately.[79]

Factors still threatening the judiciary are corruption among judges and lack of resources. The judiciary is infected by corruption, not only on the part of justices, but also on the part of lawyers and judicial staff. [80] Corruption is especially widespread in the magistrate's courts.[81] According to Frances Ogwo The existence of bribes make it particularly difficult for people to bring cases to court when transnational corporations are involved. Companies have enough resources to buy witnesses, experts, and even whole communities. Transnationals are further able to pay qualified legal advisors during long periods of time. An insufficient number of judges, tedious and cumbersome procedures, and inadequate facilities are other reasons for undue delays.[82]

Members of the police, security forces or SPDC staff have still not been prosecuted for excessive use of violence. The prosecution of locals having used force is also rare. Impunity is a recurring theme in cases of political violence in Nigeria. When arrests are made police target low-level thugs more often than the

[76] The Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No 63 of 1999.
[77] Douglas, *supra* note 43.
[78] Frances Ogwo, Programme Officer at the Human Rights Law Service. Interview in Lagos on 17 June 2003.
[79] Mitee, *supra* note 7.
[80] 'Testing Democracy: Political Violence in Nigeria' (Human Rights Watch Vol. 15, No. 9 (A) – April 2003) pp. 30–31. Nwankwo, *supra* note 5, pp. 55–56.
[81] Aina Yemisi, 'Judge decries corruption in judiciary', *The Punch*, 30 June 2003, p. 7.
[82] Nwankwo, *supra* note 5, p. 55.

politicians who sponsor them. Policemen have reported several times that they have received instructions from local politicians to release suspects. The trend seems to take the form of arbitrary arrests to appease the demand for action, but once the dust has settled the suspects are released.[83]

5.2. Compensation for Pollution

In the Federal High Court, Port-Harcourt almost all the cases filed between 1994–1995 were against oil corporations for compensation. Most of them were against Shell, some of them against Chevron. Although the cases are large in number there are difficulties with turning to courts for compensation for environmental pollution. According to Lucius Nwosu most of the judges at the lower levels are not biased. At the Supreme Court level however judges are reluctant to rule against the corporations because of fear of loosing profitable connections.

One major problem is that ordinary people with little resources cannot afford to litigate. The procedure has been made even more expensive by transferring the jurisdiction over all claims for compensation for environmental damage from oil companies from the State High Courts to the Federal High Courts.[84] Instead they may settle their claims through negotiations. It cannot however be a matter of true negotiations since the parties are too unequal when it comes to financial power and education. The major problem is however that the procedure is too long. Corporations have the financial resources to litigate for longer periods and often use delay tactics. Often the corporations delay payment by not implementing the negotiated agreements.[85] We will look at how the courts have ruled in such cases.

The following is an example of how SPDC has used delay tactics. Villagers claimed compensation for a blockade from 1966 of the plaintiffs' Utu Iyi Efi creeks and ponds at Oguta farmlands. After negotiations SPDC agreed in January 1985 to pay compensation. The applicant claimed that payment was not made and issued a summons in May 1985. The Shell Petroleum Development Company of Nigeria, Ltd (SPDC) filed a motion for an order to dismiss the action on the ground that according to Nigerian law there cannot be a suit more than 6 years after the cause of action arose. The Court of Appeal concluded that when there has been an admission of liability the time will stop running. Negotiations after SPDC had admitted liability did not prevent a future suit because the company had broken the agreement.[86]

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[83] *Supra* note 80, pp. 15, 30–31.
[84] Nwosu, *supra* note 14.
[85] *Ibid.*
[86] *Nwadario* v. *Shell Petroleum Dev. Co. Ltd* (1990) 5 NWLR (Pt 150) 322, pp. 338–339, paras. H–B.

According to Nigerian national legislation, land-owners that are victims of pollution are entitled to compensation for their damage from the oil-corporations.[87] The problem with attributing responsibility for the damage is mostly connected to sabotage. As described above oil companies are likely to blame environmental damage on the locals themselves. We will now look at one case dealing with the issue of sabotage. Plaintiffs claimed compensation from SPDC for the spillage of crude oil in October 1981 affecting the Andoni River and Creeks at the Bori High Court in Rivers State. The Court of Appeal (Port Harcourt Division) came to the conclusion that the spill was likely to have been caused by a third party and ruled in favour of SPDC.

The Court provided that a company is only liable for damage caused by third parties if it ought to have foreseen and taken measures against it. A company can be liable also for damage caused by a third party "[i]f things within the defendants control are 'dangerous things' and likely to escape and do damages, any resulting damage constitutes liability in negligence on the part of the owner". It first seemed as if the Court was about to put oil-exploiters under strict liability for their facilities. The court however decided to make liability dependent on negligence through the following comments: "In law, the owner of a dangerous thing is not liable if the thing has escaped through the independent act of a third party and there has been no negligence on his part."[88] "If the mischievous, deliberate and conscious act of a stranger causes the damages the occupier can escape liability he is absolved."[89] The final conclusion was thus that oil companies are not liable for damage caused by sabotage. Sabotage has now become a useful excuse for companies wanting to escape liability.

Once liability has been established the next step is to set the actual sum to be awarded as compensation. *Shell* v. *Farah* is a famous case in which a significant sum was awarded as compensation and guidelines for how to estimate compensation was estabilised. In 1995 the plaintiffs instituted the action in their personal as well as representative capacity of families all coming from K-Dere at the Bori High Court in Rivers State. The plaintiffs wanted compensation for damage caused by an oil spill and an order compelling the defendant to rehabilitate the land or money to cover a rehabilitation exercise. The trial judge found in favour of the respondents and awarded them NGN 4,621,307. SPDC appealed to the Court of Appeal, Port Harcourt. The appellant claimed that the trial judge erred in law when awarding the

[87] The Oil Pipelines Act (1956) Chapter 338 Laws of the Federation of Nigeria 1990 part IV. The Petroleum Act (1969) Chapter 350 Laws of the Federation of Nigeria 1990 para. 36 Schedule 1. In 1990 the laws of the Federation of Nigeria were revised and consolidated pursuant to The Revised Edition (Laws of the Federation of Nigeria) Decree 1990**.** The laws in force as of 31 January 1990 subsequently became different chapters of the Laws of the Federation of Nigeria 1990. The acts dealing with oil pollution were not subject to any major changes in subject matter.

[88] *Shell Petroleum Dev. Co. Ltd* v. *Chief Graham Otoko and 5 others* (1990) 6 NWLR (Pt. 159) 693. p. 724 paras. D–F.

[89] *Ibid.*, p. 725 para. D.

damages and that the sum was "based on a wholly erroneous estimate of damages".[90]

When estimating the sum the justice must take into account the underlying principle that a person who has suffered damages from the tortious act of another is to be restored to the same position as before the damaging act. Thus the plaintiff occupier must be compensated for the diminution of the value of the land. The loss of value can be decided from looking at the cost of replacement or repair. When property has been taken the owner should be compensated with the market value of the land. Not only physical damage to the land is to be compensated but also "annoyance, inconvenience, discomfort, or even illness to the plaintiff occupier".[91] Secondly, consequential losses or losses of profits by the user are to be compensated. Thirdly, the plaintiff should be compensated "also for the future or prospective damages reasonably anticipated as the result of the defendant's wrong, whether such future damage is certain or contingent".[92]

The reasoning of the Court is fair. The estimated amount shows that when courts estimate the sum to be awarded as compensation they try to cover all damage suffered by the plaintiff.

5.3. Compensation for Oil and Natural Gas

The General-Attorney of the Federation, the plaintiff, took out a writ of summons praying for "a determination of the seaward boundary of a littoral State within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that State pursuant to section 162(2) of the Constitution of the Federal Republic of Nigeria 1999". Meaning that he wanted to know the southern (or seaward) boundary of each of the eight littoral defendant States of Akwa- Ibom, Bayelsa, Cross-River, Delta, Lagos, Ogun, Ondo and Rivers. It was necessary to know this border when distributing resources from the Federation Account.

Other States in the Federation joined as defendants in the action. Some of the defendants raised counter-claims against the plaintiff. In different ways the defendants claimed that the Federal Government had distributed too little to them from the Federation Account and hence owed them money. The States referred to section 162(2) of the 1999 Constitution: "the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density: Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources".

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[90] *Shell Pet. Dev. Co. Ltd* v. *Farah* (1995) 3NWLR (Pt. 382) 148, p. 171, para. B.
[91] *Ibid.*, p. 194 para. D.
[92] *Ibid.*, pp. 192–193 paras. F–C.

First the Court determined that the seaward boundary of a littoral State is the low-water mark of the land surface. It thus ruled that oil and gas exploited offshore was under the jurisdiction of the Federal Government and could therefore not be regarded as extracted within the coastal States. It is on the basis of this boundary that the amount of revenue accruing to the Federation Account directly from any natural resources derived from that State pursuant to section 162(2) of the *Constitution of the Federal Republic of Nigeria 1999* will be calculated. Once this had been determined the Court started looking at the counter-claims. The following section looks at some legal issues raised by the plaintiff that were common to all counter-claims.

First, the plaintiff asked about the procedure for determining a formula for distribution of the amount standing at the Federation Account. The Court answered that section 162(2) of the Constitution was not enough in itself. A formula had to be enacted by the National Assembly in that behalf. At the time of the judgement the National Assembly had not enacted any law relating to revenue allocation. To avoid a vacuum, the Constitution in section 313 provides: "Pending any Act . . . the system of revenue allocation in existence for the financial year beginning from 1st January 1998 and ending on 31st December 1998 shall, subject to the provisions of this Constitution and as from the date when this section comes into force, continue to apply . . .". Hence 4A of Cap 16 (as amended by Decree No. 106 of 1992) was to be used pending a new formula: "An amount equivalent to 1 per cent of the Federation Account derived from mineral revenue shall be shared among the mineral producing States based on the amount of mineral produced from each State and in the application of this provision, the dichotomy of on-shore and offshore oil producing and mineral oil and non mineral oil revenue is hereby abolished."

Cap 16 was however only applicable in so far as it is not inconsistent with the provisions of the 1999 Constitution. The proviso to sub section (2) of section 162 reads: "Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources." The Constitution thus provides for "not less than 13 per cent" to be distributed on the principle of derivation. Cap. 16 says "1 per cent". These are undoubtedly inconsistent provisions. And by the provisions of sections 1(3), 313 and 315(1), of the Constitution the provisions of section 1 of Cap 16 that are inconsistent with the Constitution must give way to the Constitution. This meant that the one per cent formula prescribed in Cap 16 could not be used. Consequently the one per cent formula in Cap 16 could not be used at the same time as there was no enactment of the National Assembly pursuant to section 162(2) of the Constitution specifying that figure. The surprising conclusion was that the figure of 13 per cent that had been used in working out the principle of derivation in respect of crude oil derived from the littoral States had no legal basis. Hence no formula existed and all counterclaims based upon the assumption that such a formula existed were untenable.

This last conclusion by the Court has serious consequences for the locals of oil-producing States. I believe that the Court failed to take the purpose of the

Constitution into account. Ruling that an enactment by the National Assembly was needed before the 13 per cent principle became applicable was the same thing as deriving the weak from their constitutional protection. After the ruling the Federal Government enacted the *Niger Delta Bill*. According to the Bill the 13 per cent formula was to be implemented in relation to the mineral producing States in the Niger-Delta. Constitutional protection of the locals in oil-producing States is however forever gone. If the Niger-Delta Bill is repealed they again have no right to claim that revenue derived from oil should be returned to their region.

6. NATIONAL NON-JUDICIAL PROCEDURES

6.1. National Commissions and Inquiries

The Nigerian Government has frequently responded to environmental pollution and conflicts between groups in the oil-producing States surrounding the Niger-Delta by initiating commissions and other fact-finding missions to investigate the facts and perhaps make recommendations and/or reconcile those involved. The problem is not a matter of the commissions not coming to fair conclusions, but rather mostly a matter of the lack of power to implement the decisions.

There was a judicial inquiry into the attack on the ethnic group in Umuechem, Rivers State, in October 1990.[93] The inquiry was performed by the Commission of Inquiry to the Causes and Circumstances of the Disturbances that Occurred at Umuechem in the Etche Local Government Area of Rivers State in the Federal Republic of Nigeria. First the Commisson named officers in the Mobile Police Force as being responsible and recommended prosecution. Secondly, it stated that SPDC had played an important role in the attack as environmental pollution and loss of land caused frustration. The Commissionen provided that the SPDC was obliged to pay adequate compensation for lands acquired for oil operations, for crops and economic trees on such lands, for pollution of water, rivers and streams by oil spillage and such other liabilities as may be stipulated by law.[94]

On 12 December 1993 the Okrika attacked Ogoni settlements. Lt-Colonel Komo had just arrived in the region and set up a Commission of Inquiry headed by a serving military officer, Major Paul Taiwo. Apart from the Major the Commission consisted of two other military men and four civilians. The Commission was inaugurated 22 December 1993. Besides visiting the site the Commission was to organise public sittings. A total of 75 memoranda and 2029 claims were received.

[93] *Supra* note 4, pp. 7–8.
[94] 'Report by the Commission of Inquiry to the Causes and Circumstances of the Disturbances that Occurred at Umuechem in the Etche Local Government Area of Rivers State in the Federal Republic of Nigeria' by Hon Justice Inko-Tarish O, Chief Ahalakwo J A, Alamina BA, Chief Godwin Amadi, 1990.

Public sittings commenced 11 January 1994 and took evidence daily except on Sundays. 2013 witnesses testified with 49 exhibits tendered and received.[95]

Many witnesses made strong allegations against the Movement for the Survival of the Ogoni People (MOSOP) to the effect that MOSOP not only planned the disturbances, but also directed Ogoni Military operation during the disturbances. In the report the issue was commented on in the following way: "The Commission wishes to point out that it has painstakingly investigated these allegations to try to establish a link between the disturbances and MOSOP but was unable to establish MOSOP's involvement with the disturbance in the remotest possible way."[96] This comment shows that the Commission was at least independent enough not to side with the military in criticising MOSOP. There were also allegations of police involvement in the attack. The Commission was not independent enough to support such a view, but at least it had the courage to criticise the police to some extent. The Commission stated that it would not comment on "the attitude of the Nigeria Police before, during and after the crisis". But it did disclose that when it asked the police for a "comprehensive report of the disturbances", it was given a report "which appears to have been deliberately framed to give away as little information as possible". [97]

In its report the Commission went into detail in describing how the attack was performed. It provided the history of the land ownership issue that may have been one of the reasons behind the conflict. There is a list of those injured, and perhaps more surprisingly a list of names of the people that were involved in the killings and in the destruction. There is a description in the report of how the attack was planned.[98]

The investigations into the facts were followed by recommendations by the Commission. Primarily the apathy of the Government against the problem had to come to an end. It recommended a government initiative to mediate between the groups and investigate disputes followed by a programme for a gradual change in attitude. It emphasised the importance of the prosecution of those involved.[99] Surprisingly the Commission also recommended the splitting of Rivers State into two different States or that the Federal Government create a new local government. The Commission also included a group of recommendations regarding compensation. There was a list of dead and injured individuals combined with the recommendation that those injured and families who had suffered deaths should be given compensation. Material damage suffered was estimated in the report and the Commission recommended immediate payment of compensation in conformity with those estimations.[100]

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[95] *Supra* note 55, pp. 3–4.
[96] *Ibid.*, pp. 62–63.
[97] *Ibid.,* pp. 65–66.
[98] *Ibid.,* pp. 72–73.
[99] *Ibid.,* pp. 14, 41, 79–81.
[100] *Ibid.,* pp. 85–86.

Both the report concerning the Okrika Attack and the report concerning the Umucheum disaster included independent conclusions and good recommendations. None of the investigations were however implemented. Nobody was prosecuted and no compensation was paid.[101] The reports were not even published. The authorities tried to keep the inquiry into the Umucheum attack secret, but it was leaked in 1992.[102]

All representatives and NGOs that I interviewed agreed that by in large the national inquiries have not served any purpose. As Saro from MOSOP has stated: "They are not implemented, because they were never intended to be implemented." This practice by the Government to initiate inquiries has also continued today.

The clash between Zeekpon and Yeghe Communities in Ogoni land 5–10 May 2002, killing 38 persons and destroying property estimated at NGN 1.9 billion, was followed by the initiation of a judicial commission of inquiry. In June 2003 Chairman Justice Ben Ugbari presented a report to the governor Dr. Phil Odili. The Chairman said that during the course of the investigations the commission had received a total of 84 memoranda, 163 exhibits and interviewed 28 persons. The Inquiry recommended compensation. Still it is not clear whether the State government will pay compensation to any other person besides the paramount ruler of the Bori whose palace was razed and cousin killed. What is the reason for this? There are so many reports of inquiry commissions already accepted by the Rivers State Government, which have yet to be implemented.[103]

6.2. The Justice Oputa Panel

In June 1999, President Olesgun Obasanjo set up the Human Rights Violation Investigation Commission, later known as the Justice Oputa Panel. The Panel was mandated to investigate the causes, nature and extent of human rights violations committed in Nigeria between 1 January 1984 and 28 May 1999 and to identify those that could be held accountable for the violations. The aim of the commission was not to prosecute anybody, but to find the truth and achieve reconciliation through public hearings. The Panel handed in its final report by the end of 2000 to the Federal Government.

The response to the Panel was massive and about 10 000 petitions were sent in. The Panel declared that only those petitions that alleged infringement or denial of the right to personal liberty and the right to dignity of the person were to be tried in a public hearing. It further stated that cases that were subject of judicial proceeding were not considered suitable for public hearing by the Panel. This meant that out of 10,000 only 200 went to public sittings by the Panel. For over 16 months there were no public sittings and nothing was heard about the Panel. It blamed logistical

[101] Pyagbara, *supra* note 13. CLO, *supra* note 48, pp. 52, 85.
[102] *Supra* note 4, pp. 7–8.
[103] D. Soni, 'Ogoni crisis claims 38 lives, N 9 billion property, *The Punch*, 30 June 2003, p. 11.

problems such as lack of accommodation, funds, vehicles etc. The public sittings finally commenced in Abuja on 23 October 2000 and were later held in four other cities.[104] Over 2000 witnesses attended the hearings. President Obasanjo himself appeared before the panel.

Petitions concerning oil-exploitation in Ogoniland were heard at the sitting by the Panel in Port Harcourt. At the hearing the Federal Government apologised to all the families in Ogoniland who had lost one or several of their family members in "the sordid and sad events that took place in Ogoniland over the last few years". It was however Justice Oputa himself who delivered the message on behalf of the Government. Representing the Panel Oputa said: "Although the past is bitter and the memories are sad, yet I will implore you to forgive the past, embrace peace and shun anything that could divide you because division is a wind that blows no one any good."[105]

Many observers have expressed their doubts about the procedure. First of all, the Panel did not address economic or social rights or environmental pollution, but mostly dealt with violations of civil rights.[106] It was also believed that the Panel was used instead of judicial proceedings and hence created an escape route for human rights violators. It is at least questionable if a reconciliation procedure is suitable in cases where both the violator and the victim are identified. The Constitutional Rights Project (CRP) reported that it appears that many of the witnesses had been lying.[107]

The Commission was still regarded as successful in gathering information and bringing clarity to some issues. Much was revealed at the testimonies of military intelligence offices.[108] Although Sam Amadi believed that the Panel was mostly for show it did disclose some human rights violations and also fulfilled a purpose in letting people talk about what had happened to them, thus "steaming of" some of their anger. SPDC appeared at the Panel agreeing to enter into negotiations with both the Federal Government and MOSOP on ways to resolve their conflicting interests. Steps towards reconciliation between fractions of the Ogoni movement were also taken.

One might however question the value of finding out these facts, as the report has not yet been published. The Government uses the Babaginda suit as an excuse for not publishing the report.[109] The former dictator General Babangida did not appear at the Panel although he was called. When put under pressure Babangida filed a suit challenging the constitutionality of the Panel. The suit is still pending for interpretation.

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[104] N. Clifford, 'Oputa Panel: Can it Really Right Past Wrongs?'; 12:6 *Liberty,* December 2000, pp. 22, 23.
[105] *Ibid.*, p 27.
[106] Douglas, *supra* note 43.
[107] Nwankwo, *supra* note 5, pp. 5, 80.
[108] Agnes Tunde-olowu, Head of Legal Services at Constitutional Rights Project, Interview in Lagos on 11 July 2003. Pyagbara, *supra* note 13.
[109] Pyagbara, *ibid.*

Saro from MOSOP claimed that the will to make the truth known is not there. Many politicians were involved and they did not want to risk their political careers. The delay before the Panel could start working was due to a lack of funding from the Government. In the end it was the Ford Foundation that paid the costs. The national assembly through a bill should also have approved the creation of the Panel. This was not done and hence the Panel could not be given any means for enforcing decisions, but only to make recommendations. The Commission recommended prosecution, but this did not happen.[110]

7. INTERNATIONAL PROCEDURES ADDRESSING THE HUMAN RIGHTS VIOLATIONS

7.1. US Court Cases

Victims from the region and engaged NGOs were not satisfied with seeking redress in national courts, but also tried to gain international attention. Suits were filed in US courts, communications sent to the African Commission on Human and Peoples' Rights, and contacts established with the international community. I will start by examining the suits in the US.

In the case *Wiwa* v. *Royal Dutch Petroleum Company* the Ogoni people won an important victory when US Courts found that they had jurisdiction to try their case.[111] Plaintiffs filed the first action against the corporate defendants on 6 November 1996, but there is not yet a decision on the merits. Two rulings have been issued; one concerning personal jurisdiction and *forum non conveniens* and the other on subject matter jurisdiction. After having discussed these two rulings I will continue with the case *Abiola* v. *Abubakar* concerning immunity for foreign high-ranking State officials.

7.2. Wiwa v. *Royal Dutch Petroleum Company, Personal Jurisdiction and Forum Non Conveniens*

The plaintiffs were Ken Wiwa, Blessing Kpuinen, Owens Wiwa, and Jane Doe. Ken Wiwa sued individually and as executor of the estate of his deceased father Ken Saro-Wiwa. Blessing Kpuinen sued individually and as administrator of the estate of her husband. They first raised an action against corporate defendants Royal Dutch Petroleum Company and Shell Transport and Trading Company p.l.c. The plaintiffs alleged that corporate defendants' conduct had violated international and common law and that the violations were actionable under the *Alien Tort Claims Act* (ATCA, 18 USC. § 1350 (1993)). Plaintiffs Owens Wiwa and Jane Doe further asserted a

[110] Ndidi Bowei, Senior Legal Officer at Social and Economic Rights Action Center. Interview in Lagos on 9 July 2003.
[111] *Wiwa* v. *Royal Dutch Petroleum Company, et al*., 226 D.3d88 (2d Cir.2000).

claim under the *Racketeering Influenced and Corrupt Organizations Act* (RICO, 18 USC. §§ 1961-1968).

An action was also filed against Brian Anderson, the country chairman of Nigeria for Royal Dutch / Shell and managing Director of Shell Nigeria. Claims against Anderson differ in three ways. First, plaintiffs alleged that some of Anderson's conduct violated not just the ATCA but also the *Torture Victim Protection Act* (TVPA, 28 USC § 1350). Second, Jane Doe was not a plaintiff in the action against Anderson. Third, there was no RICO claim against Anderson.

The defendants first moved to dismiss the suit for lack of personal jurisdiction. The question of personal jurisdiction becomes particularly relevant in cases against foreign corporations. Under New York State law, NY CPLR § 301, a Court may exercise personal jurisdiction over a corporation that is doing business in New York. It is also regarded as if the corporation is doing business in New York if it operates there through a representative that is primarily employed by the defendant.[112]

The Court of Appeal in this case first stated that neither Royal Dutch nor Shell had direct contacts with New York that could confer personal jurisdiction over them. Still both conduct certain activities in New York in order to have their shares listed on the New York Stock Exchange. Both had previously been defendants in a lawsuit in New York without challenging personal jurisdiction. They had for many years retained New York counsel and owned subsidiary companies in the United States. The defendants also funded an Investor Relations Office in New York City. The office was a part of Shell Oil, a US based subsidiary in the Royal Dutch/Shell Group. Its function was however to establish relationships between Royal Dutch and Shell Transport with investors. The manager frequently sought the approval of the defendants before scheduling meetings or making important decisions. Thus the Court has personal jurisdiction over the corporate defendants.[113]

Even if personal jurisdiction has been established the defendant can object that jurisdiction under the circumstances of the case does not comport with the requirements of due process.[114] Jurisdiction is not to be exercised when a defendant does not have "minimum contacts" with the forum State and/or the assertion of jurisdiction does not comport with "traditional notions of fair play and substantial justice" meaning that the exercise of jurisdiction must be "reasonable under the circumstances of a particular case".[115] In this case the Court of Appeal dismissed the objection by the defendants that the exercise of jurisdiction did not comport with the requirements of due process. Litigation in New York City would not have been particularly inconvenient to the defendants. They were physically present in the forum State, possessed enormous resources, had no problems with litigating in English, had previously litigated in the US and had a long relationship with a law firm in the country.

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[112] *Miller* v. *Surf Properies, Inc*, 4 N.Y.2d 475, 481, 176 N.Y.S.2d 318, 151 N.E.2d 874 (1958).
[113] *Wiwa* v. *Royal Dutch Petroleum Co*, *supra* note 111.
[114] *Kernan* v. *Kurz-Hastings, Inc*., 175 F.3d 236, 240 (2d Cir.1999).
[115] *Chaiken* v. *VVPubl´g Corp*., 119 F.3d 1018, 1027 (2d Cir.1997).

When deciding on whether the case should be dismissed on *forum non conveniens* grounds the Court concluded that the British courts were adequate. After a discussion on public and private interest factors[116] the Court concluded that the case was not to be dismissed. This was concluded because two of the plaintiffs were residents of the United States and the expenses and the inconvenience imposed on plaintiffs by dismissal would exceed the inconvenience to the companies if litigation took place in the United States. Thirdly it is in the interests of the United States to provide a forum to litigate alleged violations of international human rights law. This policy by the Congress is expressed in the ATCA and the TVPA.[117] The Court provided that the TVPA "expresses a policy favoring our courts" when jurisdiction is conferred by the ATCA in cases of torture.[118]

7.3. Wiwa v. *Royal Dutch Petroleum Company, Subject Matter Jurisdiction*

Before the Court in the second ruling was the defendants' motion to dismiss the actions on the ground of lack of subject matter jurisdiction. Objections were raised concerning all three statutes in question: the ATCA, the TVPA, and the RICO. The Court also considered the motion to abstain on the basis of the act of State doctrine. The Court granted the defendants' motion to dismiss with respect to two claims only: Owens Wiwa's ATCA claim founded on an alleged violation of his right to life, liberty and security of person, and his ATCA claim for arbitrary arrest and detention.[119] It should be reminded that when a Court is to decide on a motion to dismiss the Court should accept factual allegations as true and merely determine whether the complaint itself is legally sufficient. Whether factual allegations are true are determined in the ruling on the cases merits.

7.4. The Alien Tort Claims Act

The defendants contended that the plaintiffs did not sufficiently support (1) some of their claims pleading violations of international law and (2) their contention that the corporate defendants or defendant Anderson "acted under color of law". According to the defendants the plaintiffs had therefore failed to fulfil the requirements for filing a suit under the ATCA: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations or a treaty of the United States (4) and, with certain exceptions, that the defendant was a government actor or committed the violation while acting "under color of law".

First I will look at the defendants' objection that the plaintiffs did not sufficiently support some of their claims pleading violations of international law. In

[116] *Gulf Oil Corp.* v. *Gilbert* 330 US 501, 506-507 (1947).
[117] *Jota* v. *Texaco, Inc*., 157 F.3d 163, 159 (2d Cir.1998).
[118] *Wiwa* v. *Royal Dutch Petroleum Company et al*., *supra* note 111, at 103 and 106.
[119] *Wiwa* v. *Royal Dutch Petroleum Company* United States District Court, S.D. New York, S.D.N.Y., 28 Feb. 2002. (Not Reported in F.Supp.2d) No. 96 CIV. 8386(KMW).

Unocal II the Court stated that in order to give rise to a claim under ATCA, the plaintiffs must allege a violation of an international norm that is "specific, universal, and obligatory".[120] With these requirements the Court meant that the norm must be specific enough to make it possible to determine whether the conduct in question is actually in violation of that norm, the prohibition expressed by the norm must be universally recognised and the norm must be non-derogable and therefore binding at all times upon all actors. A Court must hence first determine whether plaintiffs allege a violation of international law and secondly if the international norm is cognisable under the ATCA.

The Court ruled against the defendants and found that "cruel, inhuman, or degrading treatment" conduct and the prohibition against humanity is cognisable under the ATCA. Furthermore, it ruled that the plaintiffs had sufficiently supported their allegations with facts. The Court also found that the plaintiffs could allege violations of torture, summary execution, and arbitrary detention under the ATCA. Owens Wiwa had however only asserted that he had previously been arrested and detained without charges at some undefined time in the past. He had therefore failed to allege facts that supported a claim for arbitrary arrest and detention and the defendants' motion to dismiss was granted with respect to this claim.

It was not disputed that customary international law recognises the right to life, liberty, and personal security, and the right to peaceful assembly and expression. The Court also regarded these norms as actionable under the ATCA. Owens Wiwa had however failed to present enough facts before the Court to support his contention that the defendants violated his right to life, liberty, and personal security. Wiwa had contended that when the defendants had given him the option of buying his brother's release with an end to protests against Shell Nigeria's activities by the Movement for the Survival of the Ogoni People (MOSOP) those rights had been violated. The Court did not agree that this act had violated his right to life, liberty, and personal security.

Secondly, the defendants' objection that the plaintiffs did not present sufficient facts showing that the State action requirement under the *Alien Tort Claims Act* (ATCA) was satisfied. All defendants in this case are private actors. To satisfy the State action requirement plaintiffs must demonstrate that the defendant is a government actor or committed the violation while acting "under color of law".[121] To determine whether a private actor acts under colour of law a "joint action" test developed in case law is to be used. A private individual or entity acts under colour of law "where there is a substantial degree of cooperative action between the state and private actors in effecting the deprivation of rights".[122] It is important to note that the Court in the *Bigio* v. *Coca-Cola Co.* case made a distinction between being a wilful participant in a claim of unlawful conduct and only being an inadvertent

[120] *Doe* v. *Unocal*, 110 F.Supp.2d 1294, 1304 (C.D.Cal.2000).
[121] *Kadic* v. *Karadzic*, 70 F.3d 232, 236 (2d Cir.1995) at 239.
[122] *Doe* v. *Unocal*, *supra* note 120, at 891.

beneficiary.[123] In the latter case there is no joint action with the State and the State action requirement is not fulfilled.

First, the plaintiffs had to sufficiently allege that the link between Royal Dutch/Shell and Shell Nigeria was so strong that the latter was controlled and dominated by Royal Dutch/Shell. Only if these facts were proven true, could Royal Dutch/Shell be held liable for torts committed by Shell Nigeria. The plaintiffs claimed that meetings between Royal Dutch/Shell and Shell Nigeria had taken place in England and the Netherlands in February 1993 with the aim of finding ways of striking down MOSOP resistance. The Court found these allegations sufficient.

Secondly, there had to be allegations of co-operation between Royal Dutch/Shell and the Nigerian authorities. The Court concluded that the plaintiffs had alleged, and supported their allegations with sufficient facts, that there was a substantial degree of co-operative action between the corporate defendants and the Nigerian Government in committing the unlawful conduct. The Court thus found that the State action requirement applied to the plaintiffs' claims and that the plaintiffs succeeded in satisfying the "joint action test" in relation to both of the defendants.

7.5. The Torture Victim Protection Act

The TVPA recognises that a violation of the prohibition of torture and extrajudicial killings in international human rights law is *ipso facto* a violation of US domestic law. Statute 2(a) provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects an individual to torture is liable for damages to that individual in a civil action. In cases of extrajudicial killings the perpetrator is liable for damages to the victim's legal representative, or to any person who may be a claimant in an action for wrongful death. The requirement that alleged violations must have been perpetrated "under actual or apparent authority or color of law, of any foreign nation" is the codification of the State action requirement in the ATCA.

The defendant Anderson asserted several defences against the TVPA claims directed against him. The TVPA provides for liability for an individual who "subjects" another to torture or extrajudicial killing. Defendant Anderson interpreted this in the way that the TVPA provides a cause of action only against individuals who are primary violators and not those who assist, abet or conspire to commit torture or extrajudicial killing. The Court did not interpret the word subject as narrowing the reach of the statute to the primary violators, but rather that the word expands the reach. The Court thus concluded that not only the primary violators, but also those who cause someone to undergo torture or extrajudicial killing, could be held liable under the TVPA.

The next argument by Anderson was that the plaintiffs had not exhausted all "available and adequate remedies" in Nigeria as required by the TVPA § 2(b).

[123] *Bigio* v. *Coca-Cola Co*., 239 F.3d440 (2c Cir.2000).

Hence the claimed should be dismissed. Anderson referred to the Justice Oputa Panel and Nigerian Courts as available and adequate remedies that the plaintiffs had not exhausted. The Court disagreed. First it stated that the defendants bear the burden of demonstrating that plaintiffs have not exhausted available remedies in Nigeria. Only when Anderson has proved that plaintiffs have failed to exhaust "available and adequate remedies" in Nigeria are plaintiffs required to demonstrate that such remedies are inadequate or obviously futile. According to the Court Anderson did not succeed in meeting this initial burden. There may be difficulties in bringing a suit against Anderson in Nigeria because he is a not citizen or a resident of Nigeria. The Court also stated that Nigerian courts were corrupt and inefficient. The Justice Oputa Panel was not an available remedy according to the Court as its purpose was reconciliation and not to provide remedies.

7.6. The Racketeering Influenced and Corrupt Organisations Act

The plaintiffs contended that Royal Dutch/Shell's actions violated the *Civil Racketeering Influenced and Corrupt Organizations Act* leading to Jane Doe's loss of property and Owens Wiwa's loss of business. Statute 1962(c) provides that: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Hence to be able to state a RICO claim a plaintiff must demonstrate: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Additionally the enterprise must be engaged in, or at least affect, interstate or foreign commerce.

The defendants objected that: (1) RICO does not apply to extraterritorial action; (2) the plaintiffs fail to state a claim under the RICO statute; and (3) the plaintiffs lacked standing to bring a RICO claim. The Court dismissed all the objections.

The RICO statute is silent as to its extraterritorial application. A foreign corporation can however be liable under RICO in spite of its location. The difficulty has been to determine the degree of domestic activity required to justify RICO jurisdiction over the foreign corporation. Two tests for courts have developed determining sufficient domestic activity, the "conduct test" and the "effects test."[124] In the conduct test the Court looks at where the conduct in question was taken and in the effects test where the effect of the conduct in question took place.

The plaintiffs in this case relied on the "effects test". The plaintiffs pleaded that subject matter jurisdiction was appropriate because a great deal of the defendant's oil was shipped to the US. The alleged racketeering activities were thus used by the defendants for gaining an unfair competitive advantage in the United States oil market. The Court concluded that if these allegations were proven true, they would affect the economy of the US and were consequently sufficient for supporting subject matter jurisdiction under the RICO statute.

[124] *North South Finance Corp.* v. *Al-Turki*, 100 F.3d 1046, 1051 (2d Cir.1996), at 1051.

The plaintiffs alleged a RICO enterprise between the two corporate defendants, Shell Nigeria, the Nigerian authorities, and Willbros West Africa, Inc. The defendants argued that what had been described by the plaintiffs was not an enterprise within the meaning of RICO. According to the defendants an enterprise cannot consist of the defendants and only their agents, as these would be one single entity. The Court concluded that the alleged enterprise included at least three separate entities: the corporate defendants (with Shell Nigeria), the Nigerian military, and Willbros. The Court dismissed defendant's argument.

RICO Claims cannot be used against all unlawful acts. In §1961(1) all the predicate acts that can constitute "racketeering activity" are listed: (a) "[A]ny act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, . . . which is chargeable under State law and punishable by imprisonment for more than one year" and (b) acts indictable under the *Hobbs Act* (Title 18 USC. § 1951). The plaintiffs have alleged numerous predicate acts like bribery, murder, arson and extortion.

The defendants contended that the alleged acts were not predicative acts within the meaning of RICO because they did not occur within the US and thus did not violate the laws of a State or of the United States. The Courts have dealt with this issue of to what extent a predicate offence must be chargeable under the laws of a particular State before. It has been held that "[r]eferences to state law serve a definitional purpose, to identify generally the kind of activity made illegal by the federal statute".[125] This means that the act must not necessarily be chargeable under State law, but that State law is to be used for guidance.

The defendants further argued that the plaintiffs had failed to plead a *Hobbs Act* violation because extortion of property from plaintiffs Owens Wiwa and Jane Doe did not affect commerce within the United States (18 USC. § 1951(b)(3)). Allegations are actionable under the *Hobbs Act* statute only if it is alleged that the acts "obstructs, delays, or affects commerce" within the United States (18 USC. § 1951(b)(3)). The Second Circuit has held that the level of effect can be low holding that "whether slight, subtle or even potential is sufficient to uphold a prosecution under the Hobbs Act".[126] The Court ruled that the plaintiffs' allegations that these acts were a way of selling cheap oil in the US were sufficient to support that US commerce was affected.

For RICO standing the plaintiffs must not only show a violation of section 1962, but also injury to business or property and causation of the injury by the violation. Owens Wiwa and Jane Doe alleged that the defendants' racketeering activities caused injury to their businesses and property. Owens Wiwa was forced to leave Nigeria and leave his medical practice because of fear. Jane Doe alleged that she lost her crops because of her physical injuries caused by the Nigerian military, acting with Shell Nigeria. Now she is no longer able to operate her farm. Injury had

[125] *United States* v. *Bagaric* 706 F.2d42 (2d Cir. 1983).
[126] *United States* v. *Shareef*, 190 F.3d71, 75 (2d Cir.1999).

thus been pleaded. Further, the alleged violation of the RICO statute must have been the legal and proximate cause of the injury. The Court also found that this had been sufficiently proven. Hence the plaintiffs met all of RICO's standing requirements.

7.8. Act of State Doctrine

The defendants urged the Court to abstain from exercising jurisdiction over this case under the act of State doctrine. They claimed that a ruling by the Court would judge the acts of the Nigerian Government within its own territory and interfere with the independence of Nigeria. The act of State doctrine should however only be applied in rare cases and the defendants were to justify the application of the doctrine.[127] When determining if a court is to apply the act of State doctrine the Court should weigh the impact of the ruling on US foreign relations. The Court answered that the military regime alleged to be responsible for the torts had been replaced by a democracy. The new democracy was trying to investigate the alleged abuses and findings by the Court would thus rather be consonant with the policy of the present Nigerian Government. The Court decided not to apply the act of State doctrine.

7.9. Abiola v. *Abubakar*

Hafsat Abiola, Anthony Enahoro, and Arthur Nwankwo have sued former Head of State Abubakar under the *Alien Tort Claims Act*.[128] The suit, which was still pending in August 2003, was not specifically directed at the acts taking place in the oil-producing States surrounding the Niger Delta, but it is relevant to this region because it shows the possibility of holding the Nigerian officials behind the violations within that area accountable for their acts. Abubakar became a member of the Provisional ruling Council that ruled Nigeria in November 1993 and was Nigeria's Head of State from June 1998 until the transition to a democratic regime in 1999. This means that he was an influential official during the period when the human rights violations in the oil-producing region were most frequent. The plaintiffs contended that Abubakar caused others to torture and kill Nigerians opposed to the military regime.

Abubakar referred to the *Foreign Sovereign Immunities Act* of 1976 (FSIA, 28 USC § 1602 *et seq*) in support of a dismissal due to a lack of subject matter jurisdiction. He claimed that he, as Nigeria's former Head of State, was entitled to immunity from suit and thus the Court would lack subject matter jurisdiction. The FSIA gives a "foreign state" immunity from the jurisdiction of courts in the United States, with certain exceptions. The FSIA defines a "foreign state" in § 1603(b) as an "agency or instrumentality of a foreign state".

The Act does not explicitly give immunity to individuals. According to the judge in this case, Judge Kennelly, the FSIA has an emphasis on making it possible

[127] *Kadic* v. *Karadzic*, *supra* note 121, at 250.
[128] *Abiola* v. *Abubakar* 267 F. Supp.2d 907 N.D. Illinois, Easter Division, No. 02 C 6093 17 June 2003.

to sue in relation to commercial activities of foreign States. The FSIA provides that immunity is unavailable for acts connected to a commercial activity carried out in the United States or elsewhere. Judge Kennelly found no indication that the FSIA meant to include heads of state in the FSIA definition of "foreign state".

Judge Kennelly did not agree with the plaintiffs that the nature of the alleged acts in this case would eliminate immunity. According to the Judge, common law provides Heads of State with immunity from suit, regardless of the nature of the allegations. The Supreme Court has previously held that immunity protected foreign States from suits for unlawful detention and torture because "a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature".[129] Kennelly concluded "the same is true for a Head of State".

The matter is however not settled here. Abubakar is no longer a Head of State and immunity for private acts committed during a period as a Head of State may disappear when a defendant has stepped down from her or his office.[130] Immunity will also disappear if a State waives immunity for its former leader.[131] There had been no waiver in this case and Judge Kennelly did not find that the alleged conduct could be regarded as private acts. The Court therefore determined that Abubakar was entitled to immunity for his acts during the period that he was Nigeria's Head of State. Consequently the Court lacked subject matter jurisdiction for the treatment of M.K.O. Abiola between 8 June 1998 and until his death 9 July 1998 and plaintiff Nwankwo's claims arising from acts between 8 June 1998 and 24 August 1998. Concerning the other allegations it did have both personal and subject matter jurisdiction.

I would like to compare this case concerning immunity for the former Head of State Abubakar under US legislation with the *Arrest Warrant* case decided by the International Court of Justice (ICJ) concerning the scope of immunity from criminal jurisdiction in national courts for incumbent high-ranking State officers under international law.[132] The case concerned the Minister of Foreign Affairs of the Democratic Republic of Congo accused of war crimes and crimes against humanity.

The ICJ ruled that in customary international law there is a presumption that high-ranking State officials like the Head of State and the Minister of Foreign Affairs have immunity from jurisdiction by foreign courts. According to the ICJ sitting foreign ministers enjoy full immunity independent of whether the acts were private or official. Immunity is not exempted simply because allegations concern crimes under international law like war crimes or crimes against humanity. The ICJ therefore ruled that Belgium had failed to respect the immunity from criminal jurisdiction and the inviolability of the incumbent Minister under international law.

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[129] *Saudi Arabia* v. *Nelson*, 507 US 349, 361, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993).
[130] *Republic of Philippines* v. *Marcos*, 806 F.2d 344, 360 (2d Cir.1986).
[131] *In re Grand Jury Proceedings*, 817 F.2d 1108, 111 (4th Cir. 1987).
[132] *Democratic Republic of the Congo v. Belgium (Arrest Warrant Case)* Judgment of 14 February 2002. *See in particular* paras. 60 *et seq*.

On the other hand the ICJ added that international law does not prevent an official's State from prosecuting him or her or waiving immunity to prosecution by another State. So far the reasoning by the two courts is consistent. In addition the ICJ provided that immunity cannot be claimed before an international tribunal.

The ICJ then turned to look at immunity when the individual is no longer sitting in his or her office. The ICJ stated that when the official ceases to hold public office any State can try him or her for any acts committed prior or subsequent to the minister's period of office, as well as for private acts committed during his or her tenure. Just like Judge Kennelly ruled when applying US law.

The question is how private acts should be interpreted. Judge Kennelly ruled that war crimes and crimes against humanity could not be regarded as private acts because operating the military and police were within the functions of a Head of State. The House of Lords in the United Kingdom on the other hand has ruled, in November 1998 in the *Pinochet* case, that international crimes, including torture and hostage-taking, could not be considered as within the normal functions of a Head of State. Thus Pinochet was not granted immunity for these acts.

One must be careful when drawing conclusions from this ruling by the ICJ. It did not have any reason to go deep into the issue of immunity when an official ceases to hold public office, but merely declared its general standing. The ICJ did not at all comment on whether international crimes could be regarded as private acts or not. ICJ Judge Van den Wyngaert regrets in his dissenting opinion that the ICJ never drew the line between public and private acts in their ruling. He points out that even if many international crimes are committed as a part of State policy and therefore are within the category of official acts, immunity should never apply to such crimes.

8. INTERNATIONAL NON-JUDICIAL PROCEDURES

8.1. The African Commission on Human and Peoples' Rights

The NGOs, Social and Economic Rights Action Center (SERAC), Nigeria, and the Center for Economic and Social Rights, USA, sent a communication to the African Commission on Human and Peoples' Rights (the Commission) alleging that the Government of Nigeria had been involved in a number of human rights violations.[133] SERAC claimed that the Nigerian Government had failed to enact sufficient regulation to protect the environment and to monitor operations by the oil corporations. The Government was also alleged to have been involved in the use of force against the population. SERAC claimed that the conduct of the Government had destroyed and threatened Ogoni food sources.

When determining admissibility the Commission looked closer at whether all available local remedies had been exhausted. It noted that no domestic court actions had been undertaken to address the issue. This was not a bar if no effective remedy

[133] *The Social and Economic Rights Action Center for Economic and Social Rights* .v. *Nigeria*, Communication No. 155/95 African Commission on Human and Peoples' Rights.

was actually possible through domestic courts. According to the Commission no such remedy was available because: (1) several rights infringed were not protected under domestic law; (2) the law governing class action was not well developed and consequently it was difficult to bring an action as a people; (3) it was evident that the Nigerian Government in spite of international attention to Ogoniland had not used the opportunity to provide domestic remedies; and (4) when there is a large number of victims it could not be required that each should have gone individually to Court, even when there might be such a possibility.

Before looking at each right allegedly violated the Commission provided that the human rights protected by the Charter included both negative and positive obligations and stated that there were "at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights".[134] Throughout the decision the Commission looked at all these levels and frequently found violations of the Nigerian Government at all of them. There was considerable emphasis on the obligation to protect against damaging acts by private entities through legislation and monitoring. The Nigerian Government did not submit any written response to the allegations and thus the facts were uncontested. This meant that when the Commission looked at each violated right the facts were accepted as they were stated in the communication.

The right to health and the right to a clean environment are protected by Art. 16 and 24 of the *African Charter on Human and Peoples' Rights* (ACHPR). The Commission combined them both into a "right to a healthy environment".[135] Under this right the State is obliged not to undertake or sponsor activities that deteriorate the environment and thus peoples' health. Furthermore, the State is to take positive action to protect the environment. To comply with Articles 16 and 24 a State must permit scientific monitoring of the environment, require that studies about the impact on the environment are undertaken and communicated to the public prior to industrial projects and ensure that individuals are able to give their views on decisions affecting their communities. The Commission concluded that the Nigerian Government had failed to fulfil its obligations.

The complainants further alleged a violation of Article 21, protecting the right of peoples to their wealth and natural resources. The article provides that when resources are exploited it is to be done in the interest of the people and that dispossessed people shall be compensated. States are also obliged to eliminate all forms of foreign economic exploitation. The complainants alleged that the Government of Nigeria failed to monitor and regulate the operations of the oil companies and even itself exploited oil in an abusive manner. Thus creating a situation where the exploitation of oil reserves in Ogoni did not benefit the population. Secondly, the Ogoni Communities were not involved in the decisions

[134] Communication No. 155/95 African Commission on Human and Peoples' Rights, section 45.
[135] *Ibid.,* section 54.

that affected oil reserves in, and the development of, Ogoni. The Commission found that there had been a violation of Article 21.

Under Article 14 the right to property is protected. Article 18(1) provides that the family is to be protected by the State. Through combining Articles 14, 18 and 16 (the right to health) the Commission found that the right to housing or shelter is protected under the African Charter. Due to destruction of houses and forced evictions by the Nigerian Government and the Government tolerating such conduct by others this right had been violated.

Through combining the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22) the Commission found that the right to food is implicitly protected in the ACHPR. The African Charter consequently obliged Nigeria to protect and improve existing food sources. The Government had at least been obliged not to destroy food sources and to protect such sources from being destroyed by private parties. According to the Commission, the Nigerian Government had violated this right in both respects.

Allegations also concerned violations of Article 4, that guarantees the right to life. The Security forces had killed individuals and terrorised communities. Environmental degradation had made living in some of the areas very difficult. The Commission, in its mission to Nigeria between the 7 and 14 March 1997, had itself seen that the situation had come to a state where a life in dignity within the area was no longer possible. Article 4 had consequently been violated.

Not only did the Commission state that there had been a violation of several rights guaranteed by the ACHPR and other international human rights instruments, it also made a number of recommendations to the then sitting Government of Nigeria. It recommended the Government to stop all attacks on Ogoni communities and leaders, investigate human rights violations and prosecute those involved, compensate victims, ensure that the environment is cleaned up and restored as far as possible, require impact assessments prior to oil development, and guarantee that those affected are informed about the risks. The Commission urged the Government to keep it informed about its actions taken to address the situation in the Niger Delta region.

There were several communications filed with the African Commission concerning the detention and trial of Ken Saro-Wiwa and his co-defendants. Shortly after the death sentences were issued the Constitutional Rights Project asked for provisional measures to prevent the executions. The Commission did not receive a response to the appeal and the executions were carried out. The Commission took a final decision on the merits on 31 October 1998, finding violations against the prohibition of arbitrary detention, the right to human dignity, the right to health, the right to a fair trial, the right to life, and finally of the freedom of association and assembly.[136]

[136] Final decision taken 31 October 1998 in Banjul concerning communications 137/94, 139/94, 154/96 and 161/97 by International Pen, Constitutional Rights Project (CRP) and Civil Liberties Organisation (CLO), Nigeria on behalf of Ken Saro-Wiwa and co-defendants,

Many organisations complained about the extensive period of time that is needed by the African Commission before a decision is taken. The communication alleging violations of economic and social rights by SERAC was received by the Commission in 1995 but the case was not finally settled until October 2001. The decision concerning the Ogoni Civil Disturbances Tribunal was clearly too late. The first communication was filed in 1994 before the trial had even started, but the decision did not come until 1998 long after the executions. No particular action has been taken on the basis of the decision by the Nigerian Government or NGOs. Reasons given by involved NGOs for this incapacity to answer rapidly varied between overwhelming bureaucracy, the period of time in between the sessions being too long, and the Commission holding back and waiting for a more favourable government in Nigeria.[137]

The second major concern by NGOs was the fact that governments do not take any practical measures based on the decisions by the African Commission.[138] First of all it should be noted that the Commission is not a Court and even if the African Charter is binding upon the parties the actual decisions by the Commission as such are not. The Commission thus cannot have any sanctions at its disposal for forcing States to comply with its decisions. Many changes have taken place since the new democratic Government in Nigeria came to power. Those involved do not however believe that the decisions by the Commission played an important role when the Government formulated these new policies. Mrs Ndidi Bowei from the Social and Economic Rights Action Center (SERAC) saw these policies rather as an excuse to cover up the fact that violations are still taking place and not as a true response to the decision. Mr Morka (SERAC) believes that it would be easier to monitor implementation of the decisions if the African Commission included a plan of implementation with a timeframe and a description of recommended measures in their decisions.

The importance of the African Commission in gaining international attention and putting pressure on the Government was still recognised.[139] The decision in response to the Communication by SERAC was of particular importance. The obligation of Governments to respect, promote, fulfil and protect economic and social rights was confirmed and it was shown that these rights can be violated. Through finding that the right to housing, shelter, and food were protected, although they were not explicitly stated in the African Charter, the Commission clearly created a precedent that will be used in the future. The decision by the African

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<www.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html>, visited on 20 July 2003.

[137] Mitee, *supra* note 7. Agnes Tunde-Olowu, *supra* note 108. Felix Morka, Executive Director of Social and Economic Rights Action Center. Interview in Lagos on 9 July 2003.

[138] Mitee, *ibid.* Tunde-Olowu, *ibid.* Sam Amadi, Doctoral Student in Law/Mason Fellow in Public Administration at Harvard University, defence attorney at the trial against Ken Saro-Wiwa and the other Ogoni leaders. Interviews in Lagos on 17 June 2003 and on 9 July 2003.

[139] Tunde-Olowu, *ibid.* Ogwo, *supra* note 78.

Commission was also an important step towards recognising environmental pollution as a human rights violation.[140]

Several NGOs stated that they had used or were about to use the decisions from the African Commission as a starting point for advocacy and campaigns.[141] The Movement for the Survival of the Ogoni People (MOSOP) sent copies of the decisions to the Government demanding compliance with the recommendations. The organisation now plans to launch a national advocacy campaign based on the decisions.[142] The Social and Economic Rights Action Center (SERAC) is trying to supervise the implementation of the decision. When the decision first came SERAC duplicated it and sent the copies with a follow-up letter to different government agencies, the Attorney General of the Federation, the Niger Delta Development Commission (NDDC) officials, oil-corporations, and different groups of people in the Niger Delta. In the letters they requested a meeting in which they could explain their position. About 17 letters were sent and only one reply was received. They are now planning a fact-finding mission that will report to the African Commission on the measures that have been taken to implement the decision. SERAC believes that the decision by the Commission makes their advocacy much stronger now when they have a clear decision to refer to. [143]

8.2. UN Involvement

The Government of Nigeria sent a letter to the UN Secretary-General dated 19 December 1995 inviting the Secretary-General to send a fact-finding mission. On 22 December 1995 the General Assembly asked the Secretary-General to contact the Government of Nigeria. The mission arrived in Lagos on 29 March 1996 and finalised its report on 22 April 1996.[144] The terms of reference of the fact-finding mission was set by the Secretary-General, after consultation with the Government of Nigeria. The mission was to investigate whether the trial and execution of Ken Saro-Wiwa and others had violated any international human rights instruments to which Nigeria is a party or Nigerian domestic law.

The mission reported that they had been able to conduct consultations with individuals, officials and organisations involved in the case. The mission had however been informed by some individuals and organisations, which had attempted to get in touch with the mission or who had been interviewed by the mission, that they had been arrested and/or detained.

The mission concluded that the Tribunal violated "the standard of impartiality and independence set out in applicable human rights law as found in the *African Charter on Human and People's Rights* (Article 7(1-d) and Article 26) and the

[140] Douglas, *supra* note 43. Morka, *supra* note 137.
[141] Mitee, *supra* note 7.
[142] Pyagbara, *supra* note 13.
[143] Bowei, *supra* note 110.
[144] NDM Information Release 29 May 1996.
<www.h-net.msu.edu/~africa/sources/unreport.html>, visited on 17 June 2003.

International Covenant on Civil and Political Rights (Article 14(1))". In particular, this was done through the presence of the military.[145] The mission also found a violation of the right of appeal recognised in Nigerian domestic law and Article14(5) of the ICCPR and a violation of Article 6(4) of the ICCPR providing the right to seek pardon.[146]

The mission recommended that the *Civil Disturbances (Special Tribunal) Act No 2* of 1987 should be repealed and offences connected to civil disturbances be tried in ordinary criminal courts. An alternative was to amend the Act in several ways as to make it conform with human rights standards. All trials that were pending under the 1987 Act were to be suspended until recommended amendments had been carried out. The mission also recommended establishing a panel of jurists to determine financial relief to the families of the executed. In regard to the Ogoni people, the constitution of a committee comprised of representatives of the Ogoni community and other minority groups in the region was recommended. The Committee was to promote socio-economic development, receive complaints directed at the authorities and make recommendations to the Government.[147]

The fact-finding mission was not the only step taken by the UN-system in relation to the trial of Saro-Wiwa and others. The UN Human Rights Committee requested a report from the Government of Nigeria on 29 November 1995.[148] The Committee expressed that is was "[d]eeply concerned by recent executions after trials that were not in conformity with provisions of the Covenant". The report was submitted in time for the 56th session of the Committee.[149]

When the Committee examined the report it found violations of Articles 6, 9 and 14 of the ICCPR. The Committee recommended that decrees establishing special tribunals or including ouster clauses should be revoked and all trails before special tribunals suspended. Further, the Committee recommended that the right to a fair trial provided in Article 14(1), (2) and (3) and the right to appeal provided in section (5) of the article was to be guaranteed. The Government was to inform the Committee of the steps taken to implement the above recommendations.

The UN Special Rapporteur on Torture also responded to the Ogoni Civil Disturbances Tribunal. It transmitted urgent appeals on the behalf of Ken Saro-Wiva.[150]

The appeal by the Special Rapporteur did not prevent the trial or execution. The direct response to the report and recommendations by the fact-finding mission was also weak. The Government did not take any action to compensate the families of deceased and no committee with representatives of the Ogoni communities was

[145] 'Analysis, observations and recommendations' in *Report of the fact-finding mission of the Secretary-General to Nigeria*, sections 8, 16.
[146] *Ibid.*, sections 10–15.
[147] *Ibid.*, sections 14–15.
[148] Concluding Observations of the Human Rights Committee, Nigeria: 03/04/96.
[149] CCPR/C/92/Add.1.
[150] UN Doc E/CN.4/1994/31, para. 419.

created. NGOs still claim that the efforts of the UN had an impact. According to Civil Liberties Organisation the Government did make some changes in the 1987 Act as recommended in the report. Serving armed forces personnel were actually removed from the special tribunals and a judicial appeal process was provided for.[151] In 1999 the new democratic Government repealed a number of the decrees that were listed by the Human Rights Committee. It is however difficult to determine the role that the Committee report had behind this decision.

Mrs. Bowei from the Social and Economic Rights Action Center (SERAC) commented that she believes that UN involvement at the time was valuable for putting extra pressure on the Government. Ledum Mitee commented that the UN involvement had an important impact. Apart from putting pressure on the Government it provided support to the victims. MOSOP is now actively represented at the UN working group on minorities and Saro believes that this work is of value (he himself is the representative of the Ogoni people). SERAC on the other hand has no collaboration with the UN. Mrs. Bowei emphasised that she believes that regional procedures should be exhausted before the UN becomes involved.

9. CONCLUSION – PROCEDURES FOR ADDRESSING VIOLATIONS OF INTERNATIONAL LAW

The situation in the oil-producing States surrounding the Niger-Delta has improved since the 1990s, but there are still frequent human rights abuses within the area. Environmental pollution is present, the local population is living in poverty and violence is common. Oil-corporations and Nigerian authorities have made many public commitments in different forms, but implementation is lacking. Most of the human rights affected have been addressed by different procedures, directly or indirectly. The right to property for example was not explicitly mentioned, but there have been national cases concerning both compensation to victims for environmental pollution and compensation for oil to the state of origin. Due to the efforts of the African Commission even social rights were given attention. It should however be pointed out that no social or economic rights were directly referred to by either Nigerian or US Courts.

It is the concerted acts of the Government and the transnational corporations that have resulted in the human rights abuses. Which of these two can be held responsible for these violations? Traditionally it is only states, and not private entities, that are bound by international law. States can now also be held accountable for acts by private entities that result in human rights abuses through their obligation to take measures to protect against such acts. One example is the decision by the African Commission that the Nigerian Government was obliged under the *African Charter on Human and Peoples' Rights* (ACHPR) to protect the locals against environmental pollution. It was the acts of a private entity that was behind the human rights violation, still it was not the private entity that violated international law, but the state.

[151] *Supra* note 48, p. vii.

There is a move towards binding transnational corporations directly by international law. Parts of this move are voluntary codes of conduct, partnerships between corporations and Governments, and the involvement of corporations in international negotiations. States have still not been able to agree on an international convention that would be directly binding on all transnational corporations. There are agreements requiring Governments to oblige corporations to act in a certain way, but this is not the same thing as the corporations being bound by international law. Indirectly corporations are however bound. Through making international law part of national law corporations can be held accountable for violations.

It is not remarkable that violations of international law transformed into Nigerian national law by private entities within Nigeria can be tried in Nigerian national courts as in cases concerning compensation for environmental pollution. More remarkable is that violations of international law incorporated into US national legislation can be claimed within US courts although the acts occurred within Nigeria. A private entity is thus found accountable for violations of obligations set in international law, independent of where in the world the acts were committed. United States legislation has thus taken an important step towards holding transnational corporations directly responsible for violations of international law. One should however not forget the State action requirement for litigating under the *Alien Tort Claims Act* (ATCA) and the TVPA. It is only if acts have been taken in conjunction with the Government that violations of international law by private entities can be claimed.

Many of the human rights violations have been addressed and the procedures used have pointed out both the Government and Royal/Dutch Shell as being responsible. Still there are violations also today. What was the actual effect of the procedures?

It is not possible to get a fair judgement from a Court that is under strong influence of the Government when it is the Government itself that is being accused. Ledum Mitee said that they never really expected to get a fair judgement when turning to the Federal High Court or Court of Appeal to seek help against the Ogoni Civil Disturbances Tribunal, but at least it was worth a try. Turning to national courts that are not independent can be a way of getting public attention to the human rights abuses. A wrong judgement may however be dangerous as it justifies human rights violations. Sam Amadi said that if he could do the trial all over again he would have stayed it. Through continuing and defending the accused a judgement that justified the killing of the leaders could be issued.

Transnational corporations may have some power over national courts through bribes, but in Nigeria it has been possible to find judges that would rule against the corporations. The inequality between the victims of the corporations causing environmental pollution and the corporations when it comes to financial resources is still an obstacle. It is expensive to litigate for several years and the corporations are able to delay the case until the victim is prepared to negotiate and settle for less

compensation. With external financial backing Nigerian national courts have proved efficient for litigating against transnational corporations.

National investigations are often a way of doing something to satisfy public pressure for action. National investigations are not an efficient way of putting international pressure on an abusing Government. They may be useful for gaining international attention if combined with competent local NGOs that can use the conclusions and recommendations as support in their campaigning. By themselves however they are likely to be simply forgotten. Their main advantage is that a Commission that accepts submissions and witness statements from the victims gives the victims the opportunity to tell their story and listen to others that have been in a similar situation. In some cases a national inquiry can be suitable but one must be careful and take all circumstances into account before initiating such a procedure. The danger is that such a public hearing can create conflicts if recommendations are not followed and identified human rights violators left unpunished.

US Courts have become an available procedure for human rights victims. The advantage with making a civil suit in the US is that the damages paid in case of victory are higher than in Nigeria. Such a suit also offers an important possibility for victims of human rights to make the international community aware of their sufferings. The most important obstacle is however the distance. If Nigerian courts are too far away and expensive for people living out in the villages, US courts are even more remote and costly. A suit in the US also takes many years and few are likely to be able to litigate for such long time. I would further like to question if the judges are truly impartial in a case between transnational corporations with a major economic influence for the US and victims of human rights abuses in Nigerian villages.

The African Commission was and still is too slow. Not until long after the executions did it make its decision concerning the Ogoni Civil Disturbances Tribunal. Even if there are delays it is useful to send a communication to the Commission. Sending a communication does not have to be expensive and at least the Commission and the international community will become aware of the situation. This awareness may be enough for the abusing Government to improve its conduct. The decision on oil-exploitation has proved to be more useful because the human rights violations are still continuing even after all these years. The decision is now used for supporting NGOs in their campaigning. It is not only used to protect human rights in the oil-producing states surrounding the Niger Delta region, but also to strengthen campaigns for respect for social rights in other parts of the world.

When turning to UN involvement there is one observation that I would like to point out. Procedures at national courts and at the African Commission were instigated by the human rights victims or involved non-governmental organisations. The UN, on the other hand, takes the initiative to act independent of such communications. The only possible option would be the UN Human Rights Commission and its Working Group on Individual Petitions, but this is a slow mechanism and measures taken depend on the will of governments. It is interesting to note that the UN started responding to the situation after the trial by the Ogoni

Civil Disturbances Tribunal. The UN did not act during all the years of violations of social rights and use of force connected to the actual oil-exploitation. It is obvious that an on-off event that gains the attention of the international community is more likely to be addressed within the UN system than frequent violations extended during a longer period of time involving transnational corporations. It is a shame that the UN did not act at an earlier state. Pressure from international organisations has more effect on oil corporations than the threat of litigation in national courts.[152] Even if the UN was not able to prevent or stop the human rights abuse it did put some pressure on the Nigerian Government and made it cooperate to some extent. UN involvement also supported the victims in their struggle and recognized their rights.

All of the different ways of addressing human rights violations that were used have their deficiencies. The true key to stopping human rights abuses is knowledge. Victims being aware of their rights and the international community being aware of the victims. A government or private entity that knows that its conduct is subject to public scrutiny is not likely to continue unhindered. Through using many different ways for addressing human rights violations attention can be gained and knowledge increased. It should also be noted that even if the situation is still bad in the region today we do not know how bad it would have been if these procedures had not been used. Even if the more formal procedures discussed in this thesis are ways of gaining attention to a situation there are cheaper and quicker ways of doing this.

Both local and international NGOs and the media played a very important part in Nigeria in bringing out information. Pressure is put on the Government through frequent monitoring and reporting. Indirectly the media and NGOs also put pressure on oil corporations. The public is an important weapon in their hands when they call for consumer boycotts against corporations. Public pressure also made several Governments impose sanctions against Nigeria. These sanctions were a way of making a statement that they did not agree with the methods used by the Nigerian Government. At the same time is was a statement saying that States were not prepared to take measures to help the victims if they would loose financially. National and international NGOs agreed that the only sanction that would have had an impact on the Government were restrictions on trade and investments within the oil-sector. As Mr. Nwosu rightly states, the reluctance to impose oil-sanctions clearly told the Government that the threat was not a serious one but “only lip service”.

The problem with relying on public attention for putting pressure on human rights abusers is that interest in a situation quickly fades away. Oil-production in Nigeria is an excellent example of this. For a while the international community was screaming for change. The situation there is still bad, but it is no longer new and exciting and therefore reports from the area are no longer as interesting. Attention disappears. Oil-production in Nigeria also clearly shows that a military Government

[152] Nwosu, *supra* note 14.

is fairly immune to criticism. The executions of Ken Saro-Wiwa and the others were carried out in spite of the fact that the whole world was watching.

I believe that the only threat that can affect the decisions of severe human rights violators is the threat of individual punishment such as prosecution and civil suits for compensation. The *Pinochet* case, the *Arrest Warrent* case and the *Abubakar* case all show that high ranking state official do not enjoy impunity for international crimes committed during their time in office. An obstacle to human rights protection is however the granting of immunity in foreign national courts to Heads of States and Ministers of Foreign Affairs for public acts. When the possibility arises the ICJ must clarify that crimes under international law are not to be regarded as performed in an official capacity. It is also important to note that immunity cannot be claimed before international tribunals. With the establishment of the International Criminal Court there is an important complementary jurisdiction to that of national courts.

THE BIG ONES OF THE MUSIC INDUSTRY: COPYRIGHT AND HUMAN RIGHTS ASPECTS OF THE MUSIC BUSINESS

George Jokhadze[*]

CONTENTS

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INTRODUCTION

The current paper is an attempt to provide copyright and human rights analysis of certain practices of the five multinational entertainment conglomerates, the so-called 'Big Ones' of the music industry: Universal Music (parent company Vivendi Universal, USA), Warner Music Group (parent company AOL Time Warner Inc., USA), Sony Music Entertainment (parent company Sony Corp., Japan) and EMI Group, United Kingdom. In total, this oligopoly of 'heavyweights' releases about 75–80 per cent of all music recorded and produced worldwide. The Recording Industry Association of America (RIAA) is the trade group that represents the U.S. recording industry. RIAA members, the list of which, alongside the Big Ones, includes around 1000 recording companies, create, manufacture and/or distribute approximately 90 per cent of all legitimate sound recordings produced and sold in the United States.

Without an ambitious goal to cover and analyse each and every relevant aspect of the music industry from a copyright/human rights perspective, the paper is restricted to one general and four specific clusters of issues, presented in separate chapters. The "General Issues" chapter sets the general legal background for specific issues surfacing in the following parts of the paper, attempting to cover the general issues of human rights accountability of multinational corporations (MNCs) and copyrights vs. human rights. Chapter two, entitled "Battle for Copyright", is an attempt to analyse the recent and ongoing confrontation between major music enterprises, internet service providers and Internet users on the issue of file-sharing through peer-to-peer (P2P) networks; covering briefly the issues of legal and economic justification for copyright protection, the copyright regime in the music industry and technical aspects of online file-sharing, the paper attempts to analyse specific copyright infringements involved in music 'piracy' and to re-appraise the latter in the light of relevant human rights guarantees. The next chapter, "Recording Contracts", analyses recording contracts used in the music industry both from a copyright and a human rights point of view; copyright analysis of specific clauses of the sample recording contract, a discussion on recent disputes over unfair contracting practices and corresponding human rights issues are presented in this

part of the paper. The fourth chapter, "Antitrust", is a brief analysis of the CD overpricing tactics used by the music industry and addresses the question of human rights defences against monopolies. The final chapter, "Censoring Music", focuses on the issue of music censorship through the use of various industry standards and legislative measures as opposed to the freedom of speech guarantees.

1. GENERAL ISSUES

1.1. Human Rights Accountability of Multinational Corporations

1.1.1. Definition and status of multinational corporation in international law

In academic literature, a multinational corporation is usually described as "a cluster of corporations or unincorporated bodies of diverse nationality joined together by ties of common ownership and responsive to a common strategy".[1] The necessary elements, therefore, include the operation of the said legal entity outside the borders of its home State and the existence of a certain network in the form of ownership or common economic strategy.

Each and every one of the Big Ones, through ownership of many labels and publishing companies, is stretched over many countries and even continents. The Majors incorporate many affiliates and subsidiaries in many countries, and themselves are a part of bigger corporations, which have a rather diverse background. Therefore, they naturally fall into the category of multinational corporations (MNCs), which are often referred to as MNEs (multinational enterprises) or TNCs (transnational corporations).

Under classical international law doctrine, the main actors in international relations are States.[2] It is equally argued that international relations nowadays are not governed *exclusively* by States,[3] though they still remain the major subjects of international law, being the main creators of international norms and also the primary bearers of responsibility for their enforcement. Other actors, such as international organizations, insurgents, belligerents, peoples fighting for self-determination, individuals and perhaps even MNCs[4] are actively emerging along the States on the international plane and are increasingly being recognized as subjects of international law. Today individuals, for example, are recognized as subjects of international law, not only in the capacity of bearers of international responsibility, but also as persons entitled to certain action on an international scale, the most

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[1] D. Vagts, 'The Multinational Enterprise: A New Challenge for Transnational Law', cited at: Sarah Joseph, 'An Overview of the Human Rights Accountability of Multinational Enterprises', in *Liability of Multinational Corporations under International Law*, Menno T. Kamminga and Saman Zia-Zarifi (eds.), (Kluwer Law International, 2000) p. 75.

[2] Malcolm N. Shaw, *International Law,* fourth edition (Cambridge University Press, 1997) pp. 139–159.

[3] *Ibid.*, p. 139; please also note Ignaz Seidl-Hohenveldern, *Corporations in and under International Law*, (Cambridge – Grotius Publications Limited, 1987) p. 1.

[4] Shaw, *supra* note 2, pp. 176–177.

spectacular being a right to sue States before international tribunals for the breach of international human rights obligations, at universal[5] and regional levels.[6]

Currently, when one looks at the multiplicity of non-State actors in international law, a serious gap exists in relation to the recognition of MNCs as subjects of international law.[7] This omission becomes particularly alarming at the current stage of economic development and the ongoing process of globalization. Today, the economic power of several industrial conglomerates is far exceeding the economic potential of many States with relatively small population and developing economies, presumably giving such corporate entities enough economic and even political power to interfere in the internal affairs of the State.

1.1.2. Are Human Rights Binding on Multinational Corporations?

The issue of human rights obligations and liability of private corporations, especially multinational corporations, as well as the general status of the latter in international law, have become a centrepiece of many books, articles, studies and the bulk of discussion at various levels – from youth organizations[8] to the United Nations.[9] The formation in the mid 1990s and gradual rise, since then, of the discipline today generally known as Human Rights and Business, illustrates the growing awareness of the need for effective legal regulation in this field.

Much of the currently ongoing debate on the human rights accountability of multinational corporations builds on a growing public awareness that MNCs can and *do* violate human rights in the course of their business. Several examples, such as Shell activities in Nigeria, Bhopal disaster in India, complicity of Unocal in forced labor and other human rights abuses in Burma, Nike 'sweatshops' in South-East Asia, among many others, triggered the creation of a whole movement for so-called 'Corporate Social Responsibility' on academic, consumer and recently business levels.

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[5] *Optional Protocol to the International Covenant on Civil and Political Rights*, Art. 1; *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, Art. 1 & 2; *International Convention on the Elimination of All Forms of Racial Discrimination*, Art. 14; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 22.

[6] *European Convention on Human Rights*, Art. 34, *American Convention on Human Rights*, Art. 44 and *African [Banjul] Charter on Human and Peoples' Rights*, Art. 55.

[7] For the notes on slow development of international regulation of MNCs in the United Nations, *see* Peter T. Muchliski, 'Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD', in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, (Kluwer Law International, 2000) *supra* note 1, pp. 97–117.

[8] *E.g.* Generation Europe, <www.generation-europe.eu.com>, visited on 21 November 2003.

[9] The most recent one being The Global Compact, an initiative by the United Nations Secretary General, Mr. Kofi Annan, <www.unglobalcompact.org/Portal>, visited on 21 November 2003.

A number of efforts to find a proper solution to the growing problem of multinationals' accountability for human rights violations have been undertaken both on national and international levels.[10] On the latter, it is noteworthy to mention the ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises*, OECD *Guidelines for Multinational Enterprises*, European Parliament's *Resolution On EU Standards for European Enterprises Operating in Developing Countries*, and lastly, the Global Compact, an initiative by the current United Nations Secretary General, Mr. Kofi Annan.[11] In general, these efforts are pursuing several objectives, separately or simultaneously. First of all, the possible regulation of MNCs by their host States is considered theoretically to be the most effective, since MNC subsidiaries, operating in host States, are usually incorporated under their laws and therefore are bound by domestic legislation, in particular, human rights obligations. This solution seems to be, however, rather ineffective due to the unequal position of economically and politically weak host States versus powerful multinational conglomerates.[12] On the other hand, regulation by home States is considered to be more effective in this regard, but much depends on the will of the domestic courts of such States to provide an effective jurisdictional link, which would enable overseas victims to sue MNCs in such courts; the occurrence of this is quite rare.[13] Thirdly, self-regulation is encouraged, in the form of adoption of voluntary Codes of Conduct for MNCs, a measure that is becoming more and more popular, but still raises some questions as to actual compliance with such self-imposed standards. Fourthly, independent monitoring, by specialized audit companies or NGOs, is practiced; the Global Compact specifically encourages and promotes the practice of such monitoring.[14]

In addition to the international texts referred to above, one of the most recent texts, namely, the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*,[15] are of particular interest. The Norms list several human rights guarantees, namely, the right to equal opportunity and non-discriminatory treatment, the right to security of persons and

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[10] For example, *The Alien Tort Claims Act* of the United States; for relevant practice under this Act, please refer to Beth Stephens, 'Litigation against MNCs: the US', in Menno T. Kamminga and Saman Zia-Zarifi (eds.) *Liability of Multinational Corporations under International Law,* (Kluwer Law International, 2000) pp. 209–229; also, Jennifer Green and Paul Hoffmann, 'US Litigation Update', *ibid.*, *supra* note 1, pp. 231–240.

[11] It should be noted that all these documents are non-binding declarations.

[12] Sarah Joseph, 'An Overview of the Human Rights Accountability of Multinational Enterprises', in Menno T. Kamminga and Saman Zia-Zarifi (eds.) *Liability of Multinational Corporations under International Law*, (Kluwer Law International, 2000) *supra* note 1, pp. 78–79.

[13] *Ibid.*, pp. 79–80.

[14] <www.unglobalcompact.org/Portal>, visited on 21 November 2003.

[15] United Nations Sub-Commission on the Promotion and Protection of Human Rights, resolution 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003), source: University of Minnesota Human Rights Library, <www1.umn.edu/humanrts/links/norms-Aug2003.html>, visited on 21 November 2003.

the rights of workers, and to oblige multinational corporations to respect national sovereignty and human rights and to ensure consumer and environmental protection; in addition, they place innovative and far-reaching obligations both on multinationals and on States for the adoption of internal regulations, effective monitoring and reparation to victims of human rights abuses.

1.1.3. Do Corporations Have Certain Human Rights?

First of all, one should note that currently there is no clear-cut answer to this question. In the light of classical human rights theory, it is to be presumed that legal entities in general are legal constructs ("a fiction of law") and are not intended as such to be the bearers of the human rights.[16] The term '*human* rights' can be thought as implying possession of rights by individuals, rather than legal entities. A Naturalist approach to international law in general and in human rights theory in particular, considering the inherent rights of an individual as being central for legal regulation, also justifies such a line of argument.

However, with recognition of the legal entities' freedom of commercial speech, as a freedom of expression guarantee, by the Supreme Court of the United States[17] and the European Court of Human Rights,[18] as well as direct reference to legal persons in Article 1 of the First Protocol to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, establishing the right to the enjoyment of possessions,[19] it is becoming difficult to argue that none of the human rights guarantees can be claimed by the legal entities. One more example that immediately comes to mind would be a right to fair trial, recognized in all major universal and regional human rights instruments and forming a part of the customary 'core' of human rights. Indeed, it is hardly justifiable why individuals can be entitled to fair trial guarantees while leaving the legal entities vulnerable to arbitrariness in the proceedings. The right to privacy as a fundamental human right can be next on the list, as much as the inviolability of business premises and the protection of undisclosed information of a commercial nature can be concerned. The right to property, though arguably not universally recognized, is also of certain relevance in this context. A number of other social and economic rights, in particular intellectual property rights, can also be claimed by corporations.

Although it is to be noted that so far legal entities bear mostly human rights obligations – and not the rights themselves – expressed and enforced by consumer boycott campaigns, calls for voluntary self-regulation or attempts to legislate certain

[16] Stephen Bottomley, 'Corporations and Human Rights', cited at *Commercial Law and Human Rights* (Ashgate Darmouth Publishing, 2002) p. 62.
[17] *Ibid.,* p. 61; *see also* the famous judgment in *Virginia Pharmacy Board* v. *Virginia Citizens Customer Council*, Supreme Court of the United States, 425 U.S. 748 (1976).
[18] The case of *markt intern Verlag GmbH and Klaus Beermann* v. *Federal Republic of Germany* of 20 November 1989, European Court of Human Rights, Series A165.
[19] "Every natural or legal person is entitled to the peaceful enjoyment of his possessions . . ."

standards of ethical behaviour.[20] The reasons for the reluctance of recognizing the human rights of corporations are surprisingly hard to find spelled out clearly, but nevertheless some general conclusions can be drawn. Indeed, the structural complexity and trans-border character of multinational corporations, as bearers of human rights, can present theoretical difficulties for the human rights enforcement, and there are rather reasonable fears that MNCs will frequently abuse their human rights guarantees as an additional power tool.

Having these considerations in mind, it is to be noted that nowadays there are arguably no serious legal grounds for outright rejection of a thesis that corporations and, among them, MNCs have certain human rights guarantees. It is noteworthy that placing the bulk of obligations on a business (especially a trans-border business), without corresponding basic rights, creates a risk of inevitable scepticism on behalf of the latter in acceptance and compliance with such obligations. Ambitious as it sounds, it is nevertheless submitted that, perhaps, the classical human rights doctrine, with its exclusive focus on a human being, should be revised and re-assessed in the light of present-day requirements.

1.2. Copyright and Human Rights – General Overview

1.2.1. A Human Rights Approach to Copyright – Direct References

There is sometimes a point made that the copyright and, in general, intellectual property rights are themselves part of the human rights regime. The supporters of this point of view[21] often refer to, *inter alia*, Article 27 of the *Universal Declaration of Human Rights* (UDHR) and Article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), thereby calling for the interpretation of intellectual property protection in the light of human rights obligations of States.[22] It is argued that the human rights approach to intellectual property plays a crucial role in determining that intellectual property is not seen exclusively as an economic tool and takes into account the expression of human dignity and creativity.[23]

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[20] Bottomley, *supra* note 16, pp. 63–64.

[21] *See*, for example, Audrey R. Chapman, 'Approaching intellectual property as a human right: obligations related to Article 15 (1) (c)', *UNESCO Copyright Bulletin*, Volume XXXV, No. 3, July–September 2001, available online at <unesdoc.unesco.org/images/0012/001255/125505e.pdf>, visited on 21 November 2003; for some interesting findings on music as a human right, *see* Karen Hald, 'Music – A Human Right', available at <www.freemuse.org/01whatis/music.html>, visited on 21 November 2003.

[22] Oddly enough, the pronouncements that lead to such conclusions are contained in the instruments adopted many decades ago, but the serious debate on this issue has been initiated only in the end of 1990's.

[23] Chapman, *supra* note 21, p. 14.

Being part of the classical argument in claiming the human rights nature of intellectual property rights, Article 27 of the *Universal Declaration of Human Rights* (UDHR) is often invoked.[24] It reads:

> "1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
>
> 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

Following a broad interpretation of this article, especially of its second part, it is relatively easy to draw conclusions on the inherent nature of intellectual property rights and, in particular, copyright as a human right. However, closer scrutiny would probably reveal that these two paragraphs, addressed to different categories of beneficiaries – namely, 'everyone' in the first, as opposed to the 'author' in the second – have a certain inherent strain between them. In classical copyright doctrine, it is agreed that intellectual property rights are monopolies – although limited in time and subject to certain restrictions and exceptions, but still monopolies, and the recognition of such monopolies is rather explicit from the wording of paragraph 2 of Article 27. However, given the wording of the first paragraph, which calls for the recognition of the contribution to the common good and welfare of the rest of the society, it is difficult to reconcile it with the 'full and unrestricted monopoly property rights'[25] of the authors and creators, as the second paragraph presupposes.

Audrey Chapman, in this regard, notes:

> "In order for intellectual property to fulfil the conditions necessary to be recognized as a universal human right, . . . intellectual property regimes and the manner they are implemented first and foremost must be consistent with the realization of the other human rights, particularly those enumerated in the Covenant [on Economic, Social and Cultural Rights]."[26]

This point of view is particularly interesting, since it makes the human rights 'eligibility' of the intellectual property rights expressly dependent on the respect for other economic, social and cultural rights provided for in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Extending the meaning of the cited paragraph, the implementation of the intellectual property regimes, including copyright, should not be an impediment for the exercise of those rights. However, this argument lacks sufficient clarity, since it fails to take into account civil and political rights, some of which, like the right to privacy and freedom of expression, will be especially relevant here.

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[24] *Ibid.*; Hald, *supra* note 21.
[25] *Ibid.*
[26] *Ibid.*

In this regard, however, one point should always be borne in mind – the Declaration, being undoubtedly the standard-setting document for the whole human rights movement, is still regarded as a non-binding political proclamation. Therefore, the arguments based solely on Article 27, regrettably, lack firm legal basis. It can be, nevertheless, submitted that the UDHR has attained the status of international customary law, thus being binding, in accordance with public international law, on every State. However, it is equally argued that only *some* of the articles of the Declaration have so far reached the customary law status. Determination of the customary character of Article 27, in this respect, is clearly going outside the scope of this analysis.[27]

Article 15 of the *International Covenant on Economic, Social and Cultural Rights* basically repeats the formula provided for in the UDHR, with some minor changes:

> "1. The States Parties to the present Covenant recognize the right of everyone:
>
> (a) To take part in cultural life;
>
> (b) To enjoy the benefits of scientific progress and its applications;
>
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

In contrast to the general statement in Article 27 of the UDHR, Article 15 of the ICESCR is undoubtedly a part of the binding international treaty and carries certain legal weight. Nevertheless, the current practice seems to be not as encouraging, since it is argued that the rights enlisted in the ICESCR are 'welfare' ('second-generation') rights and thus stand on a lower level of protection compared to 'classical' (civil and political) rights. Without stepping into the debate on this issue, it is noteworthy that such distinction is strongly challenged by the new school of human rights scholars, who rightly argue that, at the current stage of development of international human rights law, there is no hierarchy of rights. This point of view finds strong support in the *Vienna Declaration and Plan of Action*, adopted by the World Conference on Human Rights on 25 June 1993, paragraph 5 of which solemnly proclaims: "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 . . .".[28]

Even if we leave the issue of legal enforceability of economic and social rights – intellectual property rights forming a part of them – open, the shaky human rights

[27] Though, of course, any alternative and founded research on this subject could significantly help to clarify the issue.

[28] It seems that every important and groundbreaking statement in international human rights law is destined to linger in a form of non-binding, political declaration; the 1993 *Vienna Declaration* is no exception in this regard.

nature of the intellectual property rights is rendered even weaker by the statement of the Members of the World Trade Organisation (WTO) in the preamble to the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), which recognizes that "intellectual property rights are private rights".

1.2.2. Indirect Link – Right to Property

It can be argued, of course, that the intellectual property rights form a part of a human right to property, which encompasses both tangible and intangible property and does not, as such, distinguish between the levels of legal protection afforded to either of them. However, this should not immediately lead to the conclusion that both are the same. Although it is generally agreed that intellectual property assets are covered by the definition of 'property', it would be an over-simplification to adopt the legal regime applicable to tangible assets with regard to intellectual property issues. One of the clear examples would be that tangible property, simply speaking, implies better control by its owner. To illustrate this point, when a person is deprived of a tangible property asset, he or she is able to perceive it, immediately or later – at the material period of time anyway. Intellectual property infringements, however, can occur on a massive scale and still, in the absence of proper enforcement mechanisms, go unnoticed. Today's borderless and universal nature of the World Wide Web provides particular support for this point of view: tangible assets cannot in principle surf freely from one State to another, while digitally compressed musical files, without the prior consent of the copyright holder, can.

Following this line of argument, it is hard to argue, on the reverse, that tangible property assets can become, in the language of UDHR and ICESCR, an object of the right of 'everyone' to 'enjoy' or 'share'. Of course, it may happen if the State takes certain authoritative steps to ensure such restrictions – by nationalizing certain property for public purposes or creating nature reservations, for example; however, such measures, if imposed, are of exceptional character rather than a rule. In contrast, both UDHR and ICESCR expressly place inherent limitations on the exclusive enjoyment of intellectual property rights by the persons authorized by the author in favour of 'everyone'. It is hard to explain this outstanding difference if not by the specific (read: intangible) nature of the intellectual property rights.

It should also not be forgotten that the right to property is not a *universally* recognized right; though it has appeared first in Article 17 of the UDHR, it did not find its way into any of the Covenants. Instead, it has been *indirectly* recognized in regional human rights systems.[29] In such state of affairs, even if intellectual property

[29] The right to property, with immediate restrictions, is recognized in the *African Charter on Human and Peoples Rights* – Article 14, *American Convention of Human Rights* – Art. 21, and Article 1 of the First Protocol to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. These provisions, however, are carefully constructed as to avoid the direct entitlement to property, and concern more with 'guaranteeing' the right to property, the "right to use and enjoyment" or the "right to peaceful enjoyment of possessions".

is actually covered by the right to property, linking intellectual property rights to human rights protection through the right to property is not, presumably, a very valuable legal argument to stand a strict human rights 'eligibility test'.

1.2.3. Indirect Link – Freedom of Expression

There is quite an interesting and equally controversial human rights/intellectual property link between the freedom of expression and copyright that has been established by some judicial authorities. See below for more information specifically on this issue, in the part on music censorship.[30]

1.2.4. Moral Rights Doctrine

Today the moral rights doctrine is firmly established in some European States[31] and on the international level. In particular, Article 6bis (1) of the *Berne Convention for the Protection of Literary and Artistic Works* provides:

> "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation."

Article 6, indeed, is very progressive in the separation of economic and moral dimensions of copyright. Although moral rights have been already mentioned both in UDHR and ICESCR, a 'second life' has been injected into these rights by the virtue of specifically defining their content – which would have otherwise remained, as opposed to already well-developed economic dimension of intellectual property protection, rather unclear. Moreover, permanent attachment of moral rights to the creator, even in case of formal agreement to assign the economic exploitation of copyrighted work to anyone else, brings the moral aspect of copyright interestingly close to human rights, giving it a necessary legal weight and clarity to support the assumptions of the UDHR and ICESCR. However, at the current stage of development of copyright and human rights law, it would be premature to state, beyond purely theoretical assumptions, that an author's moral rights do constitute a part of human rights law *per se*; such a thesis is yet to be rendered valid through express pronouncement to this effect by relevant judicial authorities.

So far, Art. 6bis of the *Berne Convention* firmly establishes the right of authorship and expressly grants to the author the right to claim his/her authorship through legal remedies. It should be noted, at the same time, that the protection of other dimension of the moral rights, as secured by Article 6bis, namely, the right to object to derogatory treatment of work, is made conditional on the premise that derogatory action in relation to the work "would be prejudicial to [the author's]

[30] The last chapter of this paper.
[31] *E.g.* France, United Kingdom and Germany.

honour or reputation". This limitation somehow waters down moral rights protection guarantees. It is not clear, either, which criteria are to be applied in determining the existence of prejudice to an author's honour or reputation, as both of these terms inevitably have very subjective meanings. In the absence of agreed guidelines on the issue, it is to be presumed that the courts should decide this issue on a case-by-case basis.

The judiciary in some States, like the United States' courts, has consistently refused to apply a moral rights doctrine.[32] This distinguishes the economic argument-based intellectual property protection in the United States from the European model, where the rights and personality of the author and creator are central to the copyright protection regime. However, this fact, frankly speaking, is quite surprising in the light of the ratification by the United States of the *Berne Convention for the Protection of Literary and Artistic Works*.[33]

2. BATTLE FOR COPYRIGHT

The popularity of the peer-to-peer networks today is simply phenomenal. According to Download.com, one of the sources of free software downloads, KaZaa, the most popular file-sharing applications of today, has been downloaded over two million times this week (!),[34] while other popular services like iMesh and Morpheus were downloaded 450,000 times and 250,000 times, respectively.[35] The total number of newcomers in the hunt for the free music files, using dozens of other applications from other sources, will probably amount to several millions of newcomers every week. The amount of files that these people may be trading over peer-to-peer networks is hard to even estimate; however, the count would be at hundreds of millions, at least.

Such activity of 'audio pirates' and the amount of media files transferred and downloaded is hardly understandable on the face of the growing awareness that such practices can very well entail criminal liability for copyright infringement. In the era following highly publicised judgments in *Napster* and *Verzion* cases, it is hard to

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[32] This can be deduced, first, from the persistent silence of the American judiciary on this point and, secondly, it is supported by the fact that the U.S. copyright doctrine is based on a utilitarian approach. For the general attitude of the United States judiciary towards the moral rights doctrine, please note Jed Rubenfeld 'The Freedom of Imagination: Copyright's Constitutionality', 112 *Yale Law Journal,* 2002, (non-paginated version, available online at The Yale Law Journal <www.yale.edu/yalelj/112/RubenfeldWEB.pdf>, visited on 21 November 2003) and Lucie M.C.R. Guibault, *Copyright Limitations and Contracts – An Analysis of the Contractual Overridability of Limitations on Copyright*, (Kluwer Law International, 2002) pp. 8–11.

[33] Source: WIPO website, <www.wipo.int/treaties/documents/english/pdf/e-berne.pdf>, visited on 21 November 2003. Under public international law, if the State is a party to an international treaty, it should perform the obligations arising from the treaty in good faith.

[34] As of 21 November 2003.

[35] Source: Download.com Most Popular Downloads, <download.com.com/3101-2001-0-1.html?tag=pop>, visited on 21 November 2003.

argue that file-sharing enthusiasts are unaware of the consequences of their actions, since they are assured on a daily basis that downloading digital music files without the permission of the author is illegal. Although the file traffic on such networks seems to have decreased recently, criminal prosecution is not a good enough cause to shy away free music enthusiasts, who persistently refuse to surrender, engage in a technological 'arms race' with music industry 'enforcers' and presumably hope for a peaceful resolution of the whole process.

Confrontation between the giants of the recording industry and peer-to-peer network operators and users in so-called 'copyright wars' attracted massive media coverage and, surprisingly, little academic analysis. This part of the paper, in the whole, is an attempt to analyze still ongoing online piracy battles in both a copyright and human rights perspectives, and will try to prove that the results of already rendered judgments would have been different, if human rights considerations would have been introduced and taken seriously.

2.1. Legal and Economic Justifications for Copyright Protection

The existence of copyright protection is not a fact of axiomatic value. Many questions that technological advances raise with regard to different aspects of copyright protection, require us to assess and re-assess, from time to time, the appropriateness of copyright in serving the aims it claims to achieve.

There are several theories for justifying the copyright regime, which can be grouped into three categories, namely, 'naturalist' approach, 'reward' theory and 'incentives' approach.[36]

The Naturalist school justifies the existence of copyright by linking the creation of the mind to the personality of the author. It is thought that such expressions of an author's talent and personality are to be recognized as an exclusive property of the creator.[37] The 'naturalist' approach is very characteristic of the European doctrine of copyright, especially the French and German legal systems.[38]

The 'reward' theory presupposes that the copyright is a legal expression of public gratitude to the author for the creation of his/her work.[39] It can be equally argued that this theory represents an economic side of the 'naturalist' approach. In other words, the personal relationship of the author with the creation of his/her mind entitles the author to economic remuneration for his/her work, while a pure 'naturalist' approach finds its best expression in the doctrine of moral rights, which permanently links the authorship and integrity of intellectual creation to the personality of its author.[40]

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[36] Lionel Bently and Brad Sherman, *Intellectual Property Law*, (Oxford University Press, 2001) p. 32.
[37] *Ibid.*
[38] Guibault, *supra* note 32, p. 9.
[39] Bently & Sherman, *supra* note 36, p. 32.
[40] Guibault, *supra* note 32, pp. 8–9.

The 'incentives' doctrine is opposite to the 'naturalist' and partially also to the 'reward' theories. Instead of placing the interests and personality of the author in the centre of legal protection, the 'incentives' approach places public interest at the forefront.[41] A good example, until recently, was the American doctrine of copyright, which, being quite 'utilitarian' (as opposed to the European 'naturalist' approach), considers the encouragement of authors by allowing them to reap personal benefits from the copyright monopolies as the best way to advance the overall public welfare.[42] Therefore, the 'incentives' awarded to the author serve the final aim of "achieving a certain result for the benefit of society".[43]

There are also certain economic considerations that are sometimes invoked to give additional weight to the above-noted theoretical justifications for copyright protection. Developed by the mega-influential Chicago School of Economics, economic theory of copyright implies that copyrighted works, due to their intangible nature, are non-excludable and non-rival goods, having, in theory, the same characteristics as public goods. This means that, by analogy to public goods, since the resulting social cost of intangible copyrighted assets is zero, there always will be under-production and over-consumption of such goods. Copyright has the effect of overcoming this problem, by allowing the authors to reap personal benefits from their works and thus making their private production possible. Therefore, "copyrights are economically justifiable since they give authors incentives to create while maintaining the public's access to their works".[44]

Such a line of argument, from an economic point of view, underlines and strengthens the 'incentives' approach, while adding to it some 'reward' theory elements. However, this theory is at odds with the naturalist approach, since it presupposes that copyrighted works are produced exclusively for individual profit and, in theory, also contribute to overall public welfare; in doing so, the economic theory of copyright protection fails to take into account personal, non-commercial considerations of the individual authors, who are very often, luckily, not driven by the aim to maximize their profits.

2.2. Copyrights Regime Applying to Musical Works and Sound Recordings

The copyright regime applying to music is as complex as any legislative attempt to stretch the protection of the law to the abstract creations of the human mind. The variety of intellectual property protections involved in the case of musical works forms an elaborate network of rights, which are often claimed by different persons and attract different levels of legal protection.

The first distinction that is to be drawn is the ownership of copyrights in musical works themselves and the rights subsisting in their fixations in material form, namely, sound recordings. As much as the notion of copyright has a direct

[41] Bently & Sherman, *supra* note 36, p. 32–33; Guibault, *supra* note 32, pp. 10–11.
[42] Guibault, *supra* note 32, p. 11.
[43] *Ibid.*
[44] *Ibid.,* p. 14, footnotes omitted.

connection with the notion of authorship, different authorship in those two cases presupposes two different copyright holders. In the first case, it will be the creator of the musical work, the composer and lyricist.[45] In the second, it will be the producer of the sound recording.[46]

The picture is further complicated by the fact that a modern musical work, in its final marketing form, contains many different values protected by different copyright laws. For example, if the melody of a song is written by one person (the composer) and the text by another (lyricist), it attracts two different copyrights – one in the musical work and a second in the literary work, and will most probably result in joint authorship, as much as the final result of joint efforts is an integral, whole piece of work.[47] The fixation of musical work in the form of sound recording is protected as such (entrepreneurial work), with the copyright owner in this case being the producer; and, quite often, the cover, layout and design of the material sound recording contain an artistic work, in which the copyright is owned by the author (or authors) of that work. However, for the purposes of the current analysis, we have to narrow ourselves only to musical works and sound recordings, and analyze the relevant protections that they attract.

To summarize the recognized intellectual property rights owned in a musical work or sound recording, the following should be noted:

- The right to copy the work (*reproduction right*); this right implies that the author of a musical work has an exclusive right to reproduce the work in whatever form or medium;[48] in relation to sound recordings, the producer of the recorded work has an exclusive right to authorize reproduction of the fixed sound recording.[49] The right to reproduction is found in the *Berne Convention for the Protection of Literary and Artistic Works*,[50] the *Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms*,[51] the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*,[52]

[45] Bently & Sherman, *supra* note 36, p. 110.
[46] *Ibid.*, pp. 112–113.
[47] *Ibid.*, pp. 115–116.
[48] *Ibid.*, pp.126–127.
[49] *Ibid.*, p. 128.
[50] Article 9, para. 1 stipulates that the author has an exclusive right of reproduction "in any manner and form".
[51] Article 6 of this Convention equalizes the protection of "duplication right" of producers with the copyright protection granted to authors of musical works, with some limitations, however.
[52] Article 10 of the Convention assigns producers a right to authorize "direct or indirect" reproduction of sound recordings.

the WIPO *Phonograms and Performances Treaty* (WPPT),[53] and, finally, the TRIPS Agreement.[54]

- Being a more contemporary development on the international scale, the right to issue copies to the public (*distribution right*); this right means that the owner of the copyright either in a musical work or in a sound recording has an exclusive right to issue copies of such work or recording to the public, or, to say it otherwise, to put the copies on the market.[55] The distribution right is provided in the WIPO *Copyright Treaty* (WCT)[56] and the WIPO *Phonograms and Performances Treaty*.[57]
- The right to rent or lend the work to the public (*rental or lending right*); in this case, the copyright owner has the right to control the rental and lending of the work, the distinction between the two being certain commercial advantage in the first case and no such profit in the second[58]. The rental right is provided for in the WIPO *Copyright Treaty*[59] and the WIPO *Phonograms and Performances Treaty*.[60] In addition, Article 11 of the TRIPS Agreement provides for the possibility to extend the application of this right to musical works, by requiring its Members to "provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works". Thus, under TRIPS, there are a number of possibilities to afford copyright protection to musical works, beyond the required minimum.
- Also being a recent development, more in response to technological challenges to the copyright regime, the right of communication to the public (communication right) has been introduced in the WIPO *Copyright Treaty*[61] and the WIPO *Phonograms and Performances Treaty*.[62] This right secures the exclusive rights of the author of a musical work and the producer of a sound

[53] Article 11 of the Treaty basically repeats similar provision of the Rome Convention, but strengthens the protection by granting producers an "exclusive right" to reproduce the work "in any manner or form".

[54] Article 14(2) repeats the corresponding provision from the Rome Convention.

[55] Bently & Sherman, *supra* note 36, pp. 130–131.

[56] Article 6 of the Treaty grants authors the exclusive right to make available to public the original or copies of their works "through sale or other transfer of ownership".

[57] Article 12 of the Treaty, which repeats the wording of the WIPO Copyright Treaty.

[58] Bently & Sherman, *supra* note 36, pp. 132–133.

[59] Article 7(1) of the Treaty grants the authors "the exclusive right of authorizing commercial rental to the public of the originals or copies of their works".

[60] Article 13 of the Treaty gives the producers of sound recordings, alongside with exclusive right to authorize the rental of the work, additional control over the use of work even after distribution of the recording.

[61] Article 8 of the Treaty.

[62] Article 14 of the Treaty gives the producers of sound recordings, alongside with exclusive right to authorize the rental of the work, additional control over the use of work even after distribution of the recording.

recording to control the access of the public to their respective works, 'by wire or wireless means'.

- Other rights in musical works and sound recordings, which are not expressly related to the topic of this analysis, include: the right to perform, show and play the work in public (*public performance right*); the right to broadcast the work (*broadcasting right*); the right to include the work in a cable-program service (*cable right*); the right to make an adaptation of the work, or to do any of the above acts in relation to adaptation (*right of adaptation*); and, finally, the right to authorize another person to carry out any of these activities.[63]

2.3. Technical Aspects of the File-sharing Process

Before proceeding to the legal analysis of the file-sharing process, it would be appropriate to demystify the process itself.

In order to be able to effectively share a file, the owner of the original sound recording or its copy should undertake several steps, first of which is 'ripping'. This means that the audio tracks on the sound recordings are first compressed (usually to the size not exceeding ten per cent of their original size)[64] into a digital format using extensions like MP3, OGG, WMA or other formats. So far, files with MP3 extension are enjoying overwhelming popularity, though they are not regarded as the highest quality media files.[65]

After the process of compression, the resulting digital media file is stored (in this particular case – uploaded) in the computer memory, usually on the hard drive, since the size of those files, although handy enough for transfer through broadband Internet connection, is too large to allow for saving them on conventional removable devices, such as floppy discs. What is important about saving a file on a hard drive, is the end result, namely, that there is a perfect digital copy of the original sound recording, which in most cases maintains the quality of the original sound recording.

File-sharing applications make it possible for the creator of the above-noted digital media file to make it available to others via an Internet connection. There is a wide variety of file-sharing programmes, which can be basically sorted out in two main categories: a) peer-to-peer networks with centralized or distributed object storage that have a centralized database with a searchable index on the file name (like now defunct Napster, Audiogalaxy, MP3.com and others), and b) fully distributed P2P networks (currently popular KaZaa, Morpheus, BearShare, WinMx,

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[63] Bently & Sherman, *supra* note 36, p. 124.

[64] Gillian Davies, 'Technical Devices as a Solution to Private Copying', at *Perspectives on Intellectual Property, Volume 8: Copyright in the New Digital Environment*, (Sweet & Maxwell, 2000) p. 168.

[65] Source: Epitonic website, 'Downloading and Streaming Music' <www.epitonic.com/help/downloadingstreamingmusic.html>, visited on 21 November 2003. Other file extensions of the same size, namely, WMA files and Liquid Audio, are of better quality, but less popular, allegedly because of the opportunities of copy-protection measures, which can be embodied in such files and present some 'unpleasant surprises' to online pirates.

LimeWire, iMesh, Grokster and many others), where users need others users' IP address to connect to the host of the media objects and the whole network is not directly run or controlled by anyone. This difference, as will be illustrated later, is crucial for the issue of legal responsibility of the file-sharing service operators, as well as in a number of other issues.

Despite these differences, P2P applications usually require the owner or user of the computer to indicate the folder(s) that he/she would like to share and download (these two can be different folders). Therefore, making the content of specific folders/drives available online is a result of a genuine choice of the owner or user of the computer, which he/she presumably makes in full capacity of doing so. It is to be noted, in this regard, that contemporary P2P services go far beyond sharing audio and video files and, as evidenced, have a substantial number of shared non-infringing content on the network.

After the file or files are made available online (shared), any user of the same file-sharing network can download such media file to his/her own computer. File-sharing applications, as a matter of rule, incorporate sophisticated search engines with a number of options, so it is nearly always possible (depending on the size of actual 'online library') to locate and download a specific musical work of a specific file extension, size and quality. Downloads within a file-sharing network usually do not require the filling out of any forms or any other formalities – the end-user can just download the media file with a click of the mouse. Download speed depends on the size of the file and the connection speed, and can range between from one to ten minutes.

Once the download process is finished, the person has a perfect – that is, absolutely identical – digital copy of the original sound recording.

2.4. Copyright Infringement Involved in Online Piracy

The copyright dimensions of online piracy, as the process described in the preceding paragraph is often referred to, still present more questions than settled answers. The matter is perhaps that 'copyright wars' are still raging and it will presumably take a number of years until an authoritative and established judicial interpretation of all aspects of this phenomenon is firmly set and followed.

Therefore, this part of the paper is a modest attempt to single out possible violations, or, putting it in usual intellectual property language, infringements of copyright involved in online piracy.

2.4.1. Reproduction Rights

Plainly speaking, since the author of the musical work has an exclusive right to reproduction, that is, to make copies of the work, any copying performed without his/her permission theoretically infringes the exclusive reproduction right of the author. By analogy, the producer's corresponding right in the sound recording is similarly infringed. Having this simple presumption in mind, we should nevertheless be wary of the fact that new technology always puts a certain 'test' on the copyright

regime, the digital environment being one of such innovative and revolutionary challenges.

With regard to reproduction rights in the world of digital music, several important distinctions are to be drawn. First of all, as a preliminary matter, we have to establish the fact that 'ripping' of an original sound recording from analogue or digital carrier of signal (such as CD, vinyl disc, Mini Disc, or even master tapes used in the recording studios) is, in fact, a reproduction. Secondly, there is a need to analyse the practice of 'pure' sharing (that is, sharing without downloading). And finally, we have to look at the actual copying of already existing compressed music files from websites and over the peer-to-peer networks, where the user downloads the media file from another user and therefore obtains a perfect digital copy of the existing media file.

1) File conversion – As a preliminary remark, it should be noted that MP3 and other digital compression formats are not deemed to be illegal as such. The RIAA, for example, states that '[MP3s'] use has had a very positive impact in terms of allowing the music industry to discover consumer interest in online music'.[66] The technology itself cannot be blamed for its allegedly illegal use, as has been accepted for a long time in U.S. courts.[67] However, this does not fully resolve the problem, since the question is not about the nature of the file compression method, but rather about the practice of copying the audio files in this medium, i.e. the end result of the use of such a method. The WIPO *Copyright Treaty* provides some helpful guidance in this respect, as much as Agreed Statement concerning Article 1(4) provides:

> "The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."[68]

The same statement, but with regard to the rights of producers of sound recordings, is also found in WIPO *Phonograms and Performances Treaty*.[69] Although the legal

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[66] From the previous version of the RIAA website, still available at <danet.deerfield.edu/technology/its_howto.cfm?action=q18>, visited on 21 November 2003.

[67] See, for example, Sony Corp. of America v. Universal City Studios Inc, 464 U. S. 417, 104 S. Ct. 774 (1984), a landmark case in the Supreme Court of the United States, where it was held that the home recording appliances did not infringe the copyrights in cinematographic works, since they could have been used for either 'infringing' or 'non-infringing' purposes.

[68] Source: WIPO website, <www.wipo.int/clea/docs/en/wo/wo033en.htm#P82_10437>, visited on 21 November 2003.

[69] Agreed statement concerning Articles 7, 11 and 16: "The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these

status of the Agreed Statements is uncertain,[70] it is nevertheless a clear pronouncement to the effect that storage of musical works in digital format represents an act of reproduction and requires, in each case, permission of relevant copyright holders; to do otherwise is an infringement of reproduction rights.

However, the case of 'ripping' for private use, that is, storage of a musical work into the internal memory of a personal computer, without the intention of sharing it through P2P network or uploading it to a website, can possibly fall into one of the 'permitted uses' categories. 'Permitted use' means that such reproduction, done without the permission of the copyright owner, does not constitute copyright infringement. This point of view is supported by the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 "On the harmonization of certain aspects of copyright and related rights in the information society", Article 5(1) of which provides:

> "Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
>
> (a) a transmission in a network between third parties by an intermediary, or
>
> (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2."

The recital 33 of the same Directive, in relation to the quoted provision, states that 'the acts of reproduction concerned should have no separate economic value on their own'. This leaves a possibility to argue that storing the files in the internal memory of the computer may fall within this required exception.[71] Although such an approach is not universal, the logic and reasoning behind it, which strikes the necessary balance between copyright considerations and the right to privacy of an individual user, can be invoked in support of general assumptions on this topic.

Therefore, having in mind the aim of this paper and the current stage of judicial developments, the storage of media in digital form on a hard drive of an isolated personal computer, without the intention to share the file through the Internet or other networks, can be deemed as non-infringing use of a musical work. Nevertheless, we should also be careful of predicting such a conclusion as a general outcome of various court proceedings, since the absence of express universal consensus on this issue may very well lead to different conclusions in different judicial systems.

Articles." Source: WIPO website, <www.wipo.int/clea/docs/en/wo/wo034en.htm>, visited on 21 November 2003.

[70] Jérôme Passa, 'The Protection of Copyright on the Internet under French Law', in Frédéric Pollaud-Dulain (ed.) *Perspectives on Intellectual Property, Volume 5: The Internet and Author's Rights*, (Sweet & Maxwell 1999), p. 31.

[71] Bently & Sherman, p. 143.

2) File sharing – In contrast to file conversion, much has been written about the copyright implications of file sharing on the Internet and it has been the central topic of a number of recent court decisions.[72] Despite this fact, it is still far from clear what constitutes infringement of the right to reproduction in various cases, since various judgements clearly seem to contradict each other.

As much as file-sharing is used as a collective term to embrace a complex of different acts, it is better to consider each of them separately. Namely, we can single out: 1) uploading the media file on the personal website; 2) sharing the media file in the P2P service; 3) downloading the media file on a hard drive.

3) Personal websites – Strictly speaking, there is a difference between actually uploading the file to the Internet and just making it available through hypertext link (in the latter case, the file remains stored on the hard drive or on another website). Reproduction will be taking place in the first case, since, by uploading the media file to a personal website, it is stored on the online server of the provider of the web space and is constantly and freely available on the Internet, with the actual possibility that other users can access and download it. Therefore, since the media file is fully uploaded on the Internet, the musical work is reproduced on the Internet.

Following this line of argument, linking the file to the website, namely, providing the hypertext link to the media file, which is actually stored on the hard drive of an individual user or on another website, with its availability depending on the times when the computer is online, may be deemed to constitute an infringement of the communication rights of the respective copyright holders.[73] It can be equally argued that once the computer is set online, with the media files stored in its internal memory becoming, accordingly, available online, the hypertext linking does constitute, in itself, an unauthorized act of reproduction. After all, the Internet is a network of networks;[74] each and every computer online, not only the powerful servers of web space providers, are to be deemed as part of the Net. In this case, it does not matter whether the storage of media files in internal memory has taken place before the computer has connected to the Internet or during the Internet session – the content of the media file is reproduced online.

However, since there are no authoritative judicial statements as to the actual type of infringement taking place in this particular case, we should presume, on a factual basis, that the distinction between uploading the media file on the website and merely providing a hypertext link leads to two different acts, the first being reproduction and the second – making the work available to the public. Therefore, in

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[72] A line of judgments in the *Napster* case, which is still far from completion; also, *see* the latest judgments in the U.S., namely, *Atlantic Recording Corporation et al* v. *Daniel Peng*, District Court of New Jersey, civil no. 03-1441, 03.04.2003; *RIAA* v. *Verzion Internet Services*, District Court for the District of Columbia, 24.04.2003; *MGM Studios Inc, et. al.* v. *Grokster*, California District Court, 25.04.2003 and others.

[73] On the infringement of communication rights in detail, *see below* at 2.4.4.

[74] Makeen Faoud Makeen, *Copyright in a Global Information Society – the Scope of Copyright Protection under International, US, UK and French Law*, (Kluwer Law International, 2000) p. 282.

the first case the right to reproduction is infringed, and in the second – the right to communication to the public.

4) File-sharing in P2P networks – With the technical methods of work of P2P networks discussed above, it is reasonable to proceed directly to the legal implications of the matter.

Once the user in P2P network puts his/her collection of media files online or, to put in another way, shares it, such action is presumably infringing the copyrights of the author of a musical work and the producer of a sound recording by 'duplicating' them online. However, certain care should be exercised with regard to such definition. It is known that some users are sharing the media files without downloading, i.e. simply posting (but not uploading) their media collections online, without the intention of downloading music from other users.[75] Such pattern may be a case when a person agrees to transfer a certain media file (or files) to another user or group of users; with very convenient and simple interface of file-sharing applications, such action is not very different from the case when a person privately gives a CD to his/her friend for copying. 'Pure' sharing and actual downloading are hence not the same, and, correspondingly, raise different copyright considerations – putting both types of acts under one heading of 'illegal duplication' may have certain adverse effects on the legal clarity of the issues involved.

A simple act of sharing media files, which embody certain musical works in the form of sound recordings, without the permission of relevant copyright owners, is certainly an infringing act – but not an infringement of the right of reproduction. It is the right to communication to the public, namely, an exclusive right to make the copies of work available to the public, which is being infringed. Accordingly, it will be considered in more detail below, under the corresponding heading.

5) Downloads – Finally, downloading media files from another user in file-sharing networks or from a website is the easiest case to classify, and should not raise any theoretical difficulties as to its qualification as unauthorized duplication of a musical work embodied in a sound recording. The perfect digital copy of a media file is made and stored on the hard drive of a computer, thus turning such an act into directly copying a musical work from another person. There is, correspondingly, no authorization from the copyright owners. Therefore, the reproduction right, under the classical copyright doctrine, is undoubtedly being infringed.

2.4.2. Distribution Rights

In fact, P2P file-sharing networks, regardless of the fact whether they are centralized or fully distributed, are distributing an enormous amount of media files with embodied musical works in the form of sound recordings. The process of file distribution is, as a matter of rule, carried out without any authorization of either of the copyright holders. By analogy with the above arguments in the case of reproduction of musical works, it can be argued that such distribution almost

[75] This can be a useful tool for fans of certain musicians, who wish to promote the latter by spreading his/her music online for a large amount of users.

certainly infringes the exclusive rights of authors and producers of sound recordings. However, this question is more complicated than it seems at a glance, since the issue of applicability of distribution rights to computer networks raises serious problems at international and regional levels. During the negotiations on the WIPO *Copyright Treaty*, the majority of delegations present refused a proposal to stretch the concept of 'distribution' from tangible methods of distribution, involving tangible assets, to the digital environment.[76] This approach found its expression in the Agreed Statement concerning Articles 6 and 7 of the Treaty, which upheld that "as used in these Articles, the expressions 'copies' and 'original and copies', being subject to the right of distribution . . . under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects".[77] The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 "On the harmonization of certain aspects of copyright and related rights in the information society" follows the same logic.[78] Although it can be tempting to go further and elaborate on theoretical implications of the right to distribution in the environment of file-sharing networks, it seems more appropriate, for the reasons of coherency of the current chapter, to omit this issue in the forthcoming human rights analysis.

2.4.3. Rental and Lending Rights

The picture is equally complicated with regard to rental or lending rights. The right to rent seems not to be in fact infringed by file trading on P2P networks, since the media files are shared and downloaded without any costs related to the amount, quality or type of music downloads,[79] and, what is most important, without any payment for the service. File-sharing software, in its turn, is usually readily available for free download. Thus, the requirement for the existence of 'commercial advantage' is not satisfied.[80] In addition, there is at least a non-binding pronouncement on a universal level as to the inapplicability of, at least, rental rights in a digital environment, embodied in the Agreed Statement concerning Articles 6 and 7 of the WIPO *Copyright Treaty*.[81]

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[76] Makeen, *supra* note 74, p. 286.

[77] Source: WIPO website, <www.wipo.int/treaties/ip/wct/statements.html>, visited on 21 November 2003.

[78] Recital 28 of the Directive states that "copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a *tangible* article" (emphasis added).

[79] Except for having a computer with Internet connection, which is clearly outside the degree of responsibility of file-sharing networks and is more an obvious matter of fact rather than legal requirement.

[80] Bently & Sherman, *supra* note 36, pp. 130–131.

[81] "As used in these Articles, the expressions 'copies' and 'original and copies,' being subject to . . . the right to rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects." Source: WIPO website, <www.wipo.int/treaties/ip/wct/statements.html>, visited on 21 November 2003.

Infringement of lending rights is more difficult to qualify. It is to be noted that lending rights are not so far recognized internationally, but are effective on the level of the European Union,[82] which led to incorporation of EC law into the legislation of the EU Members.[83] For example, the 1988 *Copyright, Designs and Patents Act of the United Kingdom*, section 18A (2)(b) provides that "[lending] means making a copy of the work available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage, through an establishment which is accessible to the public".[84]

Therefore, lending is considered to be an exclusive right of the copyright owner in a musical work or sound recording, if it is done "through an establishment which is accessible to the public" and does not represent a private loan between private individuals.[85] It can be questioned, whether peer-to-peer networks actually represent "an establishment which is accessible to the public" or are to be considered as means of private contact between two individuals – a person who shares the digital copy of the musical work and a person who downloads it. Although there are not set answers to these questions, it is to be presumed that the answers will differ depending on the type of network involved. In Napster-styled networks, with a central searchable database of digital media files, the answer would be that lending rights of the copyright owner in a musical works or sound recordings can be theoretically infringed, since such service is although 'virtual', but anyway "an establishment which is accessible to the public"[86] through an Internet connection. However, the answer in case of, for example, Morpheus, KaZaa or other fully distributed P2P networks is not so straightforward. It can be, in my opinion, rightly argued that file-sharing on such completely distributed networks represents, technically, a private contact between two individuals or a group of users through the use of search-and-download Internet applications. Therefore, such P2P networks, in general, are not 'accessible to the public' at large; rather, they represent a net of isolated bilateral contacts between individuals with the aim of sharing and downloading the files available at their individual hard drives.

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[82] European Union Rental Rights Directive, cited at Bently & Sherman, *supra* note 36, p. 133.
[83] *Ibid.*
[84] Source: <www.jenkins-ip.com/patlaw/cdpa1.htm#s18A>, visited on 21 November 2003. This definition is copied from the EU Rental Rights Directive, as noted above, with the exception of the words 'for a limited time', which meant that the loan should in fact occur within a specific period of time. This distinction is crucially important. It means that the UK law, contrary to the language of the EU Directive, is in fact allowing for a vague and therefore indefinitely long-time term of lending.
[85] Bently & Sherman, *supra* note 36, pp. 132–133.
[86] 'Public' in this context does not necessarily mean the general public or society at large; in file-sharing networks, the net of users having unlimited access to media files, with a number of such users reaching tens and hundreds of millions, does in itself fall within a notion of 'public'. On reworking of the concept of public in a digital environment, *see* Ysolde Gendreau, 'Intention and Copyright', in Frédéric Pollaud-Dulain (ed.) *Perspectives on Intellectual Property, Volume 5: The Internet and Author's Rights*, (Sweet & Maxwell 1999) pp. 18–19

When examining the possibility of the existence of a practice of lending on file-sharing networks, we should not be, at the same time, blind to the core legal meaning of the term 'lending', which means "to part with a thing of value to another for a time fixed or indefinite, yet to have some time in ending, to be used or enjoyed by that other; the thing itself or the equivalent of it *to be given back* at the time fixed, or when lawfully asked for, with or without compensation for the use as may be agreed upon".[87] This means that lent musical work should be *returned* to the rightful owner after use or enjoyment of that work; file-sharing, on the other hand, takes the form of *copying* the original media file to the end-user's hard drive. The downloaded file does not need to return to the first owner, because the latter still has it. As noted above, copying something digital is a perfect process and it is technically almost impossible to find *any* difference between an original and a copy. Therefore, it is highly questionable, even in centralized peer-to-peer networks, that the lending of musical works actually occurs.

As a conclusion, the existence of practice of lending musical works on P2P networks is, at best, a controversial issue. Since the actual copying of the media files takes place, it would be more logical to argue that the files are not being 'lent' but rather reproduced or made available to the public; this means that the lending rights' infringement action would be groundless in the case of online trading of musical works. Hence, this topic will not be revisited in the forthcoming human rights analysis.

2.4.4. Communication Rights

The right to communication, in its contemporary understanding, is undoubtedly an answer to the technological challenges to the copyright posed by the Internet; accordingly, it has been recognized only recently, namely in the WIPO *Copyright Treaty* and WIPO *Performances and Phonograms Treaty*, both adopted in 1996. Although the right to communicate to the public was partially recognized in Berne Convention, in Article 11bis, it was not meant at the time to embrace Internet technologies.[88]

There is a slight difference between the texts of the two Treaties, where they confer the rights respectively on authors of musical works and producers of sound recordings: authors' exclusive rights to authorize "any communication" is secured, while the producers of sound recordings are granted the right to authorize the making of their recordings available to the public. Regardless of this difference, they basically confirm that both categories of copyright owners have the same degree of exclusive control over the flow of their respective works on the Internet ("by wire or wireless means").

The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 "On the harmonization of certain aspects of copyright and related rights

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[87] *Black's Law Dictionary*, sixth edition (West Publishing Co., 1990), p. 901 (emphasis added).
[88] Makeen, *supra* note 74, p. 290.

in the information society", in Article 3, also confers certain rights upon the authors of musical works and producers of sound recordings by closely following the texts of WCT and WPPT. Recital 25 to the Directive further explains that the communication to the public should take the form of "on-demand transmissions".

There are several instances where the right to communicate to the public can be infringed on the file-sharing networks. One example, already noted above,[89] is placing online the hyperlink to a media file available on a hard drive or another website, on the condition that such file (or files) is available online temporarily.[90] In such case, we should determine whether "members of the public may access these works from a place and at a time individually chosen by them". Such formulation undoubtedly puts the burden of searching on the Internet users wishing to access such work; in this case, it does not matter that the owner of the website makes file available only for his/her personal use or for the narrow circle of friends.[91] Free availability of powerful search engines, which can display thousands of responses on the Net in a matter of seconds, makes the defence of 'private use' or 'private copying' even more unconvincing. Therefore, the infringement of the right to communicate to the public in the case of hyper-linking can be established.

The second case of possible infringement of communication rights, also mentioned above,[92] is 'pure' file-sharing in P2P networks, whereas the individuals make media files, stored at their computers' hard drives, available to the users of the network, without the further intention to download the files from other users. This case is very close to the one discussed above, namely, placing hyperlinks to the media files on the personal website; while differences exist – there is actually no personal website, but just a shared folder on an individual hard drive with media files on it and other users have to cue to download the file – they do not make it radically different from the copyright law perspective, however. Assuming that the intra-network users' community does constitute a 'public',[93] it is rather easy to conclude that acts of 'pure' file-sharing amount to an infringement of the right to communicate to the public, held both by the author of the musical work and the producer of the sound recording.

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[89] Under the heading "Personal websites".

[90] In case of permanent online availability of such file, even though it stays at the individual hard drive, there will be no practical difference between such linking and actual uploading of the file on the personal website (i.e. on the online server of the web-space provider).

[91] Several cases in French courts can be indicative of this argument, for example, the decisions of Paris Court of first instance in the *Brel* and *Sardou* cases, where the court confirmed that the availability of copyrighted works on the personal websites of the defendants "encourage[s] the *collective use* of their reproductions", cited at Passa, *supra* note 70, p. 39.

[92] Under the heading "File sharing".

[93] Note that both WCT and WPPT, as well as Directive 2001/29/EC speak about "members of the public" rather than "public" as such.

It should be also noted that the digital environment is capable of blurring the distinction between acts of reproduction and communication to the public, as well as related concepts of rights and infringements.[94]

2.5. Human Rights Online

The copyrights in musical works and file trading on peer-to-peer networks have been at the heart of recent 'copyright wars' in various U.S. courts. Several groundbreaking and precedent-setting judgments have been delivered.[95] While the copyright wars nowadays rarely hit news headlines, as they did a couple of years ago, the legal battles are certainly far from final completion, with many questions left unanswered.

Despite this fact, several guiding principles can be extracted from the judgments already delivered. First of all, they confirmed that, in general, sharing and downloading of copyrighted music on the Internet is a copyright infringement, committed by, at least, individual users.[96] Secondly, the fair use defences in such cases were subject to an unusually strict test, in which the judicial authorities blindly relied on the "wisdom" of the legislative branch, which extended copyright protection on account of public domain resources.[97] However, no serious discussion on relevant human rights has been initiated by the defendants; except for rather half-hearted attempts to introduce First Amendment challenges to the constitutionality of certain measures and orders, rather obvious human rights arguments did not appear before the court.

In modern jurisprudence, there is a widely recognized trend of mainstreaming human rights into each and every field of law, wherever they may be applicable. This of course does not guarantee immediate success in all relevant or irrelevant proceedings; rather, the balance can be tilted more easily towards the party in the proceedings, which invokes human rights considerations for the purposes of prosecution or defence.

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[94] Makeen, *supra* note 74, p. 292.

[95] A line of judgments in *Napster* case, most importantly *A&M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *In re Aimster Copyright Litigation*, United States District Court for the District of Illinois, 04.09.2002; *Atlantic Recording Corporation et al* v. *Daniel Peng*, District Court of New Jersey, civil no. 03-1441, 03.04.2003; *RIAA* v. *Verzion Internet Services*, District Court for the District of Columbia, 24.04.2003; *MGM Studios Inc, et. al.* v. *Grokster*, California District Court, 25.04.2003, and several others.

[96] The most recent judgment in *MGM Studios Inc, et. al.* v. *Grokster* (California District Court, 25.04.2003) recognized that provision of services by fully distributed networks does not attract copyright infringement liability on account of service providers; at the same time, individual users are not shielded from direct liability for copyright infringement on such networks.

[97] The trend, recently confirmed by the Supreme Court of the United States: "The wisdom of Congress' action, however, is not within our province to second guess . . .", *Eldred* v. *Ashcroft,* 537 U.S. (2003), p. 32.

The reluctance to introduce human rights considerations before the courts in 'copyright wars' was, perhaps, the intentional strategy of defence counsels, who should have realistically evaluated the thinking of the judiciary of a specific forum where those battles took place. The United States judiciary is generally opposed to the modern concept of indivisibility of human rights, and thus does not recognize economic, social and cultural rights as legally enforceable. The 'second generation' thinking, despite seemingly universal consensus to the contrary, embodied in the 1993 *Vienna Declaration and Plan of Action*, is still strong in the United States. However, purely strategic reasons would not save these arguments, since, in addition to 'second' and even 'third generation' rights, such 'classical' human rights as privacy, non-discrimination, freedom of expression[98] and presumption of innocence are being affected by the process of adjudication on these seemingly private law issues.

The general human rights understanding of copyright and its common implications were already discussed above.[99] The human rights approach to intellectual property in general and, in this particular case, to the copyright protection in the music industry, can be very valuable from the standpoint of the administration of justice, since it manages to exercise a careful and balanced approach to the interests at stake. It does so, on the one hand, through paying equal share to the author, by granting him/her the right to remuneration for his/her creation as a manifestation of one's human dignity, and, on the other, through benefiting society at large, by ensuring that the final aim of copyright protection is a contribution to the cultural development of the general public. With those conclusions in mind, it is relevant to proceed with the analysis of specific human rights dimensions in recent expansions of copyright protection in the music industry.

2.5.1. Authorship in a Human Rights Perspective

An interesting debate has been initiated by the defendants' motion for a stay in the *Napster* case, which argued that corporate plaintiffs, representing mostly the Big Ones, did not actually *own* the copyrights they were going to enforce.[100] The main strategy chosen to demonstrate that the suing companies lacked authorship of the musical works that they deem to be infringed was to indicate certain inconsistencies in copyright certificates granted to those corporations. Another point made was that the musical works created by the musicians on corporate artist roster were not 'works for hire' and were not properly assigned to the record labels. Thus, only procedural issues were raised, which finally led to the partial grant of the motion for a stay by the court.[101]

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[98] *See below*, chapter five (on music censorship).
[99] *See* the first chapter on general issues, under the heading "Human rights approach to copyright".
[100] *In re Napster, Inc. Copyright Litigation*, 191 F. Supp. 2d 1087 (N.D. Cal. 2002).
[101] *Ibid.*, p. 29.

Both human rights instruments that contain references to copyright, namely, UDHR and ICESCR, emphasise that it is the *author* who has the right to reap material benefits from his/her intellectual creation. It is hard to presume that the original intention of the drafters of both UDHR and ICESCR was to grant this right – as a human right – to *legal persons*. Human rights weren't and, arguably, still aren't thought as being rights attached to legal persons, except for a number of clear-cut cases or even theoretical assumptions, many of which are untested in practice. Applying such a line of interpretation, it is hardly presumable that corporations, as legal persons, and especially such huge multinational conglomerates as Big Five, can claim that they actually posses, from a human rights point of view, the copyrights of the musical works they publish and distribute; it is different to argue that they build their businesses on the copyright protection enjoyed by the author and perform purely economic functions for the production, distribution and public promotion of copyrighted works. The human rights approach to copyright thus invalidates their claim for the ownership of copyrights in musical works.

Perhaps, the argument on behalf of the music industry would have been that its exclusive economic interests deriving from copyright monopolies, rather than the *music* itself, are put at stake by the use of file-sharing technologies. But when it comes to copyrights, it should be authors, as a classical human rights approach requires, who have the last say as to authorize the use and sharing of their works.

2.5.2. Public Domain and Human Rights – a Missing Balance

Although all of the important online file-trading cases were heard in United States courts, different courts reached different conclusions and the general picture right now, objectively speaking, is rather confusing. Nevertheless, one troubling similarity that underlines these judgements is the blind belief with which the courts felt themselves compelled to uphold the protection of *copyright interests* of the music industry, which was largely represented by the Big Ones and their loyal RIAA attorneys. The statement about *copyright interests* is emphasised deliberately, since the delivered judgments seem to have lost sight of one of the fundamental concepts of classical copyright doctrine – a balance between public and private interests. Instead of upholding this balance, the courts went on the leash of controversial domestic legislation[102] and effectively stretched the copyright protection onto territories that have belonged to the public domain for a long time.

It is relatively easy to establish human rights support for the existence of the public domain, since, as noted above, the final aim of human rights pronouncements on intellectual property rights, such as Article 27 of the UDHR and Article 15 of the ICESCR, is to ensure the flow of useful and creative information to the public. This

[102] More specifically, the *Digital Millennium Copyright Act*, U.S.C. § 1201; source: <www.copyright.gov/title17/92chap12.html> (visited on 21 November 2003) and *The No Electronic Theft ("NET") Act*, which amended 17 U.S.C. and 18 U.S.C., source: US Department of Justice, <www.usdoj.gov/criminal/cybercrime/17-18red.htm>, visited on 21 November 2003.

is not to say, however, that in case of conflict between private and public interests in intellectual property, the latter should always prevail. What is required is a careful balance of interests, which would not fail to recognize the interest of both private individuals (protection of their dignity by rewarding for their intellectual creations) and the general public (free flow of information and cultural development). It seems, however, that such balancing of interests has not been done in the latest judgments on the issues of online piracy, in which the courts afforded high priority to private commercial interests of large actors in copyright industry over considerations of the public good.

2.5.3. File-sharing Networks as Digital Libraries and Fair Use – the Right to Cultural Development?

Following the line of argument in the preceding sub-chapter, where the main aims of copyright – to contribute to enriching cultural development of the general public – are upheld, one particularly interesting aspect of 'copyright wars' deserves closer attention here.

The fair use doctrine, either in common law or in continental systems, recognizes one important exception from the copyright monopoly, namely, the library use.[103] The library use attracts the right to perform a number of acts with regard to the copyrighted work without the prior permission by the initial copyright owner, namely, to make copies for research or private study, to lend the works for non-profit purposes and to make a number of reproductions for inter-library use.[104] Although it is recognized that libraries should be "prescribed, non-profit" public institutions,[105] modern technologies can challenge such presumption as being an out-dated and nostalgic reflection of pre-Internet world. Indeed, today the Internet is regarded as the biggest and most exhaustive library in the world, and the absence of the physical 'librarian' should not lead us to the conclusions on the contrary – in the digital environment with its powerful search engines, the presence of a librarian is simply not necessary. The Internet is the most widely used reference tool for both private and academic research, and with the rapidly growing amount of distance-learning courses also establishes itself as a quasi-educational institution.

If we were to suppose that the centralized file-sharing networks of Napster could be regarded as digital libraries of media files (although not 'prescribed' officially), the human rights approach to intellectual property gives additional support to the legality of the practice of file-sharing on such networks. Indeed, the wording of Article 27 of the UDHR provides for the right of "everyone to freely participate in the cultural life of the community, to enjoy the arts and *to share* in scientific advancement and its benefits". Given the assumption that "sharing in scientific advancement" is a human right, it is to be perceived that the practice of unauthorized lending of the copyrighted copies of various cultural works to

[103] Bently & Sherman, *supra* note 36, pp. 211–212.
[104] *Ibid.*
[105] *Ibid.*

individual users in public libraries is aimed at the realization of the 'overall' participation in cultural life. The Internet boosts such participation immensely, allowing the users of P2P networks, in particular, to *share* the scientific (i.e. digital technology) advancements and, with their help, to disseminate the cultural items, which can include not only musical works, but also their own literary and artistic works. Though it is understandably controversial to elevate the decentralized or even centralized networks of peer-to-peer users in a largely unregulated Internet cyberspace to a level of conventional libraries and extending to them fair use limitations granted to the latter, one point should always be borne in mind. Putting aside the copyright law arguments as to the legality or illegality of file-sharing, the file-sharing technology has enabled hundreds of millions of individuals to access and enjoy the works that they presumably could never enjoy if forced to pay for it; the cultural advancement is thus taking place on an unprecedented scale, regardless of nationality, ethnic origin, race, sex or other distinctive factors.

2.5.4. The Reversal of 'Incentives Theory' – Human Rights Support

The most disturbing trend in *A&M* v. *Napster* and *RIAA* v. *Verzion* was the faith of the judges who sided with the music industry on the assumption that, by enforcing the strict rules of copyright protection on the Internet, they were actually protecting 'music'. The courts thus followed the logic of 'mechanic manufacturing' of music, while not paying well-deserved attention to the creative process, which is supposed to benefit the public more than the conveyor production of material copies of sound recordings. It is very logical that authors create music because they want their message to be heard, rather than solely for making profit.

In this regard, it can be argued, as paradoxical as it sounds, that Napster and the rest of online file-sharing services, extensively labelled as 'pirates' and 'thieves', were and are actually upholding the human rights understanding of the copyright regime. By providing the environment where artists can approach the end listeners directly, offer them to try their work, and to convince them that the purchasing of the product which contains the musical work is necessary for the full enjoyment of their musical work, leads to the creation of nearly perfect intellectual property marketplace. On such a market, sharing and wide distribution of media files carrying the original musical work, rather than being a 'theft', is strengthening the dignity of the authors and assuring, at the same time, a certain degree of 'quality control' through tough competition, which sorts out the works that deserve to be enjoyed, thus finally enriching the cultural life of society.

Thus, the environment of digital networks has challenged the usual economic assumptions of incentives as justification for copyright protections, since the 'incentives' argument is no more the main justification for the creative activity of authors. Rather these are the incentives of *producers* and *distributors*, who claim to be granted the most protection, since the circulation of perfect digital copies in the

file-sharing networks harms the market of tangible fixations of sound recordings.[106] And, since contemporary digital technologies offer the authors an opportunity to produce their own high-quality sound recordings at low cost[107] and file-sharing networks – to distribute (communicate) such recordings in digital format at no cost,[108] the authors of musical works can afford to have a direct contact with their potential customers. Moreover, the role of sound recordings has nowadays shifted towards promotional items (merchandise) and attraction of the public to live performances.[109]

One remark, summarising the points made above from the perspective of musicians themselves, is particularly interesting in this regard:

> "Question: The promo that Earache [the recording label – *note by the author*] sent out is copy-protected. You can't even play it on a PC CD drive. Is the band worried about mp3s?
>
> Answer: Not at all! The whole thing played out as we suspected; immediately after the promo was sent out, MP3s were on the Internet. We think it's just another way to distribute our music . . . I think the people that are really hurt are the Christina Aguileras of the world. There are only one or two big songs on the album, so people download those and don't buy the album. I mean, do you know anyone who has a complete Aguilera album?"[110]

The reversal of the 'incentives' theory is fully consistent with human rights obligations deriving from the Articles 27 and 15 of the UDHR and ICESCR, respectively. It was already discussed how those provisions place *author's* interests at the centre of legal protection. As illustrated above, however, the classical economic 'incentives' theory, with the arrival of the digital environment of direct artist-consumer contacts, is no more representative of the interests of the *author* of the musical work. Instead, such 'incentives' arguments are meant to protect the financial interests of producers and distributors of sound recordings, who are moreover corporate entities[111] and use (or misuse) their marketing power to create a

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[106] Raymond Shih Ray Ku, 'Creative Destruction of Copyright: Napster and the New Economics of Digital Technology', 69 *University of Chicago Law Review* 263 (2002), p. 299.
[107] *Ibid.*, p. 306.
[108] *Ibid.*, p. 300.
[109] *Ibid.*, pp. 308–310; *see also* David Maizenberg, 'The Cultural Future of Copyright Monopolies', available online at <practice.findlaw.com/archives/feature_0503.html>, visited on 21 November 2003.
[110] A fragment of the interview with Marco Aro, vocalist of the popular Swedish rock band The Haunted, posted at <www.digitalmetal.com/interviews.asp?iID=3888>, visited on 21 November 2003.
[111] Again, human rights of corporations come to mind. In the context of this analysis, it was already illustrated that it is not possible for legal entities to claim possession of certain human rights, except some clear-cut and narrowly defined cases.

certain monopoly in the music business.[112] Therefore, the 'incentives' theory, in the modern digital environment, is no longer valid to justify the continued expansion of copyright protection.

2.5.5. Fair Use, Presumption of Innocence and Privacy

The music industry makes extensive arguments that MP3 technology, resulting in enormous unauthorized reproduction of copyrighted works on the Net, has significantly hurt CD sales and gravely endangered the music industry.[113] The District Court in *A&M* v. *Napster* seemed to be fully convinced by this argument. However, it is equally argued that the modern music, especially produced by the Majors, is becoming increasingly standard and flat, thus decreasing the public interest and demand. Other factors, such as a general recess of the U.S. and world economy, filling of the CD collections that replace old vinyl collections, challenges presented to music by other forms of entertainment (PC games, DVDs and movie theatres) are not given due consideration; instead, the music industry prefers demonising file-sharing networks for all of its ills.

The logical follow up of such a hard line of argument has been to prohibit any software of the kind which is used to share files (completely disregarding the possibility of their fair use) and, after extensive lobbying, such prohibition has found its way at least into American legislation, namely, the controversial 1998 *Digital Millennium Copyright Act* (DMCA), which prohibits circumvention of the technologies that effectively control access to copyrighted work.[114] This means that the development and use of such technology attracts criminal responsibility, without prior determination as to its infringing or non-infringing use.[115]

From a classical copyright law perspective, such strict rules of liability, without leaving any room for the non-infringing use of digital communication technologies (file-sharing applications squarely falling within this category) are able to eliminate the long-established defence of 'fair use' in copyright proceedings with regard to file-sharing networks. This raised strong concerns of certain citizens' groups in the United States, who feel that it deprives the public of certain rights it possessed with regard to copyrighted works and gives it to 'publishers'.[116]

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[112] On the monopoly of the Big Ones in music industry, *see below*, chapter entitled "Antitrust".

[113] *See* IFPI *Music Piracy Report 2002*, pp. 9–10, available online at IFPI website, <www.ifpi.org>, visited on 21 November 2003.

[114] *Digital Millennium Copyright Act*, U.S.C. § 1201, (a) (1) (A); source: <www.copyright.gov/title17/92chap12.html>, visited on 21 November 2003.

[115] For the critique of this aspect of DMCA, *see* Hiba Modar Al-Bitar, Nicola Bottero and Francesca Crosetti, 'The WIPO Copyright Treaty and its implementation', *Collection of Research Papers from Post-Graduate Specialization Course on Intellectual Property*, (WIPO 2000), pp. 145–146.

[116] *Abolish the Digital Millenium Copyright Act*, source: <www.petitiononline.com/nixdmca/petition.html>, visited on 21 November 2003.

It should be noted that, along with the fair use defence concerns, no less important are the human rights concerns that are affected by the attempts of the music industry to enforce a 'net' ban on file-sharing technologies. One of the often invisible but absolutely fundamental human rights, namely, the presumption of innocence, is endangered.

The presumption of innocence, expressed in UDHR,[117] *International Covenant on Civil and Political Rights*,[118] recognized as a part of customary international human rights law and forming, moreover, the customary 'core' of human rights protection, presupposes that no one is to be presumed guilty before a court of law for committing a criminal offence, unless proven so in accordance with all indispensable judicial guarantees. However, as long as the music industry, represented by RIAA, is taking its own measures to fight against file-sharing software applications[119] and, as a result, taking justice in its own hands by calling for the hacking of the computers of suspected 'offenders' and by preparing to plant damaging software on their computers,[120] the presumption of innocence is as relevant as ever.

Human rights understanding of this issue, apart from the 'fair use' argument, is especially helpful for the developers and users of digital communication technologies to defend their rights. The file-sharing technology, especially fully distributed networks, has substantial non-infringing use.[121] Developers and users of such software, as presumption of innocence requires, should not be presumed to be guilty of the crime of infringement, until found so by a court of law in accordance with the principles of fair trial.

The aforementioned efforts and technologies for 'legal' hacking of users' personal computers tend to be at odds with one more classical human right of fundamental importance, namely, the right to privacy.[122] The application of such technologies will greatly endanger the privacy of the individual users, as much as many of the file-encryption systems and destructive software are not only capable to be non-discriminative in the process of destruction of media files stored on a hard drive of a personal computer (thus wiping out legal media copies and collections), but also to enable the copyright owners to effectively plant some 'spy' software and to observe the user's behaviour. With the increasing use of Internet for everyday purposes, such as business, online shopping, personal communications and research,

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[117] Article 11.

[118] Article 14(2).

[119] *See*, for example, Wired News at <www.wired.com/news/conflict/0,2100,47552,00.html> or C-net News at <news.com.com/2100-1023-946316.html>, both visited on 21 November 2003.

[120] <http://www.zeropaid.com/news/articles/auto/01142003d.php>, visited on 21 November 2003.

[121] *See MGM Studios* v. *Grokster*, US District Court of California, 25.04.2003 (non-paginated version).

[122] Recognized, on the universal level, in UDHR, Art. 12 and ICCPR, Art. 17, and by all regional human rights systems.

the right to privacy, being a fundamental human right, requires copyright owners and enforcers to take a very careful approach in avoiding unlawful and unconstitutional interference with individuals' privacy in the course of their lawful activities.

2.5.6. Developing Countries and the Right to Development

Finally, it is to be noted that there is a sense of certain 'centrism' in the arguments put forward by the music industry in its fight against the free circulation of copyrighted works over the Internet. The industry majors and, seemingly, the courts tend to forget one unique feature of the Internet: it is a universal, global virtual space that recognizes no national frontiers. Therefore, they see the music market from the perspective of developed countries exclusively, where an average individual economic actor is supposed to have enough financial resources to pay for the sound recording that he or she downloads for free; the reality in the developing world is certainly different.

As already noted above, the Internet and file-sharing networks facilitated the spread of knowledge and culture on a scale that was never possible before, at virtually no cost. And, certainly, an overwhelming majority of the inhabitants of the developing countries are unable to purchase the legitimate CDs that, as Chapter Five will attempt to illustrate in more detail, are overpriced due to unlawful monopoly held by the Big Ones in the music business. Therefore, one of the possible ways to "enjoy cultural life" in the developing world is to download the music for free from the Internet.[123] Accordingly, the decisions taken in the developed world with regard to P2P networks seriously affect access of the developing world to the global culture and it's inhabitants' right to development.

The right to development, being a 'third-generation' right, has been so far expressly recognized as a human right in only one universal document, namely, the Declaration on the Right to Development, adopted by the UN General Assembly resolution 41/128 of 4 December 1986. Article 1 of 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 realized".

The right to development has not yet been recognized in any binding international treaty, thus putting it on a lower status than 'classical' or even 'second generation' rights. Thus, the problems with its judicial enforcement are inevitable. Nevertheless, though it is hard to presume that the industry and the courts would be

[123] It should be noted that for the most of the developing world downloading music is not entirely free: availability of a computer with Internet connection is a prerequisite. However, as the prices for computer hardware and software continue to fall, and many educational and non-profit institutions in the Third World begin the practice of provision of free access to the Internet, not to mention broadband-connection Internet cafes, such material prerequisites do not constitute a serious impediment anymore.

concerned with taking into account the needs of the people living outside the borders of the forum State, adding such an aspect to the ongoing 'copyright wars' can provide for more a cautious and balanced approach to the issue, since the interests involved in this particular case can go far beyond the material interests of the music industry, artists and P2P network owners and operators.

2.5.7. Is the Argument of 'Human Rights of Corporations' also Applicable to Copyrights?

Although the issue of possession of human rights by legal persons and especially multinational corporations has already been examined above in general, one specific issue of fundamental character deserves special attention in the light of the subject matter of the current part of the paper, namely, do the Big Ones really, from a human rights perspective, possess the copyright in musical works made by artists they sign on their roster?

In the European context, in the case of *Smith Kline and French Laboratories* v. *Netherlands* (application no. 12633/87, 4 October 1990), the former European Commission held that patent represents a 'possession' in the sense of Article 1 of the First Protocol.[124] It is important to note that the applicant in this case was a corporate person, moreover, a multinational; despite this fact, the Commission had no virtual problem to declare the case admissible, as it has strictly followed the wording of the Article 1, which grants the right to "peaceful enjoyment of . . . possessions" both to individuals and legal persons.

Therefore, if we extend the conclusions of this admissibility decision to the copyright regime, it may seem reasonable to argue that the companies – in our case, the Big Ones – can claim to possess the human right to copyright. The issue of the actual ownership of copyright in musical works, which was discussed above in the current chapter, is partially relevant here. As demonstrated above, the human right approach requires that *authors* of musical works own the copyrights in their creations. However, what is more relevant here, is the right to property, or at least, to "peaceful enjoyment of . . . possessions", with regard to *neighbouring* rights, namely, the copyright in a sound recording owned by the producer, which may very well be (as it is usually the case) a corporate entity. Therefore, in this sense, the human rights claim to the enjoyment of property can be absolutely valid, at least in the European context.

This puts a certain strain on the line of human rights considerations enumerated above, since there are no more "industry interests" involved, but another human right, which is partially recognized and legally enforceable. However, such balancing of human rights against each other requires a very careful analysis of the values protected and involved. It is nearly impossible to predict the results of such balancing of legitimate interests on the level of the judiciary; what is possible at this stage, is to make some general theoretical assumptions.

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[124] Cited at: Clare Ovey & Robin C.A. White, *Jacobs and White European Convention on Human Rights*, third edition (Oxford University Press, 2002) p. 303.

First of all, the human rights claim to the right to property should be accepted by the relevant court/tribunal. In the light of the aforementioned *Smith Kline* decision, such a claim predictably has a considerable degree of being successful in the European system, with the obligatory character of the judgments of the European Court of Human Rights. However, this may not be true in other contexts, namely, in United States courts.[125]

A second aspect will inevitably arise, if the argument of 'human rights of corporations', with regard to copyrights, is already declared admissible by the court. In such a case, the fundamental character of rights involved, if presented correctly, will certainly influence the balance of legitimate interests of parties. In the end, it is highly improbable that the courts will give a right to property, which is not a universally recognized right and may not be binding on a State as a written treaty obligation, priority over such unquestionably fundamental rights, such as right to privacy, presumption of innocence and non-discrimination, backed up by a number of social and economic rights involved. However, much will depend on the degree of certainty of the relevant court/tribunal that such human rights concerns really exist and are applicable in the case of music industry; this inevitably places on defence counsels (or prosecution) a burden of proof of actual human rights violations or threat of such violation.

3. RECORDING CONTRACTS

3.1. The Contract

The recording contract between the recording company and the artist wishing to be signed to the company is an important source of mutual rights and obligations for both parties. As a matter of rule, the recording companies and labels they own are very secretive about their contracts with artists and try to cover them with a 'confidentiality' exception.[126] Usually these documents are rather lengthy and include many obsolete clauses.[127] However, all sample contracts usually include

[125] Stating that, we should however have in mind the recognition of the freedom of commercial speech as a freedom of expression of commercial enterprises by the judiciary of the United States; it cannot be ruled out that the entitlement of corporations to property as a human right will be recognized with regard to intellectual property rights.

[126] In a recent motion for stay in Napster case, *In re Napster Copyright Litigation*, United States District Court for Northern California, a contract with artist (Bruce Springsteen) and certificates of transfer of ownership were filed before the Court under seal. *See* respectively pp. 14 and 6 of the judgment.

[127] Source <www.recordingartistscoalition.com/rip.html>, visited on 21 November 2003. On this website, the Recording Artists' Coalition states that a recording contract can be so lengthy that it can take up to 80 pages of text.

many obligatory or customary clauses found in almost every final recording contract; of particular interest are the following:[128]

1) Production – Under the heading "Production", the agreement between the artist and the company expressly divides the "songs" (musical works composed and performed by the artist) and the "recording" (the master tape of the sound recording). Therefore, the contract in the beginning maintains the long-established difference between the musical works and their fixations, i.e. the sound recordings; this is fully consistent with the classical copyright doctrine. It is therefore to be presumed that the exclusive rights, arising with regard to each of the items, are accordingly divided between the author of the musical work and the producer of the sound recording. However, as demonstrated further, this is simply not so.

2) Assignment of exclusive rights by artist – This provision states that, as soon as the recording process is completed, the artist 'assigns all of his/her rights, title, and interest' to the company with regard to his musical works, performance and titles of the songs.[129] This is rather a surprising provision in the light of already noted "Production" clause (see above). What is the use of separating the concepts of musical works and sound recordings, if all intellectual property rights in the former are already given away to the company? One possible answer can be that such assignment is temporary and the copyrights will return to the author after the expiration of contract. However, it is established that recording contracts are, by some strange twist of fate (or, more realistically, successful lobbying) exempted from the 'seven-year rule', effective in California where most of the contracts are signed.[130] It means that the contracts can be effectively concluded for a lifetime (!). Additionally, the rights associated with the musical work do not return to the author after expiration of contract, but are retained by the recording company. One thing should be noted, however. All . . . rights, title, and interests are assigned, as it is stated, for "distribution and commercial exploitation" of the musical work and sound recording. However, even such reservation fails to secure the necessary balance, since "commercial exploitation" may mean any act in relation to the musical work or sound recording (reproduction, rental, lending, communication), which not only brings direct profit to the artist or a third party, but forms an act of non-commercial

[128] The provisions discussed are taken from a sample recording contract, available online for free legal advice, one of many sources: <www.2shoptheworld.com/PDF/SAMPLE_RECORDING_CONTRACT.pdf>, visited on 21 November 2003.

[129] Of course, the related (neighbouring) rights in the sound recording itself are initially secured by the company as a producer of the sound recording and an exclusive owner of the master tapes.

[130] The 'seven-year rule' is applicable in California for all personal services contracts, which means that the contract cannot be binding on parties for more than 7 years from its conclusion. When this legislation was introduced, the music industry lobbied for and obtained the exemption form seven-year rule. Source: Recording Artists' Coalition website, <www.recordingartistscoalition.com/rip.html>, visited on 21 November 2003.

character leading to loss of real-time and anticipated profits by the recording company.[131]

3) Copyright – This unusually brief (in the light of the title) provision deals with obtaining copyrights (read: copyright certificates from the Library of Congress) of each and every song of the sound recording. However, the second sentence under this title in the sample contract is more interesting: the copyrights in each song are deemed to be "the *sole property* of the Company". Therefore, this provision follows suite to the "Assignment" clause and effectively makes the company (the legal person) the sole owner of all copyrights in both musical work and sound recording.

4) Royalties – This clause is important in several respects. First of all, it assigns all collecting duties with regard to royalties to the recording company.[132] This means, in the spirit of the preceding clauses, confirmation for the switch of full control of commercial exploitation from artists to recording companies. Secondly, royalties are divided between the recording company and the artist – and, as much as these percentage rates are negotiated, much will depend on how established the artist is. Moreover, the artist's 'piece of the royalties' cake' is meant to "satisfy costs incurred and paid by [the] Company" with regard to production costs of the sound recording and the costs paid to session musicians.[133] This means that the artist has to recover, in addition, all costs arising from the production of the sound recording, which is solely owned by the producer – the company itself! The resulting situation is even more bizarre in the light of the artist's waiver of *all* rights related to the commercial exploitation of the work.

5) Option to purchase – This is a clause, which leaves the 'opportunity' for musicians to 'buy out' their copyrights in the musical works they created and sound recordings for which they performed. An interesting provision is subparagraph (c), which requires, above all, the payment of a percentage of the revenues received from sales, and effectively leads to the creation of the 'vicious circle': established artists who sell well and receive bigger revenues, are thus more capable to buy out their rights – but the greater the revenues, the greater the payment; while other artists with poor sales and, accordingly, poor revenues, are practically in the same difficult position to buy out their rights as established ones.

6) Right of inspection – This clause gives the artists or their representative the right to conduct inspection on accuracy of financial statements by the recording company, particularly in respect of royalties. Although being a very welcomed approach, in reality such a right is also a dead letter for the most of musicians. As

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[131] *See A&M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), sec. V(A).

[132] Royalties are understood as "any compensation received by Company, or promised to Company, which directly or indirectly results from the use, exploitation or existence of the Recording, or any reproduction applied", source: sample recording contract, at <www.2shoptheworld.com/PDF/SAMPLE_RECORDING_CONTRACT.pdf>, visited on 21 November 2003.

[133] These are musicians who are not the permanent members of the signed band, but merely assist in performing the songs for the sound recording.

Recording Artists' Coalition reports, only very few successful artists can afford the costs of such inspection, amounting to about 5 per cent of all artists signed.[134]

3.2. Recent Disputes over Unfair Practices

Of course, the recording industry's contracting practices have not bypassed the attention of the recording artists themselves. Surprisingly enough, it was not until the 'copyright wars', in which the notion of 'authorship by corporations' was challenged, that the signed artists began speaking out on the issue.

Pioneered by famous artists Sheryl Crow and Don Henley, the Recording Artists' Coalition was established. This non-profit organization, the membership of which is open to artists signed to "a label with national distribution that includes but is not limited to the top ten retail accounts in the U.S. at the time of release", claims to fight for the rights of artists and for the end of unfair contract practices of the major recoding companies.

In addition, several high-profile lawsuits hit the Big Ones, brought by the heirs of the late legendary singer Bing Crosby against Decca/Universal,[135] rock artist Courtney Love, also against Universal,[136] and the country band Dixie Chicks against Sony Music.[137] All of the suits alleged fraud on the royalties from the recording companies and provision of inaccurate financial statements. One of them, namely, the Courtney Love lawsuit, ended in out-of-court settlement. In addition, negotiations have been held with the Big Five on account of various musicians' unions to repeal the 'seven-year rule',[138] also pursuing the road to more transparent royalty accounting practices; this process ultimately led to a major breakthrough, namely, the introduction of the Copyright Royalty and Distribution Reform Act in Congress this year.[139]

3.3. Freedom of Contract – a Human Right?

In a free market economy, the contract between individuals plays a crucial role. Correspondingly, one of the cornerstones of modern contract law is the principle of

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[134] Recording Artists Coalition website, <www.recordingartistscoalition.com/rip.html>, visited on 21 November 2003.

[135] BBC News, 'Crosby heirs sue over royalties' <news.bbc.co.uk/1/hi/entertainment/music/1606190.stm>, visited on 21 November 2003.

[136] E! Online News, 'Courtney Love takes on Universal' <www.eonline.com/News/Items/0,1,7885,00.html>, visited on 21 November 2003.

[137] BBC News, 'Dixie chicks sue Sony for $4m' <http://news.bbc.co.uk/2/hi/entertainment/1514747.stm>, visited on 21 November 2003.

[138] Source: website of the American Federation of Television and Radio Artists, Tamara Coniff, 'Labor Joining the 7-year chorus', <http://www.aftra.org/resources/pr/0102/chorus.html>, visited on 21 November 2003.

[139] Available at <www.theorator.com/bills108/hr1417.html>, visited on 21 November 2003. This legislation provides for the appointment of a Copyright Royalties Judge by the Librarian of Congress.

freedom of contract. This principle implies that everyone has the liberty to decide whether or not to enter into a binding agreement, to choose his/her contracting partner, and to determine the content of the legal obligation.[140]

The freedom of contract is sometimes regarded as a fundamental right, an argument partially supported by the Article 1 of the First Protocol to the *European Convention on Human Rights and Fundamental Freedoms*, which provides for the "peaceful enjoyment of [one's] possessions", and, therefore, implies the right to contract freely in order to make this right, among other rights,[141] a reality.[142] Article 10 of the United States Constitution and the Fourteenth Amendment have also been interpreted to afford constitutional protection to the freedom of contract.[143]

However, even if we elevate the freedom of contract, at best, to unrecognized human right of fundamental value, it is a right which is often subject to various limitations. One such restrictions is a protective public order, the main purpose of which is to protect the weaker party to the contract, especially when a powerful party imposes an obligation with the use of the standard contract form (e.g., the recording contract).[144] One of the main protections granted to the weaker party of the agreement is the *contra proferentem* rule, under which the risk of ambiguity of the contract clause is placed on the party who drafted or imposed it, and the weaker party, accepting this obligation, is put in more favourable position.[145] Some European States, like France and Germany, have even drafted special legislation aimed at the protection of authors against their powerful publishers; French legislation imposes very strict criteria of contractual clarity and accountability on the publishers.[146] The American judiciary, in contrast, is very reluctant to interfere into the private sphere of contracts between private persons.[147]

Therefore, the success of litigation questioning the validity of grossly restrictive and unfair contracts in the music industry will heavily depend, along with the factual circumstances of the case and terms of the contract itself, on the judicial forum where such a case may be heard; namely, on the belief of such a forum, as to how fundamental is the principle freedom of contract in such agreements.

3.4. Other Human Rights Concerns

As argued above, the human rights approach to intellectual property rights, in this particular case – in the music industry, can significantly challenge the validity of seemingly established norms and judicial support for the copyright monopolies'

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[140] Guibault, *supra* note 32, p. 115.
[141] Right to free association and right to freely choose one's profession.
[142] Guibault, *supra* note 32, p. 115.
[143] *Ibid.*, p. 116.
[144] *Ibid.*, p. 143.
[145] *Ibid.*, p. 144.
[146] *Ibid.*, p. 146.
[147] Generally on this issue, *see ibid.*, pp. 111–196.

expansion. Therefore, the aim of this part of the paper is to re-examine the recording contracts from a human rights point of view.

The human rights understanding of the authorship, discussed above, can be again applicable in this particular case. As demonstrated, the human rights approach requires the author to have a control over the use of his/her work. Restrictive music industry contracting practices tilt the balance between these considerations and the economic interests of large corporate producers and distributors almost completely in favour of the latter. In the case that original authors of musical works claim control of the creations of their mind as a human right, there is a high probability that such a claim would be taken more seriously by the judiciary.

Secondly, the considerations with regard to human rights of corporations should apply. It has been demonstrated that, except in some strictly limited cases, legal persons, as of now, cannot generally claim the possession of human rights. Since intellectual property rights, at least to some extent, are recognized as human rights, the claim of 'contractually agreed assignment' of all such rights simply will not be valid. Again, this demonstrates that a human rights approach to seemingly private issues gives artists one more tool of control, enabling them to tilt the balance into position where the original justice prevails.

4. ANTITRUST

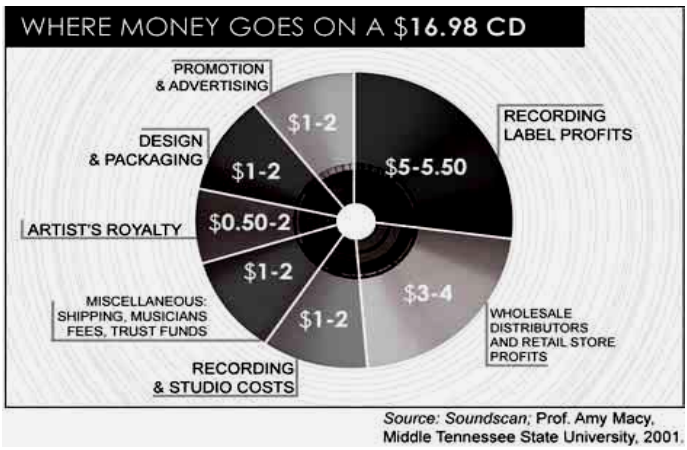
4.1. Real Costs of the Compact Disc

The Compact Disc (CD) is the most popular conventional carrier of sound recordings, which outweighs any other previous or even later sound signal medium in sales figures.[148] Nearly everyone agrees that the CD is stable, reliable, limitless and a high-quality medium for storing and reproducing music, which can be used almost indefinitely without the loss of quality. However, there are differing opinions – or, better to say, completely opposite opinions – as to the real costs of the CD.

The RIAA states that the current cost of the CD is actually lower than it should be.[149] It states that the rate of inflation of consumer prices have been about 60 per cent over the period of 1983-1996 (in 1983, the first CD was manufactured), while the price of the CD dropped by more than 40 per cent; however, it fails to provide the figures after this period. Moreover, this estimate is particularly defenceless in the light of low costs of CD production, with a general value being less than one USD per item.[150] The prices for CD-recording devices also fell dramatically: for example, in 1993, the price of the cheapest CD recorder was about USD 4500 (taking into

[148] Source: website of the IFPI, <www.ifpi.org>, visited on 21 November 2003.
[149] Boycott-RIAA website, 'CD prices' <www.boycott-riaa.com/cdprices>, visited on 21 November 2003.
[150] Recording Artists' Coalition, <www.recordingartistscoalition.com/rip.html>, visited on 21 November 2003.

account *lower* consumer prices as of then); today, even with inflated consumer price index, one can buy a cutting-edge CD recorder for less than 200 USD.[151]



The above reproduction, often used by the music industry to illustrate the costs incurred in the production of the CD, raises a number of doubts. First of all, most CDs, especially new or top-chart releases or rare items, cost much more than USD 16.98. Secondly, as already discussed above,[152] the costs of the sound recording are deducted from the artist's royalties (which, as reproduced here, are leaning more towards lower edge rather than to the higher, the latter being a privilege of very few established artists). Thirdly, with the wide use of Internet technologies, like extensive web pages, streaming audio clips and web videos, promotional pop-ups, free digital magazines (so-called 'webzines') and the ability of direct Internet contact with tour promoters and online ticket services, the promotion and advertising costs can be significantly reduced, contrary to the statement of the RIAA about the high costs of such services.[153] Online distribution services and online retail stores can also be used as a substitute for the wholesale distributors and retail stores, leading to a reduction of prices under this heading. Finally, digital technologies give a boost in quality and quantity in printing and design of the CD cover and booklet, while significantly reducing the costs of the packaging.

Even if the above scheme displays a real division of profits, then it is still irreconcilable with a human rights approach to copyright, since the author of the musical work, being exclusively entitled to reaping the profits from his/her creation, seems to be the most disadvantaged party in the process of distributing profits from CD sales.

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[151] Boycott-RIAA website, *supra* note 149.
[152] In the chapter entitled "Recording Contract", under the heading "The contract".
[153] Boycott-RIAA website, *supra* note 149.

4.2. Investigations into Price-fixing Deals

There is no surprise that the unusually high price of the CDs has spurred a lot of public concern and even led to series of investigations by the Federal Trade Commission[154] and Department of Justice[155] in the United States and the European Commission on the level of the European Union.[156] Apart from the results of these investigations, which speak for themselves,[157] the most interesting thing is that they were initiated against the Big Five *collectively* (plus a couple of large retailers), thus indicating the recognition of the fact that these companies hold, lawfully or unlawfully, an effective monopoly over the music market and follow the same practices in securing their domination. As a result of several antitrust litigations in various federal courts, alleging the unlawfulness of Minimum Advertised Price (MAP) practices, which basically force the retailers to accept overpricing of CDs, the Big Ones filed for a settlement in Portland, Maine, on 30 September 2002, agreeing to pay 143 million USD in compensation to consumers and charity organizations.[158]

At the same time, similar concerns were raised and investigations are still underway against Pressplay and Duet/Music Net, joint ventures between the Big Five that provide 'legitimate' (read: paid) online on-demand music distribution services. This, as argued, effectively reduces already powerful Big Five oligopoly to even more controversial online Big Two duopoly. [159]

Additionally, the Big Five were hit by the lawsuit from a group of consumers who complained that their copy-protected CDs (which the industry uses to prevent 'ripping' and subsequent sharing on the Internet) led to several major breakdowns and dysfunctions, of which they were not warned.[160] As of now, Los Angeles Superior Court ruled on the admissibility of the consumers' petition and dismissed objections raised by the music industry.

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[154] Federal Trade Commission, <www.ftc.gov/os/2000/05/cdstatement.htm>, visited on 21 November 2003.

[155] United States of America, Petitioner v. Time Warner, Inc., et al., <www.usdoj.gov/atr/cases/f0000/0052.htm>, visited on 21 November 2003.

[156] Tech Live News, 'Online music services face monopoly charges' <www.techtv.com/news/internet/story/0,24195,3356713,00.html>, visited on 21 November 2003.

[157] *See* Federal Trade Commission, file No. 971-0070, in which the Commission unanimously found that the Minimum Price Advertising (MAP) practices by the Big Ones violated antitrust laws by entering into unlawful price-fixing agreements with retailers. Source: Federal Trade Commission, <www.ftc.gov/os/2000/05/cdstatement.htm>, visited on 21 November 2003.

[158] Source:'Compact Disc MAP Antitrust Litigation', <www.kohnswift.com/cd-settle_2k_10_11.htm>, visited on 21 November 2003.

[159] Tech Live News, *supra* note 156.

[160] International Herald Tribune Online, 'CD lawsuit to proceed', <www.iht.com/articles/82965.html>, visited on 21 November 2003.

4.3. Are there any Human Rights Defences Against Monopolies?

As a preliminary remark, the business transactions, as a matter of rule, are not subject to State scrutiny from a human rights point of view. This has a foundation in the classical human rights doctrine, where rights are granted to individuals against the actions of a State, which has a monopoly over public relations. In contrast, private relations between individuals are mostly regulated by special legislation and are exempt from human rights litigation.[161] However, in recent years, the increasing trend of applying human rights 'horizontally' has emerged.[162] This means that private actors are also bound to respect human rights of other private actors.

It is long recognized that governments have the competence to regulate the market through introducing compulsory anti-trust legislation, thus defending competition and protecting consumers from monopolistic practices. Such protection expresses itself in consumer rights legislation, which is the classic example of State interference in the field of private relations. But can consumer rights be considered as human rights?

Prof. Sinai Deutch suggests that consumer rights, at the current stage of development, can be recognized at least as a part of 'soft' human rights law,[163] which is itself a suspicious concept. It would be more correct, in my opinion, to suggest that consumer rights can be seen as *emerging* human rights, as much as there is a consensus among all free-market economy-based States on the necessity of existence of such rights. However, the human rights eligibility test is a strict one; in this respect, although there were recently some interesting non-binding pronouncements at the UN level, namely, the *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* (with amendments of 1999 and 2000),[164] there is still no direct recognition of consumer rights as human rights.

Therefore, the monopolies as such do not violate human rights. However, it can be argued that the existence of monopolies poses a certain *danger* that human rights will not be respected by the business. Indeed, the examples of Shell activities in Nigeria, Nike and GAP sweatshops in Southeast Asia, complicity of Unocal in human rights abuses in Burma, all support the point of view that once a private corporation, especially a multinational corporation, has the exclusive ability to control the market, human rights violations are more likely to occur, since the factor

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[161] Sinai Deutch, 'Are consumer rights human rights?' in *Osgoode Hall Law Journal* 1995, pp. 538-539.

[162] About the 'horizontal' working of human rights in the context of copyright protection, *see* Guibault, *supra* note 32, pp. 153-164.

[163] Deutch, *supra* note 161, p. 577.

[164] Adopted by the General Assembly in its resolution 35/63 of 5 December 1980 under the auspices of UNCTAD and approved by the United Nations Conference on Restrictive Business Practices; source: <r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpset.htm>, visited on 21 November 2003.

of overwhelming market influence adds to the feeling of 'impunity' by such corporate heavyweights.

One thing should not escape our attention, however. The human rights concerns involved in the music industry are certainly not among grave human rights violations, such as torture or forced disappearances. Nevertheless, such rights as freedom of expression (as discussed below, Chapter 5) or the privacy of individuals on the Internet undoubtedly constitute a core of fundamental human rights, the cornerstones of the democratic society. Therefore, the danger that effective monopoly in the music industry is able to overstep such serious human rights concerns, poses some questions as to the validity of the Big Five monopoly in the music business from a human rights point of view. Probably, it is time for private petitioners to uphold their human rights through private litigation, alongside the government and supranational bodies' investigation, which sometimes can be quite lengthy and, in many cases, does not lead to satisfactory results.

5. CENSORING MUSIC

5.1. Introduction

Censorship has consistently followed the evolution of the popular music and provided fast and alarmingly effective responses to the emergence of new musical genres. The 'holy wars' against rock'n'roll in 1950's and 60's, onslaught on heavy metal in 1980's and 'gangsta' rap in the 1990's illustrate this very well. In addition, there is also an unusual trend showing that the numbers and types of censored musical topics have actually increased since the beginning of the century, notwithstanding the general evolution of the concept of the democratic society with its connotations of broad-mindedness and tolerance,[165] a fact that is capable of being only partially attributed to the actual increase in the production of music recordings. The RIAA, in coalition with The Parental Music Resource Centre (PMRC) and National Parent Teacher Association, with the use of its famous 'Parental Advisory – Explicit Lyrics' sticker on the sound recordings, has been one of the forces that contributed significantly to music censorship efforts.

The Parental Advisory Program in the United States began as a voluntary labelling effort, in which the record companies themselves, in cooperation with musicians, decided which recordings should be labelled.[166] The RIAA simply provided (and still provides) guidelines as to the size and appearance of the Parental Advisory label, with several improvements made during the 1990s.[167] However,

[165] *See, inter alia*, *Handyside* v. *The United Kingdom,* European Court of Human Rights, 7 December 1976, Series A24, para. 49.

[166] RIAA website, <www.riaa.com/issues/parents/advisory.asp>, visited on 21 November 2003; *see also* the 2000 Federal Trade Commission report, *Marketing Violent Entertainment To Children: A Review Of Self-Regulation And Industry Practices In The Motion Picture, Music Recording & Electronic Game Industries,* pp. 23–24.

[167] RIAA website, *supra* note 166.

quite soon after its inception, the Parental Advisory program had outgrown its voluntary character and entered into legislative domains or at least inspired some of the legislative proposals to a certain extent. A number of States[168] have already introduced legislation, which makes it punishable to sell recordings "harmful to minors", establishes "community standards", attempts to impose "concert ratings" or diverts the funds from financing the production of "objectionable" lyrics; the RIAA, paradoxical as it sounds, is currently opposing and struggling with these initiatives both at States and federal levels.[169] Moreover, the Federal Communication Commission recently fined several radio stations for airing songs with "profane" content[170] and the influential Federal Trade Commission released a number of reports in 2000, 2001 and 2002, entitled "Marketing Violent Entertainment To Children: A Review Of Self-Regulation And Industry Practices In The Motion Picture, Music Recording & Electronic Game Industries",[171] calling for tougher self-compliance of the music industry with its own standards.[172]

Nowadays, music censorship has also entered other, private domains, the most popular and troublesome example being the refusal of Wal-Mart, the biggest shopping chain in the United States, to allow any of the Parental Advisory labelled products to its shelves, thus hitting directly the most painful point of the music industry – its pocket.[173] In response to this challenge, the current practice in the music industry is to put out 'clean' or 'edited' versions of some controversial recordings; the 'clean' versions usually carry different artwork, edited lyrics and sometimes drop the whole songs, in order to avoid the placement of the Parental Advisory label on the recordings. This tactic, which may be seen as a classical example of modern censorship, is used to reach a wider sector of consumers, since a large part of the population usually buys music records at Wal-Mart and other retailers, which refuse to sell Parental Advisory labelled products. Quite the reverse, statistics show that sales of 'dirty' (original) versions of the records usually outnumber the sales of edited ones several times.[174]

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[168] Eric Nuzum lists Arizona, Delaware, Florida, Illinois, Iowa, Kansas, Maryland, Missouri, New Mexico, Oklahoma, Pennsylvania and Virginia as having enacted legislation in suppression of 'obscene' music; in Eric D. Nuzum, *Parental Advisory: Music Censorship in America*, (Harper Collins Publishers, 2001) p. 189.

[169] RIAA website, 'What the RIAA is Doing for Freedom of Speech', <www.riaa.com/issues/freedom/riaa.asp>, visited on 21 November 2003.

[170] Eric Nuzum's website, 'Censorship incidents', <www.ericnuzum.com/banned/y2k.html>, visited on 21 November 2003.

[171] Available online at Federal Trade Commission website, <www.ftc.gov/reports/violence/vioreport.pdf>, visited on 21November 2003.

[172] *Ibid.,* pp. 52–56.

[173] Nuzum, *supra* note 168, pp. 202–208. According to statistical findings, the Wal-Mart chain sells one of ten music CDs sold in the United States. Several other retailers, like Kmart, Super Club Music Corporation, Record World, Fred Meyer music and others implement the same or similar policies.

[174] It can be stipulated that the free expression of ideas is highly valued by the listeners of music. For some interesting conclusions on the issue of 'banned fruit is sweet', *see* Ronald

In Europe, in contrast, there were no concerted efforts to outlaw or censor popular music. Although CDs with Parental Advisory labels can be found in all big stores, there is no consistent policy of outlawing the sales of such recordings to minors. Many independent European labels issue recordings, which do undoubtedly contain 'controversial' items, but do not generally follow any rating system.

5.2. Does Copyright Protect Freedom of Speech?

It is to be noted that the judicial battles for the freedom of music have been rare both in the United States and in Europe. The most famous American cases include the trial of Jello Biafra, leader of the punk band Dead Kennedys (controversial artwork of album *Frankenchrist)* and obscenity proceedings against the rap band 2 Live Crew (for the sexually explicit references in their album *As Nasty As They Wanna Be*), as well as a number of other cases, where U.S. States legislation prohibiting the sale of 'obscene' music was struck down as unconstitutional. In all cases, freedom of expression and free speech guarantees under the First Amendment were raised; although, no copyright related issues were discussed at those trials.[175]

In most European States, in contrast, there are, with notable exceptions of Germany and Sweden, no constitutional clauses relating to copyrights as opposed to the freedom of speech.[176] In the disputes that arouse on the frictions between the two, Article 10 of the ECHR has often been invoked, but the cases so far have been quite few.[177] In most of these cases, nevertheless, the national courts[178] and the former 'gate-keeper' of the European Court of Human Rights – the Commission[179] – generally upheld the thesis about in-built checks and balances for the freedom of expression in the copyright regime. Some of these decisions were also leaning towards U.S.-based idea/expression dichotomy, although this trend has been somehow altered in recent years towards greater independence of freedom of expression concerns from copyright protection.[180]

Stein, 'Fascinating Censorship: Mundane Behaviour in the treatment of Banned Material', at <www.mundanebehavior.org/issues/v2n1/seim.htm>, visited on 21 November 2003.

[175] *See*, generally, Nuzum, *supra* note 168*,* cf. chapter entitled 'The Chronology of Music Censorship in the United States'.

[176] P. Bernt Hugenholtz, 'Copyright and Freedom of Expression in Europe', in *Innovation Policy in an Information Age* (Oxford University Press, 2000) p. 3.

[177] *Ibid.*

[178] The German Supreme Court's *Lili Marleen* decision of 1985; *Head-Kaufvertrag,* 17 December 1996, and *Karikaturwiedergabe,* 9 December 1997, decisions by the Austrian Supreme Court; *SPADEM* v. *Antenne 2* in various French courts; cited at Hugenholtz, pp. 10–13.

[179] *De Geïllustreerde Pers N.*V. v. *The Netherlands,* European Commission of Human Rights 6 July 1976, European Commission of Human Rights Decisions & Reports 1976 (Volume 8), 5; and *France 2* v. *France*, European Commission of Human Rights 15 January 1997, Case 30262/96, [1999], cited at Hugenholtz, pp. 13–15.

[180] Hugenholtz, *supra* note 176, p. 7.

With regard to idea/expression dichotomy, it is quite surprising to note, how two general concepts in this field, elaborated by the United States' courts, expressly contradict each other. The United States courts' argument that the freedom of speech is best protected by the copyright, runs contrary to the next argument, made by the judiciary itself, that copyright protects only the expression of an idea, not the idea itself. This notion strips the idea, embodied in the work – in the musical work, for example – of the protection by copyright rules, and by such extraction makes it vulnerable to censorship. Indeed, it is the *idea* underlying the work that needs protection of free speech, and copyright does not address it. The argument of the protection of the freedom of expression through copyright is, accordingly, rendered expressly invalid.

However, this does not mean that the expressions of an author's ideas in a musical work are left entirely without copyright protection. As much as the American doctrine focuses exclusively on the economic aspect of copyright, it can be argued that the idea/expression distinction, protecting only the expression, still leaves the underlying idea of the copyrighted work under the protection of the moral rights of the author. However, the American courts are reluctant to address the existence of moral rights of the author, therefore denying *effective* copyright protection for the ideas embodied in musical works.

The first possible course of resolution of this controversy will be to make a strong and coherent pronouncement on the clear nature of the protection of the freedom of expression by copyright. Such a line of argument will inevitably undermine the absolute character of idea/expression dichotomy. Quite naturally, if the copyright is supposed to *effectively* protect freedom of speech, it should extend its protection to the idea embodied in the copyrighted work. However, one question inevitably arises: does such an extension mean that all economic aspects of copyright extend to the protection of an idea? In other words, does the economic exploitation of the musical work protect the freedom of speech?

While the answer is certainly a negative one, one should be nevertheless wary of the fact that copyrights can be assigned to somebody else for the purposes of economic exploitation; an affirmative answer to the above-mentioned question would prevent the authors from at least temporary assignment of their works, the latter being of certain advantage to the artists since large recording and distributing corporations utilize their market resources for the promotion of the sound recording. To resolve this dilemma, the moral rights doctrine should be brought into play. It can be rightfully argued that the moral right to "object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work" can possibly encompass the freedom of speech. Where the author of the musical work is objecting to censorship of his/her creation – censorship being nothing more, nothing less than distortion or modification of the work – it can be said that he/she is not only protecting his/her civil rights, but also exercising moral rights as an author of the work, even in the case of the assignment of copyrights to the record company. Should the artists/record companies alliance work properly, this model can ensure much less friction between the artists and the Big Ones: the economic exploitation

of copyrights would have been managed by the company, while the artists would get their reward in the form of fair royalties and control over paternity and integrity of the musical work through moral rights.

Even if, for the sake of argument, we suppose that the recording companies are the actual owners of the all rights in the recording, it would be absurd to suppose that economic entities, created solely for bringing profit, are gravely concerned with the protection of the freedom of speech. The record companies are business establishments; they will easily sacrifice, as already illustrated by the Parental Advisory Program agreement, freedom of speech values for the possibility of gaining higher profit, in particular, by avoiding negative public (or group) opinion on controversial recordings. The moral rights doctrine is therefore very logical in this regard by striking the necessary balance between pure economic considerations of the corporate entities and the dignity of the author, by entitling the latter to maintain some of his non-commercial rights over musical works and, in particular, to object to censorship (as a form of derogatory treatment of the work, which is prejudicial to the honour of the author).

If such an argument is upheld, it will possibly raise serious questions to the continued existence of the Parental Advisory Program. Usually the major record companies are the ones who agree to the placement of the Parental Advisory label on the recordings made by artists on their signing roster. As noted above, the record companies presumably label the recording with Parental Advisory sticker in co-operation with musicians; however, the reality is quite different. The musicians themselves are usually opposed to the censorship of their works: it is illogical to suppose that the creators of the intellectual works will be readily censoring their own creations, trying to eliminate the 'controversial' messages made by themselves! The recording artists, as already demonstrated, are in a less favourable bargaining position than the record companies, which they are signed to. To put it simply, they have to submit to certain conditions to receive at least some reward for their effort of creativity. However, shifting the tool of control from the hands of music industry executives to the authors of music, as moral rights doctrine presupposes, will probably nullify any effort to 'voluntarily' put the Parental Advisory label on sound recordings.

There is one additional point that should be borne in mind. The First Amendment of the United States Constitution, which is the constitutional provision on the freedom of speech, applies only to government actions that potentially can restrict the freedom of speech. It provides for negative, but not positive, obligations on the part of the government. Therefore, the First Amendment does not protect against direct or indirect censorship by private actors.[181]

However, the copyright and, in particular, moral rights of the author represent temporary 'private monopolies', which are protected from interference by private actors mainly (the government in certain circumstances can restrict the protection of intellectual property). Therefore, the moral right of the author to object to derogatory

[181] Nuzum, *supra* note 168, p. 178.

treatment of his/her work is the most effective tool to prevent *private* parties (like retailers, industry associations, radio stations, religious groups and, of course, the Big Ones) from censoring the music. As for the governmental level (censorship in the form of legislative acts), the First Amendment in the U.S. and Article 10 of the ECHR are so far readily available and effective weapons for the author to defend his/her freedom of speech.

6. CONCLUSIONS

Indeed, the music industry giants are facing hard times these days. A great recession after a period of growth and temporary stagnation; declining CD sales; massive layoffs of employees; an endless stream of court proceedings and lawsuits – this is all definitely not an indication of a healthy sector of the economy. However, an industry that raises the suspicion from government agencies for its monopolistic practices, lawfully and unlawfully robs its hard workers – artists – of all profits, threatens the privacy of Internet users, and marginalizes its potential customers by unreasonably high prices on its products, is indeed an industry in trouble. The wrath of anti-trust authorities, bitter protests from recording artists and distrust and disobedience from the average customer, who prefers to switch to free digital media opportunities rather than to pay unreasonable prices for nicely decorated pieces of plastic, is more a harvest that the industry reaps from its 'sins' rather than an attempt of 'pirates' to get a free ride on the back of honest workers of entertainment.

Moral concerns aside, the major purpose of this study was to demonstrate that once ignored and forgotten human rights concerns can very well boomerang on the industry once they surface, sooner or later, in seemingly 'private law' court proceedings. In the 21st century, there is no more luxury for continued ignorance of fundamental human rights, be it for economic, philosophical, political or whatever reasons.

Nevertheless, as noted numerous times throughout the paper, a human rights approach to recording industry practices and copyright in general is more of a supportive value than of the substantial importance in these issues. With necessary support from the human rights doctrine, a good job of modern fighters for digital freedom, fairness in contracts and reasonable prices for entertainment will bring its fruits. Digital technology unlocked the music and made it free – not only from commercial, but also from an idealistic point of view – and the society will hardly give up this freedom in favour of an isolated group of overly well-paid music industry executives.

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