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Introduction

Kamran Hashemi* & Linda Briskman**

The Non-Aligned Movement Center for Human Rights and Cultural Diversity (NAMCHRCRD) is an outcome of the Non-Aligned Movement (NAM) Ministerial Meeting on Human Rights and Cultural Diversity, held on September 3-4, 2007, in Tehran. In the final document of the meeting, entitled “the Tehran Declaration and Plan of Action”, the Member States decided to establish the Center in Iran.

With the establishment of the Center as an institution associated with NAM, a permanent mechanism has been created in the region for institutionalizing an intercultural dialogue on human rights issues. With a special focus on the common human rights concerns and challenges that developing countries encounter, and taking into consideration the virtues of historical traditions and the values of all civilizations and cultures around the world, the Center, as an educational research institution, provides scientific contribution to the enrichment of the universality of human rights and to the implementation of human rights through localization of its concepts. The innovative approach adopted by this Center is visibly seen in its motto: “unity of diverse cultures

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towards the advancement human rights", which has laid the foundation stone for its diverse and varied scientific activities.

In line with its objectives, the Center has been able to prove its scientific mettle, via the activities it has undertaken in recent years. In comparison to 2011 the number of academic programs in 2012 doubled. In 2012 the Center extended its activities outside Iran by holding two international academic events in Geneva, the latest of which was in September when the Center, in cooperation with some prestigious academic institutions, held its first one-week Autumn School on Human Rights and Cultural Diversity, alongside the 21th Session of Human Rights Council in the UN Palace. Within Iran, an event that focused on cultural diversity and human rights education was held in Tabriz (the Center of East Azerbaijan Province), which enabled participation and partnering from that area. The list of the scientific events in 2012 is as follows:

- International Seminar: Emerging New International Human Rights Institutions/Mechanism in the NAM Region - The UN Palace, Geneva, 16 March;

- International Workshop on Human Rights and Development – Tehran, 21 May;

- International Seminar on Cultural Diversity and Human Rights Education - Tabriz (Iran), 1-2 July;

- The Second International Summer School on Human Rights and Cultural Diversity – Tehran, 9-11 July;

- International Fall School on Human Rights and Cultural Diversity – Geneva, 17-21 September;

The Center was honored to launch the first volume of the “NAM Yearbook on Human Rights and Cultural Diversity”, on the occasion of the 16th NAM Summit in Tehran on 26-31 August. The Yearbook was available on CDs and hard copies, along with the Center’s 2011 Annual report in the document Center of the Summit.1

This second volume of the Yearbook contains 16 selected papers mainly submitted to the above mentioned academic events and is divided into the themes of: Protection of Vulnerable People, Human Rights Education, Cultural Diversity and Construction of Human Rights, Right to Fair Trial, Protection of International Humanitarian Law and Some Contemporary Issues. The collection is titled “Human Rights and Vulnerable People”, which reflects the content of the majority of papers. It also recognizes that in our collective human rights endeavors we need to give most attention to the human rights of vulnerable groups. Vulnerable people include women and children particularly those victims of trafficking or armed conflicts, travelers, refugee camp dwellers, indigenous and tribal groups, and finally anyone who is considered the ‘other’ whether this is on grounds of origin, skin color, ethnicity, language, religion or culture. The papers span a wide range of interests and contexts including papers from Australia, Bangladesh, India, Iran, the United States and some European countries. An overview of the contents follows.

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1 Detailed information about the Center, including the Center’s annual reports for 2011 and 2012, and the first volume of the “NAM Yearbook on Human Rights and Cultural Diversity”, is available at the website of the Center: www.namchrccd.com and the related website of the Permanent Mission of the I.R. Iran to the UN: http://namiran.org.
Human Rights Education

Linda Briskman examines racism in a global context while drawing on Australian examples of Indigenous peoples, immigrants and Muslims. She poses questions about the limits of multiculturalism in public discourse and proposes that human rights education is a cornerstone to begin addressing systemic disadvantage and racism. In advocating a human rights approach to education, she presents ideas for the content and processes of how this might occur.

A second paper from Australia is included in the collection. According to Nina Burridge many academics argue that Australia’s race relations history, firstly with its Indigenous peoples and later with non-Anglo-Celtic immigrants, is underpinned by a lingering undercurrent of racism and indifference to human rights. Burridge in her paper provides a brief overview of Australia’s recent history, in the area of cultural diversity, Indigenous and non-Indigenous relations and human rights. According to the author discussions on human rights ought be from an educational perspective, rather than the more orthodox legal framing of human rights. In highlighting the key issues of debate as they have played out in the Australian context, her paper provides examples and insights from academic research. The final part of the paper seeks to analyze the underlying intersections between these themes and suggests that education, both at the school and tertiary level is one major pathway towards implementing change in order to promote socially just communities where the rights of all peoples in Australia’s multicultural landscape are respected.

Stefanie Rinaldi relies on Amartya Sen’s capability approach as providing a useful conceptual framework for analyzing the different dimensions of human rights education. The first section of her paper provides an overview of Sen’s approach and its main critiques, putting a special focus on the relationship between capabilities and
education. The second part discusses the commonalities and differences of capabilities and human rights before seeking to link capabilities, human rights and education. In the last section, the theoretical analysis is applied to refugee camp situations, arguing that human rights education is crucial in enabling refugees to break the vicious circle of exclusion, poverty, and powerlessness.

S. M. Masum Billah discusses the epithets of legal and human rights education in Bangladesh. He argues that traditional legal learning and stereotyping of human rights education is not sufficient to uphold the rights of the people, especially the poor and disadvantaged. Taking the example of Human Rights Summer School Model run by Empowerment through Law of the Common People (ELCOP) in Bangladesh into context, the author suggests that legal education must be brought out of the classroom and human rights education should be deeply imbibed in the mindset of the students.

**Cultural Diversity and Construction of Human Rights**

According to Hussain Diba the fundamental principles of human rights and humanitarian law are based on ethical values and moral rules. He explains that recent research in anthropology, social psychology and moral psychology have shown the influence of cultures on moral judgments and moral emotions. So there is strong evidence for the relationship between cultures and human and humanitarian laws. Diba in his paper aims to explain the psychological mechanism of the formation of humanitarianism through moral judgments and moral emotions in different cultures.

The joint paper by Soumitra Subinaya and Mahdi Yousefi reveals the rich unearthed indigenous legal knowledge of the Lanjia Saoras, an Indian tribe, in the context of International Humanitarian Law. The research reveals that International Humanitarian Law Principles are
fundamental offshoots of the human psyche. Given the non-traditional research methodology and writing style of this research paper, the researchers hope that it sets a precedent for the future by the acceptance of such pieces of work into mainstream legal research articles. This would serve two purposes: voicing tribal perspectives for the first time and employing oral history methods to explore issues of law and indigenous peoples the world over.

Daniel Aguirre and Irene Pietropaoli in their joint paper outline the development of the Association of Southeast Asian Nations (ASEAN) regional human rights system. They also examine the development of the Inter-American and African systems. Highlighted are the challenges faced by disparate developing nations in creating regional systems; the paper examines the successes and failures. Overall, the paper examines the fundamental obstacles that have long delayed a regional human rights mechanism in the ASEAN region and do not naturally conform to individual human rights values. But as the authors note, similar challenges were faced in Africa and the Americas where, despite regional complications, the systems have progressed over time. According to the authors the ASEAN regional mechanism must confront alleged cultural suspicion, operational resistance and the disingenuous application of human rights in order to progress.

**Protection of Vulnerable People**

Kamran Hashemi points out that the international struggle against non-discrimination, fascism and xenophobia, along with protection of minorities, has been concentrated on racial and national aspects of vulnerable people, rather than the religious ones. The main argument of the paper is on the similar purpose of race oriented human rights instruments such as CERD Convention, Apartheid Convention and
Genocide Convention on the one hand, and religion oriented instruments, such as the Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief, on the other. Hashemi suggests that while the main purpose of these instruments is to protect all vulnerable people, including some people on the ground of race or ethnicity, excluding others on ground of religion is not in line with the purpose of these instruments, and itself is discriminatory.

According to Robynn Allveri, despite the overall similarities in the human rights regimes of the EU and United States, a significant point of divergence occurs when a person requests asylum from an EU member state. Allveri discusses how asylum adjudicators in the United States employ a case-by-case approach, regardless of the applicant’s country of origin. On the other hand, EU adjudicators are legally required to presume that an asylum claim filed by an EU national is without merit. The author calls such cases as effectively “dead in the water” and adds that this EU presumption flows from the “Protocol on Asylum for Nationals of Member States of the European Union” (Protocol No. 24). The author suggests that the EU adopts a similar policy to the United States and rejects the exclusionary mandate of Protocol No. 24.

Abul Bashar Mohammad Abu Noman explains that trafficking in women and children is one of the most burning social problems that Bangladesh is facing today. According to the author, viewing trafficking from a human rights perspective necessitates that combating trafficking involves social, economic and legal measures in any country. The paper examines the human rights aspect of the trafficking problem, in order to analyze and evaluate the legal protection of trafficked victims and the effectiveness of legislation concerning trafficking in women and children in Bangladesh. It also
draws suggestions that are pragmatic in nature for the maintenance of human rights standards in law enforcement.

**Right to Fair Trial**

In their joint paper, Mohammad-Javad Javid and Esmat Shahmoradi review some international instruments including the Bangalore Principles on Judicial Conduct (2002), the UN Basic Principles on the Independence of the Judiciary (1985), and the UN Basic Principles on the Role of Lawyers (1990), and draw upon the experience of relevant international bodies, including Transparency International, to offer practical mechanisms that work to enhance access to justice. According to the authors, the aim of these instruments is to promote judicial transparency and accountability as two major means of promoting access to justice through the judicial sector.

Focusing on the principle of complementarity in the Rome Statutes Shahrzad Fouladvand considers the rights of accused persons as protected by the ICC and points out that these are not only present in Western legal systems (upon which the ICC is largely based) but also in the Islamic Shari’a tradition. As Article 21 of the Rome Statute stipulates, a source of law for the ICC can include general principles of law derived from national laws of the legal systems of the world, which are consistent with internationally recognized norms and standards. The paper further highlights the fact that an appreciation of cultural differences is important in order to make the ICC ratification and implementation a priority; otherwise the Court might be seen as representing the hegemony of Western justice over local traditions.
Protection of International Humanitarian Law

According to Supriya Rao, the recently released report of the Secretary General on Children and Armed Conflict draws attention to a surge in attacks on schools and teachers and the use of schools by armed forces and groups. Her paper examines the limited extent to which educational institutions and personnel are legally protected from attack under relevant international human rights and humanitarian law instruments and the consequent need for new norms to ensure that the right to education remains absolute under all circumstances.

K.C. Sowmya explains that recently the question of combatants and the protection of civilian personnel has gained prominence due to the emergence of a new category, that of Private Military/Security Companies (PMSCs). According to the author, for nearly three centuries the accepted international norm has been that only nation states should be permitted to fight wars. However, the role of PMSCs in contemporary warfare is becoming increasingly significant, changing armed forces around the world and the way wars are fought. The author attempts in her paper to focus on the involvement of private actors in armed conflict situations and to analyze the effects of blurring the distinction between military and civilian actors, which is a culturally and historically tested norm and legally established principle. She also looks into the inadequacy of the existing legal mechanisms under present international instruments.

Some Contemporary Issues

M. Omidzamani explains that with the concluding 574 page report by the UN Fact-Finding Mission on the Gaza Conflict called “Goldstone Report” of 15 September 2009, it is clear that several violations of human rights and international humanitarian law were committed during the 22-Day War in Gaza. His paper examines the possibility of
the ICC jurisdiction over these crimes and concludes that due to non-membership status of Israel and the Palestinians to the ICC, and the UN Security Council’s unwillingness to refer the issue to the Court, the ICC as a competent body was not able to apply its jurisdiction over the criminal acts committed during the Gaza Conflict.

Finally Mohsen Qasemi points out that the international economic order multilateral trading system which established the General Agreement on Tariffs and Trade (GATT) 1947, was dominant until about two decades ago. He continues that Regional Trade Agreements (RTAs) have changed this order and become an important phenomenon. The paper seeks to answer this question: which system could be more useful in protecting human rights, RTAs or WTO?
Human Rights Education
Challenging Racism through Human Rights Education

Linda Briskman*

Abstract

The paper examines racism in a global context while drawing on Australian examples of Indigenous peoples, immigrants and Muslims. The study poses questions about the limits of multiculturalism in public discourse and proposes that human rights education is a cornerstone to begin addressing systemic disadvantage and racism. In advocating a human rights approach to education, the paper presents ideas for the content and processes of how this might occur.

Introduction

Racism is one of the greatest scourges in the world today and a serious human rights violation. What is it that creates this blight, what forms does it take and how can it be overcome? It is not popular to speak about racism. My own immigrant nation of Australia is portrayed as a multicultural success and most of the population would be outraged at the accusation. Yet there is little doubt that racism exists in all sectors of society – in the school, on the sporting arena, at the workplace and within public and private institutions.

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Defining race and racism is not easy. The old Darwinist constructs of race have thankfully been discarded and there is increased recognition of race as social rather than a biological construct. Definitions of racism are varied and focus on a mix of prejudice, power, ideology, stereotypes, domination, disparities and/or unequal treatment (Berman and Paridies 2008). Race and racism can refer to ‘the attitudes and processes involve in categorizing, stereotyping and assigning value and power to people on the basis of their differences, including physical attributes (particularly color), and culture and language’ (Quinn 2009: 93)

Inherent in racist constructions is a belief in the superiority of a particular group and the inferiority of others. From this belief groups are discriminated against, exploited or excluded as a means by which the dominant group in society exercises hegemony over those groups seen as subordinate (Hall 1980, cited in Quinn 2009). In this paper I intentionally use the term racism broadly to avoid becoming embroiled in definitions of race, ethnicity, culture and religion. This allows me to give specific attention to two racisms that have taken hold in Australia, relating to Indigenous peoples and to Muslims.

**Discourses of Racism**

‘Race-thinking’ has deep roots embedded in Enlightenment thought and the history of imperialism and colonialism. Despite the fact that the concept of race has been shown to be devoid of any scientific value, it still has a stranglehold over popular consciousness (Ratcliffe 2004). In many nation states, discourses on race, ethnicity and culture have formed the basis of national identity and have determined which groups are included within and who is considered as the ‘other’ (Gopalkrishnan and Babacan 2007).
Although racism is a lived reality for many people across the world, it remains largely a silent or invisible issue. It diminishes the social fabric of society, creates social tensions, and perpetuates social inequality and impacts on the life chances of the people involved (Gopalkrishnan and Babacan 2007: 1).

Racism and xenophobia are not caused by isolated acts of individuals. Rather, racism expressed at the individual level is representative of ‘an orchestrated effort by segments of the dominant society to wage a war on the poor and on people who by virtue of their race, ethnicity, language and class are reduced at best to half-citizens and at worst to a national enemy responsible for all the ills afflicting our society’ (Macedo and Bartolome 2001: 6). Racism that is embedded in societal structures and institutions becomes so ‘normalized’ that it is rarely questioned.

Racism can occur across international borders and within nation states. I briefly outline the international sphere as a prelude to more contextual considerations including nation state responses to immigration and multiculturalism. I then turn to the question of human rights education as a transformative mechanism in the quest to overturn racist ideologies and practices.

**Racism in International Relations**

‘New racism’, a variation of colonial racism, has emerged where countries in the ‘west’ depict other nations as less civilized and inferior according to hierarchical constructions of human development. This form of racism frequently arises from international posturing in the ‘new world’, often by colonizing nations that attribute these characteristics to nations with a greater history of civilization and cultural development across many spheres which are perceived as a threat to western dominance.
Sivanandan (2007: vii) says that racism is imbricated in the socio-economic structure and political culture of a society. And, he says, if it once functioned to justify slavery, today it serves to justify imperialism. Any analysis of racism today needs to be situated within the parameters of globalism and globalization. He sees globalism as the latest stage of imperialism, which holds western civilization and values as superior to all others and insists on visiting them on the rest of the world and by the use of force if necessary. This accords with Edward Said’s formulations on Orientalism that assume that the racialized ‘other’ cannot progress without changes imposed from the outside, involving the beneficence of the west (Seidman 2012). Human rights discourse that privileges western constructs extends from such propositions. Offord (2006) refers to the work of Zillah Eisenstein (2004) in acknowledging that the universality at the heart of the modern human rights movement is fraught with the dangerous legacies of a colonial western gaze. In the west the acceptance of this dominance is largely unquestioned as it is reinforced in many ways, including in media outlets.

**Within the Sovereign State**

Similar to the international sphere, the ‘superiority’ project within nations is unchallenged through media discourse and pronouncements about illegal migration, Indigenous dysfunction or crime committed by immigrants. More insidiously a sub-text exists about threats to the dominant society in terms of values, norms and cultures. Although discredited in public discourse, the notion of assimilation rather than cultural plurality pervades many western nation states such as Australia and the UK. This has been named by Fozdar (2012) as ‘saming the other’. Rampant nationalism has also taken hold in a number of contexts. Through nationalist constructions symbols abound with the prevalence of flags and slogans, which in colonial societies like
Australia may stem in part from unspoken recognition that the land was in fact stolen from its Indigenous inhabitants; the white presence hence requires affirmation. Since the colonial invasion of 1788 white Australians have been positioned as the owners of the nation (Gehrmann 2012).

Touraine (2000: 158-159) speaks of ways to bring about cultural unification of societies through an imposition of absolute controls on individuals and groups whose interests, opinions and beliefs are divergent, encouraged by a conviction that the ‘light of reason’ must prevail. The cornerstone of nation states is often seen as the establishment of political, social and civil rights and membership denotes both civic and cultural belonging (Babacan 2010). Yet evidence points to ongoing exclusion, marginalization and disadvantage. The so-called ‘progressive’ or scientific model has not only led to the destruction of ethnic groups but has plunged some minorities into marginality (Offord 2006: 159). Indigenous groups are among those who have experienced this descent into marginality, despite increasing recognition internationally and within many nations states. For example, even though the Declaration on the Rights of Indigenous Peoples has passed through the United Nations system, Indigenous peoples in a number of countries are still relegated to the lowest rung of the socio-economic ladder and subjected to systemic discrimination and racism. Policies continue to be imposed upon them that negate Indigenous aspirations, needs and rights.

Other examples of minority marginalization come from Britain. Kundnani (2007) speaks of multicultural Britain being under attack with disturbing intensity. He argues that new forms of racism have spread and that these are linked to systemic failure to understand the causes of forced migration, global terrorism and social segregation. He adds (2007: 180):
The result is a climate of hatred and fear, directed especially at Muslim and migrant communities, and the erosion of the human rights of those whose cultures and values are perceived as ‘alien’.

**Immigration**

Although immigration and multiculturalism are intimately connected, they tend to be delinked in public policy, with the former seen as a rational nation-building project and the other as contested ideology.

Institutionally, the way race-thinking materializes is perhaps nowhere clearer than in the field of migration where nations are increasingly putting up their shutters to keep out those seen as what Weber and Pickering (2007) describe as ‘illegalized travelers’. Xenophobic responses to such migration emerge throughout the globe.

Contemporary migration raises two key issues: the rights of individuals as citizens and notions of belonging and identity (Babacan and Singh 2010). Babacan and Singh argue that modern constructs of citizenship are organized around a fixed relationship between the state, the territory and the citizen. Rights to citizenship are hence linked to belonging to specific nation states. Further they state (2010: 2):

> Within such a structure, identity, which is shaped by historical and social factors, is premised not only on self-perception but also on perception by others. Individuals and communities possess overlapping identities.

Governments such as Australia and Britain make judgments about the desirability of potential new citizens on the basis of their ethnic, cultural or ‘racial’ identity (Ratcliffe 2004). Australia’s immigration policy has always been socially engineered so the arrival of undocumented migrants (asylum seekers) has confronted the nation. Somewhat paradoxically, legislative and policy measures purport to control discrimination on the basis of race, while a public discourse speaks of nation unified around a common value base.
Is Multiculturalism A Confidence Trick?

Multiculturalism is increasingly portrayed as sheer rhetoric to mask what is happening below surface level. It is sometimes limited to celebration through music, food and cultural events. Although this is to be applauded, it fails to interrogate ideologies in societies that cling to universal conceptions of rights. This plays itself out in a number of ways.

Touraine (2000) gives the example of schools in France, which create the favoring of central categories that present obstacles for innovators and for children from minority groups. Although Indigenous peoples as original owners of the lands are not part of the multicultural discourse, the same features characterize the approach in Australia for Indigenous children. There is an argument of ‘equality' in terms of compulsory education and a uniform curriculum. But such approaches diminish traditional Indigenous learning styles and are one of the reasons why Indigenous children drop out from schools with alarming frequency. And to make matters worse Indigenous parents are ‘punished' in some Australian jurisdictions for the failure of their children to attend school by removing social security provision.

Anti-multiculturalism takes a number of forms. Muslim commentator in Australia, Waleed Aly (2011) expounds some of these. He says:

- Zygmund Bauman criticizes it on essentially cosmopolitan grounds, arguing that it offers only ‘negative' rather than ‘positive recognition that is basic tolerance, rather than equal participation;
- Johann Hart suggests that it artificially deems minority cultures to be monolithic static artifacts in a manner that denies people their individual agency; and
- More seriously it is seen as an assault on the majority population, that nations have surrendered themselves to the politics of minority separateness that has nurtured radical Islamism. Muslims
in this view need to be told how to behave; if they are invited to retain their cultural identities they will proceed to inflict their ‘backward cultures’ on the majority.

Human rights advocates expose the implications of a limited multicultural discourse. Halal food, the wearing of the hijab or nikab in public places, Islamic schools and asylum seeker boat arrivals are fused with terrorist rhetoric. We see absurd myth-making circulating in the public sphere: Christmas celebrations won’t be allowed; the holocaust won’t be taught in schools; banks will stop producing ‘piggy banks’ in which children save money as they will all offend Muslims!

In many countries 9/11 has become the symbol for racialized responses in the west and dehumanization and demonization of Muslims. It has become almost axiomatic that we must look at everything today through the lens of 9/11 (Sharruck 2002). Critics of Muslim immigration travel the world to propagate fear of Muslims. In a 2013 visit to Australia, Dutch politician Geert Wilders called for bans on Islamic migration, the cessation of building of mosques and the conversion of Muslims, while proclaiming the superiority of western culture. Conversely as noted by Australian Muslim of Pakistani origin Hanifa Deen (2010), twenty years ago anti-Islamic prejudice did not occupy public space with mainstream Australia largely indifferent towards Muslims. She says (2010: 205):

Twenty years ago Muslims across Australia were more or less a contented lot: they had freedom of religion, could build their mosques and schools with less trouble from local councils; the law was even handed; racism and religious vilification were publicly decried; hijab-wearing women were not scared of going out in public.

She sees various flashpoints for change including the first Gulf War in 1991 and more intensely after 9/11 after which hardly a month passed
without a headline placing Australian Muslims under the spotlight. This date became a defining moment for Muslims in the West.

The call for ‘tolerance’ as proposed in the white liberal discourse is paternalistic. This call does not question the asymmetrical power relations that give its adherents privilege. White liberals are hence willing to work for cultural tolerance but not to confront issues of inequality, power, ethics, race and ethnicity in a way that would lead to social transformation and greater humanity and less racism (Macedo and Bartolome 2001).

If we can understand what drives racism then there is some opportunity for it to be tackled. Although there are multiple interpretations on the causes of racism, the fear factor is a critical component. In Australia overt and covert discrimination against Indigenous peoples from the rights afforded to others, can be perceived as fear of collective approaches to life and a relationship with the land that is antithetical to neo-liberal capitalist paradigms.

Fear since 9/11 has been directed at migrants, particularly Muslim asylum seekers. Not only is there fear of terrorism but also fear of erosion of Australian values and their replacement with non-western values. Invasion anxiety is no longer linked to warfare but to migration, with border-thinking seeping through society. Fear constructs an environment that depletes a sense of belonging for minorities and cultural diversity is not meaningfully considered as a force for inclusion or exclusion (Babacan 2010).

Transformations through Human Rights Education

French social theorist Alain Touraine (2000) asks ‘Can we live together’? Human rights education needs to take the position of ‘How we can live together’?
The way human rights awareness takes place is often reactionary by exposing human rights violations and racism that have occurred internationally or domestically. At the practice level prescriptive manuals develop, cultural sensitivity training takes hold, pedagogical trials exist and debates abound as to which levels to provide human rights education.

At the most basic level attempts to combat racism are ultimately designed to prevent or redress disadvantage and to ensure equal access to and ability to participate in social, cultural economic and political life (Berman and Paridies 2008). There is urgency to this task particularly in relation to the movement of people throughout the world, who become illegalized by receiving states and who are subject to negative reception and media hyperbole. We need to be able to contend with irrational questions that arise which vary according to context and content. For example, letters to newspapers often raise questions such as: why should we not give first priority to our own citizens for social benefits; are not our own values under threat; why should languages other than English be taught; why should we allow religious dress? Responses need to be carefully crafted to be educative rather than denigrating the holders of such beliefs.

Some solutions rest with legislative reforms often based upon the tenets of the International Convention on the Elimination of All Forms of Racial Discrimination, which refers to measures for both development and protection. Other measures by states include policies of ‘affirmative action’ that accord special rights to marginalized groups. Yet the legal and political structures that bind human rights into instruments, treaties and laws differ from the realities experienced in everyday life (Offord 2006). Human rights protections are often seen as the domain of law. But the idea of human rights is derived from many bases.
A logical starting point for transformation is Baden Offord’s (2006) notion of the need for an ethics of engagement, an engagement with difference. He says (2006, p. 15):

*As the international community has attempted to organize itself according to the principles of the Universal Declaration of Human Rights (UDHR), conceptions of what being fully human implies have led to pressures for a sustained and principled exposure of the ‘other’.*

In the quest for of human rights education oft-quoted words of Eleanor Roosevelt in 1948 still have resonance:

*Where after all do human rights begin? In small places, close to home, so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighborhood (s)he lives in; the school or college (s)he attends, the factory, farm or office where (s)he works.*

This statement can be seen to direct us to counter racism at local levels and not just be complacent that international norms and domestic law and policies will suffice.

We need to bear in mind that human rights are activated by insights into normative references that are unquestioned and legitimated (Offord 2006). Human rights education to counter racism must be an emancipatory collaborative project for both the holders of false and hurtful beliefs and those at the receiving end. It must be underpinned by recognition of people’s own race privilege when they are members of the dominant group in society and the benefits that affords to them and how this diminishes the rights of others.

There are a number of foundational elements to human rights education as outlined by Fiske and Briskman (2008), which can be the cornerstone of education against racism. These include the place of philosophical explanations that are pivotal to human rights pedagogy and content. Ideas about human rights have developed over several
centuries and provoke us to think deeply about existential and practical issues. Exploring philosophical roots presents human rights as dynamic, requiring active engagement and critical thinking. Incorporating philosophy and ethics equips students with deeper knowledge and skills in their human rights engagements. The political aspect of human rights thinking acknowledges that causes and solutions of most human rights issues, including racism, involve the political realm.

_Historically_, it is important for students of human rights to have some understanding of how the United Nations was formed and how the UDHR and other international conventions came into existence. History is important in discussing racism as incremental. In Australia the most recent racisms have built upon earlier racisms including the colonization and oppression of the Indigenous population and the White Australia Policy of much of the twentieth century. To teach anti-racism requires a re-exploration of history. For example Australian history is largely constructed around victims and victors; of Australia’s participation in wars, of building a nation that was erroneously perceived as without people, and sometimes about waves of migration for the purposes of nation building. It contrasts the telling of Indigenous history about genocide, colonialism, denigration of cultures, loss of land, removal of children and exploitation.

An _anthropological_ perspective, argue Fiske and Briskman (2008), challenges the notion that human rights are a western construct and creates awareness that human rights span every cultural and religious tradition. This enables us to understand human rights as moral and customary codes guiding how we live together, how we care for one another and how we resolve disputes. Holding up a cosmopolitan or anthropological view encourages us to consciously seek out the contributions of non-western traditions and hence enriches human rights inquiry and scholarship.
At a practice level, human rights education can contribute to positioning education recipients as actors in contributing to anti-racism. The work of some human rights educators is informed by the work of Paolo Freire (1996) whose critical pedagogy occurs through a process of collaborative dialogue and inquiry in which the method of education is as important as the content. Human rights education should incorporate practice and experience.

Conclusion
Racism is a construct and a practice that crosses national borders. Confronting and eliminating racism is a task for the international community including governments, academics, practitioners and educators. In order to eliminate racism and the harms that flow require multiple strategies. Human rights education is a forerunner to creating a climate for systemic change.

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Promoting Cultural Diversity and Human Rights Education in Australian Schools: Intersecting Pathways to Socially Just Communities

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Abstract

The Australian nation in the 21st Century is a vibrant social democracy. It is a modern microcosm of the world with over 200 languages spoken in its vast landscape. It lays claim to having one of the world’s most successful transitions to a multicultural nations and to being at the forefront in the creation of the UN Declaration of Human Rights in 1948. This is contested ground, as many academics argue that Australia’s race relations history, firstly with its Indigenous peoples and later with non-Anglo-Celtic immigrants, is underpinned by a lingering undercurrent of racism and indifference to human rights.

At the intersection of these two themes of human rights and cultural diversity, Australia appears to have an unflattering history. Australia is one of the few democracies without a Human Rights Charter or Human Rights Act. According to some experts this has led to the contravention of human rights for the more marginalised members of the Australian community. This view is contested by leading politicians and social commentators who are adamant that Australians are not overtly racist. They maintain that Australia still has one of the most tolerant racially diverse societies in the world. Indeed, some reports find that migrants see Australia as a very tolerant country compared to their country of origin (Ang et al, 2002, Forrest and Dunn 2007).

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This is the context in which this paper is located. It will provide a brief overview of Australia’s recent history in the area of cultural diversity, Indigenous and non-Indigenous relations and human rights. Discussions on human rights will be from an educational perspective rather than the more orthodox legal framing of such a topic as human rights. In highlighting the key issues of debate as they have played out in the Australian context it provides examples and insights from academic research. The final part of the paper will seek to analyze the underlying intersections between these themes and suggests that education, both at the school and tertiary level, is one major pathway towards implementing change in order to promote socially just communities where the rights of all peoples in Australia’s multicultural landscape are respected.

1-Introduction

Australia is a land of contrasts, a wide brown land whose population largely clings to its city coastline and yet its national identity is buried deep within it rural past. These contrasts and paradoxes are reflected in its colonial and post-colonial history. As an outpost of British colonialism in an Asian region, fear of the ‘other’ has framed its social and political history. Yet, the Australian nation has emerged from the depths of the White Australia Policy of the 20th Century, to become one of the most ethnically and linguistically diverse nations in the world.

More paradoxes are found within its postcolonial history in relation to the legendary Australian egalitarian spirit and on its record on human rights. Australia was one of the first nations in the world (together with New Zealand) to give women the vote. In 1908 Justice Higgins, a judge in the Conciliation and Arbitration Court, in a milestone of labor reform known as the Harvester judgment, initiated the concept of a ‘basic wage’ as a fair and reasonable wage on which a family (husband and wife and three children) could live. Despite some misgivings with such a
concept and the premises on which it was based, the basic wage formed the basis of wage regulation for decades. In both world wars ordinary Australian’s opposed conscription for overseas service and in the aftermath of World War Two Australia was a leading protagonist in designing the 1948 United Nations Declaration on Human Rights. It was steered through the General Assembly by Dr. H. V. Evatt, eminent lawyer and Labor leader, as the president of the Assembly at that time.

In contrast to such progressive attitudes were our attitudes to Aboriginal Australians who were deemed to be second class citizens, unrecognised in our constitution, subjected to discriminatory laws and suffering from a history of omission and neglect which did not provide them with any sense of equality or equity well past the 1967 national referendum. The 1967 referendum saw them recognised in sections of the constitution and made it possible for them to be counted as peoples in national census statistics. Another 25 years would pass before the High Court ruled that Aboriginal people held native title rights on un-alienated land in Australia and that the concept of Terra Nullius was invalid.

If we fast forward to the second decade of the 21st Century, Australia is a very different place to what it was in the 1950s. Australia is a distinctly multicultural nation with a burgeoning economy, at least in terms of its mineral wealth, and a leading player in world politics compared to its relative size. At the intersection of these two themes of human rights and cultural diversity, Australia has a mixed record. Australia is one of the few democracies without a Human Rights Charter or Human Rights Act and it is one of the very few democracies that has mandatory detention laws pertaining to refugees and asylum seekers. These are just two examples of where our social justice record is less than exemplary.
The paper will examine Australia’s recent history in the area of cultural diversity and human rights from an educational perspective, rather than a more orthodox legal one. The author fully acknowledges the complexities, tensions and legal arguments involved in discussing which aspects of human rights should be taught in schools and teacher education institutions beyond legal faculties. It does not focus on a discussion of specific rights and responsibilities, but more on the approaches that can contribute to further developing opportunities for students to learn about a range of human rights issues during their formative years at school and in teacher training courses. The aim of education for human rights is to improve young people’s understanding of human rights both individually and collectively, in the broader context of a civil society. This means developing their capacity to engage in discussions about what constitutes a human right, to learn about specific rights, and understand the principles of active democratic citizenship to help ensure that basic human rights are protected. These are all fundamental aspects of the effective functioning of a social democracy.

This paper will discuss each of these of the over-arching themes of Diversity, Indigenous and non-Indigenous relations and Human Rights separately, highlighting the key issues of debate as they have played out in the Australian context with insights from academic research. The final part of the paper will seek to analyze the underlying intersections between these themes and suggests that education, both at the school and tertiary level is one pathway towards implementing change within the Australian community to promote socially just communities where the rights of all peoples in Australia’s multicultural landscape are respected.
2-Cultural Diversity in the Australian Context

One unmistakable feature of Australian life today is the cosmopolitanism evident in many of our neighbourhoods. This is borne out by statistics which show that 45% of Australians were born overseas or have at least one parent born overseas. They have settled in Australia from more than 200 countries, speaking almost 300 different languages, (including 50 Indigenous languages) and they have brought diversity in religious practices, languages and customs (Commonwealth of Australia, 2009).

This evolution to a modern cosmopolitan representation of a global community is predominantly the result of the policy of Multiculturalism. Introduced in the early 1970s by the Whitlam Labor government, the policy was strengthened by the Liberal Prime Minister Malcolm Fraser through the Galbally Report of 1978 and retained by partisan support for almost two decades. Until recently, Australia’s forays into multiculturalism have been much celebrated by governments of both persuasions. However, the meaning, purpose and impact of Multiculturalism came under increasing scrutiny during the late 1990s under the conservative government of Prime Minister John Howard and the rise of the extreme right-wing party One Nation led by Pauline Hanson.

The aftermath of September 11, 2001 heightened debates with the Australian community on issues related to multiculturalism. Muslim migration, refugees and asylum seekers were issues that caused tension leading Sydney’s worst racial riot at Cronulla beach riots in December 2005 when young ‘white’ Australians sporting 100% Aussie pride t-shirts, pitched themselves against young Lebanese groups in a violent display of misplaced nationalism; the community reaction, as well as the debate and implementation of the citizenship and values test for migrants in 2007 have been used by activists and academics
alike as indicators of a higher level of intolerance in post September 11 Australia – a new myopia which did not want to see beyond the white picket fence.

This view was contested by leading politicians and social commentators and some academics who were adamant that Australians are not overtly racist. According to these politicians the Cronulla beach riots were not about race and ethnicity, rather about rival youth gangs. Despite condemning the violence that took place at Cronulla, the then Prime Minister, John Howard insisted “I do not accept there is underlying racism in this country, I have always taken a more optimistic view of the character of the Australian people.” (Murphy & Davies 2005).

There is evidence that despite these events, Australia still has one of the most tolerant racially diverse societies on the planet. Indeed, some reports find that migrants see Australia as a very tolerant country compared to their country of origin and that Australians are vastly more tolerant towards difference than some European countries (Ang et al, 2002, p. 23; Forrest and Dunn, 2007). On the other hand, critics suggest that in defining Multiculturalism simply in terms of social cohesion and building a unified nation we fail to address the real undercurrents of discrimination and racism that exist in Australia. (Babacan 2006 p. 54).

It can also be argued that since 2007 with the coming to power of a more progressive Federal Labor Government, Australia has revitalised multiculturalism through the launch of a new policy, the People of Australia, in 2011. This government also instigated the National Human Rights Consultation which engaged Australians in discussions about their understanding of Human rights.

Within the education sector this public debate has been supported by positive departmental policy statements on cultural diversity (NSW DET...
2005) and various multicultural education programs and resources in schools (Mansouri & Wood 2007). However, civic leaders and policy makers still face the challenges (and opportunities) presented by the growing linguistic and religious diversity in our communities. One question that emerges is ‘What should be the role of education, including teacher education, institutions and schools in working with students to build civil societies based on principles of social justice, equity and social inclusion?’

**Dealing with Diversity in Our Schools and Communities**

Assuming that schools and education are crucial elements in countering racism and promoting cohesive communities, a small qualitative study conducted in 2007 and early 2008 titled Representations of cultural diversity in school and community settings sought to explore how a number of government schools were responding to the challenges presented by our multicultural classrooms (Burridge & Chodkiewicz 2008). The study involved case studies of a small number of public schools in the greater Sydney region with differing degrees of cultural homogeneity. These were a primary school in Inner Western Sydney; a high school in Southern Sydney; and a high school and a small primary school in Northern Sydney.

In brief, the research found that the representations of cultural diversity were often shaped by the cultural context of a school and its community and the response of the school’s leadership team. The study identified a number of different approaches that schools were taking and categorised them to be either a) an active whole school approach; b) a reactive responsive approach or c) an inactive or indifferent approach.

In the first example in a geographic area which had a highly mixed and culturally diverse community with many recent arrivals, the primary school had adopted what could be described as an active integrated
whole-school approach. Aspects of cultural diversity were being acknowledged across the school where students of all backgrounds were being included and asked to share their culture, and the school engaged in programs that were welcoming of parents through regular morning teas, bilingual newsletters, employing cultural liaison officers to communicate with parents and engaging them in oral history projects. While some of their programs were folkloric in their representations of diversity, generally their impact was one of fostering a culture of inclusion in the school.

In a largely monocultural area in southern Sydney, a critical incident became a major motivator for the school to take action to address cultural diversity. In that case the school responded or reacted after it saw the impact of the 2005 Cronulla beach riots on its school population. It initiated a program called Cooling Conflicts in the junior school years to deal with cross cultural tensions and undertook an inter-school program of cultural exchange as a way of starting to address cultural diversity across the school. The program was seen as an effective way of increasing the level of understanding of other cultures among both students and teachers. It was also a way for students to develop relationships with other students from very different backgrounds to their own.

In the third case study in another demographic area in the northern Sydney region, a high school saw its area as being quite monocultural. Because there were only a few small emerging communities and other cultural groups were largely invisible, the school did not see the need to address any cultural diversity issues, apart from considering the English language needs of a small number of students. Generally the school felt other priorities were more important than what they saw as artificially dealing with an issue such as cultural diversity, when it was not a major concern both for the school and its community.
This brief outline above provides a general overview of the study, yet it misses the complexities evident in each of these case studies, hence the following vignette from the data collected is an attempt to illustrate how current discourses are impacting on young people’s struggle with their identity in Australian schools.

**Young Muslim Voices and Struggles with Identity**

The study incorporated discussion with a number of young people from different backgrounds, including Muslim students. Those interviewed indicated that cultural barriers existed in both conscious and subconscious forms. That is to say, that in the conscious realm, the realities of geography, socio-economic status and language proficiency impacted on their capacity for intercultural contact. This led to significant struggles with their identity, particularly since 2001, as a number of young Muslim students highlighted. Their comments showed how they were being forced to question their Australian-ness as a result of their many negative experiences. Girls who wore the hijab said they were being stereotyped and made to feel they were no longer accepted as Australians.

...those of us from different backgrounds where do we fit in? I have always defined myself as an Australian. You know I was born here, raised here, gone to an Australian school, my language is English...If you look at the qualities that are attributed to an Australian...the whole mateship thing and the love of sport - well then I’m just the same as the Australian old man who screams at the television every time the sports comes on.

Being born here and living here wasn’t seen as enough anymore: you know, we’ve been here our whole lives and all of a sudden it’s an issue and all of a sudden we’re being questioned.

One clear conclusion from the evidence cited above is that educational institutions, including schools and universities, need to
engage with the debates about representations of cultural diversity, nationhood, identity and the importance of individual and collective human rights. In particular there is a strong need for the development of a better understanding of Islam. Indeed their contributions can help to shape these discourses. School educators need to focus their attention on the roles they play in converting the challenges of cultural diversity into opportunities for all children and young people. Suggestions and recommendations on how this could be achieved are discussed in the final part of this paper.

3-Human Rights and Indigenous and Non-indigenous Race Relations

Australia’s relationship with Aboriginal and Torres Strait Islander peoples since 1788 have been characterised by a history of discrimination and dispossession within our legislative structures that lasted until the 1970s. In more recent history, Australia has sought to correct some of the past wrongs through national funding programs such as ‘Closing the Gap’ (FaHCSIA, 2012), its policy of Reconciliation and its formal apology to Australia’s Indigenous peoples by then Prime Minister, Kevin Rudd, in February 2008. The Labor Government also ratified the UN’s non-binding Declaration on the Rights of Indigenous Peoples in 2009. It must be noted however, that Australia’s Indigenous Australians still suffer great social and economic disadvantage and many Indigenous students still trail behind the rest of the student population in national testing regimes. (Productivity Commission Reports 2010)

Historians such as Henry Reynolds have noted the total neglect of Aboriginal peoples as a characteristic of Australian Historical Scholarship in the 20th Century (Reynolds, 1984). Indeed Aboriginal peoples were not mentioned in the constitution; there were not counted in official census figures as citizens until 1967; they did not gain many of the social welfare benefits until 1967 because of their lack of
status - even though many fought in wars and contributed to the building of the Australian nation as farm workers. Under the policies of Protection and later Assimilation that prevailed throughout Australia from the 1880s until the 1960s, Aboriginal children could be removed from their families and placed in institutions. Known as the Stolen Generations their stories have been detailed in one of Australia's most significant national reports. The Bringing them Home Report, released in 1997 was met with great contestation by conservative forces but finally formed the basis of the National Apology to Indigenous Australians over a decade later.

Of equal significance was the discrimination Aboriginal peoples faced in our education systems, again until the 1960s, that relegated them to inferior schooling in segregated classrooms and a debased curriculum that trained them to be workers rather than professionals. The legacy of these policies is still evident in national statistics on socio-economic levels and in international testings results that depict Indigenous children are still lagging behind their non-Indigenous counterparts in literacy and numeracy as noted by this report:

While 77% of Indigenous students met the minimum benchmark for reading in 2000, this compares unfavourably with the 93% of non-Indigenous students who achieve the benchmark. With regard to numeracy, 74% of Indigenous children met the benchmark in 2000, whereas 93% of non-Indigenous students met this same standard. Of greater concern is the increase in the gap which grows to 25% in reading and 27% in numeracy by Year 5 (Mellor and Corrigan, 2004).

It is not within the scope of this paper to discuss in detail the complexities of the race relations debates that underscore Indigenous and non-Indigenous relations. However, it is abundantly clear that any discussion about Human Rights education must encompass this aspect of our history from the earliest colonial period to the 1967 referendum that gave Indigenous Australians status as peoples in the Australian
nation, to the High Court’s decision on Native Title in 1992 that recognised that Australia was not ‘terra nullius’ - a land belonging to no-one. Despite the Reconciliation movement and the National Apology, the need to address the issues of Indigenous economic and social disadvantage and Indigenous rights still remain the ‘unfinished business’ of the Australian nation.

4- Human Rights Education and the Australian Context

The issue of Human rights and education about our civic responsibilities and our rights as citizens have been in debate within Australia for decades. Australia is one of the few democratic countries that does not have a human rights framework embedded in its constitution or in its legislature. Research illustrates that Australians, on the whole have poor knowledge of their human rights. Neither is human rights solidly embedded in its school curriculum (Civics Expert Group, 1994, NHRC Report 2009).

The National Human Rights Committee formed by the Australian Government in December 2008 to conduct a nationwide consultation to investigate Australian attitudes to human rights noted in its report:

The Committee heard strong criticism of the extent of human rights education available in the Australian community. ‘We don’t know what our rights are’ and ‘We don’t know where to find out about human rights’ were common refrains when the Committee visited locations around Australia. One roundtable participant said, ‘I’ve spent 12 years, like most people, in schools, then university, etc. and not once did I see the promotion of human rights during my education, as is required by the UN declaration’ (NHRC Report 2009).

The consultation stated in its report that research by the Human Rights Law Resource Center into human rights education in Australian schools found it to be “ad hoc” and “well short of what is mandated by Article 29 of CROC [the Convention on the Rights of the Child]”. It found “that more than 80% of surveyed students did not receive any human rights
education during their formal years of schooling”. And on the available evidence Australia “has not achieved a systematic and integrated approach to human rights education” (NHRC, 2009, p.137).

The Human Rights Consultation Committee Report emphasized the importance of human rights education in the community (NHRCC, 2009). The report’s first two recommendations centred on how education remains a central pathway for the promotion of a culture of human rights in Australia that enables discussion and debate about the nature of our democracy; the value we place on individual and collective rights and freedoms and the complexities that emerge in such interrogations of a rights framework in any civil society (NHRCC, 2009). However there were no recommendations on the introduction of a Human Rights Act into our Federal Parliament.

As a response to the national consultations, the Australian Government released Australia’s Human Rights Framework (Attorney-General’s Department, 2010) and a major role was given to human rights education programmes in schools, universities, the public sector and the wider community. Schools were recognised as key sites of learning about human rights. However, the approach taken by the Australian Government was been to provide guidelines on the school curriculum and to leave any implementation to State and Territory school education systems. For any change to occur States and Territories will need to review their school curricula and specifically include the suggested learning opportunities available in such documents as the national Learning For Civics And Citizenship into State and Territory documents. One major drawback of this plan is that no direct funding has been allocated to support any new approaches or initiatives in schools.

On the other hand the role of community education and education in the public sector was supported, with the Australian Human Rights
Commission receiving $6.6 million over four years to implement programs and provide expert advice to the public sector and non-government organisations on human rights issues. Community based organisations received $2 million over four years to implement community education and awareness programmes across Australia and human rights education programmes in the Commonwealth public sector were supported with an allocation of $3.8 million (Attorney-General’s Department, 2010a).

The author of this paper, with colleagues, conducted a small scale study on human rights education in Australia’s most populous state, New South Wales.

The NSW School Education Sector as an Example of What is Happening in Australia on Human Rights Education.

In Australia, education is a state based responsibility although it is funded by the national government. In discussions with school personnel, academics and community based organisations the authors identified haphazard approaches to Human Rights education which included some emphasis in formal curriculum documents, particularly in the humanities subjects such as history and geography; a selection of useful resources for schools and the general community coming from such bodies as the Australian Human Rights Commission, and NGOs such as Amnesty International, Save the Children and Catholic social justice organizations and some attempts in schools to assist teachers with professional development in the areas of social justice and equity.

In terms of the formal curriculum, a search of secondary school curriculum documents in NSW found only limited references to human rights, human rights issues or to such bodies as the UN and its various
human rights conventions. Most curriculum opportunities were located in the senior years, Years 10 to 12, in the following subjects - Legal Studies (Yr 11 & 12), Modern History (Yr 11 & 12), and Studies of Religion (Yr 11), followed by Economics, Society and Culture, Citizenship and Society and Aboriginal Studies. This means that only a proportion of students in the senior years were able to study human rights issues at school in these subjects. In the junior secondary years, Years 7 to 10, the subjects with the most opportunities and the largest numbers studying them were Australian History - Civics and Citizenship and Australian Geography - Civics and Citizenship. Another subject Aboriginal Studies also provided opportunities in its Year 10 course, although the numbers studying it were very small. In the primary school curriculum there were opportunities in all four strands of the Year 5 and 6 Human Society and Its Environment (HSIE) syllabus to address human rights topics.

Among Catholic primary schools, the Social Justice subject also provided opportunities for students to learn about human rights issues. The syllabus and how it was taught varied from diocese to diocese.

Also worth mentioning has been the major focus over recent years in schools on values education. Led by the Australian Government and implemented by State and Territory education authorities, in NSW this has been driven through the Respect and Responsibility programme, developed by Board of Studies NSW (BoS NSW, 2007). A syllabus, together with a set of teaching resources, was developed to assist schools in implementing the programme.

Discussions with teachers confirmed that even in the subjects where the syllabus documents mention human rights issues, it was still largely at the discretion of each individual subject teacher at each school, as to which human rights issues they covered in their teaching. Generally it was only a minority of teachers, with an interest in human rights, who would address human rights issues in particular subjects.
Non-Government Organizations Working with Young People

Within both government and non-government schools in NSW, a small number of well-established community based human rights organizations have worked in various ways to involve students in a range of different kinds of human rights education programmes and activities. These include Amnesty International, World Vision, Save the Children, and Catholic Mission. Among the ways these community based organizations work with schools to educate students and teachers about human rights include setting up school groups, organizing guest speakers at school, running forums, conferences or conventions, staging theatre performances or using art to access and express student’s perspectives.

For example, Amnesty International NSW (AI) with the help of its volunteers has over recent years organized school groups, guest speakers, and conferences. In 2010 AI school groups were set up in 60 high schools across NSW. The members of the groups included students from each school and they devoted time outside class time to work on campaigns focused on either Refugees, Burma, Indigenous Rights, Stop Violence Against Women, and the Millennium Development Goals. They also have a guest speakers program for schools and conferences for students on specific topics.

World Vision has focused on setting up its own groups in schools. Called Vgen groups, they involve students in work on a major campaign that addresses a specific issue, such as the Don’t Trade Lives campaign in 2010. Through its annual Global Leadership Convention it has involved 222 schools and 952 students from schools in Sydney and Newcastle, enabling students to address an issue like child labor in India. Another way has been to involve schools in the annual World Vision 40 hour Famine. This has worked very successful with secondary schools,
involving a total of 550 schools in 2010, with 500 secondary schools and 50 primary schools.

Save the Children has organized a number of different kinds of initiatives over recent years. An Art for Advocacy programme provided a way for children to tackle social justice issues through art. Speaking Out addressed child rights and social justice issues with school aged children and the Global Peace Education Schools programme (2005-2008) was linked to a wider international initiative that also included a focus on child rights.

Since 2009 Catholic Mission has adopted a more direct rights based focus, and the stage performance has addressed the issue of children’s rights. During 2009 the Village Space performances reached 81 schools in 7 NSW Catholic Dioceses involving more than 11,000 students. Catholic Mission also has 44 Catholic schools which it emails monthly with a newsletter containing information about action and advocacy on various aspects of the rights of the child.

**Educational Resources**

A number of organizations have taken the approach of developing education resources and making them widely available in print or via the internet. They include the Australian Human Rights Commission (AHRC), Amnesty International, World Vision and Save the Children.

The AHRC, as a government agency, has focused on developing high quality educational resources as part of their support for the teaching of human rights in Australian schools. They have launched rightsED on their website, as a new way of bringing together in one place its human rights education resources for teachers. A key part of its education work has been the development of educational resources on specific issues, together with a set of curriculum resources linked to
Human Rights Education

key school curriculum learning areas for each State and Territory. The AHRC has focused on seven key rights areas, including child rights, disability rights, human rights, Indigenous rights, multiculturalism, race relations and sexual harassment. Among the educational resources it has produced are booklets, information sheets, resource sheets, worksheets and interactive activities, and DVDs.

Among the most recent publications developed by the AHRC (2010) are modules about human rights. It’s Your Right! is a teaching resource for people newly arrived in Australia who are learning English as a second language. Let’s talk about rights is a set of materials to help young people have their say about human rights in Australia. There are also resources that focus on particular areas of rights. For instance on Indigenous rights, the Bringing Them Home education module draws on a major national inquiry held in 1997. The Youth Challenge education module focuses on human rights in the classroom, disability rights, young people in the workplace and tackling sexual harassment in your school. The rights of refugee, migrants and Indigenous people are also addressed in Face the Facts education module, which helps students address myths and stereotypes about refugees, migrants and Indigenous people. Finally the Voices of Australia education module, which is an eight-part secondary school module, is aimed at increasing students’ awareness of cultural and religious diversity, discrimination and race relations.

Increasingly the AHRC has been using digital media and Web 2 technologies to reach and engage both teachers and students with its range of educational materials. Various interactive technologies, including social networking sites, are also being used to involve young learners and teachers. Also the AHRC has organized a range of professional development activities to support classroom teachers in their use of their educational materials.
Professional Development

Given the availability of quality resources for the implementation of creative classroom strategies to educate about human rights, it is imperative that teachers are given the opportunity engage with these resources and that they are properly supported to teach about human rights in their classrooms. Discussions with high school educators on human rights (CCSRC, 2009) noted that while the various approaches mentioned above were a good start, they felt it was more important to provide teachers with more support in their teaching about human rights. They identified a great need for a concerted effort to be made in the professional development of teachers.

One major opportunity exists to introduce human rights education on a national scale through the much current efforts to introduce a national curriculum in Australian school in the near future.

National Curriculum

From the 1970s there have been several attempts by the presiding Federal Government to create a national curriculum for all Australian students. Most have failed on the basis that State Governments are very reluctant to relinquish state rights to education. The latest efforts however appear to be succeeding and present educators with an opportunity to embed cultural diversity and human rights education within curriculum structures across the Australian curriculum.

The first draft of the Shape of the Australian Curriculum was released in 2009 by the newly created Australian Curriculum Assessment and Reporting Authority (ACARA). After extensive consultation in all Australian states the updated version was released in August 2011 and forms the basis for the design of all syllabus documents for each of the three phases of the introduction of a national curriculum. All states and
territories are committed to introducing aspects of the phase one core subjects of English, Math, Science and History by 2014. Phase one of the curriculum attempts to engage with the complexities of according to ACARA, ‘developing a curriculum that will equip all young Australians with the essential skills, knowledge and capabilities to thrive and compete in a globalised world’ (ACARA online).

There are general directives within the policy documents which note that in each discipline the curriculum should deal with a set of cross curriculum priorities and a list of general capabilities that students should have. For example two of the general capabilities are ‘critical and creative thinking’ and ‘ethical behavior’. It is through these directives that diversity and human rights have the most chance of being implemented. Specific subjects curriculum committees have made an effort to embed these cross-curriculum priorities and general capabilities within their syllabus content, what will be more difficult to measure is how effectively these will be incorporated in unit outlines by teachers and indeed, how well they will be taught.

5. Creating Intersecting Pathways to Socially Just Communities

At the intersection of the themes of human rights and cultural diversity lies the goal of creating a socially just and equitable society which enables the vibrancy of difference to emerge, co-exist and enrich our communities from the local neighborhood gatherings to the global sphere of international engagement.

Australia, as one of the world’s most culturally diverse communities with a robust democracy still faces challenges in the areas of human rights and diversity. What is needed is a strong commitment by governments at all levels to engage with these issues not just in policy terms but in real actions based programs that are well resourced and sustained to ensure long term outcomes.
Part of the challenge for Departments of Education in each state and territory is to renew their efforts by emphasizing the value and place of cultural diversity and human rights education in schools. While we may have at the Federal level new policies on Multiculturalism and a Human Rights Framework, as yet this is not reflected in any new policy documents emanating from the various state directorates of education. There is an urgent need for revision of such documents in many state based educational institutions.

At the same time there is a need to keep highlighting the importance of addressing teacher beliefs, attitudes and knowledge of cultural and linguistic diversity (Guerra & Nelson 2009), and on human rights issues that emanate for having a multicultural community in any work to bring about more meaningful and longer lasting change in how issues are addressed in schools.

Our analysis suggests there is a need to revisit the way cultural diversity programs and support is provided at a school level. It is vital that more strategic and focused support for the implementation of cultural diversity policies is provided across the school system at the school level. In reshaping new implementation strategies, these strategies need to be informed by the kinds of approaches that schools are actually demonstrating they are taking. In addition there is a need to recognize that human rights education is interconnected with the work on diversity whether it relates to cultural diversity or difference as it might relate to gender, sex, age and disability.

The support provided needs to be shaped by the school leadership and the school as a whole deciding to take a proactive stance on the promotion of diversity and human rights education. At a minimum it means supporting schools and teachers that have a low interest level in diversity and human rights to a position where they can start acknowledging and celebrating difference and engaging in
understanding and respecting individual and collective rights. This includes making cross-cultural contacts, allowing for differing perspectives on global issues that relate specifically to rights to be debated and encouraging the perspective that we as a community can engage in the conversations and politics of the global village for the promotion of a human rights culture.

This also implies that the type of resource support provided needs to be tailored to how each school positions itself in the implementation of policies related to human rights education and diversity.

In terms of human rights education specifically, the Human Rights Framework in schools still requires a major focus on updating school curricula. As various opportunities already exist across the curriculum, there is a need to embed topics that encourage the teaching of the history of human rights; that explore what constitutes human rights for the ordinary citizens; and discuss human rights violations both in a historical context and in the current context, nationally and internationally. For this to happen, a new mindset is needed amongst policy makers to ensure that syllabus documents embed a more broadly based human rights education in curricula across Australia.

The creation of a national curriculum body, the Australian Curriculum Assessment and Reporting Authority (ACARA), and the deliberations on what should be part of the national curriculum have provided a timely opportunity to expand curriculum documents to add further human rights education perspectives into key subject areas. There is also an opportunity to provide schools with a framework which focuses on the active participation of students and teachers in teaching about individual and collective rights and respect for others in our society.
6. Conclusion

The advice from international reports, from Australia’s own national consultation processes, and the two small scale studies carried out by the author and noted above. The curriculum needs to delineated more explicitly to the teaching of human rights and diversity in school curricula. There is a further need to professionally skill teachers in these areas within teacher education programmes and through professional development courses. This should be done in partnership with community-based organizations and other key government agencies. As a result schools will be better able to implement a rights-based framework, which embodies a focus on active participation of students and teachers in learning about individual and collective rights and ensuring respect for difference and diversity in our society.

This has less to do with teaching about civics and more to do with teaching about human rights, valuing difference, and respecting both individual and community rights. It has less to do with an assimilated Australian identity or a narrow set of Australian values, and more to do with teaching about universal values, multiple heritages and global perspectives. It is appropriate to conclude with comments by the eminent human rights lawyer Geoffrey Robertson in an address to NSW teachers in 2006, emphasizing the important role for schools and teachers in the implementation of effective human rights education:

> For students in our state schools and teachers as well, [teaching human rights] may serve to show that privilege is an anachronism, [that] dogma is a distraction, freedom is a birthright and discrimination wrong... To the advantages of state education -- secularity, diversity and locality -- let us now add humanity (Carr, 2006).

Educators need to reclaim the moral high ground and restate what are seen as the main reasons for undertaking a school education. As Martha Nussbaum states:
Education is often discussed in low-level utilitarian terms: how can we produce technically trained people who can hold onto "our" share of the global market? With the rush to profitability, values precious for the future of democracy are in danger of getting lost (Nussbaum, 2009).

For too long there has been a mindset amongst policy makers that education is all about the market and human capital investment and the curriculum has been laced with instrumentalist processes that give emphasis to narrow assessment based pedagogical practices that discourage creativity and critical thinking. According to Nussbaum, education should be more about human development:

*Education for human development is a very broad idea. It includes many types of cultivation that are pertinent to a student's personal development. It is not simply about citizenship... [its] goal [is]... producing decent world citizens who can understand the global problems to which this and other theories of justice respond and who have the practical competence and the motivational incentives to do something about these problems (Nussbaum, 2009).*

If education has a transformative role to play in educating young minds about their rights and responsibilities and role within civil society (McLaren, 2002), then schools need to become more positive agents of change in dealing with the complexities of living in our globalised communities.

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Sen’s Capability Approach and Human Rights Education: the Special Case of Refugee Camp Situations

Stefanie Rinaldi*

Abstract

In 2004, the first United Nations Decade for Human Rights Education came to an end. A report submitted by the High Commissioner for Human Rights suggests that the main achievement of the Decade was to put human rights education on the agenda of national governments, leading to the adoption of national policies. It identifies the development of specific methodologies for human rights education as one of the major challenges. As a follow-up, the United Nations General Assembly proclaimed the World Programme for Human Rights Education. In December 2011, referring to the World Programme, the UN General Assembly adopted the United Nations Declaration on Human Rights Education and Training (‘Declaration on HRET’). The adoption of this declaration represents a milestone in a series of measures aiming to promote human rights education, acknowledging that this particular form of education is crucial for the development of ‘a universal culture of human rights’.

The attention to human rights education has recently gained calls for an analysis of its raison d’être and the influence it can have on the promotion of a universal culture of human rights. This article seeks to

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address this question relying on Amartya Sen’s capability approach, which provides a useful conceptual framework for analysing the different dimensions of human rights education. The first section provides an overview of Sen’s approach and of its main critiques, putting a special focus on the relationship between capabilities and education. The second part will discuss the commonalities and differences of capabilities and human rights before seeking to link capabilities, human rights and education. The Declaration will serve as the main point of reference when establishing this tripartite relationship. In the last section, the theoretical analysis will be applied to refugee camp situations, arguing that human rights education is crucial in enabling refugees to break the vicious circle of exclusion, poverty, and powerlessness.

1. Introduction

In 2004, the first United Nations Decade for Human Rights Education came to an end. A report submitted by the High Commissioner for Human Rights suggests that the main achievement of the Decade was to put human rights education on the agenda of national governments, leading to the adoption of national policies.1 It identifies the development of specific methodologies for human rights education as one of the major challenges.2 As a follow-up, the United Nations General Assembly proclaimed the World Programme for Human Rights Education.3 In December 2011, referring to the World Programme, the UN General Assembly adopted the United Nations

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2 Commission on Human Rights (n 1) §25.
Declaration on Human Rights Education and Training (‘Declaration on HRET’).4 The adoption of this declaration represents a milestone in a series of measures aiming to promote human rights education, acknowledging that this particular form of education is crucial for the development of ‘a universal culture of human rights’.5

The Declaration takes a holistic approach to human rights education. Rather than merely focusing on the diffusion of factual knowledge about human rights, the Declaration also promotes education for and through human rights, thereby taking into account both the means and the ends of human rights education. Moreover, it acknowledges the indivisibility and interdependence of all human rights as well as its importance for peace, democracy, development and social justice. Due to its comprehensive approach, the Declaration has the potential to become a groundbreaking instrument in the area of human rights education.

The attention human rights education has recently gained calls for an analysis of its raison d’être and the influence it can have on the promotion of a universal culture of human rights. This paper seeks to address this question relying on Amartya Sen’s capability approach, which provides a useful conceptual framework for analysing the different dimensions of human rights education. The first section provides an overview of Sen’s approach and of its main critiques, putting a special focus on the relationship between capabilities and education. The second part will discuss the commonalities and differences of capabilities and human rights before seeking to link capabilities, human rights and education. The Declaration will serve as the main point of reference when establishing this tripartite relationship. In the last section, the theoretical analysis will be applied to refugee camp situations, arguing that human rights education is crucial in

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4 United Nations Declaration on Human Rights Education and Training (16 February 2012) UN Doc A/RES/66/137 (Declaration on HRET).
5 Declaration on HRET (n 4) art 2(1).
enabling refugees to break the vicious circle of exclusion, poverty, and powerlessness.

2. The Capability Approach and Education

2.1. The Value of Positive Freedom, Well-Being and Agency

The capability approach was first developed by Amartya Sen in the 1980s. It is mainly a humanistic critique of mainstream economic theory which assesses development in purely economic terms. Instead of concentrating on increasing the income of a state, Sen developed the notion of human development, insisting that development should be understood in terms of people’s well-being and ‘the ability - the substantive freedom - of people to lead the lives they have reason to value and to enhance the real choices they have’.6 It also criticises the human capital approach which focuses on the ability of human beings to augment production possibilities. 7 The human development approach reverses this end-means relationship by treating economic growth as one means among many allowing the expansion of human well-being.8

a) Capabilities and Well-Being - the Individual Level

The capability approach is based upon several concepts. Central to its understanding is the distinction between functionings and capabilities. According to Sen, ‘[a] functioning is an achievement, whereas a capability is the ability to achieve’.9 The capability set of a person represents the choice of different combinations of functionings she or

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8 S Fukuda-Parr, ‘Rescuing the Human Development Concept from the HDI: Reflections on a New Agenda’ in Fukuda-Parr and Shiva Kumar (n 7) 117-118.
he can achieve. It thus reflects a person’s ability to convert commodities into functionings thereby achieving utility. The set of functionings a person has reason to value and which she pursues by making use of her capabilities, is what Sen calls ‘well-being’. The focus on capabilities thus allows to make a distinction between whether a person possesses the ability to do something she values doing, and whether external influences such as means, instruments, or permissions allow her to do it.

One of the most debated issues around the capability approach is the establishment of a list of capabilities. Martha Nussbaum, who has embraced but also criticised Sen’s approach, argues in favour of a list of central human capabilities that allow individuals to live a dignified life. Replying to this criticism, Sen holds that any kind of list imposes specific capabilities even though some individuals might have reason to value a different set of capabilities. Consequently, capabilities should, so Sen, be prioritised through a democratic process.

b) Agency and Agency Achievements - the Societal Level

It is important to note that although well-being is assessed in terms of individual achievements, the capability approach embraces ethical individualism - as opposed to methodological individualism - in that it takes into account social relations between individuals and the social

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11 Sen (n 6) 74.
environment as a whole.15 Sen calls this aspect ‘agency’ which he defines as ‘what a person is free to do and achieve in pursuit of whatever goals or values he or she regards as important’.16 He thereby acknowledges that human beings are not inherently selfish but do in fact care about other individuals and society as a whole. They may want to pursue goals other than their own well-being. Agency thus allows for individuals to become active agents in society instead of merely being objects of public policies. Again, a person’s agency is directly influenced by diverse social and economic arrangements.

Agency can be perceived in either individual or collective terms. A person can act on behalf of society as an individual, or she can do so as a member of a collective. Sen emphasises that the latter form of activity - what Sakiko Fukuda-Parr calls ‘collective action’17 - is central in a democratic society which derives its legitimacy from public dialogue and reasoning as well as active participation of the broad society. As Sen holds, ‘[d]emocracy has to be judged not just by the institutions that formally exist but by the extent to which different voices from diverse sections of the people can actually be heard’.18

The outcome of agency is what Sen calls ‘agency achievements’ which do not necessarily contribute to individual well-being but rather increase the well-being of society.19 Nonetheless, while agency achievement is desirable in itself, it may add to a person’s well-being through the simple pleasure of helping others. At the same time, capabilities strongly influence an individual’s agency through empowerment,20 an aspect which is fundamental in human rights

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17 Fukuda-Parr (n 8) 121.
20 Sen (n 6) 191.
education. Agency and agency achievements as well as capabilities and well-being are thus mutually dependent and interrelated. While capabilities enable individuals to convert commodities into well-being achievements, agency allows them to convert commodities into agency achievements, thereby increasing the well-being of society as a whole and of its individual members. The notion of agency thus derives its importance from its emphasis on the active role of human beings in this process of expanding well-being.

c) Positive Freedom and Human Development

In Sen's view, freedom is determined by one's ability to choose how to live one's own life, a form of freedom that he calls 'positive freedom' as opposed to 'negative freedom' defined as absence of interference.21 Sen argues that freedom has two aspects. The first aspect is opportunity, that is the capability or the real possibility 'to achieve alternative functioning combinations'.22 It is important to note that Sen stresses the importance of real opportunities. A girl does not have any capability to go to school, for example, if - although there is a school in the village - due to her gender she is denied access to this school or she must stay at home to take care of her siblings. The second aspect of positive freedom is agency. Again, Sen acknowledges that society matters and that the ability to act on behalf of what we value, be it for one's own sake or the sake of others, enlarges freedom.23

The emphasis on positive freedom and well-being, be it of individual human beings or of society as a whole, makes the human development approach unique. Not only does it emphasis the human aspects of the outcome of development, it also is concerned with its

22 Sen (n 6) 75.
23 Sen (n 19) 60.
process, whereby people are granted a central role rather than being reduced to an object. Although Sen insists on the collective aspect of agency, Sakiko Fukuda-Parr points out that this dimension is often neglected. She criticises the fact that the annual Human Development Reports, to the extent that they even deal with human agency, have focused on individual rather than collective action. To a certain degree, this shortcoming has been addressed in recent years with the 2010 Human Development Report emphasising the importance of democracy and dialogue.

2. Is Education Inherently Good?

Sen has often been criticised for his limited analysis of the role of education in the capability approach. Several scholars have analysed and conceptualised this relationship in order to bridge this gap.

a) Sen and Elementary Education

Although Sen’s work on education is limited in scope, he does not neglect the issue entirely. In Development as Freedom he addresses education as a social process which is inherently linked to freedom and therefore also to capabilities. First of all, Sen stresses that commodities are not the only input necessary to develop freedom. Rather, social and economic arrangements, including education and human rights, determine to which degree individuals can make use of

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24 Fukuda-Parr (n 8) 117.
25 Fukuda-Parr (n 8) 120.
28 See Unterhalter (n 27) 492-496.
these commodities. 29 Such influences can either enhance or undermine capabilities. In this sense, education fulfils an instrumental role. Madoka Saito, who focuses on the influence of the capability approach on pedagogy and educational theory, agrees that the capability approach adds an important new dimension to the potential benefits of education by diverting the focus from the accumulation of human capital to the development of human capability.30

According to Sen, education also fulfils an important role in forming functionings (or what Saito calls human capital). Melanie Walker refers to this accumulation of particular knowledge and skills as the ‘intrinsic’ dimension of education31 and Elaine Unterhalter to the ‘outcome’ dimension 32 enhancing participatory freedom. These outcomes might be crucial for further development of agency achievements and well-being. Let us assume that one outcome of education is literacy. It is obvious that being literate is crucial in enhancing agency and further capabilities such as the ability to demand accountability or to understand one’s own rights.

Furthermore, Sen perceives of education as a capability per se, even classifying it at as a basic capability central to well-being.33 It is noteworthy, however, that in this context Sen refers to education as a very narrow concept restricted to elementary education which is expressed in terms of literacy and numeracy.34 This leads to Lorella Terzi’s argument that Sen’s approach is too restrictive. In her view, depriving individuals of the capability to be educated disadvantages them considerably compared to individuals who possess this capability.

29 Sen (n 6) 3.
30 Saito (n 27) 17.
31 Walker (n 27) 31.
32 Unterhalter (n 27) 495.
33 Sen (n 6) 20.
in several regards. Not only does it deprive them of gaining literacy, it also becomes almost impossible for them to develop other functionings such as reasoning. Nevertheless, it is too simple an approach to regard education per se as a capability. The capability to be educated cannot be reduced to the education process itself, as this capability depends on a number of different factors such as being nourished and being healthy, to name but a few. This means that in order to realise the capability to be educated certain functionings need to be achieved. The indivisibility of these factors illustrates well why an approach perceiving the relationship between commodities and utility as purely linear is incomplete.

b) Empowerment and Participation: Enhancing Capabilities and Agency

One of the central aspects of the capability approach is the position it grants individuals as main actors in both choosing the life they want to live and forming public policies. Sen consistently insists that participation and dialogue are crucial for freedom and well-being. This is the main reason why he refuses to establish a list of basic capabilities. As pointed out above, he emphasises that such a list needs to be drafted based on a democratic and participatory process. It is thus individuals, in a dialogue with wider society, who determine which capabilities are developed. Since capabilities and agency determine the level of freedom, this means that individuals themselves are the central actors in expanding freedom and well-being. In Sen’s words, ‘different sections of the society (and not just the socially privileged) should be able to be active in the decisions regarding what to preserve and what to let go’.36

Not only participation, but also empowerment is crucial in enhancing capabilities. According to Israel Scheffler, empowering somebody

35 Terzi (n 34) 30.
36 A Sen (n 6) 242.
means enabling a person to do something if he or she decides to do so.\textsuperscript{37} In other words, individuals have the power to pursue and achieve what they have reason to value. The concept of empowerment is consequently closely linked to Sen’s notion of positive freedom, which he describes as ‘the range of options a person has in deciding what kind of life to lead’.\textsuperscript{38} Since according to the capability approach these options only contribute to positive freedom if they are viable, meaning if the person has both the capabilities and the functionings to realise these options, the concept of empowerment as defined by Scheffler is intrinsic to the capability approach.

It has been argued above that for commodities to be transposed into capabilities favorable social and economic arrangements need to be put in place. Empowerment and active participation are aspects of such arrangements that are crucial for the development of both capabilities and agency. It is important to note, however, that the relationship between these concepts is not a one-way street. While participatory action and empowerment are indeed important, one should bear in mind that achieved functionings such as literacy can foster empowerment and active participation. Empowerment, participation, capabilities, agency, and functionings thus form a kind of spiral. In an ideal world, the spiral would never end or be reversed, whereby the freedom and well-being of the society as a whole would constantly increase.

Overall, education is central in ensuring empowerment and participation. Nonetheless, Sen has often been challenged on the basis that he regards education as an ‘unencountered space, unmarked


by contested power, history, or social division’. Unterhalter warns about making ‘a causal link between education and capabilities’ because education may in certain cases harm agency and capabilities and thus not necessarily enlarge freedom. Along the same line, Walker emphasises that pedagogy is never uncontaminated. Rather, it is influenced by the social context and existing power structures. Consequently, instead of enhancing empowerment and participation, certain educational systems may diminish or even destroy capabilities that had already been developed beforehand.

c) Autonomy and the Value of Values: Ensuring Well-Being and Agency Achievements

Another element of Sen’s approach that is often criticised is his assumption that freedom and capabilities are inherently good. Nussbaum argues that some freedoms and capabilities may be abused, providing arguments why freedom should be regarded as neutral rather than good. Saito specifies that creating capabilities does not involve any evaluation of the outcome (functioning) which, under certain circumstances, may be negative rather than positive. A striking example of abuse of capabilities is the composition of genocidaires in Nazi Germany. A study carried out by Michael Mann suggests that out of a sample of 1500 perpetrators, 41% had a university degree, which was disproportionally high at the time. He

39 Unterhalter (n 27) 492.
40 Unterhalter (n 27) 494.
41 Walker (n 27) 37-38.
42 M Nussbaum, ‘Poverty and Human Functioning: Capabilities as Fundamental Entitlements’ in D Grusky et al, Poverty and Inequality (Stanford University Press, Stanford 2006) 64.
43 Saito (n 27) 29.
refers to the example of a doctor called Kurt Heissmeyer who abused of his high level education by experimenting on camp children.45

In order to avoid this kind of abuse, Saito advocates the teaching of values to avoid the abuse of capabilities. In his view, embracing certain values enables individuals to make the right decision when it comes to choose a specific set of capabilities. It also helps avoiding situations where empowerment - gained partly through education - is used to the detriment of others or oneself.46 The same can be said for agency, since actions on behalf of somebody else could potentially be detrimental to a third party. Acknowledging the importance of values and normative judgment allows for the capability approach to become truly ethnically individualistic by narrowing an individual's choices for the benefit of society. Education, whether informal or formal, thus plays a crucial role in the conversion of capabilities into well-being and of agency into agency achievement.

Saito makes another valid contribution to Sen's work. He points out that the debate about capabilities and the education of children inevitably leads to the question whether the capability approach is applicable to children at all. Does the freedom of a child not need to be restricted to ensure that her or his interests are respected? How can we assess children's life in terms of capabilities if they are not mature enough to take their own decisions on certain matters? Saito shares the response Sen provided to these questions with her readers: according to Sen, the freedom of children might be restricted to assure that, once grown up, they can live a life in freedom. It is thus the freedom a child will enjoy in future that needs to be considered.47 Saito herself, on the other hand, stresses the importance of quality education. In her view, education can only lead to an expansion of capabilities if it teaches a child to be

45 Mann (n 44) 351.
46 Saito (n 27) 29.
47 Saito (n 27) 25-26.
autonomous. Otherwise, a person will not be able take free decisions and she will therefore be derived of real opportunities. Arguably, Sen would probably counter this argument by saying that a given ability is not a capability if it does not represent a real opportunity. However, if a person lacks autonomy to freely decide which ability to use, she is not deprived of a capability by an external force. Rather, her choice is restricted due to lack of autonomy, which prevents her from realising the goals she has reason to value. Like values, autonomy is thus a pre-condition for individuals to make use of their capabilities and agency.

While the capability approach has already been further developed by adding empowerment and participation, the inclusion of values and autonomy leads to a complex capability framework in which of a number interdependent factors mutually influencing each other. Let us start with commodities, which are, as outlined above, one component of the capabilities approach. For commodities to be converted into capabilities and agency, a favorable socio-economic environment is required. Education plays an important role in forming this environment by empowering individuals and inciting them to participate actively. At the same time, external factors such as an education system which reaffirms existing power patterns may impede the development of new capabilities, diminish existing capabilities, and undermine agency. Although Sen advocates for measuring equality in terms of capabilities, capabilities are a means rather than an end. To achieve well-being for oneself or for others (agency achievement), capabilities and agency need to be transformed into functionings. Education enhances values and fosters autonomy thereby fostering individuals' ability to choose a capability set and use agency in a way that leads to positive functionings for both themselves and society as a whole. Furthermore, education directly contributes to the development of

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48 Saito (n 27) 27-28.
49 Sen (n 19).
functionings by dispersing factual knowledge which, in turn, enhances capabilities and agency. These complex relationships can be visualised as a never-ending spiral leading to the highest attainable level of utility. It is noteworthy, that in this context utility it does not correspond to John Rawls’ individual utility as the maximisation of personal satisfaction; rather it refers to a broader concept encompassing the capacity of society to mould itself democratically through debate and reasoning.

3. The Value Added of Human Rights Education - Enabling Individuals to Make Use of Their Capabilities

3.1. Capabilities, Human Rights and Development

The relationship between human rights and the capability approach has been widely discussed by experts such as Arjun Sengupta50 and not least by Sen 51 himself. While Sen concentrates on the commonalities and differences of the two concepts, the approach generally taken is the expansion of the notion of human development to two of the leading concepts in current development theory: the human rights based approach (‘HRBA’) to development and the right to development. The HRBA expands the concept of human development by recognising the enlargement of freedom and well-being as a right. Like the human development approach, the HRBA is not limited to the outcome, but also encompasses the process of development. Consequently, the HRBA defines development as the process of expansion of freedoms that respects and promotes human rights.52 Finally, Bard Andreassen and Stephen Marks provide a useful definition of the right to development which according to them is the

51 Sen (n 13) 151.
52 Sengupta (n 50) 18-23.
‘[r]ight to a process as well as to progressive outcomes aiming at the full realisation of all human rights in the context of equitable growth. More broadly, it involves the general improvement of the capabilities of the population in ways that are compatible with human rights’.53

Human rights law does not only provide a framework for the process of human development, it also makes an important contribution to its outcome. The rights-language provides a useful tool in fostering development. 54 The creation of duty-bearers and right-holders strengthens the latter in that they can demand accountability. If, for instance, refugees are denied access to education, they can refer to international human rights law to invoke their right to education, be it in front of a court, through quasi judicial mechanisms or through naming and shaming. So far, much emphasis has been put on the relationship between development and economic, social and cultural rights. It is noteworthy that both the Covenant on Economic, Social and Cultural Rights 55 and the UN Declaration on the Right to Development 56 emphasise the progressive realisation of human rights, acknowledging that development is a process. Moreover, they both consider financial resources as a means rather than an end and thus perceive development of something broader than merely economic growth.

However, as Fukuda-Parr points out, civil and political freedoms also play a crucial role in human development, a fact which is also acknowledged in the UN Declaration on the Right to Development.57 Freedom of assembly, freedom of speech, and the right to vote, to name but a few, are a pre-requisite for democratic participation,

53 BA Andreassen and PM Stephen, ‘Conclusion’ in Andreassen and Stephen (n 50) 384.
54 Sen (n 13) 152-155.
57 Declaration on the Right to Development (n 56) art 6.
dialogue, and collective action, which are all part of agency and which, on its turn, is a main component of Sen’s concept of human development. Consequently, the indivisibility of human rights is inherent in the human rights-based approach to development.

3.2. Enlarging Capabilities Through Human Rights Education

The close relationship between human rights and capabilities leads to the question what value human rights education can add to mainstream education. If, on one hand, education is central for the development of capabilities, agency and well-being, and on the other hand, human development must be rights based, what is the role of human rights education?

During the last few years human rights education has gained substantial attention of NGOs and international law scholars. While several documents on human rights education have been adopted at the regional level, the Declaration on Human Rights Education and Training is the first instrument at the global level uniquely devoted to this evolving area and thus offers useful insight in the approach taken by the United Nations. According to the Declaration, human rights education and training contributes to ‘inter alia, the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding and developing their attitudes and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights’. Consequently, human rights education has two major objectives, namely to prevent future human rights violations and to promote universal values based on human rights.

59 Declaration on HRET (n 4) art 2(1).
The Declaration on HRET highlights three elements of human rights education and training facilitating the achievement of these aims.60 Firstly, it affirms that education must be about human rights, thereby providing the necessary knowledge about the international human rights system and teaching values that allow individuals to convert capabilities into functionings without doing harm to others. Secondly, the need for education through human rights is stressed, that is that human rights must be respected in education. A parallel can be drawn between this element and the emphasis human development puts on the process of development. Thirdly, the Declaration emphasises the role of education for human rights, which ‘includes empowering persons to enjoy and exercise their rights and to respect and uphold the rights of others’61 as well as encouraging active participation. This last feature creates the most obvious link to the capability approach as they both put the human being at the center of any transformative social process and insist on democratic dialogue and decision-making.

a) Transforming Capabilities into Functions: Education about Human Rights

Education about human rights fulfils several functions regarding well-being. First of all, pursuant to article 2(2)(a) of the Declaration on HRET, education about human rights ‘includes providing knowledge and understanding of human rights norms and principles, the values that underpin them and the mechanisms for their protection’.62 Knowledge about human rights is a pre-requisite for any effort to foster a culture of human rights. How can human rights be respected and realised if the people in charge, and indeed those at all levels of society, do not have any knowledge about the fundamental principles and underpinnings of human rights law? How can individuals claim their

60 Declaration on HRET (n 4) art 2(2).
61 Declaration on HRET (n 4) art 2(2)(c).
62 Declaration on HRET (n 4) (emphasis added).
rights and demand accountability if they do not know which rights they are entitled to and which mechanisms can be used to enforce them? By dispersing factual knowledge, human rights education contributes directly to developing functionings which, in turn, may enhance capabilities such as presenting a case in court and exerting pressure on governments.

The Declaration on HRET, referring to the 1993 Vienna Declaration states in its preamble that human rights education defined in a broad sense also includes education about peace, democracy, development and social justice. This comprehensive approach relies upon the conviction that education for peace, human rights, democracy and sustainable development are inherently linked. These forms of education all share a common goal; fostering peaceful coexistence of all human beings and increasing the well-being of society and its members through intercultural dialogue and tolerance.

Education about human rights is not limited to the dispersion of factual knowledge though. The ability to autonomously take informed decisions is another capability that can be developed through human rights education. As Saito argues, autonomy is central for freedom. Rights languages provides individuals with a strong argument when they refuse to follow accepted customs and traditions. Fostering autonomy also encourages individuals to think about their preferences. Do they take decisions on the basis of what they have reason to value or rather due to adaptive preferences which evolved over time?

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65 Nussbaum (n 42) 49.
Human rights education can thus contribute to increasing available opportunities and capability sets by strengthening autonomy.

Furthermore, human rights education teaches values, another element which is crucial for the conversion of capabilities into well-being. While Saito does not specify which values should be taught, according to the Human Rights Education Handbook teaching human rights values such as respect, fairness and dignity is one of the main tasks of human rights education. Although, admittedly, the values that are supposed to be taught should be determined through a democratic process in which cultural context will be crucial, it can be assumed that the values mentioned in the handbook are acceptable in most societies. The teaching of these values helps assure that capabilities are not abused and converted into negative functionings, as for example the use of the capability to speak for inciting hatred and racism. Also, it may contribute to developing and changing adaptive preferences of a given society.

In conclusion, education about human rights enables individuals to effectively transform capabilities into well-being that is detrimental neither to themselves nor to society. However, teaching about human rights is possible only if rights in education and the right to education are guaranteed.

b) Avoiding the Destruction of Capabilities: Education through Human Rights

As outlined in the first section, several scholars have pointed out that education may harm the development of capabilities under certain circumstances. Acknowledging that even an educational system

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aiming to change specific social arrangements might accidentally contribute to their affirmation, UNESCO holds in its Guidelines for Curriculum and Textbooks Development in International Education that ‘[c]onsistency between the methods used in international education and its messages is an imperative’. 67 In line with the human development approach, the Declaration on HRET therefore insists on both the ends and means of education. It affirms that human rights must be taught through human rights, meaning that the rights of both trainers and learners must be respected in the process of learning.

The power of education in reproducing prejudices and misperceptions must not be underestimated. Katarina Tomaševski, former UN Special Rapporteur on the right to education, cites the example of a Kishwahili textbook used in Tanzania which describes a girl’s school-free day as consisting of chores such as washing, cleaning, cooking and grocery shopping. She advocates the revision of textbooks in order to overcome certain deeply anchored stereotypes. 68 This approach is also taken in the Convention on the Elimination of All Forms of Discrimination against Women which requires in its article 10(c) ‘[t]he elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education’. 69

Additionally, in certain countries the educational environment represents a direct physical and mental danger to pupils. In her study on gendered education and the HIV/AIDS epidemic in South Africa, Unterhalter outlines the dilemma that may be posed. While education is essential for girls to achieve freedom through the acquisition of

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functionings such as literacy and capability to realize themselves, South Africa has a high rate of rape and sexual violence in schools. The risk of trauma, infection and death due to this lack of regulated social facilities often impedes the acquirement of capabilities and destroys capabilities already acquired in the schooling process. The same can be said for situations in which basic needs such as food and water, health or housing are not respected or children are subjected to corporal punishment.

Another potential danger that must be addressed is indoctrination. The educational system developed in Nazi Germany provides a useful example in this regard. In the late 1930s, teaching candidates were subjected to ideological tests and the Nazis took control over different university bodies in order to ensure that Jewish students were bullied and books burnt whenever ordered through the Nazi command structures. Moreover, Nazi ideology was firmly embodied into scientific studies. The education system, redesigned to shape future Nazis, centred around racial education and fostered contempt for human beings who were ‘different’. Admittedly, all forms of education involve indoctrination to a certain degree. The example of Nazi Germany, however, demonstrates to what point indoctrination can be destructive. Clearly, such a system inducing racism and violence is not compatible with a rights-based approach to education.

Considering these different facets of an educational process respecting human rights, Tomaševski even argues that human rights in education are a prerequisite for human rights education. This argument is based upon the educational theory of experiential

70 Unterhalter (n 27) 494-500.
73 Tomaševski (n 68) 40-43.
learning which, again, emphasises the process rather than the outcome. It perceives learning as a holistic and continuous process allowing a person to transform experience into knowledge.\textsuperscript{74} As the Crick Report on Citizenship Education points out, this type of learning is crucial in citizenship education since it fosters active participation by teaching children how to discuss, debate and interact with other individuals.\textsuperscript{75} The same applies to human rights education and a rights-based approach to education is thus a prerequisite for pupils to learn through their experiences.

Human rights through education is intrinsically linked to the right to education which is not, as one might assume, limited to the question access to education. In its General Comment on the Right to Education the Committee on Economic, Social and Cultural Rights developed the so-called 4As-approach.\textsuperscript{76} This approach provides a useful conceptual framework integrating the whole range of human rights, thereby stressing their interdependence and indivisibility. According to the Committee, education must be available, accessible, acceptable and adaptable. Accessibility refers to physical accessibility, meaning that it must be within safe reach, but also to the absence of other barriers to education such as discrimination. Availability includes, among others, adequate facilities and materials, safe drinking water, and trained teaching staff. The element of acceptability, on the other hand, allows for education to be put within a specific cultural context without however violating basic human rights such as non-discrimination. Acceptability also means that

\textsuperscript{74} D A Kolb, \textit{Experiential Learning - Experience as The Source of Learning and Development} (Prentice-Hall, New Jersey 1984) 25-38.
\textsuperscript{76} Committee on Economic, Social and Cultural Rights, ‘General Comment No 13’ (8 December 1999), UN Doc E/C.12/1990/10, §6.
teaching must be accurate and neutral. Lastly, education needs to be adaptable to the needs of pupils.

This general approach to the right to education can be transposed to human rights education.77 Only if human rights education is available, accessible, acceptable and adaptable to everyone can it foster the development of a universal culture of human rights. Although none of the major international human rights instruments explicitly mentions a right to human rights education, they refer to it implicitly.78 The UDHR, for instance, stresses the role of teaching and education in promoting respect for human rights.79 Furthermore, the Committee on Economic, Social and Cultural Rights acknowledges that recent documents such as the Vienna Declaration and Programme of Action, which explicitly recognise the right to human rights education, ‘reflect a contemporary interpretation of’ the provision contained in the ICESCR. 80 The adoption of the Declaration on HRET is a further step towards the full and explicit recognition of the right to human rights education.

c) Transforming Commodities into Capabilities: Education for Human Rights

It was argued above that education fosters the expansion of capabilities through empowerment and active participation. The focus on these two concepts is a characteristic of both human rights law and the capability theory since both approaches are human-centred. As Garth Meintjes points out, it is the objective of empowerment (or

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77 The Declaration refers to the principles of availability, accessibility, and adaptability in its art 5.
79 See, for instance, Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), preamble.
80 Committee on Economic, Social and Cultural Rights (n 76) 5.
education for human rights, as the Declaration on HRET calls it) which distinguishes human rights education from other forms of education.

Notwithstanding the vast literature dealing with the role of empowerment in promoting human rights, this aspect of education is often neglected in the everyday use of the term education. Often, education is reduced to the diffusion of factual knowledge. This may be explained by the complex relationship between empowerment and well-being. Like education in general, human rights education in particular should not be regarded as a capability per se. Rather, it is a useful instrument to enlarge existing capabilities and develop new capabilities. Consequently, human rights can be promoted through education.

Based on the example of gender-based violence, Anita Ho and Carol Pavlish analyse the tripartite relationship between capabilities, accountability and human rights. In order to break the vicious circle of lack of empowerment and capabilities on one side and impunity and bad governance on the other side, they advocate the establishment of an ‘accountability-enabling environment’ in which individuals are free to make their own choices and to demand their rights. Human rights education can make a valid contribution to the creation of this environment by providing both the factual knowledge about procedures to demand accountability - education about human rights - and the soft skills or capabilities that are necessary to make use of this knowledge.

While empowerment is an important factor, the role of active participation should not be neglected. Like empowerment, active participation can be promoted through education.

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81 Declaration on HRET (n 4) art 2(2)(c).
participation is useful in transforming commodities into capabilities in that it provides individuals with the ability to act on their own behalf or on behalf of others. At the same time, participation can be perceived as agency achievement, or as an end in itself, attained through empowerment. Human rights education encourages individuals to actively participate in social and political debates and democratic processes by informing them about their rights and the respective enforcement mechanisms. Civil and political rights such as freedom of assembly, freedom of speech and opinion, and - at least for citizens - the right to vote are of particular importance in this regard. Human rights education also seeks to re-establish self-esteem which is crucial in furthering participation. It thus fulfils the function of a social process that allows for individuals to convert commodities into capabilities.

3. 3. Human Rights Education and Agency

One might recall that agency freedom refers to ‘one’s freedom to bring about the achievements one values and which one attempts to produce’, as compared to well-being freedom which Sen defines as ‘one’s freedom to achieve those things that are constitutive of one’s well-being’. According to Sen, the two approaches - well-being and agency - overlap and are correlative.

In the context of human rights education it is particularly crucial to take into account both well-being and agency because they allow individuals to become (active) ‘agents’ rather than (passive) ‘patients’. Not only does the agency approach provide the sociological underpinning for methods of human rights education that focus on the active role of right-holders, it also takes into account the

84 Flowers et al (n 66) 59.
85 Sen (n 19) 57.
86 Sen (n 19) 57.
87 Sen (n 6) 190.
88 Sen (n 6) 190.
economic, social and political structures that influence individual capabilities. Moreover, it acknowledges the fact that individuals are not inherently selfish but do actually care about the society they live in. As Sen himself acknowledges, ‘[f]reedom is one of the most powerful social ideas’.90

Unfortunately, the Declaration is silent on the issue of agency. It contents itself with a reference to the right of persons ‘to participate effectively in a free society’.91 If individual freedom is defined as ‘the range of options a person has in deciding what kind of life to lead’92 a society is ‘free’ if its members can define and form it jointly by choosing among several options. Consequently, the concept of agency is implicit in the Declaration. Moreover, it stipulates that all individuals shall be ‘aware of their own rights and responsibilities in respect of the rights of others’.93 The emphasis put on the rights of others demonstrates that human rights education, rather than being limited to individual well-being, also encompasses the broader notion of agency. Furthermore, the concept of agency is tightly linked to the notion of empowerment, since both aim at increasing people’s control over their lives.94

Embracing the principles of education about human rights, education for human rights (human rights through education), and education through human rights (human rights in education and the human right to education) allows for the progressive realisation of all human rights in a people-centred and democratic process, thereby enhancing

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90 Sen (n 19) 69 (emphasis added).
91 Declaration on HRET (n 4) preamble.
92 Drèze and Sen (n 38) 10.
93 Declaration on HRET (n 4) art 4(b) (emphasis added).
94 Meintjes (n 81) 65.
equality in terms of capabilities and agency, increasing the well-being of society and its members.

4. Human Rights Education for Refugees as a Necessity Rather than a Luxury

One might recall that Sen describes freedom as the ‘range of options a person has in deciding what kind of life to lead’.95 It cannot be denied that, generally speaking, refugees are deprived of these options to a large degree. External circumstances, be they manmade or natural, forced them to leave their homes and seek protection in improvised facilities which often do not fulfill even the most basic human needs. The situation in refugee camps calls for a complementary assessment of the utility of human rights education, taking into account both the improvised nature of many refugee camps and the fact that they are often not as temporary as they are supposed to be, with the Palestine Refugees in the Middle East serving as one of the most drastic examples.

Considering the traumatising experiences refugees usually have gone through, one might be suspicious of the quest for education in refugee camps. Should a refugee camp not rather provide protection, shelter and food for its inhabitants? Even though these doubts concerning certain prioritisation strategies are comprehensible, it must be noted that one does not necessarily exclude the other. Ruud Lubbers, former United Nations High Commissioner for Refugees, once held that ‘experience shows that once refugees have met their basic need for food, water and shelter, their primary concern is to ensure that their children can go to school’.96 He argues that education allows for refugees to be more optimistic about their future and consequently

95 Drèze and Sen (n 38) 10.
96 R Lubbers, ‘Foreword’ in J Crisp et al (ed), Learning for a Future: Refugee Education in Developing Countries (UNHCR 2001), III.
avoid negative functionings such as getting involved in illegal or military activities. Moreover, their ability to defend their own rights is increased.97

A holistic approach to human rights education including ‘personal empowerment, nation-building, democratic participation, and conflict resolution’98 is especially pertinent in strengthening the agency of refugees. Striving towards these objectives seems to be crucial in marginalised communities marked by tensions and outright violence, insecurity, and resignation. Education thus enhances security, the main objective of refugee camps.

4.1. Education as a Concern of Humanitarian Action

Refugee camps are a response to humanitarian emergencies, attempting to save the highest possible number of lives. Traditionally, humanitarian response is based upon three pillars, namely nourishment, shelter and health services. Nonetheless, education is increasingly included in emergency operations as a fourth pillar.99 In its Resolution on the Right to education in emergency situations, the General Assembly reaffirms that ‘the right to education [is] an integral element of humanitarian assistance and humanitarian response’.100 The Field Guidelines for Education of the United Nations High Commissioner for Refugees (‘UNHCR’) identify three major objectives of education initiatives in refugee camps or so-called ‘emergency education’.101 Although the guidelines focus on elementary education for children, they provide a useful framework for the analysis of the goals of human rights education in refugee camps.

97 Lubbers (n 96) III.
100 UN GA Res 64/290 ‘The Right to Education in Emergency Situations’ (27 July 2010) UN Doc A/RES/64/290.
101 UNHCR ‘Education - Field Guidelines’ (Geneva 2003) §§ 1.1.2 - 1.1.4.
Firstly, education enhances protection by identifying exploited, abused, disabled or otherwise marginalised children, teaches children about their responsibilities and rights, and raises awareness about the prohibition of the recruitment and use of child soldiers. In their study about empowerment of women in a refugee camp in Rwanda, Ho and Pavlish observe that the community did not have sufficient knowledge about human rights and perceived them as a western concept not applicable to them. In order to overcome this shortcoming, education about human rights has been built into the curriculum of many camp education programmes. It is noteworthy that not only children, but also adults should be provided with the opportunity to benefit from human rights education.

Secondly, education can address psycho-social needs arising from traumatising experiences by bringing structure into the life of refugees and providing support through the interaction with teachers. The need to lessen the impact of trauma and displacement on the psycho-social well-being has often been reiterated. UNHCR points out that immediate action is required regarding children in particular because their personalities and coping skills develop at a rapid pace and feelings of disruption and insecurity experienced by refugee children harm this development. Education through human rights might contribute to diminishing the psycho-social impact of violence by providing positive experiences. Activities fostering self-esteem and the realisation that, notwithstanding all the negative experiences, they have the same human rights as other people, might help refugees to look forward and be more optimistic about their future.

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102 Ho and Pavlish (n 83) 97.
103 Sinclair (n 99) 10.
Lastly, education promotes self-reliance and furthers socio-economic development. Margaret Sinclair argues that it is vital to sustain study skills and convey peace-building messages.\textsuperscript{105} Moreover, self-esteem and the capability to interact socially have to be built up. Achieving these goals is facilitated through an empowering social environment which enables refugees to become agents rather than objects. This will allow them to make use of their factual knowledge about human rights when demanding accountability.\textsuperscript{106} Education for human rights, by empowering refugees, by strengthening their agency and by encouraging them to actively participate in society, makes a valid contribution to social change and community development.

Although the approach taken by UNHCR is a useful point of departure, several reservations need to be made. It has been argued that education through human rights plays an important role in experiential learning. However, it cannot be reduced to this aspect. In an emergency situation it is even more difficult to supervise and monitor teaching staff in order to assure that the security of pupils and students is guaranteed. Human rights in education and the right to education, the two facets of education through human rights, are thus of immense importance. In this sense, the Plan of Action for the World Programme of Human Rights Education stipulates that one of the aims is to ‘[f]oster teaching and learning environments free from want and fear that encourage participation, enjoyment of human rights and the full development of the human personality’.\textsuperscript{107} In addition, considering

\textsuperscript{105} Sinclair (n 99) 10.
\textsuperscript{106} Ho and Pavlish (n 83) 91.
that refugees often fled ethnic conflict, it is crucial that education schemes do not transmit hatred and rivalry to the next generation.108

Furthermore, educational programmes should strive towards changing existing perceptions about roles in society and interrupting existing power patterns. As argued above, such external factors may under certain circumstances do more harm than good by destroying capabilities. By way of example, due to resource constraints some initiatives concentrate on the training of leaders. Such a focus carries the risk of reinforcing existing power structures instead of interrupting them. 109 Consequently, continuous monitoring, evaluation, adaptation and development of educational systems is necessary to avoid a negative impact.

4.2. From Humanitarian Response to Development

UNHCR puts a heavy emphasis on rapid humanitarian response. In reality, however, refugees often stay in the same camp over years or even decades, as the example of Palestinian refugees shows. Longer-term objectives of human rights education such as preventing human rights violations and conflict in the long run, and enhancing participation in democratic decision-making processes, should thus not be neglected. Admittedly, UNHCR partly takes into account this long-term dimension in arguing that education shall promote social and economic development. However, if refugees are to be allowed and enabled to take their life in their own hands, it is crucial that education in refugee camps pays equal attention to this aspect.

The necessity for agencies and NGOs operating in refugee camps to enhance human rights education is based on a premise which is very

108 M Sinclair (n 99) 14.
109 M Sommers, ‘Peace Education and Refugee Youth’ in Crisp et al (n 96) 204.
simple on the surface: to increase the value of the capability sets of
refugees by enabling them to take charge of their own well-being and
by furthering their agency. Attaining this objective, however, is not easy
at all. The vicious circle of exclusion, deprivation, dependence and
powerlessness must be interrupted. Consequently, rather than treating
refugees as passive objects of humanitarian action, human rights
education programmes aim at supporting refugees in their aspiration
to make use of their own power and accept their own responsibility,
thereby dealing directly with the root-causes of conflict.

4.3. The Right of Refugees to Human Rights Education

Even though the Declaration on Human Rights Education and Training
is not legally binding, it is a very useful instrument to support demands
for human rights education for all. In addition to the affirmation of the
general principle of non-discrimination, the Declaration stipulates that
‗[h]uman rights education and training should be accessible and
available to all persons, and should take into account the particular
challenges and barriers faced by, and the needs and expectations of,
persons in vulnerable and disadvantaged situations and groups,
including persons with disabilities, in order to promote empowerment
and human development and to contribute to the elimination of the
causes of exclusion or marginalisation, as well as enable everyone to
exercise all their rights‘.110

The capability approach provides a useful explanation for the inclusion
of this reference to marginalised people. Contrary to the human
capital approach which focuses on the resources needed to achieve
a certain outcome level, the capability approach emphasises the
range of options an individual has to choose from, regardless of the
input needed. It thus strives to make the unequal equal. By way of
example Sen refers to the needs of disabled people. He argues that a

110 Declaration on HRET (n 4) art 5(2).
disabled person possessing the same commodities as a person without a handicap is disadvantaged compared with the latter. Consequently, the favourable treatment of the disabled person is justified.

A parallel can be drawn to refugees. More input in terms of human rights education might be necessary to attain a set of capabilities which is equal to the one non-marginalised people dispose of. While under different circumstances human rights education can focus on the diffusion of factual knowledge and the strengthening of participative and empowering approaches, in the case of refugees other factors such as insecurity, ongoing conflict, lack of self-esteem through displacement, and existing power hierarchies, to name but a few, demand a more holistic approach. The capability approach justifies the use of additional resources in order to attain an equal set of capabilities. This favourable treatment of refugees is also promoted in several conventions devoted to specific groups of people. The 1951 Refugee Convention, for instance, guarantees refugees the same right to elementary education as nationals. The Convention on the Rights of the Child, taking into account the child’s need for development, stipulates that education shall be directed towards ‘[t]he 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 [...] groups’.

The availability of education merits special consideration in the case of refugee camps. Often, international organisations and NGOs step in and provide education instead of the government because most refugee camps are situated in countries that lack either the resources or the will to do so. Accessibility, both in terms of non-discrimination and

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111 Sen (n 13) 154.
113 CRC (n 78) art 29(1)(d).
in physical terms is also crucial, considering that security is the major concern of camp operators. In terms of acceptability, special attention must be paid to accurate and fair teaching material aiming to prevent further tensions. Adaptability is obviously key, considering the often changing and hugely challenging environment of a refugee camp.

A rights-based approach based upon the 4As allows full consideration of the special needs and demands of refugees. It permits an incorporation of the basic principles of human rights law such as non-discrimination, participation and inclusion, and accountability.114 If human rights education does not respect these basic requirements, human rights are threatened in their essence. Consequently, human rights education can make a valid contribution to expanding capabilities and agency and thereby to human development.

5. Conclusion

This essay sought to analyse what human rights education has to offer and why the United Nations have increasingly concentrated on promoting this special form of education. Based on Sen’s capability approach, it argued that human rights education fulfils several functions in fostering human development: Education for human rights or human rights through education empowers individuals and encourages active participation, thereby facilitating the transformation of commodities into capabilities and fostering agency. Education about human rights helps prevent the abuse of ability and therefore, like the capability approach, acknowledges that individuals are part of society whose interests need to be protected. Education through human rights, consisting of human rights in education and the right to education, allows due consideration of the process of education, insisting that the end does not justify the means; rather, human rights

education can be successful only if human rights are experienced in the process of education.

The case of refugees living in camps shows that the application of the Declaration on Human Rights Education and Training will not be an easy task in practice. Human rights education initiatives will face numerous challenges. It is probable that sceptics will invoke the same arguments that dominate the debate around economic, social and cultural rights, that is that governments lack the necessary financial means to implement the right to human rights education and that therefore, they should rather focus on fulfilling basic needs such as food, shelter and health and promote core human rights including the right to elementary education. Admittedly, the implementation of human rights education will face financial constraints. As in the case of economic, social and cultural rights, however, such constraints do not relieve governments from their duty to progressively realise this right and take immediate action in terms of non-discrimination and other aspects of this right that can be implemented immediately.

Furthermore, the erroneous assumption that education is inherently good must be overcome. Implementing human rights education in its full range, including rights in education, is therefore crucial. A comprehensive approach also reduces the danger of abuse of empowerment since it focuses on marginalised and vulnerable people instead of leaders. The three elements of human rights education must thus be seen as complementary, allowing for both means and ends of education to be taken into due consideration.

Notwithstanding these obstacles, the Declaration on HRET provides a comprehensive and useful framework for developing new education policies and adapting existing ones. It has the potential to make
human development a reality by furthering people’s interests and respecting their rights in the process. Its implementation is therefore crucial for the development of a truly universal culture of human rights.

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Others

Human Rights Education in Bangladesh: A Pro-poor Approach

S M Masum Billah *

Abstract

This paper discusses the epithets of legal and human rights education in Bangladesh. The study suggests that traditional legal learning and stereotype of human rights education is not sufficient to uphold the rights of the people especially the poor and disadvantaged people. Taking the example of Human Rights Summer School Model run by Empowerment through Law of the Common People (ELCOP) in Bangladesh into context the paper argues that legal education must be brought out of the class room and human rights education should be deeply imbibed in the mindset of the students. To fight the discriminatory legal system and omnipotent state power and to respond for jurisprudence of humanity and cultural diversity, there must be anti-generic lawyering premise, who can be termed as rebellious lawyers. The rebellious lawyers should motivate, train up, mobilize the community people to fight poverty of their own. The study concludes that a pro-poor approach in human rights education can make pro-people judges, lawyers, activists and teachers who can nurture and fashion jurisprudence of humanity.

1. Introduction

The perception of law and rights is ultimately circumscribed by the kind of legal education one imparts.1 Traditional legal education leads to

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traditional lawyering where lawyers formally represent others. They litigate more than they do anything else. They consider themselves the ‘preeminent problem-solvers’ and suspect that subordination of all sorts cyclically repeats itself in certain sub-cultures, thereby preventing people from helping themselves and taking advantage of many social services and educational opportunities. More importantly, most lay and professional people operating in this realm do not feel any need to break away. Ill-prepared, our students are familiar with Donoghues and Stevensons, Marburies and Madisons, Liversidge and Andersons but fail to feel the sense of deprivations of the millions of Rams and Rahims living in a situation of unimaginable ‘human indignity’. Lawyering for them becomes a highly rewarding in financial terms of profession, a vocation blessed with the 3 Ps.—privilege, power and position—while the objective of their activities, the central figure of all activities of a lawyer—the human clients remains in oblivion—ignored, overlooked, bypassed.2

Such a pessimistic approach to lawyering is a direct consequence of our traditional legal education which today may be viewed as ‘obsolete, archaic, reactionary and anti-people’. The essence of which is: i) prevailing legal education must give way to anti-generic learning as much as traditional lawyering must be replaced by new form of pro-people lawyering and ii) communities must be organized to push for pro-poor laws and similarly lawyering should also be pro-poor. So, the new breed of lawyers is to be the agents of ‘social change’ by standing with the people fighting for their cause. The law students, the future lawyers are to be trained up for this purpose. The legal education in Bangladesh is to take responsibility to make the students more pro-human. Law students are to be brought to the secondary

1 M. Rahman, Socially Relevant Legal Education: Role of Law Schools and ‘Rebellious Lawyering’, (Journal of Law and Development: Dhaka, 2009), Vol. 1, Number 1, at 33.
2 Ibid. at 33.
schools, slums, and garments industries and confronted with social stigmas, legal problems of the slum dwellers and women garment workers. The lawyers should be ready to sacrifice the comforts of life to guarantee the dignity of millions of poor compatriots, prepared to work with the poor to organize the community, train the community leaders and provide them with the skills to confront the adversaries. These ‘rebellious lawyers’ can usher a change in the society for legal empowerment of the poor in the days to come. What better other models of ‘legal education’ designed to protect the rights of the people can we forge?

2. Why Human Rights Education?

Effective protection of human rights provides the foundation for lasting national development and social justice. A knowledgeable citizenry equipped with human rights education is the pinpoint to achieve such a noble goal. The Universal Declaration of Human Rights identifies teaching and education as key means for the importance of the citizens knowing about and education as key means for the promotion and protection of human rights. Human Rights education, asserts Mary Robinson, is a vaccine against intolerance, animosity and conflicts in our communities and empowers individuals to stand up for their rights and those of others.3 The term "human rights education" evokes different images. It refers, on the one hand, to the human right to an education and, on the other, to being educated about human rights issues.4 To the extent that the former is partly encompassed within the broader right to general education, it is the latter that has dominated the work of most actors in the field. It is in this sense that the United Nations defines HRE as "training, dissemination and information efforts

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aimed at the building of a universal culture of human rights. Inevitably, law schools should have to shoulder responsibility to impart human rights education. Unfortunately, law schools in Bangladesh still need to go a long way to achieve this purpose. Even though, amidst this void, there are civil society, NGO and independent academic efforts to advance human rights education in Bangladesh. In the following part of the essay, an endeavor of human rights education in Bangladesh initiated by an academic NGO, ELCOP has been described so as to depict a unique institution of human rights learning.

3. Society, Legal Education and Human Rights: Bangladesh Perspective

Status of human rights in Bangladesh is paradoxically viewed unsatisfactory. The law schools merely teach human rights as a course which is frustratingly meager. The law enforcing agencies are trained on some aspects of human rights; it is basically run by civil servants who always grow bias for governmental initiatives, rather than the disadvantaged. The NGO’s do profess human rights awareness with some success, but it is to be understood that human rights education is all pervasive and all embracing. The picture may be explained by the following broad headings.

3.1. Ethics and Justice

The aim of legal education should be ‘ethical justice education’ geared to the empowerment of the mass people of Bangladesh. To that effect the legal curricula should have contained and addressed the issues of poverty, injustice, governance, social factors, economy, culture etc. to equip the needs of the students. For that, the syllabus should have to be diverted to a socially responsive legal education. Legal education in Bangladesh, as urged by Mizan, must be directed

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to justice education. 6 “Justice education” is a concept which emphasizes legal ethics and social responsibility of the legal profession. 7 A simple and stereotypical legal education system which takes into account merely mechanics of law is not desirable. There should be a scholastic and professional juxtaposition to reflect the true content of legal education.

3.2. Societal Reality

Legal education must be taken out of the classroom and brought to the community itself. It is absurd to think that a student should get himself admitted into law course and finish his education within the corridors of the universities without coming into contact with the mass people. It has to be a community-focused education where the students must be given the practical experiences regarding how people feel in the society? What is the perception of law in the society? How general people look at law? How the common folks look at justice? What are the legal grievances, pathos and bathos, fobs and sorrows of poor people? To change the whole inbuilt mechanism the law graduates, the future Judges, lawyers, professionals, advisers need to interact with the community people more closely. So, legal education should be brought to community, so that it becomes an open door legal education, of course without prejudicing in-house lectures and trainings.

3.3. Culture and Social Values

The cultural and social value of legal study is painfully absent in our legal education. We often say that law schools in Bangladesh put too much importance on theoretical aspects of law disregarding the practical orientation of legal profession. On the one hand the proposition is true, but it is equally true that our students lack

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convincing knowledge on legal philosophy, legal history and schools of jurisprudence in particular. How many legal thoughts have been developed by our theory-centric legal study so far? Theory should be translated into practice. In many cases, 'students pass out, qualified as law graduates and practitioners who may never have heard of Bentham or Pound'. The clear vision of law schools, division of degrees according to the aim of the graduates can solve this riddle.

3.4. Appreciation of Human Rights

The all-embracing evolution of human rights jurisprudence has unfolded new dimensions of human rights concept. Legal education in Bangladesh cannot remain isolated from these trends. So, it is well felt that there should be a reflection of human rights appreciation in our course designation (Law Commission: 2006). Let me provide an example. In land law, we study the procedure of making a khatiyan (record of rights), but we hardly study how complexities in khatiyan making procedure messes the right to property of the masses. We never study, for example, the women’s access to land in Bangladesh in our land law curricula. We study principles of granting temporary injunction or appointing a receiver in civil procedure code, but we perhaps do not analyze the degree to which a temporary injunction or receivership is an effective remedy in the civil justice delivery system in this country. Like examples can be made in some other subjects seemingly not having any relationship with human rights. So, human rights inculcation in legal study is the urge of the day.

4. ELCOP’s Effort to Produce New Breed of Lawyers

VD Kulshreshtha, , Landmarks in Indian Legal & Constitutional History: 1995 at 312.
If basic human rights and specific human rights are to be protected, it is necessary that the people are conscious and aware of their rights they are entitled to as human beings or as members of any particular group or profession. Ignorance of individual rights is more like to render the rights vulnerable to violation by public authorities or by private circles. Need for public education is thus adequately felt. So, the concept of ‘Street Law’ was initiated by a leading human rights educationist of the Country, a Dhaka University Law professor - Dr. Mizanur Rahman. Here the objective was/is not only to make the school children and slum-dwellers aware of their rights and duties, but also to acquaint them with fundamentals of the law of the land and some of the laws which they need to know for their daily life. Motivated students seek to provide the target groups essential knowledge of human rights, environmental law, family law, consumer’s law, constitutional law, system of governance, court system, conflict resolution etc. It seeks to inculcate in them qualities of good citizenry.

No sooner did the street lawyers go to the slums and hard core poor that they realized that mere dissemination of knowledge and information is not enough for empowerment of the poor. Structural and functional limitation of the Law Clinic of Dhaka University led a small group of students and teachers to take the avowed commitment of the Street Law further and to form an organization Empowerment through Law of the Common People (ELCOP) in October, 2000. ELCOP recognized that there is a strong social demand for a Socially Relevant and Responsive legal education and lawyering in the country. ELCOP quite consciously is in the process of translating this demand into rights demand. ELCOP believes that unless a social demand is transformed into rights demand it may lack legitimacy and consequently deprived not only of governmental but also of wider popular support. At this point ELCOP advocated that socially non-relevant and non-responsive legal education is a violation of the right to education in the broad
sense, violation of the right to information and traditional lawyering a
violation of the right to equal protection of law, the right to access to
justice and right to proper representation. Thus, social demand was
transformed into a rights demand and subsequently what was essential
was to design action based on the social demand/rights demand.

Having taken up the issue, ELCOP very soon understood the magnitude
of the task and recognized that mere public awareness building may
not suffice to empower the poor. It was felt that a solid group of
lawyers whom some authors have designated as ‘human rights
militants’9, specially trained and motivated, is necessary if rights of the
poor are to be protected. In pursuance of this objective to train
students in the spirit lawyering ELCOP introduced, two distinct but
intricately related programs, namely the Human Rights Summer School
(HRSS)10 and the Community Law Reform (CLR). HRSS, a two weeks
long residential course on human rights jurisprudence and art of
advocacy, has been contemplated as the breeding ground of anti-
generic rebellious lawyers, sensitized to the needs of the time and
society. As of now after ten years of the endeavor, HRSS has been
able to reshape existing concept of legal education, question the
efficacy and validity of traditional learning and regnant lawyering,
remould the graduates in the spirit of social engineering and imbibe in
them a commitment to engage in empowerment lawyering.

9 (M. Rahman, 2000)
10 Novelty and nobility of HRSS is that it gathers every year the best law students from
four public universities of Bangladesh along with participants from other SAARC
countries, numbering more than fifty for two weeks in an intensive and intimate
human rights training and education programme. It is not merely human rights
training and education theoretically and practically teaching the norms of human
rights law, but more importantly motivating the learners by both practical and
theoretical means to propagate the message of human rights, to practically work
in the field for protection and promotion of human rights and to motivate others to
do the same. Presently, it has over 500 alumni who are working either as lawyers,
judges, university teachers, researchers or human rights activists throughout the
globe.
But with the onslaught of corporate capital and a kind of cosmetic lawyering under the veil of PIL it was felt that the battle was half won. It was understood that a public spirited lawyer may have some achievements but he is always in an elevated position compared to the client and accompanied by the 3Ps of the profession whereas, the clients are doomed to live their old lives in indignity. Therefore, it was thought that if the end result is to be changed, the nature and type of lawyering must be changed first. With this end in view, Community Law Reform (CLR), an offshoot of the HRSS was initiated. The main objective of the CLR is to use and apply the potentials of the law students to organize the poor and the marginalized communities in a manner that they can protect and promote their rights themselves. The CLR rationale was founded on the philosophy that:

Poverty will not be stopped by people who are not poor. If poverty is to be stopped, it would have to be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve the poor must put his skills to the task of helping poor people organize themselves.11

Therefore, it was concluded that what was necessary was a kind of progressive lawyering that will enable a community and a group to gain control of the forces which affect their lives. In other words, social justice to become a reality must be preconditioned by empowerment of the poor and disadvantaged people. So, CLR was initiated so that students, they would be rebellious lawyers could go to the community, live with community members, share their grief and agony, organize the community, identify its potential leaders and subsequently train them up. In ELCOP parlance it is called Developmental lawyering or Community Lawyering.12 This CLR intervention completes the cycle of rebellious lawyering: Social Demand>Designation>Promote.

12 (Rahman, 2002; Schukoske, 2005)
action>Public policy. The success of the whole cycle depends on educated, sensitive, trained, motivated and pro-poor new breed of lawyers, the rebellious lawyers. Rebellious lawyering commences and sustains in organizing the community. A true rebellious lawyer is therefore, necessarily an efficient community organizer.

ELCOP started in 2000 and CLR was introduced in 2001. The time span is rather short to see a visible impact, but some successes have led the initiators to show the courage to draw a simple arithmetic dream:

If we train only 50 students annually and even if I’m overly optimistic, I can see that at best 12 to fourteen of them will ultimately remain rebellious lawyers. Again, half of them will be somewhere in the peripheries and rest half will be lawyering in the capital –mostly in the Supreme Court of Bangladesh. In 20 years from now, 140 to 150 rebellious lawyers will be in the Supreme Court—a solid group of lawyers dedicated to the cause of the poor and the humanity and I can see very clearly how this group of rebellious lawyers will bring about a fundamental change in the attitude of the Bench and the Bar towards the poor and the marginalized.13

Unless legal activists emerge, the gulf between the rich and poor will not be eliminated. Lawyers should not be a part of the 3Ps - Power, Privilege and Position. They should be able to make the law sing for the poor; only then the society will be changed.

5. The Message of HRSS Model of Human Rights Learning: Ethical and Humanistic Jurisprudence

Law ought not to be costly and the poor should not feel that law is the patrimony of the rich. With this sense of feeling Human Rights Summer School (HRSS) has modeled the alternative way of understanding law and rights. The ethical resonance of HRSS finds its expression in its

catchphrase that ‘lawyering for the poor is lawyering for justice’ and its recent transformation to ‘lawyering with the poor, is lawyering for justice’. HRSS understands the ethics from a larger societal perception where lawyers of tomorrow would fight for the millions of downtrodden and impoverished people. Summer School believes in the philosophy that costly justice might tend to abate the spirit of litigation, which in turn aggravates the misery of the poor, where the lawyer’s sense should come into play and stand beside the impoverished. HRSS imbibes the learners to question the discourse of justice i.e. nature, limits, legitimacy and legality of state power and hegemony. Creation and sustenance of such discourse of justice, according to Baxi, is articulated by ethical standards for identification and measurement of professional deviance. HRSS’s motto in this sense takes an ethical dimension.

If teaching of ethics is to mean something for the society, the law school should shoulder the responsibility of the venture that the ‘ethical sense’ has ‘infused’ a burning in the mindset of the novice learners against the injustices that prevail in the state-system and therefore, prompts the students to fight for the cause of humanity or pledge for rebellious lawyering, to borrow the term used by HRSS. From this perspective, rebellious lawyering attains the characteristics of a component of ethical lawyering. By the time they graduate, law students should have developed an understanding of the inevitable need for practitioners to exercise discretion in their professional roles, together with an understanding of the situational constraints that may have a bearing on ethical decision-making. At the same time they have to be able to recognize their consequent responsibility to exercise careful judgment in all situations calling for deliberation and choice in the interests of their clients, the administration of justice, the community

14 Ibid. at 33.
and themselves. This is what we may call community lawyering, another fundamental notion of Human Rights Summer School.

6. Probable Impact of Pro-poor Approach of Human Rights Education

Life’s demands on law are diverse and all-embracing. Law graduates need to be equipped with intellect, knowledge, skills and values which they would be required to apply not only in the formal dispensation of justice through courts, but in maintaining justice and rule of law in the broader field of life by observing, interpreting and applying law. Human rights education, therefore, should aim to produce enlightened educated citizens, specializing in law and understanding the problems and needs of life through law. It is submitted that the following may be an attitudinal advantage of human rights learning through the pro-poor approach and thereby making a shift from the administration of injustice to administration of justice.
<table>
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<th>Pro-Poor Approach in Human Rights Education (HRSS Model)</th>
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<td>Realism</td>
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<tr>
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<td>Politics, Equity, Mercy, Justice</td>
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<tr>
<td>Rule</td>
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<td>Judge Finds Law</td>
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7. Conclusion

The lawyer for social change can resort to any and all of the means available at his disposal such as litigation, public education, seminars, rallies, lobbying or writing for scholarly journals. However, the most significant of what a pro-people lawyer needs to do is: community mobilizing and organizing. The weak and the helpless client (in our case group-client/s) must be organized, motivated, trained and taught to resist the omnipotent state and the discriminatory legal system in order
to bring about expected social change leading to empowerment of the common people.16

ELCOP has translated into practice the vision of Nelson Mandela:

One could hardly think of a better way to advance the cause of human rights than to bring together students – who are the leaders, judges and teachers of tomorrow – from different countries, with chief justices and professors, to debate some of the crucial issues of our time in the exciting and challenging atmosphere of a courtroom, where they can test their arguments and skills against one another in the spirit of fierce but friendly competition..17

Thus, human rights education imparted by ELCOP has ripened into a solace to the gangrenes of legal education of Bangladesh.

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17 Mandela (2008), AFRICAN HUMAN RIGHTS MOOT COURT COMPETITION, Preface.
Cultural Diversity and Construction of Human Rights
Moral Development, Culture and Humanitarianism

Hossein Diba*

Abstract

It is clear that the fundamental human rights and humanitarian legal principles are based on ethical values and moral rules. The most recent researches in anthropology, social psychology and moral psychology have shown the influences of culture on moral judgments and moral emotions. So there are strong evidences for the relationship between culture and human and humanitarian laws. This article aims to explain the psychological mechanism of the formation of humanitarians' beliefs by forming moral judgments and moral emotions in different cultures.

There are two different approaches to explain how and to what extent culture is effective in making moral judgments and moral emotions. The first approach is a cognitive one which claims that humans are reasoning beings and that they reason within a realm that we can label moral about welfare, justice, and rights in ways that involve concerns with dignity, worth, freedom, and treatment of persons. The alternative view emphasizes feelings, and the conception of morality in this approach is that conscience is formed and regulated by feelings and emotions.

The most popular theorists in the former approach are Lawrence Kohlberg and in the latter are Antonio R. Damasio and Jonathan Haidt. It is also important to know what the religious approach in this subject is.

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and what the major conclusions of these studies are for expanding the human and humanitarian laws in the world.

1. Introduction

It is clear that the fundamental principles of values of humanitarianism that include most of the human rights and all of the humanitarian legal principles are based on ethical values and moral rules. On the other hand, the most recent researches have shown that there is a powerful relationship between culture’s values and value-belief-norms, moral judgments and moral emotions of individuals. So there are strong evidences for the relationship between culture and shaping the individual's belief of humanitarianism. Therefore, studying the relationship between culture and moral development is necessary for understanding the psychological mechanism of formation of the humanitarianism beliefs in individuals and societies.. And as J. Haidt says, "A correct understanding of the intuitive basis of moral judgment may therefore be useful in helping decision makers avoid mistakes and in helping educators design programs (and environments) to improve the quality of moral judgment and behavior." 1

To examine the above subject, it must also be noted that, according to the opinions of many researchers in the field of social science, the relationship between individuals and culture is too complex and the following question is seriously raised: Are human beings merely passive when facing cultural issues and formed values of culture? Or can individuals be influential in forming and changing the norms and values and moral judgments of a society? To study these issues, two subjects must be taken into consideration:

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1 - How is the mechanism of interactions between the individual and a shaped culture in a community? Is this relationship unilateral or bilateral?

2 - How is the mechanism of formation of moral beliefs in human beings? What is its role in acceptance and moral judgments?

Based on the above discussions, this article will be presented as below:

After the explanation of individual affecting and being affected by culture, I will explain the mechanism of how a person is being affected by society values to make it clear how the moral roots of altruism, which is the basis for human rights and humanitarian norms, are formed and if the cultural backgrounds for shaping the human and humanitarian rights norms are not suitable in some societies, then what is the role of individuals to improve and reform that situation? And if the moral values of a society’s culture are compatible with humanitarianism, then how can we increase the internalization of these values by our knowledge about the mechanism of formation of the moral judgments?

2. Cultures and Individuals

The first scientific assumptions about culture were presented by anthropologists. They introduced and defined the concept of culture. The classic definition of culture, which was followed by most of the latter sociological definitions, was stated by Edward B Taylor, the ”father of anthropology”. The culture as described by him is ”a mental phenomenon, consisting of the contents of minds, not of material objects or observable behavior”.

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In different books he also introduced the concept of culture as that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society. There should be an important role for individuals in a Society in formation of their culture because culture as researchers explain is “the product of what people continually construct with what they find always already there around them”3. To study the interactions between individuals and culture, it should be noted that in cultural psychology studies, societies are divided into two major groups, as Wainryb has noted these divisions and their geographical situations and pointed out their traits below:

Cultural psychologists’ notion of coherent and consistent patterns of cultural organization is best exemplified by the proposition that patterns of culture can be broadly sorted into individualistic or collectivistic. According to this formulation, cultures with an individualistic orientation (e.g., the United States, Canada, Western Europe, Australia, and New Zealand) structure social experience around autonomous persons, relatively detached from their relationships and community, and motivated to attain freedom and personal goals. Cultures whose core is collectivistic (e.g., much of Asia, Africa, and South America) structure social experience around collectives such as the family or the community; members of collectivistic cultures are identified largely by their interdependent roles and by the duties prescribed to them by the collective social system.4

Although the studies in cultural psychology have shown that individuals are less affected by society and social groups and their culture in individualistic societies, it should be noted that, according to all theories in moral development, in both forms of these societies, moral values are

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mostly affected by the culture. However, in individualistic societies, a person is more prepared to be affecting or choosing the values. On the other hand, researches show that even in traditional societies often called collectivistic, individuals are also free and active in acceptance or rejection of those norms and moral values of society’s culture. Nowadays this procedure has become a tradition as Nussbaum explains here:

At the heart of this tradition is a twofold intuition about human beings: namely, that all, just by being human, are of equal dignity and worth, no matter where they are situated in society, and that the primary source of this worth is a power of moral choice within them, a power that consists in the ability to plan a life in accordance with one’s own evaluations of ends.

The moral equality of persons gives them a fair claim to certain types of treatment at the hands of society and politics. What this treatment is will be a subject of debate within the tradition but the shared starting point is that this treatment must do two closely related things. It must respect and promote the liberty of choice, and it must respect and promote the equal worth of persons as choosers. 5

So, although in traditional perspectives the individuals are dominated by society, today researchers believe that in most reciprocal social relationships, even in cases that one party is more powerful and has more capabilities and facilities, the relationships are always reciprocal and it may even be said that as individuals affect the culture in adulthood, in return, children are effective in changing cultural perspectives of their parents at home, as described by Leon Kuczynski and Geoffrey S. Navara:

Traditional views of context in the social sciences generally emphasize how the environment constrains human agency by canalizing meaning and placing limits on individual choices (Fine, 1992). Approaching context from the perspective of human agency brings a balanced interest in the enabling

Cultural Diversity and Construction of Human Rights

effects of context. Social and cultural contexts have been constructed by collective and personal action to support agency, not just to constrain it (Brandtstädter, 1997; Giddens, 1990). Similar statements can be made about the parent–child relationship as a proximal context of children’s development..... However, the relationship context also incorporates enabling elements that offer children considerable scope to exercise their agency or to negotiate the nature of the constraints placed upon them (Kuczynski, 2003).

If someone wants to examine this issue from a religious perspective, it is right to say that divine religions have also noticed the importance of culture’s effect on thoughts and feelings of individuals. For that reason, on the one hand, religions have given so many recommendations and guidelines for cultural safety and protection of culture. On the other hand, religions do not consider individuals as passive beings in front of a society’s culture and have considered numerous responsibilities to create and change values in their society. Based on what was said in this section, it can be concluded that although individuals obtain most of the social norms like altruistic values from the culture of their community, and this issue will also be emphasized in the next section, but people do not drift in front of the cultures and while being affected by culture, in contrast, they influence the culture. After examining views that explain the relationship between individuals and cultures we will discuss the two theories on how the formation of moral judgments occurs.

3. Moral Development and Moral Judgment

In psychology, study of the development of the moral sense—i.e., of the capacity for forming judgments about what is morally right or wrong,

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6 Leon Kuczynski, Geoffrey S. Navara, Sources of Innovation and Change in Socialization, Internalization and Acculturation In M. Killen & J. Smetana (Eds.), Handbook of moral development, (p.305), NJ: Lawrence Erlbaum Publishers. Published, 2005.
good or bad is called moral psychology\textsuperscript{7} and in this field of study, moral
development focuses on the emergence, change, and understanding
of morality from infancy to adulthood. At first glance it appears that the
internalization of moral values in individuals within societies are formed
by a simple process through education and the relationship with
parents, siblings, peers and others during childhood, adolescence and
adulthood and it seems easy to discover and predict the mechanism of
this process and the details of its implementing procedure. But after a
lot of studies researchers in moral psychology and related spheres like
anthropology and social psychology acknowledged that
understanding the mechanism of achieving moral development and
predicting moral behavior is difficult and implementing moral behavior
is a complicated process. So they say that despite several decades of
studies, more research is needed.

There are a lot of theories about moral development and as Melanie
Killen and Judith G. Smetana have written in the preface of the
Handbook of Moral Development, "Research on moral development,
whether examined in terms of affect, cognition, emotions, behavior, or
neuroscience, as well as its applications for education or clinical
settings, has greatly expanded over the past 20 years"\textsuperscript{8}. And as noted
before, it seems that one cannot understand how humanitarianism
could be expanded in all its diversity without understanding its roots in
cultural values and the emergence of moral development through
being influenced by culture.

Moral judgment is the most important part of moral development and
so it is important to know how it is formed. Moral judgments are defined
as evaluations (good vs. bad) of actions or character of a person that
are made with respect to a set of virtues held to be obligatory by a

\textsuperscript{7} encyclopedia Britannica
\textsuperscript{8} M. Killen & J. Smetana (Eds.), Handbook of moral development, (p.305). NJ:
culture or subculture. This part of the article includes two most famous and affective approaches:

3.1. Cognitive-Developmental Approach

Some theorists emphasize the cognitive and rational aspects to clarify moral judgments. Rationalistic approaches in moral psychology claim that moral knowledge and moral judgment are formed by a process of reasoning and reflection. This theoretical perspective was formulated by Jean Piaget whose work is the point of beginning of contemporary theories of moral development. In his research, he focused on cognition and reflection. He published his influential book, The Moral Judgment of the Child, in 1932 to explain his theory.

According to the theory of Swiss psychologist, Jean Piaget, the first stage in moral development is the primary thinking of young children about moral issues that is characterized by egocentrism and a strict adherence to rules, duties and obedience to authority. In the first stage, moral reasoning is affected by authority without any reflection.

In the second stage, moral thinking relates social relationship with adults and through interactions with others; in this stage children expand their ability for considering rules critically by mutual respect and cooperation between them and adults. In the second stage moral reasoning is formed by perspective-taking, not egocentrism, and so individuals in this stage are nearer to fundamental principles of values of the Altruism because the ability of perspective-taking includes a direct concern for and responsiveness to the weal and woe of others. Piaget claimed that the best moral development appears in cooperative problem-solving events that happen in relationship with cultural values. Piaget’s work was expanded by the American psychologist Lawrence Kohlberg. He

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extended Piaget's work on cognitive reasoning into adolescence and adulthood.

In Kohlberg's view, like Piaget's, the moral force in personality and the roots of moral judgments in individuals are cognitive, not emotional, and as he wrote: "affective forces are involved in moral decisions, but affect is neither moral nor immoral. When the affective arousal is channeled into moral directions, it is moral; when it is not so channeled, it is not. The moral channeling mechanisms themselves are cognitive." He claimed, like Piaget, that logic and morality develop through constructive stages. His theory holds that moral reasoning has six identifiable developmental stages and his six-stage sequence of moral judgment development is grouped into three major levels.

The first level, called pre-conventional, includes avoiding breaking rules that are backed by punishment, obedience for its own sake (at stage one) and self-interest driven that involves instrumental, pragmatic values of actions (at Stage two). It must be noted that concern for others in stage two is not based on loyalty or intrinsic respect, but rather a "You scratch my back, and I'll scratch yours" mentality.

The second level is conventional. Conventional morality is characterized by an acceptance of society's conventions concerning right and wrong and understanding that norms and conventions are necessary to uphold society. This level includes stage 3 (interpersonal accord and conformity driven and define what is right in terms of what is expected by people close to them and being good—for example, a good brother, mother, teacher) and stage four (authority and social order obedience-driven).

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The last level (third) is Post-Conventional that is characterized by reasoning based on principles, social contract principles in stage five and universal ethical principles in stage six.\textsuperscript{12} It was a brief explanation about rationalism theory in moral judgment and as Darley says it is still an effective approach in moral psychology\textsuperscript{13}.

According to the description of Cognitive-Developmental approach, Piaget believes that the best way in moral development is that individuals in interaction with others in society, reach to a rational cognition of moral values and, according to the Kohlberg's highest level of moral development (Post-Conventional), individuals in the highest stage of this level can reach to a reasoning understanding of moral values based upon universal ethical principles.

Piaget and Kohlberg emphasized the roles of thought and rationality in moral judgment (and consequently man’s freedom in choosing and values), and the assumption that thought is centrally involved in human moral functioning. Despite the fact that there are many critical studies in some specific areas of these two approaches in the field of moral psychology, most studies show that individuals use thinking and rationality in cognition and moral judgments and this promotes their abilities in choosing values and prove that they are free to choose values by their rationality. So Cognitive-Developmental Approach is the nearest approach in moral development to Kantian ethics and is also is the nearest approach among different moral philosophy theories to Humanitarianism. Cognitive-Developmental Approach has widespread implications for how morality values have been conceptualized by social scientists.

\textsuperscript{12} ibid
3.2. Emotional Approach

The broad conception of morality in emotional approach is that moral judgments are largely formed through and regulated by strong emotions. The emotional approach is presented as an alternative to rationalist models. The model is a social intuitionist model because it deemphasizes the private reasoning done by individuals and emphasizes instead the importance of social and cultural influences. Moral reasoning does not cause moral judgment; rather, moral reasoning is usually a post hoc construction, generated after a judgment has been reached 14. This approach also connects morality to evolutionary processes, the brain, neurology, and culture. Damasio and Haidt analyzed the connections among biological processes, emotions, and feelings; they also explained the relation between these factors and moral judgments. The central claim of the emotional approach is that moral judgment is caused by quick moral intuitions.

The emotional approach proposes that moral judgments appear in consciousness automatically and effortlessly as the result of moral intuitions. It also proposes that moral reasoning is an effortful process, engaged in after a moral judgment is made, in which a person searches for arguments that will support an already-made judgment.15

In addition Damasio explains that even the post reasoning is affected by emotion and emotion is also affected by body. He says, “I suggested that feelings are a powerful influence on reason, that the brain systems required by the former are enmeshed in those needed by the latter, and that such specific systems are interwoven with those that regulate the body” 16. So according to this theory, moral development is

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15 ibid
primarily a matter of the cultural shaping endogenous intuitions that are strongly affected by feeling and emotions.

4. Comparison and Conclusion

As mentioned in the previous sections, the formation of humanitarianism values depends on forming moral judgment among individuals and societies. By examining the functional differences of these two approaches we can achieve significant results about the mechanism of formation of humanitarianism values and also the mechanism of performing necessary reforms or change some attitudes of the societies.

It is understood from the previous explanations that both approaches agree that cultures are effective in formation of moral judgments, but in cognitive approach the moral judgments are formed by impacts of culture on thinking and reasoning process so culture's influence is indirect and the main factor in moral judgment is rationality. And so it may be different with culture, as Melanie Killen and Nancy Geyelin Margie explain: “Much more explicitly than Piaget, Kohlberg drew on Kantian ethics to define morality, and he utilized Rawls' (1971) theory of justice framework to formulate his stage theory of morality. However, like Piaget, Kohlberg defined morality as distinct from cultural norms and customs, and he did so by identifying principled morality as post conventional (independent of culture) and pertaining to humankind. In his seminal paper on moral development, Kohlberg (1971) gave examples of Stage six reasoning as acts of civil disobedience, such as “helping slaves escape before the Civil War”.”

So according to the Cognitive-Developmental Approach, cultural norms are accepted only if they are compatible with rationality. But

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based on the emotional approach the cultures of societies have direct impacts on emotions and affects, so in emotional process the culture is main factor.

Comparing Piaget’s and Kohlberg’s views emphasizing cognitive aspects of moral judgments with Haidt’s and Damasio’s views emphasizing the emotional aspects shows that according to the theory, focused on emotional issues, human being, in moral judgments, is constantly affected and passive not effective and influential. According to this theory making moral judgments by people is unconscious and based on emotional and physiological issues and since in the process of moral judgments, thinking and reflection are not effective and these judgments are coercive and non-arbitrary, individuals' agreement or disagreement with these values will not be optional. But in the Cognitive-Developmental approach, individuals are free to agree or disagree with cultural norms.

In reviewing these two approaches, much psychological, sociological, and anthropological evidence shows that in moral judgments, both thinking and reasoning factors and emotional factors are effective. Each approach has focused on one of these factors. But it should be noted that cognitive theorists accept that emotional factors are effective in moral judgments and decision-making in a special role, as Elliot Turiel Says:

To say that humans are reasoning beings with flexibility of thought does not mean that emotions do not play a role. It does mean, however, that morality is not primarily driven

By emotions, it also means that it is not mainly emotions that guide the formation of judgments about right and wrong. Rather, emotions are
embedded in reasoning, with emotions involving evaluative appraisals.18

Theorists of emotional approach also explain that rationalistic approaches accept that moral emotions such as sympathy may sometimes be inputs to the reasoning process, but moral emotions are not the direct causes of moral judgment. In return, emotional approach claims that there are two cognitive processes at work - reasoning and intuition - and the reasoning process has been overemphasized. So the theorists of the emotional approach have also accepted, to some extent, the role of thinking and rationality in moral judgments. But according to their point of view, in most ordinary and immediate moral judgments made by people in moral events, emotional factors effect judgments and moral action covaries with moral emotion more than with moral reasoning.19

So if we accept that reasoning and rationality factors as well as emotional factors are effective in shaping the value beliefs of morality and ethics and consequently have impacts on philanthropy, each of these factors can be used in certain social and cultural circumstances. Considering that the roots of values of humanitarianism lie in morality and moral judgments and, as previously mentioned, most part of the moral values are taken from public culture of communities, so it should be noted that if the public culture of a society is rich in moral values, and if there are no other obstacles, most people of that community will naturally respect the humanitarian values and human rights.


But if the positive cultural values of some communities have disappeared or have converted to abnormality during the time because of social, economic or political damage, we should not expect people to believe in all values of humanitarian or human rights and to be committed to them. In this group of communities, some positive moral values have disappeared or become the anti-values; the question raised here is that what is the role of individuals in improving the situation? If rational and intellectual aspects of individuals' moral judgments are strengthened, at least they will result in three very important benefits.

First, with one’s awareness of the reasons why a specific behavior is allowed or prohibited, individuals find more motivation to do it or leave it. Moreover, due to this awareness, individuals comply more accurately actions with value rules in certain circumstances. These two benefits are in the acceptance and commitment aspects, but in negative aspects individuals reject the incorrect judgments that arise from wrong norms.

Emotional approach distinguishes role and effect for human emotions in two completely different sections (although Haidt and others have not stressed this division). First, in the formation of moral values in childhood and later and the other, the influence of emotions in moral judgments in moral dilemmas. And since their claims about the influence of emotions in these two processes seem acceptable, the mechanism of emotional effects can be utilized to strengthen humanitarian moral values.

The emotional approach in the first case (the formation of moral values in childhood and later) offers mechanisms such as Immersion in Custom Complexes. The custom complex has recently been proposed as the key construct for understanding development within a cultural context, it is a customary practice and ...the beliefs, values, sanctions, rules,
motives and satisfactions associated with it. In this case, it can be said that suitable cultural preparations can be helpful to shape the humanitarian values through Immersion in Custom Complexes. In the second case, namely the influence of emotions in moral judgments, we can also reinforce these emotions (if they are consistent with human values) in people's daily behavior to create some sort of guarantee for humanitarian values realization.

In the meantime, some gaps and vacancies remain, but even the emotionalists believe that moral reasoning can also be used in these cases, since the emotionalists reject the role of reasoning and moral thinking in ordinary and immediate decision-making and moral judgments, but individuals can have a normal reflection and thought and choose their own moral values. The emotional approach also accepts that one’s moral reasoning is affecting on other people.

Therefore, the cognitive theory can be useful to offer a helpful and acceptable mechanism to review moral values to modify and complete them by individuals and also review the impact on others and the community to change their incorrect beliefs about moral values. Emotions also lead to altruism, Haidt says. “If reasoning ability is not sufficient to motivate moral action, then what is? Batson and his colleagues have developed the empathy-altruism hypothesis, which states that empathy aroused by the perception of someone’s suffering evokes an altruistic motivation directed toward the ultimate goal of reducing the suffering.” Therefore, it must be noted that if the moral values of the culture of society are compatible and consistent with humanitarian values, the basis for intensifying the emotional states of individuals in a society for more internalization of these values in individuals will be achieved through educational programs and media.

20 ibid
21 ibid . p.824.
effects. Obviously, in such circumstances the aspects of emotional affects will be used more than cognitive aspects.

And also if some social norms and values in a particular community are against the values and principles of humanitarianism, one can pay more attention to the aspects of rationality and thought and promote them within the community through public education, to undermine the values contrary to humanitarian principles and encourage the values consistent with humanitarian issues, as Turiel says:

If social relationships are evaluated and judged by standards that can differ from those embedded in societal arrangements and cultural practices, then it is likely that people will critique, oppose, and resist inequalities and conditions that allow for injustices in domination and subordination.22

Turiel has accepted the cognitive approach and he agrees with Piaget that moral thinking relates to social relationships and stresses that development is a constructive process stemming from children’s interactions with multiple aspects of the social environment. Moral development does not involve accommodation to social expectations, rules, or norms, and moral functioning does not entail compliance with authority dictates, societal arrangements, or cultural practices. It would follow, therefore, that insofar as people perceive societal arrangements and cultural practices to foster injustices or unequally restrict the rights of certain groups, there would be opposition. That is, the approach outlined implies that individuals scrutinize and critique existing practices, which may well result in opposition and resistance.23

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It should be stressed at the end of this article that to ensure the adherence of states to the humanitarianism issues that includes human rights and humanitarian legal principles, these values should be internalized within individuals of those communities. To achieve this goal, one should use foundations of education which can be obtained from moral psychology. This process should begin in childhood and continue into adolescence and adulthood. This is an important capacity. However, less attention has been paid to it. And international organizations like the UN and the Red Cross should consider it in their educational and cultural programs.

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International Humanitarian Law from the Perspective of the Lanjia Saoras, an Indian Tribe Untouched by Millennia of Mainstream Civilizational Progress

Soumitra Subinaya* & Mahdi Yousefi**

Abstract

Much has been mainstreamed into law from perspectives of the mainstream discourses including mainstream historical discourses. The voices of indigenous tribes across the world that have remained untouched over millennia by mainstream civilizations have gone unheard. This paper seeks to be the first of its kind in pouring out the rich unearthed indigenous legal knowledge of the Lanjia Saoras, an Indian tribe, in the context of International Humanitarian Law. Unlike the conventional legal articles, the researcher employs the Oral History Method (OHM) generally used in the social sciences, given the paucity of large secondary research data, and given the oral tradition amongst the Lanjia Saora tribe that is devoid of the written script. These constraints render doctrinaire research difficult. The informed informants in this research range from people belonging to the Lanjia Saora tribe to sociologists to other knowledge-holders in Odisha. Written works on International Humanitarian Law from a Hindu perspective are not rare but the present research deals with tribal population who predate the Aryan invasion of India and are not Hindus. However, principles from

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ancient Indian texts and modern International Humanitarian Law have also been provided alongside tribal war laws to show the striking similarities amongst the modern law and the evolved sense of war ethics present in ancient and present tribal India. The focus throughout the paper is however on understanding the war laws of the Lanjia Saora tribe of Odisha, one of the poorest states of developing India. The research reveals that International Humanitarian Law Principles are fundamental offshoots of the human psyche. The researchers in writing this paper for the second NAMCHRCD International Conference on Human Rights and Cultures feel like the lawyer who was questioned by the Court if his argument was supported by any precedent. To this, the lawyer had replied with a “No” and added “If it may please this Court, it can enjoy the privilege of being the first one to set a precedent for the future by accepting my argument.” Similarly, given the non-traditional research methodology and writing style of this research paper, the researchers hope that the readers set a precedent for the future by accepting such pieces of work into mainstream legal research article writing that not only voice tribal perspectives for the first time but also employ oral history method (given the constraints) to explore issues of law and indigenous peoples world over.

Introduction

Much has been mainstreamed into law from perspectives of the mainstream discourses including mainstream historical discourses. The voices of the indigenous tribes across the world that have remained untouched over millennia by mainstream civilizations have gone unheard. This paper seeks to be the first of its kind in pouring out the rich unearthed indigenous legal knowledge of the Lanjia Saoras, an Indian tribe, in the context of International Humanitarian Law. Unlike the conventional legal articles, the researchers employ the Oral History Method (OHM) generally used in the social sciences, given the paucity
of large secondary research data, and given the oral tradition amongst the Lanjia Saora tribe that is devoid of the written script. These constraints render doctrinaire research difficult. The informed informants in this research range from people belonging to the Lanjia Saora tribe to sociologists to other knowledge-holders in Odisha. Written works on International Humanitarian Law from a Hindu perspective are not rare but the present research deals with tribal population who predate the Aryan invasion of India and are not Hindus. However, principles from ancient Indian texts and modern International Humanitarian Law have also been provided alongside tribal war laws to show the striking similarities amongst the modern law and the evolved sense of war ethics present in ancient and present tribal India. The focus throughout the paper is however on understanding the war laws of the Lanjia Saora tribe of Odisha, one of the poorest states of developing India. The research reveals that International Humanitarian Law Principles are fundamental offshoots of the human psyche. The researchers in writing this paper feel like the lawyer who was questioned by the Court if his argument was supported by any precedent. To this, the lawyer had replied with a “No” and added “If it may please this Court, it can enjoy the privilege of being the first one to set a precedent for the future by accepting my argument.” Similarly, given the non-traditional research methodology and writing style of this research paper, the researchers hope that the readers set a precedent for the future by accepting such pieces of work into mainstream legal research article writing that not only voice tribal perspectives for the first time but also employ oral history method (given the constraints) to explore issues of law and indigenous peoples world over.
Who are the Lanjia Saoras?

The Saora or the Sabara tribe are inhabitants on Indian soil since a very remote antiquity. They predate the Aryan invasion into India. The Lanjia Saora, literally the “Hill-Saora”, represent a section of the Saora tribe that inhabit the contiguous hilly terrain stretched across Gunupur Sub-division of Rayagada and Parlakhemundi Sub-division of Gajapati districts of Southern Odisha. According to Singh, “The History of the Saora from the earliest times has been narrated by many writers, notably Thurston, Bell, and Elwin. The name of the tribe has been known for about two thousand years. Pliny makes mention of Suri and Ptolemy of Sabari. Ptolemy particularized his description by saying that the tribe dwelt in the south west region of the Gangetic delta and at a short distance from the sea coast, making identification of the tribe with the Saora of Orissa possible. The name of the Saora also occurs both in the Mahabharata and the Katha-Sarit Sagar.” (1984:1) The Lanjia Saora, also called Saura, Sabara, Saur, Sahar, Sora, show racial affinity with the proto-Austroloid aborigines. The nomenclature “Saora” has been derived from the Scythian word, “Sagories” which denotes “Axe”. Others believe the “Saora” is a derivative of the Sanskrit word, “Saba Roye” which translated into “carrying a corpse”. The two connotations are befitting for Saoras given the fact that they have a habit of carrying the axe on their shoulders and hunting animals.

4 Ibid.
Thurston (1909) has classified the Saoras into two: the hill Saora or the Lanjia Saora and the low country Saora. The Lanjia Saoras have been further divided into:

1. Savara, Jati Savara – they regard themselves as superior and eat the flesh of buffalo but not cow.

2. Arsi, Arsi, and Lambo Lanjia – their occupation is weaving coarse clothes as well as agriculture.

3. Luara or Muli – this section makes arrow heads and other iron articles.


5. Jadu – said to be a name among the Saora for the hill country beyond Kalakote and Puttasingi.

6. Kumbi – these sections are potters who make earthen pots used for cooking or for hanging up in houses as fetishes of ancestral spirits or certain deities.

The Low Country Saoras are divided into two groups:

1. Kapu/Pallapu – cultivators

2. Sudho – good/pure

The Saora habitats are the remotest, inaccessible areas flocked by hilllocks and clad with heavy forest thickets. They speak an ancient indigenous Mundari dialect called “Sora”. The Lanjia Saoras normally practise shifting or “jhoom” cultivation. They also hunt for survival. The Saoras unlike other tribal communities do not have clan or sib organization. They do not possess complementary institutions of

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5 E. Thurston Castes & Tribes of Southern India Vol.3, 1909.
totemism and taboos in matrimonial relations. Instead, the Saoras live in extended families called “Birindaś” that consist of descendants from a common ancestor of four or five generations.7 The Saoras love their children immensely.8 Religion has an over-pervasive hold over the Saoras. The concept of a single supreme God is absent amongst the Saoras.9 The Saora gods are different from one another in character, function and disposition. Some gods are benevolent while others are malevolent. All these gods constantly demand something or the other from the Saoras. If these demands are unmet, the gods cause harm to the people. Sonnum or Sunnam is the general name for the Saora deities.10 The deities possess names such as Rudesum, Karunisum and Labosum.11 Besides these, the Saoras worship other malevolent deities and evil spirits.

**Saorian Laws and International Humanitarian Law Principles**

Just like Dharma in ancient India, the Lanjia Saoras developed the concepts of “Ersi” and “Ukke” which have the force of law and the breach of which attracts the wrath of gods. “Punishment by the gods is a more serious matter. All gods punish any diversion from the formalist path of safety; the breach of a taboo leads to almost immediate and certainly automatic retribution but the greater gods such as Uyungsum and Darammasum are said to punish men for sin.”12 (Elwin, 1955) “Supernatural sanctions operate the machinery of social control and play a significant part in promoting conformity with accepted moral standards of the contemporary (Saora) society. Failure to comply with the ethos and value system arouses the wrath of superhuman beings...
and creates conditions for divine punishments during the life-time of culprits.”\textsuperscript{13}(Singh:1984). Ukka means custom and socially approved good conduct, the breach of which in certain cases affects individuals and society calling for imposition of appropriate social sanctions for restoration of status quo. It is backed by social sanctions. Ersi means divine rules breach of which attract serious social as well as supernatural sanctions. The following classification will clarify Ukka and Ersi\textsuperscript{14}:}

<table>
<thead>
<tr>
<th>Breach of Ukka/Offences</th>
<th>Breach of Ersi/ Sins</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telling Lie</td>
<td>Homosexuality and bestiality</td>
</tr>
<tr>
<td>Theft</td>
<td>Killing a woman (even during war, no matter which party she belongs to)</td>
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<tr>
<td>Marriage inside the village</td>
<td>Pride and superiority complex</td>
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<tr>
<td>Adultery (excluding incest)</td>
<td>Profaning sacred rites and ceremonies</td>
</tr>
<tr>
<td>Premarital sex (not incestuous)</td>
<td>Touching a horse and its excreta</td>
</tr>
<tr>
<td>Homicide (includes killing the unarmed in a war)</td>
<td>False swearing of oath in the names of the deities</td>
</tr>
<tr>
<td>Physical assault (includes assault on the unarmed in a war and rape)</td>
<td>Sexual intercourse during natural calamities (even rape)</td>
</tr>
</tbody>
</table>

\textsuperscript{13} Bhupinder Singh \textit{The Saora Highlanders}, Bombay, Somaiya Publication Pvt. Ltd., 1984.

<table>
<thead>
<tr>
<th>Breach of Ukka/ Offences</th>
<th>Breach of Ersi/Sins</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arson</td>
<td>Woman killing animals especially for ritual sacrifice</td>
</tr>
<tr>
<td>Violence and aggression</td>
<td>Woman to dig a grave</td>
</tr>
<tr>
<td>Insult, misbehaviour and humiliation</td>
<td>Woman to climb a Salap tree</td>
</tr>
<tr>
<td>Jealousy and ill feeling</td>
<td>Eating the flesh of dog, horse, cat, frog, vulture, kite and snake</td>
</tr>
<tr>
<td>Socio-economic exploitation</td>
<td>Priests or shamans committing adultery</td>
</tr>
<tr>
<td>Greedy and miserly conduct</td>
<td>Incest</td>
</tr>
<tr>
<td>Laziness</td>
<td>Women eating pork</td>
</tr>
</tbody>
</table>

As we shall subsequently observe, principles of International Humanitarian Law are embedded within the concept of Ukka and Ersi.

The Lanjia Saoras being an archaic tribal community, it has no written law or law making and enforcing agencies but a distinct political set up in every village and law in the form of Ukka and Ersi. Every Saora village is has a secular headman called Gomango or Naiko, sacerdottal headman called Buya or Jani or Karji, headman’s subordinates (Mandal/ Dal Behera), messenger (Barik), astrologer (Desari) and Shaman (Kundan/Beju).15 Conflicts and legal disputes are generally looked into and resolved by the Gomango and the Buya. However, of late, the practice of resolving conflicts both intra and inter village has been taken up by a council of elders in the village. The Saora consider their respective villages as political units/ nations and the members of other villages as foreigners. There have been

numerous wars between villages/nations for acquisition of farmlands for cultivation.

**International Laws of War between Saora Nations**

These laws are international because, as mentioned earlier, each Saora village is a nation for the Lanjia Saoras but given the concept of Ukka and Ersi operating in the Saorian religion, laws of armed conflict amongst the Saoras have remained common. We will see how these indigenous people offered an advanced sense of International Humanitarian Law by understanding the similarities in their war laws and International Humanitarian Laws as given in second list of the three statements on the basic rules of the law of armed conflict published by The International Committee of the Red Cross. This second list is reproduced below:

**II Fundamental Rules of International Humanitarian Law Applicable to Armed Conflicts**

1. Persons hors de combat and those who do not take a direct part in hostilities are entitled to respect for their lives and moral and physical integrity. They shall in all circumstances be protected and treated humanely without any adverse distinctions.
2. It is forbidden to kill or injure an enemy who surrenders or is hors de combat.
3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and equipment. The emblem of the Red Cross or the Red Crescent is the sign of such protection and must be protected.
4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against

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all acts of violence and reprisals. They shall have the right to correspond with their families and receive relief.

5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be responsible for an act he has not committed. No one shall be subjected to physical and mental torture, corporal punishment or cruel or degrading treatment.

6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.

7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed only against military objectives.

The researchers reproduce each of these above principles whenever she encounters a like tribal warfare law. Besides, the researchers also extract like principles from ancient Indian texts which like the tribal war laws show an advanced sense of proximity to the contemporary laws of armed conflict. This is done to show the similarities amongst the Lanja Saora tribal war laws, the ancient Indian war ethics and the modern International Humanitarian Laws. Thus, the researchers proceed now, incorporating five interview studies using the oral history method at suitable places.

**Interview 1**

Sridhar Gomango, a Saora of Keraba village was interviewed by the researchers. He is a man of around 80 years of age and the researchers asked him to recollect instances of armed conflict between Keraba and Karanjasing villages/nations of the Saoras. When asked what laws governed the armed conflict, he, himself being a participant of such
armed warfare when barely sixteen, answered that “A long metal trumpet-like-pipe was blown by both the warring parties to intimate the other of their approach. Wars could not continue after the sunset. Women, children, the infirm, the injured and the surrendered were not to be killed. The acceptable weapons were metal swords, axe and arrows with a bow. Poisoned arrows were only to be used in killing animals and not men. Killing the unarmed or raping a woman after victory constituted the breach of Ukka and Ersi.”

These tribal war laws seem congruous to the provisions of the Geneva Conventions, as in the Basic Rules of the Geneva Conventions and their additional protocols. The ICRC published fundamental rules of International Humanitarian Law (as mentioned earlier) that are similar to these tribal war laws are:

1. Persons hors de combat and those who do not take a direct part in hostilities are entitled to respect for their lives and moral and physical integrity. They shall in all circumstances be protected and treated humanely without any adverse distinctions.

2. It is forbidden to kill or injure an enemy who surrenders or is hors de combat.

In the Shanti Parva of the Mahabharata that makes many mentions of the Saora tribe, similar rules also find mention:

“This means to kill someone not in combat; to rape a woman, or misbehave with her; ingratitude; to rob one devoted to learning and

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17 The modern laws of war were developed mainly by The Hague Peace Conferences of 1899 and 1907, and in the four Geneva Conventions of 1949 and the two 1977 Additional Protocols thereto.
knowledge; to deprive another of all he has – these are considered very low acts even among robbers.”

“The enemy who is exhausted; is fearful; has laid down his arms; is crying; or is running away; has no weapons left to fight with, or has given up the fight; is sick; is pleading for his life; is young or is old, must never be killed. Whoever is in such a state must indeed be protected.”

**Interview 2**

D. Raika, another old Saora from Angra village, when questioned by the researchers about the inter-village/inter-national tribal war laws elaborated that, “We are forbidden to kill or injure an enemy who surrenders. We are not supposed to destroy any religious tree or rock structure or any civilian houses during the battle. We are prohibited to kill the wounded or woman or children or the elderly. Deviance from these laws of war would mean breach of Ukka and Ersi. The breach is followed up with sanctions for the offenders. The warrior who kills the unarmed must confess to the Buya and conduct penance rituals involving donation of a buffalo and grains to the victim’s family.”

The *Manava Dharmashastra*, an ancient Indian text, also has provided for right of a person who surrenders in the following words:

“He must never slay a man standing on the ground, [the implication is that the soldier, in this case the king, is fighting on the chariot or a mount] a man with joined palms, a man with loose hair, a seated man, a man declaring “I am yours”, a sleeping man, a man without his armour, a naked man, a man without his weapons, a non-fighting...”

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20 Id.
spectator, a man engaging with someone else, a man with damaged weapons, a man in distress, a man badly wounded, a frightened man.”

**Interview 3**

D. Sabara, an elderly Saora of Alangada village was interviewed by the researchers. She recollected how her village/nation was defeated in an armed invasion by the warriors from the neighbouring village/nation but the victorious army did not maltreat them. She said, “The victorious party respected the dignity of women. The defeated wounded warriors were provided medical care by the victorious party and the women were allowed to nurse and communicate with their defeated kins. No act of violence was inflicted on the defeated party. Other than asking the defeated to secede from their farmlands, no other demand was made by the victorious party.”

The ICRC published International Humanitarian Law Principles that are in consonance with the above tribal war laws are:

3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and equipment. The emblem of the Red Cross or the Red Crescent is the sign of such protection and must be protected.

4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and receive relief.

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5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be responsible for an act he has not committed. No one shall be subjected to physical and mental torture, corporal punishment or cruel or degrading treatment.

The Mahabharata, an ancient Indian text, also mentions similar thoughts:

“Whose weapons are broken; who finds himself in trouble; the string of whose bow is snapped; whose battle horse is killed – he should never be attacked. Such an enemy falling into one’s hands, his wounds should be tended, and he should be taken to his home.”

“You shall never kill a woman, a child or an ascetic, nor kill anyone not in combat with you, you shall never hold a woman by force.” No one among you shall ever kill a woman. And you shall look to the welfare especially of those devoted to learning and knowledge. You would, should it become necessary, even fight for its sake.”

As mentioned earlier, the principle of distinction was adhered to in the tribal warfare and the unarmed civilians were unharmed. Moreover, use of poisoned weapons was banned which shows that parties to the conflict did not have an unlimited choice of means of warfare.

The ICRC published International Humanitarian Law Principles that are similar to the aforementioned tribal war laws are:

6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.

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22 Bhagshastro vipinnashch krittajyo hatvahanaha | Chikitsyaha syaat svavaishaye prapya svagrahe bhavet || shanti 15.13 ||

23 Ma vadhistamsv sttiyam bhirun ma shishu ma tapasvinam | Naayudhyamano hantavyo na cha graahmaa balata sttiyaha || shanti 135.13 ||

24 Sarvatha stri na hantavyaa sarvatsattveshu kenchit | Nityam tu brahmane svasti yodhavyam cha tadarshatah || shanti 135.14 ||
7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed only against military objectives.

Manava Dharmashastra, an ancient Indian text, also mentions similar war ethics:

“When he is engaged in battle, he must never slay his enemies with weapons that are treacherous, barbed, or laced with poison, or whose tips are ablaze with fire.”


**Saora Personality and Humanitarianism**

We observed that the Lanjia Saora do observe war rules which are in pari materia with the content and spirit of International Humanitarian Law principles. The researchers believe that “Humanitarianism is the soul of International Humanitarian Law” and that the Lanjia Saora tribes display an advanced sense of humanitarianism. To prove the same, the researchers find it pertinent to clear the air regarding the perceived stereotypes about Lanjia Saoras and show that elements of compassion, love and generosity which are fundamental to the tenets of Humanitarianism that believes in the principles of Universality, Humanity and Impartiality are very much present in the Lanjia Saoras. This in turn will provide us with the reason behind the international humanitarian laws of armed conflict followed by the tribe.

First, let us mention the stereotypes. A number of authorities have passed numerous judgements on the Saora personality from time to time describing them as “reserved, suspicious, refractory,
obstinate...savage" (Yeats 1931) 26 ; "entirely destitute of moral sense....not straight-forward in..their dealings, always take every unfair advantage" but "quite courageous" (Rowney, 1882) 27 ; "not civilized,...unlike human beings...like wild beasts,...a set of dangerous people...barbarous..bad subjects and not trustworthy" (Ghose, 1848)28. J.S. Wilcock, Agent in Koraput recorded in a judgement of a murder case in 1939: “The accused are Saoras, aboriginals in a primitive stage of civilization, little above the level of savages. Their character is evinced by the fact that after committing a ferocious murder for the flimsiest motives, they made no attempts whatever to conceal the crime or their participation in it...”29

John Campbell, the illustrious, brave and sympathetic British Officer who could check the barbarous “human sacrifice" of the Kandha tribe wrote about Saora in his book, “A Personal Narrative of Thirteen Years of Service amongst the Wild Tribes of Khondistan" (London, 1864): “They(Saoras) are professed thieves and plunderers, and the terror of the inhabitants of the plains”.30

These comments about the Lanjia Saora tribe breed stereotypical false notions. More careful observers like N. Macmicheal, Political Agent in Ganjam in 1914-15 remarked, “The more one sees of the Saoras, the more one realizes what thorough gentlemen they are”.31 It is true that the Saoras are skeptic and resentful of anything that is alien and exploitative. Verrier Elwin (1955) who came in intimate contact with the tribe said: “The Saoras intractability and obstinacy are due to his


28 Id.

29 Id.

30 Id.

31 Id.
resistance against (alien) laws and regulations that he knows will ultimately destroy his economy; he resists the forest laws because he knows they will impoverish him, the excise laws because they will rob him of his happiness, and the attempts to educate him because he sees in them an attempt to invade his country by an alien speech and customs." 32

**Interview 4**

The researchers approached Professor Dr. Rita Ray, a famous Indian sociologist and professor of Sociology at National Law University Odisha to understand more about the Saora personality and humanitarianism. Professor Dr. Rita Ray has researched extensively on tribal sociology including sociology of the Saora tribe. On being asked about the Saora personality, she said, “The personality of people should not be judged only on their behavior towards foreigners but also on their conduct within their community. Some Saoras may be cruel, arrogant, quarrelsome, aggressive or obstinate. However, such people are few and they are strongly condemned by their fellow Saoras. It will be fallacious to condemn the whole Saora tribe for occasional outburst of savagery.” On being questioned about whether Saoras and their link with humanitarian principles, she opined, “The Saoras have a very developed sense of humanitarianism. Their religion and economy instil in them a strong bond with fellowmen. During natural calamities, they stand as one and offer aid to their fellowmen irrespective of caste, creed and color. This is in concomitance with the humanitarian principle of Impartiality. The Saoras do not limit assistance during epidemics or natural disaster only to their nation (their village) but also aid internationally, that is provide grains and their ‘doctors’ to other villagers. They realize that human life is precious and every human life,

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whether in their village or in others must be respected because human life is the gift of gods such as Darammasum and Uyungusum. This is similar to the humanitarian principle of Universality." She added, "The Saoras too believe in the humanitarian principle of Humanity as they, as I said earlier, aid another ailing human being because, the other is a human soul, a gift of the gods."

The principle of beneficence operates amongst all Saoras in a village. Their extended families or birindas make them inter-dependent. They love each other a lot. By and large, they are gentle, kind hearted, affectionate, and sociable and have many great virtues, which must be taken into account while judging their personality.33 They are good citizens, very fond of each other, devoted friends, and good domestic partners, fond of children, hospitable to strangers, obedient to chiefs and always ready to help the poor and the needy.34 The most condemned person is the proud man, because pride destroys good fellowship and humanitarianism. 35 The proud man is called “adaibobmaran” or “Duaiymaran” meaning the “one who is easily provoked”.36 “Generosity is a virtue while miserliness is a vice is Saora society. They praise the person who gives away freely and hate the person who accumulates wealth selfishly. A miser is called “ersumaran” or “rankamaran” and is treated as black sheep, because miserliness strikes at the root of mutual cooperation and exchange, which are integral parts of their socio-economic life.”37

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34 Ibid.
35 Ibid.
36 Id.
37 Id.
Interview 5

The researchers interviewed Mrs. Tilottama Mohanty, an informed informant with deep knowledge of the Hindu sacred texts and well versed with texts on the Lord Jagannath cult. The Saora tribe have made their way into these ancient Indian texts. On being asked to describe the Saoras as described in the Jagannath folklore, she replies, “Vishwabasu, the Saora king, worshipped Lord Jagannath as the deity of the Saoras before the Lord arrived at Puri.” She adds, “The Saoras are described as very affectionate, intelligent, religious people who did not believe in warmongering and spreading hatred. Even after the Puri king stealthily took away their revered deity, they never retaliated with an attack.”

Conclusion

Thus, we find in our research that Humanitarianism and principles of International Humanitarian Law as we find today did exist and continue to exist in a like form even in the indigenous Lanjia Saora tribes who have been left untouched by the wheels of what is seen by the mainstream as civilizational progress. This shows that war is as old as humankind and the principles of International Humanitarian Law are as old as the Lanjia Saoras. This in turn establishes that behind the International Humanitarian Law principles is the concept of Humanitarianism which is an offshoot of hedonic human values of love, pity, compassion and generosity which are prized even amongst indigenous tribes such as the Lanjia Saoras. We observed that the International Humanitarian Law is a magnified human conscience which is ever-existent and which operated as Dharma in ancient India and continues to operate in Ukka and Ersi in the Lanjia Saora community. To conclude, we provide the readers with a case study that will display that the Lanjia Saoras too have evolved over the years and prefer peaceful
alternative dispute resolution to armed conflict, just like mainstream civilizations of our world today:

**Case Study**

A few years ago, some villagers of Karanjasing released cattle into the farmlands of the adjacent village Keraba. The cattle destroyed the standing crops and a quarrel took place among the inhabitants of both the villages. When, the inhabitants of Keraba threatened to release their livestock into the fields of Karanjasing with armed support, the villagers of Karanjasing warned them with the threat of black magic to destroy their crops and spread epidemic. There arose a possibility of armed conflict between the two villages. The matter was however settled in a joint meeting of the leaders of both the villages with mediation of the famous Gomango of Sagada village, late Sridhar Gomango. Friendship between both the villages was restored after holding a common feast at the end of the meeting.

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ASEAN Regional Human Rights Protection: Lessons from the African and Inter American Regional Systems

Daniel Aguirre* & Irene Pietropaoli**

Abstract

The Association of Southeast Asian Nations (ASEAN) is developing a regional human rights system. Stemming from the adoption of the ASEAN Charter in 2007, two regional bodies have been created, albeit with limited mandates reflecting its members’ aversion to enforceable human rights standards. The ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Commission on Promotion and Protection of the Rights of Women and Children (ACWC) can encourage states to adopt international measures and provide recommendations on matters of general application to ASEAN – they cannot deal with specific states or human rights violations. Nevertheless, their creation draws attention to and provides a focal point for civil society for regional human rights issues. As such, they constitute an important first step.

Part one of this article outlines the development of the ASEAN regional human rights system. It examines human rights cooperation leading up to the ASEAN Charter, the process of setting up the regional human rights bodies and the preliminary results of the AICHR’s first meetings in 2010. Part two examines the development of the Inter-American and African systems. It looks at the challenges they faced as disparate

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developing nations in creating regional systems and examines their successes and failures. It notes the key characteristics – complaints and reporting mechanisms as well as courts – and how they evolved despite political and practical obstacles. The part goes on to chart their progress emphasizing constructive symmetries with the development of the ASEAN human rights bodies. Part three scrutinizes specific challenges resulting from regional politics in ASEAN and its persistent reluctance to accept human rights law responsibility. Part four provides recommendations and looks at the future of the regional mechanism.

Overall, this paper examines the fundamental obstacles that have long delayed a regional human rights mechanism in the region and do not naturally conform to individual human rights values. But it notes that similar challenges were faced in Africa and the Americas, where despite regional complications, the systems have progressed over time. The ASEAN regional mechanism must confront alleged cultural suspicion, operational resistance and the disingenuous application of human rights in order to progress.

1. Introduction

The Association of Southeast Asian Nations (ASEAN) is developing a regional human rights system. Stemming from the adoption of the ASEAN Charter in 2007, two regional bodies have been created, albeit with limited mandates reflecting its members’ aversion to enforceable human rights standards. The ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Commission on Promotion and Protection of the Rights of Women and Children (ACWC) can encourage states to adopt international measures and provide recommendations on matters of general application to ASEAN – they cannot deal with specific states or human rights violations.

1 Charter of the Association of Southeast Asian Nations, 20 November 2007, Singapore (entered into force 15 December 2008) [ASEAN Charter].
Nevertheless, their creation draws attention to and provides a focal point for civil society for regional human rights issues. As such, they constitute an important first step.

The political barriers facing the ASEAN human rights mechanisms are not unique. Similar challenges confronted regional systems in Africa and the Americas. Yet while all states in all regions jealously guard their sovereignty and regard the interference of regional human rights mechanisms with suspicion, ASEAN has resisted forming a system much longer and have opposed human rights law both in theory and practice. Does the formation of these ASEAN bodies mark the first steps towards engagement in regional human rights protection or are they a façade masking business as usual? Is this a cynical exercise to add legitimacy to foreign and regional investment in the region? Global trade regimes have increasingly adopted the language of human rights to suit trade and investment goals.2

Human rights inevitably court controversy as they reach to the core of a state’s political identity. This is true in Southeast Asia where human rights law is unevenly implemented and viewed as a foreign concept. The resistance to human rights law is manifest in ASEAN policy that emphasizes non-intervention and is elucidated in the cultural relativism debate. Governments and scholars have denied the universality of human rights3 insisting upon a different set of ‘Asian Values’. Yet this set of Asian values is put forward by national elites on behalf of domestic populations, many of whom do not enjoy democratic participation, resulting in the marginalization of competing voices.4 The Asian state is not the community.5

4 Yash GAI, ‘Asian Perspectives on Human Rights,' in James TANG (ed.), Human Rights and International Relations in the Asia Pacific Region (Pinter, 1995), at 55.
This relativism debate cooled after the Asian financial crisis in the late 1990s and its limits were established. Yet authoritarianism and communitarian values continued to be nourished by strong assertions of sovereignty and non-intervention. ASEAN states remain reluctant to implement human rights law despite joining the international human rights community through ratification of various treaties. Some states claim that western human rights threaten sovereignty and stability, limiting their economic development policy and ability to invest.

ASEAN states, according to policy makers, traditionally hold Confucian-style values, are guided by patron-client relations and have personalized authority with dominant political parties and a strong centralized state. They argue that collectivism is the core Confucian discipline and that individual’s worth is found only in the group, and that people are content with subordination to the group, theoretically legitimizing authoritarian regimes. While this notion has been challenged by civil society groups as legitimizing authoritarian rule, some of these groups in turn remain suspicious of human rights due to their linkage with neoliberal global economic policy. This paper will not address the somewhat stale debate on Asian values except to

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5 Ibid., at 61-62.
7 Hitoshi NASU and Ben SAUL (eds), Human Rights in the Asia Pacific Region: Towards Institution Building (Routledge, 2011), at 3. It has been argued that justification for authoritarian rule now stems from the war on terror. Leema AVONIOUS and Damien KINGSBURY (eds), Human Rights in Asia: A Reassessment of the Asian Values Debate (Macmillan, 2008), at 5-6.
9 NASU and SAUL, supra note 7, at 4.
note the challenge it presents to the conceptual and legal application of human rights standards in the region.12

The ASEAN Way, 13 built upon a conservative vision of non-intervention and sovereignty, 14 prevents the enforcement of human rights law by determining human rights to be purely internal affairs. 15 ASEAN member states do not uniformly accept legal principles that elevate human rights above domestic jurisdiction. Nor do they accept that sovereignty undergoes fundamental changes in cooperation with a functioning regional human rights protection mechanism.16 ASEAN’s existence has never compromised the sovereignty of its member states. The original Bangkok Declaration maintains that ASEAN should avoid

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12 It is important to note, however, that the Asian Values debate has broadened discussion on the actual application of human rights law and has perhaps tempered the zeal in which human rights was promoted by advocates. It has fostered greater awareness of cultural dimensions and increased flexibility in developing human rights law. See: Michael FREEMAN, ‘Human Rights and Real Cultures: Towards a Dialogue on Asian Values,’ 16 Netherlands Quarterly of Human Rights 1998, at 25.

13 The term ‘ASEAN Way’ has been used to describe the development and practices of ASEAN. Despite the lack of a clear definition, the term ASEAN Way often refers to a mechanism of dispute management through the process of consensus and consultation. ASEAN norms comprise the non-use of force, regional reliance, non-interference in domestic affairs and avoidance of military alliance, while the ASEAN Way is characterized by compromise and consultation, consensus building, ambiguity, avoidance of strict reciprocity, and rejection of hard legalization. See, Amitav ACHARYA, Constructing a Security Community in Southeast Asia: ASEAN and the Problems of Regional Order, (New York: Routledge, 2001), at 47-72.

14 See the Declaration on Southeast Asia as a Zone of Peace, Freedom and Neutrality in 1971 and the Treaty of Amity and Cooperation in Southeast Asia in 1976. This idea is also revealed in the original Bangkok Declaration, which proclaimed the member states’ determination “to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their peoples.”

15 Ben SAUL, Jaqueline MOWBRAY and Irene BAGHOOMIANS, “Resistance to Regional Human Rights Cooperation in the Asia Pacific: Demythologizing Regional Exceptionalism by Learning from the Americas, Europe and Africa”, in NASU and SAUL, supra note 7, at 117.

16 For a brief introduction to these changes see, David FORSYTHE, Human Rights in International Relations 2nd ed. (Cambridge: Cambridge University Press, 2006) at 5-7.
Part one of this article outlines the development of the ASEAN regional human rights system. It examines human rights cooperation leading up to the ASEAN Charter, the process of setting up the regional human rights bodies and the preliminary results of the AICHR’s first meetings in 2010. Part two examines the development of the Inter-American and African systems. It looks at the challenges they faced as disparate developing nations in creating regional systems and examines their successes and failures. It notes the key characteristics – complaints and reporting mechanisms as well as courts – and how they evolved despite political and practical obstacles. The part goes on to chart their progress emphasizing constructive symmetries with the development of the ASEAN human rights bodies. Part three scrutinizes specific challenges resulting from regional politics in ASEAN and its persistent reluctance to accept human rights law responsibility. Part four provides recommendations and looks at the future of the regional mechanism.

Overall, this paper examines the fundamental obstacles that have long delayed a regional human rights mechanism and do not naturally conform to individual human rights values. But it notes that similar challenges were faced in Africa and the Americas, where despite regional complications, the systems have progressed over time. The ASEAN regional mechanism must confront alleged cultural

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17 In the Bangkok Declaration, the following phrase was included. “Southeast Asia share a primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development, and that they are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their peoples”. See, ASEAN Declaration [Bangkok Declaration], Bangkok, 8 August 1967 signed by the Presidium Minister for Political Affairs/ Minister for Foreign Affairs of Indonesia, the Deputy Prime Minister of Malaysia, the Secretary of Foreign Affairs of the Philippines, the Minister for Foreign Affairs of Singapore and the Minister of Foreign Affairs of Thailand.
suspicion, operational resistance and the disingenuous application of human rights in order to progress.

2. Background on ASEAN

Until recently, human rights have not featured prominently in any ASEAN activity or rhetoric. It is primarily an economic and political union protecting the national interests of its members. ASEAN was established on 8 August 1967 in Bangkok, Thailand, with the signing of the Bangkok Declaration by five founding states: Indonesia, Malaysia, Philippines, Singapore and Thailand. The organization was born in a post-colonial power vacuum and a fear of communism. Priority was afforded to economic development, attracting investment and political stability in order to dissipate support for communist insurgency. ASEAN’s history reveals the centrality of security and safeguarding elite interests.

The easing of Cold War tensions allowed ASEAN to admit its underdeveloped and communist neighbours. Successively, Brunei

18 Ibid. Human rights are not found in the text of the Bangkok Declaration of 1967. Yet the sparse two page document addressed objectives related to human rights, such as: a) to accelerate economic growth, social progress and cultural development (Second, 1.); (b) to promote regional peace and stability, the respect for justice and the rule of law and adherence to the principles of the United Nations Charter (Second, 2.); (c) to promote mutual assistance in the economic, social, cultural, technical, scientific and administrative fields (Second, 3.); and (d) to collaborate towards raising the living standards of ASEAN peoples. (Second, 5); ASEAN has also issued many official statements, including declarations and action plans, addressing similar human rights related issues. For a complete collection of these statements from 1967 to 2003 see, Carlos MEDINA et al., eds., ASEAN and Human Rights: A Compilation of ASEAN Statements on Human Rights (Philippines: Working Group for an ASEAN Human Rights Mechanism, 2003).


21 See, Alan COLLIS, Security and Southeast Asia: Domestic, Regional and Global Issues (Boulder: Lynne Rienner, 2003).
Darussalam, Viet Nam, Laos, Myanmar and Cambodia joined the association making up the current ASEAN member states. Its objectives remained to protect members’ sovereignty, to accelerate regional economic growth and to safeguard stability. Faced with a rapidly globalizing world of regional blocs, ASEAN sought to “move towards a higher plane of political and economic cooperation to secure regional peace and prosperity.”

The principles of ASEAN unity are inspired by the Charter of United Nations, emphasizing sovereignty, non-interference, and the pacific settlement of disputes. But ASEAN’s position on human rights differs slightly and was originally outlined in 1991 stating that the implementation of human rights ‘should remain within the competence and responsibility of each country,’ and it should not reduce national sovereignty. In July 1993, ASEAN met in Singapore and adapted its position on human rights to affirm the Vienna Declaration. Member states agreed that ‘ASEAN should coordinate a common approach on human rights and actively participate and contribute to the application, promotion and protection of human rights.’ This joint communiqué included a specific section devoted to ASEAN’s commitment to human rights and considered ‘the establishment of an appropriate regional mechanism on human rights.’ ASEAN did, however, reemphasize that human rights were subject to the principles

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23 Simon SHELDON, "ASEAN and Multilateralism: The Long, Bumpy Road to Community", 30.2 Contemporary Southeast Asia (2008), at 269.
24 Bangkok Declaration, supra note 17, Second.
25 Ibid, Preamble (establishing ASEAN). The ASEAN founding documents are available online ASEAN: <http://www.aseansec.org>.
27 Joint communiqué of the 24th ASEAN ministerial meeting (19-20 July 1991), Kuala Lumpur.
29 Text is available online ASEAN: <http://www.aseansec.org/politics/pramm26.htm>.
of national sovereignty, territorial integrity and non-interference. Cultural relativism was confirmed in the 1993 Bangkok Declaration, which qualified human rights which states that:

[W]hile human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.31

In practice, ASEAN has marginalized human rights law and opposed its use by foreign states, international organizations and civil society in the region.32 Li-ann Thio explains that, ‘Awakening a “rights consciousness” in ASEAN peoples was to be avoided as it might provoke claims against their governments that, ASEAN leaders felt, would impede the exercise of broad government powers required to achieve development goals.’33 Instead, ASEAN promoted regional harmony, compromise and consensus that have lead to a fraternal silence concerning human rights violations. The subsequent decade yielded little progress on human rights.

In November 2004, ASEAN adopted the Vientiane Action Plan (VAP) 34 that included provisions committing ASEAN to the establishment of a Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) by 2010.35

32 In his opening address to the Twenty-Fourth ASEAN Ministerial Meeting in 1991, for example, the Prime Minister of Malaysia noted that “when the issue of human rights is linked to trade, investment and finance, ASEAN cannot but view it as added conditionality and protectionism by other means.” Joint Communiqué of the 24th ASEAN Ministerial Meeting (July 19-20, 1991), 7, online ASEAN: <http://www.aseansec.org/politics/pramm24.htm>.
33 THIO, supra note 20, at 9.
34 Vientiane Action Plan [adopted November 30, 2004], Vientiane, Lao PDR.
ASEAN approved a blueprint for creating an ASEAN Community by 2015. In November 2007, the ASEAN leaders adopted the Charter of the Association of South East Asian Nations (ASEAN Charter). The Charter provides a legal and institutional foundation for an ASEAN Community. ASEAN had never been associated with international law and treaties. Rodolfo C. Severino, the former Secretary-General of the Association, explained that, ‘ASEAN has always been regarded as a group of sovereign nations operating on the basis of ad hoc understandings and informal procedures rather than within the framework of binding agreements arrived at through formal processes.’

The Charter is designed ‘[t]o strengthen democracy, enhance good governance and the rule of law... and to promote and protect human rights and freedoms,’ and ‘[t]o enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare, and

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37 ASEAN Charter, supra note 1.


39 ASEAN Charter, supra note 1, art. 1(7).
justice.’ 40 Article 14 of the Charter reaffirmed a commitment to human rights and established an ASEAN human rights body.41

The AICHR was subsequently established on 23 October 2009 at the ASEAN Summit in Cha-am, Thailand. 42 On 7 April 2010, ASEAN also inaugurated the ASEAN Commission on Promotion and Protection of the Rights of Women and Children (ACWC). 43 Proposals for a commission that constituted comprehensive human rights protection and reporting mechanisms44 had been denied by authoritarian ASEAN member states.45 The result is a system trusted with far fewer powers than regional systems in the Americas, Europe and Africa.46

There are three pillars of cooperation in ASEAN. The first is regional political security, the second is economic stability and the third is a loose grouping of socio-cultural concerns. The work of the AICHR comes under regional political security while the ACWC’s activities will come under the third.47 The AICHR will function cross-sectorally, mandated to engage with the security, economic stability

40 Ibid. art. 1(11).
41 Ibid. art. 14(1).
42 On 23 October 2009, the Heads of State/Government of ASEAN presided over the Inaugural Ceremony of the ASEAN Intergovernmental Commission on Human Rights (AICHR), during which they also announced the Cha-am Hua Hin Declaration on the Inauguration of the AICHR [Cha-am Declaration].
46 SAUL et al., supra note 15, at 108.
47 Sriprapha PETCHARAMEE, Comments on the New Agenda of ASEAN, First Meeting of the ASEAN University Network, Human Rights Education Network (AUN-HREN), (18-19 February 2010), Bangkok, Thailand.
and socio-cultural pillars of the ASEAN community. This promotion of human rights to the highest echelons of regional governance reflects ASEAN’s tendency to associate and balance human rights with political stability and regional security. In contrast, the ACWC will be operating as part of the socio-cultural pillar through its reporting to the ASEAN Ministers Meeting on Social Welfare and Development, the ASEAN Committee on Women and other bodies.

The ACWC, proclaimed to constitute a turning point for the region, is an intergovernmental consultative body and part of the ASEAN organisational structure, likely to compliment the AICHR. The ACWC is mandated to promote and protect women and children’s rights within the ‘different historical, political, socio-cultural, religious and economic context in the region and the balances between rights and responsibilities’ by encouraging compliance with international and regional human rights norms through ‘innovative strategies’ and raising public awareness. The ACWC can also encourage periodic review of national legislation, regulation, policy, and practices related to the rights of women and children and propose measures

48 Alistair D.B. COOK and Priyanka BHALLA, “Regional Champions. Examining the Comparative Advantages of AICHR and ACWC”, NTS Insight, issue 1 (June 2010).
49 Vietnam’s Prime Minister Nguyen Tan Dung, as the ASEAN Chair, said that the establishment of the ACWC represents the common will of the ASEAN leaders reflecting the aspirations of women and children and thus translating into reality the objectives set out in the Charter, in the VAP and the Roadmap for ASEAN Community for 2009-2015. See also: Asia Forum for Human Rights and Development (FORUM-ASIA), “ASEAN Commission on Women and Children: Difficult to Have Protection Mandate”, (16 April 2010), online FORUM-ASIA: <http://www.forum-asia.org/index.php?option=com_content&task=view&id=2522&Itemid=129>.
ACWC Terms of Reference, supra note 35, art. 4. See, Rafendi Djamin, Indonesia’s Commissioner for the Human Rights Commission said that the ACWC “will serve as a complementary body to the AICHR and will work on sectoral issues under the guidelines and standards of the AICHR”.
ACWC Terms of Reference, supra note 35, art. 2.1.
51 Ibid., art. 5.1.
52 Ibid., art. 5.2.
53 Ibid., arts. 5.3 and 5.5.
54 Ibid., art. 5.10.
their rights. The ACWC shall ‘complement, rather than duplicate, the function of international human rights committees,’ using a ‘non-confrontational and cooperative approach.’ The ACWC met for the first time in August 2010.

The AICHR Terms of Reference state that its purposes are ‘[t]o promote and protect human rights and fundamental freedoms of the peoples of ASEAN,’ and ‘[t]o uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity’. The AICHR will ‘promote human rights,’ and ‘uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments’. The AICHR Terms of Reference do not provide complaints, monitoring or reporting mechanisms despite its planned position as ‘the overarching institution responsible for the promotion and protection of human rights in ASEAN’.

The AICHR is mandated to do the following: coordinate the region’s human rights cooperation; promote ASEAN human rights instruments; promote public awareness and education programmes, conduct research and disseminate information; provide advice and capacity building in order to ratify and implement international human rights instruments and treaties; and to help develop ASEAN positions

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55 Ibid., art. 5.12.
56 Ibid., art. 3.4.
57 Ibid., art. 3.6.
58 ASEAN Secretariat, Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, (July 2009), online ASEAN: <http://www.aseansec.org/DOC-TOR-AHRB.pdf>. [AICHR Terms of Reference], arts. 10-12.
59 Ibid., arts. 1.1-1.2.
60 Ibid., arts. 1.4-1.6.
61 Ibid., art. 8.
62 AICHR Terms of Reference, supra note 58, arts. 4.2 and 4.6.
63 Ibid., art. 4.6.
64 Ibid., art. 4.3.
65 Ibid., art. 4.4 and 4.5.
on human rights.66 The AICHR can also obtain information from member states on a voluntary basis, engage with stakeholders and other institutions, conduct thematic studies and prepare reports for ASEAN ministerial meetings.67

The AICHR is a ten-member body, with one representative appointed by each ASEAN member state.68 They will serve three year renewable terms. The AICHR reports to the ASEAN Foreign Ministers and is assisted by the ASEAN Secretary-General and Secretariat. The role of Chairperson will rotate among countries chairing the ASEAN.69 The first Chairperson was Dr. Sriprapha Petcharamesree, a human rights activist and academic from Thailand. In 2011, the Chairpersonship rotated to Indonesia, and its representative Rafendi Djamin has taken over the position.

On 28 June 2011 the AICHR began to draft the ASEAN Human Rights Declaration (AHRD).70 The Drafting Group met for the first time on 1 July 2011 in Vientiane. During this meeting, they discussed the structure, topics and content of the AHRD.71 The Drafting Group should “develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various

66 Ibid., art. 4.11.
67 “AICHR Unveiled, for the Betterment of All ASEAN Peoples”, 15th ASEAN Summit, Cha-am, Thailand, Press Release (23 October 2009).
68 The AICHR is composed of representatives appointed by ASEAN Member States, namely, H.E. Pehin Datu Imam Dato Paduka Seri Ustaz Haji Awang Abdul Hamid Bakal (Brunei), H.E. Om Yentieng (Cambodia), Mr. Rafendi Djamin (Indonesia), H.E. Bounkeut Sangsomsak (Lao PDR), H.E. Datuk Muhammad Shafee Abdullah (Malaysia), H.E. Kyaw Tint Swe (Myanmar), H.E. Rosario G. Manalo (the Philippines), H.E. Richard Magnus (Singapore), Dr. Sriprapha Petcharamesree (Thailand), and H.E. Do Ngoc Son (Viet Nam), who shall serve for a term of 3 years, which may be renewable once. CVs of the representatives are available online ASEAN: <http://www.aseansec.org/22769.htm>.
69 AICHR Terms of Reference, supra note 58, art. 5.9.
Cultural Diversity and Construction of Human Rights

ASEAN conventions and other instruments dealing with human rights.”72 The first phase should incorporate human rights standards from the Universal Declaration of Human Rights, as well as other human rights instruments ASEAN members are parties to. The Drafting Group was expected to deliver the first draft of the ASEAN Declaration by December 2011; its mandate was extended once and it submitted a preliminary draft to the AICHR in January 2012. Finally, the ASEAN Declaration of Human Rights was adopted in Phnom Penh on 19 November 2012.73

3. The African and Inter-American Regional Systems

The nascent ASEAN regional human rights bodies face similar structural and political challenges as their counterparts did at the Organization of American States (OAS) and the African Union (AU). Regional comparison reveals claims about a unique ASEAN experience precluding human rights law as exaggerated.74 The development of these other regional bodies provides lessons, predicts problems and gives reasons for optimism about the ASEAN regional system.

All the regions are comprised of politically, socially and economically diverse developing states. The American and African regions had military dictatorships and human rights abuses were common in many member states. Domestic sovereignty was a key factor in the development of these systems, where it is also jealously guarded. Yet the African and American systems now have important powers to receive and investigate complaints and country reports which ASEAN has not been allowed. Both the Inter-American and

72 AICHR Terms of Reference, supra note 58, art. 4.2.
74 SAUL, et al., supra note 15, at 108.
African systems have developed courts, albeit with varying degrees of success.

Like ASEAN, the OAS was formed in the shadow of a perceived communist threat. It has since established several innovative protection mechanisms. Political change and the acceptance of human rights at the national level stimulated the development of a regional system over time. In 1995 Pasqualucci argued that despite imperfections, its innovative approaches in dealing with human rights problems made it a model for systems in Africa and Asia.

The AU, formerly the OAU, was created amidst decolonization in 1963 and, like ASEAN, was brought into existence to protect the sovereignty and territorial integrity in the region. This contrasts with the founding documents of the OAS, which addressed human rights and democracy. The OAU originally afforded little importance to

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75 States in the 10th Inter-American Conference at Caracas expressed serious concern about the solidarity for the preservation of the political integrity of the American states against communist intervention. Odeen Ishmael, Statement in the Permanent Council of the OAS during Discussions on the Inter-American Democratic Charter, OAS, June 20, 2001; OAS, The Declaration of Solidarity for the Preservation of the Political Integrity of the American States Against the Intervention of International Communism, Tenth Inter-American Conference, March 1–28, 1954.


77 Ibid., at 302.

78 The OAU was created in 1963 as a political institution to unite and consolidate the independence of African states. As a result of the Constitutive Act, adopted in 2000, coming into force, an African Union will now replace the OAU. The ACHPR will remain in force, as will its Commission, although its exact place within the Union has yet to be fully determined. For more on the origins and development of the African system see: Andrew MORAVCSIK, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,” 54 International Organization 2 (2000); Makau wa MUTUA, “The African Human Rights System in a Comparative Perspective: the Need for Urgent Reformation,” The Nairobi Law Monthly 44 (1993).
human rights in practice 79 while stressing sovereignty and non-intervention to protect violent regimes.80

A. Protection Mechanisms: State Reports, Individual Complaints and Courts

Today the Inter-American system is two-tiered: the Inter-American Commission on Human Rights 81 and the Inter-American Court of Human Rights. 82 The Commission determines the statutory requisites of admissibility. 83 The Inter-American Commission can hear individual complaints, and the petition may be submitted by either the victim or a third party after any state party declares it (Article 45).84 It allows exceptions to the exhaustion of domestic remedies for the admission of a petition.85 The Inter-American Commission, unlike the AICHR, could monitor and evaluate serious violations of human rights during the dictatorships 86 including Chile in 1973 and Argentina in

82 Ibid., art. 33.
83 Ibid., art. 48(1)(a).
84 However, the exercise of the power of the Inter-American Commission to accept petitions is not bounded by declarations of the state parties. Article 44 states "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."
85 It applies if: 1) the domestic legislation of the concerned state does not afford due process; 2) people are denied access to the remedies under domestic law or has been prevented from exhausting them, or 3) there is an unwarranted delay in rendering a final judgment. See Exceptions to the Exhaustion of Domestic Remedies, (Arts. 46(1), 46(2)(a)and 46 (2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, (August 10, 1990), Inter-American Court on Human Rights, Ser. A No.11.
All the same, the number of cases where final decisions were respected was minimal. In 1986 the African Charter on Human and Peoples' Rights created the African Commission which provided the regional system with a protective function but no real enforcement mechanism. This is not surprising because virtually no African state, with the exceptions of the Gambia, Senegal, and Botswana had democracy before the African Charter was adopted. The African Charter takes into account tradition, allowing the Commission to take into account African practices, customs and principles providing a regional expression of human rights. This includes peoples' rights and concomitant duties on individuals, for example, creating pan-African human rights identity.

Cultural relativism, in this case, has not diminished international legal standards.

Similar to the AICHR, the African Commission was mandated to promote human rights, collect documents, sponsor research on general human rights problems in Africa, organize conferences and seminars, and formulate principles to guide implementation and to interpret Charter provisions. But crucially, the Commission could receive and consider interstate, individual and group complaints alleging violations of the Charter and signatory states must submit reports on

87 PASQUALUCCI, supra note 76, at 322
92 African Charter, supra note 89, art 61.
93 SAUL et al., supra note 15, at 113.
their implementation of the Charter. Nevertheless, the number of communications brought to the Commission remains low compared to regional violations.

Despite modest beginnings, the Inter-American and African Commissions’ authority to conduct on-site visits and prepare country reports, issue press releases, and facilitate friendly settlements of human rights complaints have facilitated important gains in the promotion and protection of human rights. The Inter-American system has effectively examined governments protected by amnesties, going so far as to impede the prosecution of Heads of State. Recently, eminent individuals connected with the Inter-American system have assumed human rights policy positions within member states. The referral of cases to the Court has also had a chilling effect on human rights abuses.

The Inter-American Court, in 1979, was developed in a region characterized by authoritarian regimes, mass atrocities, and human rights violations; a region where governments routinely used torture, summary executions and enforced disappearances. By the time the Court received its first contentious cases in 1986 the landscape in the

94 The ACHPR does not exactly specify individual communications,” which, in practice, are included in the “other communications.” Rachel MURRAY, “Decisions by the African Commission on Individual Communications under the African Charter on Human and People’s Rights,” The International and Comparative Law Quarterly 46.2 (1997), at 412–34.
97 TITTEMORE, supra note 86, at 461.
98 PASQUALUCCI, supra note 76, at 301 and 353.
Americas was changing, but still included several conflict-ridden states and transitional democracies. The Inter-American Court of Human Rights can provide advisory opinions to member states of the OAS regardless of their ratification of the Convention (Article 64).100 The Court is a judicial body that issues binding decisions.101 Its judgment stipulate compensatory damages and advisory opinions might contribute to jurisprudence that enhances continuity.102

With the adoption in June 1998 of the Protocol to the African Charter establishing a Human Rights Court103 the African system became two tiered like the Inter-American one.104 The African Human Rights Court should complement the African Commission.105 However, the ‘mere addition of a court, although a significant development,’ is considered unlikely to address the structural weaknesses of the African

100 American Convention, supra note 81. Article 64 states, “The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties.” Another distinctive uniqueness of the Inter-American system is that a state party is, upon ratifying the Convention, recognizing the jurisdiction of the Court without any special agreement (Article 62.1). Article 62.1 states, “A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.”


105 The African Commission on Human and Peoples’ Rights is the supervisory organ for the implementation of the African Charter on Human and Peoples’ Rights. See, MUTUA, supra note 85, at 355.
human rights system. The exact relationship between the Court and the Commission is still being worked out.

B. Interaction with Civil Society

Both the American and the African Commissions attempt to counteract problems of access by allowing unrelated parties to complain of human rights violations on behalf of the victim. NGOs have more extensive resources than individuals and fewer security problems related to filing complaints. The Inter-American Convention stipulates the right of individual complaints and by “any nongovernmental entity legally recognized in one or more member states” of the OAS. The African Commission has expanded its mandate to include NGOs input as well. Both Commissions rely extensively on NGOs to fulfill its investigative and prosecutorial functions.

The African Commission proved to be an early disappointment to Africa’s civil society. Its plenary sessions were viewed as a mockery, concerned more with procedure than human rights practices. It was referred to as a ‘Toothless Watchdog’ and a ‘tool of governments’ meant more for appearance than safeguarding actual rights. Similarly, complaints concerning the nascent ASEAN human rights system repeatedly condemn it as a ‘paper’ or ‘toothless tiger’. Since then, civil society has begun to work with the African Commission. For example, human rights NGOs and academics spearheaded successful campaigns for an African Court on Human Rights.

106 MUTUA, supra note 89, at 345.
107 PASQUALUCCI, supra note 76, at 315-16.
108 Ibid.
110 PASQUALUCCI, supra note 76, at 317-18.
111 NWANKWO, supra note 79, at 53.
112 See: DON NANJIRA, supra note 90, Chapter 6.
Cultural Diversity and Construction of Human Rights

and Peoples’ Rights. Civil society has also been instrumental to the Commission’s highly acclaimed communications.

C. Political and Economic Challenges

Throughout their existence the Inter-American Court and the African Commission have contended with challenges to their authority, non-compliance with decisions and a shortage of political support. Politics have played a role in the elections of the judges in the Inter-American system, while several early African Commissioners were government appointees that undermined independence and impartiality. State control over the early stages of regional system development meant little opposition to state policy. This scenario has been replicated in the early stages of the ASEAN system.

The Inter-American and African systems also suffer from a lack of funding. The Inter-American Court has received meagre financial support from the OAS. The Court only functions on a part-time basis. In its first ten years, the Court issued only 12 advisory opinions and decided three joined contentious cases. The Courts lacks lawyers to

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115 See: CAVALLARO and BREWER, supra note 101, at 774; DON NANJIRA, supra note 90, at 227.
117 NWANKWO, supra note 79, at 53.
118 DON NANJIRA, supra note 90, at 228.
119 PASQUALUCCI, supra note 76, at 356-7.
120 Ibid, at 343-48. In 2000 the president of the Court implored the OAS for funding, as the budget of one million USD ‘permits the Court to function only with the minimum of resources, with a consequent deterioration in the services required for the proper operation of the Court.’ Inter-American Court of Human Rights, Informe a la Comisión de Asuntos Jurídicos y Políticos del Consejo Permanente de la Organización de los Estados Americanos (OEA) en el marco del diálogo sobre el Sistema Interamericano de Protección de los Derechos Humanos 32 (16 March 2000), online Inter-American Court of Human Rights: <http://www.corteidh.or.cr/discursos.cfm>. See also, CAVALLARO and BREWER, supra note 101, at 783-84.
process cases and conduct basic legal analysis. The Court has made one decision since the Protocol entered into force in 2004, dismissing a case against Senegal. It has no cases pending. Funding and human resources will be an ongoing issue for the ASEAN regional bodies.

The African Commission is now less reluctant to confront controversial issues and oppose sitting governments. While these communications remain non-binding, civil society ensures they are difficult for governments to ignore. Moreover, these decisions have advanced human rights jurisprudence and advocacy. With the African Court set to become functional, the steady advance of regional human rights protection is plausible.

121 Consequently, the Court relies on amicus briefs, submitted by voluntary organizations or by other states. The Court's admission of the amicus briefs is based on Article 34(1) of the its Rules of Procedure, which states “the Court may, at the request of a party or the delegates of the Commission, or proprio motu, decide to hear a witness, expert, or in any other capacity, any person whose testimony or statements seem likely to assist it in carrying out its function”. See: PASQUALUCCI, supra note 76, at 357; DON NANJIRA, supra note 90, at 228.

122 Judgment in the matter of Michelot Yogogombaye versus the Republic of Senegal, application No. 001/2008.

123 It has issued important communications on Charter issues including: cultural rights, environmental rights, food rights, health rights, housing rights, indigenous peoples’ rights, legal aid, prisoner’s rights, property rights, non-state actors, as well as progressive realization, the obligation to protect and respect human rights in general. See, for example: Malawi African Association and Others v. Mauritania, African Commission on Human and Peoples’ Rights Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000); Free Legal Assistance Group and Others v. Zaïre, Comm. No. 25/89, 47/90, 56/91, 100/93; Center on Housing Rights and Evictions (COHRE) v. Sudan, Communication 296/2005; Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorais Welfare Council v. Kenya, 276/2003.

Early efforts within the Inter-American system to ensure protection and accountability for violations of human rights were largely unsuccessful, owing to the inability or unwillingness of governments in the region to confront past or ongoing atrocities. Over the past several years, however, the work of the regional system has had discernible juridical and political impacts at the domestic level.\textsuperscript{125} Given their recent advancement, this progress in other regional systems should provide some optimism for civil society in ASEAN member states.

Evidently, regional systems do not change human rights practice in member states. In fact, it was through the growth of national democratic institutions spurred by civil society and external factors that these regional human rights mechanisms have gained relevance and begun to function. Only through domestic human rights development can a regional system become effective. These systems did not appear fully formed. They represent a slow evolution of diverse views towards consensus.

4. Challenges for the ASEAN Human Rights Bodies

By legitimizing regional human rights discourse, the creation of human rights bodies can have a positive impact. ASEAN has promoted regional cooperation by establishing non-binding, consensus-based procedures and decision making rules that encourage engagement by all member states on economic and political issues.\textsuperscript{126} This engagement is paramount for progress on human rights; it is envisioned that interaction should encourage the adoption of human rights

\textsuperscript{125} TITTEMORE, supra note 86, at 450.
It is a remarkable achievement that ASEAN states, none of which have model human rights records, will now delegate representatives to regularly meet and discuss human rights policy, previously prohibited in most inter-governmental forums.

Transforming this success into the national implementation of human rights law faces longstanding obstacles. Absolute gains of economic collaboration have forged the ASEAN identity, yet relative gains and national interests still prevail in times of domestic or regional instability. There is a strong tendency to link human rights with security policy which raises questions about the implementation of human rights law in practice. The primary concern of many ASEAN leaders has been maintaining political stability, with sovereignty and non-intervention as the basis of cooperation on regional security, trade and economic development. It remains to be seen whether human rights policy will be implemented in national law in a manner that permits domestic populations access to justice and full participation in development decision-making.

The priority placed on economic development and attracting investment coupled with the belief that human rights interfere with development policy challenge the concept of a functioning human rights body. Obstacles to legal integration and the lack of a common human rights understanding in the region further inhibits regional progress. There remains no exact definition of human rights or model of implementation agreed upon by ASEAN states. Hikmahanto Juwana explains that ASEAN states interpret human rights obligations stemming

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128 SHELDON, supra note 23, at 269.
129 NASU and SAUL, supra note 7, at 5.
130 Yet some ASEAN members have undergone remarkable transformations in attitude to sovereignty and non-intervention, for example Indonesia. Simon BUTT, “Regional Autonomy and Legal Disorder: Proliferation of Local Laws in Indonesia”, 32 Sydney Law Review (2010), at 177.
from international agreements differently. This variation means that consensus on human rights issues will not be forthcoming. The limitations examined in part two are applicable to both human rights bodies.

A. ASEAN and Human Rights

The ASEAN Way designates the domestic affairs of member states, including national regime type, economic structure, and ethnic and social class compositions, beyond the organization’s mandate. This is not unusual in itself; non-intervention is the principal norm of international law and international relations. Yet in ASEAN, it restricts the promotion of human rights to cooperation and consensus. The ASEAN Way written into the mandate of the new ASEAN human rights bodies; the respect of national sovereignty, non-interference, consensual decision making, and the need for gradual, constructive, non-confrontational cooperation are central to their functions. This renders ASEAN incapable of enforcing many human rights agreements or monitoring their domestic implementation in the short term.

The ASEAN way has prohibited intervention by ASEAN in the domestic affairs of member states. ASEAN members rarely criticize their neighbours’ internal affairs, especially on human rights issues. Rather, ASEAN members have provided political support against

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132 Interestingly, the ASEAN anthem is also entitled ‘The ASEAN Way’ and can be viewed online at: <http://www.youtube.com/watch?v=linTTWHu1YQ>

133 Bangkok Declaration, supra note 17. See also, Diane K. MAUZY, “The Human Rights and ‘Asian Values’ Debate in South East Asia: Trying to Clarify the Key Issues” (1997) 10 The Pacific Review 210, at 221.

134 AICHR Terms of Reference, supra note 58, art. 2.1.

135 Ibid., art. 6.1.

136 Ibid., arts. 2.4 and 2.5.

137 MAUZY, supra note 133, at 268.

destabilizing activities. For example, the norms of non-intervention have been long evident in ASEAN policy of engagement with Myanmar, where human rights abuses are not confronted despite sustained criticism from the international community. Conflicts in East Timor and Aceh were deemed Indonesia’s internal issues and ongoing conflicts in the South of Thailand, the south of the Philippines and Indonesia are off-limits to official human rights discourse.

Myanmar provides an example of the political stalemate concerning human rights caused by the ASEAN Way of politics. Myanmar’s persistent human rights abuses have underscored the inability and unwillingness of member states to intervene. The ASEAN way ties the hands of the organization to reign in Myanmar. ASEAN instead promotes engagement with Myanmar’s government and holds that this is the most effective way of promoting change in the country. While this may weaken ASEAN’s human rights legitimacy it must be seen within the context that places priority on regional economic development and the maintenance of domestic sovereignty.

Based on alphabetical order, Myanmar will chair ASEAN in 2016. But the country has submitted a request to chair ASEAN in 2014, swapping its schedule with Laos. Indonesia, the chair of ASEAN in 2011, is opting to examine the country’s progress in democracy, human rights and reconciliation efforts after its recent election. Myanmar’s leadership proposal has raised concerns that the country’s poor democratic and human rights records may jeopardize efforts to form an ASEAN community by 2015. Rafendi Djamin, Indonesia’s representative to the AICHR, said that nevertheless Myanmar should be given the chance to show its commitment to improving human rights

ACHARYA, supra note 13, at 58.

as it could, “encourage the country to show ASEAN and the world that it is committed to improving its national situation.” 142 He said that by participating in AICHR, Myanmar had shown its effort to improve, although the most important thing was to resolve its human rights issues.143

In international law States remains the primary human rights duty bearer. Petcharamesree explains that non-interference in domestic affairs and unconditional engagement are the primary obstacles to practical discourse at the AICHR.144 Without the ability to examine or criticize human rights related law and policy, the organization is impotent. Prof. Muntarbhorn expressed his concern that ASEAN’s preoccupation with a non-confrontational and evolutionary approach based on consensus, could lead to the condoning of egregious human rights violations such as genocide and crimes against humanity.145 Political will is required to form an effective regional system. Some member states are suspicious of any expansion of human rights law.146 Failure to address key human rights issues in the region could undermine the legitimacy of the organization. The hope that members will conform to regional norms in order not to embarrass the collective has failed in practice – the cases of Cambodia, Laos and Myanmar provide strong evidence. These states attract international opprobrium and potentially undermine the very legitimacy of ASEAN itself.


143 Ibid.

144 PETCHARAMESREE, supra note 47.


The colour coded political crisis in Thailand shook regional stability in ASEAN. During the ‘Battle of Bangkok’ in April and May of 2010, Indonesia called for ASEAN to push Thailand to settle the conflict peacefully, while Vietnam and Cambodia recommended establishing a summit to coordinate a resolution.147 The neighbour’s responses seemed politically motivated148 and indicate the organization’s preoccupation with political and economic stability over addressing the systematic human rights violations of member states. The AICHR representative from Thailand moved the AICHR forward, urging the two parties to negotiate and the AICHR to appoint a regional fact finding team to investigate human rights’ violations.149 The Thai government vetoed ASEAN initiatives and refused outside assistance as interference in its domestic affairs.

The eventual ASEAN response to Thailand was limited. At the 16th ASEAN summit held on 8th April 2010 the issue was not raised. Finally, a statement was issued by ASEAN which mentioned that ‘peace, stability and the development of Thailand are crucial for driving the region towards the target of becoming the ASEAN community in 2015.’ Expect ASEAN to condone discussion of issues that threaten economic stability, like in Thailand, but to remain silent on important underlying systematic human rights violations seen to maintain economic stability such as those in Myanmar.


148 Ibid.

ASEAN states rate economic development more highly than human rights. They insist that development is a precondition for human rights despite regional evidence, such as the experience of the Philippines, to the contrary. Economic development is seen as the primary source of political and social change despite the fact that rapid regional development has not resulted in the widespread enjoyment of human rights. Linking development aid or investment with human rights is resisted by ASEAN states, with engagement promoted as the catalyst of human rights. Yet, the sudden about face on human rights policy in ASEAN may reflect the recognition that human rights policy can legitimize and attract foreign investment and development aid.

ASEAN integration faces a high level of diversity among member states. Simon Tay argues that the European system of human rights, for example, evolved in a particular context of a much broader harmonization and integration in politics, economics, security and social policy. The ASEAN Way and regional politics renders the comparison meaningless. Legal amalgamation in ASEAN is more difficult. So far no attempt has been made to coordinate national systems beyond promoting national human rights institutions. By contrast, the Council of Europe (CoE) and the Organization of American States (OAS) began early in harmonizing regional human rights law.

ELDRIDGE, supra note 11, at 38.

Amitav ACHARYA, “Human Rights and Regional Order: ASEAN and Human Rights Management in Southeast Asia” in TANG, supra note 4, at 170-72.


MAHBUBANI, Can Asians Think?, supra note 3, at 76.


Ibid.
The absence of common standards in ASEAN is evident in women and children's rights. Only the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), both of which have weak enforcement mechanisms, enjoy universal ratification by ASEAN members. ASEAN 'governments have shown more comfort in dealing with the rights of women and children,' as they are less sensitive politically and come with less onerous legal obligations. This regional ratification seems to indicate a common legal standard and jurisdiction for the ACWC, but consensus remains elusive. Neither treaty is uniformly implemented in national legal systems. ASEAN states such as Singapore, Brunei Darussalam, Thailand, and Malaysia have entered reservations to essential provisions of the CEDAW (for example to Articles 2 and 16) or general reservations. Only one state—the Philippines—has ratified the CEDAW Option Protocol that allows for individual complaints. Human rights awareness and education on the part of women and children remains low.

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156 Convention on the Elimination of all forms of Discrimination Against Women, 18 December 1979, GA Res. 34/180, UN Doc. A/34/46 (entered into force 3 September 1981) [CEDAW]


159 LINTON, supra note 8, at 440.

160 Article 2 (Policy Measures) Singapore; Article 5(a) (Role Stereotyping and Prejudice) Malaysia; Article 7(b) (Political and Public Life) Malaysia; Article 9(2) (Nationality) Malaysia, Brunei, Singapore; Article 11 (Employment) Malaysia, Singapore; Article 16 (Marriage and Family Life) Singapore, Thailand, Malaysia.

161 Brunei Darussalam: Constitution, Islam; Malaysia: Shariah, Constitution; Singapore: Private/religious/personal laws, socio-political conditions, national legislation; Thailand: Constitution, national laws.
ASEAN states are not willing to submit to an independent supervisory body.162 The choice of the word ‘intergovernmental’ is evidence of the central role of the state in the AICHR. The ASEAN Charter was expected to modify the ASEAN way of non-interference. Initially, the drafting hinted at the possibility of inclusion of disciplinary measures against members who failed to abide by the Charter in the area of human rights. Nonetheless the AICHR was not granted investigating power. Not surprisingly, Myanmar objected to the concept of a human rights body which could interfere in its internal affairs.163 The foreign ministers agreed that no punitive measures such as suspension or sanctions would be included. Human rights policy will be tempered by national interests and regional politics.

The human rights bodies could be used to present a favorable picture of the status quo in ASEAN states. Sometimes states enter treaties to relieve the pressures from other states, from influential supranational political entities, or from their own communities.164 Ratification of human rights treaties serves as a signalling device: “States ratify human rights treaties after periods of regional crisis as a way to attract aid from the major international donors.”165 Signalling that they intend to remain democratic or even that they are moving towards human rights, it is argued, can result in substantial material benefits from the international community through development aid or other assistance.166 Giving development aid to extremely corrupted governments – for example Laos and Myanmar ranking respectively number 154 and 176 out of 178 countries in the 2010 Corruption

162  LINTON, supra note 8, at 490.
164  THIO, supra note 20, at 13-25.
166  LINTON, supra note 8, at 443.
Perception Index\textsuperscript{167} has the risk to reinforce authoritarian regimes that deny human rights despite their formal commitments.

The lack of functioning national human rights institutions, laws or enforcement mechanisms in many of the states present a further formidable task in realizing regional human rights protection. Only four of the ten ASEAN states have national human rights institutions,\textsuperscript{168} and they have taken varying positions on the most prominent human rights law issues.\textsuperscript{169} ASEAN states readily participate in human rights dialogue at the United Nations but continue to stress their development-first approach,\textsuperscript{170} and the need to balance universality and diversity.\textsuperscript{171} Several member countries do not accept international human rights law in practice, but want to avail of international relations in which human rights discourse has become more prominent. Given the fact that human rights are not guaranteed at the national level in many of ASEAN’s member states, a regional human rights body will face challenging political obstacles. For a

\begin{notes}
\item[168] The Philippines, Indonesia, Malaysia and Thailand.
\end{notes}
regional monitoring system to be effective, human rights must be understood by citizens and codified in national legal regimes.172

The UN driven trend towards universal ratification of the principal human rights treaties has resulted in little tangible regional change on the ground.173 At a minimum, there needs to be a legal infrastructure and understanding about the implications of treaty participation within the legislature, judiciary, executive, and by the ordinary citizens in member states.174 Do many states that ratify human rights treaties have any intention of meeting their commitments? What motivates states to take on such heavy legally binding obligations? Have they genuinely embraced the value system that underpins the human rights paradigm, or are these just hollow self-interest driven gestures?175 It is unclear if the ASEAN human rights bodies will constitute surface initiatives with little achievements of substance, or reflect a genuine movement towards human rights standards in the region with practical and measurable enforcement.

B. Limited Mandate: No Protection Mechanisms

The protective mandate outlined in the AICHR Terms of Reference is limited to an advisory and recommendation function.176 The Commission will not prepare country reports, which considerably limit its power. The AICHR will be a Commission “without teeth, but with

174 LINTON, supra note 8, at 442.
175 Ibid.
176 The Office of Human Rights Studies and Social Development, supra note 158, at xix.
a tongue," 177 in a region where human rights remain politically sensitive. As Termsak Chalermthalanon, the director for political and security cooperation at the ASEAN Secretariat in Jakarta, explains, “Like all other ASEAN organs or bodies the commission shall operate through consultation and consensus, with firm respect for sovereign equality of all member states...ASEAN would not have come this far if its member states wanted to bite one another with sharp teeth just to get things done their own way." 178 In practice, governments will end up monitoring their own conduct. Singapore’s Minister for Foreign Affairs, Raymond Lim, confirmed AICHR’s limited powers, cautioning that its creation required accommodation of the “history, the realities and culture of all the ten ASEAN Member States.” 179

Inter-state complaints are unlikely as members tend to be reluctant in addressing human rights violations, keeping out of each other’s domestic affairs unless it is politically advantageous. Indonesia’s representative, Rafendi Djamin, remains optimistic that such a policy would be more relaxed with the presence of the AICHR. He claims that the Commission is authorized to obtain information on human rights cases from consenting member states. Critics dismiss this notion as having no legal foundation, noting that trade and security matters within the region are higher priorities. 180

Individual and group complaints mechanisms are the cornerstone of the other regional human rights systems in Europe, Africa and the Americas. The only possibility for discussing ASEAN human rights violations is through thematic discussions. The process of deciding on themes is unclear. The first two chosen are migration and

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177 DURBACH et al., supra note 113, at 211.
178 “AICHR: ASEAN’s journey to human rights”, The Jakarta Post (1 November 2010).
180 The Jakarta Post, supra note 131.
corporate social responsibility. The results of these studies will be a set of non-binding recommendations that will not oblige further action.181

The mandate of ACWC has not been fully determined.182 Forum-Asia, an umbrella organisation for regional rights groups, explains that the Commission’s terms of reference infer the promotion of rights over a protection mandate.183 Nevertheless, the ACWC is expected to establish, in the next three years, a children’s and women’s rights monitoring system in Southeast Asia that ‘will deal with sensitive issues relating to children and women’.184

Budgetary concerns will limit the effectiveness of the human rights bodies in ASEAN. The AICHR has a limited budget, no secretariat, no permanent office and no paid employees.185 It is currently using seed money for operational funding: US$20,000 per country.186 The commission is based at the ASEAN Secretariat in Jakarta, with ‘only a table or two’ to do its work.187 It may take some time before the commissioners get their own office with a meeting room, a library, a research center and staff.188

The AICHR’s members are generally not independent from their governments. The Commission is composed of officials chosen by and accountable to member states. Eight of the ten representatives are ‘His Excellencies’.189 Three members were from the High-Level Panel that

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182 The Jakarta Post, supra note 43.
183 CRIN, supra note 49.
184 The Jakarta Post, supra note 43.
185 PETCHARAMESREE, supra note 47.
186 “We Will Engage Civil Society Groups”, The Jakarta Post (1 November 2010).
187 The Jakarta Post, supra note 178.
188 Ibid.
189 H.E. Pehin Datu Imam Dato Paduka Seri Ustaz Haji Awang Abdul Hamid Bakal (Brunei), H.E. Om Yentieng (Cambodia), H.E. Bounkeu Sangsomsak (Lao PDR), H.E. Datuk Muhammad Shafee Abdullah (Malaysia), H.E. Kyaw Tint Swe (Myanmar).
drafted the AICHR’s Terms of Reference.190 Only representatives from Indonesia and Thailand have human rights advocacy experience. Rafendi Djamin notes that diversity will create conflicts of interest between their role as activists and government representatives.191 The ACWC’s Terms of Reference call for a transparent, open, participatory, and inclusive selection process. 192 A composition that requires representatives from all states and includes appointments by recalcitrant governments may affect the credibility of the AICHR. 193 Theoretically this process allows for more specific accountability than does the present selection process of AICHR. 194

The ASEAN Charter resolves to put people at the center of the regional community-building project in its preamble and first article. 195 Civil society charges that ASEAN is ‘more into rhetoric than real action’.196 Human rights discourse may have been legitimized at the regional level, but it is important to distinguish between norm-recognition and norm-compliance. ASEAN member states’ human rights treaty compliance records are a case in point. ASEAN contains a number of ‘champions of ratification’ who accede to human rights standards but do not implement them at the national level.197 It is this

H.E. Rosario G. Manalo (the Philippines), H.E. Richard Magnus (Singapore), and H.E. Do Ngoc Son (Viet Nam).

190 Bangkok Post, supra note 145.
191 The Jakarta Post, supra note 186.
192 ACWC Terms of Reference, supra note 35, art. 6.4.
194 COOK and BHALLA, supra note 48.
195 ASEAN Charter, supra note 1, Preamble and art. 1.13. Article 1.13 reads: ‘To promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building’.
197 ‘Champions of Ratification’ is a phrase often invoked by Dr. Sriprapha Petcharamesree. For example, see, Sriprapha PETCHRAMESREE, First Meeting of
gap between ratification and implementation that necessitates independent regional monitoring.

For Civil Society Organizations (CSOs) ‘people-oriented’ represents an historic opportunity for ASEAN to become more transparent in its decision-making, to enable popular participation, and to address human rights issues. The problem is matching ASEAN rhetoric with real action. 198 ASEAN has been traditionally viewed as antithetical to civil society participation and human rights. 199 The principles of the ASEAN Charter, aside from article 1, focus more on the codification of state-centrism, sovereignty, and non-interference. 200

A lack of participation by CSOs prevailed during the establishment of the ASEAN human rights bodies. Despite CSO consultation by the High Level Panel on several occasions, the development of the Terms of Reference was secretive. The authoritarian governments of Laos, Myanmar and Vietnam obstinately refused to legitimize the role of CSOs in decision-making. 201 The drafting process of the ACWC Terms of Reference that included CSOs and members of the Working Group in Bangkok was more transparent, but not all states allowed for CSO participation. 202 For example, CSOs from Lao PDR did not participate in the meeting. 203

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198 MEDINA, supra note 18.
200 Ibid., at 326.
201 For a discussion on the ACWC and Laos, see: Irene PIETROPAOLI, “Challenges for ASEAN Human Rights Mechanisms: The Case of Lao PDR from a Gender Perspective” in NASU and SAUL, supra note 7.
202 Dialogue with Civil Society Organisations in the Drafting of the Terms of Reference for the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, Bangkok (18-19 August 2009).
203 PIETROPAOLI, supra note 201.
The 2007 ASEAN Charter makes no provision for an institutionalized role for civil society. The Solidarity for Asian Peoples’ Advocacy describes the ASEAN Charter as, “a document that falls short of what is needed to establish a ‘people-centred’ and ‘people-empowered’ ASEAN.” 204 Most civil society participation and ‘any broader accountability of ASEAN governments remains largely window dressing,’ according to Kim Hyung Jong, of the Department of South East Asian Studies at the University of Malaya.205

The AICHR convened its First Meeting from 28 March to 1 April 2010 during which the Representatives discussed its rules of procedure and effective operations as the overarching human rights institution in ASEAN. The Meeting also discussed the development of the Five-Year Work Plan.206 But the results in Jakarta disappointed civil society. The AICHR rejected meeting requests from CSOs and national human rights institutions citing a lack of agreement on rules of procedure. It also turned down the human rights violations cases submitted by civil society organizations as beyond its mandate. Members Vietnam, Laos and Myanmar, long-time targets of human rights groups, were believed to be behind the decision not to meet with civil society representatives.207

The limited mandate of the AICHR in dealing with civil society resulted in the process being described as ‘deplorable’ in local


206 Press Statement by the Chair of the ASEAN Intergovernmental Commission on Human Rights on the First Meeting of the ASEAN Intergovernmental Commission on Human Rights, ASEAN Secretariat (1 April 2010).

207 Jakarta Globe, supra note 181.
mainstream media. This was not a good start for the AICHR and the new ‘people centred’ ASEAN. Yap Swee Seng, the co-convenor of the Solidarity for Asian Peoples’ Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), a coalition of more than 70 non-governmental organizations in Southeast Asia, and the Executive Director of Asian Forum for Human Rights and Development argues that:

As representative of a human rights institution, the refusal to meet with civil society is in itself a contradiction of the spirit and principles of human rights. How can we expect this institution to promote and protect human rights in future? The AICHR must take an inclusive and participatory approach especially at these early stages that would determine how the body will operate.”

SAPA TFAHR submitted a civil society proposal on rules of procedure for the AICHR in dealing with civil society. The AICHR discussed this proposal with the view to adopting rules of procedure at their second meeting in Danang, Vietnam, in June and July of 2010. Tasked with defining a five year work plan, conducting thematic studies and delimiting the terms of procedure for dealing with civil society, the AICHR’s second meeting confirmed the stalemate among its members as no tangible progress was made and the regular

208 “Is ASEAN Biting off More than It Can Chew?” The Nation, Thailand (5 April 2010).
obstructing states blocked action on civil society. National interests and a limited understanding of the role of a free and active civil society present daunting obstacles.

Despite these obstacles to participation, the AICHR is a progressive step in a region characterized by centralized or authoritarian policy making. The AICHR is empowered to undertake a dialogue with civil society and other human rights institutions, providing for broader engagement.211 In particular, the Working Group for an ASEAN Human Rights Mechanism has played an important role in the process and is a go-between for civil societies and ASEAN.212 Tan Hsien-Li, a member of the Working Group recognizes, “it was largely through the Working Group’s consistent effort and patience that ASEAN officials were gradually put at ease with the idea of regional human rights.’213 Promoting a less adversarial form for the ASEAN human rights body has allowed for more interaction and influence.214

5. What Next for the ASEAN Human Rights Mechanisms?

ASEAN lacks a common position on human rights and several member states are persistent violators. Relations between ASEAN members are often characterized by mistrust, with reciprocity making states unwilling to address their neighbour’s human rights violations. Historical animosities and competition over resources also create distrust and narrow the scope of cooperation.215 The result is a weak mandate unable to directly address human rights violations either through reporting or complaints mechanisms. The human rights bodies

211 Bangkok Post, supra note 145.
213 Ibid.
214 Ibid.
215 SAUL et al., supra note 15, at 124.
are largely politicized and have insufficient civil society participation. Yet this was the norm for burgeoning regional political systems as the discussion of the African and Inter-American regional systems reveals.

Civil Society will play a key role and has catalyst functions at the national and regional levels. Despite concerns over the state-centric structure of the regional mechanism, civil society organizations are cautiously optimistic about the potential of a regional body. The effectiveness of regional systems reflects the involvement of civil society. According to Tsein-Li, civil society has been the driving force behind the creation of the AICHR and that combined with slow democratization, this has created more amicable conditions for human rights dialogue in the region.

NGOs must continue to push and engage with the regional system in order to enhance its mandate. The AICHR and ACWC are empowered to undertake dialogues with civil society providing room for broad discourse. NGOs have declared their willingness to take up this role. They consider their interaction with the regional mechanisms as test cases for the legitimacy of a people-centred ASEAN. The AICHR and ACWC should immediately seek a partnership with CSOs and favourable rules of procedure to include civil society. Their current TORs are for five years only and must be renewed providing ample opportunity for regional and national CSOs to lobby for their expansion.

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217 TAN, supra note 212, at 130-31.

218 TAN, supra note 141, at 8.

219 On the Role of the Working Group for an ASEAN Human Rights Mechanism as an example of civil society interaction see: TAN, supra note 212.

220 MUNTARBHORN, supra note 35.

221 Results of the Workshop with Civil Society Organizations on Indigenous Peoples and ASEAN (9-10 July 2010), Bangkok, Thailand, on file with author.
Civil society should push for the inclusion of an individual and group complaints mechanism as well as a state reporting. The creation of a regional system is seen as an evolving mechanism and civil society organizations have indicated they will advocate for a greater mandate for the AICHR.222 This will require what Hsein-Li Tan calls ‘persistent engagement and insistent persuasion’ towards getting an effective Commission, Court and increased ties to human rights treaties223 and involves a ‘steady and persistent effort in engaging and encouraging ASEAN officials to undertake the regional institutionalisation of human rights.’ 224 This means a ‘step by step’ approach to advocacy taking into account the slow acceptance of responsibility by ASEAN states.225 The formation of the AICHR is seen only as a first step and the AICHR will have to use this support to push the limits of its mandate.

Progress has been limited for the regional bodies in the first year. They have not been particularly effective in promoting or protecting human rights and have made no comment on long-standing human rights violations in the region.226 The regional bodies must act creatively to make the most of their mandates. The AICHR must complete its aims to take stock of existing human rights mechanisms and build networks of human rights organizations.227 While many in civil society view these as lukewarm initiatives,228 they are of great importance in a region where human rights are becoming part of governance and culture.229 There is very little regional information available despite the work of national and international human rights

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222 TAN, supra note 212, at 139.
223 Ibid., at 141-42.
224 TAN, supra note 141, at 8.
225 Ibid., at 9.
226 Ibid., at 161.
227 PETCHARAMESREE, supra note 47.
229 TAN, supra note 141, at 157-58.
institutions and CSOs. This best practice needs to be consolidated and disseminated broadly within the region.

Even this limited first step will prove difficult as few government officials are aware of human rights law or interested in training. Petcharamesree notes that this ‘could be a hindrance if we cannot find any common ground as ASEAN requires consensus,’ adding that commitment to human rights values is the key.230 Many members did not understand that human rights law protects people, not states, and that human rights are not purely domestic affairs.231 The strengths and weaknesses of other regional systems need to be explained to ASEAN. Perhaps its members would not be so fearful of regional standards if they realize that these come with relatively weak enforcement mechanisms and usually provide for a wide margin of appreciation to member state interests.

Human rights education must be at the forefront of both civil society and the AICHR’s work. Human rights awareness must be raised from within the culture of South East Asian people, which is a long-term process. Unlike in the results-based western style of management and analysis, often the process is just as important in South East Asia. The development of a regional system can reflect the consciousness of its people. Perhaps here the importance is in the journey as well as the destination. Despite the weakness of this regional mechanism, Tan explains that the process of increasing and improving human rights is as important as the goal of a functioning system.232

The AICHR’s activities will likely reflect the interests of that state holding the chairpersonship. The AICHR will be active when chaired by Indonesia, the Philippines and Thailand, and less so in the years when

231 PETCHARAMESREE, supra note 41.
232 TAN, supra note 141, at 9.
other members chair. Myanmar’s turn will garner much attention from media and NGOs. Both the first and second meetings were characterized by deadlock as states put national interests before human rights.

The AICHR will also draft the Declaration and conduct thematic studies. Indonesia has indicated it will draft a human rights declaration when chairing ASEAN in 2011. Todung Mulya Lubis argues that only Thailand, Philippines and Indonesia are ready and willing to work with a binding regional charter and that the result will be an inadequate compromise. At the same time, the Indonesian National Commission on Human Rights deputy chairman Ridha Saleh expressed concern that it would not be legally binding on member states. It is a priority for ASEAN countries to find consensus on a regional human rights Declaration with standards not less than international ones outlining obligations.

The AICHR drafting committee must try to get as much international law into the treaty as possible even if the international standards are not ratified by every member state. A Declaration is a first step towards a convention that is vital for ensuring that the AICHR becomes part of the legal governance framework and that human rights are included in the regional rule of law. Creating regional human rights law should be a core principle of the AICHRs future activities. Drafting a regional instrument allowed the African Commission to create a body of law reflecting the region’s unique view of human rights. This might be a valuable lesson to ASEAN states that seek to preserve distinctiveness by incorporating regional characteristics such as community and development rights.

233 TAN, supra note 212, at 131.
234 The Jakarta Post, supra note 131.
235 Ibid.
236 Ibid.
237 Working Group for an ASEAN Human Rights Mechanism, supra note 18.
238 TAN, supra note 141, at 248.
The AICHR must make the most of its thematic studies to increase awareness and challenges political opposition. The first studies on migrant workers and corporate social responsibility could address important and sensitive regional human rights topics, raise awareness and have a political impact. Future thematic reports could deal with even more pressing issues directly related to regional human rights violations such as corruption, minority rights, disability rights and participatory democracy. There is room to take bold steps as ASEAN cannot go back now. Lessons from other regional systems indicate that once a human rights body is formed it cannot be repealed and that civil society will press for its gradual expansion. The thematic reports offer unique opportunities to work with CSOs and NHRIs in order to highlight regional human rights problems.

Part of the mandate of the AICHR is to facilitate the ratification of international standards and this should be a priority. While some ASEAN states have signed the core treaties, their implementation remains abysmal. The regional bodies have to monitor implementation, provide guidance on best practice and draw attention to failures. The AICHR must work with CSOs and NHRIs towards their implementation in domestic law. In turn, the AICHR should ensure that NHRIs operate in accordance with international standards such as the Paris Principles.239 Regional protection hinges on domestic implementation. This partnership should push for the creation of national human rights commissions and ensure that the new human rights bodies are meaningful institutions and do not legitimize the status quo in ASEAN.240 The ultimate goal should be removing human rights from the list of subjects states can negotiate on rendering them inalienable.

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It would be useful to clarify the mandates and cooperative methods of the AICHR and the ACWC in order to reduce overlap while increasing scope and use of resources. Despite the differences between their mandates, both commissions could work together. AICHR Commissioner, Rafendi Djamin mentioned that since AICHR is mandated to provide technical advice on human rights to all ASEAN sectoral bodies, it can help ACWC in mainstreaming important women’s and children’s issues under both the political-security and economic pillars of ASEAN. The ACWC, in turn, can aid AICHR in providing specialised technical expertise on women’s and children’s protection issues in the region.241 The ACWC’s mandate includes monitoring relevant international human rights law treaties242 which provides a valuable asset to the regional system but very little information is available about its potential role. The organizations have struggled to work together thus far.243

ASEAN faces diffuse political pressures while attempting to balance their internal and external politics of human rights. While internally ASEAN states historically hold fast to sovereignty and non-intervention, burgeoning civil society groups demand democratization and human rights law. Externally, ASEAN states are increasingly obliged to cooperate with human rights organizations as part of international relations. But by engaging with international human rights mechanisms, and forming a regional system, states erode their autonomy over domestic policy as far as it may conflict with human rights law. Insistence on non-intervention therefore becomes problematic. Many states would prefer to garner the international reputation, and attract more investment, that accompanies human rights rhetoric without sacrificing immunity from external scrutiny.

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241 Ibid.
242 ACWC Terms of Reference, supra note 35, arts. 2(5), 3(2), 3(4) and 5(11).
243 TAN, supra note 141, at 162.
ASEAN member state governments must choose between a legitimate regional attempt to promote, protect and fulfil human rights law or attempting to legitimize the status quo and promoting economic growth alone. The cautious necessity of the ASEAN way is understandable politically and economically. Remarkable statesmanship has been required in overcoming them. Severino has argued that, “By not forcing its incredibly diverse and mutually suspicious members into legally binding standards, ASEAN has done the remarkable job of moving its members from animosity to the close cooperative relationship that they enjoy today, a relationship in which violent conflict is all but unthinkable.”

Despite this achievement, the ASEAN Way of non-interference is not compatible with the enforcement of human rights law because regional monitoring entails interference in domestic affairs. Human rights law governs the relationship between the state and its citizens. In order for a regional body to protect and promote human rights law, this relationship must be scrutinized, eroding the principle of non-intervention. Now that ASEAN has begun to address regional human rights, it must confront inconsistent legal systems, political systems and law enforcement/security mechanisms. Dealing with human rights at the regional level will require eventual standardization in conformity with international law. The ASEAN way must be reformed to foster integration. The ASEAN way not only hampers human rights, it fetters free trade and fosters drug and human trafficking, refugee flows and trans-national crime. This reform will be very difficult as the ASEAN way is now codified in the ASEAN Charter.

The governments of ASEAN must come to terms with the desires of the people for basic human rights and link them with development.

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244 SEVERINO, supra note 38.
and economic and political stability. Given the regional emphasis on sovereignty, ASEAN states will not accept anything against their will. Appeals to realist political and economic objectives may be more effective in encouraging human rights implementation.

There is increasing tension between civil society, the general population and the government in a number of ASEAN states. Political instability can be the result when populations feel that their human rights are systematically stifled by unjust governance. Advances in human rights are inevitable as eventually people will take what they believe to be theirs. Large-scale protests have been seen recently in Malaysia and Thailand while in the other states it simmers below the surface. There is a need to address the democratization process in Laos, Cambodia, Myanmar and Vietnam. Given the events of the 2011 Arab spring, it is vital that ASEAN states realize stability means including domestic populations in a ‘people centred’ governance system taking into account their human rights. Democratizing states could look to the best regional practices to avoid their own revolutions while more advanced ASEAN states can look to international practice to improve their records while promoting economic stability and continued economic growth.

What is certain is that once human rights law gets a foot in the door, it is very difficult to close that door again. A cursory glance at the development of regional and international human rights protection mechanisms indicates that they increasingly encroach on domestic sovereignty by empowering individuals and groups within societies. The development of human rights protection mechanisms at the regional level.

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and national levels can ‘take on a life of their own.’ 247 Yet ASEAN is set to increase cooperation with neighbouring superpower China, a state that does not place a high priority on the human rights record of its trading partners. Based on this increasing cooperation with China, the ASEAN way of non-interference seems bound to continue and likely to be strengthened. 248 It is likely that human rights will remain outside of vital trade and investment negotiations in near the future. This might be a big mistake on the part of regional governments.

6. Conclusion

The improved dialogue on human rights in South East Asia is clear, but so are the challenges that face regional application of human rights norms. South East Asia suffers from widespread human rights violations. With the admission of Vietnam, Laos, Myanmar, and Cambodia, ASEAN’s political diversity increased, making it more difficult for all ten Member States to agree on how to cooperate on human rights. 249 The wide variety of economic and political systems – ranging from military dictatorship to planned economies to emerging democracies – further complicates cooperation on all matters, especially concerning the still sensitive issue of human rights. ASEAN’s inadequate response has encouraged doubts about the organization’s ability to influence regional human rights matters.

There is a relatively narrow scope of cooperation in ASEAN compared to other regions and this limits the degree of mutual confidence necessary to cooperate on human rights. External human rights scrutiny is required but it can rapidly erode diplomatic relations in ASEAN, where criticism is taken personally by leaders 250 and stokes historical animosities between populations. Enforcement of human rights law

247 NASU and SAUL, supra note 7, at 6.
248 HYUNG JONG, supra note 205 at 26.
249 For an in depth analysis of the first 30 years of ASEAN and human rights see: THIO, supra note 20.
250 TANG, supra note 4, at 186-87.
requires increased cooperation in trade, diplomacy and migration. Improved regional social relations, democratization and legal collaboration are all important for regional protection of human rights. While the ASEAN mechanism is an important first step, it ‘falls short of both international guidelines for regional human rights mechanisms as well as best practice in other regions.’

Human rights are at an important junction in South East Asia. There is strong civil society pressure building in states that permit it and being suppressed in the others. ASEAN member states are now more open to human rights discourse than ever before. No longer can human rights be excluded from ASEAN regional activities as is reflected by the evolution of its nascent human rights bodies. This constitutes a rapid political change that has yet to be reflected in practice. To do so, ASEAN human rights bodies will have to overcome their structural weaknesses, political dependence and separation from civil society to challenge the ASEAN Way of political engagement and promote a human rights culture among diverse states. While their mandates remain substantively more focussed on promotion than protection of human rights, this should not close the door to creative ways of covering human rights protection more proactively. 252

As late as 2002 the activist and scholar Uprenda Baxi dismissed ASEAN as a regional trade instrument serving as an “antibody” to the “epidemic” of human rights.253 In doing so, he explained, “These regimes regard all human rights as irritating impositions, insofar as these retard global capital’s mission to create conditions and circumstances of ‘development’, only within which human rights may envision their practical and foreseeable future.”254 The ASEAN Charter, by contrast,

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251 SAUL et al., supra note 15.
252 “What is not prohibited in the ToR is not forbidden”, MUNTARBHORN, supra note 35.
253 BAXI, supra note 2, at 10.
254 Ibid.
contains some powerful language that promises some dramatic policy changes applicable to a number of ASEAN’s more recalcitrant members. Whether ASEAN’s position on the promotion and protection of human rights has evolved significantly since Baxi’s damning analysis remains to be seen.

Protection of Vulnerable People
Race, Religion and Human Rights Struggle for Protection of Vulnerable People

Kamran Hashemi*

Abstract

Discrimination and xenophobia are threats to peace, and in many occasions have led to armed conflicts. Similarly the former UN Special Rapporteur on Racism, Doudou Diène finds racism and xenophobia, rather than terrorism, as “the most serious threats to democracy”. On the other hand, international struggle against non-discrimination, fascism and xenophobia, along with protection of minorities, has been concentrated on the racial and national aspects of vulnerable people, rather than the religious ones. This policy seems no more adequate when as Abdelfattah Amor, the former UN Special Rapporteur on religious intolerance states “there are borderline cases where racial and religious distinctions are far from clear-cut.

The main argument of the paper will be on the similar purpose of race oriented human rights instruments such as CERD Convention, Apartheid Convention and Genocide Convention on the one hand, and religion oriented instruments, such as the Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief, on the other. The research suggests that while the main purpose of these instruments are to protect all vulnerable people, including some people on the grounds of race or ethnicity and excluding others on ground of religion

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is not in line with the purpose of these instruments, and itself is discriminatory.

To protect security and peace and , and in this line to address the shortcoming of legal bases of combating xenophobia and to include all ‘others’ under the protection of anti-discrimination, anti-racism and anti-xenophobia struggle, the paper suggests exploring the concept of ethnoreligiosity to be replaced, when appropriate, with merely ethnic (racial) or religion element.

1. Introduction

The UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, finds racism and xenophobia, rather than terrorism, as “the most serious threats to democracy”. 1 Similarly Diène refers to “the centrality of the amalgamation of the factors of race, culture and religion in the post-9/11 ideological atmosphere of intolerance and polarization.” 2 According to him this atmosphere “favors the incitement to racial and religious hatred… [and] is indicated by the latest controversies about the caricatures of the Prophet Muhammad published by the Jyllands-Posten newspaper in Denmark.” 3

On the other hand, international struggle against non-discrimination, fascism and xenophobia, along with protection of minorities, has been concentrated on the racial and national aspects of vulnerable people, rather than the religious ones. This policy seems no more adequate when the main conflicting element of so-called clash of civilizations is religions. Europe, particularly has another specific concern, which is the increasing number of Muslims in the continent.

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2 Ibid.
3 Ibid.
Furthermore, “there are borderline cases where racial and religious distinctions are far from clear-cut” 4

By examining the status of two elements of race and religion in the core human rights instruments, the main argument of the paper will be on the similar purpose of race oriented human rights instruments such as CERD Convention, Apartheid Convention and Genocide Convention on the one hand, and religion oriented instruments, such as the Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief, on the other, when the issue of protection of the vulnerable is concerned. The research suggests that whenever the purpose of the above mentioned instruments is to protect all vulnerable people, including some people on the grounds of race or ethnicity and excluding others on ground of religion, it is not in line with the purpose of these instruments, and itself is discriminatory.

There are however some other human rights areas which are specific to the element of religion. ‘Religion’ unlike ‘race’, is itself a subject of rights which are known as ‘religious rights’. Furthermore for some states limitations on human rights might be linked to religion when the issues of public order, moral values and rights of others are concerned.

To support the argument, another comparison can be made between the purpose of limiting clauses in Articles 19(2) of the International Covenant on Civil and Political Rights (ICCPR) 5 and 10(2)

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of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (the ECHR)\textsuperscript{6} on the one hand, and Article s 20(2) of the ICCPR and 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)\textsuperscript{7}, on the other hand. While the purposes of the limitation clauses of the former articles are such matters as public policy or rights of others, the main purpose of the latter articles are protection of vulnerable ‘others’, which is similar to the purpose of all international and regional instruments on protection of vulnerable, for which affirmative measures have to be undertaken.

Finally, to protect security and peace worldwide, and in this line to address the shortcoming of legal bases of combating xenophobia, and to include all ‘others’ under the protection umbrella of anti-discrimination, anti-racism and anti-xenophobia struggle, the paper suggests exploring the concept of ethnoreligiousity to be replaced in the related human rights instruments, with merely ethnic (racial) or religion element.

2. Race, Religion and the Issue of Discrimination

Article 55(c) of the Charter of the United Nations\textsuperscript{8} commits all states to promote “universal respect for, and observance of human rights and fundamental freedoms for all, without discrimination as to race, sex, language or religion.” By the same token, the Universal Declaration of

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Human Rights (UDHR)9 reiterates this fundamental principle in Article 2: “Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Similarly all states are committed under Articles 2(1), 24 and 26 the International Covenant on Civil and Political Rights (ICCPR) 10, Articles 2(2) and 7(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 11 to non-discrimination policies towards all persons on their territory and subject to their jurisdiction on grounds such as race, color, sex, language and religion.

On the other hand, among different grounds for discrimination, to compare the relevance of ‘race’ and ‘religion’ on the issue of ‘discrimination’ one can contrast the purposes of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 12 with those of the Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief (the Religion Declaration) 13. ‘Religion’ unlike ‘race’, is itself a subject of rights which are known as ‘religious rights’. Therefore, while the main

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9 Universal Declaration of Human Rights (UDHR), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). For the text of Articles 2(1) and 26 of the ICCPR see supra note.
purposes of the ICERD are prevention of ‘discrimination on ground of race’ and ‘racial intolerance’, the main purposes of the Religion Declaration are ‘prevention of discrimination on ground of religion’ and ‘religion intolerance’ along with an additional purpose which is ‘protection of religious rights’. According to Capotorti:

Even if a state maintains strict neutrality as between various faiths, inequality of treatment is not necessarily excluded. The demands of various religions are different, and a law prohibiting certain acts, or enjoining the performance of others, may prevent one religious group from performing an essential rite or from following a basic observance, but be of no importance at all to another group.14

This issue of religious rights makes a study on the relevance of discrimination to religion more complicated. This is the main reason why - while the ICERD is an almost universally accepted treaty against racial discrimination, which has been in force for more than 26 years, there is no international or regional binding instrument against religious based discrimination, apart from the non-binding Religion Declaration. This is despite the fact that the struggle against both kinds of discrimination had a common starting point in the history of the United Nations, as Ghan fire states:

The history of freedom of religion or belief and the elimination of racial discrimination were closely related in the early period. In the late 1940s and early 1950s, United Nations actions in the fields of racial and religious intolerance were not differentiated. This was only to occur after the end of the 1950s when acts of racial and religious intolerance, mainly in Europe, prompted separate and specific United Nations actions in each of these spheres. However, whilst the prohibitions of racial intolerance came to be enshrined in a

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convention as far back as 1965, the legal status of religious discrimination remains as a Declaration. 15

Considering the complexity in the concept of religious based discrimination, as mentioned before, one should make a distinction between ‘discrimination on ground of religion and beliefs’ and ‘discrimination between followers of different religions in their religious rights’ (discrimination in religious rights). When the issue of minority rights is under question, a similar distinction can be made between discrimination on the grounds of identity and discrimination in identity rights. While the former discrimination, namely discrimination on the grounds of religion or identity is contrary to one of the basic universally accepted principles of human rights, the latter, namely, discrimination on religious rights or identity rights can fall subject to different states’ policies and legitimate restrictions.

These two kinds of discrimination can also be called explicit or implicit discrimination or, as referred to by Weller, direct or indirect discrimination. 16 Also, as Krishnaswami, Special Rapporteur of the Sub commission on minorities, has called them de-jure discrimination and de-facto discrimination. Direct or de-jure discrimination can loosely be called, as Krishnaswami notes, “traditional forms of discrimination.” 17 In the majority of countries although


the law of the country, especially family law, is equally applicable to everyone, it reflects in certain important matters the concept of the predominant group. Krishnaswami, on the question of religious rights and practices, names this phenomenon the ‘de-facto pre-eminence’ of a religion:

There is no doubt that historically the principle of separation of state and religion emerged as a reaction against the privileged position of the established church or the state religion, and that its purpose was to ensure a large measure of equality to the members of various religions. Within the framework of this principle of separation, however, de-facto pre-eminence is sometimes achieved by a particular religion and the law of the country – although equally applicable to everyone – reflects in certain important matters the concept of the predominant group. Thus rules regulating marriage and its dissolution are often taken over from the religious law of the predominant group. Similarly, official holidays and days of rest in many countries correspond to a larger extent to the religious holidays and days of rest of the predominant group.18

The state, even when applying the principle of separation, may afford a special status to religious organizations, distinct from that granted to other kinds of associations. But such a status may be granted only on condition that the religious group satisfies certain special conditions – a possibility for some but not for others. By contrast a state may pass legislation with different restricting effects on different religious groups. The most controversial of this type of legislation was the ban on religious symbols which targets Muslim girls more so than others. On the relevant cases in European courts Evans states:

One issue that has caused conceptual difficulties in other jurisdictions that deal with religious freedom but has not been discussed in any detail by the Commission or Court is the interaction between neutral and generally applicable laws and freedom of religion or belief. This is

not because of a lack of cases dealing with the issue, but rather because neither the Court nor the Commission has given sophisticated consideration to such cases as a distinct group. The general and neutral law problem arises when a state passes legislation that does not on its face mention religious issues or appears to discriminate against a religious group. Sometimes this neutral appearance is deceptive and the law can either have been passed with the intention of curtailing the religious practices of a particular group or is enforced or applied in a discriminatory manner. These cases merely create the impression of laws that are general and neutral but the reality is otherwise and no particular problem arises in determining that they interfere with religion or belief. 19

Capotorti also refers to another similar concern with regard to the customs of minority groups with inferior positions in Europe:

The available information further reveals that some minority groups, in particular those which occupy an inferior position in the society in which they live, confront severe problems in their efforts to maintain their customs. The situation of the Gypsies in Europe and of the indigenous population in various countries is illustrative of that point. 20

Articles 8 and 12 of the Constitution of Malaysia refer to these two kinds of discrimination. Article 8 prohibits discrimination on the grounds of religion among others:

(1) All persons are equal before the law and entitled to the equal protection of the law.


20 Capotorti Study, supra note, p. 67.
(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.21

While Article 12 (1) is similar to Article 8 in that it reiterates the principle of non-discrimination on the grounds of religion, Article 12(2) finds it lawful for the Federation or a state to provide special supports for Muslim institutions. The Article reads as follows:

(1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth -

(a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or

(b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).

(2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a state to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose. 22

With regard to the instances of provisional measures in favor of minorities, according to General Comment 23, “as long as those


22 Ibid.
measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under Article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.”

It should be noted that this kind of different treatment or so-called ‘positive discrimination’ is justified in cases of indirect discrimination and not direct discrimination.

Finally, it should also be added that recognition of some religious groups and non-recognition of some others is an issue of discrimination in identity rights and might be justifiable. Yet, if such recognition or non-recognition leads to discrimination on the grounds of identity or even the ignoring of some fundamental rights of non-recognized minorities, it should be prohibited, as it leads to the violation of the basic principles of human rights.

3. Offences against Religion and Religious Hatred Speech

The legitimacy of limitations on freedom of expression, particularly when it overlaps with the issue of religious rights, has been a controversial issue. Article 19(1) of the ICCPR states: “Everyone shall have the right to hold opinions without interference.” According to the Human Rights Committee General Comment 10: “This is a right to which the Covenant permits no exception or restriction.” On the other hand, everyone is free to express his opinions. According to Article 19(2) of the ICCPR: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart

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information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Unlike freedom of opinion, freedom of expression is subject to responsibilities and duties and therefore subject to limitations. According to Article 19(3) of the ICCPR: “The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions.” According to the same article these limitations, however, “shall only be such as are provided for by law and are necessary: (a) For the respect of the rights or reputations of others; (b) For the protection of national security or public order (order public), or of public health or morals.”

There is a similar limitation clause for freedom of expression in Article 13(2) of American Convention on Human Rights and Article 10(2) of the European Convention on Human Rights. The limitation clause in the European Convention provides more grounds for limitations than does Article 18(2) of the ICCPR:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

25 Ibid.

It is a common policy among the majority of states to pass legislation on insulting religions and religious feelings. Some Muslim states have incorporated such restricting measures either in their Press Code and/or Penal Code. As an example from a Muslim state, Article 160(3) of the Penal Code of Algeria provides penalties for those who deface, destroy or profane any places of worship whatsoever, and Article 160(4) provides penalties for those who mutilate, destroy or defile “monuments, statues, pictures or other objects that may be used for the purposes of religious worship.” Likewise, Article 77 of the Act of 3 April 1990 on information provides penalties for anyone who, in writing, or by sounds, images, drawings or any other direct or indirect means, offends against Islam and the other celestial religions. 27

Religious related limitations against freedom of expression in some European states are found in laws against blasphemy or insulting religion.28 As an example, Austrian law reads as follows:

> Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates.29

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28 Such laws still exist in legislation of several Western countries, such as in Austria (Articles 188, 189 of the criminal code), Finland (Section 10 of Chapter 17 of the penal code), Germany (Article 166 of the criminal code), Ireland (Article 40/6.1.i of the Constitution), The Netherlands (Article 147 of the criminal code), Spain (Article 525 of the criminal code). Yet, there has been a tendency in Western countries towards the repeal or reform of blasphemy laws, and these laws are only infrequently enforced where they exist.

The following definition of blasphemous libel in the UK was given by the trial judge in the case of Whitehouse v. Lemon (The Gay News case). “Blasphemous libel is committed if there is published any writing concerning God or Christ, the Christian religion, the Bible, or some sacred subject, using words which are scurrilous, abusive or offensive and which tend to vilify the Christian religion (and therefore have a tendency to lead to a breach of the peace.) 30

While the Austrian blasphemy law criminalizes insulting against all recognized religions, in the United Kingdom, as well as in some other Western and Muslim countries, the subject of blasphemy law is only insulting the dominant religion. The European Commission has stated that the “main purpose” of the English common law offence of blasphemous libel is “to protect the rights of citizens not to be offended in their religious feelings.”31 However, the Rushdie case supported an opposite view. Members of the Muslim community in Britain referred the case of Rushdie to court in order to complain about the blasphemies in the Satanic Verses. The complaint was dismissed for the reason that the protection provided by English blasphemy law is only to the Church of England, and in some respects to Christianity as a whole.32 The European Court of Human Rights also refused the case, saying that there was no positive obligation for the UK to protect Muslims from blasphemy.33


33 The European Commission determined that the protection provided by English blasphemy law only to Christianity, was not discrimination on the grounds of
Similarly, blasphemy law in Massachusetts only addresses Christianity. Section 36 of Chapter 272 of the Massachusetts General Laws reads as follows:

Whoever wilfully blasphemes the holy name of God by denying, cursing or contumeliously reproaching God, his creation, government or final judging of the world, or by cursing or contumeliously reproaching Jesus Christ or the Holy Ghost, or by cursing or contumeliously reproaching or exposing to contempt and ridicule, the holy word of God contained in the holy scriptures shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars, and may also be bound to good behavior.34

Article 20 of the ICCPR introduces a new area for limitations against freedom of expression. It also obliges states to adopt legislative measures against such expressions. The article reads as follows: “1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

In the ECHR there is no article similar to Article 20 of the ICCPR, but Article 13(5) of American Convention on Human Rights is equivalent to it. Article 13(5) of the American Convention reads as follows: “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offences punishable by law.” However, “while Article 13(5) requires the prohibition of advocacy that constitutes incitement

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to violence, Article 20 of the ICCPR requires the much broader prohibition of advocacy that constitutes incitement to discrimination, hostility or violence.”35 Nevertheless the American Convention offers protection to a broader range of groups than Article 20, as indicated in Article 13(5), which states, “the enumerated grounds for protection are illustrative only.”

Finally it should be noted that despite the earlier drafts of the Religion Declaration, it contains no similar article to that of Article 20(2) of the ICCPR on religious hatred, as Boyle states:

Although the 1981 [Religion] Declaration couples intolerance with discrimination in its title, it is primarily concerned with the question of discrimination. Thus it has no clause equivalent to Article 4 of the ICERD Convention on incitement to religious discrimination or hatred, although in other respects it follows the structure of that treaty. The draft Convention and early drafts prepared by the Sub-commission of what became the 1981 [Religion] Declaration did have an anti-incitement clause. 36

Article 4 of the ICERD Convention reads as follows:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of


Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

The main purpose of Article 20(1) and Article 20(2) have a major purpose equivalent to Article 4 of the ICERD, which is protection of vulnerable ‘others’ to live free from fear. In this sense, it is similar to the purposes of provisions of other international and regional instruments on protection of vulnerable peoples, for which affirmative measures have to be undertaken. These purposes are different from ‘rights of others’ or ‘public order’ under Article 19(3) of the ICCPR, or other limitation clauses in international and regional instruments.

However, according to Boyle, “while this obligation [in the Article 20] should constitute an adequate international guarantee, comments made by [the Human Rights] Committee members suggest that many countries do not appear to take their obligations under Article 20 seriously.”37 In other words, those states which have not resorted to

37 Boyle, supra note, p.65.
affirmative measures against religious hatred will continue to be in breach of their international obligations under Article 20(2).

Finally, there are many more circumstances under Articles 19(3) and Article 20 of the ICCPR in which freedom of expression can be circumscribed than there are under the limitations against freedom of religion under Article 18(3) of the ICCPR. However, when freedom of religion overlaps with freedom of expression, those restrictions against the latter might encroach upon the former. In this sense, the provision of Article 20 is reiterated in the Human Rights Committee General Comment 22 on freedom of religion: “In accordance with Article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”38

4. Overlapping Areas of Elements of Race and Religion and the Concept of Aggravated Discrimination

There are wide overlapping areas between different types of identities. For instance, with regard to ‘religious identity’, where the example of Islam is concerned, this identity sometimes is combined or attached to ‘ethnicity’. According to Article 160(2) of the Constitution of Malaysia, “‘Malay’ means a person who professes the religion of Islam, habitually speaks the Malay language, and conforms to Malay custom . . . .”39 Also, in most Muslim countries, similar to non-Muslim countries, religion is considered a part of the national identity and/or cultural identity.

In Egypt “Makram Ebeid, a Coptic nationalist leader in the interwar years, liked to say that ‘Christianity is my religion, but Islam is

38 General Comment No. 22, supra note, para.7.
Protection of Vulnerable People

my culture.’” 40 However, unlike the Christian Copts in Egypt or in the north of Sudan, Christians in the south of Sudan have been in a minority-majority or south-north conflict with Muslims over previous decades that is in fact a conflict between different identities, as Ronen concludes:

[It is] essentially a struggle between two starkly different societies to define the state’s identity and, as far as the south is concerned, to maintain its own in the face of the rising tide of Islam . . . It could be defined as a struggle between Africanism and Arabism . . . . Nevertheless, the religious components of identity [are] central to both.41

Similarly it is not clear whether European Jews are a religious or an ethnic minority, or incorporate elements of both. In a similar vein, it has been an issue of political and legal struggle by Muslim minorities in the United Kingdom that ‘the Race Relations Act’ of 1976, affords protection just to Jews and Sikhs as ethnic groups, but not to members of other religions.42 The same overlap exists for Bosnians, where the International Criminal Tribunal for the Former Yugoslavia has been perplexed about how to define the victims of the Serb ‘genocide’: ‘Muslims’, ‘Bosnian Muslims’, etc.43


41 Yehudit Ronen, ‘Religion and Conflict in Sudan: A Non-Muslim Minority in a Muslim State’, in Orfa Bengio & Gabriel Ben-Dor (eds.) Minorities and the State in the Arab World (Lynne Rienner Publishers, USA, UK, 1999), p.85.


It is worth mentioning that a comprehensive study on the issue has been presented in 2000 by Abdelfattah Amor, the former UN Special Rapporteur on religious intolerance, to a world conference against racism, racial discrimination, xenophobia and related intolerance at Geneva. The report which introduces the concept of aggravated discrimination states that

There are borderline cases where racial and religious distinctions are far from clear-cut. Apart from any discrimination, the identity of many minorities, or even large groups of people, is defined by both racial and religious aspects. Hence, many instances of discrimination are aggravated by the effects of multiple identities.44

5. Race, Religion and Human Rights Struggle for Protection of Vulnerable People

International struggle for protection of minorities has had two main approaches. The first and the older one is security approach for protection of security of minorities and their right to life. This approach is based predominantly on reciprocity of states. This is evident in the phenomenon amongst European (and some non-European) states of recognition of minorities based on bilateral or multilateral treaties. For example, at the end of the First World War based upon the peace treaties of Versailles, Saint German, Trianon and Neuilly, five special treaties of minority protection were concluded between Poland,
Czechoslovakia, Romania, Yugoslavia and Greece respectively, on the one hand, and the allied and associated powers on the other. Very similar provisions were directly included in the peace treaties of Saint German (with Austria), Trianon (with Hungary), Neuilly (with Bulgaria) and Lausanne (with Turkey). Between 1919 and 1940, sixteen countries undertook international obligations on the protection of minorities. 45

Similarly, after the Second World War, in the agreement between Austria and Italy in Paris, September 1946, ‘German-speaking inhabitants’ of the Bolzano province and of neighbouring bilingual townships were granted a number of rights. In addition, a special autonomy, comprising legislative and administrative powers, was provided for the province of Bolzano, where German-speaking citizens constituted the majority of the population. Also the Memorandum of Understanding between the government of Italy, the UK, the US and Yugoslavia, in London 1954, regarding the free territory of Trieste was signed to safeguard the ‘Yugoslav ethnic group’ in the Italian-administrated area and the ‘Italian ethnic group’ in the Yugoslav-administrated area.46

The second and recent approach is the human rights approach and its main focus is on the issue of non-discrimination and the rights of minorities to identity. However, there is no doubt that without providing


46 For similar treaties see for example agreement between India and Pakistan, New Delhi, 8 April 1950; the Austrian State Treaty for the Re-establishment of the Independent and Democratic Austria, Vienna, 15 May 1955; Agreement between the UK and Singapore, London, March-April 1957; Memorandum for the final settlement of the problem of Cyprus, London, Feb. 1959; Unilateral Declarations of Germany and Denmark of 1955 on German and Danish minorities; The Government Declarations of France and Algeria on protection of Algerians of French civil status, 19 May 1962, Algeria. See Capotorti Study, supra note, pp.12-13.
for the minorities the right to live free from fear, their right to non-discrimination and identity is meaningless. On the other hand, in the time of so-called clash of civilizations, and particularly in the critical situations for Muslim minorities in the aftermath of the September 11, the international community should again have more focus on protecting the security of minorities and more concerned about the element of religion in its struggle.

One of the reports of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène on Danish Cartoons elaborates more on one of the most serious examples of this critical situation. Diène finds that “the cartoons illustrated the increasing emergence of the racist and xenophobic currents in everyday life.” 47 He also stresses the political atmosphere in Denmark which contributed to a “context of the emergence of strong racist, extremist political parties and a corresponding absence of reaction against such racism by the country’s political leaders.” 48

Diène emphasizes his criticism of the government’s actions by referring to the “national and political backdrop to the cartoons”, in which the government had signed an accord with the far-right Danish People’s Party. He quotes a spokesman of the Danish People’s Party, Soren Krarup, who had said that “Muslim immigration is a way for Muslims to conquer us, just as they have done 1,400 years past.” 49 He notes “the

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48 Ibid.
increasing prominence of far-right racist and xenophobic platforms in the political programs of traditionally democratic parties”. 50

The report links in to the earlier document which examined not only Islamophobia, but anti-Semitism and Christianophobia. It notes that “the criticism of the cartoons by Jewish and Christian community leaders indicates, first of all, a deeply-held belief that the cartoons exemplify the increasing trend to defame all religions and the prevailing ideological climate of intolerance towards religion itself and religious practices.” In conclusion, he identifies underlying causes for increasing Islamophobia, “as symbolized by the cartoons of the Prophet Muhammad in a Danish newspaper”: the precedence of political and ideological considerations over religious factors; the general increase in defamation of religions; the worldwide crisis of identity; and the inadequacy of international law, particularly international instruments on human rights and combating racism and discrimination, in matters of religion. Diène in another report cites racism and xenophobia, rather than terrorism, as “the most serious threats to democracy”. 51

The Special Rapporteur on racism, in line with his previous writings notes: “the increasing trend in defamation of religions cannot be dissociated from... the ominous trends of racism, racial discrimination, xenophobia and related intolerance which in turn fuel and promote racial and religious hatred.

Diène notes “the centrality of the amalgamation of the factors of race, culture and religion in the post-9/11 ideological atmosphere of intolerance and polarization.” This atmosphere “favors the incitement to racial and religious hatred... [and] is indicated by the latest

50 Ibid.
controversies about the caricatures of the Prophet Muhammad published by the Jyllands-Posten newspaper in Denmark.” 52

6. Conclusion

To sum up, the only distinction that can be made between religion and race in human rights instruments is when the issue of discrimination in religious rights is concerned; in other areas the purpose of the related human rights documents are the same and the elements of race and religion are interchangeable.

In fact the concept of aggravated discrimination raised by Amor is also insufficient for the purpose of protecting vulnerable, as there are cases where discrimination imposed is purely religious. To address this shortcoming of legal bases of combating xenophobia and to include all ‘others’ under the protection of anti-racism and anti-xenophobia struggle, one may suggest exploring the concept of ethnoreligiosity to be replaced with merely ethnic (racial) or religious element. Paul Gordon states:

Anyone who is considered an ‘other’ can be the object of racist violence whether this is on grounds of skin color, ethnic origin, religion or culture. Frequently, of course, such grounds merge, as in the case of Arabs who may be attacked because of their religion, their ethnicity or their skin color, or Jews who may be seen as both culturally and religiously different. One should not look for pure grounds for such hate, but accept that many groups are in practice vulnerable to the expression of what might loosely call ‘race hate’. In Europe at the present moment such groups include migrant workers and their families, refugees and asylum-seekers, Muslims, Jews and gypsies. 53

Protocol No. 24: Fact or Fiction for EU Roma?

Robynn L. Allveri*

Abstract

The legal systems of the European Union (EU) and the United States are premised upon many common norms, often resulting in parallel bodies of jurisprudence. Due to these shared legal principles, one would expect the EU and the United States to use similar standards in the adjudication of asylum claims.

The EU and the United States have a solid history of promoting human rights and assisting asylum-seekers. Both have promulgated and/or joined international agreements to respect human rights, and to assist victims of human rights violations. Finally, both have welcomed large numbers of asylees into their respective territories.

Yet despite the overall similarities in the human rights regimes of the EU and United States, a significant point of divergence occurs when a person requests asylum from an EU member state. The difference is so stark in fact, that it is hard to reconcile with the previously-mentioned similarities.

Asylum adjudicators in the United States employ a case-by-case approach, regardless of the applicant’s country of origin. On the other hand, EU adjudicators are legally required to presume that an asylum claim filed by an EU national is without merit. Such cases are effectively “dead in the water.” This EU presumption flows from the “Protocol on

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Asylum for Nationals of Member States of the European Union” (Protocol No. 24), one of the main subjects of this paper.

Protocol No. 24 has been under intense scrutiny, from within and outside the EU. Major revisions to Protocol No. 24 are needed, because it does not match the reality faced by some EU minorities. For example, the Roma (“Gypsies”) in certain EU member states are subject to marginalization, racist attacks, arbitrary arrest, prolonged detention, police beatings, and a largely complacent police and judicial system.

The difference in EU and United States asylum standards becomes shockingly clear in Roma cases. As a former immigration attorney in the United States, this author successfully represented a large number of Roma asylum applicants from Bulgaria. If these applicants had requested asylum in the EU, their cases would most likely have been denied.

In general, the EU’s reputation as a promoter and defender of human rights is well-deserved. However, Protocol No. 24 eviscerates the asylum claims of thousands of Roma who come from EU countries. It creates an almost irrebuttable presumption against the EU asylum applicant, stating that EU member states are “safe countries of origin,” and that EU-origin asylum claims are presumed to be “manifestly unfounded.”

The multi-faceted approach of the U.S. asylum regime provides a more thorough and meaningful review of Roma asylum claims. Cases are assessed on an individual basis, with little (if any) legal presumptions against the applicant. The EU would be wise to adopt a similar policy and reject the exclusionary mandate of Protocol No. 24.

Introduction

The European Union (EU) and the United States (U.S.) have long histories of promoting human rights and assisting asylum-seekers. Both are
parties to international agreements which recognize and protect basic human rights. Each one has enacted domestic and regional laws which aim to protect victims of human rights abuses. Finally, both have welcomed large numbers of refugees and asylees into their respective territories.1

The legal systems of the EU and the U.S. are premised upon many common norms, often resulting in parallel bodies of jurisprudence. Due to these shared legal principles, one would expect the EU and the U.S. to use similar standards in the adjudication of asylum claims. For the most part, this expectation holds true. However, a glaring difference exists when an applicant’s country of origin is an EU member state.

Asylum adjudicators in the U.S. employ a case-by-case approach, regardless of the applicant’s country of origin. On the other hand, EU adjudicators are legally required to presume that asylum claims filed by EU nationals are without merit. Such cases are effectively dead in the water. The EU presumption comes primarily from the Protocol on Asylum for Nationals of Member States of the European Union (Protocol No. 24).2

**The Origin of Protocol No. 24**

Protocol No. 24 was the result of intense lobbying by former Spanish Prime Minister, José María Aznar.3 Aznar was furious over the protection of certain Euzkadi ta Askatasuna (ETA) members in France and Belgium. The rationale used by Spain to advance Protocol No. 24 was that

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2 OJ, 10 November 1997, C340/103. Protocol No. 24 is also known as the “Aznar Protocol” or “Spanish Protocol.”

3 Mr. Aznar served as Prime Minister from 1996-2004.
human rights were so well-established and protected in the EU, that giving asylum to EU nationals would be contradictory and redundant. 4 Spain wanted to eliminate the possibility of asylum for ETA members in the EU. Not only was Spain’s goal realized, but Protocol No. 24 ultimately “eliminated asylum within the Union for its own nationals.” 5

Prior to the adoption of Protocol No. 24, the EU Council of Ministers and of Justice and Home Affairs issued a non-binding Resolution which addressed asylum claims made by EU nationals. 6 The Resolution provided for a simplified and rapid procedure for such claims, but maintained that “Member States continue to be obliged to examine individually every application for asylum, as provided by the Geneva Convention…” 7 [emphasis added].

Spain’s response to the Council’s Resolution was chilling: “Experience shows that as a result of delaying tactics in various proceedings and appeals, this accelerated procedure can in fact take several years. It therefore serves no useful purpose. The only valid solution is for the application to be rejected at the outset and not accepted for processing.” 8 At Spain’s urging, the Resolution was eventually superseded by Protocol No. 24.

Protocol No. 24 was officially adopted as part of the 1997 Treaty of Amsterdam, 9 which amended the earlier Maastricht Treaty on European Union. The Protocol was reaffirmed in the subsequent 2007

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6 OJ, 1996, C274/13 (June 20, 1995).
7 Id. at para. 20.
9 The Treaty of Amsterdam formally entered into force on May 1, 1999.
Lisbon Treaty. 10 Two highly controversial concepts are embedded within the language of Protocol No. 24. First, the Protocol asserts that EU member states “shall be regarded” as “safe countries of origin.” Second, an asylum claim made by an EU national shall be “dealt with on the basis of the presumption that it is manifestly unfounded” 11 [emphasis added].

Although asylum claims by EU nationals are feasible under Protocol No. 24, the Protocol creates numerous impediments which make the process virtually inaccessible. According to the Protocol:

Any application for asylum made by a national of a Member State may be taken into consideration…only in the following cases:

(a) If the Member State of which the applicant is a national proceeds…to take measures derogating…from its obligations under the Convention [for the Protection of Human Rights and Fundamental Freedoms];

(b) If the procedure referred to in Article F.1(1) of the Treaty on European Union has been initiated and until the Council takes a decision in respect thereof;

(c) If the Council …has determined, in respect of the Member State [of] which the applicant is a national, the existence of a serious and persistent breach by that Member State of principles mentioned in Article F(1);

(d) If a Member State should so decide unilaterally in respect of the application of a national of another Member State…the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded… (emphasis added).

Subsection “d” of the Protocol creates a formidable presumption against EU asylum applicants, while subsections “a-c” establish

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10 The Lisbon Treaty was signed by 27 EU members on December 13, 2007 and became effective on December 1, 2009.
11 Belgium formally rejected this presumption in favor of a case-by-case approach (see “Declaration by Belgium on the Protocol on Asylum for Nationals of Member States of the European Union,” annexed to Protocol No. 24).
politically cumbersome and bureaucratic processes. As noted by Columbia University professor Karin Landgren, the Protocol “erects ponderous political obstacles to the processing of such requests. States are proffered many bases on which to refuse to process these requests; they retain an option to decide unilaterally to do so. The unilateral decision must also be communicated to a political organ of the EU, the Council.”12 The Protocol has also been criticized for being the “product of a political decision-making process” in which Foreign Ministers engaged in reciprocal trade-offs.13 The Protocol “was not put to democratic vote, nor was it drafted or shared in a transparent manner.”14

Protocol No. 24 should be abandoned or significantly revised, not only because it conflicts with international refugee law, but because it does not match the reality faced by some EU minorities. For example, the Roma15 in certain EU member states are subject to racist attacks, marginalization, arbitrary arrest, prolonged detention, police beatings, and a largely complacent police and judicial system. Bulgaria, Romania, and Hungary are three EU countries often criticized for hardships faced by their Roma citizens. These nations are addressed in the second half of this article.

The EU’s Human Rights Regime Surrounding Protocol No. 24

In general, the EU’s reputation as a promoter and defender of human rights is well-deserved. In 1953, the EU promulgated the Convention for the Protection of Human Rights and Fundamental Freedoms (now known as the European Convention on Human Rights). All EU member

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12 Landgren, supra.
13 Ibid.
14 Ibid.
15 The Roma (or Romani) originated in Northwest-India and migrated to Europe about 600 to 800 years ago. They are often referred to pejoratively as “Gypsies” or “Travelers.”
states are signatories. Article 1 of the Convention requires signatories to respect human rights, Article 13 guarantees an effective remedy when those rights are violated, and Article 14 specifically states that the enjoyment of these rights shall be secured without discrimination on the basis of national origin (among other grounds).

Pursuant to the 1953 Convention, the European Court of Human Rights was created in 1959. While not formally part of the EU, the Court enforces the 1953 Convention. Under the Court’s jurisdiction, individuals can sue states for alleged violations of human rights.

A more recent expression of EU human rights law is the Charter of Fundamental Rights of the European Union, which was proclaimed on December 7, 2000 and became legally binding on December 1, 2009. Of particular interest is Article 18 of the Charter, which specifically guarantees the right to asylum. Under Article 18, the EU’s present treatment of EU-origin asylum claims is an anomaly.

Current EU law eviscerates the valid asylum claims of hundreds, if not thousands of Roma EU citizens. Protocol No. 24 is the primary roadblock to claims filed by EU nationals. However, the rationale and principles of Protocol No. 24 were reaffirmed in subsequent EU Directives: namely, the 2004 Qualifications Directive and the 2005 Asylum Procedures Directive.

The 2004 Qualifications Directive is a cornerstone in the development of the EU’s Common European Asylum System (CEAS). It flows directly from the asylum agenda of the 1997 Amsterdam Treaty. Among other things, the Directive defines the term “refugee” and gives various grounds for protection. However, it excludes EU nationals from the

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16 This coincides with the date the Lisbon Treaty entered into force.
17 Council Directive 2004/83/EC (on minimum standards for the qualification and status of third country nationals...as refugees...and the content of the protection granted).
definition of “refugee.”

The Directive refers only to “third country nationals” and “stateless persons” (excluding all EU citizens, even if they might be in need of protection). In other words, the Directive envisions no circumstances where an EU national might be a legitimate refugee. The UNHCR expressed its concern that the Directive’s definition of “refugee” does not coincide with the 1951 Geneva Convention’s definition of “refugee.”

The 2005 Asylum Procedures Directive also stems from the Amsterdam Treaty. The 2005 Directive confirms that “refugees” do not include EU nationals. It also declares that Bulgaria and Romania (whose Roma populations are plagued by well-documented abuses) should be regarded as “safe countries of origin.”

This declaration was justified by Bulgaria and Romania’s then-pending status as candidates for accession to the EU.

The European Council on Refugees and Exiles (ECRE) criticized the 2005 Directive’s provisions on safe countries of origin, “which are inconsistent with the proper focus of international refugee law on individual circumstances.”

The ECRE also noted that the Directive “restricts the refugee definition to third country nationals and stateless persons, thus excluding EU citizens from the definition. This is not consistent with Member States’ obligations under Article 1A of the 1951 Geneva Convention. Not only is this restriction discriminatory and therefore in breach of Article 3 of the 1951 Geneva Convention, but the potential repercussions may be greater as the EU enlarges. Given the export value of EU asylum policies, it also sets a very bad precedent for other regions of the world.”

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19 Art. 2(c) of Council Directive 2004/83/EC.
21 Id. at Preamble, Section 20.
22 ECRE Information Note on the Asylum Procedures Directive (2005/85/EC), IN1/10/2006/EXT/JJ.
23 Ibid.
the legal impact of the Directives and Protocol No. 24 would be devastating.

Criticism of Protocol No. 24

The Preamble of Protocol No. 24 states that it "respects the finality and the objectives of the Geneva Convention...relating to the status of refugees." This assertion is appropriate, as the Geneva Convention’s refugee provisions cannot be derogated by treaty and are generally accepted as universal in scope. However, the Protocol’s substantive provisions overshadow the Preamble and unquestionably violate the 1951 Geneva Convention.

Protocol No. 24 has been scrutinized from within and outside the EU. In fact, the EU’s own European Commission stated that it was “unfortunate” that the Protocol was included in the Amsterdam Treaty. The United Nations High Commissioner for Refugees (UNHCR) also voiced opposition to Protocol No. 24 while the matter was being considered by EU Foreign Ministers. The UNHCR concluded that the Protocol would be “at variance with international obligations that all Member States of the Union have undertaken,” and advised the EU President against adopting it.

Non-governmental organizations such as Human Rights Watch, Amnesty International, and the ECRE have all condemned Protocol No. 24.

24 UN Office of Legal Counsel, Memorandum from Paul Szasz, Acting Director & Deputy (May 21, 1997).
25 See, for example Carrera, Guild & Merlino, The Canada-Czech Republic Visa Dispute Two Years On: Implications for the EU’s Migration and Asylum Policies (Oct. 2011)
27 UNHCR, Position on the Proposal of the European Council Concerning the Treatment of Asylum Applications from Citizens of European Union Member States (appended to letter of February 3, 1997 from Director, UNHCR Division of International Protection to Michiel Patijn, Secretary of State, Ministry of Foreign Affairs of the Netherlands).
28 Ibid.
24. Human Rights Watch said the Protocol is an EU attempt to “exempt itself from the 1951 Refugee Convention” and that other countries will be encouraged to take similar steps. 29 Amnesty International stated that the Protocol lays down standards which fall short of international standards. 30 Finally, the ECRE maintained that the Protocol set a “very bad precedent for other regions of the world, linking the legal right to asylum to the political and economic alliance of neighboring countries.” 31

Noted British writer and commentator William Shawcross vehemently attacked Protocol No. 24, describing it as “disgraceful” and “insidious.” 32 According to Shawcross, the argument that human rights are so well protected in the EU that no EU citizen would want to apply for asylum “reeks of complacency.” 33 Shawcross hit the nail on the head when he identified the Protocol’s underlying legal problem: it denies “an entire group of people” access to the provisions of the 1951 Geneva Convention “on the basis of national origin.” 34 Under international law, discrimination on the basis of nationality is the Protocol’s most serious defect.

Non-Discrimination Standards under International Law

A substantial body of international law prohibits discrimination on the basis of nationality. The Universal Declaration of Human Rights affirms that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of a kind, such as race, color, sex,

29 Human Rights Watch Press Release (June 12, 1997).
31 ECRE, Analysis of the Treaty of Amsterdam in so far as it Relates to Asylum Policy (Nov. 10, 1997).
33 Ibid.
34 Ibid.
language, religion, political or other opinion, national or social origin, property, birth, or other status." 35 Article 7 adds that “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration...” Finally, Article 8 declares 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” [emphasis added].

The United Nations Convention Relating to the Status of Refugees (1951 Geneva Convention) also upholds the principle of non-discrimination on the basis of nationality. Article 3 states that its provisions shall be applied “without discrimination as to race, religion or country of origin” [emphasis added]. Article 1 of the Convention defines a refugee as “any person” who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." Although the EU itself is not a party to the Geneva Convention (all EU member states are), the existence of Protocol No. 24 “poses an obvious problem that could thwart [the EU’s potential] membership...to the Geneva Convention." 36

Finally (and perhaps most notably), Article 14 of the EU’s own European Convention on Human Rights specifically prohibits discrimination based on "sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" [emphasis added].

35 Article 2.

36 European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, Setting up a Common European Asylum System-2010 Study (at p. 443).
Despite the clear language of the European Convention and other international provisions noted above, Protocol No. 24 was pushed through under a barrage of political pressure. The result has been de facto foreclosure of the asylum process to EU nationals.

**Roma in Today’s EU: Bulgaria, Romania, and Hungary**

According to the U.S Department of State, the “marginalization of the Romani minority remained Bulgaria’s most pressing human rights problem” in 2011.37 Police “were more likely to use excessive force on persons of Romani origin” and “sometimes arrested suspects for minor offenses and physically abused them to force confessions, especially in cases involving Romani suspects.”38

This author has personally represented many Bulgarian Roma asylum applicants, most of whom presented compelling evidence of mistreatment. They endured racial slurs by government officials, humiliation and segregation of their children in school, arbitrary arrest, sexual assault while in custody, forced evictions, police intimidation, police interference with their Roma-rights groups, and failure to investigate and prosecute skin-head attacks against them.

The Roma of Romania fare no better than their Bulgarian counterparts. In a 2011 government report on Romania, it was noted that “significant societal discrimination against Roma continued,...and there were reports that police...mistreated and harassed detainees and Roma.”39 Moreover, police brutality was fairly routine. Journalists and senior government officials made statements that were discriminatory against Roma. A notable example was Romanian President Basescu’s statement blaming Finland’s opposition to Romania’s accession to the

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38 Ibid.
Schengen area on the “Gypsies,” who “aggressively beg and steal” in Finland.\textsuperscript{40} The 2011 report also cited the following events: Roma evictions in Bucharest, Buzau, Cluj Napoca, and other localities; NGO reports that Roma were denied access to, or refused service in, many public places; and discrimination by teachers and other students (Roma children were placed in the back of classrooms, some schools placed Roma students in separate classrooms or separate schools, teachers ignored Roma students, other children engaged in unimpeded bullying of Roma children).

Hungarian Roma also experience persistent human rights abuses. In 2011, major issues were societal discrimination and exclusion of the Roma population, and violent right-wing extremism.\textsuperscript{41} “Discrimination against Roma exacerbated their already limited access to education, employment, health care, and social services. Right-wing extremism, including public campaigns by paramilitaries to intimidate and incite hatred against Roma and other minorities, increased.”\textsuperscript{42} Other human rights problems during the year included use of excessive police force against suspects, particularly Roma. Human rights NGOs reported that Roma were discriminated against in almost all fields of life, particularly in employment, education, housing, penal institutions, and access to public places, such as restaurants and bars.

European government officials acknowledge the abuse of Roma inside the EU. The Parliamentary Assembly of the Council of Europe has confirmed pervasive anti-Roma sentiment in certain EU member countries. In 2010, the Assembly said it was “shocked by recent outrages against Roma in several Council of Europe member states, reflecting an increasing trend in Europe towards anti-Gypsyism of the

\textsuperscript{40} Ibid.
\textsuperscript{42} Ibid.
The Assembly went on to state that the “situation is reminiscent of the darkest hours in Europe’s history. ....The Roma people are still regularly victims of intolerance, discrimination and rejection based on deep-seated prejudices in many Council of Europe member states.”

Germany has likewise admitted that Roma are not well-treated within its borders. The Neukölln district of Berlin (well-known for a diverse immigrant population), published its second “Roma Status Report” earlier this year, finding that many Roma live under “precarious circumstances.”...Neighbors often react to the new arrivals with “a lack of understanding, resignation, cries for help, fury, outrage and even hate.” Despite being EU citizens, the Romanians and Bulgarians were last in the “ranking order” of the nationalities represented in Neukölln, the report concluded.

The U.S Approach to Asylum

As a former U.S. immigration attorney, this author represented a large number of asylum applicants from Bulgaria. Almost without exception, the applicants were persecuted or feared persecution because of their Roma ethnicity. An estimated 80-85% were granted asylum. If these applicants had requested asylum in the EU, their cases would most certainly have been denied.

Despite somewhat inconsistent approval ratings on a country-wide basis, Roma have a good overall chance of winning asylum in the United States. This is partially due to a lack of nationality-based...

43 Council Resolution 1740 (2010).
44 Ibid.
45 Özlem Gezer, Out of Bulgaria and Romania: Wave of Immigrants Overwhelms German System (May 2012) (citing the Neukölln report).
46 Ruth Ellen Wasem, Asylum and “Credible Fear” Issues in U.S. Immigration Policy, Congressional Research Service (June 29, 2011).
presumptions in the U.S. asylum regime. U.S. asylum law rejects the notion that certain countries are presumed to be “safe.” Each asylum case is examined on the individual merits, regardless of the applicant’s country of origin. The basic definition of “refugee” is broad, and based on the definition found in the 1951 Geneva Convention.\(^{47}\) Eligibility for asylum is governed by the Immigration and Nationality Act (INA).\(^{48}\)

In its most basic form, U.S. asylum law allows an applicant to file an affirmative or defensive application. An affirmative application is filed by a claimant who is physically present in the U.S. and not in removal proceedings. The application is filed with a regional Asylum Office, under the jurisdiction of the U.S. Citizenship and Immigration Services (USCIS). After the requisite interview and background checks are completed, the case is either approved or referred to the Executive Office for Immigration Review (EOIR). If the case is referred to the EOIR, it means that removal proceedings have commenced in Immigration Court.

A defensive asylum application is filed by an applicant in removal proceedings. The person may be in removal proceedings for a reason unrelated to asylum (entry without inspection, visa overstay, commission of a crime, etc.), and may have a legitimate reason to request asylum as a defense. A defensive application may also be the renewal of an application which started in the Asylum Office (i.e., an affirmative application was referred to the EOIR’s Immigration Court). The referred applicant effectively gets “two bites” at the asylum apple.

\(^{47}\) INA 101(a)(42). The term “refugee” means…any person who is outside any country of such person’s nationality… who is unable or unwilling to return to…that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion (emphasis added).

\(^{48}\) INA §208; 8 U.S.C. §1158.
If an applicant’s defensive asylum application is denied, he or she may appeal to the EOIR’s Board of Immigration Appeals, and/or a regional U.S. Circuit Court of Appeal. Finally, even if an asylum applicant is statutorily ineligible for asylum, he or she may qualify for some other form of relief, such as: 1) withholding of removal, or 2) relief under the United Nations Convention Against Torture.

When compared to other countries, Bulgaria is not a top source country for asylum applications. Bulgarians are greatly outnumbered by applicants from China, the Middle East, Africa, India, and Russia. However, the number of Bulgarian applicants (mostly Roma) is impressive, considering Bulgaria’s relatively small population, its physical distance from the U.S., and the difficulty in entering U.S. territory. From 2005-2011, the number of Bulgarian applications approved by the USCIS Asylum Offices was 217. During the same period, 349 additional applications were approved by the EOIR’s Immigration Courts.

The EOIR also publishes statistics on asylum approval rates by country. In fiscal year 2010, forty-three percent (43%) of defensive applications lodged by Bulgarians were approved, thirty-five percent (35%) were denied, and the rest were abandoned, withdrawn, or otherwise

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49 For example, failing to file within 1 year of entry, conviction of a particularly serious crime, or prior firm resettlement in a third country. INA §208(a)(2)(B), INA §208(b)(2)(A)(i), and INA §208(b)(2)(A)(vi), respectively.

50 INA §241(b)(3); 8 U.S.C. §1231


52 Ruth Ellen Wasem, supra (at Appendix Tables A-1 and A-2).

53 An applicant commonly pays a bribe for a passport and Mexican visa, then hires a smuggler to take him/her across the border. Passports, money, and other valuables are often stolen by smugglers.


55 Ibid.
disposed of. In fiscal year 2011, the approval rate for Bulgarians climbed to fifty-six percent (56%) and the denial rate dropped to twenty-seven percent (27%). The remaining seventeen percent (17%) were withdrawn or otherwise disposed of. In short, a Bulgarian Roma applicant has about a 50-50 chance of winning asylum.

The U.S. system encourages robust and thorough review, which is untainted by presumptions based on nationality. Unlike EU adjudicators, U.S. Immigration Judges and Asylum Officers do not ignore evidence which tends to prove that some EU countries are not “safe” for Roma.

**Conclusion**

Protocol No. 24 is an aberration under international law. Not only does it arrogantly presume that asylum is rarely (if ever) needed for EU nationals, it effectively bans a class of applicants on the basis of nationality. The Protocol’s misguided concepts have been reinforced by the 2004 and 2005 Asylum Directives. The end result is a Common European Asylum System that is unresponsive to the most vulnerable victims—the Roma of central and eastern Europe.

Non-EU members are often unable or unwilling to assist Roma refugees. Accommodating a sizeable refugee population requires resources that many non-EU states do not have, or do not wish to allocate. Moreover, the attitude towards Roma in non-EU countries is often just as hostile as in EU-member states (perhaps even worse). Roma trying to escape persecution in the EU are therefore forced to seek asylum in distant

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56 Executive Office for Immigration Review (Office of Planning, Analysis, and Technology), FY 2010 Asylum Statistics (January 2011)
57 Executive Office for Immigration Review (Office of Planning, Analysis, and Technology), FY 2011 Asylum Statistics (February 2012)
58 Ibid.
jurisdictions. That may explain the surprising number of Roma asylum applications filed in the United States, and in Canada.59

These international quests for asylum will cease if Protocol No. 24 is repealed and the EU offers protection to its persecuted minorities. It is time for the EU to reject nationality-based presumptions and the “safe country of origin” concept. The demands of international law require a major shift in EU policy--sooner, rather than later.

59 Canada has been clamping down on a flood of Roma asylum claims, which will likely lead to a higher number of applications in the United States. See: Carrera, Guild, and Merlino, supra; Mary Sheppard, Refugee System a Disgrace, Advocate Says, CBC News (March 12, 2012); Tobi Cohen, Hungarian Asylum Seekers Flood Canadian Shores in 2011, Postmedia News (Feb. 12, 2012); Don Butler, Most Roma Asylum-Seekers Being Denied Legal Aid, Refugee Lawyer Says, The Ottawa Citizen (Jan. 16, 2012).
A Human Right-based Approach for Combating Trafficking in Women and Children: Bangladesh Perspective

Abul Bashar Mohammad Abu Noman*

Abstract

Trafficking in women and children is one of the most burning social problems that Bangladesh is facing today. It is well acknowledged that the problem of trafficking is deeply rooted in social, legal and economic structures of a State that influences vulnerable groups of people to be trafficked from their home countries. Bangladesh is a country of origin for a large number of traffic victims. Women and children are disproportionately victims of trafficking in any country. This also holds true for Bangladesh, where amongst the traffic victim, women are mostly trafficked for the purposes of forced prostitution. But women and children are also trafficked for domestic service, organ trade, forced labor, used as camel jockeys or for forced marriage. Cross-border traffic victims are very often subjected to slavery-like conditions and to serious physical abuse. There is also internal trafficking of women and children from rural areas to larger cities.

In Bangladesh, trafficking is traditionally viewed as a problem of ‘law and order situation’ rather than as a social problem or human rights issue and hence, usually legal measures are prescribed to criminalize trafficking and penalize the traffickers. The traditional and narrower approach can hardly address the wider aspect of human rights violation involved in trafficking. Therefore, conventional

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understanding of trafficking merely as a criminal offence cannot fully
comprehend the wider social, economic and cultural context of the
phenomena of trafficking. Viewing trafficking from a human rights
perspective necessitates that combating trafficking involves social,
economic and legal measures in any country. Human rights
perspectives should also be taken into consideration in repatriation of
trafficking victims so as to ensure their safe migration, security, privacy
and minimum institutional standards with a women and children friendly
atmosphere.

A human rights based approach to trafficking problems is not
only essential for true understanding of structural causes of trafficking,
but is also useful for undertaking preventive measures and remedial
steps for combating trafficking. The present study therefore aims to
examine the human rights aspect of trafficking problem, to analyze and
evaluate the legal protection of trafficked victims and effectiveness of
legislation concerning trafficking in women and children in Bangladesh
and to draw suggestions those are pragmatic in nature for the
maintenance of human rights standards in law enforcement.

1. Introduction

Slavery and exploitation of the vulnerable by the powerful are
human rights violations as witnessed by the world over the course of
history. The international slave trade appeared to have ended as a
result of intervention by the international community,1 but slavery-like
practices in the form of trafficking in person remain and have recently
been given priority by the international community due to violations of
human rights by way of curtailing fundamental freedoms, forced labor,

1 See Vienna Congress Treaty, Act XV, Declaration relative to the Universal Abolition
of the Slave Trade (1815) 63 CTS 473, Slavery Convention (1926) 60 LNTS 253.
sexual exploitation and preventing women and child development.2 Women and children, being the most vulnerable groups in the world’s population, have been targeted by traffickers. About 800,000 people are trafficked each year across international borders, of which 80 percent are women and 50 percent are children.3 It is evident from different studies that the majority of the trafficked women and children are involved in commercial sexual exploitation which violates national and international laws regarding rape, torture, abduction and sometimes even murder and constitutes a gross violation of human rights.4

In Bangladesh, trafficking in women and children is a very serious and continuing problem.5 Bangladesh is a country of origin and transit for trafficking in women and children.6 In Bangladesh, women are vulnerable to trafficking due to traditional socio-cultural practices and values, limited opportunities for educational and vocational development, and lack of opportunity to take an effective part in the development process, which manifestly subjects them to discrimination and exploitation in various forms.7 The social tendency to keep women dependent on men,8 lower priority in the provision of health, education

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and nutritional support than that of the male counterpart and low literacy rates among women prevent them from participating influentially in socio-economic and socio-political activities. Official numbers on trafficking in Bangladesh are unavailable. However, estimates of the number of women and children trafficked range from 10,000 to 20,000 per year. Trafficking occurs both within Bangladesh and across its borders to India, Pakistan, and Middle Eastern countries, primarily the United Arab Emirates and Kuwait. Amongst the reasons for trafficking, women are mostly trafficked for the purposes of forced prostitution. But women and children are also trafficked for domestic service, organ trade, forced labor, use as camel jockeys or forced marriage. Cross border trafficking victims are very often subjected to slavery-like conditions and serious physical abuse. There is also internal trafficking of women and children from rural areas to the larger cities.

In Bangladesh, a significant number of children are deprived of their basic rights and needs. Many children, predominantly from rural areas, have to turn to employment for survival. In fact, child labor is one of the major social problems of Bangladesh. According to a survey conducted by the Government in 2005, there are 7.9 million child workers in Bangladesh, who are highly vulnerable to trafficking. Furthermore, poor families are found negligent in keeping the size of the

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10 In Bangladesh the literacy rate for women, 15 years and above is 29.3 per cent compared to 51.7 per cent for men of the same cohort. See, UNDP, ‘Human Development Report’ (2001) 212.
13 M. Rahman, ‘Child Labor and Human Rights: Bangladesh Perspective’ (1994) 5 The Dhaka University Studies 75,77
families small. As a result, they try to involve their children in various jobs to earn their livelihood without thinking about child development and the impact of the work environment upon the child. The precarious conditions of child labor also make children vulnerable to trafficking.15

Trafficking in women and children involves violations of the right to life, right to liberty and human dignity, security of persons, the right not to be tortured or not to be subject of cruelty of any form whatsoever including inhuman and degrading treatment, right to a home and family, right to proper education and employment, right to healthcare etc., which are core human rights. The impact of trafficking issues on such fundamental rights necessitates a rights-based approach for combating trafficking.16

In Bangladesh, trafficking is traditionally viewed as a problem of ‘law and order’ rather than as a social problem or human rights issue.17 Trafficking is a special type of crime due to the fact that various basic human rights are violated through it. The traditional and narrower approach can hardly address the wider aspect of human rights violation involved in trafficking. Therefore, conventional understanding of trafficking merely as a criminal offence cannot fully comprehend the wider social, economic and cultural context of phenomena of


trafficking. A human rights based approach to trafficking problems is not only essential for true understanding structural causes of trafficking, but also is useful for undertaking preventive measures and remedial steps for combating trafficking.

Therefore, rather than dealing with the issue in the traditional way whereby the issue of trafficking is considered only as far as it concerns the maintenance of law and order, this paper concentrates on identifying the issues necessary for developing an anti-trafficking strategy which covers the social, economic and legal aspects for ensuring rights of the victims of trafficking and enables them to lead a secure and better life in society free from stigma and discrimination.

2. Objectives

The objectives of this paper are:

- To provide an overview of trafficking in persons, its causes and the consequences in the context of Bangladesh.
- To understand the concept of a rights-based approach in relation to trafficking and to examine the problem of trafficking from a human rights perspective.
- To review the international and regional framework for combating trafficking.
- To analyze the existing legal, procedural and policy frameworks for combating trafficking in women and children in Bangladesh.
- To evaluate the existing anti-trafficking framework in Bangladesh from a human rights perspective.

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To put forward recommendations to set the anti-trafficking program within a right based approach for combating trafficking in women and children in Bangladesh.

3. Meaning and Definition of Trafficking

The travels of the word “trafficking” started from around 1900 with a view to preventing the ‘white slave trade’ in women whereby women from Europe were voluntarily migrated or trafficked to Eastern states to work as concubines or as prostitutes. Usually, the foundation definitions of trafficking of persons are those that have been developed by various International Conventions, Protocols and other multilateral instruments that seek to establish and sharpen a common understanding of the subject to combat trafficking effectively. But none of the treaties defines the concept of trafficking. In 1949, the earlier treaties were consolidated by the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. It obliges states to punish any persons who, “to gratify the passions of another, procures, entices or leads away, for the purposes of prostitution, another person, even with the consent of that person.” The definition of the term ‘trafficking’ in this Convention is in no way exhaustive or able to cover the wide scope of trafficking. After

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23 Article 1(1), Ibid.
a long debate between the advocates in support of preventing prostitution and the advocates in support of granting license to prostitutes, the United Nations once again took an initiative to define the term trafficking in its subsequent protocol namely United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially women and Children 2001.24 (hereinafter referred as Protocol of 2001). The Protocol of 2001 is the first ever approach of the United Nations in defining the term ‘trafficking’ which runs as follows:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.25

Therefore the above definition has pointed out the act, means of the act and purpose of the act. This definition has a universal approach and is capable of integration into any legal system. The above definition applies whenever an act of recruitment, transportation, transfer, harboring or receipt of persons is committed without his/her free consent26 with a view to engaging the person in question in prostitution, forced labor, slavery or practice similar to slavery, servitude or the removal of organs. In one sense, trafficking is the sale or

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25 See Article 3(a), ibid.
26 The term free consent is referred to a consent not influenced with force, coercion, fraud, abduction, deception etc. and the same is covered by almost all legal systems of the world. Nevertheless consent under the Protocol is irrelevant in view of the provision of Article 3(b) the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, 2001
purchase of a woman or children for the purpose of placing the trafficked person in a community other than where he/she ought to have lived.

The Protocol of 2001, though the most recent and binding international instrument on trafficking, suffers from a lack of technical clarity on some important issues. Firstly, it failed to distinguish between ‘trafficking in women’ and ‘trafficking in children’. This issue ought to have been addressed by the Protocol of 2001 on the ground that the means of procurement, the forms of abuse and exploitation, the rights violated and the approaches for rehabilitation, repatriation and social integration etc. are not always identical in each case. The treatment of victims differs according to age and maturity. Secondly, the definition is silent about the state’s responsibility in respect of combating trafficking. Thirdly, the concept of trafficking within national borders is not addressed specifically by the definition. Trafficking is not always a cross border activity, but may also occur domestically. It is to be noted here that if the definition is not modified to remove this lacuna, internally displaced persons, due to natural disasters or other reasons, who are another class vulnerable to trafficking, will remain outside the reach of anti-trafficking programs. Last, but not least, it did not help resolve the ambiguities between trafficking and migration. However, the protocol has not been ratified by Bangladesh.

28 Ibid.
30 Ibid.
4. Definition of Trafficking: Regional and Bangladesh Perspective

The SAARC31 countries, under a regional instrument namely SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002 32 (hereinafter referred as SAARC Convention 2002), defined ‘trafficking’ in the following way:

Trafficking means the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking.33

The definition given by the SAARC Convention is limited by only focusing on prostitution, ignoring other sources of oppression and harmful situations in trafficking. Further, it does not distinguish between women and children. By concentrating on the end result and not on the process of trafficking and abuse, for whatever purpose, the Convention does not recognize trafficking as a distinct and unique crime regardless of any nexus with prostitution. In addition, the Convention does not distinguish between movements and migration that are legitimate and consensual and those that are coerced or deceived.34

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31The South Asian Association for Regional Cooperation (SAARC) is an economic and political organization of eight countries in Southern Asia. It was established on December 8, 1985 by India, Pakistan, Bangladesh, Sri Lanka, Nepal, Maldives and Bhutan. In April 2007, at the Association’s 14th summit, Afghanistan became its eighth member. <http://en.wikipedia.org/wiki/South_Asian_Association_for_Regional_Cooperation> accessed 25 June 2012.
32 It was adopted 5 January 2002 at the Eleventh SAARC Summit held in Kathmandu.
33 Article 1(3) of the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002
In Bangladesh, there is no legislation which specifically defines the term ‘trafficking’ though there are several pieces of legislation which cover the offences relating to along with prescribing punishment in different degree. However, in 2003, the Government of Bangladesh with the assistance of International Organization of Migration (IOM) and other donor agencies set up a ‘Bangladesh Counter Trafficking Thematic Group’ to work on trafficking issues at policy level. After holding a series of presentations, the ‘Thematic Group’ redefined the term trafficking in persons in the following way:

*Trafficking is a situation where a person no longer has control over some elements of their life for a given period of time. These elements include the type of work they do, the environment and conditions in which this work is carried out and the person’s freedom of movement in the context of this work situation. This lack of control is the actual harm of a trafficking experience.*

The Thematic Group in Bangladesh tried to develop this working definition wholly based on the end result of trafficking and is therefore not a holistic definition. The emphasis on the condition of the person i.e. losing of control of his/her life for a specified period of time and the workplace environment, only cover a small part of trafficking. It failed to create a comprehensive definition starting from inducement by traffickers to involvement of the victim with illegal trades such as prostitution, slavery or other forms of abuse. The failure to develop a better definition reveals a failure to concentrate on the issue in depth

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35 See Section 339, 340, 350, 359, 362, 371, 374 & 375of the Penal Code 1860; See also Section 5 & 6 of the Prevention of Repression against Women and Children Act 2000; For further details see Chapter 5.


37 Ibid.
despite evidence of the many violations committed in the process of trafficking itself. 38

So, in accordance with the discussions on definition of trafficking, there is not yet a consensus over the constituting elements of trafficking. Different agencies have tried to define the term in their own way, but they did not try to enhance earlier definitions by incorporating new constituting elements related to trafficking without creating a new definition and leaving the same for criticism. So, unless or until the definition of trafficking is universally accepted, attempts to combat trafficking cannot be optimally coordinated.

However, a pragmatic approach to defining trafficking in persons should take into consideration, at a minimum, the following issues:

i. The causes and consequences of human rights violations through trafficking should be addressed within a single domain. Within this, there should be adequate determination of the rights violated to identify which fall under the criminal justice system and which under the civil justice system. This is important since the traffickers not only commit a crime but also violate a good number of civil rights of the victim.

ii. It should include all types/forms constituting elements of trafficking, such as prostitution, forced labor, domestic work, debt bondage, forced/fraudulent marriages, illicit adoptions, begging, camel jockeying, organ transplants, certain culturally sanctioned practices, child sex tourism, child pornography etc.

iii. Consent should be irrelevant for the purpose of the definition in relation to illegitimate purposes or in case of children.

iv. The definition should separately identify ‘trafficking in women’ and ‘trafficking in children’.

v. The definition should be exhaustive in terms of trafficking in domestic area and cross border trafficking.

vi. The definition should be of such that it does not make any confusion between migration and trafficking.

vii. It should address the rights of the person guaranteed in both national and international instruments.

5. Causes of Trafficking in Women and Children in Bangladesh

Numerous studies have been conducted to identify the causes of trafficking of women and children. Some have identified economic vulnerability as the root cause of trafficking, 39 while some other scholars identified a variety of reasons behind trafficking rather than focusing on a particular issue. 40 However, the root cause of trafficking depends on some indicators like socio-economic condition, cultural attitude, magnitude of social problems and geographical condition of the state. Whatever the reason in a particular country, the experience shows that the root causes of trafficking in Bangladesh may be identified under the following headings:

Poverty, Illiteracy, Rural-urban Migration

Poverty has been identified by many scholars as the root cause of trafficking. 41 Poverty results in inadequate educational and economic

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opportunities and thus it continuously becomes a strong cause for trafficking. Apart from this, poverty creates economic disparity between the people within a society. Economic instability due to lack of economic resources and competent policies to reduce the unemployment rate on the basis of domestic resources is one of the major causes which makes the women and children make vulnerable to trafficking. Having no source of income, the children of poor families are subject to work as domestic or industrial labor. So when people accept an offer of migration for employment in order to improve their economic condition, either to the cities or abroad, they may become subjects of trafficking. There are also some related factors like feminization of poverty, whereby females are found to be poorer than the male family members. In Bangladesh, it is also revealed that the earning of female headed families are 35% lower than that of their counterparts and this situation places females in a vulnerable situation to become victims of trafficking. Besides this, social problems like dowry, social exclusion etc. act as causes behind trafficking. Due to imbalance in the labor market, the chance of involving women and children in exploitative work is high.


The Ministry of Women and Children Affairs, GOB, see supra note 27, p.27.

Ibid.


Dowry is not a direct cause of trafficking. When the parent of a girl cannot arrange the marriage due to want of dowry, most of the time girls in this situation are married to old man or unknown persons.


Ibid.
Natural Calamities

Natural calamities like cyclones, drought and flood are common to different parts of Bangladesh due to its geographical situation. The natural calamities push the inhabitants of affected areas to migrate from their own place in search of food and shelter and once again they are vulnerable. In this situation the traffickers are able to attract the people affected by natural calamity very easily by showing them an opportunity to work and earn money.

Lack of Education and Awareness

Lack of education and awareness is another main cause of trafficking in Bangladesh. The traffickers take advantage of people’s ignorance and misguide them easily to achieve their target. Due to lack of awareness, people have less opportunity to evaluate the offers of the traffickers which are very lucrative in nature. Besides this, in rural areas, people’s ignorance about the birth registration put the children at a loss to prove their age in case of convicting a person for child trafficking or for child marriage. The intention of the poor parents to reduce the family burden by allowing child marriage is also an outcome of ignorance.48

6. Impacts of Trafficking in Women and Children in Bangladesh

Trafficking has diverse impacts on the victim, the victim’s family and society. From the root causes of trafficking to victimization, several human rights violations are involved. Stigma and discrimination act as a bar to reintegration or rehabilitation of the victim. The consequences of the trafficking experience on victims are generally devastating for them: they may include damage to their physical and mental health, injuries and death. Trafficking has an impact both on child and adult

victims; however, children are more vulnerable and thus special attention should be paid to help them to recover from the situation of exploitation. The impacts of trafficking can be described in the following way:

**Social Impacts**

Trafficking becomes a threat to society because traffickers operate across borders with impunity with the growing involvement of organized criminals and by generally undermining the rule of law. Trafficking threatens the very fabric of society because it involves not only criminals but also law enforcers. It manifests and perpetuates patriarchal attitudes and behaviour, which undermine efforts to promote gender equality and eradicate discrimination against women and children.

Due to the traditional social structure, the victims never receive positive support from the society; rather they remain in fear of social exclusion if the incident of trafficking is disclosed. Therefore, the victims remain silent in most cases though successfully returning home and as such the victim remains deprived of legal remedies leaving the perpetrators to remain active in their ill trades. The social stigmatization of prostitutes in many societies increases victims’ vulnerability and makes it impossible for them to be reintegrated in their native communities. For example, girls who manage to escape from the sex trade and return to Bangladesh are often not accepted back into their communities - they are considered "spoiled". They are forced to go underground selling sex to survive. It will not be out of place to mention here that the development of the children is hampered by the incidents of trafficking. Psychological trauma of

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50 Asian development Bank, ‘Combating Trafficking in Women and Children in South Asia: regional Synthesis paper for Bangladesh, Nepal and India’ (Manila, 2002) 45.
51 Ibid. p.47
52 Ibid. p. 41
children usually remains unaddressed and unresolved. Moreover, the trafficked children are compelled to lead illegal lives. Illegality taints every dimension of their lives. Their criminalization severely stigmatizes them and intensifies their victimization, and leaves them with no recourse for redress. One thing to be specially noted here is that children of victims of trafficking who are involved in commercial sex trade are extremely vulnerable because they are within the easy reach of the criminals and the female child may also become a victim of the commercial sex trade.

**Economic Impacts**

Bangladesh, being a developing country, has limitations on the use of resources. The incidents of trafficking puts the Government under a burden to employ a certain authority and create a collaborative environment in association with other stakeholders, which involves an additional financial burden on the Government. Besides this, the contribution of the victim of traffickers in the market remains unaccounted for by the Government. The income of foreign migrant workers is a good source for foreign currency reserve, but the income of the victims of trafficking is absorbed by the black market, thereby reducing the positive contribution of regular migration to the national economy. The loss of future productivity and earning power through low educational levels, ill health and potentially premature death is also felt at the country and regional levels. A poor nation can ill afford to lose their young people, whose present and future productive capacity is essential to growth. Diseases, including HIV/AIDS, are also an enormous burden on such countries and causes further imbalances

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55 Asian development Bank (2002), see supra note 50, p. 46
between the young and middle-aged potential workforce and older people dependent on them.  

**Health Impacts and HIV/AIDS**

The effects on victims’ health largely depends on the form of exploitation they are subjected to. In the case of sexual exploitation, victims are exposed to sexually transmitted diseases (STDs) including HIV/AIDS. Women and girl children who were sexually exploited may also subsequently suffer from drug addiction, high-risk abortions and teenage pregnancies, which may affect their reproductive health for life. A Study by an NGO in Bangladesh found that ‘more than 20 per cent of street child prostitutes die before reaching adulthood and almost 22 per cent become physically incapacitated and are fit only for begging.’ Trafficked persons are reportedly traumatized by their experiences. The mental and emotional state of the survivors may include depression, suicidal thoughts, malevolence, helplessness, dissociation, distraction and psychotic disorders. The consequences of trafficking in organs are equally devastating: victims usually do not receive the necessary care after the removal of an organ. Thus, they may contract infectious diseases and even die. In the long term, they may suffer chronic pain and ill-health; they may find themselves unable to work as well as before, leading to unemployment and a situation of increased poverty in which depression and a sense of usefulness may flourish.

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56 Ibid.  
58 ICDDR, see supra note 46, p. 38  
59 Ibid.  
60 C Better and J Stacchowiak, see supra note 57, p. 114  
7.1 Rights Based Approach to Combating Trafficking
Soon after World War II, world leaders became conscious of protecting human rights by creating international obligations upon the states. As time went on, the human rights based concept became clearer and has achieved an important place in the development agenda at national and international levels. Economic disparity between the rich and the poor is a historical phenomenon and the desire of people to develop their own economic condition for better living is pushing them to migrate from one place to another in search of a better job.

There are thousands of incidents in which poor people, especially women and children, move from one place to another with an intention of migration but are actually trafficked and put forward for prostitution, forced labor and many other illegal activities. When a person is trafficked his/her core human rights are endangered and in almost all cases the trafficked persons are deprived of the core human rights like freedom of movement and experience violations such as forced labor, sexual exploitation, discrimination etc. If programs or activities for the prevention of human trafficking are to address these violations effectively, they are required to be human rights based activities or programs.

7.2 Issues in a Rights Based Approach to Trafficking
The circumstances in trafficking in women and children are identical in most of the cases where victims are subjected to sexual exploitation through brutal treatment in the form of physical abuse and threats by the traffickers and their henchmen. If all the incidents of trafficking i.e. socio-economic condition of the victim, manner of approach by the traffickers, modes of procurement, involving the victim in prostitution or forced labor, rescue of victim, filing cases against the traffickers, conviction and punishment of the traffickers, rehabilitation of the victim etc. are measured on the basis of human rights standards, we can
clearly identify a good number of rights that are being violated. In view of previous studies on this topic, victims of trafficking are entitled to two-fold rights namely preventive rights and curative rights. The preventive rights are of an economic, social and cultural nature like the right to basic necessities, right to education, right to employment, etc., while the curative rights are of a civil and political nature like right to life, right to fair trial and right to protection of law. It will not be out of place to mention here that in considering a rights based approach we should not only concentrate on the victim’s protection but also ensure that it does not have any adverse effect on basic human rights.62 The issues in a rights based approach to trafficking therefore should concentrate on the following aspects:

1. The prevention of trafficking.
2. Legal and Social Protection for the Victims and Witnesses of Trafficking
3. The Rehabilitation of the Victims and Witnesses

**The Prevention of Trafficking**

Prevention of trafficking is a most common term used by different quarters who are working for combating trafficking. There is no doubt that preventive measures always perform better than curative measures. Developing countries are found to be the country of origin and country of transit for trafficking due to their poor economies. Therefore the socio-economic condition is very important when addressing the trafficking related issues. Unless or until the economic conditions are addressed by the anti-trafficking framework, other things cannot be effective for the prevention of trafficking.

The right to basic necessities of life which comprise of (i) right to food, clothing, shelter, education and medical care; (ii) right to work at a reasonable wages; (iii) right to reasonable rest and recreation; and

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(iii) right to social assistance in undeserved situation is the main issue. A woman or child of a poor family is vulnerable for trafficking only when they cannot fulfill their basic necessities.

The protection of basic necessities should be the core issue in a prevention of trafficking program. It is not a new thing to incorporate. To the contrary, almost every constitution has a commitment to ensure the right to basic necessities, albeit progressively. Nevertheless, if the Constitution also contains provisions in relation to provide priority support for the marginalized groups, the Government can thereby emphasize ensuring the right to basic necessities of people in vulnerable areas for trafficking on a priority basis.

Apart from the right to basic necessities, the right to education and information is explicitly required for prevention of trafficking. Education on one hand makes competent people for qualified jobs and on the other hand builds awareness so that they can save themselves from the trafficker’s approach.

**Legal and Social Protection for the Victims and Witnesses of Trafficking**

The victims of trafficking are deprived of various rights from core human rights to other rights available under the legal system of a country. Some studies identified that the right to integrity and security of the person, the right to freedom from torture and other cruel, inhumane or degrading treatment, the right to freedom of movement, the right to home and family, the right to health and the right to live like a human being and not to be treated as commodity etc. are violated when a woman or children is a victim of trafficking.63 Some legal systems address the issue only in penalizing the traffickers and some by restoration of rights through remedial measures.64 But in fact, trafficking related issues should be dealt with by a holistic approach coupled with both legal protection and social protection. Legal protection can

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63 Z Hossain & A A Faruque, see supra note 18, p.236.  
64 Ibid.
ensure the punishment of the traffickers and awarding damages to the victim and providing witness protection where necessary. Protection is also required on a social level for the purpose of removing stigma and discrimination of the victims of trafficking.

Victims of trafficking should be provided medical, psychological, legal and social assistance and a good legal basis may ensure such assistance for example, as it is available in the anti-trafficking laws of Azerbaijan, Bulgaria, Dominican Republic, Philippines etc.65 The victims are entitled to be rehabilitated in the society as they were before becoming a victim of trafficking. Due to consequential activities of trafficking like prostitution or pornography, victims lose social support which most of the time discourages them from returning to the society and their family. Their continuing vulnerability is contrary to anti-trafficking initiatives.

The demand for rehabilitation and reintegration of victims of trafficking into society even after being abused has been given priority by different quarters, as discussed in the next section.66 Under legal protection, certain rights should get priority, especially for victims of trafficking provided they can be rescued or are willing to come forward. They are amongst others the right to equal protection of law, right to safety and right to compensation.

In order to ensure the right to equal protection of law, the necessary legislative measure should be taken by harmonizing the substantive and procedural issues in law. It is important to note here that the substantive issues must be specifically defined as offences with severe punishment. Thereafter, the procedural law in that behalf should have the following characteristics:

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i. The lodging of complaint should be simplified in a way that the victim and any person on behalf of the victim should be eligible to file a complaint in respect of an incident of trafficking.

ii. There should be a specific time limit to complete the investigation process and complete the trial along with necessary provisions to ensure accountability of the investigating officer and the Court or Tribunal respectively.

iii. There should be adequate protection measures for the victim, for example, provision for trial in camera, restriction on publishing news about the trafficking related cases to protect the victim and her family’s identity.

iv. There should be adequate protection measures for witnesses so that they come to the Court freely and without any sort of fear in mind and depose in the Court properly.

v. There should be separate rules of evidence to enable the prosecution to discharge the burden of proof based on the testimony of the victim.

Usually criminal law is of punitive nature only, whereas to deal with the trafficking issues the right to compensation is another important aspect which can be utilized to rehabilitate and reintegrate the victim. Thereby, the legal remedy for the victims of trafficking should be such that it can impose a penalty on the traffickers along with awarding damages to the victims.

The Rehabilitation of the Victims and Witnesses

The final issue in the rights based approach to trafficking is rehabilitation of the victims and witness and reintegration of the victims in society. The United Nations put an obligation upon states to take necessary measures for providing educational, medical, social, economic and other related services for rehabilitation and social adjustment of victims of prostitution in society which can be regarded
as a guiding principle for the purpose. In addition to that, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime 2000 has provisions to ensure the right to housing, right to counselling and information, right to physiological and psychological medical assistance and right to employment through education and proper training. Rehabilitation is crucial and vital to the rights based approach to trafficking. In this regard, the right to safety, right to residence, right to employment, right to medical treatment etc. are priority rights.

The right to safety for witnesses of trafficking, who are often also the victims, should be of a universal nature so that the right holder can claim it in any state, whether the state be the country of origin or destination or transitory state. Developed countries like USA and European countries have witness protection systems under the domestic law though it is not available to everyone due to strict procedures. However, developing countries which are very vulnerable to trafficking are not equipped with structural and adequate witness protection mechanisms. Witness protection systems in trafficking issues are important when the state requires testifying against the trafficker to make him liable under law. If the victim or witness is in fear, then justice cannot be done and as such the object of the law will not come out in the reality, but rather will always remain a dream.

Thereafter, the right to residence has got the priority. The right to residence is very much cooperative to encourage the victim to come

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69 M Y Mattar, see supra note 67, p.362.
70 Ibid, p.364
71 Ibid.
forward to support the anti-trafficking program by giving proper information.72 The rehabilitation of the victim and her family in a safe place to live is one of the most important preconditions to successful anti-trafficking program. So, the victims of trafficking should have a right to safe residence in the destination state or in the country of origin.

The rehabilitation of the victim can be achieved only when the victim is provided with the right to employment with proper wages so that she can live with her family within the society with full dignity and respect from others. The right to return is therefore tied up with the economic rehabilitation of the victim. The receiving state is under an obligation to take necessary measures for safe return of the victim to the country of permanent residence and at the same time the country of origin is under an obligation to provide necessary travel documents to ensure safe return and entry into the country of origin without any unreasonable delay.73

7.3 The Need for a Rights Based Approach to Combat Trafficking
Incidents of trafficking seriously violate core human rights standards from the root cause of trafficking to rehabilitation of the victim of trafficking. The programs for combating trafficking require focus on the right based approach for making its objective successful and to make the outcome of the program sustainable. I have discussed the rights violated from the beginning of trafficking to its end which need to be addressed under the legal and social protection mechanisms. Involving multidisciplinary issues, trafficking cannot be dealt with under a single approach. Whatever the plan of action be, it has to address migration and emigration law, criminal law, labor and industrial law,

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72 Ibid.
73 See Article 8 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially women and Children 2001.
restoration of civil rights etc. Unless or until there is a rights based initiative, the program for combating trafficking will not succeed.

The rights based approach for combating trafficking requires the government to redesign its policies, to enact necessary legislation or amend existing legislation, to set up appropriate authority to provide support and service to the victims and to develop a strategic program interface which will be gradually implemented but will ensure all the rights to make them available to the victim under a single framework.

In a nutshell, the approach ensures basic human rights such as the right to life, the right to dignity and security, the right to just and favorable conditions of work, the right to health, the right to equality and the right to be recognized as a person before the law. Through a greater level of protection at home and abroad, with the assistance of customary international law in absence of domestic legislation, a rights based approach is clearly preferable to the traditional approach to combating trafficking which focuses solely on penal sanctions for perpetrators.

8. Existing Legal and Policy Framework of Anti-trafficking in Bangladesh

The present legal system as we see in Bangladesh was set up by the British from the pre-colonial era. As we go through the legislation, we find that even 200 years ago it tried to cover some issues with a view to

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preventing trafficking in women and children under the perspective of the then socio-economic status and socio-cultural behavior of the people. Therefore, addressing the issue of trafficking in women and children has a long history and remedies have been provided under the structured legal regime. After the independence of Bangladesh in 1971, all other colonial era legislation was incorporated into Bangladesh’s legal system77 and from thereafter to date, there have been numerous initiatives to address the issue of trafficking in women and children and the same is reflected in the Constitution78 and other legislation.

8.1 The Constitution of Bangladesh79
The Constitution of Bangladesh (hereinafter referred as the Constitution) did not provide for any definition of trafficking in person, but some constituent elements of trafficking such as prostitution, forced labor of any form have been mentioned in the Constitution primarily from a law and order perspective within a criminal law discourse. It has a strong and positive commitment to prevent prostitution.80 The significant importance of this provision is that the commitment is one of the fundamental principles of the state policy which shall be applied in the making of laws.81 The Constitution further guaranteed the right not to be exploited by forced labor of any form. 82 Therefore the constitutional basis for framing anti-trafficking legal regime is available and thereby the Government is to go for legislative initiative to make the constitutional commitment more effective under the general law.

77 All laws were incorporated by the President’s Order No. 48 of 1972.
78 Constitution is the supreme law of Bangladesh. Article 7 of the Constitution provides for supremacy of the Constitution and Article 26 provides that any law in conflict with the fundamental rights as provided in the Part III of the Constitution shall be void.
79 The Constitution of the People’s Republic of Bangladesh was adopted on 4 December 1972 and came into force 16 December 1972.
80 See Article 18(2) of the Constitution of the People’s Republic of Bangladesh 1972.
81 See Article 8(2), Ibid
82 See Article 34(1) of the Constitution of the People’s Republic of Bangladesh.
The Constitution further guarantees the right of citizens to enter into any lawful profession in accordance with their qualifications and desire.83 The essence of this right signifies that no one can be compelled to be involved in any trade or profession which is illegal or immoral.84 However, entering into a profession or trade may be restricted with a view to protecting the public interest.85 So in accordance with the provision of Article 40, it is clear that the Constitution it acts against trafficking by prohibiting involvement in any illegal trade or profession.

8.2 The Penal Code 186086
The Penal Code did not incorporate the offence of trafficking specifically in the Code, but it deals with various offences related to trafficking, such as kidnapping and abduction87, Procurement and importation of girl from Foreign Country88, Wrongful Restraint and Confinement,89 Buying and selling of minors under the age of 18 years for the purpose of prostitution or illicit intercourse or for any unlawful and immoral purpose,90 Inducing a Woman with a view to seducing her to illicit intercourse91 etc.

8.3 Suppression of Immoral Traffic Act 193392
This Act provides that keeping and managing or allowing a premises to be a brothel is a punishable offence and the offender is liable to be punished with imprisonment for a term not exceeding two years or with fine or with both.93 This expressly discourages prostitution by not only providing punishment for a person who induces a women for

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83 See Article 40, Ibid
84 Abdul Jalil v Bangladesh 45 DLR 24
85 Nasreen Fatema v Bangladesh 49 DLR 542
86 The Penal Code 1860 (Act No. XLV of 1860)
87 s360-363, Ibid.
88 s367-371, Ibid.
89 s339-346, Ibid.
90 s372-373, Ibid.
91 s366, Ibid.
92 The Suppression of Immoral Traffic Act 1933 (Act No. VI of 1933)
93 s4(1), Ibid.
prostitution94 but also for soliciting for prostitution95 and for living on the earnings of a prostitute.96 It further provides punishments for encouraging or abetting the seduction or prostitution of a girl below 18 years.97

**8.4 The Children Act 1974**98

The Act provides penalties for different kinds of offences committed against a child, such as cruelty, employing for begging, handing over intoxicated liquor or dangerous drugs, exploitation, alluring the child to brothel, encouraging seduction and so forth. Approaching a child over the age of four to reside in or frequently to go to a brothel is a punishable offence for which the offender is liable to be imprisoned for a term not exceeding two years or fine or both.99

**8.5 The Women and Children Repression Prevention Act 2000**100

This Act has incorporated trafficking related offences which have been described in the Penal Code and in the Suppression of Immoral Traffic Act, 1933. The significance of this Act is that it prescribed more severe punishment than the Acts stated earlier. Any person responsible for importing or trafficking any women and children to engage them for any immoral purpose or for buying or selling women and children for that purpose is liable to be punished with the death penalty or imprisonment for term not exceeding 20 years and not less than 10 years.101 Apart from this provision on trafficking, this Act further dealt with some other offences related to trafficking, such any person guilty of rape or rape related murder is liable to receive the death

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94 s9, Ibid.
95 s7, Ibid.
96 s8, Ibid
97 s12, Ibid
98 The Children Act, 1974 (Act No. XXXIX of 1974)
99 s41, Ibid.
101 s5 & 6, Ibid.
penalty and any person guilty of sexual oppression is liable to get rigorous imprisonment for a term not exceeding three years.

8.6 Policies and National Plan of Action Concerning Trafficking in Women and Children

The Government of Bangladesh framed the National Plan of Action against Trafficking and Sexual Exploitation 2001 on the basis of data collected at different levels through the GO, NGO, INGO and UN Agencies. In 1994 the Government formulated a policy under the name and style of a National Children Policy 1994, describing the position of the Government in respect of child labor, child oppression, child trafficking and urged that the protection of the rights of the child should get priority in the implementation of the national development agenda. The National Women Development Policy 2008 has strong commitment against trafficking and other consequential circumstances arising out of trafficking such it provided to implement the laws in respect of trafficking, child marriage, prostitution etc., for holding trials in such cases expeditiously, focusing on social and economical protection of women through legal aid and rehabilitation and reintegration of victims.

9. Evaluations of the Existing Mechanisms in Respect of the Rights Based Approach to Anti-trafficking in Bangladesh

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102 s9, Ibid.
103 s10, Ibid.
106 See Article 4.1, Ibid
107 See Article 5.7, Ibid
108 See Article 5.9, Ibid
109 See Article 5.3 & 5.4, Ibid
9.1 Critical analysis of Substantive Laws and Policies on Anti-trafficking

From the legislative measures, the intention of the Government to combat trafficking is clear. But overlapping legislation and lack of harmonization among them is a remarkable issue as a result of which the laws are not able to play the role in combating trafficking that they should. The drawbacks of the existing laws can be described as follows:

1. The Constitution of Bangladesh though provided provision for incidents consequential to trafficking, it did not define trafficking. The attitude of the Constitution as inferred from the provisions of Part III of the Constitution which contains the fundamental rights is that it partially supports the rights based approach for trafficking. The Constitution of Bangladesh, in the part on Fundamental Rights, prohibits all forms of forced labor.110 But the fundamental right to be free from forced labor has been defined from a traditional criminal justice perspective.111 It did not take into consideration the concept of restorative criminal justice. As a result, the judicial concern for contravention of this right is confined to the punishment of offenders only. While punishment is necessary to eliminate forced labor of any form, the interests of protecting the dignity and ensuring rehabilitation – both psychological and material – of the victim of slavery and servitude must be equally important concerns of justice.

110 Art. 34 of the Constitution of Bangladesh.
111 Article 34 of the Bangladesh Constitution read as follows: “All forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

Nothing in this article shall apply to compulsory labor.

(a) by persons undergoing lawful punishment for a criminal offence; or
(b) required by any law for public purpose.”
2. Penal Code is silent about the child pornography or sex tourism. It failed to address organ transplant which is one of the frequent consequences for the victims of trafficking. The Penal Code does not contain provisions which specifically address trafficking but do criminalize other offences such as kidnapping and abduction.

3. The Suppression of Immoral Traffic Act, 1933 is not a comprehensive law for prohibiting prostitution. It speaks about prohibition on prostitution of girls under 18 years of age but silent about those who have attained 18 years of age. Further it is contradictory with the constitutional commitment under Article 18(2) that the state shall adopt effective measures to prevent prostitution.

4. The Children Act 1974, however, puts an obligation upon the Government to set up an appropriate body or mechanism to provide best support for the protection of child rights. But no such special authority has been set up to date and as such the ultimate responsibility under this Act rests upon the Police who are indeed not capable to deal with the issue due to its own deficiency. It will not be out of place to mention here that the street beggars or orphans are high risk groups for the purpose of trafficking and therefore, unless or until there is a strong authority to protect the rights of the children, the ultimate object will be frustrated. Neither the Suppression of Immoral Traffic Act, 1933, nor the Children Act, 1974, has taken into consideration the involvement of boys in prostitution, which is another issue to take into serious consideration especially for the floating boys.

5. The Prevention of Repression of Women and Children Act, 2000, which is the most recent one, provides for severe punishments for offences related to trafficking of women and children, yet it does not define trafficking. The Act also provides a number of time
limits to expedite investigation and prosecution of cases, but is silent about what will happen if the trial is not completed within the stipulated time period. Another limitation of this Act is that it does not criminalize trafficking or procuring and using a child for begging. The Act also does not make it mandatory to establish shelters for trafficked women and children or provide them with basic needs such as health-care or legal aid. There is also no provision in this Act which deal with issues of repatriation of victims of trafficking or programmes to support their reintegration. The Act is not fully in accordance with the UN Convention on the Rights of the Child (CRC), 1989 as regards the definition of child. CRC clearly states that child shall mean any person less than 18 years of age, whereas the Women and Children Repression Prevention Act, 2000 has defined a child as any person of age not exceeding 16 years, instead of 18.

6. The policies developed to date for protecting the rights or women and children reveals that they contain various suggestions to deal particular issues, especially the numerous provisions for dealing with trafficking in women and children. But the policies have a persuasive value only and hence their lack of binding effect does not allow direct action unless or until they are incorporated into legislation through a rigid procedural formality. Besides this, the institutional arrangements under the policies also suffer from lack of coordination between the policy makers and other important institutions of the Government.

9.2 Critical Analysis of the Procedural Framework
In respect of lodging a complaint, both the general law and special law in force in Bangladesh are silent about delay in lodging the complaint, which is in fact considered as a great legal lacuna in criminal trials causing dismissal of the case on ground of fatal error
unless there is a reasonable explanation for such delay. In prosecuting the traffickers it is quite impossible to lodge the complaint as soon as the occurrence happens because unless or until the offender and the allegation is supported by prima-facie evidence the criminal trial fails. Besides this, there is no clear conception of the determination of reasonable delay in lodging information specially in the trafficking cases.

In cases of trafficking and sexual exploitation, the evidence may consist only of the testimony of the victim. It is difficult for a victim to prove such a heinous crime committed against her. Moreover, in the context of prevailing social values, a sexually exploited victim irrespective of age, status and religion confronts the society as an object of shame as if she is also guilty for that situation and the offender takes the advantage. It is impossible for a child to prove the fact that he has been trafficked and some sort of sexual exploitation had been committed against him.

Another important aspect of ensuring right to fair trial is availability of legal aid for the people who deserve it. In Bangladesh due to the poor economic condition, people cannot think of ensuring their legal right through the intervention of the Court. In order to ensure justice for the marginalized section of the population, the Government of Bangladesh has enacted the Legal Aid Act 2000. But the provisions of this Act are vague and incompatible with the present socio-economic condition of Bangladesh. The eligibility criterion for getting legal aid is an absurd measurement in terms of yearly income.

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112 39 DLR (AD) 187; 6 MLR (AD) 240
113 UN Human Rights Committee, ‘General Comment 32’ on Article 14: Right to equality before courts and tribunals and to a fair trial, (23 August 2007) UN Doc CCPR/C/GC/32, paragraph 30.
114 The Legal Aid Act 2000 (Act No VI of 2000).
115 MU Chowdhury, ‘Legal System of Bangladesh: In Search of Reforms’ Premier University (2008) 103
of a person. More so, the application process is full of technicality which cannot be absorbed by the victims of trafficking and hence in this regard the right to fair trial is not ensured for the victims of trafficking.

9.3 Witness and Victim Protection in Bangladesh
In Bangladesh, there are no adequate victim and witness protection provisions under the main substantive and procedural laws. The Prevention of Repression of Women and Children Act, 2000 as amended in 2003 makes provision for victim protection such as safe custody for women and children during trial. However, where the victim will stay is not clear. According to section 31 of this Act, the tribunal can give the order for the woman or child to be kept outside the jail and in a ‘government approved place,’ but no clear guidelines regarding government approved places for safe custody have been put in place.117

However, in some recent judgments, the Supreme Court expressed concern for the protection of victims and their well being. In the case of Tayazuddin & another Vs. the State, where the victim was burned by acid throwing, the High Court Division held that the State has a duty to protect and safeguard the rights of its citizens, including victims and witnesses, to equality before the law, equal protection of law and the right to life and personal liberty, to which there is a corresponding right to protection of those concerned.118 It also emphasized the right of a victim to see a fair trial119 and directed the

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116 See Rule 2(i) of the Legal Aid Rules 2001
118 Tayazuddin and another v The State 21 (2001) BLD (HCD) 503.
119 “…In a democratic country governed by the Rule of Law, the Government is responsible for ensuring free and fair trial not only to the accused but also to the victim of crime. It is, also, emphasised that the Court is not only to see the right of the accused persons, but also to see the right of the victim of crime and society at large. The Court is to see that the victim of crime can have a trial free from all fear
responsible government agencies to take all steps to secure the safety of the informant, victim and witnesses to enable them to give testimony in support of the prosecution case. The decision of the High Court Division in respect of victim and witness protection is no doubt a good approach, but being case law does not bear the same result as a definite provision in the legislation. So, in spite of the efforts of the High Court Division for victim and witness support, there is yet a need for legislative enactment or amendment to ensure victim and witness protection in trafficking cases.

The existing laws in Bangladesh relating to trafficking do not provide any provision for compensation. It will be pertinent to mention that under section 545 of the Criminal Procedure Code 1898, both trial and appellate or revision courts can award compensation to victims. However, section 545 is subjected to two limitations: firstly, compensation to victims can be awarded only when a substantive sentence is imposed and not in cases of acquittal; secondly, quantum of compensation is limited to the fine levied and not in addition to or exceeding it.

The courts of Bangladesh, however, have rarely resorted to section 545 to award compensation to the victim as this provision leaves it entirely to the discretion of the courts to grant compensation to crime victims and defray costs of the proceedings. Compensation can be awarded to the victim of crime at the discretion of the tribunal under the Prevention of Repression of Women and Children Act, 2000. However, these provisions have remained largely unused due to insensitivity of judges towards victims.

\[120\] s545, The Criminal Procedure Code 1898.
\[121\] The Women and Children Repression Prevention Act 2000 s15.
\[122\] AA Faruque, see supra note 117, p. 24.
9.4 Repatriation and Reintegration of Victims in Bangladesh

There is no specific provision in the existing legislations for repatriation or reintegration of the victims of trafficking in Bangladesh. In spite of having no specific provision for repatriation and reintegration of the victims of trafficking, the National Plan of Action for Children (2005-2010) provides some guidelines in this behalf. It provides for ensuring livelihood services for victims of trafficking through community support. It also provides for building awareness among the duty bearers regarding the recovery of victimized children. It approached necessary legislative and policy level efforts for removing stigma and discrimination and ensuring their access to health, education, legal and social services. Similarly, the Women Development Policy 2008 also provides for measures to be taken for the victims of trafficking. It provides that there should be sufficient measures for building awareness, legal assistance and support for continuation of proceedings, physical and social security for the victims of trafficking. The policies are not binding and as such they cannot help effectively in comparison to legislation.

In the case of Mr. Abdul Gafur vs. Secretary, Ministry of Foreign Affairs, Govt. of Bangladesh, the Supreme Court of Bangladesh clearly recognized repatriation as a fundamental right and put emphasis on the state’s responsibility in ensuring repatriation. The Court observed that any rehabilitation scheme must not be incompatible with the dignity and worth of a person. It must to be designed to uplift personal morals and

125 17 BLD (1997) 213.
family life, to provide for jobs giving them an option to be rehabilitated, or to provide facilities for better education and economic opportunities in order to minimize the conditions that give rise to prostitution.

The CEDAW Committee recommended the Government to ensure proper support for facilitating rehabilitation and reintegration of the victims of trafficking in the society.126 The Committee on the Rights of the Children pointed out that there is no program in support of social and psychological recovery, which made it difficult for reintegration of the child into society.127

The Committee of Optional Protocol II on the Rights of Children recommended ensuring an effective rehabilitation program through bilateral agreements with neighbouring countries.128 The bilateral effort of both the states can play an effective and coordinating role for the prevention of child trafficking and care for child victims of trafficking who are involved in the commercial sex industry.129

In a nutshell, it is clear that in the legal system of Bangladesh the victim and witness protection and rehabilitation has not got a substantial space. But when the issue comes before the judicial authority, they have played an important role in directing the Government to perform its responsibility for ensuring the rehabilitation and repatriation of the victims of trafficking. Various policies developed to date signify that the effective measure for ensuring such rehabilitation and repatriation is widely understood by the different agencies of the Government. These now require incorporation within

127 UN Committee on the Rights of the Child, ‘Concluding observations of the Committee on the Rights of the Child: Bangladesh’ (2003) CRC/C/15/Add. 221, para 71
128 UN Committee on the Rights of the Child, ‘Concluding observations: Bangladesh’ (2007) CRC/C/OPSC/ BGD/CO/1, para 41
129 Ibid, para 42
legislative measures; otherwise it will not always be possible to settle the issue through judicial interpretation.

10. Status and Application of International Instruments Regarding Trafficking in Women and Children in Bangladesh

The international community, in order to prevent and combat trafficking in human beings developed a number of international and regional standards. It is important to note that enjoyment of the full protection of rights within an anti-trafficking context; all relevant instruments must be ratified and effectively implemented. Bangladesh follows the dualistic approach for implementation of the obligations under international legal instruments. 130 Under the Constitution of Bangladesh, treaties between Bangladesh and foreign countries are to be submitted to the Parliament through the President. 131 Though the constitutional provision does not make it clear whether the submission of a treaty before Parliament is for making legislation or for obtaining mere Parliamentary approval, it is clear that the provisions of international instruments are not directly applied in the legal system of Bangladesh. 132 Implementation of the international instruments can be made only by enacting legislations or by way of legislative amendments in the existing legislations.

131 Article 145 of the Constitution of the People’s Republic of Bangladesh.
132 Z Hossain & A A faruque, see supra note 18, p.275.
List of Bangladesh’s Ratification of International Human Rights Treaties Relating to Trafficking

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Name of Instruments</th>
<th>Ratified (R)/Acceded (A)/ Signed (S)</th>
</tr>
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<tbody>
<tr>
<td>1</td>
<td>Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949</td>
<td>11 Jan 1985(A)</td>
</tr>
<tr>
<td>2</td>
<td>Supplementary Convention on the Abolition of Slavery, Slave Trade and institutions and Practices Similar to slavery 1956</td>
<td>5 Feb 1985(A)</td>
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<tr>
<td>3</td>
<td>International Covenant on Civil and Political Rights 1966</td>
<td>6 September 2000(A)</td>
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<tr>
<td>5</td>
<td>Optional Protocol to the International Covenant on Civil and Political Rights</td>
<td>Not yet ratified</td>
</tr>
<tr>
<td>6</td>
<td>Convention on Rights of the Child 1989</td>
<td>3 August 1990(R)</td>
</tr>
<tr>
<td>7</td>
<td>Convention on the Elimination of All forms of Discrimination against Women 1979</td>
<td>6 November 1984(A)</td>
</tr>
<tr>
<td>8</td>
<td>Optional Protocol to the Convention on the Elimination of All forms of Discrimination against Women</td>
<td>6 September 2000(R)</td>
</tr>
<tr>
<td>10</td>
<td>Convention against Transnational Organized Crime 2000</td>
<td>Not yet ratified</td>
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<tr>
<td>11</td>
<td>Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially women and Children 2001</td>
<td>Not yet ratified</td>
</tr>
<tr>
<td>12</td>
<td>Convention concerning Forced or Compulsory Labour (ILO Convention No. 29) 1930</td>
<td>22 June 1972(R)</td>
</tr>
<tr>
<td>13</td>
<td>Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst forms of Child Labour (ILO Convention No 182) 1999</td>
<td>12 March 2001(R)</td>
</tr>
<tr>
<td>14</td>
<td>The SAARC Convention for Preventing and Combating Trafficking in Women and Children for Prostitution 2002</td>
<td>Ratified</td>
</tr>
</tbody>
</table>

Evaluating the activities of Bangladesh to implement the convention, the CEDAW Committee has commented on some issues in the absence of which it is not clear that Bangladesh has truly implemented the CEDAW Convention. The Committee noted that taking legislative measures for some specific issues concerning rights of women is a positive approach, but it failed to define the term discrimination in contravention with the provision of CEDAW Convention. 134 The CEDAW Committee further showed its concern over the fact that the incidents of trafficking are prevalent in the country and the trial system of the traffickers were questioned on the ground that the traffickers are convicted by the Courts only in a few cases. 135 The CEDAW Committee recommended developing a comprehensive formula for preventing and combating trafficking. Apart from domestic efforts, it suggested to go for international, regional and bilateral initiatives among the sending, receiving and transitory states for trafficking. It also recommended a sustainable economic strategy to reduce the vulnerability of women which is one of the root causes of trafficking. It also emphasized providing education and training to the vulnerable groups, arranging training for Police and border officials to enhance their capacity for preventing trafficking and providing full support to the victims of trafficking so that they can give their testimony freely. 136

The Committee on CRC, showing its concern about the growing rate of forced child prostitution in Bangladesh, recommended that the Government of Bangladesh take adequate measures for the reintegration and non-criminalization of victims. It further recommends taking proper initiatives to remove phenomena like using children as

135 See para 243, ibid.
136 See para 244, ibid.
camel jockeys, child prostitution and child trafficking in domestic and cross-border areas.137

The Committee on CRC also commented that child pornography has not been adequately defined in existing legislation.138 Further, the Committee took into consideration the fact that the rate of commercial sexual exploitation of children involving trafficking in Bangladesh is growing. It recommended the Government develop a clear definition on child trafficking along with prescribing exemplary punishment for offenders.139

It further recommended making bilateral agreements with neighbouring countries for combating trafficking140. In order to prevent, detect, investigate, prosecute and punish the offenders responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism it emphasized international, regional and bilateral mechanisms.141

In spite of the fact that Bangladesh has ratified various international instruments concerning trafficking, Bangladesh has not removed some reservations on important conventions. Bangladesh has made reservations on Article 2 and 16(1)(c) of CEDAW Convention and 14(1) of the CRC which contain the very basic essence of the object and purposes of these Conventions. The Optional Protocol I of ICCPR has not yet been ratified by Bangladesh whereby the individuals can complain to the international forum for violations of rights. Besides this, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2001 has not been ratified by

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139 para 27, Ibid.
140 See para 41, Ibid.
141 See para 42, Ibid.
Bangladesh although it is the main international instrument concerning trafficking. It is even evident that Bangladesh is yet to incorporate various international instruments ratified by it into national legislation. Not only ratification by the Government of Bangladesh but also incorporation of the international obligation in the national legislation is required to enjoy the benefits of these instruments for combating trafficking.

11. The Way Forward to Ensuring a Rights Based Approach to Combating Trafficking in Women and Children in Bangladesh

The Government of Bangladesh has taken several initiatives to combat trafficking. These initiatives range from legislative to administrative. As discussed in the previous chapters, the Government at least showed its intention to comply with the commitments under international legal instruments on trafficking. But the Government’s effort did not support the anti-trafficking agenda of the Government as it should. Though the Government legislated to prescribe severe punishment for the traffickers, it did not take necessary steps to reduce the overlapping of the laws dealing with trafficking related offences. There is no initiative on the part of the Government to focus on preventive and restorative measures apart from criminalization of trafficking. There is nothing in laws dealing with the trafficking related offences prescribing the measures for ensuring ‘victim and witness protection’, ‘repatriation’ or ‘rehabilitation’ of trafficked persons. These terms are vitally important and need legislative safeguards and clarity to do justice for the victims of trafficking. It is true that Bangladesh has adopted many international treaties and Conventions addressing the issue of trafficking, but it did not come forward to make necessary legislative actions for incorporating the substantive portion of the international instruments into the domestic laws. Since the problem of trafficking is influenced
by a complex set of factors, an effective strategy in combination of both control measures and preventive measures is required. The anti-trafficking program should focus on the violation of rights of the victims and restoration of the same with proper dignity. So in order to promote and protect the rights of the victims of trafficking, the following measures are required to be taken by the Government of Bangladesh to set the anti-trafficking program within a rights based approach.

11.1 Need for a Comprehensive New Legislation on Trafficking
The lack of specific or adequate legislation on trafficking in Bangladesh has been identified as one of the major obstacles in the fight against trafficking. The development of an appropriate legal framework that is consistent with relevant international instruments and standards will play an important role in the prevention of trafficking and related exploitation. It is therefore necessary to have in place a new, comprehensive piece of legislation dealing in a holistic manner with all aspects of trafficking in women and children. The new law should contain a comprehensive definition of trafficking. It should have specific provisions to deal with all forms of trafficking, such as trafficking or prostitution, forced labor, domestic work, debt bondage, forced and fraudulent marriages, illicit adoptions, begging, camel jockeying, organ transplant, trafficking due to culturally sanctioned practices, trafficking for purposes of child sex tourism and child-pornography. The law should make specific and compulsory provision for compensation to victims of trafficking of any kind. The compensation should include not only monetary expenses incurred, but also exemplary compensation for the harm done, as well as compensation in the form of health care, education facilities, job opportunities, etc. The law should also have specific victim assistance programmes.
11.2 Reforms of Procedural Laws and Criminal Justice System

The criminal justice system should be more rights-based, gender sensitive and child friendly. For the purpose of trafficking the criminal justice system should focus on remedial measures in line with criminalization of trafficking. A gender sensitive and child friendly approach should also be adopted and practiced in investigating the cases relating to trafficking. The use and management of pro-active, intelligence-led investigative tactics should be developed. Use of video conferencing and other technological tools should be used for prosecution of traffickers and the laws should either be amended or be enacted to ensure the admissibility of evidences adduced from photograph, video footage, voice records etc. In order to achieve this target, an independent investigation system for trafficking related cases and access to information relating to trafficking should be ensured. The criminal justice system should take special care to protect victims’ dignity and human rights. The overlapping situation in existing procedural laws specially relating to lodging a complaint should be removed.

The rules of evidence as prevailing in the existing law are inadequate and one-sided. It is virtually impossible for a woman or child to prove the fact that they have been trafficked and some sort of sexual exploitation had been committed against them. So, for all types of trafficking cases, the Evidence Act 1872, should be amended to remove the corroboration requirement which most of the time affects the case. Witness protection schemes should be set up for victims so that they can testify against their traffickers. Such schemes should assist the prosecution in presenting evidence before the courts and would help to secure a higher rate of conviction.
11.3 Effective Rescue, Repatriation and Reintegration Mechanisms Should Be Ensured

As previously mentioned, there is no specific provision for repatriation and reintegration of victims of trafficking in Bangladesh. If trafficked persons are rescued before they have been too seriously harmed, the probability of being accepted back into their communities is much higher. This also means the traffickers can be identified and cases are pursued immediately. Subsequent to the rescue of the victims, safe return should be guaranteed by both the receiving State and the State of origin. Sometimes, victims, especially those who have undergone grave sexual abuse and exploitation do not want to return to their countries or communities and families due to a feeling of guilt, shame and fear of stigmatization and social exclusion and rejection. In such cases, trafficked victims should be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety.

As noted by the Special Rapporteur,142 there is a need to move from a paradigm of rescue, rehabilitation and deportation to an approach which is designed to protect and promote women's human rights, in both countries of origin and countries of destination. Although some women may be traumatized by their experiences and may, on a case-by-case basis, desire counseling and support services, overwhelmingly it is not just “rehabilitation” that women need. They may need material support and sustainable incomes. Therefore, government measures to address trafficking must focus on the promotion of the human rights of the women concerned and must not further marginalize, criminalize, stigmatize or isolate them, making them more vulnerable to violence and abuse.143

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143 Ibid. p. 34, para 114
Government-NGO partnerships in anti-trafficking strategies should be further developed to improve rehabilitation and reintegration services for the rescued victims including psychological counseling and care. Adequate provision should be made for safe shelter homes for trafficked women and children instead of keeping them in police custody. Multi-purpose centers should be established where rescued trafficked victims can receive educational and vocational skills or income generation training courses, which will reduce their vulnerability to trafficking. Such multi-purpose centers can also attract poor and destitute women and children with the goal of raising their awareness to the process and risks of child trafficking. Such multi-purpose centers can be set up at district level. These centers can bring informal and non-formal education as a means to help reduce the incidence of trafficking and increase the general awareness of communities on the issue and the value of education generally.

11.4 Proper Preventive Strategies Should Be Adopted
Preventive measures against trafficking should be proactive, precautionary, protective and deterrent. The factors that generate demand for exploitative commercial sexual services and exploitative labor should be investigated and strong legislative, policy and other measures to address these issues should be adopted. Since poverty is one of the root causes of trafficking in Bangladesh, community-based poverty reduction programming plays an important role in trafficking prevention. Increasing the livelihood options for those with few resources (particularly women) is vital to ensure the most vulnerable are prevented from falling into the trap of trafficking networks. Programme building on partnerships between civil society and state agencies provide multi-dimensional approaches to trafficking prevention programs. Prevention programmes and strategies should also be specially oriented to the demand areas, the transit
Protection of Vulnerable People

points and the destinations. Additionally, factors that lead to social disintegration of families and communities also need to be addressed.

Awareness raising and education of the groups that are most susceptible to trafficking are the two key components of any intervention strategy for preventing trafficking. Furthermore, programmes to increase the status of women and girls and address other discriminatory traditions can help build collective efforts to combat trafficking. Awareness-raising programmes must be aimed at vulnerable groups, parents, school teachers, community leaders, employers, lawyers, police, public officials, law enforcement agencies, and the general public on issues of trafficking, gender discrimination, women and child rights, victim support, and rehabilitation.

The media has a major role to play in preventing trafficking. The media can make the public aware of their rights and thereby generate and augment human potential against exploitation. It can promote various government schemes addressing the vulnerability factors. The media strategy should cover print and electronic media at the national and regional levels so as to achieve the widest outreach possible for anti-trafficking awareness.

11.5 Training and Capacity Building for Stakeholders and Law Enforcing Agencies
The implementation of anti-trafficking laws involves various stakeholders such as enforcement officials, prosecutors, lawyers and judges. In particular, law enforcing agencies and prosecutors are important institutions for implementing anti-trafficking laws and preventing trafficking. In Bangladesh, the low rates of prosecution and conviction of traffickers can be attributed to the inadequate training of law enforcing agencies, prosecutors, judges and lack of adequate financial and technical support.
The main objective of capacity-building programmes should include increased prosecution and conviction, child sensitive rescue operations, repatriation and reintegration, coordination linkages between stakeholders and monitoring and accountability of activities relating to anti-trafficking. Human rights based counter-trafficking training for the judiciary, law enforcement agents, medical personnel, community leaders, trade union leaders, immigration officials, and borders security forces and NGO personnel should be developed and imparted.

Any capacity-building training should be undertaken on the basis of need assessments, clearly defined roles of various agencies, an understanding of existing knowledge and expertise and an analysis of the roles and competencies required for the implementation of a comprehensive strategy. The lack of understanding of trafficking and relevant laws on trafficking among law enforcement agencies remains as one of the major problems of law enforcement in the domain of trafficking. Therefore, it is imperative that the law enforcing agencies should be well equipped with sufficient motivation and training to enforce the anti-trafficking laws. Appropriate training should be provided to the law enforcing agencies for enhancing their capacity building and skills in combating the problem.

Similarly, the judiciary as an important stakeholder should also be included in training and capacity-building programmes in order to make them more sensitive and proactive in dealing with cases involving trafficking. Extensive programmes on gender sensitisation and human rights training, particularly those relating to violence against women should be provided to the judges. A gender-sensitive judiciary can do much in the way of eradicating trafficking problems.

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Victims also should be provided capacity-building training to empower them and to prevent their further entrapment into trafficking and involving them in social justice education and raising awareness to issues of trafficking in their own communities, provided they wish to return to their communities and families and wish to be identified as victims of trafficking of any form whatsoever.

11.6 Policy and Institutional Reforms
Establishment of special cells on trafficking of persons in relevant ministries of government such as Women and Children Affairs Ministry, Home Ministry, and Information Ministry is recommended. A database on information on trafficking victims with adequate identity protection measures should be in place. A database will act as a case information system which will ensure comprehensiveness of data of trafficking victims and easy processing that serves the purpose of case reports, multi-disciplinary investigations and long-term anti-trafficking planning. In order to implement a rights-based approach to anti-trafficking measures, a rights-based migration policy needs to be adopted.

A national institution to provide information resources on women and children’s rights and status should be created for collecting information and undertaking research on trafficking. The proposed national institution shall also be responsible for prevention of trafficking and rehabilitation of the victims of trafficking.

There is need to create a victims’ compensation fund at the national level that can be partially funded by the fines collected from criminal prosecutions. In such a case, a particular victim’s compensation need not be dependent on the recovery of a sum from the offender. Fines as a source of revenue is not significant for the state, but as a nucleus for a compensation fund it can be of considerable importance. The national human rights commission should also be
given a mandate to deal with government failures to redress human rights violations in the case of trafficking in women and children.

11.7 Monitoring and Coordination among the Different Government Agencies Is Necessary

Different institutions under the Government are related to anti-trafficking program. It is important to have an effective monitoring and coordination mechanism to harmonize among the activities of law enforcement, immigration, trade unions, employment, social services and child welfare agencies and NGOs. A close watch on the high risk labour sectors such as restaurants, sweatshop industries, domestic service, agriculture and construction is necessary to prevent trafficking to a significant extent.

The Government should develop a mechanism to reduce overlapping of activities among different Government agencies related to anti-trafficking programs. In her concluding remarks to the Commission on Human Rights in April 2001, Ms Calcetas-Santos, UN Special Rapporteur on Child Prostitution, Sale of Children and Child Pornography urged improvements in the system of networking amongst themselves and UN departments, NGOs and States to avoid overlaps in the mandates of various agencies and human rights experts.145

11.8 Ensuring State Obligations under Various Instruments and Cooperation among SAARC Countries

In order to ensure better protection in the international arena, Bangladesh should ratify all the existing international instruments relating to the prevention of trafficking and illegal migration and also withdraw reservations to ratified instruments to ensure human rights for

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the victims of trafficking. To implement the existing ratified instruments, the government of Bangladesh should adopt implementing legislation and take necessary administrative steps in this regard.

Compatible legislation should be enacted in all the SAARC countries to reduce the gaps and contradictions and enable the victim to get proper protection within the region. There should be proper and effective border security through bilateral arrangements between the bordering countries. There should also be a mutual mechanism between the bordering countries to prevent trafficking, smuggling and illegal migration. The SAAR Regional Convention should be enlarged to cover different forms of exploitation such as camel jockeying, slavery, organized begging and organ trading that occurs as consequential to trafficking. There should be a separate cell under the SAARC Secretariat to support the member states to adopt effective measures in line with the SAARC Convention to combat trafficking. An obligatory reporting mechanism for the parties to the SAARC Convention should be incorporated in the framework of the Convention to monitor progress in implementing the Convention.

It should be ensured that victims of cross border trafficking are voluntarily and successfully repatriated and traffickers extradited. Extradition treaties should be adopted between source and destination countries in the region to facilitate the extradition of traffickers. Long term cooperation is necessary among the law enforcing agencies of source countries and countries of destination regarding prevention of trafficking as well as repatriation and rehabilitation of traffic victims.

The SAARC countries should develop a mechanism to collect comprehensive data on trafficking. There should be a central database and a regional survey to assess the nature of the problems, the numbers involved, the profile of victims of trafficking and the profile
of the traffickers. There should be a regional taskforce on trafficking that will plan and implement a concerted strategy for the region.

12. Conclusion

There is no doubt that trafficking violates numerous human rights and that it is necessary to concentrate on all the rights violated by an incident of trafficking. The anti-trafficking programs as prevailing in Bangladesh do not cover all these rights. Besides this, the preconceived view is that criminalization of trafficking only focused on penalizing the wrongdoer can mentally satisfy the grievance of the victim. But mere criminalization does not bring justice on the ground that it is unable to restore all the rights violated by trafficking. Justice therefore can only said to be ensured when all the rights are restored to the victim as if he/she had not been trafficked. To achieve this goal, the anti-trafficking program should be developed in consideration of human rights perspectives. The nature of the anti-trafficking program should be participatory, integrated and holistic to reflect effective coordination among the activities of different agencies whether government or non-governmental. The program should have a triangular approach to combat trafficking which will cover prevention of trafficking, prosecution of traffickers and protection of human rights of trafficked persons. At the same time, there should be economic and social programs for empowerment of vulnerable groups, especially for women and children in low income areas. The Government should incorporate under its Women Development Program provisions to facilitate such persons through training, logistic support and resources to enable them to build their career either as entrepreneurs or professionals. Therefore, all such activities have to be built upon the basic substratum of human rights, which, in turn, will also be the yardstick for the efficacy or utility of the concerned initiative.
Right to Fair Trial
Access to Justice in the National Courts, with a View to International Instruments

Mohammad-Javad Javid* & Esmat Shahmoradi**

Abstract

Access to justice can be defined as the right of individuals and groups to obtain a quick, effective and fair response to protect their rights, to prevent or solve disputes and to control the abuse of power, through a transparent and efficient process, in which mechanisms are available, affordable and accountable. As an undeniable human right, however, access to justice is impaired in many of the national courts across the globe. A variety of factors contribute to failure of judiciaries to administer justice, which will be investigated in this research.

This study reviews some international instruments including the Bangalore Principles on Judicial Conduct (2002), the UN Basic Principles on the Independence of the Judiciary (1985), and the UN Basic Principles on the Role of Lawyers (1990), and draws upon the experience of the relevant international bodies, including Transparency International, to offer practical mechanisms that work to enhance access to justice. The aim is to promote judicial transparency and accountability as two major means which promote access to justice through the judicial sector.

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Introduction

Failure of the judiciary to provide public access to justice is perceived as a major threat to the rule of law and democracy, as well as to human rights and social justice. It hinders economic development, and endangers the stability of democratic institutions and the moral foundations of society. Creating a fair, meritocratic and transparent judicial system promotes access to justice for all by making the system more likely to deliver decisions based on law rather than other considerations such as political expediency or bribery.

For this purpose and accordingly, international standards, while not directly enforceable, represent international consensus on an ideal judicial system. Initiatives at legal and judicial reform have introduced a number of legal instruments at the international level, implementation of which by states significantly promotes access to justice at the national level. The relevant international standards are stipulated in the following instruments:

- Universal Declaration of Human Rights (1948);
- International Covenant on Civil and Political Rights (1966);
- UN Basic Principles on the Independence of the Judiciary (1985);
- UN Basic Principles on the Role of Lawyers (1990);
- UN Guidelines on the Role of Prosecutors (1990);
- UN Convention Against Corruption (UNCAC) (2003);

For the above instruments to be enforced in the national justice systems, judiciaries, in addition to other key members of the broader justice system, are required to engage in and monitor observance of
the provisions they stipulate. Studies have shown that “political will” 1 is the first and foremost factor in administration of justice. The primary reason for the deterioration of many court systems is known to be political neglect. According to Ginsburg’s theory, the necessary condition for judicial independence to emerge is that “political actors should be interested to protect independent courts as impartial forums where their present or future interests can be defended even if overridden in the political arena” 2. Naturally, only when the government is determined to enhance the enforcement of justice in its courts, can we hope that any recommendations aimed at promotion of access to justice can find their way into practice.

Given the above, authors of the present paper take the “political will” of governments as the first prerequisite and supply a number of recommendations to be implemented to enhance access to justice in the national courts. The paper begins with a discussion on the role of transparency in promotion of access to justice, how a judicial system can make use of transparent mechanisms, and the Principle of Open Justice and its exceptions. It then deals with judicial corruption as a cause and effect of lack of transparency in a judicial system. The constructive role of accountability and competence of judges will also be reviewed and the need for a balance between judicial independence and accountability will be highlighted.

The role of key actors in judicial system will be examined as well as the explanatory power of judicial structure in promotion of access to justice. More specifically, the contribution of the civil society (NGOs

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and academics) will be investigated. The paper will conclude with a diagnostic checklist for access to justice and a list of recommendations to this end.

1. Building a Culture of Transparency
As an international issue, transparency came to prominence after World War I in the post-war negotiations. It then took considerable time for many nations to pursue transparency. Transparency and the right to access government information are now internationally regarded as essential to democratic participation, trust in government, prevention of corruption, informed decision-making, accuracy of government information, and provision of information to the public, companies, and journalists, among other essential functions in society.3

Transparency in the judicial system ultimately serves to keep government honest. With judicial corruption as an issue raised at the international level, judicial transparency is seen among the standards for the integrity of a justice system. Indeed, what is required is “a careful balance of independence and accountability, and much more transparency than most governments or judiciaries have been willing to introduce”4.

Notwithstanding the above, conspicuously absent from many judicial reform programs has been transparency in the court systems. According to the Global Corruption Report 2007 provided by Transparency International, “Opaque court processes … prevent the media and civil society from monitoring court activity and exposing

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4 Diana Rodriguez and Linda Ehrichs (eds.), xxiii
judicial corruption." 5 Naturally, such opaque processes can pave the ground for violation of the rights for citizens to access justice.

Transparency is a characteristic of an efficient judiciary in terms of its work and organization. “The public needs reliable access to information pertaining to laws, proposed changes in legislation, court procedures, judgments, judicial vacancies, recruitment criteria, judicial selection procedures and reasons for judicial appointments.” 6 Also, to establish a transparent organization, “the judiciary must publish annual reports of its activities and spending, and provide the public with reliable information about its governance and organization.”

Transparency also applies to the removal processes of court judges. “Removal mechanisms for judges must be clear, transparent and fair, and reasons need to be given for decisions. If there is a finding of corruption, a judge is liable to prosecution.”

Prosecution services, too, must be transparent. “The prosecution must conduct judicial proceedings in public (with limited exceptions, for example concerning children); publish reasons for decisions; and produce publicly accessible prosecution guidelines to direct and assist decision makers during the conduct of prosecutions.”

Enforcement of any laws aimed at promotion of access to justice is in need for performance monitoring. To enhance transparency at this level, the collection and publication of enforcement data can be helpful. Publication of data, with due consideration of certain conditions 9 can “dissuade perverse incentives in courts”. 10 According

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5 Ibid: xxiv
6 Ibid: xxvii
7 Ibid
8 Ibid
9 Conditions and limitations on publication of court data can be in some circumstances, children’s cases included. The principle of open justice must be balanced against other principles of justice which protect the interests of parties to
to the Principle of Open Justice, “except in extraordinary circumstances, the courts of the land are open to the public” 11. This principle arises out of the belief that “exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers.”12

Transparency standards also apply to judicial asset disclosures. Judges and other court actors “should make periodic asset disclosures, especially where other public officials are required to do so.”13

Civil society monitoring and reporting can also contribute to transparency in the judicial systems. Civil society organizations have been helpful by “monitoring the incidence of corruption, as well as potential indicators of corruption, such as delays and the quality of decisions.”14

Corruption is one of the certain consequences of lack of transparency in judicial systems. Evidently, “corruption in a country is very rarely a

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litigation. In Australian Securities and Investments Commission v Rich (2001) 51 NSWLR 643, Austin J identified eight considerations which qualify the principle of open justice:

(a) the principle of prematurity, in the sense that evidence has not been tested or answered.
(b) The principle of trial by media before material can be tested in open court in public proceedings.

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(e) Surprise or ambush which might undermine a negotiated position.
(f) The risk of misleading reporting.
(g) The fact that the evidence is hearsay should not dissuade a judge from making it available.
(h) The need to protect commercial confidentiality.

See: “Media access to court records and exhibits”, Judicial Commission of New South Wales, accessed online:


12 See: ibid


14 Ibid
one-dimensional phenomenon, but is rooted in interdependent and
dynamic political, administrative, social, and economic
components‖15. As admitted by experts, “corruption is an attack at
the very heart of the state‖16. More specifically corrupt judicial systems
can deprive people of access to justice. Indeed, corruption can be a
cause as well as an effect of lack of transparency.

2. Accountability and Competence of Judges

The judiciary needs to be independent of outside influence, particularly
from political and economic powers. “An independent and impartial
justice system” for instance “underpins the effective implementation of
the United Nations Convention against Corruption (UNCAC)”17. But
with “the tension that exists between the principles of independence
and accountability, efforts to address judicial accountability have
been perceived as problematic”18. Naturally, “judicial independence
does not mean that judges and court officials should have free rein to
behave as they please. Indeed, judicial independence is founded on

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15 Koechlin, Lucy (2007), An Evaluation of National Integrity Systems (NIS) from a
16 "Soziale Entwicklung und Terrorismus" [An Attack on the Very Heart of the State];
See: Mickolus, Edward F., and Simmons, Susan L., Terrorism, 1992-1995: A
Chronology of Events and a Selectively Annotated Bibliography. Available online
at:
http://books.google.com/books?id=UlBzCC0c2McC&pg=PA925&dq=P925&dq=%22of+the+State:+Social+Development+and+Terrorism
17 See: Schultz, Jessica, “The UNCAC and judicial corruption: Requirements and
No. 18
18 Mayne, Greg, “Judicial integrity: the accountability gap and the Bangalore
Principles”, in: Diana Rodriguez and Linda Ehrichs (eds.), p. 41
public trust, and to maintain it, judges must uphold the highest standards of integrity.”19.

There are various national and international initiatives that seek to plug this gap. There is no single internationally accepted set of standards on judicial accountability, although the Bangalore Principles on Judicial Conduct, which were adopted by the UN Economic and Social Council in 2005, address issues surrounding the individual accountability of judges. The Bangalore Principles set out six core values that should guide the exercise of judicial office, namely: independence, impartiality, integrity, equality, propriety, and competence and diligence. The focus on practical guidance and specificity, compared to other international standards, makes them of direct utility to members of the judiciary.20 According to Noel Pepys:

> Judges must be legally accountable by providing reasoned decisions and judgments that are open to appeal. Financial accountability ensures that the judiciary accounts for both the intended and actual use of resources allocated to it. The judiciary must also be accountable for the way it is run: structures and standards should be regularly evaluated and improved, and the judiciary should comply with codes of ethics and professional standards. 21

Noel Pepys proposes the following mechanisms (in Global Corruption report 2007, pp. 8-11) as a set of remedies to increase accountability of the judiciary:

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19 Diana Rodriguez and Linda Ehrichs (eds.), “Accountability and competence of judges”, p. 40
20 Mayne, Greg, in: ibid: 42
21 Noel Pepys, Mary, “Corruption within the judiciary: causes and remedies” in: ibid, p. 8
1- Judges need to be and appear to be impartial, independent and beyond reproach.

2- Laws should require judges and other public servants in the judiciary to file a personal declaration of assets and one for their close relatives.

3- A code of conduct is necessary to strengthen the integrity of judges and improve public perception of the courts by clarifying the behavior expected of judges.

4- Publication of judicial decisions can expose corrupt judges who are unable to justify their rulings by reasoned opinions, while protecting judges whose reasoning demonstrates that they have properly applied the law to the facts in a case.

5- Court procedures must be simplified and made comprehensible to the court user; They must be precise in order to minimize court staff discretion, and must clearly delineate responsibilities to enhance the accountability of each staff member.

6- Computerized case-management systems that allows for transparent tracking of case files enhances the effectiveness of court proceedings and ensures that cases are heard in a reasonably efficient manner.

7- And finally, in many countries, the provision of an alternative dispute-resolution (ADR) mechanism, whereby the plaintiff and defendant attempt to reach a settlement outside the courtroom, can reduce the backlog of cases in the court.

3. Key Actors in the Judicial System

Judges are only part of the broader system of justice. They operate in a political environment to the extent that their decisions affect the other branches of government by, for example, checking executive power, applying the laws as set out by the legislature and, in some countries, by determining whether laws adhere contravene the constitution. But
judges only play their part after a case has come to court: it first has to pass through the hands of the police, prosecutors and lawyers.22

Within the broader justice system there are key actors which can hinder access to justice through their specific mechanisms. Prosecutors, court personnel, lawyers and bar associations may gain material private benefit to alter legally-determined treatment of case files or evidentiary material. Enforcement agencies such as bailiffs may fail to enforce sentences “in exchange for financial (e.g. bribe) or other material private benefit”23. The same can apply to the police in their dealing with criminals. According to the Global Corruption Barometer (2010), “The police are the institution most often reported as the recipient of bribes”24. As figures show, “almost three in 10 of those who had contact with the police worldwide report paying a bribe. The judiciary and registry & permit services follow”25.

As for perceived judicial corruption, “a country comparison indicates the explanatory power of judicial structure” 26. The following illustration27 shows the key players contributing to access to justice in the national courts:

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23 Buscaglia, Edgardo, “Judicial corruption and the broader justice system” in: Diana Rodriguez and Linda Ehrichs (eds.), op.cit. p. 71
25 Ibid
27 Transparency International, Introducing Judicial Corruption, available online at: www.u4.no/...reading/transparency-international.../2355
As illustrated above, there are a number of external factors which can contribute to the development of justice systems included among which is the civil society (NGOs and academics). Beyond the courts, human rights activists, academics and development NGOs, may have concerns that overlap with those of the long-suffering court users, whose demands for efficient judicial systems resound throughout this paper.

The participation of civil society in the monitoring of corruption cases is “a right recognized in relevant international covenants”28. While it is not unlikely that NGOs and academics undermine judicial independence or integrity through overzealous or malicious criticism of judicial competence, this does not serve as an excuse for preventing them from performing their normal functions and duties. Civil society

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does contribute to “good governance”29 and to the understanding of issues relating to administration of justice by monitoring potential indicators of corruption, such as engineered delays and the quality of decisions, and by commenting on the decisions of judges. 30 Academics for instance can generate reasonable debate about the appropriate requirements for judicial and legal training. They can also offer expert advice and training to judges, the judiciary and the government in implementing training strategies.31

Transparency International provides the following recommendations as some measures to be taken by civil society and policy makers:32

The Civil society should:

✓ Utilize the international standards as the basis of their engagement with governments and judiciaries on the issues of judicial independence and accountability.

✓ Bring to the attention of judiciaries the existence of the Bangalore Principles and encourage their adoption, or the adoption of a similar code, and the development of enforcement mechanisms consistent with judicial independence.

✓ Encourage discussions among judges at national level on issues of judicial conduct and accountability, and the need to uphold adequate standards, and begin a dialogue with the judiciary about these issues.

30 For more information on judiciary’s role in good governance, see: Kim, Joongi, (2007), “The Judiciary’s Role in Good Governance in Korea”, Policy and Society 26(2), 15-32
32 See Global Corruption Report 2007
✓ Using the international standards as a basis, educate the broader population about the issues of judicial independence and accountability, and the role of the judiciary in society.

✓ Inform the public about standards of conduct that judges can be expected to uphold.

✓ Provide the judiciary with standards against which it can measure its performance.

4. Diagnostic Checklist for Access to Justice

The following checklist constitutes Transparency International’s recommendations on best practice in the judicial system. It synthesizes existing international standards on judicial independence, accountability and corruption, and was developed through a process of consultation with judges, judges’ associations, legal professionals, academics and professionals in the justice-sector reform field.

The checklist covers two areas: (1) the system requirements for a clean judiciary; and (2) the responsibilities of actors involved in the judicial system, both of which we will review in this section.

1. System requirements for a clean judiciary

Clear system requirements that support the activities of judges and other actors must be in place in order to prevent corruption. These are:

i. Safeguards for the independence of judges (e.g. judges’ independence as well as their immunity);

ii. Good conditions of service for judges (e.g. safeguards that prevent the political manipulation of judicial salaries and promotions);

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33 Judiciary Advocacy Toolkit, pp. 22-30
iii. Fair and independent appointments processes (e.g. judicial appointments based on merit, requiring a demonstrable record of competence and integrity);

iv. Judicial accountability, which comprises:

- Legal accountability: Reasoned decisions and judgments, and the appeals process ensure that the basis for all judicial decisions can be traced and justified, thereby limiting the potential for decisions to be made in response to external pressure or bribery.

- Administrative accountability: ensures that the administration of the judiciary and the justice system is transparent; structures and standards are regularly evaluated and improved; and that the judiciary complies with codes of ethics and professional standards.

- Financial accountability: Judiciary accounts for use of public resources; this kind of accountability ensures that the judiciary accounts for both the intended and actual use of resources allocated to it. Judges are increasingly being asked to account for their incomes and some countries require judges to make financial disclosures.

v. Transparency: Public access to information on the judiciary, cases, the law and judicial recruitment and judicial disciplinary processes improves transparency and the effectiveness of these procedures, and provides a means of challenging irregularities.

2. Responsibilities of actors involved in the judicial system:

I. Responsibilities of judges:

- Independence and impartiality;

- Education (judges take individual responsibility for their own knowledge, competence and development);
- Legal accountability (Reasons for decisions are given and recorded with competence and due diligence);

- Administrative accountability (All reasonable measures are taken by a judge to ensure that cases and appeals are heard without undue delay).

II. Responsibilities of the judiciary:

- Independence
- Ethical conduct should be actively promoted by the judiciary
- Appointments (based on competencies, skills and merits of judges at all levels)
- Accountability and transparency
- Discipline (Ensure that internal disciplinary measures and investigative procedures include a means of receiving complaints confidentially from litigants, lawyers and judges.)

III. Responsibilities of politicians (legislature and executive):

- Relationship between political powers and the judiciary: Members of the executive and legislature do not place pressure on individual judges or the judiciary as a whole by making public statements that unduly influence the actual or perceived security and independence of any judge.
- Allocation of resources to judiciary-related matters: (a) Adequate resources should be allocated to enable the judiciary to carry out its functions properly and effectively. (b) Provisions should not be manipulated on security of tenure and remuneration of judges with the aim of influencing judges
- Appointments and removals

IV. The role of lawyers
- Independence: lawyers do not seek to influence the decisions of judges in any way that is improper or outside the bounds of the law and legal procedure. They do not mislead the court or clients.

- Accountability: Individual lawyers are responsible for the management of their caseload and must not overstretch themselves; accept new cases knowing that a hearing will clash with an ongoing case; or seek adjournments unnecessarily or for the sake of their own convenience or personal gain.

- Report any unethical behavior to the relevant professional body using settled complaints procedures.

- Report to the relevant law enforcement body criminal behavior or anything that improperly influences judicial decisions

**Conclusion**

It is the right of individuals to obtain a fair response to protect their rights through a transparent and efficient judicial system. As an undeniable human right, however, such access to justice can be denied in several branches and by several actors within the broader judicial system.

This study reviewed some international instruments and drew upon the experience of some international organizations including Transparency International to offer practical mechanisms to enhance access to justice in domestic courts. Accordingly, two major factors were identified, namely transparency of the judicial system as well as accountability of judges.

We discussed how accountability could be built into judicial systems through improvements in case reporting, and the recording of proceedings and transcripts. As stated in this paper, at an individual level, members of the judiciary must be ‘professionalized' through
judicial education, the promotion of a code of ethics, and improved complaints procedures.

Building a culture of transparency was said to be among the most significant standards for the integrity of a justice system. While most judiciaries have been unwilling to offer the necessary level of transparency, it was discussed that transparency could ultimately serve to strengthen public trust in government and that corruption could be a certain consequence of lack of transparency.

Judges are only part of the broader system of justice. Within the broader justice system there are some key actors which can hinder access to justice through their specific mechanisms. As a result, the key actors were enumerated in this paper and their role explained in promotion of access to justice.

Finally, some recommendations were offered which were developed by Transparency International through a process of consultation with judges, judges’ associations, legal professionals, academics and professionals in the justice-sector reform field.

Ultimately, as in our view the primary reason for the deterioration of many court systems is political neglect, it is very much hoped that governments and political actors come to realize the need for reforms in their judicial system in order to establish mechanisms that ensure a higher level of administration of justice.

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and Reduce Corruption], available online at: http://www.ettelaat.com/ethomeedition/Siasi/281/106.pdf


The International Criminal Court (ICC) and the Rights of the Accused

Shahrzad Fouladvand*

Abstract

The adoption of the Rome Statute of the International Criminal Court (ICC) was the culmination of an historic exercise that saw the creation of a court with applicable law, rules and procedures that could be acceptable to the nations of the world in order to bring to justice those accused of genocide, crimes against humanity and war crimes. Principal to the ICC is the principle of complementarity which actively encourages national systems to investigate and prosecute core international crimes and grants the Prosecutor and Chambers a broad discretion in its application. However, in applying this principle, an understanding of the inherent differences between the Rome Statute and national justice systems can have a positive impact both with respect to the ICC and in the domestic implementation of international criminal law.

In this context, this paper considers the rights of accused as protected by the ICC and points out that these are not only present in Western

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legal systems (upon which the ICC is largely based) but also in the Islamic Shari’a tradition. As Article 21 of the Rome Statute stipulates, a source of law for the ICC can include general principles of law derived from national laws of the legal systems of the world, which are consistent with internationally recognized norms and standards. This paper further highlights the fact that an appreciation of cultural differences is important in order to make ICC ratification and implementation a priority; otherwise the Court might be seen as representing the hegemony of western justice over local traditions. It finally suggests that the technical assistance of a professional group with expertise in a broad range of criminal justice areas and who are familiar with the main features of the Rome Statute system and the operation of the ICC is needed to assist States in ICC-related endeavors.

Introduction

Taking into consideration that there is a demand for morality ‘based on a common set of norms and values shared by the entire international community’,1 it is argued that the creation of the International Criminal Court (ICC) provides a moral duty to modify national jurisdictions in order to prosecute and punish violations of core international crimes. This is evident from the fact that 121 states – almost two thirds of the world – are parties to the court and subscribe to the goals of the ICC as outlined in the Preamble: the prosecution of the most serious international crimes and the ending of impunity for the perpetrators thereof.2 In the ICC system, the Prosecutor is granted broad discretion in the initiation and conduct of criminal proceedings, such as the

selection of situations for investigation and cases for prosecution,\textsuperscript{3} which is based upon the assumption that the ICC presents ‘a universally recognized type of justice’.\textsuperscript{4}

However, it is important to take into consideration cultural differences, such as traditional African justice\textsuperscript{5} and Sharia law, when the Prosecutor considers whether to proceed in such endeavors. An important question that may be raised here is the moral authority or legitimacy of the ICC and the appropriateness of its procedures in relation to different criminal justice systems. The main contribution of this paper is its emphasis on the importance of a credible complementarity mechanism that effectively ensures the prosecution of international crimes in a manner which is sensitive to and cognisant of local culture(s) and traditions. Otherwise, as the research demonstrates, the Court will enjoy little support, particularly as enforcement has so far focused only on Islamic (Libya and parts of Sudan) or less developed African countries.

\textbf{Complementarity Regime of the ICC}

As Arsanjani writes, the Rome Statute was built on three principles.\textsuperscript{6} The first principle is that of complementarity which upholds the primacy of national courts over the ICC.\textsuperscript{7} This principle has been described as the cornerstone of the Rome Statute, without which the

\begin{itemize}
\item \textsuperscript{5} Ibid., p. 365.
\item \textsuperscript{7} Ibid.,
\end{itemize}
realization of a permanent ICC would not have been possible:8 it 'permeates the entire structure and functioning of the Court'.9 The second principle confines the Court to dealing only with the most serious crimes of concern to the international community as a whole.10

The third principle is that the Statute should, to the extent that it is possible, remain within the realm of customary international law.11 At the heart of the ICC is the principle of complementarity under which national courts have become significant fora for prosecuting international crimes. In contrast to the primacy over national courts of the two ad hoc tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the complementarity regime of the ICC precludes admissibility under the special circumstances set forth in Articles 17-20 of the Rome Statute. The complementarity principle empowers states to become more effective at investigating and prosecuting international criminal cases through the good faith application of domestic criminal process and jurisdictional capacity with respect to such cases. Therefore, it is imperative to focus on the ICC model in order to examine the practical and moral legitimacy of its complementarity regime and how the Court should ensure that national court systems have the capacity to provide local justice for international crimes.

It is worth mentioning here that the Rome Statute defines the question of complementarity as pertaining to the admissibility of a case rather than to the jurisdiction of the Court. The issues of admissibility and

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11 Ibid.,
jurisdiction have to be distinguished. The Court cannot exercise its jurisdiction if a case is inadmissible. The principle of complementarity does not affect the ICC’s jurisdiction but it regulates when the Court may exercise this jurisdiction. As a jurisdictional precondition, the situation within which the alleged crime was committed may lead to a referral to the Court through one of the trigger mechanisms. The Prosecutor then has the power to consider the admissibility of the case to determine whether to initiate an investigation. In other words, ‘the procedural aspect of complementarity is embodied in the regime of admissibility to which all cases are subject’, and ‘it refers to the policy choices made in deciding what kinds of cases should be heard at the ICC rather than national courts.’

Since the complementarity regime has potential global reach, I have tried to assess it in terms of normative principles from both the developed and the developing world. Although the principle of complementarity is intended to offer states and the international community a possible ‘way out’ when the absence of trial or punishment for international crimes would be unacceptable, it should not, however, be analysed only in the light of the provisions of the ICC Statute. Each national context must be taken into account, as it will influence the state’s ability to exercise its jurisdiction over international crimes. This implies an analysis of national criminal justice systems to

17 Note that the UN Security Council can refer matters to the ICC whether they occur on the territory of ICC state parties or not pursuant to Article 13(b), ICC Statute.
evaluate their ability to assert jurisdiction. Without going into detail, it can logically be assumed that the inherent differences between legal systems will influence the way in which the principle of complementarity will be implemented. This must be acknowledged as a normal interaction between international and national legal systems and taken into consideration. In this context, even if international crimes are defined in the same way at the international and national level, differences in criminal procedure and admissibility of evidence may lead to divergences of application. For instance, if one person is accused of an international crime but insufficient evidence is gathered or fair trial rules are not met, national judges may be reluctant to permit the prosecution of the accused and bar proceedings. They would comply with their national judicial framework, but not necessarily with international requirements. An important question that may be raised here is: would the ICC accept such a situation, or would it initiate proceedings on grounds of unwillingness or inability to prosecute those accused of international crimes?

The complementarity regime is designed to find a balance between the sovereign right of all states to exercise criminal jurisdiction over acts within their jurisdiction and the effective prosecution of international crimes of concern to the international community as a whole. However, the effective prosecution of international crimes depends on action at the national level on the one hand, and the Prosecutor’s monitoring of situations in states with a view to identifying possible instances where the goals of the Statute are in danger of

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19 Ibid., p. 391.
20 Ibid., p. 632.
22 Preamble of the Rome Statute, para. 4.
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being disregarded on the other.24 In essence, alongside the concept of state sovereignty, the interest of the international community in the effective prosecution of international crimes25 is important to put an end to impunity, which falls within the analysis and decision-making realm of the Prosecutor.

Reluctance of Islamic States to Participate in the ratification of the Rome Statute

The creation of the ICC fulfils a moral duty under which the Court is able to have an impact in the international system for the prosecution of serious crimes - regardless of the national, political or other identity of the perpetrators - when a domestic system is unwilling or unable to do so.26 In this sense, the Court can be understood as a project of public interest versus the particular interests of states. Public interest is based upon universal morality: impartiality and equality, the fundamental principles shared by all major law systems.27 Indeed, the intent of the drafters was to create a court and procedures that could be acceptable to the nations of the world in spite of the different policies and ideologies governing their criminal justice systems.28 However, substantive and procedural features of the ICC emerged from negotiations between states at the Rome Conference. The ICC negotiators from common law and civil law states pushed for rules and procedures that were based on their legal backgrounds, forging a compromise between common law and civil law principles rather than

24 Ibid., p. 597.
25 Ibid., p. 597.
27 Ibid., p. 53.
Islamic law or mixed law states. In fact, the differences between Islamic law and Western legal systems constituted a large obstacle at the Rome Conference. Islamic law was largely neglected in the ICC negotiations since Islamic states constituted the smallest group amongst the negotiators by comparison with civil law and common law states. Furthermore, as Bassiouni remarks, due to diplomatic disputes, lack of time and oversight during the review stage, the Drafting Committee on the establishment of an international criminal court which he chaired - was left with the ‘task of putting together the pieces of an enormous jigsaw puzzle.’

Therefore, the Rome Statute does not represent all types of jurisprudence, such as Islamic jurisprudence, which is one of the reasons why the Court does not receive support from the Islamic states of North Africa and the Middle East. Although the ICC has the potential to fulfill the role of a universal system of justice it has excluded all non-western based global ideologies, including Islamic law. Thus, the operation of the ICC complementarity regime was not envisaged (or drafted) with all types of juridical traditions in mind and is, therefore, viewed with suspicion by nations with different criminal justice ideologies and policies. Further, Islamic countries often challenge the legitimacy of the ICC based on allegations of selectivity of cases and political interference from major powers which has resulted in mistrust towards the emerging practice of the ICC.

30 Ibid.
Together with this perceived disconnect with Islamic tradition, is the main concern of Arab countries towards the ICC as an international criminal justice institution: the concept of national sovereignty. Since most Arab states were subjected to colonialism, they are deeply concerned and sensitive with regard to any external interference in their domestic affairs. The relationship between international criminal tribunals and states is a complex one, with the complementarity regime of the Rome Statute being specifically designed, in theory, to support sovereignty. However, it is argued that states with ‘well-developed criminal justice systems that have the ability and the capacity to investigate and prosecute ICC crimes would benefit more from [complementarity].’ In other words, criminal justice systems in less developed countries are more likely to be seen as unable to effectively hold proceedings where genocide, crimes against humanity and war crimes are at issue. Thus, the ICC will not be conducive to protecting their sovereignty, and ‘their system[s] will be assessed by judges from those same Western-based countries.’ However, the tension between Islamic states and the ICC could be resolved by a mutual, ongoing practice of appealing to the interests of all states parties. Although the ICC itself is not based on universal jurisdiction, the contention of universal jurisdiction is that ‘all states have an interest in punishing crimes that are of international concern’, which can be seen in the Preamble to the Rome Statute. However, the

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34 Ibid.,
35 www.parliament.the-stationery-office.com/pa/cm200001/cmstand/d/st010503/pm/10503s04.htm [accessed on 10th July 2012]
exclusion of Islamic law principles from the Rome Statute, which could be interpreted by some Islamic scholars as substituting the law of man for the law of God, has created a common concern for Muslim countries when considering whether to join the ICC.39 Therefore, it is important to determine whether Muslim countries accept a duty to either prosecute or extradite alleged perpetrators of international crimes and whether this can be reconciled with Islamic law.40 In other words, although the ICC has been mostly hailed as a success, Islamic states still regard its operation with scepticism as Islamic legal traditions are unjustifiably neglected by the ICC which has relied overwhelmingly upon Western inspiration.41 Therefore, cultural adaptation will reflect the willingness of states to reconcile their national customs with international law, allowing Islamic states to resolve the tensions between secular and Islamic law.42

ICC Implementing Legislation

As the ICC Assembly of States Parties in its action of plan recognized, the universality of the Rome Statute and its incorporation into domestic law is imperative for the Court’s credibility and for it to operate effectively in order to bring to justice those responsible for core

40 Ibid.,
41 Badar, M. E. (2011). "Islamic law (Shari’a) and the jurisdiction of the International Criminal Court." Leiden Journal of International Law 24(2), p. 411. The author notes at least one instance where Islamic law jurisdictions have been referenced by the Office of the Prosecutor and subsequently considered by the Appeals Chamber. See Situation in the Democratic Republic of the Congo, Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, Case No. ICC-01/04-143, 24 April 2006, paras. 27-29; Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, Case No. ICC-01/04-168, 13 July 2006, para. 31.
international crimes. The Preamble of the Rome Statute states that the effective prosecution of these crimes must be ensured by taking measures at the national level and by enhancing international cooperation. In addition, it is the duty of every ICC State party to exercise its criminal jurisdiction over those responsible for international crimes. However, it is essential that national criminal procedures initiated by the relevant state be undertaken in good faith with regard to the principles of due process recognized by international law. Otherwise, the ICC Prosecutor may exercise his or her discretion to initiate an investigation.

Complementarity is one the major principles that should be reflected in ICC implementing legislation. If a State wishes to address international crime(s) itself, rather than having it investigated and prosecuted by the ICC, it will have to ensure that its criminal law covers the conduct and forms of responsibility provided for in the Statute from at least the date at which the Court’s jurisdiction begins. Whether such legislation should have retroactive effect to ensure that international crimes are fully prosecutable is a policy matter for the relevant state to decide. However, it is important to ensure that the state concerned is capable of meeting its obligations and respect for international due process standards such as the rights of the accused.

Rights of the Accused and ICC Implementing Legislation

43 Assembly of State Party, Assembly resolution ICC-ASP/5/Res.3 of 1 December 2006 available at www.icccpi.int
44 Paragraphs 4 and 6 of the Preamble of the Rome Statute
45 Articles 17 and 53(1) of the Rome Statute of the ICC. The author notes that this is not the current policy of the ICC Prosecutor, with which the author respectfully disagrees: Prosecutor v. Gaddafi and Al-Senussi, Prosecution Response to Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, Case No. ICC-01/11-01/11-167-Red, 5 June 2012, paras. 27-32.
46 International crimes can be prosecuted retroactively within national jurisdictions so long as the conduct was recognised as a crime under customary international law at the date of its commission: Article 15(2), International Covenant on Civil and Political Rights (1966).
A number of the Rome Statute’s provisions protect fair trial rights in order to balance the effectiveness and efficiency of ICC proceedings with the rights of the accused. In fact, the fundamental rights of accused persons have been recognised in various international instruments such as the Universal Islamic Declaration of Human Rights, the Cairo Declaration on Human Rights in Islam, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, as well as national constitutional and/or criminal laws. As the rights of the accused during investigations and trials affect the proceedings within the jurisdiction of the arresting and detaining State, ICC State parties may therefore need to adapt certain aspects of their criminal justice systems to ensure that national investigation and arrest procedures comply with the aforementioned human rights instruments, and complement the work of the ICC.

In the context of the Rome Statute, Article 66 provides that everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. Article 67 (1) further stipulates that the accused shall be entitled to a public hearing, to a fair hearing conducted impartially, and to the following minimum guarantees:

(a) to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

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47 The Universal Islamic Declaration of Human Rights is a document created by Islamic Councils in 1981.
48 The Cairo Declaration on Human Rights in Islam (CDHRI) is a declaration of the member states of the Organization of the Islamic Conference adopted in Cairo in 1990.
49 International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly in 1966.
50 The Universal Declaration of Human Rights (UDHR) is a declaration adopted by the United Nations General Assembly in 1948.
(b) to have adequate time and facilities for the preparation of the defense and to communicate freely with counsel of the accused’s choosing in confidence;
(c) to be tried without undue delay;
(d) to be present at the trial, to be informed of legal assistance and to have legal assistance assigned by the Court.

In order that these procedural guarantees of the accused are respected, states should ensure the rights of persons during an investigation in accordance with Article 55(1)-(2) which require state officials respect his or her rights not to be compelled to incriminate himself or herself, not to be subjected to any form of coercion or duress, not to be subjected to arbitrary arrest or detention, to be questioned in the presence of counsel, to remain silent and to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court.51

Article 59 addresses arrest proceedings in the custodial state. Under paragraph 2, a person arrested shall be brought promptly before the competent judicial authority in the custodial state which shall determine, in accordance with the law of that state, that:

(a) an ICC warrant applies to that person
(b) the person has been arrested in accordance with the proper processes, and
(c) the person’s right have been respected.

With respect to surrender to the ICC, if the person who is the subject of the arrest is already being investigated or serving a term of imprisonment for a different offence, then the requested State is still obliged to grant the request for surrender, but must consult with the

51 Article 55 (1)(2) of the Rome Statute of the ICC
Court after making its decision to grant the request, in order to determine the most appropriate course of action.52 Where the person has already been prosecuted for the same offence or conduct that relates to that offence, then the ne bis in idem principle should be followed.53

These fundamental rights - particularly the presumption of innocence, time in custody and appearance before a competent judicial authority - have already been implemented in most countries and must be communicated to the accused in the very early stage of the proceedings and prior to being questioned. For example, under the Shari‘a the presumption of innocence,54 due process of law and no punishment without proper legal procedures, the respect for the inherent dignity of the accused person throughout all the criminal procedures, and the right to a fair and speedy trial have been recognized.55 The followings are other important rights that are guaranteed in the Shari‘a.

(a) Defense rights which includes the right to present evidence, the right to be heard, the right to full equality in treatment with the opponent before the court or judge. In essence, the accused has the right to defend himself or herself against any accusation.56

(b) the right to be silent, and the right not to be a witness against oneself: the accused has the full right to speak freely without any pressure. In addition, the accused has the full the right to silence and not to speak, while it is proscribed to force any accused to speak or present any information which he or she does not wish to present.57

Thus, in the area of accused’s rights, the Shari‘a would appear to be generally compatible with the relevant Rome Statute provisions

52 Article 89 (4) of the Rome Statute of the ICC
53 Article 20 of the Rome Statute of the ICC
57 Muhammad Abdel Haleem, Op Cit., p. 50.
Right to Fair Trial

notwithstanding the fact it was not envisioned with the Shari’a at the forefront of the drafters’ minds.

As the above demonstrates, the Rome Statute cannot operate independently of state action. Furthermore, the national implementation of the Rome Statute involves a broad range of criminal justice areas including criminal investigation, proceeds of crime, witness and victim protection, mutual legal assistance, national security and military law. In other words, from a practical point of view, a core group of personnel in these areas are needed who are familiar with the main features of the Rome Statute system and the operation of the ICC on the one hand, and the ability to effectively coordinate government departments and other relevant entities on the other. In this regard, training and ongoing support are very important in order to familiarize government and civil society with the requirements of the Rome Statute and to identify how best to implement it into domestic legal orders.

The Peace and Justice Initiative (PJI) is such a professional body which actively assists States in the development of domestic legal frameworks for the implementation of the Rome Statute, and in particular, capacity building workshops for legislative drafters, assistance in reviewing existing laws for compatibility with the Statute, and technical review of draft ICC implementing legislation.

With respect to capacity building, PJI organises activities such as training, workshops, seminars, and peer-to-peer meetings tailored for the requirements of:

- Judges and judicial assistants,
- War crimes investigators (including on issues relating to forensic and military analysis),
- Prosecutors,
- Defense Counsel,
• Registry officials (including on issues of victim protection and witnesses).

Among its projects, PJI has reviewed the Nigerian draft ICC implementing legislation in partnership with the Nigerian Federal Ministry of Justice and has also developed a position paper for the Minister of Justice and Attorney General of Ghana on the Ghanaian draft implementing law. Similarly, PJI has presented a position paper on the Yemeni draft Law on Transitional Justice and National Reconciliation to Yemen’s Minister of Human Rights and Legal Affairs. A further PJI position paper has been submitted to the Judges of the War Crimes Chamber of the High Court of Uganda on the law to be applied in domestic international criminal prosecutions, giving consideration to whether Uganda’s ICC implementing legislation could be applied retrospectively.58

Conclusion
Prior to the establishment of the ICC, the international community could act through the UN Security Council to create *ad hoc* international tribunals when states failed to fulfill their duties to either extradite or prosecute those responsible for international crimes. However, the ICC as an independent and permanent international criminal court with a global jurisdiction came into force and has the power to prosecute those accused of violating fundamental international crimes regardless of their nationality. In this context, the effectiveness and legitimacy of the ICC depends on support and widespread ratification of the Rome Statute. During the process of implementing laws, the degree to which new law will be necessary depends on existing laws and legal system of a state party. This paper attempts to address that international

justice should be compatible with the principles of internal justice and that need to be recognized universally. In fact, the international tribunals are intended to be truly global, but that the practice of the international tribunals increasingly gives the impression that defenders from the developing world are being dragged unwillingly before alien western courts. This paper further focused on the rights of the accused at the ICC and it highlighted that the fundamental rights of the accused have been recognized in different legal traditions such as Islamic Shari’a. Finally, it emphasized that the ICC requires the effective prosecution of international crimes in a manner in which is legitimate in terms of local culture and traditions.

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Protection of International Humanitarian Law
Protecting the Right to Education: the Need for New Norms to Protect Educational Institutions and Personnel from Attack

Supriya Rao*

Abstract

The recently released report of the Secretary General on children and armed conflict draws attention to a surge in attacks on schools and teachers and the use of schools by armed forces and groups. Such attacks have a devastating impact on the lives of children living in situations of conflict where schools can provide an anchoring force of stability under conditions in which support structures normally provided by the family and society are frayed. Aside from the immediate impact: the loss of lives, damage and destruction of school property, overall decline in school attendance and the closure of schools, such actions have grave consequences that can persist even beyond the end of hostilities. Over the long term, such actions deprive children of their right to education and, by the same token, an opportunity to develop skills and competencies that are central to reducing fragility and in forging an enduring peace.

There has been a growing conviction that attacks on schools, educational personnel as well as the use and occupation of schools by armed forces or groups are a grave violation against children and that such actions violate international humanitarian law, and moreover that

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criminal sanctions are necessary to bring the perpetrators to justice. This paper examines the extent to which educational institutions and personnel are protected from attack under relevant human rights law and international humanitarian law instruments and argues for the adoption of new norms that would augment protections to ensure that the right to education remains absolute under all circumstances.

1. Introduction

The recently released report of the Secretary General on children and armed conflict draws attention to a surge in attacks on schools and teachers and the use of schools by armed forces and groups. Needless to say, such attacks have a devastating impact on the lives of children living in situations of conflict where schools can provide an anchoring force of stability under conditions in which support structures normally provided by the family and society are frayed. Aside from the immediate impact: the loss of lives, damage and destruction of school property, overall decline in school attendance and the closure of schools such actions have grave consequences that can persist even beyond the end of hostilities. Over the long term, such actions deprive children of their right to education and, by the same token, an opportunity to develop skills and competencies that are central to reducing fragility and in forging an enduring peace.

The report of the Secretary General gives a glimpse of the scale of the problem and provides in relevant part that in Chad, 477 schools were damaged and used by armed groups depriving an estimated 67,500 children of an education; in Yemen, 211 attacks on schools affected a total of 150 schools and disrupted the schooling of some 200,000 children in 2011; and in South Sudan, 21 schools were used by armed groups which disrupted schooling for 10,935 children.1 These findings correlate with UNESCO’s Education under Attack report (2010) which

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documents incidents of targeted attacks against thousands of education buildings, staff and students in over 31 countries in Asia, Africa, Europe and Latin America in the period spanning 2007 - 09.2 Although accurate statistics of such attacks and their impact on access to education are not available due to a combination of access and verification constraints, the data provided suggests a problem with far greater dimensions.

There has been a growing conviction that attacks against schools and educational personnel, as well as the use and occupation of schools by armed forces or groups, are a grave violation against children and that such actions violate international humanitarian law and criminal sanctions are necessary to bring the perpetrators to justice. A recent affirmation of this palpable shift is reflected in U.N. Security Council Resolution 1998 (2011) which strongly condemns “attacks as well as threats of attacks in contravention of applicable international law against schools” and urges all parties to “refrain from actions that impede children’s access to education.” Of note, this resolution calls upon Member States to take action against perpetrators of these violations for “attacks on schools and attacks or threats of attacks against protected persons in relation to schools through national justice systems and where applicable, international justice mechanisms (…) with a view to ending impunity for those committing crimes against children.”3

Preceding this, in 2010 the General Assembly adopted a Resolution on the right to education in emergency situations 64/290 which calls upon States to fulfill their obligations under “international humanitarian law and international human rights law, including to respect civilians including students and educational personnel and to respect civilian objects such as educational institutions (…) as well as to criminalize

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under their domestic law attacks on educational buildings.”

Notably, the Committee of the Rights of the Child in its concluding observations has similarly raised concerns regarding attacks on schools, the use and occupation of schools by military forces as well as the establishment of military bases near schools leading to increased targeting of schools and their closure and has repeatedly underscored that such actions are barriers to fulfilling the right to education.

While there does not appear to be an accepted definition of what constitutes ‘an attack on education’, the UNESCO 2010 Report provides some guidance in this regard. It broadly defines attacks on education as “targeted violent attacks, carried out for political, military, ideological, sectarian, ethnic, religious or criminal reasons, against students, teachers, academics and all other education personnel and also covers targeted attacks on education buildings, resources, materials and facilities, including transport.” It also defines violent attacks to include “both actual or threatened occupation of educational property by force.”

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5 See for e.g., Committee on the Rights of the Child Fifty-sixth session in its Concluding Observations to Afghanistan "expresses its extreme concern over attacks by insurgent groups on school facilities, which have killed dozens of school children and their teachers, and led to the closure of hundreds of schools throughout the country since 2007, especially in the South of the country. The Committee is particularly concerned that, in the prevailing conditions of conflict, schools have been used as polling stations during elections and occupied by international and national military forces” CRC/C/AFG/CO/1 (8 April 2011).

In its concluding observations to Colombia the Committee recommends the State party to: "cease immediately the occupation and usage of schools or the nearby establishment of military bases by State armed forces and further provide training on the principle of distinction and the protection of the civilian population in training of the police and military” CRC/C/COL/CO/3 (Forty-second session 8 June 2006).

Further, it its concluding observations to Chad, the Committee recommends the State party "make every effort to ensure that schools are safe places for children, in particular for girls, and that they are free from sexual and physical violence and recruitment into armed conflict" CRC/C/TCD/CO/3 Fiftieth session (12 February 2009).

6 UNESCO Report supra note 2 at 17.
Against this background, this paper examines the extent to which educational institutions and personnel are protected from attack under relevant human rights law and international humanitarian law instruments and argues for the adoption new norms that would augment protections to ensure that the right to education is absolute under all circumstances. Part I deals with traditional norms and international law on the right to education; part II then discusses protections granted to educational institutions and personnel under international humanitarian law; part III considers specifically protected objects under international humanitarian law and examines the protections accorded to civil defense, civilian hospitals as well as cultural property and places of worship; and lastly, part IV provides recommendations for legal reform.

2. Traditional Norms and International Law on the Right to Education

International standards are derived from principles intricately linked with values drawn from religious and cultural practices from all over the world. Because such practices were widely accepted and valued by societies over time, in recent history they have been codified into treaties that proclaim them to be part of "the highest aspiration of the common people".7 It can be strongly argued that education has held a great importance for people through history and even to this day in many religions and traditions it holds a sacred place. Considering this and other factors, several treaties entered into in the past century have upheld the right to education as a fundamental right.

Foremost among them is the Universal Declaration of Human Rights ("UDHR"), which in article 26 states that "everyone has the right to education. Education must be free at least in the elementary and

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fundamental stages. Elementary education must be compulsory."\(^8\) The International Covenant of Economic, Social and Cultural Rights ("ICESCR"), further consolidates this by providing in article 13 that "State parties to the present convention recognize the right of everyone to education" and that "primary education shall be compulsory and available free to all."\(^9\) Further, the Convention on the Rights of the Child ("CRC") which is the principal international legal instrument detailing the rights of the child, in article 28 recognizes "the right of the child to education" and requires State Parties to "make primary education compulsory and available free to all."\(^{10}\) Finally, ILO Recommendation No. 190 on the Worst Forms of Child Labor, which provides non-binding guidelines, supports the provision of universal education as a strategy for prohibition and effective elimination of the worst forms of child labor including the forced or compulsory recruitment of children for use in armed conflict.\(^{11}\)

Even in the context of emergencies, treaties emphasize the importance of not compromising the right to education. The Convention relating to the Status of Refugees requires refugees to be given "the same treatment as is accorded to nationals with respect to elementary education."\(^{12}\) Finally, Additional Protocol II which applies in non-international armed conflicts provides in article 4 that "children shall be provided with the care and aid they require, and in particular they shall receive an education."\(^{13}\) The language used in these treaties therefore recognizes the importance of education and binds States to

\(^{10}\) Convention on the Rights of the Child at art. 28 (1989).
\(^{12}\) Convention relating to the Status of Refugees at art. 22(1) (1951).
\(^{13}\) Additional Protocol II at art. 4(3)(a) (1977).
make free education available at least at the elementary level. However, there do not appear to be explicit provisions in these or related international human rights instruments on the duty to protect schools and teachers from attack in order to implement the rights recognized in these conventions.

3. Protections Granted to Educational Institutions and Personnel under International Humanitarian Law

International humanitarian law accords educational institutions and personnel the general protection due to civilian objects and civilians. This is in contrast with other civilian objects and their associated personnel that are specifically protected under international humanitarian law such as hospitals, civil defense and cultural property. These specifically protected objects are granted protections that go beyond what is accorded to civilian objects on account of their humanitarian importance or their contribution to the spiritual and cultural heritage of society. However, in equating schools with civilian objects, the law does not factor in their humanitarian contribution to the lives of children living in conflicts, as well as their larger role in contributing to development and in building a durable peace and security.14

Schools are given the general protection due to civilian objects under article 51 of Additional Protocol I (1977) (“AP I”) Therefore, within the meaning of article 52(2) they are protected from attack unless they are “used to make an effective contribution to military action” and “total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”15 Article 53(3) of AP I establishes the presumption in cases of doubt where an object is normally dedicated to civilian purposes such as a school is being used

15 AP I at art. 52(2).
to make an effective contribution to military action, that it is not so used.16

Likewise, teachers and other educational personnel are accorded the general protections due to civilians under article 51 of AP1. Therefore, they "shall not be the object of attack" and "acts or threats of violence the primary purpose is to spread terror among the civilian population are prohibited." However, the exception to the civilian protection from attack is provided in article 53(3) of AP I which provides that the immunity afforded to civilians from attack ceases for such time as they take direct part in hostilities. The commentary on AP I provides that a civilian who takes part in armed combat becomes a legitimate target, though only for as long as he takes part in hostilities.

Concerning the issue of criminalizing such attacks, the Rome Statute of the International Criminal Court ("ICC") makes it a war crime in both international and non-international armed conflicts to "intentionally direct attacks against building dedicated to education, provided they are not military objectives."17 Of note, the ICC is conducting a preliminary examination in Afghanistan on attacks on protected objects, including persistent attacks on girls' schools by means of arson, armed attacks and bombs.18

The determination that protection accorded educational institutions civilian objects lapses is based in part on whether they are used to contribute to military action and likewise for educational personnel on whether they are directly participating in hostilities. However, international humanitarian law does not put any restriction on the use and occupation by armed forces or groups, which turns them into

16 AP I at art. 53(3).
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military objectives and therefore legitimate targets. Statistics cited in the Report of the Secretary-General indicate that such use is pervasive in practice. In particular, for the period 2011-12 the report documents that there have been 31 incidents of military use of schools in Afghanistan; 23 cases in Ivory Coast; 23 cases in the Occupied Palestinian Territories and Israel and 31 cases in India.19

The reason why protections granted to schools and teachers falls short becomes evident upon reviewing the protections accorded to other specifically protected objects such as hospitals, religious buildings and cultural property for example, and the personnel associated with them. Although the protections accorded to the object vary, on the whole each specifically protected object has a definition under international humanitarian law. Additionally, the protections accorded place the burden on both armed forces and groups to refrain from military use of such objects or directing any acts of hostility against them. Furthermore, they restrict the circumstances under which the special protection accorded to them ceases by adding the requirement of giving fair warning setting a reasonable time limit. Moreover, international humanitarian law establishes internationally recognized emblems for each specific object as a practical measure to facilitate recognition. To protect personnel affiliated with these specifically protected objects, international humanitarian law raises the level of protection by requiring that the State issue identification which the personnel may carry at all times and by permitting them to use the recognized emblem during working hours to make their affiliation with these objects more visible. Finally, to establish accountability, criminal penalties are provided for any actions violating the protections granted to some of these objects.

19 Report of the Secretary-General on Children and armed conflict, supra note 1.
4. Specifically Protected Objects under International Humanitarian Law

The following section reviews a few of the specifically protected persons and objects namely civil defense, hospitals as well as religious buildings and cultural property. In each case they are conferred protections beyond what is provided to civilian objects in general.

(a) Civil Defense

The functions carried out by civil defense organizations are the criteria used to define them. Article 61 of AP I therefore focuses on the performance of the listed humanitarian tasks that are intended to protect the civilian population against the dangers and to help it to recover from the immediate effects of hostilities or disasters, and to provide the conditions necessary for its survival. For example, the listed humanitarian tasks include preventive measures such as giving out a warning prior to an air raid or with respect to a forthcoming natural disaster in order to protect the civilian population.

Civil defense organizations and personnel are given the general protections of being “respected and protected” according to article 62(1) of AP I and are entitled to perform their civil defense tasks “except in cases of imperative military necessity.” The commentary on AP I clarifies this by providing that the drafters wished to indicate that these articles supplement and do not replace the general provisions and therefore, civil defense organizations as civilians should

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20 Art. 1 of AP I provides “The tasks are warning, evacuation, management of shelters, management of blackout measures, rescue, medical services, including first aid and religious assistance, fire-fighting, detection and marking of danger areas, decontamination and similar protective measures, provision of emergency accommodation and supplies, emergency assistance in the restoration and maintenance of order in distressed areas, emergency repair of indispensable public utilities, emergency disposal of the dead, assistance in the preservation of objects essential for survival; and complementary activities necessary to carry out any of the tasks mentioned above, including but not limited to, planning and organization.”

21 AP I at art. 62(1).
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not be made the object of attack.22 AP I does not specifically address the use of civil defense in support of military action.

As regards the maintenance of this specifically protected status, the protection provided ceases if two conditions are met: firstly civil defense organizations “commit or are used to commit, outside their proper tasks, acts harmful to the enemy” and a warning has been given setting a reasonable time limit for the recipients and such warning has remained unheeded.23 The notice requirement sets a further limitation before civil defense organizations or buildings can be legitimately targeted and thereby strengthens the protections.

Lastly, as a practical measure to enable recognition of civil defense organizations, their personnel, buildings and material as specifically protected objects, AP I requires that they need to be identifiable using the international distinctive sign for protection of civil defense which is an equilateral blue triangle on an orange background.24

(a) Civilian Hospitals

Civilian hospitals are defined in article 18 of Geneva Convention IV (“GC IV”) which provides that hospitals must be “organized to give care to the wounded and sick, the infirm and maternity cases.”25 The commentaries on AP I help explain this definition and provide in relevant part that civilian hospitals must be organized or in other words have staff and the equipment required to give care. The commentaries also provide that the categories of patients listed are

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23 AP I at art. 65(1).
24 AP I at art. 66(1) and (4).
not cumulative and it is not necessary for a civilian hospital to treat all these categories of people.26

Hospitals are immune from attack according to article 19 of Geneva Convention I (“GC I”) and article 18 of GC IV which state that hospitals “may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.” 27 The commentaries on GC IV explains that the belligerents are under a general obligation to do everything possible to spare hospitals and therefore hospitals may not be attacked. The commentaries on GC I also add that “to respect” such units also means not to interfere with their work in other words using them in any way that hinders their medical function.

The immunity granted to civilian hospitals ceases as stipulated in article 19 of GC IV when they are “used to commit, outside their humanitarian duties, acts harmful to the enemy.” 28 The commentaries on GC IV shed light on this provision and provide that such harmful acts would include the use of the hospital as a shelter for able-bodied combatants or as a store for arms or ammunition. In other words, hospitals need to refrain from any interference direct or indirect in military operations. Nevertheless, even where hospitals are put to such use, their immunity only ceases according to Article 19 of GC IV after a warning has been issued providing a reasonable time limit and after such warning has remained unheeded. 29

To facilitate identification and protection of hospitals, they may be marked with the Red Cross emblem provided for in article 38 of GC III

28 GC IV at art. 19.
29 GC IV at art. 19.
or any of the other recognized emblems such as the Red Crescent.30 Concerning protection of hospital personnel article 20 of GC IV provides that those “regularly and solely engaged in the operation and administration of civilian hospitals (...) shall be respected and protected.”31 The stipulation that such staff must be “regularly and solely” engaged implies that they are employed on a full time basis with the hospital either as doctors or nurses or other staff necessary for the administration of the hospital.32 To preserve their immunity from attack hospital staff are required to abstain from any participation direct or indirect actions that would be “harmful to the enemy” under article 19 of GC IV.33

In addition to these protections, article 20 also provides for the identification of hospital staff, “by means of an identity card certifying their status, bearing a photograph of the holder and embossed with the stamp of the responsible authority.”34 Hospital staff are also allowed to identify themselves by an armlet issued by the State bearing the Red Cross emblem on their left arm while carrying out their duties.35 The commentaries on GC IV elaborate that this restriction that hospital staff can only wear the arm band while on duty is because there needs to be a close connection between the sign and the duties that it seeks to protect and, moreover, that hospital staff are not given special protection on their own account but because of the humanitarian work they are doing. Moreover, the commentaries on GC IV add that the restriction is likely to reduce the risk of abuse, as it is

30 GC IV at art. 18
31 GC IV at art. 20.
33 GC IV at art. 20.
34 GC IV at art 20.
35 GC IV at art. 20.
difficult to supervise the wearing of the armlet when staff are off duty.36

(b) Cultural Objects and Places of Worship
In outlining the special protections granted to places of worship and cultural objects Article 53 of AP I prohibits “any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.”37 The definition of cultural objects and places of worship is elaborated in the commentaries on AP I which indicate that this provision does not cover any place of worship or any cultural objects but those “whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.”38 Such objects are immune from attack and the only derogation possible is if the place of worship or cultural object turns into a military objective within the meaning of article 52 of the AP I. 39 To protect religious buildings and cultural objects from becoming military objectives the Additional Protocol prohibits “use such objects in support of the military effort.”40 Further, it also prohibits making "such objects the object of reprisals."41

This article is “without prejudice” to the provisions of the Hague Cultural Property Convention (1954) or other relevant international instruments and therefore supplements those treaties rather than modifying them. The Hague Convention provides for a definition of cultural property in article 1 and states in relevant part that “the term ‘cultural property’ shall cover, irrespective or origin or ownership: (a) movable and immovable property of great importance to the cultural heritage of

37 AP I at art. 53(a).
38 Other places of worship are given the general protection accorded to civilian objects in keeping with art. 52 of AP I.
40 AP I at art. 53(b).
41 AP I at art. 53(c).
every people such as monuments of architecture, art or history, whether religious or secular, archaeological sites” and (b) “buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives.”

The specific protections outlined in the Hague Convention include safeguarding and respect for cultural property. Respect for cultural property is outlined in article 4 of the Convention and requires “refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict and by refraining from any act of hostility directed against such property.” These provisions are similar to those contained in AP I regarding the prohibition to commit any act of hostility and use of cultural property that can put it in danger of becoming a military objective. However, the Hague Convention provides an exception to attack and military use in article 4(2) “where military necessity imperatively requires such a waiver.” Lastly, article 4(4) prohibits “any act directed by way of reprisals against cultural property.”

Cultural property of very great importance is granted special protection under article 8 of the Hague Cultural Property Convention, provided that they are situated at an adequate distance from any large industrial center or from any important military objective and are not used for military purposes and are entered in the ‘International register of Cultural Property under Special Protection’. Such specially protected cultural property are immune from any act of hostility directed against such property, and from any use of such property of

43 Id. at art 4(1).
44 Id. at art. 4(2).
45 Id. at art 4(4).
46 Id. at art. 8(1) and (6).
its surroundings for military purposes. If any one of the parties commits a violation of these obligations the other party is released from the obligation to ensure the immunity of the property concerned. In addition, immunity may be withdrawn in the “exceptional case of unavoidable military necessity, and only for such time as that necessity continues.”

The Second Protocol to the Hague Cultural Property Convention (1999) (“Second Protocol to the Hague Convention”) greatly strengthens the standard of protection by specifying that a waiver on the basis of imperative military necessity in accordance with Article 4(2) of the Convention may only be invoked “when and for as long as the cultural property has been made into a military objective” and “there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.” It also adds that a such a waiver on the basis of imperative military necessity may only be invoked to use cultural property for military purposes only “when and for as long as no choice is possible between such use of the cultural property and another feasible method of obtaining a similar military advantage.”

The Second Protocol to the Hague Convention provides for enhanced protection provided that cultural property meets three conditions:

(a) It is cultural heritage of the greatest importance for humanity

47 Id. at art. 9.
48 Id. at art. 11.
49 Hague Cultural Property Convention at art. 11(2). It further provides that “such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity.”
50 Second Protocol to the Hague Cultural Property Convention at art. 6(a) (1999).
51 Id. at art. 6. It also adds that “the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise. Also in the case of attack an effective advance warning shall be given whenever circumstances permit.”
(b) It is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection and

(c) It is not used for military purposes or to shield military sites and a declaration has been made by the Party, which has control over the cultural property confirming that it will not be so used.52

As a result of enhanced protection the parties to the conflict will refrain from making such property the object of attack or from using the property or its immediate surroundings in support of military action.53 Cultural property loses its enhanced protection if the property no longer meets any one of the three criteria in article 10 mentioned earlier or for as long as the property by its use becomes a military objective.54 Under these circumstances the cultural property may become the object of attack if the attack is the only feasible means of terminating the use of the property as a military objective and all feasible precautions are taken to minimize damage to the cultural property.55

To maintain these protections, the Convention contains provisions on the marking of cultural objects and identification of personnel assigned to the protection of cultural property. Article 6 provides that cultural property may bear a distinctive emblem which is commonly known as the blue shield so as to facilitate its recognition.56 The distinctive emblem repeated three times may be used only as a means of identification of (a) “immovable cultural property under special

52 Id. at art. 10.
53 Id. at art. 12.
54 Id. at art. 13(1).
55 Id. at art. 13(2).
56 The distinctive emblem is defined in article 16 of the Hague Cultural Property Convention which states in relevant part that “The distinctive emblem of the Convention shall take the form of a shield, pointed below, per saltier blue and white (a shield consisting of a royal-blue square one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle.”
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When the distinctive emblem is used alone it is a means of identification of (a) “cultural property not under special protection and (b) the personnel engaged in the protection of cultural property.”

Concerning personnel engaged in the protection of cultural property article 15 of the Hague Convention provides that they should be respected. To facilitate their identification in practice, The Hague Regulations require that such persons may wear an armlet bearing the distinctive emblem, issued and stamped by the competent authorities. In addition, the Hague Regulations also provide that such persons are provided a special identity card bearing the distinctive emblem, a photograph and other particulars and shall bear an embossed stamp of the authorities.

It is worth highlighting that the Second Protocol to the Hague Cultural Property Convention requires State parties to establish criminal penalties to be adopted under their domestic law for the offences of making cultural property under enhanced protection or other cultural protected under the Convention the object of attack and using cultural property under enhanced protection or its immediate surroundings in support of military action.

5. Recommendations

To ensure that the right to education is not compromised and to protect schools and teachers from attack and keep them operational even in the context of emergencies, new norms are needed in line with the protections identified in the previous sections. An important means of affording such protections is through an international instrument that sets forth obligations binding both state parties and non-state actors. Since the issue of attacks on education involves the interplay of norms

57 Hague Cultural Property Convention at art. 15.
58 Regulations for the Execution of the Hague Cultural Property Convention at art. 21(1) – (3).
59 Second Protocol to the Hague Cultural Property Convention at art. 15.
that are central to child rights and international humanitarian law, such an instrument could by way of example, take the form of an optional protocol to the Convention on the Rights of the Child.

The adoption of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000) ("Optional Protocol"), which similarly concerns issues that overlap with child rights and humanitarian law, provides a precedent for taking this approach. The Optional Protocol was the result of an initiative led by a number of different actors driven by a concern that the legal standards on the recruitment and use of children in armed conflict, as enshrined in the CRC, were inadequate and needed to be strengthened. Of particular relevance was raising the age limit for recruitment and participation in hostilities from fifteen as established under the CRC to eighteen through a new treaty that would also consolidate in a single instrument other protections on the involvement of children in armed conflict. To that end, this process demonstrates how the CRC establishes minimum standards from which related norms could be derived and further developed.

Furthermore, the Optional Protocol is also a precedent as an international instrument outside the framework of traditional humanitarian law that imposes duties on States and at the same time incorporates norms applicable to non-state actors. This is in congruence with international humanitarian instruments such as the Additional Protocols of 1977 that create obligations for both State and non-State actors. In particular, article 4(1) of the Optional Protocol prohibits the recruitment and use of children under 18 by armed groups. Aside from this, inclusion of such norms as an optional protocol to the CRC would have the added benefit of bringing them under the monitoring and supervisory system of the CRC. As part of this

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60 Optional Protocol to the CRC at art. 4(1).
reporting system in addition to state parties, NGOs can also provide important inputs on the status of implementation creating further impetus for effective implementation.

Another argument for adopting such an instrument outside the paradigm of the Geneva Conventions of 1949 and its Additional Protocols of 1977 is because attacks on education occur in wide ranging circumstances of conflict and armed violence, which may or may not rise to the threshold of an armed conflict as defined within the framework of the Geneva Conventions. In so doing, such an instrument would expand the scope of application beyond situations of armed conflict to other situations of violence where educational institutions and personnel are equally vulnerable to being targeted.

In conclusion, it is to be hoped that new norms will be adopted to remedy the gaps identified in protecting educational institutions and personnel from attack and will help to guarantee that the right to education remains absolute under all circumstances.
Principle of Distinction in Law of Armed Conflict and the Role of PMSCs: A Critical Appraisal

K.C. Sowmya *

Abstract

Historically, human societies are deeply impregnated with humanism and have given birth to concepts and practices which remain as guiding principles of all that place these societies among the world's humanitarian human civilizations. From the inception of war many civilizations have distinguished between combatants and civilians under an injunction now formally known as the principle of distinction. Distinguishing between combatants and civilians has long represented an important aspect of warfare and has been recognized as the indispensable means by which humanitarian principles are injected into the rules governing conduct in war.

The principle found expression in legal and non-legal instruments long before the adoption of the Geneva Conventions. A number of ancient legal codes required that belligerents exercise care not to kill civilians. Each ancient civilization – the Islam, the Hebrews, the Chinese, the Greeks and Hinduism – expressed this requirement in different forms. However, the overarching idea remained that certain persons were to be spared the cruelties of war. As a legal principle, the principle of distinction historically rested on the belief that certain persons, because

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they are presumed innocent, cannot lawfully be targeted. Thus, civilians were protected against armed violence through norms and practices that were later formalized in international humanitarian law.

Recently, the question of combatants and the protection of civilian personnel has gained prominence due to the emergence of a new category, that of Private Military/Security Companies (PMSCs). For nearly three centuries, the accepted international norm has been that only nation states should be permitted to fight wars. However, the role of PMSCs in contemporary warfare is becoming increasingly significant, changing armed forces around the world and the way wars are fought.

PMSCs are profit-driven organizations that trade in professional services intricately linked to conflict and warfare. Their essential purpose is to enhance the capability of a client’s military forces to function better in conflict, or to deter conflict more effectively. PMSCs range from small consulting firms to large transnational corporations that provide logistics support or lease out combat helicopters, fighter jets, companies of commandos, or battalions. The scope of services offered within this industry is expansive and the services provided vary according to the level and degree of their specialization.

PMCSs raise a multitude of legal, political and practical questions. Far more worrisome is the current use of PMSCs as substitutes for ordinary soldiers without corresponding rights and obligations. They are not aware when and where they might be considered legitimate targets and this is morally and legally unjustifiable. The proposed paper will attempt to focus on the involvement of private actors in armed conflict situations and to analyze the effects of the blurring distinction between military and civilian actors, which is a culturally and historically tested norm and legally established principle. It will also look into the inadequacy of the existing legal mechanisms under present international instruments.
Background

Humanitarian considerations are a motivating force behind the codification of modern international humanitarian law (IHL), the main objective of which is to limit the suffering caused by armed conflict.

Military objects are legitimate targets but a distinction must be made between military and civilian objects and combatant and non-combatants. The fundamental principle in ‘Hague Law’, that governs the means and methods of warfare, is that any belligerent, whether in an international armed conflict (IAC) or a non international armed conflict (NIAC), must distinguish between military objectives on the one hand and civilian persons and goods on the other. Only the former may be attacked; civilian objects must not. Underlying this rule is the principle that, even in an armed conflict, the only legitimate military action is that which is aimed at weakening the military potential of the enemy, whereas attacks on those who do not participate in the conflict are prohibited. The concretization of this principle in the rules of the law of armed conflict means that the doctrine of ‘total war’ is repudiated; it cannot engage in attacks without giving consideration to whether the target actively participates in the armed conflict.

One of the most important aspects of the principle of limitation elucidated in the Hague Regulations is the duty to distinguish between military and civilian objectives. Armed conflict in the twentieth century has placed a heavy strain on the principle of distinction. This makes it more remarkable that the principle has been fiercely maintained. The principle of distinction is so fundamental that it may not be pushed aside. To a very large extent, IHL stands or falls on its observance.

1 Art 48, AP I – In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.
The principle of distinction contains three facets:

a) the prohibition placed on the targeting or attacking of civilian persons;

b) the prohibition placed on the targeting or attacking of civilian objects; and

c) the prohibition placed on indiscriminate attacks.

Principle of distinction constitutes one of the pillars of the laws of war. The principle found expression in legal and non-legal instruments long before the adoption of the Geneva Conventions. A number of ancient legal codes required that belligerents exercise care not to kill civilians, each ancient civilization – the Hebrews, the Chinese, the Greeks, Islam and Hinduism – expressed this requirement slightly differently. The overarching idea remained that certain persons were to be spared the cruelties of war. As a legal principle, the principle of distinction historically rested on the belief that certain persons, because they are presumed innocent, cannot lawfully be targeted. The principle of distinction is also inherent in customary international law. Important religious texts refer to this principle. Distinction between military and civilian objects and combatants and non-combatants is one of the basic principles of the Islamic law of Qital. The Koran (2:190) does not allow indiscriminate killing as it states that ‘fight in the way of Allah against those who fight you’ and warns: ‘do not transgress’ these limits. The principle of distinction in the law of armed conflict and the Islamic law of Qital is compatible.

Ancient Hindu texts clearly recognized the distinction between military targets, which could be attacked, and non-military persons and objects, which could not be attacked. Warfare was thus largely coined to combatants, and only the armed forces were legitimate targets. The laws of war in ancient India drew a clear distinction between civilians and belligerents. That same principle is found in Article 48 of Additional
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Protocol I, while Article 51 thereof protects civilians from military operations.

Manusmriti also laid down certain principles that should be followed by both warring parties. The Rig Veda also laid down the right conduct of war. The Ramayana tells an interesting story in the course of epic war: an ultra-destructive weapon became available to Lakshmana, the younger brother of Rama, which could destroy the entire enemy race, including those who could not bear arms. Rama advised Lakshmana that the weapon could not be used because such mass destruction was forbidden by the ancient laws of war, even though the enemy, Ravana, was fighting an unjust war with an unrighteous objective.

The principle, and its justification, began to truly formalize around the fifteenth and sixteenth centuries, in particular with Francisco de Vitoria, who established that:

“[I]t is never lawful in itself intentionally to kill innocent persons. . . . It follows that even in wars against the Turks we may not kill children, who are obviously innocent, nor women, who are to be presumed innocent.”

Hugo Grotius in the seventeenth century and Jean-Jacques Rousseau in the eighteenth century, too, viewed innocence and the bearing of arms as central elements in the determination of who should be protected in war. Jean-Jacques Rousseau was among the first to provide a modern formulation of the distinction between the soldier who carries his weapon, on one hand, and the “man” who has laid it down, on the other:

Since the purpose of war is to destroy the enemy State, it is legitimate to kill the latter’s defenders as long as they are carrying arms; but as soon as they lay them down and surrender, they cease to be enemies.
or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives.

The first legal codification of the distinction between civilians and combatants made its appearance in 1863, and has since become known as the Lieber Code. According to the Code, soldiers were to distinguish between "the private individual belonging to a hostile country" and the "unarmed citizen", who "is to be spared in person, property, and honor as much as the exigencies of the war will admit."

In addition to placing an emphasis on the bearing of arms, the Code referred to women and children as "inoffensive individual" who cannot be murdered and should be granted protection. Harmlessness, innocence, and the bearing of arms were viewed, then as now, as essential characteristics of non-combatancy. The resonance and influence of the Lieber Code on later instruments was such that its core principles remain at the heart of the laws of war today. Ultimately, the principle of distinction was consecrated into treaty law and has, since then, been repeatedly blessed by international courts and tribunals.

The principle of distinction was expressed as early as 1868 in the St. Petersburg Declaration in the following words: ‘That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.’

In other words, no military necessity justifies direct attacks on civilians or civilian objects. Respect for the principle is what makes it possible for humanitarian law to fulfil its aim of protecting the civilian population from the consequences of armed conflict.

As a general principle, civilians are entitled to protected status under IHL and may not be attacked. Greatest of care must be exercised in

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conducting military operations in order to minimize civilian casualties. The principle of distinction is one of the foundation stones upon which the edifice of IHL rests. As Fenrick has stated: ‘Military commanders are obliged to distinguish between civilian objects and military objectives and to direct their operations against military objectives.’

Several key provisions of The Hague Regulations annexed to the 1907 Fourth Hague Convention, the 1949 Geneva Conventions and their Additional Protocols of 1977 enshrine the principle of distinction between civilians and civilian objects and military objectives.

Article 25 of The Hague Regulations prohibits the attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended. Article 27 states: ‘In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.’

The thrust of the Fourth Geneva Convention of 1949 is towards providing for the protection of civilians and civilian objects, in particular Part II concerning the General Protection of Populations Against Certain Consequences of War, and Article 33 concerning collective punishment and reprisals against protected persons. Additional Protocol I augments these provisions of the Geneva Conventions,

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4 Regulations Respecting the Laws and Customs of War on Land, Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Reprinted in Roberts and Guelff, op. cit. n. 8, pp. 48 at 53.
5 Article 33 of the Fourth Convention provides: ‘No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.’
without replacing them. Additional protections are set out in Part IV of the Additional Protocol I. Article 48 is supplemented by detailed Article 51, which sets out specific rules concerning the protection of the civilian population against military operations; Article 54, which addresses protection of objects indispensable to the survival of the civilian population. Other articles in Part IV focus on other ways to

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6 Article 49(4) of Additional Protocol I provides: 'The provisions of this Section [i.e., Section I, General Protection against the Effects of Hostilities, of Part IV of the Additional Protocol] are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.'

7 Article 51 provides: '1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
   (a) Those which are not directed at a specific military objective;
   (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
   (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:
   (a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
   (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

   (c) 6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.'
increase the protection of the civilian population, by, for example, the obligation to take precautions in attacks (Article 57) and against the effects of attacks (Article 58). Articles 59 and 60 concern localities and zones under special protection.

Support for the principle of distinction has also come from other sources. Resolution XXVIII adopted by the 20th International Conference of the Red Cross and Red Crescent, held in 1965 in Vienna, declared that all governments and other authorities responsible for action in armed conflict should, inter alia, conform to the principle that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible. The International Court of Justice, in its Nuclear Weapons Advisory Opinion, stated that the principle of distinction between combatants and non-combatants is one of the cardinal principles of IHL, and that ‘these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law’.8

**International Armed Conflicts**

The principle of distinction between civilians and combatants was first set forth in the St. Petersburg Declaration, which states that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”. The Hague Regulations do not as such specify that a distinction must be made between civilians and combatants, but Article 25, which prohibits “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended”, is based on this.

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8 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, para. 79.
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principle. The principle of distinction is now codified in Articles 48, 51(2) and 52(2) of Additional Protocol I.

The prohibition on directing attacks against civilians is also laid down in Protocol II, Amended Protocol II and Protocol III to the Convention on Certain Conventional Weapons and in the Ottawa Convention banning anti-personnel landmines. In addition, under the Statute of the International Criminal Court, “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” constitutes a war crime in international armed conflicts.

Many military manuals, including those of States not, or not at the time, party to Additional Protocol I, stipulate that a distinction must be made between civilians and combatants and that it is prohibited to direct attacks against civilians. In addition, there are examples of national legislation which make it a criminal offence to direct attacks against civilians, including the legislation of States.9

As mentioned above, in the advisory opinion in the Nuclear Weapons case, the ICJ invoked the principle of distinction.

Non-International Armed Conflicts

Article 13(2) of Additional Protocol II prohibits making the civilian population as such, as well as individual civilians, the object of attack. The prohibition on directing attacks against civilians is also contained in Amended Protocol II to the Convention on Certain Conventional Weapons. It is also set forth in Protocol III to the Convention on Certain Conventional Weapons, which has been made

9 In the Kassem case in 1969, Israel’s Military Court at Ramallah recognized the immunity of civilians from direct attack as one of the basic rules of IHL. There are, moreover, many official statements which invoke the rule, including by States not, or not at the time, party to Additional Protocol I. The rule has also been invoked by parties to Additional Protocol I against non-parties.
applicable in non-international armed conflicts pursuant to an amendment of Article 1 of the Convention adopted by consensus in 2001. The Ottawa Convention banning anti-personnel landmines states that the Convention is based, inter alia, on “the principle that a distinction must be made between civilians and combatants”. Under the Statute of the International Criminal Court, “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” constitutes a war crime in non-international armed conflicts.

As early as 1938, the Assembly of the League of Nations stated that “the intentional bombing of civilian populations is illegal”.10 The 20th International Conference of the Red Cross in 1965 solemnly declared that governments and other authorities responsible for action in all armed conflicts should conform to the prohibition on launching attacks against a civilian population. Subsequently, a UN General Assembly resolution on respect for human rights in armed conflicts, adopted in 1968,11 declared the principle of distinction to be applicable in all armed conflicts. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council reaffirmed its strong condemnation of the deliberate targeting of civilians in all situations of armed conflict. The UN Security Council has condemned or called for an end to attacks against civilians in the context of numerous conflicts, both international and non-international, including in Afghanistan, Angola, Azerbaijan, Burundi, Georgia, Lebanon, Liberia, Rwanda, Sierra Leone, Somalia, Tajikistan, the former Yugoslavia and the territories occupied by Israel.

The jurisprudence of the International Court of Justice12, International Criminal Tribunal for the Former Yugoslavia13 and of the Inter-American Commission on Human Rights14 provides further evidence that the obligation to make a distinction between civilians and combatants is customary in both international and non-international armed conflicts.15

The principle of distinction is a corollary of the principle of protection: without the former, the latter is impossible to uphold. However, the paradigm of lawful combatants on the one side, engaged in fighting, and innocent civilians on the other side, not involved in and protected from hostilities, hardly reflects the reality of conflict today. IHL applicable during armed conflicts is premised on a fundamental assumption that war fighting is the work and privilege of soldiers and that civilians are generally to be considered as protected persons and not involved in hostilities. This assumption may have reflected the actuality of armed conflict, but it has already become divorced from reality and today increasingly seems an old-fashioned and outdated notion, out of step with the reality of today’s wars. The sanctity of the principles of distinction and protection is threatened by a number of contemporary phenomena. The privatization of formerly military functions is one such phenomena.

**The Privatization of Military Functions**

The trend in recent years has been towards privatization or corporatization of the military. The Armed Forces have contracts with hundreds of defense contractors, which provide an array of services. Many military subcontractors are former military personnel. Although

12 Nuclear Weapons case
13 Tadić case, Martić case and Kupreškić case
14 The case relative to the events at La Tablada in Argentina
15 http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1
now civilians, they are hired because of their military training, often to engage in tasks requiring military skills and which raise the question of their direct participation in hostilities. Today, civilian subcontractors are engaged in a wide range of services for the military in many parts of the world, including: operations planning; maintenance and logistics expertise; computer and communications technical support; weapons manufacture, maintenance and operations; engineering; information and electronic warfare operations; space operations; intelligence gathering and analysis; scientific research and development; security; administration, managerial and logistical support; humanitarian aid delivery; fire fighting; catering; and mail delivery.

The increasing use of PMSCs raises three fundamental questions. First, can they be combatants and therefore both use force and be targeted? Secondly, are they entitled to POW status? Thirdly, even if considered civilians, can they be targeted? The answers to these questions affect not only the treatment of such persons during hostilities but also when captured.16

At present, there is no commonly agreed definition of what constitutes a PMSC. The companies that participate in the military industry neither look alike nor do they serve the same market. They vary in their market capitalisation, number of personnel, firm history, corporate interrelationships, employee experience and characteristics and even the geographic location of their home base and operational zones. In the scholarly literature, different approaches have been adopted to this key question of definition.

PMSCs are profit-driven organisations that trade in professional services intricately linked to conflict and warfare. Their essential purpose is to

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16 Louise Doswald-Beck, Private military companies under international humanitarian law
enhance the capability of a client’s military forces to function better in conflict, or to deter conflict more effectively. PMSCs range from small consulting firms to large transnational corporations that provide logistics support or lease out combat helicopters, fighter jets, companies of commandos, or battalions. A number of modern PMSCs are military enterprises with uniformed military ranks, staff, doctrine, training syllabi, unit spirit, cohesion, and discipline. Most operate as "virtual companies". The scope of services offered within this industry is expansive and the services provided vary according to the level and degree of their specialisation. At one extreme, PMSCs may provide forces for combat and all combat support. The other end of the spectrum is dominated by PMSCs providing logistics and supply services.17

Beginning in the 1990s, PMSCs have been active in zones of conflict and transition throughout the world. They have been critical players in several conflicts and often the determining actor. They have been active on every continent but Antarctica. Today, this industry includes hundreds of companies presently operating in more than 50 countries worldwide. Their customers range from “dictators, rebels and drug lobby” to “sovereign states, multi-national corporations and humanitarian NGOs. The demand for their services is likely to increase and also these PMSCs regularly work for governments. In a number of cases, PMSCs are hired by multinational corporations or NGOs in the aid and disaster relief business in insecure environments. PMSCs might

17 Contract soldiers from the former Soviet Army have been found alongside regular forces in Chechnya, and have defended facilities in Azerbaijan, Armenia, and Kazakhstan. Hired Russian combat aircraft and pilots proved to be decisive to the outcome of the war between Ethiopia and Eritrea. In Sri Lanka, the government has hired PMC pilots to fly helicopter gunships. In Brunei, battalions of Nepalese Ghurkhas, who formerly served in the British Army, are in charge of territorial defence. Others are heavily engaged in arms procurement and supply. The most recent development is that PMCs have been hired to oversee and coordinate the operations of other PMCs.
even have a role in enabling the UN to respond more rapidly, effectively and economically in crises.

The post-World War II era saw a resurgence of the employment and deployment of foreign contractors. Events in Afghanistan, Colombia, Somalia, Sudan, Uganda, Liberia, and the Western Balkans have indicated the return of paramilitaries led by warlords. Transnational terrorist groups, drug cartel forces, ethnically and religiously motivated armed groups, or internationally organised criminal enterprises are other examples of the privatisation of conflict, while the increased use of PMSCs is a manifestation of the privatisation and commercialisation of armed conflict. The recent wars in Bosnia, Sierra Leone, Kosovo, Afghanistan, and Iraq were all fought with the help of civilian contractors. It is because of the reluctance of the militarily potent members in the international community to commit resources that weak governments and the humanitarians request private security. In the case of the training of African peace forces through western PMSCs the stronger states try to empower regional forces to enforce stability in the regions. They delegate this international responsibility to African states armies by using the PMSCs.

For first world countries, it is a way of avoiding to enlist their own soldiers and material at risk. Through training and consulting foreign armed forces influence is secured. Moreover it is a way of collecting information about developments in the host state. For governments in troubled states, it is a possibility to secure their position and enhance inner as well as external security. For Trans-National Corporations (TNCs), it is necessary to guard their investments in insecure areas. The TNCs are supporting indirectly the political regimes in the countries they are working in because of the financial shares usually given to these host governments. Finally the humanitarian community which conducts an historically new global ‘business’ needs security to operate. In the
present world, certain regions are heavily influenced through the business conduct of TNCs. Nonetheless the companies operating there do not own private armies and do not fight against local rulers. They pay for private security forces to guard their assets, but these companies do not fight wars to gain control over resources. For example, DynCorp works in Colombia for an elected government which is legitimised by the international community. However one can argue that DynCorp’s operations are part of the US governments overall strategy to maintain its influence in Latin America. Besides it is a smart way to save money; the Colombian government receives financial support from the US. In turn, Colombia spends parts of this money hiring the US firms to support it in the war on drugs. Armor Group’s support for UN operations follows the described pattern; financial resources given by the US government to the UN flow back through the hiring of the American PMSCs, at least through the taxes paid by this company at home. Troubled states also profit, through the possibility to buy security on the international markets and also because of the fact that many of these states are providing manpower for the industry.

Problems of PMSCs
Multiple problems are involved in engaging PMSCs in conflict areas. Because the PMSCs remain unclassified by any formal measure, the exact number of PMSCs that have entered the market is difficult to establish and it remains in constant flux. The global number is estimated to be in the mid-hundreds. London alone headquarters at least 10 firms that have overseas contracts worth more than $160 million. These firms have more than 8000 former British soldiers on their books as employees. Similarly, at least several dozen firms based in the US specialise in providing tactical and consultative military services. Another 60 such firms work in the demining sub sector. Most such enterprises hail from South Africa, UK, US, and occasionally France and
Israel. They all share essentially the same goals to improve their client’s military capability, thereby allowing that client to function better in war or deter conflict more effectively. Military companies are unfettered by political constraints. They view conflict as a business opportunity and have taken advantage of the pervasive influence of economic liberalism in the late 20th century. However, states are not the only customers for military skills. Western mining corporations also stand to benefit when a PMSC restores order, thereby raising questions as to whether these business entities share any formal ties.

On one hand, there is widespread belief that the privatization of armies is a potentially dangerous and destabilising development, but it is also an accommodation to the reality that states are no longer willing or able to meet the financial and political costs of maintaining their monopoly on the use of deadly force. The UN has continued to criticize African governments in particular for hiring mercenaries to provide security in return for a stake in the host nation’s rich mineral resources. However, the only realistic choices for such governments may be to obtain outside military assistance in the form of mercenaries or forfeit power. Once a greater degree of security has been attained, the company apparently begins to exploit the concessions it has received by setting up a number of associates and affiliates which engage in such varying activities as air transport, road building, and import and export, thereby acquiring a significant, presence in the economic life of the country in which it is operating.

The reality of the contemporary international scene has brought about the emergence of two complementary factors: the collapse of the bipolar model and a reluctance to commit troops to overseas action. Following unsuccessful interventions in Rwanda, Liberia, and Somalia, Western governments are increasingly reluctant to deploy national
forces into situations that have little direct relevance to their strategic interests, or where the risks of involvement are unacceptably high.

The traditional branches of international law did not envisage the emergence and involvement of these corporate warriors and their companies. There exists questions regarding the status of the employees of PMSCs - are they combatants or civilians?

If they are combatants, they may be targeted at all times. In fact they could have the right to take direct part in hostilities and, if captured, they are entitled to prisoner of war (POW) status and may not be prosecuted for having participated in hostilities. On the other hand, if they are civilians they may not be attacked. However, if they take direct part in hostilities, they will lose this immunity from attack during such participation. Moreover, as civilians they do not have a right to take direct part in hostilities. If they do so, they will not, when captured, be entitled to prisoners of war (POW) status and may be tried for merely having participated in hostilities, even if in doing so they did not commit any violations of IHL.

**Combatants**

IHL is very clear that members of the armed forces of a state are combatants, it does not provide clear and specific guidance as to who can be considered a member of the armed forces, nor as to the pre-requisites to be met by militias or volunteer corps for them to ‘‘form part’’ of the armed forces. The term ‘‘combatant’’ has a very specific meaning under IHL. There are four categories of persons who can be considered combatants under IHL.

Furthermore, only combatants may lawfully directly participate in hostilities which means they are immune to prosecution for lawful acts
of war (killing enemy soldiers) but not immune from prosecution for commission of violations of IHL. If captured, combatants have the right to be POW unless they have failed to distinguish themselves from the civilian population while fighting. Members of the armed forces of a (state) Party to a conflict are combatants. IHL does not set out the steps that states must take in order to incorporate individuals into their armed forces, which is a matter of internal law. However, it does set out certain minimum requirements for those forces.

If the status of a combatant is established, then the person is entitled to the rights which IHL confers. The most important of these is the right, following capture, to be recognized as a POW, and to be treated accordingly.

The Hague Regulations of 1907 lays down that the laws, rights and duties of war apply only to armies and to militia and volunteer corps which form part of the army. The militia and volunteer corps which do not form part of the army, should fulfil the conditions under Article 118. The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops, without having had time to organize themselves in accordance with the above-mentioned rules, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.19 The armed forces of the belligerent parties may consist of combatants and non combatants. In case of capture by the enemy, both have a right to be treated as POW.20

18 Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.
In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

19 Article 2 - Levée en masse

20 Article 3
Convention – III, which deals only with the protection of prisoners of war and not with the conduct of hostilities, this combatant status is not explicitly affirmed, but it is implicitly included in the recognition of prisoner-of-war status in the event of capture. The Hague Regulations expressed it more clearly in attributing the "rights and duties of war" to members of armies and similar bodies (Article 1).

According to the Additional Protocol – I, the armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict. Article 43(2) declares that members of the armed forces have the status of combatants, with two exceptions: medical and religious personnel.

In any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. These include auxiliary services, administrative services, the military legal service and others. Whether they actually engage in firing weapons is not important. They are entitled to do so, which does not apply to either medical or religious personnel, despite their status as members of the armed forces, or to civilians, as they are not members of the armed forces. All members of the armed forces are combatants, and only members of the armed forces are combatants.

Undoubtedly the success of guerrilla operations depends on the requirements of flexibility and mobility which are largely dealt with in Article 44 '(Combatants and prisoners of war)'. However, this concept

\[21\text{ Art 43 (1)}\]
\[22\text{ Art 43 (2)}\] - Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
of mobility could not be extended into the legal field without falling fatally back into the "presumption of illegality", of which guerrilla fighters have justifiably complained, and which Articles 43 - 45 of the Protocol have endeavoured to remove. The Protocol exceptionally allows a guerrilla combatant to wear purely civilian dress, if the nature of the hostilities requires it (Article 44 - 'Combatants and prisoners of war,' paragraph 3). However, it does not allow this combatant to have the status of a combatant while he is in action, and the status of a civilian at other times. It does not recognize combatant status "on demand". On the other hand, it puts all combatants on an equal legal footing.

When a party to the conflict includes a group of persons to its army, it has to notify the other party about the same. Thus, uniformed units of law enforcement agencies can be members of the armed forces if the adverse Party has been notified of this.

**Whether PMSCs Are Combatants?**

Combatant status is tied to membership in the armed forces of a party to a conflict or to membership of a militia or volunteer force that belongs to a party to the conflict and fulfils specific criteria.

It is thus necessary to assess whether PMSC employees are incorporated within the armed forces of a party to a conflict, as

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23 Art 44 (3) – In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
(a) during each military engagement, and
(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

24 Art 43 (3) - Whenever 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict..
defined in Article 43 (1) of Additional Protocol I or Article 4A(1) of the Third Geneva Convention.

The first means by which PMSC employees may qualify as combatants—determine whether they are members of the armed forces of a party to the conflict. Article 43(2) of Additional Protocol I stipulates that “Members of the armed forces of a Party to a conflict ... are combatants, that is to say, they have the right to participate directly in hostilities.”

IHL does not prescribe specific steps that must be taken by states in order for people to be registered in their armed forces under Article 4A(1) of the Third Geneva Convention or under Article 43 of Protocol I; that is a matter of purely domestic law. Incorporation therefore depends on the will and internal legal regime of the state in question. However, it is clear that some form of official incorporation is necessary, especially since Article 43(3) of Protocol I imposes a specific obligation on states that incorporate their own police forces or other paramilitary forces into their armed forces to inform the opposing side. This suggests that IHL anticipates that although it is a matter of domestic law as to how members of armed forces are recruited and registered within a state, it should be clear to opposing forces precisely who constitutes those forces. Incorporation of a PMSC employee into the armed forces of a Party to a conflict therefore depends on the will and internal legal regime of the state in question. It would be entirely possible for states to incorporate PMSCs into their armed forces if they choose to do so; if they did, PMSC employees would have combatant status. However, the will of an individual to be a member of a state’s armed forces, is not sufficient for that individual to be a part of the armed forces. There has to be some official form of incorporation.

A consideration of the purpose of recognizing this class of combatants in law further indicates that it is inappropriate to rely on Article 4 (GC III)
to define PMSC employees as combatants. The historical purpose of the provision was to allow for the members in the Second World War to have prisoner of war status. They were much more easily incorporated to the remnants of defeated armed forces or groups seeking to liberate an occupied territory than to PMCs. Indeed, the “resistance” role of these militias was a factor in granting them prisoner of war status. Granting combatant status to security guards hired by an occupying power appears to subvert the aims of the drafters of the Convention when recognizing this category of combatants, which was to make room for resistance movements and provide them with incentive to comply with IHL. Of course, there is no obligation to restrict the interpretation of this provision to its historical purpose, but advertence to that historical purpose provides some indication of the inadequacy and inappropriateness of using that provision in the context of modern PMSCs.

States hiring PMSCs rather tend to emphasize that those individuals are civilians. The US Department of Defense Instruction on “Contractor Personnel Authorized to Accompany the U.S. Armed Forces” of 2005 defines the status of contractors as “civilians accompanying the force”. In addition to this official position, the regulations passed by the Coalition Provisional Authority in Iraq obliged PMSCs to comply with human rights law, which would be sorely inadequate if the US, as an occupying power, knew or believed that they were part of its armed forces. Finally, a mere commercial contract is not sufficient to incorporate a person to armed forces and therefore a PMSC into the armed forces of a Party. Thus, the PMSCs contracted by the US armed forces in Iraq are not members of its armed forces.

A similar exercise would necessarily have to be conducted for each state’s contractors, but it is generally reasonable to presume that PMSCs are not incorporated into a state’s armed forces. A person may also have combatant status if he or she belongs to a militia or volunteer
force that (1) belongs to a party to a conflict and (2) fulfils specific criteria.

The second means for a group to qualify for combatant status under the Geneva Conventions is to meet the requirements laid down in Article 4A(2) of the Third Convention.25 The determination as to whether each PMSC meets these five requirements would have to be made on a case-by-case basis – not an inconsequential issue considering that there are scores of PMSCs operating world over presently. Many lack uniforms and are not subject to a responsible command.

The four requirements must all be met by the group as a whole. This article thus demands that each PMSC be considered on its own. The members of many of these may wear uniforms and look very much like Article 4A(2) forces but may in fact be civilians. Many PMSCs may distinguish themselves from local civilians through their attire, but considering the plethora of companies, it will be very hard for an enemy to distinguish one PMSC from another, the employees of which do not come under Article 4A(2) and whom it would be a crime to target directly.

With regard to the criteria of “belonging to a Party to a conflict”, one may be tempted to imagine that all those hired by the States meet this requirement by virtue of the contract between the government and the company, but the fact that the official position of many of these

25 Article 4 A (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.
states is that they are civilians makes this an untenable argument. Moreover, when one considers the complex chains of subcontracts with reconstruction companies and aid agencies hiring their own PMSCs to protect their worksites and aid convoys, the relationship becomes much less clear.

In addition, whether and how such companies “belong” to a party to a conflict can also be measured by the responsibility for their actions that the affiliated government would accept. It could in fact be argued that when states make a conscious choice to engage non-military personnel from the private sector to perform certain tasks, then to qualify those persons somehow as a kind of paramilitary force for the purposes of Article 4A(2) flies in the face of logic.

One of the reasons States have recourse to PMSCs in certain contexts is to get around national laws that would prevent them from sending their own armed forces: the use of PMSCs by the US in Colombia to battle the FARC due to a law prohibiting official US intervention is a frequently cited example. It is thus essential to take privatization as a serious signal that States would be at the very least quite reluctant to incorporate PMSCs into their armed forces. Consequently, it is imperative to determine the status of PMSC employees under IHL if they are not combatants.

The theory of innocence played a determinant role in the solidification of noncombatant immunity. It was necessary to separate harmful persons from harmless and innocent ones, and to treat them differently in time of war. As individuals who have ceased being harmless by bearing weapons or have chosen to become involved in the war effort one way or another, PMSCs fit in the century-old understanding of combatancy status and do not meet the requirements of those benefiting from noncombatant immunity. Applied to today’s battlefield reality, the theory of innocence, the concepts of harmlessness, and the
bearing of arms all advocate for a treatment of PMSC as combatants under IHL. Their participation in the war effort, their uniforms, their weapons, their cooperation with ordinary soldiers, and their occasional participation in combat, all do not contribute to their appearance as ordinary, harmless, men especially in the eyes of the enemy. While soldiers are presumed to share similar values, patriotism, disciplinary norms and, most importantly, a concern for civilians’ life, PMCs are, coarsely put, “in it for the money.” They do not wear the colors of any state and they are assumed not to have any true commitment to the cause for which they are fighting.

To conclude, the fact that PMSC employees do not have combatant status means that they may not directly participate in hostilities or can be prosecuted for taking part in hostilities.

**Civilians**

The principle of the protection of the civilian population is inseparable from the principle of the distinction which should be made between military and civilian persons. In view of the latter principle, it is essential to have a clear definition of each of these categories. In the course of history many definitions of the civilian population have been formulated. However, all these definitions are lacking in precision, and it was desirable to lay down some more rigorous definition, particularly as the categories of persons they cover has varied. Thus the Protocol adopted a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces. Its negative character is justified by the fact that the concepts of the civilian population and the armed forces are only conceived in opposition to each other, and that the latter constitutes a category of persons which is now clearly defined in international law and determined in an indisputable manner by the laws and regulations of States.
Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War contains a definition of the persons protected by that Convention against arbitrary and wanton enemy action when they are in the power of the enemy. However, Part II, entitled "General protection of populations against certain consequences of war" has a wider field of application.

The definition has been put in a negative form; as it is intended to cover anyone who is 'not' a national of the Party to the conflict or Occupying Power in whose hands he is. The Convention thus remains faithful to a recognized principle of international law: it does not interfere in a State's relations with its own nationals. It will be observed that owing to its negative form the definition covers persons without any nationality.

The words "at a given moment and in any manner whatsoever", were intended to ensure that all situations and cases were covered. The Article refers both to people who were in the territory before the outbreak of war (or the beginning of the occupation) and to those who go or are taken there as a result of circumstances: travellers, tourists, people who have been shipwrecked.

Article 50, Additional Protocol - I reproduces almost word for word the provision contained in the 1973 draft (Article 45). The definition covers civilians individually as well as collectively when they are referred to as the "civilian population", a concept which can be found in many articles in the Protocol.

Article 50 of Additional Protocol I follow a process of elimination and removes from the definition those persons who could by and large be termed "combatants". In other words, apart from members of the armed forces, everybody physically present in a territory is a civilian. Article 50 of the Protocol concerns persons who have not committed hostile acts, but whose status seems doubtful because of the
circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked. Again if combatants do not clearly distinguish themselves from the civilian population in accordance with the provisions of Article 44, this could result in a weakening of the immunity granted to civilians and the civilian population. The second paragraph provides that “the civilian population comprises all persons who are civilians”. However, in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population.

**Whether PMSC are Civilians?**

Under IHL, one must be either a combatant or a civilian. This is confirmed by Article 50 of Additional Protocol I, which defines a civilian as “any person who does not belong to one of the categories of persons” defining combatants.

Furthermore, the Commentary to the Geneva Conventions of 1949 states: Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.

Nevertheless, all civilians, including those who are not “protected persons”, are protected against attack as long as they do not actively or directly participate in hostilities. It is important to note here that in -some circumstances, some members of PMCS providing services to the armed forces of a party to a conflict would have POW status if they fell
into enemy hands, even though they are civilians. This treatment is prescribed for “persons who accompany the armed forces without actually being members thereof, such as ... supply contractors, members of labor units or of services responsible for the welfare of the armed forces”. In order for such persons to have POW status, however, they must have authorization from the armed forces which they accompany (and usually an identity card indicating that authorization) and they must refrain from directly participating in hostilities. There may be some situations in which this either-or qualification seems unsatisfactory, as perhaps is the case with heavily armed and uniformed PMSC groups.

If PMC employees, as civilians, directly participate in hostilities, they lose the protection from attacks normally accorded to civilians. Enemy combatants may legally target and kill them during their participation in the same way that they may target and kill other combatants. Moreover they may be prosecuted and punished for the mere fact of having participated in hostilities.

**Can Members of PMSCs Be Attacked?**

If members of PMSC’s are combatants in international armed conflicts, then there is no doubt that they can be specifically targeted for attack. As we have seen, however, members of PMSCs are more likely in practice to be considered civilians under IHL. This does not necessarily mean that they are immune from attack as civilians who “take a direct part in hostilities” lose this immunity. A difficult issue is to establish in which circumstances a civilian can be considered to be taking “a direct part in hostilities”, other than in the simple scenario of the moment during which a person is in the process of using a weapon against the adversary.
In the context of an international armed conflict, it is clear that the persons whose conduct is to be analysed are those that are not “combatants”. Article 51(3) of Additional Protocol I provides that: “Civilians shall enjoy protection from attack unless and for such time as they take a direct part in hostilities”.

Given that combatants can be attacked and the purpose of the law is to avoid deliberate attacks on civilians, civilians who choose to be in the vicinity of the armed forces take the risk of being “collateral damage” in any event. To widen the definition risks losing the impact of the principle of distinction which was so carefully included in Additional Protocol I. If this results in an unrealistic protection of PMCs that in practice undertake what is recognizably military work (which is, after all their chosen profession), then, the solution ought to be not to categorize such PMSCs as civilians and weaken the protection of regular civilians.

**Conclusion**

Presently, there is no clear remedy, either domestically or internationally, that can hold PMSCs accountable for misconduct. In this environment, PMSC operate in conditions that is similar to armed conflict - although the conditions may not constitute an armed conflict as defined by the Geneva Conventions - performing functions that blur the lines between civilian and combatant. Therefore, it is essential that international and domestic law address the gap that allows PMSCs to escape liability. The only way to comprehensively achieve this is to accord PMSCs a recognizable legal status. This can be done effectively by codifying definition of PMSCs and according liabilities and protections on that basis. By using a multilateral treaty to create an international body that provides oversight and requiring states to implement enforcement mechanisms, the international community can ensure that no person or company is beyond the reach of the law.
This type of accountability is imperative, given that States are becoming more reliant on PMSCs in both war and peace time, where at times number of PMSCs may be more than the military present.
Some Contemporary Issues
The ICC Jurisdiction over the Crimes Committed during the Gaza Conflict, with an Eye on the Goldstone Report

M. Omidzamani*

Abstract

With the concluding 574 page report by the UN Fact-Finding Mission on the Gaza Conflict called “Goldstone Report” on 15 September 2009, it has been cleared that several violations of human rights and international humanitarian law were committed during the 22-Day War in Gaza. The Report endorsed the grave breaches of the Fourth Geneva Convention in Gaza such as willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, and extensive destruction of property (not justified by military necessity). The Report accused both sides of the conflict and in particular Israeli Armed Forces, for committing war crimes and possible crimes against humanity in Gaza and further called upon the Security Council and the ICC to prosecute the perpetrators of such crimes, and make them accountable before the law. However, none of the preconditions for the ICC jurisdiction or a Security Council referral are met to enable a straightforward basis for the ICC jurisdiction over the Gaza Conflict. It seems, due to non-membership status of the Israel and the Palestinian to the ICC and the Security Council’s unwillingness to refer the issue to the Court, the ICC as a competent body would not be able to apply its jurisdiction over the criminal acts committed during the Gaza Conflict.

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Introduction

Releasing the 574 page report by the UN Fact-Finding Mission on the Gaza Conflict called “the Goldstone Report” on 15 September 2009 and its endorsement by the Human Rights Council on 16 Oct 2009 was considered as a major development in the human rights field since the establishment of the Human Rights Council in 2006 1. The Goldstone Report besides different features and dimensions which yet to be considered separately, elaborates two significant issues in contemporary international law. The first issue is to establish the close relationship between human rights issues and international humanitarian law on one side and international peace and security on the other side. The second issue is to highlight such relationship and its priority to ensure greater respect and better protection for the human rights, and to combat the culture of impunity in the world. The Report accuses Israeli Armed Forces and Palestinian Groups for committing war crimes and crimes against humanity in Gaza, and further recommends the Security Council and the ICC to prosecute the perpetrators of the crimes, and make them accountable before the law. This paper aims to answer several questions. Why the ICC could not yet exercise its jurisdiction over the Gaza Conflict since January 2009? Why the SC did not pay attention to the Goldstone recommendations to refer the Gaza Conflict to the ICC? Why the ICC could not exercise its jurisdiction over the Gaza Conflict directly? And more importantly, why the Human Rights Council could not have an

1 On 9 January 2009 at the 9th special session of the Human Rights Council, convened to address “The Grave Violations of Human Rights in the Occupied Palestinian Territory including the recent aggression in the occupied Gaza Strip” a Resolution condemning Israel’s assault on Gaza and calling for an end to the occupation of all Palestinian lands occupied since 1967, decided “to dispatch an urgent, independent international fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression”.
effective role to protect international human rights and international humanitarian law and pave the way for the prosecution of the criminals and further combat impunity in the Occupied Palestinian Territories? Thus, several cases of war crimes and crimes against humanity in the Rome Statute and the Goldstone Report will be discussed and possible ways for the ICC.

The main argument of this paper is: due to current legal constraints and further political obstacles, the ICC could not exercise its jurisdiction over the Gaza Conflict. The paper explores, the ICC’s jurisdiction over the criminal acts committed during the Gaza Conflict under three separate parts. According to this examination, it seems that the ICC, due to non-membership status of Israel and Palestinian to the ICC and further unwillingness of the Security Council to refer the issue to the Court, has faced serious constraints to address war crimes and crimes against humanity in Gaza. This means that the Human Rights Council has failed to protect international human rights and international humanitarian law.

1. War Crimes and Crimes against Humanity in the ICC Statute and the Goldstone Report

In order to examine and analyze what happen during the Gaza Conflict and verify whether these serious violations of international humanitarian law fall within the subject-matter jurisdiction of the International Criminal Court, it is necessary to discuss War Crimes and Crimes against Humanity in the ICC Statute and the Goldstone Report separately.

1.1. War Crimes and Crimes against Humanity in the ICC Statute

The ICC is an international organization with legal personality separate from the United Nations. The Court’s subject matter jurisdiction is limited to crimes of genocide, crimes against humanity, war crimes, and
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crimes of aggression, which have been committed since the Rome Statute entered into force on July 1, 2002 (Worster, 2011:1158). However, war crimes and crimes against humanity are the main, although not only, crimes prosecuted today. The Rome Statute of the International Criminal Court provides a wide range of war crimes and crimes against humanity in certain Articles of the Statute as the following:

A. War Crimes in the ICC Statute:

Traditionally, war crimes were crimes committed by a soldier of one state’s army against a soldier of civilian subjects of another state. The classic examples of war crimes are the torture of prisoners of war or slaughter of non-combatants (May, 2005: 6). Article 8 of the 1998 ICC Statute is the most comprehensive enumeration of war crimes. It gives a list of wide range of violations of the laws and customs that date back to centuries before the Christian era (Ball, 2002:6). According to Article 8, “war crimes” means grave breaches of the Geneva Conventions of Aug 12, 1949. These prohibited acts are:

- Willful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- Willfully causing great suffering, or serious injury to body or health;
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
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- Unlawful deportation or transfer or unlawful confinement;
- Taking of hostages.
- Intentionally directing attacks against the civilian population;
- Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments or hospitals;
- Rape, sexual slavery, forced pregnancy or any other form of sexual violence;
- Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities (The Rome Statute of ICC, 2011: 5).

B. Crimes against Humanity in the ICC Statute:

Crimes against humanity are a category of crimes largely invented in the early twentieth century to capture a range of crimes that one person commits against another person, that are directed against a population and are organized by a State or State-like entity, not necessarily during war (May, 2005: 6). Article 7 of the ICC Statute lists a wide range of "crimes against humanity" to include any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- Murder;
- Extermination;
- Enslavement;
- Deportation or forcible transfer of population;
- Imprisonment;
- Torture;
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
• Persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds;
• Enforced disappearance of persons;
• The crime of apartheid;
• Other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury (The Rome Statute of ICC, 2011: 3).

1.2. War Crimes and Crimes against Humanity in the Goldstone Report

There is a wide range of war crimes and crimes against humanity endorsed by the Goldstone Report. The Report while referring to several incidents during three weeks at the end of 2008 and the beginning of 2009 in Gaza indicated that more than 1400 Palestinians, including children and women, lost their lives as a result of the Israeli deliberate, unlawful and wanton attacks on civilians and civilian objects. This was a clear violation of the rule of customary international humanitarian law which caused several war crimes and crime against humanity in Gaza (Goldstone: paras 30, 33&355). The Report concluded that what occurred in Gaza was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability (Goldstone: para 1690). The Report further asserted that whatever violations of international humanitarian and human rights law may have been committed, the systematic and deliberate nature of the activities described in this Report leave the Mission in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations (Goldstone: para 1690). With its emphasis on the necessity of identifying those most responsible for the crimes committed in Gaza,
the Goldstone Report stressed the role which the International Criminal Court should play in the international community’s responsibility for ensuring accountability for the victims of ‘Operation Cast Lead’ (Kearney, 2009:2).

A. War Crimes in the Goldstone Report: The War Crimes in the Goldstone Report are as the following:

- Violation of the Fourth Geneva Convention in connection with willful killings and willfully causing great suffering to protected persons and as such give rise to individual criminal responsibility and targeting and arbitrary killing of Palestinian civilians is a violation of the right to life. (Goldstone: paras. 46, 50, 60, 85)

- The severe beatings, constant humiliating and degrading treatment and detention in foul conditions allegedly suffered by individuals in the Gaza Strip under the control of the Israelis and in detention in Israel, would constitute torture and a grave breach under article 147 of the Fourth Geneva Convention and a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (Goldstone: para 1175)

- Unlawful and wanton destruction which is not justified by military necessity such as the destruction of industrial infrastructure, food production, water installations, sewage treatment, and housing (Goldstone: paras 50, 1722)

- Arbitrary deprivation of liberty and violation of due process rights in the cases of detained Palestinian civilians, continuous and systematic abuse, outrages on personal dignity, humiliating and degrading treatment contrary to fundamental principles of international humanitarian law and human rights law which constituted the infliction of a
collective penalty on those persons and amounts to measures of intimidation and terror. (Goldstone: paras 60, 74, 78, 91)

- The blockade on the Gaza population and its enjoyment of human rights which severely affected economy, employment opportunities, education infrastructure, family livelihoods, industrial sector, and agricultural production in Gaza. (Goldstone: paras 27, 65, 66, 70)

- The deliberate attacks on civilian objects in violation of the rule of customary international humanitarian law whereby attacks must be strictly limited to military objectives. These facts further indicate the commission of the grave breach of extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly. (Goldstone: paras 32, 43, 704)

- Constituting a deliberate attack against the civilian population where there is no intended military target by the Palestinian armed groups. This attack had breached the fundamental principle of distinction which indicates that an attack must distinguish between military and civilian targets. (Goldstone: paras 1929, 1921)

- Violation of the grave breaches provisions of the Fourth Geneva by committing several incidents involving the destruction of industrial infrastructure, food production, water installations, sewage treatment and housing, the destruction of residential housing caused by air strikes, mortar and artillery shelling, missile strikes. (Goldstone: paras 53, 50, 54)

- The attacks on industrial facilities, food production and water infrastructure investigated by the Mission are part of a broader pattern of destruction, which includes the
destruction of the only cement packaging plant in Gaza where there was a deliberate and systematic policy on the part of the Israeli armed forces to target industrial sites and water installations. (Goldstone: para 54)

- Killing of hundreds of non-combatants, including many children, women, and members of the police during the military operations. (Goldstone: paras 350, 351, 352, 353, 354)
- The deliberate attacks on Gaza government infrastructure and Gaza police. (Goldstone: paras 387 386, 383, 391)

B. Crimes against Humanity in the Goldstone Report: The Crimes against Humanity in the Goldstone Report are as the following:

- The series of acts that deprive Palestinians in the Gaza Strip of their means of subsistence, employment, housing and water, that deny their freedom of movement and their right to leave and enter their own country, that limit their rights to access a court of law and an effective remedy, could lead a competent court (Goldstone: paras 75, 1936).
- The widespread or systematic attack on a civilian population that blatantly discriminated and infringed a fundamental right recognized under international customary law or treaty, and was carried out deliberately with the intention so to discriminate (Goldstone: para 1332).
- The systematic discrimination, both in law and in practice, against Palestinians in legislation (including the existence of an entirely separate legal and court system which offers systematically worse conditions than that applicable to Israelis) and practice during arrest, detention, trial and
sentencing compared with Israeli citizens is contrary to the ICCPR, article 2, and potentially in violation of the prohibition on persecution (Goldstone: para 1502).

- The series of acts that deprived Palestinians in the Gaza Strip of their means of sustenance, employment, housing and water, that deny their freedom of movement and their right to leave and enter their own country, that limit their access to courts of law and effective remedies could amount to persecution (Goldstone: para 75).

- The intention to inflict collective punishment on the people of the Gaza Strip by the deliberate actions of the Israeli armed forces and the declared policies of the Israeli Government – as they were presented by its authorized representatives – with regard to the Gaza Strip before, during and after the military operation (Goldstone: para 1331).

- Violation of the principles of distinction and proportionality in customary international humanitarian law between civilian and military objects as well as combatants and civilians by deliberate attacks on civilians and civilian objects (individuals, whole families, houses, mosques) unlawfully and wanton attacks and destroying without military necessity and violation of principles of distinction (Goldstone: paras 53, 1005, 1921, 1950, 1888, 1888, 1929).

- Deliberate and indiscriminate rockets and mortars attacks by the Palestinian armed groups which were incapable of being directed towards specific military objectives and were fired into areas where civilian populations were based. (Goldstone: para 108)
2. Goldstone Recommendations to the UN Security Council and the ICC

To prosecute the criminals and make them accountable before the law, Judge Goldstone made several recommendations to a number of United Nations bodies, including Security Council, and also to Israel and Palestinian Authorities (A/HRC/RES/S-12/1). Here, the recommendations to the ICC and the SC will be examined as the following:

2.1. Recommendation to Security Council

Goldstone, in paragraph 1969 of the Report, called upon the Security Council under Chapter VII of the Charter of the United Nations, to consider the Gaza Conflict and in the absence of good-faith investigations within six months of the date of its resolution, refer the Gaza Conflict to the Prosecutor of the International Criminal Court (Goldstone: para 1969 [d]). This referral is pursuant to Article 13 (b) of the Rome Statute. According to paragraph 1969, the Security Council should ask the Government of Israel and Palestinian, under Article 40 of the Charter of the United Nations, to take all appropriate steps, within a period of three months, to launch appropriate investigations (that are independent and in conformity with international standards) into the serious violations of international humanitarian law and international human rights law. At the same time, the Security Council should establish an independent committee of experts in international humanitarian law and human rights law to monitor and report on any domestic legal or other proceedings undertaken by the Government of Israel and Palestinian in relation to the aforesaid investigations. The committee of experts at the end of the six-month period should report
to the Security Council on its assessment of relevant domestic proceedings initiated by the both side of the Conflict.2

2.2. Recommendation to the ICC

Article 12 (3) of the ICC Statute indicates that if: “the acceptance by a State which is not a Party to this Statute is required under paragraph 2 (of this Article), that State may by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. Due to this procedure, the Palestinian National Authority on 21 January 2009 submitted its Declaration to the International Criminal Court (ICC) to accept the jurisdiction of the ICC in the territory of Palestine (Lattanzi, 2003:277.). Concerning to this declaration, Goldstone in paragraph 1970 of the Report made a recommendation to the Prosecutor of the ICC. According to the paragraph, the Prosecutor under Article 12 (3) of the Rome Statute, should make the required legal determination to the Palestinian Declaration received by the Office of the Prosecutor of the ICC.

3. Different Scenarios before the ICC to Exercise its Jurisdiction over the Gaza Conflict

The International Criminal Court is a permanent tribunal created to examine genocide, war crimes, crimes against humanity, and the crime of aggression. However, among the most complicated matters of the ICC Statute both in a legal and political sense - which at the same time is of utmost importance for its proper functioning and its international acceptance - is that of its jurisdiction range (Markus, 2003:412). In order to systematically analyze the issue, it is important to

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2 This committee was established on 25 March 2010 (A/HRC/RES/13/9) by the Human Rights Council following General Assembly resolutions, including resolution 64/10, adopted on 5 November 2009, and resolution 64/254, adopted on 26 February 2010, in follow-up to the report of the Fact-Finding Mission (Goldstone Report).
address the jurisdictional dilemma faced by the Prosecutor and address the far-reaching consequences of initiating an investigation. The Court also does not have universal jurisdiction and may only exercise its jurisdiction if: the accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court; the crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or the Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime in question (Lattanzi, 2003: 277).

Therefore, the ICC can only exercise its jurisdiction over crimes committed within the territory, or by a national, of States Parties to the Rome Statute, unless a non-state party accepts the Court’s jurisdiction with respect to a particular crime (Worster, 2010:1158). The individuals should be directly responsible for committing the crimes. Moreover, those who may be liable for the crimes, by aiding, abetting, or otherwise assisting in the commission of a crime are also responsible for their crimes. The latter may include military commanders or other superiors whose responsibility is defined in the Statute (www.icc-cpi.int/Menus/ICC/).

Now, and with regard to Gaza Conflict, there would be different scenarios before the ICC to exercise its jurisdiction over the Conflict. The Prosecutor of the ICC does not have jurisdictional authority to initiate an investigation into the alleged crimes committed in the 2008-2009 Gaza Conflict. States Parties, Security Council, and the Prosecutor of the Court under certain conditions are able to refer a situation to the International Criminal Court. More details will be given here as the following:

3.1. The ICC Jurisdiction over the Gaza Conflict by Israel Referral

According to Article 13 of the Rome Statute, the Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in
accordance with the provisions of the ICC Statute if: (a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with Article 14 (Rome Statute, Article 13). Article 14 of the Rome Statute indicates that a State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. However, referral of the Gaza situation by Israel to the ICC is one of the options which may enable the Court to exercise its jurisdiction over the crimes committed during the Israeli attacks to Gaza. But due to non-membership of Israel to the ICC, the Court would not be able to exercise its jurisdiction over the situation in Gaza. Moreover, due to the nature of the Goldstone Report which more or less endorses Israeli crimes in Gaza, the acceptance of the ICC jurisdiction and referral of the issue to the Court by the Israeli regime in the future will be unlikely and at least for the time being, it is impossible to expect that the Israel will accept the Rome Statute which enables the ICC to address the Goldstone Report.

3.2. The ICC Jurisdiction over the Gaza Conflict by Palestinian Referral

Referral of the Gaza Conflict by the Palestinians to the Court is another possible scenario to enable the prosecutor to investigate the situation in Gaza and determine whether any persons should be charged with the commission of criminal acts reported in the Goldstone Report. But

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3 Article 14: A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
due to non-membership of Palestine to the Rome Statute, the Palestinian is not able to refer the issue to the Court.

Moreover, Palestine is not officially recognized as a United Nation member state and as such cannot be a member of the ICC. To have a solution on this issue, on 21 January 2009, Ali Al-Khashan, as Minister of Justice for the Government of Palestine, signed a declaration under Article 12(3) of the Rome Statute recognizing the jurisdiction of the International Criminal Court ‘for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002 (Kearney, 2009:2). In fact, Article 12(3) allows a state that is not a party to the Statute to “accept the exercise of jurisdiction by the Court” by way of a declaration lodged with the registrar. The declaration states that: “in conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting, and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002” (www.icc-cpi.int/NR/rdonlyres). However, the main issue to be tackled by the Court is whether or not such recognition may produce the effect of devolving the situation in Palestine to its jurisdiction (Pellet, 2010:982).

The Vienna Convention instructs that treaty terms should be interpreted with consideration for the object and purpose of the treaty, and the object and purpose of the Rome Statute is to end impunity for war crimes for purposes of an Article 12(3) acceptance of jurisdiction and in order to fulfill the Rome Statute’s purpose of promoting justice for victims and perpetrators of war crimes, the ICC should recognize that Palestine is at least a quasi-state, and interpret the Rome Statute liberally to allow for its accession or acceptance of the Court’s jurisdiction (Worster, 2011:1192).
However, Luis Moreno Ocampo, the ICC prosecutor indicated that he lacked the legal basis to examine the case. But since the Palestinian National Authority signed a commitment on 21 Jan 2009 recognizing the court's authority, the prosecutor has appeared more open to studying the Palestinian claim (Simons: 2009). The question is whether the registrar would accept it, given that it would have to make a decision on statehood in the face of widespread international disagreement (Luban: 2009). Some jurists believe if the Palestine is not recognized as a state, there would be no any other possible state to enable the ICC to exercise its jurisdiction over the Gaza. In this regard, Ms. Béatrice Le Fraper, director of jurisdiction for the prosecution says that the prosecutor has agreed to explore if he could have jurisdiction in the case. She cautioned that accepting jurisdiction would not automatically set off a criminal investigation (Simons: 2009). Sean Murphy, a law professor at George Washington University, believes that the lack of international consensus about the PNA’s status meant that the success or failure of the Palestinian move might depend on the authorities in The Hague (Luban: 2009). In this regard, the office of the Prosecutor in April 2012 concluded that it is unable to proceed with investigating and prosecuting these crimes unless the relevant United Nations bodies (in particular, the Secretary General and General Assembly) or the ICC Assembly of States Parties (made up of 121 states that have ratified the Rome Statute) decide that Palestine qualifies as a state for the purpose of acceding to the Rome Statute. This decision was taken due to the Palestinian territories not being recognized as a

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4 The issue of Palestinian statehood has become the focus of much discussion and potential controversy in the context of the jurisdiction of the ICC because of the longstanding history of recent violent conflicts between Israel and Palestinian Groups. In particular, the possibility of accountability under international criminal law for actions by both sides to the conflict is potentially being triggered by the military incursion into Gaza by the Israeli military in December of 2008.
some sovereign nation by the United Nations. In fact, the Article 12(3) is tied to the notion of a “State.” It provides that a State which is not a party to the Statute may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to a crime. The core purpose of the Article is to allow non-party States to cooperate with the court. It follows that Palestine must qualify as a “State” in order to come within the scope of the provision.

3.3. The ICC Jurisdiction over the Gaza Conflict by Security Council Referral

The legal regime of the Rome Statute does not include the ICC authority to exercise power over the states not party to its Statutes. These states do not have any obligations to cooperate with the Court by the mere terms of the Statutes (Lattanzi, 2003: 30). However, as the Security Council under the UN Charter has primary responsibility for the maintenance of international peace and security, it may refer a situation to the Court. According to the article 13(b) of the Rome Statute, the Court may exercise its jurisdiction with respect to a crime (referred to in article 5 in accordance with the provisions of the Statute) if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council. The Security Council will be acting under Chapter VII of the UN Charter, and Article 13(b) of the Rome Statute which authorizes acceptance of referral from the SC relies on the this Chapter. Chapter VII provides for the SC an enforcement power, and will be as a legal basis for such referral (Zimmermann, 1998:216). However, it is to be noted that although the referral of a situation to the Court by the SC is one of the solutions to enable the ICC to exercise its jurisdiction over a situation, it cannot change the provisions and functions of the Court (Lattanzi, 2003: 30). It means that the SC only refers a situation to the Court and has not any roles in its legal investigation procedures. Having said this, if
the ICC receives the Goldstone Report from the SC, it will find itself eligible to address the Report. This referral has been done previously with regard to the issue of Darfur in 2005 (S/RES/1593 (2005)) and also the human rights situation in Libya in February 2011 (S/RES/1970 (2011)) 5.

But, despite such understanding, the Security Council denied to consider the Goldstone Report in detail. SC while rejecting to hold an emergency session on the Report at its regular monthly Middle East briefings on 14 Oct 2009 disregarded the Report. Representative of the USA in this regard indicated that “On the matter of the Goldstone Report on the Gaza Conflict that was requested by the Human Rights Council in Geneva (A/HRC/12/48), the allegations of human rights and humanitarian law violations contained therein, are not a matter for the Security Council action (S/PV.6201(2009)). Other permanent members of the SC also made similar remarks. Therefore, the recommendation made by the Judge Goldstone in its Report, namely the referral of the Report to the ICC through the SC, has not been implemented.

In fact, the Security Council’s refusal to consider the Goldstone Report and further denying to refer the Report to the ICC is essentially against the purposes of the Human Rights Council and in particular the Goldstone Report which aimed to end impunity for those who committed war crimes and crimes against humanity in the occupied Palestine Territories. The decision made by the 9th Special Session of the Human Rights Council to dispatch a Fact-Finding Mission to Gaza, was aimed to find out the reality of the crimes committed during the war in Gaza and to punish the perpetrators of such crimes. If the Goldstone Report’s recommendations including those recommendations to the ICC and the SC had been implemented, the Human Rights Council could have succeeded in protecting human rights in Gaza. To ignore

5 These cases were referred to ICC by Security Council according to Article 16 of the Rome Statute.
such criminal offences and keep the violators of international humanitarian rights living without any persecution and ever enjoying impunity, are against the goals of the Human Rights Council and all international human rights treaty bodies.

3.4. The ICC Jurisdiction over the Gaza Conflict by the ICC Prosecutor

There can be no lasting peace and stability among the nations which suffered from cruelty and horror of war crimes and crime against humanity unless there is justice for the victims. The ICC Prosecutor has to act a crucial role in this field of combating against impunity and prosecute the perpetrators of the such crimes, and make the criminals accountable before the law. The independent ability of the Prosecutor to initiate his/her own investigations and cases was one of the most hotly debated issues during the negotiations of the Rome Statute (Manuel Ventura). The results of these negotiations are now enshrined in Articles 13(c), 15 and 53(1) of the Rome Statute that regulate the circumstances under which such a power can be exercised at the International Criminal Court. According to the Article 13 (c) of the Rome Statute, the Court may exercise its jurisdiction with respect to a crime if the Prosecutor has initiated an investigation in respect of such crime in accordance with the Article 15 of the Rome Statute. Article 15 indicates that the Prosecutor may initiate investigations proprio motu on the basis of information on the crimes within the jurisdiction of the Court. A proprio motu investigation requires the Prosecutor to convince the Pre-Trial Chamber that there is a "reasonable basis" to proceed with one; while a state referral does not (Jon Heller: 2011). Article 15 of the Rome Statute indicates that the Prosecutor must conduct a preliminary examination of information received regarding alleged crime(s). The Prosecutor can request information from United Nations
organs, States, NGOs and other reliable sources to aid in this process. According to Article 15, only after the Prosecutor has analyzed the seriousness of the information and concluded that there is a reasonable basis to commence an investigation, a request can be made to the Pre-Trial Chamber to launch an investigation. However, the ICC has not found so far any reasonable basis to proceed with the issue. It means, with this scenario those who are suffered from the war crimes are unable to proceed with the issue of the Gaza Conflict at the Court.

**Conclusion**

This paper discussed the possibility of the ICC jurisdiction over the crimes committed in the Gaza Strip and analyzed four scenarios in this regard. These scenarios arise from several recommendations made Judge Goldstone in his Report to the Human Rights Council. The Report highlighted the role of the Security Council in protection of human rights and international humanitarian law and effectively related the human rights issues to international peace and security matters. In this regard, the role of the ICC to have a concrete act against impunity and make the violators of international human rights accountable is very crucial. However, none of the preconditions for the ICC jurisdiction or a Security Council referral are met to enable a straightforward basis for the ICC jurisdiction over the Gaza Conflict. The concerned parties involved, namely Israel and Palestinian are not the parties to the International Criminal Court, and the Palestinian declaration accepting the ICC's jurisdiction over the Gaza Conflict is not accepted by the

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6 In making the request, the Prosecutor must present to the Pre-Trial Chamber information in his/her possession that supports the initiation of an investigation. Once an application has been filed, it falls upon the Judges of the Pre-Trial Chamber to evaluate the information presented by the Prosecutor. For the Judges to authorize an investigation, a number of requirements must be met.
ICC. Thus, Given the current constraints on jurisdiction under the Rome Statute such as non-membership status of the Israel and the Palestinian to the ICC and the Security Council’s unwillingness to refer the issue to the Court, and the relatively young experience of the Court, the ICC has faced serious legal constraints to exercise its jurisdiction over the war crimes and crimes against humanity committed during the war in Gaza. This means that the Human Rights Council has failed to protect international human rights and international humanitarian law in Gaza.

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      #States_that_recognize_the_State_of_Palestine
Regional Trade Agreements versus the WTO: A Human Rights Perspective

Mohsen Qasemi *

Abstract

The international economic order multilateral trading system which established by General Agreement on Tariffs and Trade 1947 (GATT) was dominant until about two decades ago. Regional Trade Agreements (RTAs) have changed this order and become an important phenomenon. One of the main objectives of the World Trade Organization (WTO) as a central institution of multilateral trading system is raising standards of living. There are many scholars who suggest that WTO should take steps to protect human rights in its activities. There have always been opposing views which declare that since WTO has no explicit rule for human rights, it has no human rights related obligations. At the time when the WTO was established, member states began to join RTAs and since then, the escalating growth of these agreements and their effects on multilateral trading system has been controversial. There are some aspects of RTAs that have received too little attention from scholars. It’s important to take a different view and evaluate the RTAs based on non-commercial aspects. The present paper seeks to answer this question: which system could be more useful in protecting human rights, RTAs or WTO?

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1. Introduction

There are many aspects of human rights related to international trade. All forms of cultural rights, economic rights and labor rights fit in this category. The relationship between international trade and human rights is not contemporary. Although in practice there are some controversies surrounding this relationship it has long been disputed. In recent years the WTO has been criticized for negative impacts of its agreements on human rights. These concerns have been reflected by international bodies such as the United Nations Commission on Human Rights (UNCHR). Some views declare that WTO obligations lead to violations of human rights and there are some other views that declare that since WTO has no explicit rule for human rights, it has no human rights related obligations.

In the international economic order multilateral trading system which established by GATT was dominant until two decades ago. RTAs
have changed this order and become an important phenomenon in globalization. While the WTO is the central institution of international trade and its rules have become a constitution in world trade, RTAs, in many cases, for example government procurement, investment and services have gone beyond the WTO rules and they provide a wide range of trade rules.13 There is a long history of the question of whether RTAs have a negative effect on the WTO trade liberalization system. The effect of RTAs on non-members, multilateral trading system and the reasons for RTAs proliferation in the international trade literature shows that these topics are the most common. This paper takes a different view and evaluates RTAs based on human rights aspects. The paper first gives an overview of the human rights issues in WTO’s activities and rules, it then describes the same in RTAs and analyzes the potential of RTAs for protecting human rights. As a conclusion, the paper answers this question: which system could be more useful in protecting human rights, RTAs or WTO?

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12. The RTAs are preferential trading Agreements between countries in a certain region or groups of countries in different regions, RTAs operate alongside multilateral trading system under the WTO and encompass free trade areas (FTA), customs unions (CU), common markets and economic unions (EU).

13. A number of agreements go beyond the requirements of the GATT/GATS in providing for economic cooperation. A distinction is commonly made between shallow and deep integration: ‘shallow’ integration referring to the elimination of the traditional border measures, tariffs and non-tariff measures; ‘deep’ integration referring to policies that are beyond the border. See J. Davidson, Paul, " The Legal Framework for RTAs/FTAs in The Asia-Pacific Region " , 2005 APEC Study Center Consortium Conference Building an Asia-Pacific Economic Community, Jeju, Korea, 2005, p. 13. Investment Provisions in RTAs go beyond existing provisions on investment at the WTO, either in terms of substance or objectives. See Macrory, Patrick F. J, & others, The World Trade Organization: Legal, Economic and Political Analysis, Springer, 2005, p. 316. RTA provisions on government procurement broadly parallel and appear to borrow from corresponding provisions of the government procurement agreements (GPA), they may validate and even extend the influence of these provisions. See Anderson, Robert D & others, "GOVERNMENT PROCUREMENT PROVISIONS IN REGIONAL TRADE AGREEMENTS: A STEPPING STONE TO GPA ACCESSION? " , Arrowsmith and Anderson, 2011, p. 2.
2. Human Rights and the WTO

According to WTO’s preamble, one of its main objectives is raising standards of living and also the term sustainable development has been included in the Marrakesh Agreement which founded the WTO, as well as Appellate Body decisions and the terms of reference for the Committee on Trade and Environment. The WTO is a member-driven organization and every member has ratified one or more UN human rights conventions. The question is “should the WTO orient its activities by human rights or should the human rights stay away from those activities?”. The following sections describes the WTO rules that intersected to human rights.

A. The TRIPS Agreement

In many cases the high prices of drugs are a barrier to needed treatments, The right to health is violated by TRIPS agreement which prevents poor people from access to generic drugs which are produced or imported without respecting intellectual properties as protected under TRIPS. For instance, for being allowed to join WTO, Columbia had to agree to immediately halt use of generic drugs, even though the Doha Declaration allows Least Developed Countries (LDCs)

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to wait until 2016 to do so.17 The same scenario happened to Nepal. Pharmaceutical patents restrict access to essential medicines by encouraging biopiracy in biologically-rich developing countries. They enable pharmaceutical companies to pirate medicinal plants and other genetic materials from resource-rich developing countries which are subsequently used to produce patented medicines. While patented medicines are expensive and unaffordable to the indigenous communities that own the biological resources used in producing them, biopiracy further deprives them of the traditional medicines that serve as alternative means of meeting their healthcare requirements.18

B. Decision-making Process

Criticisms of WTO have increased for secretive, untransparent and imbalanced decision-making process which lead to frustrating the poor member states to represent their public interests. The analyses of the informal processes of decision-making in the WTO showed that in spite of the formally fair provisions, the informal procedures of decision-making are problematic and breach the principle of sovereign equality of states. Thus, in situations where a member’s inability to effectively participate in WTO decision-making is as a result of its economic weakness – e.g. inability to maintain a permanent delegation in Geneva – the case can still be made for the operation of the principle of sovereign equality of states.19 From a different perspective, WTO has no relation with NGOs in decision-making process. In this area human rights can play a role as a source, but the Trade Policy Review Body

17. See Dommen, Caroline, op.cit. p. 6.
(TPRB) does not refer any information from NGOs.20 A number of WTO divisions have established relations with NGOs with whom they work regularly, in addition the office of Director-General provides direction on the WTO's practices for engagement with NGOs and civil society. Nevertheless NGOs' efforts focus on seeking to influence the WTO's agenda and trade-policy making at the WTO including negotiations.21

C. The Agreement on Agriculture (AoA)22

The right to food is covered in various human rights conventions and 127 members of WTO have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). The AoA established a set of rules which are biased against developing countries, constraining the state from acting to respect, protect and fulfill the right to food.23 Developing countries have been pressed to open their economies to imports under structural adjustment programmes.24 Increase in imported foodstuffs displaces rural farmers from domestic


22 . Agreement on Agriculture is one of the WTO agreements which entered into force on January 1, 1995. AoA provides provisions in 3 areas: market access, domestic support and export subsidies. The main objective of the AoA is to increase international agricultural trade through reduction of tariffs.

23 . See Hawkes, Shona & Plahe, Jagjit Kaur, " The WTO’s Agreement on Agriculture and the right to food in developing countries ", Monash University, Business and Economics, 2010. The AoA ignores real differences among countries by suggesting that all nations can benefit from following varying degrees of the same liberalization policies. Worse, the agreement allows rich countries to buy themselves extraordinary exceptions to the rules, something developing countries cannot hope to do. See Li, Xiaozhen & Wang, Wei, " WTO Agreement on Agriculture: A Developing Country Perspective ", Journal of Politics and Law, Vol 1, 2008.

markets, depriving them of incomes. Cheap food imports into many developing countries takes away the livelihoods of poor people of which farmers are in the majority.25 Reduction of tariffs allows cheap imports of low cost agricultural produce that compete (and often dislodge) with domestic products and destroy local livelihoods. As a result they may lose out where they are supposed to gain from the AoA.26

Supply side constraint in developing countries may also prevent farmers from realizing the benefits of increased market access/lower tariffs supposed to come with the AoA. Developed countries, on the other, may manipulate some provisions of the AoA to their advantage at the expense of developing countries.27

D. The General Agreement on Trade in Services (GATS)28

Realisation of human rights requires regulatory space and flexibility to tailor domestic regulatory policies according to each countries needs.29 WTO rules and negotiations on liberalization of trade in services risk the governments' policy space and flexibility.30 In other words, the GATS rules reduce the role of member states in domestic

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25. Rich countries may employ various devious means to keep out exports from developing countries, using legal loopholes to undermine the poor, e.g. SPS measures allow countries to restrict imports on health grounds; and anti-dumping measures used to protect local producers from cheaper imported produce. Developing and least developed countries are less able to protect themselves sufficiently against cheap imports from developed countries which continue to use domestic and export subsidies to support their producers. See Ibid, 13.


27. See, Ibid, 18. Right to food concerns also emerges in other WTO agreements. The TRIPS agreement allows for the introduction of intellectual property right protection for plant genetic resources or another sui generis system. This could limit the availability of seeds for food production and undermine traditional practices by small farmers of seed exchange and developing plant varieties. See Gray, Kevin R., “ Right to Food Principles vis-à-vis Rules Governing International Trade “, British Institute of International and Comparative Law, 2003, p. 46.

28. The GATS agreement provides a legal framework for trade liberalization in services which entered into force in January 1995.


30. See Dommen, Caroline, op.cit. p. 7.
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regulation of services and increase the role of private companies in a vast scope, including water, education, health care, tourism, transport, libraries, telecommunications, banking, insurance, and prisons. These rules have a potential to pose a threat to basic public services through foreign service provider companies. GATS text is also very ambiguous about what aspects of our lives its rules cover.31

A human right to safe water is explicitly recognized in only two UN human rights conventions,32 although it can be referred from other rights such as right to food and health. The liberalisation of water services involves the entry into the local water and sanitation market of foreign firms to provide either whole or part of the service.33 As a result, local consumers may become less involved in deciding how the service is operated, pay a higher charge for the service and have fewer community members employed in the production process.34 Communities around the world are fighting water privatization because of its devastating impact on consumers, workers and the environment.35 Another way GATS might reduce a country’s flexibility

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31. See Wallach, Lori, “Attack on Public Services: The General Agreement on Trade in Services (GATS)”, The International Forum on Globalization, 2003, p. 2. There is lack of clarity as to what extent the GATS market access obligation would prohibit policies that aim to preserve water by placing limits upon the amount of water that is used as an input into service delivery processes. While a footnote to Art. XVI 2(c) appears to allow such measures this is not the case for the other subparagraphs of Art. XVI. From an environmental and water management perspective, there is no reason for only selectively allowing such conservation policies. See Ostrovsky, Aaron & others, “GATS, Water and the Environment”, Center for International Environmental Law, Geneva, 2003, p. 47.

32. See The Convention on the Rights of the Child, 1989, article 24, paragraph 2(c), see also Convention on the Elimination of All Forms of Discrimination against Women, 1979, article 14, paragraph 2(h). On 28 July 2010, through Resolution 64/292, the United Nations General Assembly explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realization of all human rights. See http://www.un.org/waterforlifedecade/human_right_to_water.shtml.


34. See Ibid, 13.

35. For example, After privatizing the water systems in Cochabamba, Bolivia in 1999, a subsidiary of the Bechtel Corporation, implemented massive price hikes.
to regulate in the public interest is through limiting a governments’ ability to provide economic measures in favour of disadvantaged groups (indigenous people).36

E. Legal Text and Internal Conflict

The WTO has not explicitly recognized or mentioned human rights in its rules. The only legal base for implementation of human rights is Article XX GATT known as public morals exception.37 Two other agreements of the WTO contains public morals exception: the GATS Article XIV and the Agreement on Government Procurement (GPA), Article XXIII. The TRIPS agreement also contains a general exception-type clause

Families earning a minimum wage of $60 per month suddenly faced water bills of $20 per month. Rate increases of 100 percent were the most common, while increases of 300 percent were reported. The citizens rose in protest, forcing the cancellation of Bechtel’s contract and replacing it with a community-controlled water system that is providing water more equitably and universally than before. Bechtel has responded with a $25 million lawsuit for lost profits. See Juhasz, Antonia, “WTO’s threats to global water security “, The International Forum on Globalization, 2003, p. 2.

36. Human rights law requires governments to take steps to ensure enjoyment by particularly vulnerable groups of their human rights. Some governments protect steps they take to this end in their GATS commitments. New Zealand for instance, exempts from its GATS obligations ‘current or future measures at the central and sub-central levels according more favorable treatment to any Maori person or organization in relation to the acquisition, establishment or operation of any commercial or industrial undertaking,’ and Australia does much the same for its indigenous peoples. Malaysia has also exempted the special economic policies it instituted from the 1970s to advance the interests of the disadvantaged ethnic Malay Bumiputera population from GATS. See Dommen, Caroline, op.cit. p. 9.

37. Article XX provides: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(e) relating to the products of prison labor;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
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relating to the granting of patents.38 Also Article XXI GATT allows the member states to take any action under pursuance of their obligations under the UN charter.

According to Article XX (a) member states are allowed to adopt trade measures to protect public morals. However, it leaves us with these questions "how is this exception to be interpreted?" or "what extent can this exception clause be applied?".39 It has been suggested that the WTO should interpret the public morals exception as a reference to human rights.40 The first case in public morals was U.S.-Gambling case in 2005 which the WTO recognized the right of the United States to ban internet gambling services on the grounds that such services violated American public morals.41 Article XX (b) could be used to justify public health measures, an example is the EC-Asbestos case where the import ban of Asbestos was a justified measure to protect the worker's health

38. Article 27(2) allows members to exclude inventions from their patent systems where it is “necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.” See Office of the U.N. High Commissioner for Refugees, Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights, United Nations, New York and Geneva, 2005, p. 4.

39. In EC-Asbestos case, The panel noted that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. See Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, 2000, p. 61.

40. Three of the general exceptions could be applicable to a broader range of human rights concerns. The first is the exception allowing States to take measures for the protection of public morals.22 The second is the exception allowing measures for the protection of human, animal and plant life or health. The third allows measures for the protection of public order/order public. See Ibid.

41. See Wu, Mark, “Free Trade and the Protection of Public Morals: an Analysis of the Newly Emerging Public Morals Clause Doctrine”, Yale Journal of International Law Vol. 33, 2008, p. 215-269. The Panel stated that “public morals” denoted “standards of right and wrong conduct maintained by or on behalf of a community or nation”. The Panel believes that a measure that is sought to be justified under the public morals exception must be aimed at protecting the interests of the people within a community or a nation as a whole. See Appellate Body Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, 2004, p. 237.
in France. Paragraph (e) is concerned with the working situations that violate the International Labor Organization (ILO) rules and standards. Paragraph (g) have often applied to justify environmental measures.

Non-discrimination is a basic principle in multilateral trading system. If member states want to use trade measures to protect human rights in compliance with public morals exception, they must do so without violating other rules of the WTO, including non-discrimination rules. In this case, an import ban on a specific product, e.g. goods produced with child labor or under very hard working conditions in violation of basic working standards, violates Art. XI, which prohibits all trade restrictions but tariffs. A trade embargo for products from a specific country will violate Art. I (MFN treatment), or impose a specific tax on either all products from a specific country or on all products produced under certain conditions would be a violation of the national treatment principle in Art. III GATT. A challenge for judicial bodies concerned with international trade is establishing the appropriate scope of these noticeably vague “public morals” clauses in order to simultaneously respect national conceptions of morality and allow for freedom of

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44. There are two basic principles of non-discrimination in WTO law: the most-favoured-nation (MFN) treatment obligation and the national treatment obligation. Under the MFN, benefits granted to one member must automatically and unconditionally granted to another, under the national treatment member states treat the products of foreign as those of local.

45. See Zagel, Gudrun Monika, op. cit. p. 11.

46. See Ibid.
international trade. 47 The Dispute Settlement Understanding (DSU) states that the WTO provisions must be interpreted in accordance with customary rules of interpretation of public international law. 48 In practice, this means that a defendant should be allowed to invoke non-WTO rules as a justification for breach of WTO rules. 49 However, such a justification should be recognized only when both disputing parties are bound by the non-WTO rule and that rule prevails over the WTO rule pursuant to conflict rules of international law. 50 The relevance of the non-WTO rule is the determinant in the identification of which non-WTO rules can be used in the interpretation of WTO applicable law. 51 The practice has so far been restrictive and it is far from clear whether the violation of human rights could be covered by any WTO exceptions. 52

47. In August 2009, in China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China—Audiovisual), a WTO Dispute Panel adopted and applied the GATS’ public morals framework to a Chinese GATT Article XX(a) public morals defense of China’s restrictions on imports of U.S. audiovisual goods. The Panel found that the Chinese measures failed the “provisional justification” test because “none of the relevant measures [were] demonstrated to be ‘necessary’ within the meaning of Article XX(a) to protect public morals.” See Smith, Tyler M., “Much Needed Reform in the Realm of Public Morals: A Proposed Addition to the GATT Article XX(A) Public Morals Framework, Resulting from China-Audiovisual “, Cardozo J. of Int’l & Comp. Law, 2011, p. 734-773.


50. See Ibid.


52. See Ibid.
F. Conflict of Interests

WTO rules, as reflected in the Marrakesh Agreement, are biased against developing countries.53 Indeed, this unsatisfactory situation was recognized by the Director-General of the WTO, Pascal Lamy, in 2006. 54 Developing countries undertook proportionately more obligations to liberalize their economies than developed countries.55 While developed countries generally have lower tariff bindings, the tariff cuts for developing countries mandated in the Uruguay round were deeper.56 Many developing countries were forced to maintain tariff levels lower than those to which they are committed under the WTO, due to loan conditions imposed by other institutions, such as the World Bank and the International Monetary Fund.57 In this case, conflict of interests between developed and developing countries has a potential to hinder the protection and implementation of human rights. For instance, Sanitary and Phytosanitary Agreement (SPS) authorises WTO members to take measures for the purpose of meeting nutritional or dietary needs or the protection of health.58 This can assist in ensuring food quality for the population but also can be used as a means to protect markets against exported goods from developing countries.59 The developing countries declare that the claim from developed countries for higher human rights and social standards is merely a hidden form of protectionism and aims to protect their

54. See Ibid.
55. For example, Vanuatu severely cut tariffs due to pressure from the Asia Development Bank from the mid-1990s, even though it has not yet joined the WTO. See Ibid
57. See Joseph, Sarah, op.cit.
58. See Gray, Kevin R., op.cit.
59. See Ibid.
national industries and decrease the competitive advantage of developing countries.60

3. Proposals

The WTO is often accused of being the cause of economic injustices, but even amongst critics of trade liberalization and the WTO, views differ sharply as to whether abolishing the WTO would be the solution to the problem.61 An amendment of WTO legal text is unlikely, but mainstreaming human rights in WTO activities could be a possible way to improve the situation. In the context of mainstreaming human rights, flexible or innovative interpretation of the WTO rules by the dispute settlement body will arguably enhance this prospect, albeit indirectly and in a limited manner.62 Trade negotiations tend to take place in secret, or with little public consultation, whilst human rights law requires participation, information, assessment and accountability.63 If human rights law were applied in the trade negotiation process, it would require there to be broader public consultation about proposed agreements, and there would be more prior assessment of the likely impacts of new rules, with particular attention to the effects of new trade rules on the poorest and most vulnerable sectors of a population.64 Some might complain that this might slow down the

60. See Zagel, Gudrun Monika, op.cit. p. 23.
61. See Dommen, Caroline, op.cit. p. 11.
63. The Committee on the Rights of the Child is one of the several human rights bodies that has recalled the relevant human rights law, saying that States must ‘undertake assessments of the potential impact of global trade policies concerning the liberalization of trade in services on the enjoyment of human rights.’ ‘In particular, the Committee recommends that these assessments should be undertaken prior to making commitments to liberalize services within the context of WTO or regional trade agreements. See Dommen, Caroline, “ Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence “, ASIL Conference on Human Rights and International Economic Law, 2004, p. 2.
64. See Ibid.
speed of trade negotiations, but it would increase the robustness, the fairness and the legitimacy of any new agreements entered into.\textsuperscript{65} WTO should increase its interaction with external actors. For example, more meaningful opportunities for NGOs participation in WTO operation should be provided and their voice must be heard more directly.\textsuperscript{66} Also WTO should be in relation to international human rights bodies. The UN human rights bodies have not only started to examine the relationship between trade and human rights, but also started to elaborate approaches to mainstream human rights in the WTO.\textsuperscript{67} Consultation between the ILO, the UN Human Rights Council, human rights committees and the WTO member states could improve the ability of each and all to implement policies that can reduce barriers to trade of goods and services and simultaneously avoid undermining fundamental human rights.\textsuperscript{68}

4. Regional Trade Agreements and Human Rights

As stated earlier, the MFN treatment is a key principle of non discrimination in the multilateral trading system. Article XXIV GATT provides an important exception to Article I (MFN treatment) by allowing states to enter into RTAs.\textsuperscript{69} The main objective of joining to these agreements is preferential liberalization of trade between members. Around the time that the WTO was created, member states became increasingly frustrated with the slow process of multinational

\textsuperscript{65} See \textit{ibid.}


\textsuperscript{67} A first step is Paul Hunt’s in-depth study on the right to health, which analyzes what the WTO and human rights bodies could do to avoid the negative impact of trade rules on the right to health. See Zagel, Gudrun Monika, op.cit. p. 35.


trade negotiations. They subsequently began to negotiate bilateral or regional trade agreements and, from day one, many of these agreements included human rights provisions and incorporated a public moral exception. Since then, RTAs have had an escalating growth and it appears to be no end to the conclusion of them. There is much controversy over the economic effects of RTAs on the multilateral trading system. The classic question that has been asked is whether such arrangements are trade creating or trade-diverting.

This section of the paper will only describes the effects of RTAs on human rights.

A. Divergent Policies

Most of the regional trade agreements include a general exceptions clause similar to Article XX of the GATT 1994, which sets out a list of mainly public policy reasons which (subject to certain conditions) entitle the parties to ignore the remaining obligations in the agreement. Many RTAs have taken a passive approach that merely acknowledges the importance of human rights. Article 6 of the Common Market for Eastern and Southern Africa (COMESA) Treaty provides the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.

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70. See Aaronson, Susan Ariel, op.cit. p. 2.
71. See Ibid.
72. The number of regional trade agreements (RTAs) between WTO members continued to increase. By the end of 2011, WTO members had notified over 500 RTAs to the WTO. All WTO members except Mongolia are members of one or more, with some belonging to as many as 30. The WTO received 25 new notifications in 2011. See The Annual Report of World Trade Organization, Geneva, 2012.
74. See Ibid.
77. Article 6(e) provides the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.
and general exception clause in Asean Free Trade Area (AFTA) are the examples. Other RTAs have taken a more active approach by providing for enforcement mechanisms that oblige countries to abide by human rights standards. The North American Free Trade Agreement (NAFTA), for example, in addition to providing a dispute settlement process, also allows the complaining party to levy an assessment against a member that has violated the required labor standards. In Mercosur, if any party to Mercosur fails to protect ILO core labor standards, a supranational Commission on Social and Labor Matters can review allegations at the behest of another member state. Mercosur provides several human rights provisions and also includes the Ushuaia Protocol on Democratic Commitment, which prohibits the entry of undemocratic states into the common market. This provision was invoked against Paraguay in 1996. The Cotonou Partnership Agreement (2000), the trade and development accord between the European Union (EU) African, Caribbean and Pacific (ACP) group of nations, included some gender-relevant provisions (Art. 1: “Systematic account shall be taken of the situation of women and gender issues in all areas – political, economic and social”, and Art 31, which refers to gender as a “thematic and cross-cutting” issue).

B. Cultural Connection

Regarding the fact that RTAs are no longer geographically regional, some areas such as labor rights and indigenous rights can be more protected in agreements with a regional nature. Countries with similar

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78. See Powell, Stephen J. & Low, Trisha, op.cit.
79. See Ibid.
80. See Aaronson, Susan Ariel, op.cit. p. 9.
81. See Ibid.
82. See Ibid.
83. Also appendix 4 provides a summary of language on gender. Although RTAs do not usually address gender equality as part of the trade agreement, See Gibb, Heather, " Gender and Regional Trade Agreements ", the 13th Meeting of the APEC Women Leaders Network, 2008, p. 19.
cultural background and ecosystems can more readily agree in setting base standards for labor rights, indigenous rights and environmental protection.84 For instance, New Zealand is responsible for a general exceptions clause in its Thailand and Transpacific agreements allowing affirmative action measures to support its indigenous population.85 RTAs that include labor rights provisions generally address both substantive and procedural rights.86 Substantive labor rights include maximum working hours, minimum wages, and health and safety protections.87 Procedural labor rights include the right of association and the right to collective bargaining.88 Cultural connectivity is also an important element in this area. For instance, the RTAs concluded by the US and the EU are one of the main drivers behind the observed increased frequency of labor provisions in RTAs.89 As stated earlier, the Mercosur has an enforcement mechanism for protection of labor rights. There are also few labor provisions in the recent RTAs concluded in the Asia and Pacific region. ASEAN-Australia-New Zealand Agreement recognises in Chapter 9, Article 1(d), the need to ‘protect the domestic labor force and permanent employment in the territories of the

84. See Powell, Stephen J. & Low, Trisha, op.cit. p. 56.
85. These clauses state that: Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods and services, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favorable treatment to Maori in respect of matters covered by this Agreement including in fulfillment of its obligations under the Treaty of Waitangi. See Bartels, Lorand, op.cit. p. 9.
87. See Ibid.
88. See Ibid.
89. See Häberli, Christian & others, “ Regional Trade Agreements and Domestic Labour Market Regulation “, International Labour Office, Geneva: ILO, 2012, p. 4. NAFTA was one of the first RTAs with significant links to labor rights. Its side agreement the North American Agreement on Labor Cooperation (NAALC), goes beyond many RTAs by providing for the possibility of using sanctions in the systematic reinforcement of domestic labor. See Powell, Stephen J., op.cit. p. 127.

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Parties’. 90 All of these agreements are concluded in between countries in a certain region with a close cultural relations.

C. The TRIPS-PLUS Agreements

TRIPS agreement standards essentially ignore the identities and collective rights of indigenous peoples. 91 The knowledge and practices that local and indigenous populations have passed on through generations have been linked closely to the conservation and sustainable use of biodiversity in their communities. 92 This knowledge exhibited by these communities living in close relationship with biodiversity has been termed “traditional knowledge.” 93 Intellectual property laws have privatized this knowledge through patents, copyrights, and plant breeders’ rights 94 and the pharmaceutical industry has focused its attention on indigenous people’s territories in search of new medicines and food supplements. 95 Yet, the financial and technological benefits of these innovations were rarely shared with indigenous people. 96 One of the main effects of these patents is that the cost of the medicine is set at a high level. 97 In Emerging Market countries, the high costs of new medicines have caused many of the sick to have little or no access to the best available treatments. 98 Traditional knowledge has become a frequent subject in recent RTA

90 A recent bilateral memorandum of understanding with a commitment not to undercut social protection has been concluded between New Zealand and the Philippines as a side agreement to the ASEAN-Australia-New Zealand Agreement (2010). This agreement on labor cooperation is to ‘improve working conditions and living standards’ and to uphold high level standards of labor laws, policies and practices ‘in the context of economic development and trade liberalisation’. See Ibid.
91 See Powell, Stephen J. & Pérez, Patricia C., op.cit. p. 146.
92 See Ibid.
93 See Ibid.
95 See Powell, Stephen J. & Low, Trisha, op.cit. p. 50.
96 See Helfer, Laurence R., op.cit.
97 See Powell, Stephen J. & Low, Trisha, op.cit.
98 See Ibid.
negotiations, but has not been included in the final provisions. 99 Developed countries, in particular the United States, have protected intellectual property rights more than TRIPS agreement. Provisions that have such standards (higher than those required by TRIPS) are known as “TRIPS-plus” provisions. 100 These “TRIPS-plus” rules undermine the flexibilities reaffirmed by the Doha Declaration on TRIPS and Public Health and restricts Morocco’s ability to take measures designed to reduce the cost of medicines and to ensure access to these by the poorest sections of its population. 101 TRIPS provides an exception from the patent protection for countries in need of the product by granting compulsory licenses. 102 These licenses allow a country undergoing a health crisis to create generics without the consent of the patent holder. 103 Developed countries have used RTAs to prevent these licenses from being granted. 104 The flexibilities in the TRIPS agreement, such as compulsory licenses, parallel imports, and the ability to set standards for patentability and patent terms, are key tools in fighting

99. In fact, the United States recently rejected several proposals for increased protection of traditional knowledge in its negotiations with Colombia and Peru. See Powell, Stephen J. & Pérez, Patricia C., op.cit.
100. See Powell, Stephen J. & Low, Trisha, op.cit. p. 51.
101. See Lumina, Cephas, op.cit. p. 15.
102. See Powell, Stephen J. & Low, Trisha, op.cit.
103. See Ibid.
104. See Ibid. In the U.S.’s more recent RTAs with developing countries, it has essentially put a five year shield on producing generics of pharmaceuticals by prohibiting generic producers in the developing countries from using pre-existing safety testing data and requiring those producers to conduct the same tests themselves before getting approved. See Cimbolic, Brian, “The Impact of Regional Trade Areas on International Intellectual Property Rights “, 2007, p. 10. Available at: http://works.bepress.com/brian_cimbolic/1 . There are several countries in the Region, including Bahrain, Jordan, Morocco, and Oman, have already signed bilateral free-trade agreements (FTAs) with the United States of America which include TRIPS-plus obligations. Moreover, a large number of countries in the Region have also signed bilateral association agreements (AAs) with the European Union in addition to several bilateral FTAs with a number of European countries under the European Free Trade Association (EFTA) agreements, which also contain intellectual property chapters which are of a TRIPS-plus nature. See El Said, Mohammed K, “Public Health Related TRIPS-plus Provisions in Bilateral Trade Agreements “, WHO Regional Office for the Eastern Mediterranean and ICTSD, 2010, p. 16.
HIV/AIDS. Developing countries must preserve their ability to use these tools.

D. The Role of RTAs in Peace and Economic Growth

Recent empirical studies seem to confirm the adage that countries that trade with each other (on equitable terms) are less likely to fight each other. In theory at least, there are a number of ways that RTAs can support peace. For instance, Regional groupings such as Mercosur and South Asian Association For Regional Cooperation (SAARC) can serve as aspirational clubs and can play a stabilizing role for countries on their borders. RTAs also provide non-military ways to resolve disputes and promote understanding and dialogue between countries. Many such agreements have institutional dispute settlement mechanisms to mediate economic conflicts that have also been used for managing wider political disagreements. From a world order perspective the role of RTAs is to help create a new equilibrium in politics that balances the protection of the vulnerable and the interests of humanity as a whole. There are Several RTAs that have been established with the explicit purpose of preventing conflict between or within states and that's because economic integration makes conflicts more costly for individual states.

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106. In the case of Thailand and the SACU countries, a comparison of the costs of AIDS to the anticipated benefits of the FTA indicates that the economic and social costs outweigh the benefits, and these countries have done well to move away from FTAs with the United States. See Ibid.
108. See Ibid.
109. See Ibid.
110. See Ibid.
111. See Ibid.
113. For instance, Mercosur was originally established to reduce tensions between Argentina and Brazil. In December 2004 Israel and Egypt signed a trade protocol.
Attacking a neighbouring economy becomes just as damaging as attacking one's own.114

RTAs may have indirect effects on human rights by leading to economic growth which promote active participation in political processes by interest groups and as a result promote higher human rights standards.115 RTAs lead to increased trade between states and increasing trade also leads to specialization which itself increases the efficiency of production, as states learn from their past experiences producing the good or service, and can focus on developing new and improved techniques for production.116 This increase in efficiency leads to products being made at lower costs which will allow more people to be able to consume the good or service.117 Reducing trade restrictions have been linked to a decrease in the power monopolies.118 As trade is liberalized, foreign investment increases which provides competition for any monopolies or oligopolies that existed within a state.119 This competition leads to development of new technologies that increase the efficient scale of production and distribution.120 Then, the same technology can be used to decrease the costs of collective action.121 This long-term process can be seen as an indirect

with the US designed to accelerate the two countries’ rapprochement. The deal creates five special zones where Egyptian goods will have free access to US markets, as long as 35 percent of the goods are the product of Israeli-Egyptian cooperation. The Stability Pact for Southeastern Europe was initiated in 2000 to create a free trade area designed to promote economic recovery and integration in the war-devastated Balkan region. See See Brown, Oli & others, op.cit. p. 9.

114. See Brown, Oli & others, op.cit. p. 8.
116. See Ibid.
117. See Tayyab, Qurrat-ul-ain, op.cit. p. 11.
118. See Tayyab, Qurrat-ul-ain, op.cit. p. 12.
119. See Ibid.
120. See Ibid.
121. See Ibid.
consequence of opening the country to international trade through RTAs.122

E. Coercive Measures

As mentioned earlier, there are many RTAs that have a human rights clause or public morals exception.123 However, RTAs have increased the scope of these clauses in three main areas: environment, culture and indigenous rights.124 RTAs often provide enforcement mechanism that are based in coercion – that is, they can take away or threaten to take away trade benefits if states do not adhere to the human rights standards that are laid out in the agreement.125 EU trade agreements with more than 120 countries are examples of these agreements.126 There is strong evidence that RTAs have influenced their repressive members human rights behaviors by direct coercion—where contract obligations have been ceased with a target abuser, a set of demands for policy change have been issued, and new behaviors have consequently been adopted.127 A refugee massacre in Rwanda after the genocide is one such case.128 Rwanda was a nonreciprocal trade member of the EC under the Lomé IV Treaty which contained a human rights clause guaranteeing member commitment toward the

122. See Ibid.
123. The earliest regional convention to do so was the Stockholm Convention establishing the EFTA in 1960, which included a public morals exception clause identical to the one in the GATT. Other examples of regional trade agreements that have also chosen to adopt a public morals clause include the NAFTA and the conventions establishing free trade zones in the Association of South East Asian Nations, the Southern African Development Community, and the Caribbean Community. Public morals clauses can also be found in a number of bilateral agreements, including the Chile-Mexico FTA. See Wu, Mark, op.cit. p. 221.
125. Inserting human rights conditionality clauses into PTAs is one example. These clauses make all of the benefits within the agreement void if certain human rights standards are not met. See Tayyab, Qurrat-ul-ain, op.cit. p. 6.
128. See Ibid.
improvement of basic human rights as a fundamental condition of market access. Lomé earmarked 22 million ECU for reconstruction under conditions that the new government respect basic human rights and operate under rule of law. Before the first transfer of resources could take place, the Rwandan army evacuated a refugee camp, violating the rights of many people. In direct reaction, the Commission suspended payment and EC ministers appealed to the Rwandan government to investigate the massacre and to arrest and detain the perpetrators as a precondition for payment. Resistance by the government to impose sanctions on members of the army led to the unconditional withholding of funds until sanctions were implemented. In 1995 the government agreed to prosecute those responsible, and the Commission conditionally reinstated payments under Lomé. Influence was direct and actively coercive. In another case between the EU and Pakistan, RTA influenced state behavior through threat of sanction without actually carrying out the sanction. Respect for workers’ rights was established as a condition for preferential market access under the European Commission's generalized system of preferences. When it became known that the Pakistani government was using forced child labor, the European Parliament requested an immediate investigation. The European Commission used the threat of a ban on imports coupled with trade incentives to get Pakistan to actively participate in the ILO.

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129. See Ibid.
130. See Ibid.
131. See Ibid.
132. See Ibid.
133. See Ibid.
134. See Ibid.
135. See Ibid.
136. See Tayyab, Qurrat-ul-ain, op.cit. p. 7.
137. See Ibid.
138. See Ibid.
139. See Ibid.
Because of these policies, Pakistan introduced national legislation outlawing child labor.140

Still other cases offer evidence that some RTAs influence through coercion coupled with persuasion.141 On the other hand, there are opposing views which are convinced of the idea that RTAs do not significantly lower government’s human rights abuses.142 However, the abovementioned cases show that how RTAs can affect the member states human rights behavior. Yet, many RTAs are new and also they are not concluded to regulate or monitor human rights by nature, but they may play an effective role for implementing human rights and there are good examples of those types of RTAs in different regions.

5. Conclusion

The relationship between human rights and international trade has been discussed for a long time. With the WTO being the most important international organization in the field of international trade, most discussions focused on the position and role of human rights in the law of the WTO.143 Common criticisms are that the WTO is not working in the interests of the majority of its members, poses a threat to democracy and environmental justice, and does not have transparency in its processes, does not address the concerns of developing countries but exposes them to pressures from powerful

140. See Ibid.
141. In two similar cases, human rights reforms were initiated in both Togo and Fiji through direct coercive measures enacted under a hard RTA with the EU. See Hafner-Burton, Emilie M, op.cit. p. 610.
countries and its agreements violate human rights. In the meantime, the world outside the WTO has witnessed a proliferation in the number of RTAs in which their legitimacy comes under the Article XXIV GATT. There is a long history of the economic evaluation and the question whether RTAs have negative effect on WTO trade liberalization system. This paper has examined RTAs based on human rights aspects and answered this question: which system could be more useful in protecting human rights, RTAs or WTO?

Under the current WTO legal framework or more precisely article XX GATT known as public morals exception, there is only a very limited possibility to enforce human rights standards. On the one hand, the multilateral trading system is founded on the principle of nondiscrimination. On the other hand, the system is also founded on the notion that countries should not be forced to liberalize trade when doing so would threaten their public morality. As a result, any measures to improve human rights through Article XX should comply the non-discrimination rules of the WTO. Trade negotiations tend to take place in secret, or with little public consultation, whilst human rights law requires participation, information, assessment and accountability. What WTO needs is an approach that would remove the political wrangling, accommodate the diversity of WTO membership, make more opportunities for NGOs participation in decision-making process and create more effective mechanisms for


146. See Zagel, Gudrun Monika, op.cit. p. 21.

147. See Wu, Mark, op.cit. p. 215.

148. See Ibid.

149. See Dommen, Caroline, op.cit. p. 2.
an equitable world trade regime. The WTO also needs to cooperate with the international organization such as UN human rights bodies for mainstreaming human rights to its activities. It is also the responsibility of member states to ensure that human rights considerations are incorporated in WTO activities.

As WTO members relentlessly pursue new RTAs to achieve even faster economic growth than the extraordinary numbers posted by global trade rules, the fewer negotiating parties and their greater cultural connectivity have led to address the intersection of international trade with human rights to a more effective system compared to the culturally disparate and near-unmanageable 157 member of the WTO. Today, incorporating a public morals exception clause into RTAs has become nearly a standard practice and almost all the RTAs have included human rights clause in their agreements. In addition, some of them have increased the scope of article XX GATT such as NAFTA. Countries today are witnessed to give more preference to RTAs. Because political forces are more influential on regional bases, in these situations human rights clauses are more likely to be included as preconditions for performance of trade obligations.

There can be more achievements for understanding and implementing the labor rights and indigenous rights at the regional level with cultural connections. RTAs have more transparency and accountability than multilateral trading system. Many such agreements have dispute settlement mechanisms to mediate economic conflicts that have also


152. See Wu, Mark, op.cit. p. 221.


154. See Ibid.
been used for managing wider political disagreements.155 They have also protected human rights through their enforcement mechanisms and coercive measures. Additionally, enforcement mechanisms at a regional level can be monitored better than at the multilateral level.156 There are many cases that show how RTAs can change the member states human rights behavior through economic incentives that gives members benefits if they maintain human rights standards or, in some cases, by threat of sanction without actually carrying out the sanction. A disadvantage of RTAs is in relation to “TRIPS-plus” agreements that have gone beyond the TRIPS agreement. Developed countries have imposed more restrictions for protecting the patent over the human life in the developing countries. In general, RTAs have more positive potential to protect human rights than multilateral system. In negotiating the process of these agreements, states must understand those areas that have related to human rights with respect to their cultural similarity and geographical proximity before adopting a trade policy.

155 . See Brown, Oli & others, op.cit.