B Poverty reduction strategies ('PRS')

In 1993, the World Conference on Human Rights declared,

> The existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights; its immediate alleviation and eventual elimination must remain a high priority for the international community.[60]

> [E]xtreme poverty and social exclusion constitute a violation of human dignity and . . . urgent steps are necessary to achieve better knowledge of extreme poverty and its causes, including those related to the problem of development, in order to promote the human rights of the poorest, and to put an end to extreme poverty and social exclusion and to promote the enjoyment of the fruits of social progress. It is essential for States to foster participation by the poorest people in the decision-making process by the community in which they live, the promotion of human rights and efforts to combat extreme poverty.[61]

Development is largely concerned with the elimination of mass poverty, which in 2005 affected 2.56 billion people living on less than $2.00 per day (2.096 billion excluding China) according to the World Bank; those living in extreme poverty (less than US$1.25 per day) were estimated at 1.38 billion (1.176 billion excluding China).[62] The slight decline since 1981 is much greater when expressed as a percent of the world population: in 1981, 69.2 per cent of the population of the developing world were living on less than US$2.00 per day (58.6 excluding China), declining to 47.0 per cent (50.3 excluding China) in 2005, while those living on less than US$1.25 per day were 51.8 per cent (39.8 excluding China) in 1981 and only 25.2 (28.2 excluding China) in 2005.[63]

The focus of the World Bank and the IMF has been on the Poverty Reduction Strategy process to reduce the debt of Heavily Indebted Poor Countries ('HIPC') that have submitted Poverty Reduction Strategy Papers ('PRSPs'). Launched in September 1999, PRSPs should be prepared by the government through a *country-driven* process, including broad participation

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60 *Vienna Declaration* [14].

61 *Vienna Declaration* [25].

62 Shaohua Chen and Martin Ravaillion, *The Developing World is Poorer Than We Thought, But no Less Successful in the Fight Against Poverty*, Washington DC: Development Research Group, World Bank, tables 5 [41]. For a critique of the methods used by the World Bank, see Stephan Klasen, 'Levels and Trends in Absolute Poverty in the World: What we know and what we don't', Courant Research Centre, 'Poverty, Equity and Growth in Developing and Transition Countries: Statistical Methods and Empirical Analysis', Discussion Papers No. 11, Georg-August-Universität Göttingen, August 2009.

63 Ibid., table 4 [41]. See also World Bank, *2008 World Development Indicators* (World Bank, Washington DC, 2008).

that promotes *country ownership* [and] link the use of debt relief under the enhanced … HIPC initiative to public actions to reduce poverty'.[64]

How have the institutions responsible for international human rights promotion and protection engaged with the poverty reduction agenda? In a Concept Note, the High Commissioner for Human Rights drew the World Bank's attention to the following:

> In linking a Poverty Reduction Strategy to a universal normative framework and State obligations emanating from the human rights instruments, the goals of the Poverty Reduction Strategy could be sustained with enhanced accountability of the relevant stake-holders. The universal nature of human rights, their mobilization potential and their emphasis on legal obligations to respect, protect and promote human rights, while encouraging national ownership and people's empowerment makes the human rights framework a useful tool to strengthen the accountability and equity dimensions of the Poverty Reduction Strategies.[65]

The issue had already been raised by the Commission on Human Rights, which in 1990 requested its Sub-Commission to consider the relationship between human rights and poverty[66] and the Sub-Commission appointed a Special Rapporteur on human rights and extreme poverty, whose report was published in 1996.[67] The High Commissioner hosted an expert seminar in February 2001 to consider a declaration on human rights and poverty, leading the Commission to request the Sub-Commission to consider 'guiding principles on the implementation of existing human rights norms and standards in the context of the fight against extreme poverty'.[68]

In a related development and in direct response to a request from the Chair of the Committee on Economic, Social and Cultural Rights, the High Commissioner commissioned in 2001 guidelines for the integration of human rights into poverty reduction strategies from professors Paul Hunt, Manfred

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64 Jeni Klugman (ed.), *A Sourcebook for Poverty Reduction Strategie*s, Washington DC: The World Bank, 2002 [2] (emphasis in original).

65 United Nations Office of the High Commissioner for Human Rights, *Comments on the Concept Note Joint World Bank and IMF Report on Poverty Reduction Strategy Papers – Progress in Implementation 2005 PRS Review* (2005) World Bank, http://siteresources.worldbank.org/INTPRS1/Resources/PRSP-Review/un_ohchr.pdf at 14 January 2009.

66 Commission on Human Rights, *Human Rights and Extreme Poverty*, UN Doc E/CN.4/Res/1990/15 (23 February 1990) [5].

67 Leandro Despouy, *The Realization of Economic, Social and Cultural Rights: Final report on human rights and extreme poverty, submitted by the Special Rapporteur*, UN Doc E/CN.4/Sub.2/1996/13 (28 June 1996).

68 Commission on Human Rights, *Human Rights and Extreme Poverty*, UN Doc E/CN/4/Res/2001/31 (23 April 2001).

Nowak and Siddiq Osmani. The authors consulted with national officials, civil society and international development agencies, including the World Bank, and produced a 60-page document setting out basic principles of a human rights approach to: (a) formulating a poverty reduction strategy; (b) determining the content of a poverty reduction strategy; and (c) guiding the *monitoring* and *accountability* aspects of poverty reduction strategies, with a special section on accountability.[69]

In 1998 the Commission appointed an Independent Expert on the subject of human rights and extreme poverty[70] and between 1999 and 2008 the three successive Independent Experts have issued ten annual reports[71] and reports of visits to nine different countries: Portugal (October 1998), Bulgaria, Yemen (November 1998), Bolivia (May 2001), Benin (August 2001), the Dominican Republic (December 2002), Yemen (October 2003), Sudan (November 2004), the United States of America (October 2005) and Ecuador (November 2008).[72]

C Millennium Development Goals

The MDGs define the priorities for the international community and guide much of the technical co-operation and assistance provided by bilateral and multilateral donors.[73] They are a set of eight goals with 18 numerical targets and over 40 quantifiable indicators. The MDGs are:

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[69] Paul Hunt, Manfred Nowak and Siddiq Osmani, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (OHCHR, Geneva, 2002) (emphasis added). See also Paul Hunt, Manfred Nowak and Siddiq Osmani, *Human Rights and Poverty Reduction Strategies – Human Rights and Poverty Reduction – A Conceptual Framework* (OHCHR, Geneva, 2003).

[70] UN Doc E/CN.4/Res/1998/25 (17 April 1998).

[71] See UN Doc E/CN.4/1999/48 (29 January 1999); UN Doc E/CN.4/2000/52 (25 February 2000); UN Doc E/CN.4/2001/54 (16 February 2001); UN Doc E/CN.4/2002/55 (15 March 2002); UN Doc E/CN.4/2003/52 (20 January 2003); UN Doc E/CN.4/2004/43 (29 April 2004); UN Doc E/CN.4/2005/49 (11 February 2005); UN Doc E/CN.4/2006/43 (2 March 2006); UN Doc A/HRC/5/3 (11 June 2007); UN Doc A/HRC/7/15 (28 February 2008); UN Doc A/HRC/11/9 (27 March 2009).

[72] See respectively UN Doc E/CN.4/1999/48 (29 January 1999); UN Doc E/CN.4/2002/55 (15 March 2002); UN Doc E/CN.4/2003/52/Add.1 (16 January 2003); UN Doc E/CN.4/2004/43/Add.1 (8 January 2004); UN Doc E/CN.4/2004/43 (29 April 2004); UN Doc E/CN.4/2006/43/Add.1 (27 March 2006); A/HRC.11.9/Add. 1 (19 May 2009).

[73] The MDGs build on the commitments of the heads of 189 countries, meeting in New York in September 2000, to adopt a United Nations *Millennium Declaration*: see G A Res 55/2, UN GAOR, 55th sess, 8th plen mtg, UN Doc A/Res/55/2 (8 September 2000).

- Eradicate extreme poverty and hunger
- Achieve universal primary education
- Promote gender equality and empower women
- Reduce child mortality
- Improve maternal health
- Combat HIV/AIDS, malaria, and other diseases
- Ensure environmental sustainability
- Develop a global partnership for development.

While economists may be best equipped to define and analyse poverty in terms of market forces, income distribution, utility, budgeting, and access to resources, concepts of good governance, the rule of law and human rights have become widely accepted as part of sustainable human development and poverty reduction, and consequently of the MDGs. The High Commissioner for Human Rights has focused attention on the relationship between MDGs and human rights by disseminating to governments charts on the intersection of human rights and MDGs and has published a fairly exhaustive analysis of how human rights can contribute to MDGs,[74] as have the UNDP[75] and national development agencies.[76]

Philip Alston has characterised the relation between human rights and the MDGs as 'ships passing in the night' and takes the argument for mainstreaming human rights in the MDGs a step further by noting that these goals 'have

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[74] OHCHR, *Claiming the MDGs: A Human Rights Approach* (United Nations, New York/Geneva, 2008).

[75] UNDP published a primer, *Human Rights and the Millennium Development Goals: Making the Link* (Oslo Governance Centre, Oslo, 2007) as a follow-up to a 2006 UN E-Discussion 'How to Effectively Link MDGs and Human Rights in Development?' (see http://www.undg.org/archive_docs/8073-e-Discussion_MDGs_and_HR_-_Final_Summary.doc at 15 January 2009) and a Working Group Meeting 'Human Rights and the MDGs – Theoretical and Practical Implications', as well as the deliberations of the Working Group Meeting 'Human Rights and the MDGs – Theoretical and Practical Implications' (see http://www.undg.org/archive_docs/8991-Linking_Human_Rights_and_the_Millennium_Development_Goals__theoretical_and_Practical_Implications.doc at 15 January 2009).

[76] See, for example, the Swedish International Development Agency (http://www.sida.se/English/About-us/Organization/Policy/ at 20 October 2009); the UK's DFID (http://www.dfid.gov.uk/Global-Issues/How-we-fight-Poverty/Human-Rights/Human-rights-and-justice/; http://www.dfid.gov.uk/mdg at 20 October 2009); the US MCA (http://www.mcc.gov/mcc/bm.doc/mcc-report/fy09-criteriaand methodology.pdf at 20 October 2009); Canada's CIDA (Canadian International Development Agency Sustainable Development Strategy 2007–2009, Action 4, 2006, available at http://www.cida.gc.ca/sds); Denmark's DANIDA (http://www.danidadevforum.um.dk/en/menu/MonitoringAndIndicators/MDGAndPRSPAlignment/ at 20 October 2009).

been endorsed in an endless array of policy documents adopted not only at the international level but in the policies and programmes of the national governments to whom they are of the greatest relevance'.[77] In assessing whether the MDGs involve obligations under customary international law, Alston applies the two tests for a human rights claim having that character: '(i) the right is indispensable to a meaningful notion of human dignity (upon which human rights are based); and (ii) the satisfaction of the right is demonstrably within the reach of the government in question assuming reasonable support from the international community' – and concludes that 'many of the MDGs have the virtue of satisfying these criteria without giving rise to great controversy' and therefore 'that at least some of the MDGs reflect norms of customary international law'.[78]

Alston has reservations regarding MDG 8 (global partnership for development) because, with respect to that goal, 'developed country governments would be expected to resist strongly any suggestion that there are specific obligations enshrined in customary international law'.[79] He points out that the persistent rejection by developed countries of a more general legal duty to provide aid 'and the failure of even the most generous of donors to locate their assistance within the context of such an obligation, would present a major obstacle to any analysis seeking to demonstrate that such an obligation has already become part of customary law'.[80] Further, he considers that '[a]t some point, the reiteration of such commitments [to mobilize resources to ensure that countries committed to the MDGs have the additional resources necessary] . . . will provide a strong argument that some such obligation has crystallized into customary law'.[81]

As described above, the way the UN system, NGOs, and bilateral donors approach aid programmes and policies, the rethinking of poverty reduction strategies, and the realigning of MDGs have accommodated to a considerable degree a human rights approach. The same cannot be said for the international legal regimes of trade and investment.

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[77] Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 774. This article is based on a paper prepared by Alston as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development entitled *A Human Rights Perspective on the Millennium Development Goals* (2003) HuRiLINK, http://www.hurilink.org/tools/HRsPerspectives_on_the_MDGs—Alston.pdf at 15 January 2009.

[78] Ibid.

[79] Ibid 775.

[80] Ibid 777.

[81] Ibid 778.

4 The tensions between human rights law and the legal regimes of international trade and investment

The third dimension of human rights in development is the most visible feature of globalisation, namely international trade and investment. Regarding the relationship between trade, development and finance, it is widely acknowledged that least developed countries, landlocked developing countries and small, vulnerable countries, particularly in Africa, do not benefit from the global trading system and need greater access to markets in developed countries, as well as to financial assistance to remove supply-side constraints (lack of capacity to produce a surplus of exportable goods of sufficient quantity and reliable quality).

Similarly, in the realm of international law, the tension that characterises the relationship between international human rights law and the legal regimes of trade and investment is based on perceived teleological incompatibility. The essential aims of international trade are to make goods and services available at low prices for consumers of the importing country, to improve trade balances for the exporting country, and to increase the gross national product for the trading partners. The related aims of foreign direct investment are to maximise profits for multinational corporations investing abroad and to provide jobs for workers and revenue and related advantages in the country of investment. These are the interests pursued by those who negotiate legal arrangements for trade and investment. Vast numbers of legal relationships are involved at all levels of these operations, which are often characterised by asymmetrical power relations giving advantages to rich countries and powerful corporations and causing resources to flow to investors and national treasuries (or to private bank accounts where corruption occurs). These ends are best pursued by means of free markets and free trade, which are not the preferred means of human rights and are often perceived to have negative impacts on human rights.

The related issues of trade and investment each pose serious problems and give rise to much controversy regarding the applicable norms of international law.

A International trade

At a ministerial meeting of the WTO held in Doha in November 2001, the 'Doha Round' of trade negotiations was launched, the purpose of which was 'to ensure that developing countries, and especially the least developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development'.[82] The negotiations collapsed in July

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[82] UN Doc A/C.2/56/7 annex (14 November 2001) [2].

2008 and it was unclear at the time of writing whether they would resume. The WTO has been criticised not only for failing to meet the development needs of less-developed countries, but also for reinforcing the tendency of government representatives from the finance sector to disregard the human rights obligations better known in other departments of government. A considerable body of scholarship has emerged in the last decade on the failure of the international trade system to engage productively with the international human rights regime.[83]

Several human rights concerns regarding the international trade regime are discussed in the chapter by Adam McBeth in this volume.[84] Another is respect for international labour standards. Many argue that the trade liberalisation driven by WTO rules might generate a 'race to the bottom', whereby states compete with each other for foreign investment by lowering regulatory costs, such as labour standards: WTO rules restrict the ability of states to protect their workforces from such transnational regulatory competition. Formally the trade ministers meeting in Singapore in 1996 renewed their 'commitment to the observance of internationally recognized core labour standards' and acknowledged the ILO as the competent body to set and deal with these standards, and affirmed their 'support for its work in promoting them'.[85] However, they added:

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[83] On WTO and human rights generally, see Padideh Ala'i, 'A Human Rights Critique of the WTO: Some Preliminary Observations' (2002) 33 *George Washington International Law Review* 537; Arthur E Appleton, 'The World Trade Organization: Implications for Human Rights and Democracy' (2000) 29 *Thesaurus Acroasium* 415; Jagdish Bhagwati, 'Trade Linkage and Human Rights' in J Bhagwati and M Hirs (eds) *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel* (Springer, Heidelberg/New York, 1998) 241; Sarah H Cleveland, 'Human Rights Sanctions and the World Trade Organization', in F Francioni (ed) *Environment, Human Rights and International Trade* (Hart Publishing, Oxford, 2001) 199; Marjorie Cohn, 'The World Trade Organization: Elevating Property Interests Above Human Rights' (2001) 29 *Georgia Journal of International and Comparative Law* 247; T Flory and N Ligneul, 'Commerce international, droits de l'homme, mondialisation: les droits de l'homme et l'Organisation mondiale du commerce', in *Commerce mondial et protection des droits de l'homme: les droits de l'homme à l'épreuve de la globalisation des échanges économiques* (Bruylant, Brussels, 2001) 179; Hoe Lim, 'Trade and Human Rights: What's At Issue?' (2001) 53 *Journal of World Trade* 275; Ernst-Ulrich Petersmann, 'From "Negative" to "Positive" Integration in the WTO: Time for "Mainstreaming Human Rights" into WTO Law' (2000) 37 *Common Market Law Review* 1363; Asih H Qureshi, 'International Trade and Human Rights from the Perspective of the WTO', in F Weiss, E Denters and P de Waart (eds) *International Economic Law with a Human Face* (Kluwer Law International, The Hague, 1998) 159.

[84] See Chapter 6 at pp. 154–64.

[85] *Singapore Ministerial Declaration*, WTO Doc WT/MIN(96)/DEC (18 December 1996) [4].

> We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.[86]

Even though the Singapore meeting agreed that the ILO and WTO secretariats would continue to collaborate, as the ILO candidly recognised, 'it is not easy for them to agree, and the question of international enforcement is a minefield'.[87]

Whether protecting workers' rights against the race to the bottom, or any of the myriad other problems resulting from free market and trade liberalisation, the basic argument from the human rights perspective is that governments should respect their human rights obligations when they negotiate membership in and participation in the treaties adopted under the auspices of organisations like the WTO.

The Committee on Economic, Social and Cultural Rights threw down the gauntlet at the time of the Seattle Third Ministerial meeting of the WTO in 1999 when it stated that the process of global governance reform

> must be driven by a concern for the individual and not by purely macroeconomic considerations alone. Human rights norms must shape the process of international economic policy formulation so that the benefits for human development of the evolving international trading regime will be shared equitably by all, in particular the most vulnerable sectors.[88]

Significantly, it sought to convince the ministerial gathering that

> trade liberalization must be understood as a means, not an end. The end which trade liberalization should serve is the objective of human well-being to which the international human rights instruments give legal expression.[89]

It also urged WTO members to ensure that

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[86] Ibid.

[87] WTO/ILO, *Labour standards: consensus, coherence and controversy* (2008) WTO, http://www.wto.org/English/thewto_e/whatis_e/tif_e/bey5_e.htm at 15 January 2009.

[88] CESCR, *Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization (Seattle, 30 November to 3 December 1999)*, UN Doc. E/C.12/1999/9 (26 November 1999) [5].

[89] Ibid [6].

> their international human rights obligations are considered as a matter of priority in their negotiations which will be an important testing ground for the commitment of States to the full range of their international obligations'.[90]

This claim was echoed in a resolution by the Sub-Commission requesting 'all Governments and economic policy forums to take international human rights obligations and principles fully into account in international economic policy formulation'.[91]

The Secretary-General expressed the essence of the link between trade and human rights in the following terms:

> There is an unavoidable link between the international trading regime and the enjoyment of human rights. Economic growth through free trade can increase the resources available for the realization of human rights. However, economic growth does not automatically lead to greater promotion and protection of human rights. From a human rights perspective, questions are raised: does economic growth entail more equitable distribution of income, more and better jobs, rising wages, more gender equality and greater inclusiveness? From a human rights perspective, the challenge posed is how to channel economic growth equitably to ensure the implementation of the right to development and fair and equal promotion of human well-being.[92]

B Foreign direct investment

In 2006, global flows of foreign direct investment ('FDI') reached a new all-time peak, with FDI inflows to developed countries more than double the total amount of inflows from developed to developing countries.[93] The total number of transnational corporations ('TNCs') is estimated by UNCTAD as representing 78,000 parent companies with over 780,000 foreign affiliates. This activity represents 10 per cent of global GDP and one-third of world exports.[94]

These commercial non-state actors have been the object of efforts to establish guidelines for decades, beginning with the OECD *Guidelines for Multinational Enterprises* of 1976 and the ILO *Tripartite Declaration of*

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90 Ibid [7].

91 Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Trade Liberalisation and Its Impact on Human Rights*, UN Doc E/CN.4/Sub.2/RES/1999/9 (26 August 1999).

92 Kofi Annan, *Globalization and its impact on the full enjoyment of all human rights, Preliminary report of the Secretary-General*, UN Doc A/55/342 (31 August 2000) [13].

93 Ban Ki-Moon, *Annual ministerial review: implementing the internationally agreed goals and commitments in regard to sustainable development*, UN Doc E/2008/12 (21 April 2008) [62].

94 Ibid xvi.

Principles concerning Multinational Enterprises and Social Policy Reform of 1977. Other milestones in introducing human rights considerations into the practices of TNCs include the Global Compact, a voluntary and self-regulatory mechanism, launched by UN Secretary-General Kofi Annan in 2000, by which the corporations commit to nine core human rights, labour rights and environmental principles; and the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights,[95] which were adopted by the Sub-Commission in 2003.[96]

In 2005, the Commission created the position of Special Representative on the issue of human rights and transnational corporations and other business enterprises,[97] to which John Ruggie was appointed. His report of 2008 outlines the three core principles of the state's duty to protect, the corporate responsibility to respect, and the need for more effective access to remedies.[98] A more detailed discussion of the relationship between human rights and multinational corporations is provided in the chapter by Adam McBeth in this volume.[99] The application of international law to relations between business and human rights in the context of globalisation is only partially covered by the work of the Special Representative. The field is evolving through lawsuits against corporations, revision of company policies incorporating human rights, proxy resolutions at meetings of shareholders, consideration of new standards by international organisations, and other ways of harmonising the international law of human rights with that of international business transactions.[100]

5 Conclusion

The relationship between human rights and development is relatively straightforward at the theoretical level since both deal with advancing human well-being, with the first focusing on normative constraints on power relations to ensure dignity and the elimination of repressive and oppressive practices,

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95 UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

96 However, the Commission decided that the Norms had 'no legal standing, and that the Sub-Commission should not perform any monitoring function'. Commission on Human Rights Decision 2004/16 (20 April 2004).

97 Human rights and transnational corporations and other business enterprises, Commission on Human Rights Resolution 2005/59, adopted on 20 April 2005. The decision to create the position was endorsed by the Economic and Social Council in its decision 2006/273, adopted on 25 July 2005.

98 *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5, 7 April 2008.

99 See Chapter 6.

100 The Business & Human Rights Resource Centre provides access to a vast amount of information and analysis on all aspects of the subject. See http://www.business-humanrights.org/Home.

while the latter focuses on the material conditions and distributional arrangements that allow people to benefit from economic processes. The difficulty comes with the current state of international law governing this relationship. This chapter has outlined three dimensions of the international law of human rights and development, each of which provides a different approach with differing degrees of political acceptability.

The law governing the right to development, as we have seen, is fraught with political posturing but provides the most systematic legal definition of human rights in development by making development itself a human right and governments – of both developed and developing countries – the bearers of obligations to enhance prospects for equitable development while fully integrating human rights into the process.

The law relating to development assistance and poverty reduction strategies is far less controversial, insofar as most governments and bilateral and multilateral development agencies have acknowledged the value of introducing human rights into the related strategies and programmes and have translated this awareness into specific modes of doing development in a human rights way.

The field of international trade and investment offers a stark contrast to the general consensus on human rights in development due to the fundamental divergence in objectives and purposes. Indeed, the law governing trade and investment has evolved over the centuries to increase the comparative economic advantages of transactions by powerful economic interests. Efforts to draw the attention of governments seeking those advantages to constraints based on human rights obligations are met with reactions ranging from benign neglect to open hostility.

Each of these three dimensions of the international law of human rights and development will evolve with the changes in the international political economy and is likely to be transformed in the coming decades by new market forces, especially in the energy sector, and by the emerging economic powers of India, Brazil, and above all China, but also by responses to the financial crisis and growing disparities and inequalities, as well as by the wave of rising expectations generated by the refining and clarifying of human welfare through the law and practice of human rights.

8. Gender and international human rights law: the intersectionality agenda

Anastasia Vakulenko[*]

1 Introduction

The Fourth World Conference on Women, held in Beijing in 1995, was a true turning point for feminism. It was then that the concerted feminist effort to challenge the historic male bias of international human rights law finally led to formal recognition, giving birth to the global human rights strategy of gender mainstreaming. The importance of this strategy, which essentially means incorporating a gender perspective into all human rights action,[1] was subsequently restated in numerous UN resolutions,[2] as well as in the work of the UN General Assembly and Security Council.[3] At least nominally, gender was accepted by the mainstream.

Productive feminist engagement with international human rights law did not stop there, however. Since then, feminism has consistently targeted the very category of gender as it provides the basis for gender mainstreaming policies. It has done so by bringing the idea of *intersectionality* to the fore of its engagement with international human rights discourse. Intersectionality is about exploring how gender interacts with 'multiple social forces, such as

[*] The author thanks the anonymous reviewer for her helpful comments and the editors for their wonderful editorial support.

[1] The United Nations ('UN') Economic and Social Council ('ECOSOC') defines gender mainstreaming as 'the process of assessing the implications for women and men of any planned action, including legislation, policies and programmes, in all areas and at all levels, and as a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and social spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.' See *Report of the Economic and Social Council for the year 1997*, UN GAOR Official Records, 52nd Session Supplementary No 3, UN Doc A/52/3/Rev.1 (1999) Ch IV, [4].

[2] The most recent is *Mainstreaming a gender perspective into all policies and programmes in the United Nations system*, UN Doc E/Res/2006/36 (27 July 2006).

[3] For more information, see the website of the UN Commission on the Status of Women: http://www.un.org/womenwatch/daw/csw/ at 9 December 2008.

race, class . . . age, sexuality, and culture'.[4] It means that our experiences of gender are shaped by all those things, thus complicating simplistic, singular understandings of the nature of women's disadvantage.

Indeed, it is now impossible to speak of gender and international human rights law without taking notice of the intersectionality agenda. What is more, intersectionality is one area in which feminist theory has had a remarkable influence over feminist activism and practice, refuting the criticism, often levelled at feminism, of retreating into theorising instead of making a difference in the real world.

This chapter explores the ascendancy of intersectionality in both feminism and international human rights law, assessing successes as well as stalemates in this process. It also considers the role that internal feminist critique might play in moving intersectionality, both a theoretical concept and an international human rights agenda, beyond its present limitations.

2 How intersectionality evolved

Within the last couple of decades, intersectionality has truly pervaded feminist theory and activism. It has even been asserted that 'intersectionality is the most important theoretical contribution that women's studies, in conjunction with related fields, has made so far'.[5] It has permeated the international human rights arena. How has this come to be?

The idea of intersectionality is both complex and simple. The academic definition is 'signifying the complex, irreducible, varied, and variable effects which ensue when multiple axes of differentiation – economic, political, cultural, psychic, subjective and experiential – intersect in historically specific contexts'.[6] Essentially, this means that it is impossible to experience 'pure' gender or gender discrimination. Rather, one's experience as a woman is always formed in the context of one's broader belonging in the world.

This seemingly obvious fact had nonetheless for a long time proved elusive for mainstream, white middle-class feminism – as captured by the 19th century political locution 'Ain't I a Woman?' This famous phrase is attributed to Sojourner Truth, an enslaved, illiterate black woman who campaigned for both the abolition of slavery and women's rights. In her famous speech at the 1851 Women's Rights Convention in Akron, Ohio, she challenged dominant white, upper-class constructions of womanhood prevalent at that time: '[t]hat man over there says that women need to be helped into carriages, and lifted

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4 M Deckha, 'Is Culture Taboo? Feminism, Intersectionality, and Culture Talk in Law' (2004) 16 *Canadian Journal of Women and the Law* 14, 16.

5 L McCall, 'The Complexity of Intersectionality' (2005) 30 *Signs* 1771, 1771.

6 A Brah and A Phoenix, 'Ain't I a Woman? Revisiting Intersectionality' (2004) 5 *Journal of International Women's Studies* 75, 76.

over ditches, and to have the best place everywhere. Nobody helps me any best place. And ain't I a woman?'[7] As Avtar Brah and Ann Phoenix observe, this 'deconstructs every single major truth-claim about gender in a patriarchal slave social formation',[8] and as such mirrors black feminist voices more than a century later.[9]

Although Sojourner Truth's rhetoric is a powerful antecedent of intersectionality feminism, the concept of intersectionality as we know it today was more closely mirrored in feminist discourse in the 1970s and was gradually accepted by mainstream feminism during the 1980s and 1990s. One of the first to pioneer the study of intersectionality was a black lesbian feminist organisation from Boston, the Combahee River Collective. In 1977, they issued a statement in which they affirmed their commitment to 'struggling against racial, sexual, heterosexual and class oppression' and 'the development of integrated analysis and practice based upon the fact that the major systems of oppression are interlocking'.[10] In the early 1980s, the writings of Adrienne Rich[11] and Marilyn Frye[12] exposed the heteronormative foundations of mainstream feminist theory. More generally, Denise Riley famously wrote about the impossibility of being exhausted by the category 'woman'.[13]

In its earlier stages, intersectionality was associated with mostly US black and Latina feminist critiques of mainstream feminist theory and law which were seen as imposing the essentialist standard of the white (middle-class, heterosexual) woman.[14] In Britain, the project of 'black British feminism'

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7 No formal record of Sojourner Truth's speech exists. This quotation is from the version recounted by the president of the Convention, Frances Gage, in 1863, as cited in ibid 77.

8 Ibid 77.

9 On Sojourner Truth, see also D Haraway, '*Ecce Homo*, Ain't (Ar'n't) I a Woman, and Inappropriate/d Others: The Human in a Post-Humanist Landscape' in J Butler and J W Scott (eds) *Feminists Theorize the Political* (Routledge, New York, 1992) 86.

10 Combahee River Collective, 'A Black Feminist Statement' in L Nicholson (ed) *The Second Wave: A Reader in Feminist Theory* (Routledge, New York, 1997).

11 A Rich, 'Compulsory Heterosexuality and Lesbian Existence' (1980) 5 *Signs* 631.

12 M Frye, *The Politics of Reality: Essays in Feminist Theory* (The Crossing Press, Trumansburg, 1983).

13 D Riley, *'Am I That Name?' Feminism and the Category of Women in History* (University of Minnesota Press, Minneapolis, 1988).

14 G Anzaldúa, *La Frontera/Borderlands: The New Mestiza* (Aunt Lute Books, San Francisco, 1987); P H Collins, *Fighting Words: Black Women and the Search for Justice* (University of Minnesota Press, Minneapolis, 1998); P H Collins, 'Some Group Matters: Intersectionality, Situated Standpoints, and Black Feminist Thought' in L Richardson, V Taylor and N Whittier (eds) *Feminist Frontiers* (McGraw-Hill, Boston,

combined the efforts of women of African, Caribbean and South-Asian origin whose political coalition was intended to challenge racism within both wider society and white feminism.[15] According to Brah and Phoenix, much of the early black British feminism grew out of local women's organisations, which eventually formed a national organisation called the Organisation of Women of Asian and African Descent in 1978.[16] These early developments were crucial for challenging the essentialism embedded in the first and second-wave feminist movements on both sides of the Atlantic, which were traditionally dominated by white middle-class heterosexual women.[17] As Rebecca Johnson points out, the rise of intersectionality is mired in 'the past that gave it birth', that is, feminism's persistent grappling with the issues of essentialism and identity.[18]

2004) 66; K W Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 129 *University of Chicago Legal Forum* 139; K W Crenshaw, 'Mapping the Margins: Intersectionality, Identity, Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241; A Y Davis, 'Racism, Birth Control, and Reproductive Rights' in M G Fried (ed) *From Abortion to Reproductive Freedom: Transforming a Movement* (South End Press, Boston, 1990) 15; T Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (1995) 10 *Berkeley Women's Law Journal* 16; A P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581; B Hooks, *Feminist Theory: From Margin to Center* (South End Press, Cambridge, 1984); M Kline, 'Race, Racism and Feminist Legal Theory' (1989) 12 *Harvard Women's Law Journal* 115; M J Matsuda, 'Beside My Sister, Facing the Enemy: Legal Theory out of Coalition' (1991) 43 *Stanford Law Review* 1183; C T Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) 30 *Feminist Review* 61; E V Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Beacon Press, Boston, 1988).

[15] See the summary in Brah and Phoenix, above n 6. See also A Brah, *Cartographies of Diaspora, Contesting Identities* (Routledge, London, 1996); S Grewal, J Kay, L Landor, G Lewis and P Parmar (eds) *Charting the Journey* (Sheba, London, 1988); and H S Mirza (ed) *Black British Feminism* (Routledge, London, 1997).

[16] Brah and Phoenix, above n 6, 78, list these organisations' main concerns as follows: 'wages and conditions of work, immigration law, fascist violence, reproductive rights, and domestic violence.'

[17] See, for example, K-K Bhavnani (ed) *Feminism and 'Race'* (Oxford University Press, Oxford, 2001); H Carby, 'White Women Listen! Black Feminism and Boundaries of Sisterhood' in P Gilroy (ed) *The Empire Strikes Back* (Hutchinson, London, 1982) 212; B Smith, *Home Girls: A Black Feminist Anthology* (Kitchen Table/Women of Color Press, New York, 1983).

[18] R Johnson, 'Gender, Race, Class and Sexual Orientation: Theorizing the Intersections' in G MacDonald, R L Osborne and C C Smith (eds) *Feminism, Law, Inclusion: Intersectionality in Action* (Sumach Press, Toronto, 2005) 21, 33.

The seminal work of the American feminist scholar, Kimberlé Crenshaw introduced intersectionality into feminist legal scholarship.[19] Crenshaw argued that the focus on traditional identity categories (such as race and gender) in anti-discrimination law and doctrine works to exclude those who are at the categories' intersections, notably black women. According to her, intersectionality aims:

> [T]o bring together the different aspects of an otherwise divided sensibility, arguing that racial and sexual subordination are mutually reinforcing, that black women are commonly marginalized by a politics of race alone or a politics of gender alone, and that a political response to each form of subordination must at the same time be a political response to both.[20]

Intersectionality has also burgeoned in fields of feminist knowledge other than law and human rights. Indeed, it has been asserted that 'there has been a veritable explosion of output of scholarship on this theme recently'.[21] In 2006, the *European Journal of Women's Studies* published a special issue (13 (3)) devoted to intersectionality, with articles cutting across various academic disciplines. Jessica Ringrose suggests that intersectionality has also influenced broader disciplines beyond women's studies, 'from psychology to European politics, and around specialist areas of research such as health, counseling and sexuality'.[22] Noticeably, intersectionality is becoming a dominant framework in education research.[23] Intersectionality has also been theorised as a research methodology, including for empirical work.[24] Leslie McCall has argued that

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19 Crenshaw, above n 14 (1989).

20 Crenshaw above n 14 (1991), 1283.

21 J Ringrose, 'Troubling Agency and "Choice": A Psychoanalytical Analysis of Students' Negotiations of Black Feminist "Intersectionality" Discourses in Women's Studies' (1997) 30 *Women's Studies International Forum* 264, 264, referring to Brah and Phoenix, above n 6; A Phoenix and P Pattynama, 'Editorial: Intersectionality' (2006) 13 *European Journal of Women's Studies* 187; N Yuval-Davis, 'Intersectionality and Feminist Politics' (2006) 13 *European Journal of Women's Studies* 193.

22 Ringrose, above n 21, citing A Bredström, 'Intersectionality: A Challenge for Feminist HIV/AIDS Research?' (2006) 13 *European Journal of Women's Studies* 229; E Burman, 'From Difference to Intersectionality: Challenges and Resources' (2003) 6 *European Journal of Psychotherapy, Counselling and Health* 293; M Verloo, 'Multiple Inequalities, Intersectionality and the European Union' (2006) 13 *European Journal of Women's Studies* 211.

23 Ringrose, above n 21, 265.

24 A Ludvig, 'Difference between Women? Intersecting Voices in a Female Narrative' (2006) 13 *European Journal of Women's Studies* 245; McCall, above n 5; B Prins, 'Narrative Accounts of Origins: A Blind Spot in the Intersectional Approach?' (2006) 13 *European Journal of Women's Studies* 277.

intersectionality remains a valuable statistical tool for studying existing inequalities, despite the considerable theoretical disagreement about the categories along which such inequalities are constituted.[25]

3 The global ascendancy of intersectionality

Crenshaw's work has been so influential that intersectionality now features noticeably in legal doctrine, practice and feminist legal activism across the globe. The Beijing Platform for Action called on governments to:

> intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people.[26]

Since then, intersectionality has acquired considerable conceptual purchase in international human rights law and activism. In 2000, the UN Human Rights Committee ('HRC') issued its *General Comment 28 on Equality of Rights between Men and Women*, in which it stated:

> Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. States parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way, and include information on the measures taken to counter these effects.[27]

Thanks to the persistent activist lobbying of intersectionality as 'a springboard for a social justice action agenda',[28] as well as respective academic work,[29] gender has firmly made its way into the UN law and practice dealing with racial discrimination. In 2000, the UN Committee on the Elimination of

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[25] McCall, above n 5.

[26] *Report of the Fourth World Conference on Women*, UN Doc A/Conf. 177/20 (17 October 1995) Annex I, [32].

[27] HRC, *General Comment 28: Equality of Rights between Men and Women (Article 3)*, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) [30].

[28] Association for Women's Rights in Development ('AWID'), 'Intersectionality: A Tool for Gender and Economic Justice' (2004) 9 *Women's Rights and Economic Change* 2.

[29] See, for example, L A Crooms, 'Indivisible Rights and Intersectional Identities or, "What Do Women's Human Rights Have to Do with the Race Convention?"' (1997) 40 *Howard Law Journal* 619; C Romany, 'Themes for a Conversation on Race and Gender in International Human Rights Law' in A Y Davis and A K Wing (eds) *Global Critical Race Feminism: An International Reader* (New York University Press, New York, 2000) 53.

Racial Discrimination ('CERD') issued *General Recommendation XXV* on *Gender Related Dimensions of Racial Discrimination*, in which it for the first time admitted that '[t]here are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men'.[30] The Recommendation lists sexual violence against women members of particular communities committed in detention or armed conflict, coerced sterilisation of indigenous women and abuse of women workers in the informal sector or domestic workers employed abroad as forms of racial discrimination directed specifically at women. It also acknowledges specific consequences of racial discrimination suffered by women, such as pregnancy and ostracism resulting from racially motivated rape. Gender bias in the legal system and discrimination against women in the private sphere of life are named as factors preventing women's access to remedies for racial discrimination.[31]

In line with the Recommendation's assurance that 'the Committee will endeavour in its work to take into account gender factors or issues which may be interlinked with racial discrimination',[32] the CERD has more recently demonstrated its awareness of how grounds such as descent intertwine with gender, producing unique forms of discrimination.[33] In another general recommendation, the disadvantaged situation of Roma girls and women in the fields of education and health has been acknowledged.[34] In the area of protection of non-citizens, the Committee has also 'endeavour[ed] . . . to take into account gender factors or issues which may be interlinked with racial discrimination'.[35] It has acknowledged the different standards of treatment of female non-citizen spouses of citizens and the abuse faced by the children and spouses of non-citizen workers.[36] CERD *General Recommendation XXX on Discrimination against Non-Citizens* also prompts states parties to address

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30 UN Committee on the Elimination of Racial Discrimination ('CERD'), *General Recommendation XXV, Gender Related Dimensions of Racial Discrimination*, UN Doc A/55/18 (20 March 2000) Annex V, 152, [1].

31 Ibid [2].

32 Ibid [3].

33 For example CERD, *General Recommendation XXIX on Article 1, Paragraph 1 of the Convention (Descent)*, UN Doc HRI/GEN/1/Rev.6XXIX (1 November 2002) [1(k)]: 'Take into account, in all programmes and projects planned and implemented and in measures adopted, the situation of women members of the communities, as victims of multiple discrimination, sexual exploitation and forced prostitution.'

34 CERD, *General Recommendation XXVII: Discrimination Against Roma*, UN Doc A/55/18 (20 March 2000) Annex V, 154, [22], [34].

35 CERD, above n 30, [3].

36 CERD, *General Recommendation XXX: Discrimination Against Non-Citizens*, UN Doc CERD/C/64/Misc.11/Rev.3 (1 October 2002) [8].

specific problems faced by non-citizen domestic workers, such as debt bondage, passport retention, illegal confinement, rape and physical assault.[37]

Intersectionality issues featured prominently at the 2001 World Conference against Racism, Xenophobia and Related Intolerance ('WCAR'), which was held in Durban, South Africa. The final text of the Declaration adopted at Durban refers to the 'differentiated manner' in which 'racism, racial discrimination, xenophobia and related intolerance reveal themselves . . . for women and girls' and recognises 'the need to integrate a gender perspective into relevant policies, strategies and programmes of action against racism, racial discrimination, xenophobia and related intolerance in order to address multiple forms of discrimination'.[38] This was so largely thanks to the feminist NGOs that had consistently advanced this agenda in the international arena.[39] Their work was informed by that of feminist scholars; Crenshaw even delivered a background paper at the Expert Group Meeting on Gender and Race held by the UN Division for the Advancement of Women in Zagreb, Croatia, prior to the 2001 World Conference.[40]

The Center for Women's Global Leadership ('CWGL') was particularly instrumental in centring the intersectionality agenda on Durban, proclaiming it 'an occasion to renew our commitment to looking at the intersection of racism, sexism and other oppressions in a rights based context . . . as we must keep the effects of multiple oppressions central in all our work'.[41] CWGL pioneered 'the expansion of existing methodologies and the design of new methodologies that address intersectional discrimination [which] not only surface the diversity of women's experiences but also seek to address discrimination that occurs when

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37 Ibid [34].

38 WCAR, *Declaration* (2001) OHCHR, www.unhchr.ch/pdf/Durban.pdf at 9 December 2008, [69].

39 See S George, *Why Intersectionality Works* (2001) Women In Action, http://www.isiswomen.org/pub/wia/wiawcar/intersectionality.htm at 9 September 2008; AWID, above n 28; R Raj (ed) *Women at the Intersection: Indivisible Rights, Identities, and Oppression* (Center for Women's Global Leadership, Rutgers, 2002); and J Riley, 'GAD and Intersectionality in the Region: Forging the Future' (Working Paper No 8, Melbourne University Private Working Paper Series: Gender and Development Dialogue, 2003).

40 United Nations, *Gender and Racial Discrimination: Report of the Expert Group Meeting: 21–4 November 2000, Zagreb, Croatia* (2000) UN, http://www.un.org/womenwatch/daw/csw/genrac/report.htm. See also Women's International Coalition for Economic Justice ('WICEJ'), *How Women Are Using the United Nations World Conference Against Racism, Racial Discrimination and Related Intolerance, Durban 2001* (2003).

41 Center for Women's Global Leadership, *A Women's Human Rights Approach to the World Conference Against Racism* (2001) CWGL, http://www.cwgl.rutgers.edu/globalcenter/policy/gcpospaper.html at 9 December 2008.

multiple identities intersect'.[42] As a result of CWGL's and other women's groups' lobbying at various preparatory meetings prior to the WCAR, the special session of the UN Commission on the Status of Women ('CSW') in March 2001 called upon governments and the international community to:

> [D]evelop methodologies to identify the ways in which various forms of discrimination converge and affect women and girls and conduct studies on how racism, racial discrimination, xenophobia and related intolerance are reflected in laws, policies, institutions and practices and how this has contributed to the vulnerability, victimization, marginalization and exclusion of women and the girl child.[43]

A Working Group on Women and Human Rights, which operated at the CSW session, advanced disaggregated data collection, contextual analysis, intersectional review of policies and design and implementation of intersectionality policy initiatives as the four elements of a methodology to address intersectional discrimination.

Disaggregated data collection is intended to describe women's realities more accurately and to determine what factors (such as race, ethnicity, descent) contribute to women's discrimination. The idea is that data disaggregated by various identity categories:

> [W]ill make it possible to identify the magnitude of impact of particular problems and policies on particular groups of women. For example, in order to evaluate the problem of the feminization of poverty it is important to identify the extent of the impact of poverty on different groups of women.[44]

Nira Yuval-Davis notes that the need for this was highlighted in several WCAR forums, including by the then UN High Commissioner for Human Rights, Mary Robinson.[45]

Contextual analysis is intended to identify the root causes and context of the problems that women face as a result of convoluted identities. Such contextual realities could include:

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42 Ibid.

43 UN Commission on the Status of Women, *Draft Agreed Conclusions on Gender and All Forms of Discrimination, in particular Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001) UNCSW, http://www.un.org/womenwatch/daw/csw/draftacrace.htm at 9 December 2008, [40].

44 Working Group on Women and Women's Rights ('WGWWR'), *Background Briefing on Intersectionality* (2001) WGWWR, http://www.cwgl.rutgers.edu/globalcenter/policy/bkgdbrfintersec.html at 9 December 2008.

45 Yuval-Davis, above n 21, 204.

> [T]he legacy of slavery or colonialism or ancient animosities, as well as religious and cultural factors. For example, disaggregated data may reveal the extent of rape of ethnic women during a situation of war, but an analysis of the context reveals a history of inter-ethnic struggle for economic power that created a climate of acceptance among the majority group for the rape of minority women.[46]

Intersectional review of policies and systems of implementation is intended as a tool to evaluate policy initiatives and implementation systems for their usefulness and efficacy for different women.

> For example, does a policy initiate [sic] addressing racial discrimination and economic opportunity for one group of women create further tensions with other racial or ethnic women creating a competition and hierarchy of minorities that serves to perpetuate the domination of a majority group. Or on the other hand, do the implementation procedures for national machinery include a variety of strategies that are sensitive to the different situations of subordination of women within different groups.[47]

Design and implementation of intersectional policy initiatives are intended to develop new strategies to combat identified patterns of discrimination.

> National machineries and the UN systems can take concrete steps and implement plans of action based on the data to support such work; governments need to enable data collection, analysis and the allocation of adequate resources for this task. In addition to the implementation there must be mechanisms for effective review of such implementation.[48]

This practical and detailed methodology has been applauded as 'impressive and a step forward'.[49] At present, UN human rights committees and special rapporteurs explicitly use intersectionality as a framework when dealing with gender issues. The important 2002 UN *Resolution on the Integration of the Human Rights of Women and the Gender Perspective* 'recognizes the importance of examining the intersection of multiple forms of discrimination, including their root causes from a gender perspective, and their impact on the advancement of women and the enjoyment by women of their human rights'.[50] The concept of intersectionality is particularly salient in the work of the current Special Rapporteur on violence against women, Professor Yakin

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46 WGWWR, above n 44.

47 Ibid.

48 Ibid.

49 Yuval-Davis, above n 21, 205.

50 UN Commission on Human Rights, *Resolution on the Integration of the Human Rights of Women and the Gender Perspective*, UN Doc E/CN.4/2002/L.59 (16 April 2002).

Ertürk.[51] Prosecution of crimes of sexualised violence at times of war and genocide is another area aided by intersectional approaches.[52] In this way, intersectionality, which originally emerged as a theory at the margins of academic feminism, has now been widely accepted in international feminist activism and human rights discourse.

4 Problems with intersectionality

Despite these evident successes, intersectionality is not devoid of problems. It can be surmised that the term 'intersectionality' in feminist discourse has at least two dimensions: (1) a concern with subjectivity, referring to a particular paradigm based in individual identity categories; and (2) the interplay of different power relations and/or systems of oppression in society. Arguably, these two dimensions have tended to serve as quite separate analytical categories in feminist theory and practice, prompting Nira Yuval-Davis to assert, with reference to the 2000 Zagreb meeting, that 'the analytical attempts to explain intersectionality . . . are confusing'.[53]

Overall, the first meaning (referring to a combination of different identity characteristics of an individual) has featured more saliently. For example, McCall asserts that the word intersectionality 'immediately suggests a particular theoretical paradigm based in *identity categories*'.[54] Although many scholars believe that intersectionality 'emphasizes that different dimensions of social life cannot be separated out into discrete and pure strands',[55] it is arguable that the concept's application has tended to rely on overlapping, if not cumulative, *identities*.[56] Crenshaw's own metaphor to explain intersectionality is that of crossroads:

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[51] Recent examples include Yakin Ertürk, *Towards an Effective Implementation of International Norms to End Violence Against Women: Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, UN Doc E/CN.4/2004/66 (26 December 2003); Yakin Ertürk, *Intersections of Violence Against Women and HIV/AIDS: Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, UN Doc E/CN.4/2005/72 (17 January 2005); Yakin Ertürk, *Indicators on Violence against Women and State Response: Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, UN Doc A/HRC/7/6 (29 January 2008).

[52] See, for example, D Buss, 'Sexual Violence, Ethnicity, and Intersectionality in International Criminal Law' in E Grabham, D Cooper, J Krishnadas and D Herman (eds) *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge Cavendish, London, 2008) 105.

[53] Yuval-Davis, above n 21, 196.

[54] McCall, above n 5, 1771 (emphasis added).

[55] Brah and Phoenix, above n 6, 76.

[56] See, for example, W Brown, 'The Impossibility of Women's Studies' (1997) 9 *Differences* 79, 86; McCall, above n 5, 1771.

> Intersectionality is what occurs when a woman from a minority group . . . tries to navigate the main crossing in the city . . . The main highway is 'racism road'. One cross street can be Colonialism, then Patriarchy Street . . . She has to deal not only with one form of oppression but with all forms, those named as road signs, which link together to make a double, a triple, multiple, a many layered blanket of oppression.[57]

Accordingly, an individual is treated as a composition of (discrete) identity elements, such as gender, race, sexuality, religion, class and so on. This is problematic precisely because it seems to defeat the very point of intersectionality – that one strand of identity (gender) cannot exist in isolation from others.

This conundrum is already inherent in the CSW's much-praised four-step methodology. Yuval-Davis notes that disaggregated data collection would by definition rely on the fiction of 'unambiguous and mutually exclusive categories'.[58] Furthermore, the strategy of disaggregated data collection might be at odds with the fundamental premise of the indivisibility of human rights. To be fair, though, this is a dilemma pertaining to human rights doctrine itself. According to CWGL:

> The human rights system is based on the idea that human rights are indivisible and interrelated. But the treaties and mechanisms set up to defend and promote human rights tend to be linear – that is, they treat different aspects of abuse and discrimination (race, sex, age, migrant status, and so forth) separately.[59]

The second usage of 'intersectionality', prevalent in feminist theory as well as activism, is concerned with 'large-scale, historically constructed and hierarchical power systems'.[60] This usage refers to the interaction of what has been described as 'systems of hostility and depreciation'[61] or the 'interlocking

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57 K W Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color' (1994) Harvard School of Public Health, http://www.wcsap.org/Events/Workshop07/mapping-margins.pdf at 9 December 2008.

58 Yuval-Davis, above n 21, 205.

59 CWGL, above n 41.

60 B T Dill, S M Nettles and L Weber, 'What Do We Mean by Intersections?' (Spring 2001) *Connections: Newsletter of Consortium for Research on Race, Gender, and Ethnicity* 4.

61 L McWhorter, 'Sex, Race, and Biopower: A Foucauldian Genealogy' (2004) 19 *Hypatia* 38, 55. See also N Zack (ed) *Race/Sex: Their Sameness, Difference, and Interplay* (Routledge, New York, 2007); H Zia, 'Where Race and Gender Meet: Racism, Hate Crime and Pornography' in E Disch (ed) *Reconstructing Gender: A Multicultural Ontology* (Mayfield, Mountain View, 1997) 504.

systems of domination',[62] roughly corresponding to the identity constituents described above. In other words, the second usage conceptualises gender, race, sexuality and so on in terms of systemic forces that shape societies rather than as traits featured by individuals. However, this second meaning of intersectionality has tended to be less prominent and has even been more adequately addressed under different covers. It has been observed that human rights activists who deal with what might be termed intersectional issues may eschew the concept in their work, as they may believe that they already address the complexity of social inequality by other means.[63]

As far as theory goes, there is an abundance of literature that theorises the complexity of contemporary modalities of power – the aspect that proponents of intersectionality tend to pay insufficient attention to. For example, the rich literature on governmentality, which explores ways in which late modern subjects are constituted through discourses of power, does not at all use the term 'intersectionality' (and arguably does not need to). For example, Davina Cooper has advanced the concept of 'organising principles' as a better theoretical alternative. She describes organising principles as (1) operating not just between subjects, but as organisational processes, social practices and norms; (2) not linear, but asymmetrical and contradictory; and (3) not simply imposed from 'above', but part of the constitution of a community and individual practices.[64]

Furthermore, Iris Marion Young proposed conceptualising gender as seriality, drawing on Jean-Paul Sartre's idea of series.[65] Seriality implies an understanding of gender as:

> [A] particular form of the social positioning of lived bodies in relation to one another within historically and socially specific institutions and processes that have

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62 S H Razack, 'Speaking for Ourselves: Feminist Jurisprudence and Minority Women' (1991) 4 *Canadian Journal of Women and the Law* 400, 454.

63 See, for example, E Grabham, 'Intersectionality: Traumatic Impressions' in E Grabham, D Cooper, J Krishnadas and D Herman (eds) *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge Cavendish, London, 2008) 183. On the practical co-operation of various interest groups, see S Goldberg, 'Intersectionality in Theory and Practice' in E Grabham, D Cooper, J Krishnadas and D. Herman (eds) *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge Cavendish, London, 2008) 124.

64 D Cooper, '"And You Can't Find Me Nowhere": Relocating Identity and Structure within Equality Jurisprudence' (2000) 27 *Journal of Law and Society* 249.

65 I M Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy and Policy* (Princeton University Press, Princeton, 1997), drawing on J-P Sartre, *Critique de la raison dialectique: Théorie des ensembles pratiques* (Gallimard, Paris, 1960).

> material effects on the environment in which people act and reproduce relations of power and privilege among them.[66]

This means a passive grouping of individuals according to structural relations 'in ways too impersonal to ground identity',[67] insofar as it makes strategic or political sense. In this scheme, gender remains a useful category of analysis insofar as it continues to serve as a major organising principle of society. Likewise, it remains a useful basis for political affinities insofar as people's lives continue to be influenced by gender-related disadvantage. In this way, a 'gender identity' only makes sense if its conditionality and political purposefulness are acknowledged.

Due to its insufficient emphasis on the broader, structural dimensions, intersectionality has been criticised for fragmenting both subjectivity and the forces that shape it. Prominent critical and feminist theorists such as Judith Butler and Wendy Brown have insisted that it is misleading to think of gender in isolation from race, or of race as free of all inflection of gender or sexuality.[68] Various streams of subjectivity literature have highlighted the pointlessness of constructing the individual as an atomistic, detached, 'relentlessly self-interested'[69] entity. For Félix Guattari for example, 'the fundamentally pluralist, multi-centred, and heterogeneous character of contemporary subjectivity' means that 'an individual is *already* a "collective" of heterogeneous components'.[70] Feminist authors as diverse as Iris Marion Young, Toril Moi and Wendy Brown all agree, albeit in very different registers, that structural influences are always subsumed and internalised in the individual before individual identity components can be meaningfully articulated.[71] In addition, Brown has emphasised that the social powers constituting identity are not simply different powers, but different *kinds* of power, as gender, sexuality, race, religion and so on are not equivalent problematics.[72]

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66 I M Young, 'Lived Body vs Gender: Reflections on Social Structure and Subjectivity' (2002) XV *Ratio (new series)* 410, 422.

67 Ibid.

68 See V Bell, 'On Speech, Race and Melancholia: An Interview with Judith Butler' (1999) 16 *Theory, Culture and Society* 163; Brown, above n 56; W Brown, 'Suffering Rights as Paradoxes' (2000) 7 *Constellations* 230; J Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (Routledge, London, 1993).

69 W Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, Princeton, 1995) 25.

70 F Guattari, 'Remaking of Social Practices' in G Genosko (ed) *The Guattari Reader* (Blackwell, Oxford, 1996) 266 (emphasis added).

71 Young, above nn 65–6; T Moi, *What Is a Woman? And Other Essays* (Oxford University Press, Oxford, 1999); Brown, above n 69; Brown, above n 56; Brown, above n 68.

72 Brown, above n 56. See also W Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton University Press, Princeton, 2006).

In light of these insights, the concept of intersectionality appears to be flawed as it more often than not tends to presume that 'intersections' exist prior to the subject and are more or less co-extensive. This is so despite numerous reiterations by feminist activists that the intersectional disadvantage is not simply cumulative. Indeed, 'the metaphor of the intersection appears too static to respond to such complexities'.[73] According to Davina Cooper, the 'ontological fallacy' of intersectionality is that it assumes that 'the axes have an existence apart from the ways in which they combine'.[74]

Most recent feminist theorising has asserted that intersectionality has reached the limits of its potential for feminism, with its value being confined to simply highlighting complex experiences before the law.[75] Although this function itself may be a sound political strategy, intersectionality is, according to Joanne Conaghan, '*rather limited in its theory-producing power*. In particular, while it acts as an aid to the excavation of inequality experiences at a local level, it tells us little about the wider context in which such experiences are produced, mediated and expressed'.[76]

Furthermore, drawing analysis on the very categories that produce and sustain 'intersectional' subjects can promote 'entrenching rather than loosening identities' attachments to their current constitutive injuries'.[77] According to Emily Grabham, whose analysis draws on Brown's critique of identity,[78] 'focusing on the "intersections" between categories merely leads to the

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[73] Grabham, above n 63, 185.

[74] She further explains: 'Models that emerge as rough approximations, developed by humans in an effort to try to understand the social, become reified as phenomena with an independent and prior existence. Discrete axes of gender, class, race and age do not exist independently on some distant plane prior to their convergence in the form of distinct social permutations. Rather, identifying axes of class, gender, race and age occur in the course of making sense of social life.' D Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge University Press, Cambridge, 2004), 48.

[75] J Conaghan, 'Intersectionality and the Feminist Project in Law' in E Grabham, D Cooper, J Krishnadas and D Herman (eds) *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge Cavendish, London, 2008) 21.

[76] Ibid 29 (emphasis added). Cf Rebecca Johnson's argument that '[t]he point of intersectional analysis is to see whether or not the experiences of those located at the intersections can provide insights crucial to the construction of better theories': Johnson, above n 18, 29.

[77] Brown, above n 69, 134. Cf Johnson's argument that intersectionality should be seen as not merely about victimisation, but highlighting unique strategies of resistance: Johnson, above n 18, 29. Johnson draws on Mann, who argues that 'we should think of ourselves as conflicted actors rather than as fragmented selves': P S Mann, *Micro-Politics: Agency in a Post-Feminist Era* (University of Minnesota Press, Minneapolis, 1994) 4.

[78] Brown, above n 69.

production of "more" categories, thereby supporting the law's propensity to classify'.[79] Intersectionality thus is very prone to falling back into the trap of binarism, replicating and multiplying 'the taxonomy of the norm and its deviations', of which '[identity] categories are merely sub-sets'.[80]

This replication is most apparent in intersectional discrimination claims. The phenomenon of 'intersectional discrimination' has received considerable attention in doctrinal legal scholarship, where 'intersectional' tends to be used more or less interchangeably with adjectives such as 'double', 'compound', 'additive', 'cumulative' and 'multiple'.[81] Sarah Hannett explains that '"multiple discrimination" can occur in at least two ways: where the grounds of discrimination are additive [or double] in nature, and/or where the discrimination is based on an indivisible combination of two or more social characteristics'.[82] In this scheme, 'additive discrimination' denotes situations where an individual suffers cumulatively from (different) discriminatory practices to which the two or more different groups he or she belongs to are susceptible, with statistics being key in determining such discrimination.

Grabham is right to point out that such claims 'do not interrogate social positions as effects of power'.[83] On another occasion, she recounts her own experience as a lawyer of preparing a discrimination claim on behalf of a trans lesbian woman who had experienced harassment at work: having to squeeze the case into 'one or more of the following grounds: sex, sexual orientation and/or gender reassignment'[84] reified rather than challenged these categories. The utterly fragmentary nature of discrimination law meant that it was impossible to even accurately translate what had happened or how the individual herself felt about it into a legally intelligible picture.[85]

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79 Grabham, above n 63, 186.

80 R Sandland, 'Feminist Theory and Law: Beyond the Possibilities of the Present?' in J Richardson and R Sandland (eds) *Feminist Perspectives on Law and Theory* (Cavendish, London, 2001) 89, 114.

81 See M Eaton, 'Patently Confused: Complex Inequality and *Canada v Mossop*' (1994) 1 *Review of Constitutional Studies* 203; S Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 *Oxford Journal of Legal Studies* 65; and E W Shoben, 'Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination' (1980) 55 *New York University Law Review* 793.

82 Hannett, above n 81, 68.

83 Grabham, above n 63, 192.

84 E Grabham, 'Taxonomy of Inequality: Lawyers, Maps and the Challenge of Hybridity' (2006) 15 *Social and Legal Studies* 5, 15.

85 'M herself could not identify one sole "discriminatory ground" that accounted for the way she had been treated overall . . . [S]he was acutely aware of the way that her colleagues were reacting to her status as a woman, a lesbian, and a transgender woman, and in her eyes one could not be separated from the other': ibid.

A survey of international equality and discrimination jurisprudence reveals a similar result. One example is the case of *Abdulaziz, Cabales and Balkandali v United Kingdom*,[86] in which the applicants, whose husbands were precluded from joining them in the United Kingdom, alleged discrimination on the grounds of both race and sex under Article 14 of the *European Convention on Human Rights*. The European Court of Human Rights approached the complaint as implying two distinct types of discrimination, despite the clear interaction of the two as the operation of the immigration rule in question relied on gendered stereotypes of immigrants of Asian descent. Only sex (and not race) discrimination was found in the case.

In the case of *Dahlab v Switzerland*,[87] a teacher who had been told to remove her Islamic headscarf complained of sex discrimination. This was dismissed as the European Court of Human Rights considered that the measure 'was not directed against her as a member of the female sex' and that the law 'could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith'.[88] This legalistic abstraction appears to completely discount the specific, intersectional reality of Islamic headscarf restrictions affecting Muslim women in a particular way in a particular European context.

It is also interesting to note the older but much-praised HRC decision in *Lovelace v Canada*,[89] in which a Maliseet Indian woman had lost her status as an Indian under Canadian law due to her marriage to a non-Indian (whereas an Indian man married to a non-Indian woman would not have lost his status). The HRC chose to uphold Lovelace's rights by way of applying Article 27 of the *International Covenant on Civil and Political Rights* ('ICCPR'),[90] which protects minority rights. Interestingly, it considered that this provision was 'the one which is most directly applicable',[91] despite having the option of deciding the case under various non-discrimination and equality provisions of the ICCPR.[92] Arguably, this goes to show the difficulty of squaring intersectionality with available discrimination and equality frameworks in international human rights law.

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86 (1985) 7 EHRR 471.

87 Application No 42393/98 (Unreported, European Court of Human Rights, Trial Chamber, 15 January 2001).

88 Ibid 461.

89 Communication No R.6/24, UN Doc A/36/40, Supp.40 166 (30 July 1981).

90 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

91 *Lovelace v Canada*, Communication No R.6/24, UN Doc A/36/40, Supp.40 166 (30 July 1981) [13.2].

92 For an excellent analysis of this case, see K Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press, Cambridge, 2002) 358ff.

Thus, intersectional claims may not even be able to challenge what Conaghan calls 'law's representational role'.[93] As Grabham puts it:

> Viewing intersectional analysis in the context of the genealogy of identity claims in liberal society gives us more of an understanding why it has not had the radical effects in discrimination law that we might have wished for. If single-ground rights claims are based on disciplinary identities, then intersectional rights claims (and many forms of legal intersectional analysis) are no less bound to these categories. Using more categories in legal analysis, or focusing on the intersections between legal categories, does not of itself challenge the regulatory function of liberal identity. Indeed, the precision required for intersectional perspectives can be seen to approximate the 'anatomy of detail' that goes into the production of subjects for surveillance and regulation.[94]

In sum, intersectionality has been successful at highlighting the problem of the marginalisation of certain identities and experiences in feminist politics, law and broader human rights discourse. Intersectionality feminists have had impressive influence in the international human rights arena. However, the concept's utility beyond this 'representational function' is open to question.

5 Conclusion

Joan Wallach Scott once wrote that the history of feminism had been 'the history of the project of reducing diversities (of class, race, sexuality, ethnicity, politics, religion, and socio-economic status) among females to a common identity of women (usually in opposition to patriarchy, a system of male domination)'.[95] This, however, is only true up to a point. It is also true that the feminist project has been for quite some time animated by another central concern, the need to conceptualise the oppression of women – as Gayle Rubin famously put it more than three decades ago – in its 'endless variety and monotonous similarity'.[96] Intersectionality purports to do exactly that as it highlights that 'pure' gender does not exist, that gender alone does not account for the complex inequalities that women worldwide persistently find themselves in.

Arguably, intersectionality is a success story of feminism on at least two counts. First, it has been a tremendously influential agenda on the global human rights arena as feminists have succeeded in integrating an intersectional gender perspective into major areas of UN human rights work. Second,

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93 Conaghan, above n 75, 40.

94 Grabham, above n 63, 192.

95 J W Scott, 'Introduction' in J W Scott (ed) *Feminism and History* (Oxford University Press, Oxford, 1996) 1, 4.

96 G Rubin, 'The Traffic in Women' in R R Reiter (ed) *Toward an Anthropology of Women* (Monthly Press, New York, 1975) 157, 160.

it is one area in which feminist theorists and activists have worked in tandem, with theory making a difference in the 'real world'. These two successes are to be welcomed and celebrated.

More recently, however, concerns have been voiced over the limiting potential of intersectionality. It has been criticised for fragmenting subjectivity and thus colluding with the regulatory (rather than empowering) impulse of human rights. Perhaps this is an inevitable side-effect of a successful strategy. Yet if feminism is to continue to have an impact on the lives of real women, it has to take internal critique on board. This does not necessarily imply discarding intersectionality as a strategic tool. Rather, acknowledging the limitations of intersectionality means using it even more wisely and supplementing it with a range of more targeted, if less ambitious, agendas and tools.

9. Refugees and displaced persons: the refugee definition and 'humanitarian' protection

Susan Kneebone[*]

> Humanitarian: Having regard to the interests of humanity or mankind at large.[1]

> The vast majority of refugees are . . . unprotected under codified international law. They are 'humanitarian' refugees who seek shelter from conditions of general armed violence . . . or simply bad economic conditions.[2]

> [H]umanitarianism is the ideology of hegemonic states in the era of globalisation marked by the end of the Cold War and the growing North–South divide . . . [T]he Northern commitment to humanitarianism coexists with a range of practices which violate its essence.[3]

1 Introduction

The discussion in this chapter was inspired by a talk by a distinguished Italian academic who was agonising over Italy's refugee 'crisis', which involves increased numbers of persons attempting to reach Italy by sea from North Africa and eastern Europe.[4] In this speech the academic made use of a distinction between 'refugees' and 'humanitarian entrants'. In particular, it was

[*] My thanks to Karen Spitz for her research assistance in connection with this chapter, and to Sarah Joseph for her helpful comments. I am responsible for any remaining misconceptions.

[1] C T Onions (ed), *The Shorter Oxford English Dictionary On Historical Principles* (3rd ed, Clarendon Press, Oxford, 1973) 995.

[2] K Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1985–86) 26 *Virginia Journal of International Law* 857.

[3] B S Chimni, 'Globalization, Humanitarianism and the Erosion of Refugee Protection' (2000) 13 *Journal of Refugee Studies* 243.

[4] Paola Totaro, 'Italy's island of hope to become a prison for desperate refugees', *The Age* (Australia) 7 February 2009, 15, citing UNHCR statistics that in 2008 a record 36,952 refugees landed on Italian shores (a 75 per cent increase on 2007) and that 31,000 were processed on the Italian island of Lampedusa. See S Kneebone, C McDowell and G Morrell, 'A Mediterranean Solution? Chances of Success' (2006) 18 *International Journal of Refugee Law* 492, 492–500, for a discussion of the Mediterranean 'problem'.

suggested that persons fleeing for economic reasons, or persons fleeing generalised violence, were not 'proper' refugees within the meaning of the 1951 *Convention Relating to the Status of Refugees* (the 'Refugee Convention'),[5] and that if states chose to assist them, it would be for 'humanitarian' motives. It was clear from the context of the talk that a very narrow definition of a refugee was being applied. According to the speaker, a refugee is someone who flees civil or political persecution. If this misunderstanding is widely accepted, then Italy and indeed Europe and other industrialised states do indeed have a 'refugee crisis' – a crisis of meaning.

In this chapter, I argue that the malaise of the international regime of refugee protection (as indicated by the current reluctance of Mediterranean states to process refugees arriving by boat) reflects a confused notion of 'humanitarian protection' and misunderstanding of the term 'refugee'. I suggest that industrialised states make use of a binary which they have developed between the legal definition of a refugee and the notion of humanitarian protection. When humanitarian protection is granted to refugees and asylum seekers fleeing conflict or economic disadvantage, it is associated with government 'largesse' or discretion, with the idea of extra-legal remedies.[6] The effect of this binary is to de-couple the Refugee Convention from its general humanitarian and human rights focus and to assert state border control or sovereignty in the name of 'humanitarianism'.[7] It thus strengthens the perception that there are 'genuine' and 'bogus' or 'non-genuine' refugees.

Further, as I illustrate below, the main reasons for flight today are civil wars and generalised violence, or denial of social and economic rights. Thus a restrictive reading of the Refugee Convention enables states to exclude a large portion of the world's refugees from its protection.

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[5] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 1989 UNTS 137 (entered into force 22 April 1954) (the 'Refugee Convention'). In everyday parlance a 'refugee' is a person in flight, a person seeking refuge. However, in international law a 'refugee' is a person who comes within the definition in Art. 1A(2) of the Refugee Convention and the *Protocol relating to the Status of Refugees*, opened for signature on 31 January 1967, 19 UNTS 6223, 6257 (entered into force 4 October 1967).

[6] *Ruddock* v *Vadarlis* [2001] 1329 FCA, (2001) 110 FCR 491 [126] per Beaumont J.

[7] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (3rd ed, Oxford University Press, Oxford, 2007) 1: 'The refugee in international law occupies a legal space characterised, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation and on the other competing humanitarian principles derived from general international law and from treaty.'

The argument in this chapter is essentially that restrictive approaches to refugees and to interpretation of the refugee definition reflect a confused understanding of the meaning of 'humanitarian'. As the quotations above illustrate, the word has different contextual connotations. The general term 'humanitarian' is associated historically with ethical and theological meanings and, in its 'pure' or literal sense, has the core idea of concern for humanity. In this chapter I explain how this sense of 'humanitarian' became absorbed into International Humanitarian Law after the atrocities of World War II. Subsequently, the ideas of 'humanitarian intervention' has been used to describe the basis of military intervention in certain states, and 'humanitarian assistance' has been used to describe the protection given to displaced persons. In legal terms, the roots for such intervention or assistance are very different. It is my central argument that, through conflation of ideas, 'humanitarianism' has become politicised and divorced from the original meaning of 'humanitarian'.

The argument is developed in two main sections. First, I discuss the development of the Refugee Convention definition and the mandate of the United Nations High Commissioner for Refugees (the 'UNHCR'), and the latter's mandate on the issue of internally displaced persons ('IDPs'). In that discussion I note that the UNHCR mandate covers both protection of refugees and humanitarian protection. Secondly, I will trace briefly the development of the idea of 'humanitarian protection' for displaced persons to demonstrate how this straightforward notion has lost its way.

To begin, a snapshot of the current global situation of refugees and displaced persons is provided.

2 The current situation: refugees and 'displaced persons'

The current regime of international refugee protection is undoubtedly under stress. Whilst the 1951 Refugee Convention contains a definition of a 'refugee'[8] which covers 11.4 million refugees, a large proportion of the world's displaced population estimated at 51 million[9] is not covered by the definition as they have not crossed an international border.[10] This cohort

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[8] In Article 1A(2) of the Refugee Convention, a refugee is defined as a person with a 'well-founded fear of persecution' by reason of one of the five grounds set out in the article.

[9] United Nations High Commissioner for Refugees ('UNHCR'), *2007 Global Trends: Refugees, Asylum-seekers, Internally Displaced and Stateless Persons* (June 2008) 2. This figure includes 25.1 million who come under the UNHCR mandate (as explained in the text), of whom the UNHCR is providing direct assistance to 13.7 million.

[10] Such persons are known as Internally Displaced Persons ('IDPs'). Art. 1A(2) of the Refugee Convention requires a person to be 'outside the country of his nationality'.

includes 26 million affected by what the UNHCR terms as 'conflict-induced internal displacement'.[11] Conflict is also a major reason for international flight in order to seek asylum. The UNHCR's statistics on asylum seekers[12] reveal that the main countries of origin are Iraq, followed by the Russian Federation, China, Somalia, Afghanistan and Serbia.[13] After a period of decline, both the global refugee population and the total number of displaced persons are increasing.[14]

For the large part, this scenario is played out in countries far from the industrialised states that drive the policy behind international refugee protection.[15] Further, over the last two decades, those industrialised states have systematically introduced restrictive non-entrée measures and interpretations of the refugee definition which limit access to international refugee protection in those states. Of those who have left their country, 80 per cent of refugees remain in the same region, and the number of those living in 'protracted refugee situations' continues to rise.[16] Simultaneously, the number of 'urban' refugees, that is, those living in cities and recognised by the UNHCR as refugees, has increased.[17] Such persons are awaiting a 'durable solution'.[18]

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[11] UNHCR, above n 9, 2.

[12] An 'asylum seeker' is a person seeking asylum from persecution who has yet to be recognised as a 'refugee' as defined in Art. 1A(2) of the Refugee Convention. But note that the UNHCR takes the view that a person who satisfies that definition is a 'refugee' without the need for a determination to that effect. This is known as the 'declaratory' theory – see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva: 1979, re-edited 1992) ('UNHCR Handbook') [28].

[13] UNHCR, *Asylum Levels and Trends in Industrialized Countries: First Half 2008* (17 October 2008) 6.

[14] UNHCR, above n 9, 6.

[15] UNHCR, *Asylum Levels and Trends in Industrialized Countries: First Half 2008: Statistical Overview of Asylum Applications Lodged in 38 European and 6 Non-European Countries* (17 October 2008) 6.

[16] Brookings-Bern Project on Internal Displacement, *Expert Seminar on Protracted IDP Situations* (Geneva: 21–22 June 2007) – the figure quoted at p. 1 is 14.2 million. In 2005 it was calculated that the UNHCR's mandate covered 8.7 million refugees and that the total IDP population was 23.7 million. In 2006 the total IDP population had risen to 24.5 million. See ibid, Table 1 on 22. See also UNHCR, above n 9, 2: in 2007 the UNHCR figures were 11.4 million refugees and 25.1 million IDPs.

[17] That is, they have been recognised by the UNHCR as coming within the refugee definition and are awaiting regularisation of their status as per one of the 'durable solutions' referred to below.

[18] The three 'durable solutions' are classically stated as return (repatriation), local integration (eg through naturalisation) and resettlement. See S Kneebone, 'The Legal and Ethical Implications of Extra-territorial Processing of Asylum Seekers: the "Safe Third Country" Concept' in Jane McAdam (ed) *Moving On: Forced Migration, Human Rights and Security* (Hart Publishing, Oxford, 2008).

These trends take place within the context of a globalised world in which it is estimated that the number of people living outside their homeland stands at 200 million.[19] It has been suggested that the majority leave their place of birth because they are unable to earn a living and because there is a demand for their labour elsewhere.[20] These migrants include 'regular' (legal) and 'irregular' (illegal) migrants. The latter group includes asylum seekers. A recent UNHCR Discussion Paper has put UNHCR's role into this context with the following description:

> While the majority of people move to establish new livelihoods, improve their standard of living, join members of their family or take up educational opportunities, those of concern to UNHCR are forced to flee by human rights violations and armed conflict.[21]

This context points to a second important factor in the global refugee picture which has driven the response of the receiving industrialised states. Often the line between asylum seeker and 'illegal migrant' is fine, as many are fleeing economic disadvantage brought on by post-conflict situations or as a result of persistent discrimination. In the context of international migration, refugees are often juxtaposed with 'mere' 'economic' migrants or described as 'economic refugees'. The 'migration–asylum nexus', which is employed in this context, concentrates upon the fact that there are 'mixed flows' of asylum seekers and irregular (economic) migrants. The effect of the 'migration–asylum nexus' is to treat the protection needs of refugees as a secondary consideration to migration controls.

This is the background to the tendency of industrialised states to characterise any protection given to 'economic refugees', or those fleeing conflict, who arrive in their jurisdiction, as 'humanitarian'.[22] Such objects of 'humanitarian' protection are considered to be outside the scope of the legal refugee definition. We turn now to consider the development of the Refugee Convention definition.

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19 Antonio Guterres, 'UN High Commissioner for Refugees', *The Age* (Australia) 11 December 2007, 13.

20 Ibid.

21 *Refugee protection and durable solutions in the context of international migration*, prepared for the High Commissioner's Dialogue on Protection Challenges, UNHCR/DPC/2007/Doc.02 at [2] (19 November 2007).

22 K Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1985–86) 26 *Virginia Journal of International Law* 857.

3 The Refugee Convention definition, the UNHCR mandate and 'humanitarian protection'

At the global level, the international system of refugee protection in the post-World War II period has mostly developed in reaction to refugee crises and mass outpourings, rather than as responses to the needs of individual refugees. As the history of the development of the Refugee Convention definition demonstrates, this means that the reality does not sit well with the legal situation. As the figures discussed above suggest, the world's refugee and displaced person population is largely out of sight of industrialised states as a result of focused policies of 'containment' or 'warehousing' of groups of refugees.

The Refugee Convention, which was negotiated in the aftermath of World War II, was intended to deal with the European problem of 1.25 million refugees arising out of the post-war chaos. In particular it was directed at the victims of Nazi and other fascist regimes. This is recognised by the refugee definition, which describes a refugee as a person with an individual 'well-founded fear of being persecuted' as a result of 'events occurring before 1 January 1951' (Article 1A(2)), with states having an option to limit their obligations to refugees from Europe under Article 1B. The *Protocol relating to the Status of Refugees* of 1967 (the 'Refugee Protocol')[23] removed these temporal and geographical limits, thus apparently indicating that the Refugee Convention applied globally.

The Refugee Convention not only provided an individualised definition of a refugee but also made it clear that it was an instrument for human rights protection. The Refugee Convention, which arose from European events and which was brokered (largely) by European nations, was a manifestation of the development of a system of international law and institutions intended to provide responses and solutions to a global problem. The importance of the establishment of the UNHCR in 1951 to administer the Refugee Convention under the United Nations General Assembly (the 'GA') should not be underestimated. This measure anticipated the development of far-reaching human rights instruments which were intended to recognise the universality of human rights. Notably, the reference in the Preamble of the Refugee Convention to the *Universal Declaration of Human Rights*[24] is relied upon to indicate the underlying human rights basis of the Refugee Convention. The view of leading refugee law scholars is reflected by Michelle Foster, who says:

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[23] *Protocol relating to the Status of Refugees*, opened for signature on 31 January 1967, 19 UNTS 6223, 6257 (entered into force 4 October 1967) (the 'Refugee Protocol').

[24] *Universal Declaration of Human Rights*, GA Res 217(111) of 10 December 1948, UN Doc A/810 at 71 (1948) ('UDHR').

> In light of the reference in the Preamble to the UDHR, it is arguable that the Refugee Convention should be placed within the context of the developing body of international human rights law.[25]

As James Hathaway has explained, the instruments[26] leading up to the 1951 Convention were inspired either by 'humanitarianism', that is 'an attempt to accommodate the reality of a largely unstoppable flow of involuntary migrants across European borders'[27] or by the need for individual human rights protection. The significance of the Refugee Convention was that it made such protection dependent upon the need to prove individual persecution rather than being applicable to categories of persons subject to human rights abuse.

Thus in this context it can be seen that the Refugee Convention is an instrument of human rights protection which was intended to implement the basic right to flee persecution and to seek and enjoy asylum, and to enshrine the right against *refoulement* or return to a place where 'life' or 'freedom' is threatened (Article 33(2)). The refugee definition in Article 1A(2) refers to a person who is outside her or his country, and who has a 'well-founded fear of being persecuted for reasons of' one of five specified grounds: namely, race, religion, nationality, membership of a particular social group or political opinion.[28] This was a significant development as previous refugee instruments had provided a generalised, descriptive refugee definition.[29] It is now regarded as well established that the Refugee Convention and the elements of the definition, including the meaning of 'persecution' and 'being persecuted', should be interpreted within a human rights framework which includes reference to the standards provided by the main human rights treaties.[30] As Hathaway has said,

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[25] Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, Cambridge, 2007) 49, citations omitted. See also James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge, 2005) 8.

[26] See, eg, 1933 *Convention relating to the International Status of Refugees*, 159 LNTS No. 3663; 1938 *Convention concerning the Status of Refugees coming from Germany*, 191 LNTS No.4461. See James C Hathaway, 'The Evolution of Refugee Status in International Law: 1920–1950' (1984) 33 *International and Comparative Law Quarterly*, 348.

[27] James C Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 *Harvard International Law Journal* 129, 137.

[28] Each of these grounds has been interpreted in the light of general human rights protections.

[29] James C Hathaway, 'The Evolution of Refugee Status in International Law: 1920–1950' (1984) 33 *International and Comparative Law Quarterly*, 348.

[30] Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, Cambridge, 2007), Chapter 2. The role of 'soft law' and 'customary' law are less clear.

the Refugee Convention was 'rarely understood to be the primary point of reference' for refugee rights.[31]

However, in practice the elements of the definition (which are themselves undefined) have been interpreted restrictively for some categories of claims, including those which according to the UNHCR are the basis upon which most people flee, namely conflict and human rights violations.[32] In particular the Refugee Convention definition, which applies to individuals, has been interpreted to require 'targeted' persecution (through the words 'for reasons of' which have been interpreted to require a strict nexus, or causal link, between the 'predicament'[33] of the applicant for refugee status and one of the given Convention grounds). Therefore, for example, people caught up in civil war or fleeing conflict may have difficulty in bringing their claim within the Refugee Convention definition because the harm suffered by an individual is indistinguishable from that suffered by a general section of the population at large. In the context of civil war and internal conflict, a distinction has been made between laws or acts which apply to the general populace (which are prima facie not persecutory by nature) and those which single out an individual or group of individuals (and may amount to 'persecution').[34] A second restrictive technique is to interpret the Refugee Convention to cover principally abuses of civil and political rights (as did the Italian inspiration for this discussion), whereas the human rights context of the Refugee Convention makes it clear that it was intended to cover denial of or discrimination on the basis of *all* human rights, including the so-called 'second generation' social and economic rights.[35] Thus substantial numbers of refugees are excluded from protection by restrictive interpretations in receiving states.

Such restrictive interpretations reflect the history of the development of the international refugee regime. In the Cold War period, crises such as the Hungarian one of 1956 and the Czech uprising in 1968 emphasised the ideological basis of the individualised concept of refugee protection in the 1951 Refugee Convention (and thus supported a reading of the definition as focused upon civil and political rights). However, from the 1970s onwards, refugee crises in other parts of the world, largely in Africa and Asia, suggested that the

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31 James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge, 2005) 5.

32 See UNHCR, above n 21, [2].

33 See generally, Foster, above n 30, 247.

34 *Adan* v *Secretary of State for the Home Department* [1999] 1 AC 293. See S Kneebone, 'Moving Beyond the State: Refugees, Accountability and Protection' in S Kneebone (ed) *The Refugee Convention 50 Years On: Globalisation and International Law* (Ashgate, Aldershot, 2003) 285–317, 297–305.

35 Foster, above n 30.

refugee problem was not unique to Europe and that it required different approaches. As we shall see in the next section, these developments highlighted the 'humanitarian' nature of refugee protection.

The UNHCR promoted the 1967 Refugee Protocol to enable it to deal with new situations of refugees en masse, such as Chinese refugees fleeing communism and refugees from African states affected by de-colonisation, civil wars and independence movements. However, whilst the Refugee Protocol recognised the global nature of the problem, the universality of the rights of refugees, and the possibility of global solutions,[36] it did not grant the UNHCR the extra powers it wanted to deal with groups of refugees.[37] The legacy of this episode was to create a distinction between refugees who flee individualised persecution (and who can claim refugee status under the 1951 Refugee Convention) and those who flee generalised violence (who may have difficulty in proving that they are persecuted as individuals for Refugee Convention reasons). The process surrounding the creation of the Protocol also showed the tension between state interests and the UNHCR, which is dependent on the same states as donors for its operations.

A Development of the UNHCR mandate: refugees and humanitarian protection

The UNHCR was established by the GA in 1950 and provided with a statute to describe its role and mandate, the *Statute of the Office of the United Nations High Commissioner for Refugees* (the 'UNHCR statute').[38] It replaced the International Refugee Organisation, whose Constitution had specified categories of persons and refugees to be assisted (as mentioned above). Importantly, the UNHCR statute refers to its 'humanitarian' and 'non-political' role in the same sentence, thus endorsing the association between humanitarian ideals and neutrality. Article 2 of the UNHCR statute provided as follows:

> The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.[39]

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[36] Laura Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14 *International Journal of Refugee Law* 238, 248.

[37] Sara E Davies, 'Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol' (2007) 19 *International Journal of Refugee Law* 703.

[38] UNGA res. 428(V), Annex of 14 December 1950.

[39] Ibid.

At the same time, Article 6 of the UNHCR statute adopted the Refugee Convention definition of a refugee. Thus, it has been suggested that the UNHCR statute contains an 'apparent contradiction'.[40] On the one hand it applies to groups and categories of refugees, but it also provides an individualised definition in the same terms as the 1951 Refugee Convention. It seems that no specific consideration was given to this fact. In practice the UNHCR mandate has evolved subsequently in direct response to large-scale crises to cover both refugees and other categories of displaced persons in regions of origin, asylum seekers in destination states and stateless persons, who are collectively referred to as 'persons of concern' in the UNHCR's collection of statistics.

A brief summary of the UNHCR's involvement in such crises illustrates the flexible and incremental evolution of its role and mandate. In 1957 the GA authorised the UNHCR to use its 'good offices' to intervene in the crisis of mainland Chinese in Hong Kong. The 'good offices' mandate was used again in 1959 in relation to refugees in Morocco and Tunisia.[41] Another extension of its protection mandate, which harked back to the pre-1951 period, was through the conferment of prima facie status on certain groups of refugees without the need for individual determinations.[42] Thus in this context the ideas of humanitarian and individual protection clearly ran together.

The reference to 'persons of concern' in contemporary statistical reports has it origins in the GA's use of the term 'refugees and displaced persons of concern' since the mid-1970s.[43] In particular this term was used to describe UNHCR activities in Sudan (1972) and in Vietnam (1975). At this time the term 'displaced persons' was used to refer to victims of countries split by civil war, so the legal niceties of whether they were 'refugees' was avoided. The UNHCR was reluctant to use the term 'refugee' for this category of displaced persons or to accord them prima facie status in this period.[44] It has been suggested that this category of displaced persons had its foundations in humanitarian necessity rather than legal status,[45] thus reinforcing a distinction between the legal status of 'refugee' and humanitarian status.

In particular, the UNHCR developed its mandate in the refugee crisis in Indochina in the 1970s and 1980s when up to three million people fled in the

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40 Goodwin-Gill and McAdam, above n 7, 23.

41 Ibid 24–5.

42 Ibid 27.

43 Ibid 26.

44 Ibid 28. See also Sara E Davies, *Legitimising Rejection: International Refugee Law in South East Asia* (Martinus Nijhoff Publishers, Leiden and Boston, 2008), Chapter 3.

45 Goodwin-Gill and McAdam, above n 7, 27.

two decades after 1975. Always subject to critical scrutiny by donor countries and regional participants, the UNHCR experimented with various responses during this crisis. For example, 600,000 people who fled Indochina between 1975 and 1979 were initially granted prima facie status. Later the concept of temporary protection was utilised. Subsequently, the UNHCR assisted in the formulation of the Comprehensive Plan of Action (the 'CPA') for Indo-Chinese Refugees. The CPA developed in two stages. The first stage was brokered by the United Nations Secretary-General in 1979, resulting from pressure by the Association of Southeast Asian Nations (the 'ASEAN'), and involved temporary asylum to be followed by resettlement in a third country. In an attempt to deter clandestine departures it was accompanied by an Orderly Departure Programme ('ODP'). However, when the problem continued to escalate, it was followed in 1989 by the formal CPA, which had an emphasis on voluntary returns and reintegration in the country of origin. In this instance the Malaysian government requested the UNHCR to convene a second international conference, in which the ASEAN again participated. As a result, the CPA was agreed upon at a Geneva Conference held on 13–14 June 1989 by the UNHCR, the countries of first asylum and 50 resettlement countries.

The role of the UNHCR in the implementation of the CPA is nothing short of controversial.[46] The predominant features of the CPA were the emphasis on orderly departures and resettlement and consequently, although countries in the region provided initial asylum, they did not eventually sign up to the Refugee Convention. It has been suggested that the UNHCR's pragmatic approach to the problem is responsible for the current lack of commitment in the South East Asia region to refugees.[47] Further criticism arose from the fact that the UNHCR assisted with the processing of asylum seekers in countries of first asylum by producing Guidelines to encourage uniformity of practice in the region. But, as the UNHCR's role in this respect under the CPA was to 'observe and advise', individual states retained control over the selection process. Yet many critiques emerged of the processes and of the UNHCR's

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[46] A sample of the voluminous literature on this issue includes: S A Bronée, 'The History of the Comprehensive Plan of Action' (1993) 5 *International Journal of Refugee Law* 534; W C Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck' (2004) 17 *Journal of Refugee Studies* 319; Y Tran, Comment, 'The Closing of the Saga of the Vietnamese Asylum Seekers: The Implications on International Refugees and Human Rights Laws' (1995) 15 *Houston Journal of International Law* 463; UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (Oxford University Press, Oxford, 2000) Chapter 4: 'Flight from Indochina'.

[47] See Davies, above n 44.

perceived failure to be more proactive in this respect.[48] The UNHCR was also criticised for its role in assisting 'voluntary' returns to Vietnam. Additionally in this period the UNHCR took on a humanitarian role which involved monitoring the situation in the country of origin for those who remained or who were returned. The UNHCR was criticised for engaging too actively with 'humanitarian' measures within Vietnam and thus breaching its 'non-political' mandate.

Altogether, the role of the UNHCR in the CPA demonstrated the complexity of its position and a flexible and pragmatic application of its mandate. Importantly, during this crisis the term 'displaced persons' was used. The CPA facilitated the incremental development of the UNHCR's role, which in the last two decades has become increasingly solution and protection oriented[49] rather than bound by legal categories. For example, UNHCR played an important role in coordinating relief in the 2004 tsunami disaster in South East Asia. It has also recently indicated its support for solutions to 'environmental refugees' who do not strictly meet the Refugee Convention refugee definition. It thus regards its humanitarian protection mandate to cover groups and persons who fall outside the legal category of 'refugee' or the strict terms of its mandate[50] in accordance with the literal meaning of the term 'humanitarian', that is, 'having regard to the interests of humanity at large'. Or, to express this in more positive terms, it perceives its mandate to refugees within the context of its broader humanitarian role.

B The 'internally displaced persons' issue: the UNHCR's mandate and 'humanitarianism'

The above discussion demonstrates that the legal definition of a refugee in the 1951 Refugee Convention does not cover all categories of displaced persons; but the term 'humanitarian protection' has broader application. In the 1980s, in response to mass displacements, scholars who had begun to study the phenomenon of forced migration and displaced persons pointed out the limits of the Refugee Convention definition. As David Turton expressed it, 'no sooner had the concept of refugee been confined to this legal box than it began

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48 See, eg, R Mushkat, 'Implementation of the CPA in Hong Kong' (1993) 5 *International Journal of Refugee Law* 562. See also Richard Towle, 'Processes and Critiques of the Indo-Chinese CPA: An Instrument of International Burden-Sharing?' (2006) 18 *International Journal of Refugee Law* (Nos 3 and 4) 537.

49 Susan Kneebone, 'The Legal and Ethical Implications of Extra-territorial Processing of Asylum Seekers: the Safe Third Country Concept' in J McAdam (ed), *Moving On: Forced Migration and Human Rights* (Hart Publishing, Oxford, 2008) Chapter 5.

50 Goodwin-Gill and McAdam, above n 7, 29, n 74.

jumping out'.[51] Meanwhile legal academics such as Kay Hailbronner reinforced the distinction between the legal definition and humanitarian protection which is implicit in UNHCR's mandate, by focusing upon the need for particularised fear and by attacking the notion of 'humanitarian' refugees.[52] In particular it was argued that the Refugee Convention did not apply to 'those who shelter from conditions of general armed violence', natural disaster or 'simply bad economic conditions'.[53]

By contrast, in other regions affected by mass displacements of people, new instruments broadened the legal definition and recognised the coincidence between refugee and 'humanitarian' protection. For example, Article II(2) of the 1969 Organisation of African Unity *Convention Governing the Specific Aspects of Refugee Problems in Africa* (the 'OAU Convention')[54] states that the grant of asylum is 'a peaceful and humanitarian act'. This OAU Convention arose in the context of independence movements and massive displacements in the decolonisation period of Africa.[55] The 1969 OAU Convention was a direct inspiration for the 1984 *Cartagena Declaration on Refugees* adopted at a Colloquium held at Cartagena, Colombia, in November

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[51] David Turton, *Conceptualising Forced Migration* (October 2003) RSC Working Paper no 12, www.rsc.ox.ac.uk at 20 March 2009, 13; David Turton, *Refugee, forced resettlers and 'other forced migrants': towards a unitary study of forced migration* (September 2003) UNHCR Working Paper no 94, <http://www.unhcr.org/research/RESEARCH/3f818a4d4.pdf> at 20 March 2009; David Turton, 'Who is a forced migrant?' in Chris de Wet (ed) *Development-induced Displacement: Problems, Policies and People* (Berghahn Books, New York/Oxford, 2006) 14–37; M Cernea, 'Bridging the research divide: studying refugees and development oustees' in *In Search of Cool Ground: War, Flight & Homecoming in Northeast Africa* (United Nations Research Institute for Social Development, New York, 1996).

[52] K Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1985–86) 26 *Virginia Journal of International Law* 857.

[53] Ibid 858. See also T A Aleinikoff, 'State Centred Refugee Law: From Resettlement to Containment' (1992) 14 *Michigan Journal of International Law* 120; J Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law?' (1990) 31 *Harvard International Law Journal* 129, argued that neither a humanitarian nor a human rights approach was an adequate approach in itself to the refugee 'problem'.

[54] Organisation of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force on 20 June 1974) ('OAU Convention').

[55] Between 1963 and 1966 the number of refugees in Africa rose from 300,000 to 700,000: Micah B Rankin, 'Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On', UNHCR, New Issues in Refugee Research, Working Paper No. 113 (April 2005) 2.

1984 (the 'Cartagena Declaration'),[56] which relates to the 'refugee situation' in Central America. This was a response to mass refugee influxes, in this case arising from political and military instability in Central America in the 1970s and 1980s. As in the OAU Convention, the refugee definition in the Cartagena Declaration is linked to root causes[57] and confirms that the granting of asylum is 'humanitarian' in nature. The Cartagena Declaration reflected the then current experiences of refugees by expressing its 'concern' at the problem raised by military attacks on refugee camps and settlements in different parts of the world.[58] Additionally, going beyond the 'legal' refugee issue, it expressed its 'concern' at the 'situation of displaced persons within their own countries'.[59]

The term 'internally displaced person' (IDP), which came into use in the 1980s, distinguishes refugees as persons who have crossed a border, and focuses upon the fact that IDPs are 'internal refugees'. As we shall see, a different response based upon humanitarian principles and 'responsibility to protect' was formulated for IDPs. However, the UNHCR continued to play a role in the protection of IDPs in a further extension of its mandate. In so doing, the binary between legal status and humanitarian protection became entrenched.[60]

The first major international recognition of an IDP issue was the Security Council authorisation for Allied intervention in Iraq to protect the Kurds in 1991, although the issue had been acknowledged since the end of the 1980s in the context of difficulties in repatriating Cambodian and Afghan refugees. Thomas Weiss and David Korn[61] point to Resolution 1992/73[62] of the Commission on Human Rights, where the United Nations Secretary-General was requested to appoint a Special Representative on IDPs and to commission

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56 *Cartagena Declaration on Refugees*, OAS/Ser.L/V/II.66, doc.10, rev.1, (22 November 1984) 190–93 ('Cartagena Declaration').

57 Art. I(2) of the OAU Convention states: 'The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'

58 Cartagena Declaration [III(7)].

59 Cartagena Declaration [III(9)].

60 Indeed it has been argued that the UNHCR continually sought a humanitarian role: G Loescher, 'The UNHCR and World Politics: State Interests vs Institutional Autonomy' in (2001) 35 *International Migration Review* (no 1) 33–56.

61 Thomas G Weiss and David A Korn, *Internal Displacement – Conceptualization and Consequences* (Routledge, London, 2006), Chapter 1.

62 UN Doc E/CN.4/1992/73 (1992).

a study of the IDP issue, as the beginning of the development of a separate 'mandate' on the issue.[63]

Throughout the 1990s, the advocates for resolution of the IDP issue sought to keep the issue out of the United Nations, whilst the UNHCR fought to retain the integrity of its protection mandate. At the same time, the UNHCR further expanded its 'good offices' mandate to provide humanitarian assistance to IDPs,[64] as for example in the Balkans crisis. In 1993, the GA authorised UNHCR involvement in IDP issues where there was a specific request from the United Nations and where the state concerned consented.[65] But this humanitarian role did not include the provision of legal protection.[66] In September 2005 the UNHCR was assigned the role of 'cluster' chair for the protection of conflict-generated IDPs in the United Nations Inter-Agency Standing Committee established to co-ordinate humanitarian protection.[67] In addition, the UNHCR chairs clusters on emergency shelter and on camp management and co-ordination under this approach.

In the debate over the role of the UNHCR in relation to IDPs there are various assumptions about the scope of its mandate. For example, it has been argued that its primary role is to determine legal status,[68] and that its role in the Balkans raised issues of conflict of interest between its 'protection' mandate to refugees and its role in 'containing' displaced persons within the country of origin.[69] Elaborating upon that point, it has been suggested that the UNHCR's role was initially conceived as 'neutral, passive and reactive'. Thus, there is continuing disagreement about the limits of the UNHCR's mandate, and about how UNHCR should perform its humanitarian role. But my argument is that there is a synergy between the legal definition of a refugee and 'humanitarianism'. In practical terms it may not be possible to draw a bright line between refugees and other groups in need of humanitarian assistance.

The IDP issue is greatest in situations where there are failed states and internal conflict (such as West Darfur, Sudan and Chad). In these situations,

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63 Francis Deng was the appointee. The study by Deng culminated in the Guiding Principles on Internal Displacement E/CN.4/1998/53/Add.2 of 11 February 1998.

64 Guy S Goodwin-Gill, 'International Protection and Assistance for Refugees and the Displaced: Institutional Challenges and UN Reform', paper presented at the Refugee Studies Centre Workshop, Oxford, 24 April 2006.

65 UNGA res. 48/116, 'Office of the United Nations High Commissioner for Refugees' of 20 December 1993 [12].

66 Goodwin-Gill and McAdam, above n 7, 34.

67 Established under 'Strengthening of the co-ordination of humanitarian assistance of the United Nations', GA res 46/182, of 19 December 1991 [Annex, 38].

68 Goodwin-Gill, above n 64, 2.

69 Goodwin-Gill and McAdam, above n 7, 49.

the distinction between IDP and refugee is fluid and technical, depending upon whether a person has managed to cross a border. Certainly IDP and protracted refugee situations often coexist on different sides of the border in Africa in particular. As the figures quoted above demonstrate, IDPs now outnumber refugees in today's world.

In light of the above discussion, it is perhaps unsurprising that a debate has developed over the UNHCR's increasingly 'solution-oriented' approach through its humanitarian work in regions of origin. One of the overarching problems which besets the international response to refugees is the tendency to 'contain' or 'warehouse' them in regions of origin.[70] The proponents of refugee rights stress the importance of the institution of asylum, and the UNHCR's role in defending it,[71] implicitly and expressly critiquing the UNHCR for putting too much focus upon regions of origin. They perceive this quest for solutions in regions of origin as fuelling the use by industrialised destination states of restrictive entry practices and restrictive interpretation of the refugee definition. This debate reflects the binary between the legal definition of a refugee and the notion of humanitarian protection – the latter is seen as the appropriate response in far-away places and the justification for refusal to grant refugee status by industrialised destination states.

4 IDPs and the development of humanitarian 'norms'

A plank of the argument in this chapter is that restrictive approaches to refugees reflect a confused understanding of the meaning of 'humanitarian'. As the quotations at the outset of this chapter illustrate, the word has different connotations which reflect its different uses. For example, the term 'humanitarian intervention' has been used to describe the basis of military intervention in the case of the United Nations in Iraq in 1991 (in aid of the Kurds), and subsequently by NATO in Kosovo. Often the intervention was needed in order to provide assistance to civilian populations. The term 'humanitarian assistance' has been used to describe the protection given to displaced persons, including by the UNHCR, often in the aftermath of humanitarian interventions. In legal terms, the roots for such intervention or assistance are very different. It is my central argument that, through the conflation of ideas, 'humanitarianism' has become politicised and divorced from the original meaning of 'humanitarian'. As others have said:

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[70] M J Gibney, 'Forced Migration, Engineered Regionalism and Justice between States' in S Kneebone and F Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books, Oxford, 2007), Chapter 3.

[71] A Suhrke and K Newland, 'UNHCR: Uphill into the Future' (2001) 35 *International Migration Review* 284–302 at 292; James C Hathaway, 'Forced Migration Studies: Could We Agree Just to "Date"?' (2007) *Journal of Refugee Studies* 349.

> This contemporary debate over the purposes, principles, and politics of humanitarianism reveals a struggle to (re)define the humanitarian identity . . . The debate over the humanitarian identity reflects a search to recapture the unity and purity that is tied to its presumed universality.[72]

In this section, I provide a thumbnail sketch of the legal bases of humanitarian intervention and assistance and the debates concerning the scope of these principles. In particular I want to demonstrate how the *IDP Guiding Principles* 1998 (the 'Guiding Principles')[73] attempted to reconcile these debates and to provide a normative framework within which the rights both of displaced persons and of refugees are recognised. This is in contrast to the UNHCR mandate, which lacks an explicit normative framework. Although refugee scholars argue for the need to interpret the Refugee Convention definition broadly, in accordance with its human rights context[74] and the general framework of rights, this is not mandated.[75]

The traditional meaning of 'humanitarian law' as a branch of international law is concerned with the scope of the rules of conduct in armed conflict, now codified in the 1949 Geneva Conventions and the two Protocols of 1977. The main change in humanitarian law since World War II has been its emphasis on the shielding of the civilian population from the effects of war,[76] as well as its extension into and prescription of minimum standards of humane conduct in non-international armed conflict. It has been suggested that humanitarian law shares with human rights law, albeit on a narrower basis, 'a fundamental concern for humanity'.[77]

The International Committee of the Red Cross (the 'ICRC'), which has a unique and central role in international humanitarian law as a neutral NGO providing humanitarian assistance, maintains its own guidelines of humanitarian behaviour, albeit in a context applicable to the ICRC rather than states.

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[72] Michael Barnett and Thomas G Weiss (eds) *Humanitarianism in Question: Politics, Power, Ethics* (Cornell University Press, Ithaca and London, 2008) 5.

[73] Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to Commission resolution 1997/39, Addendum, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2 (11 February 1998).

[74] This includes reference to the UDHR in the Preamble to the Refugee Convention.

[75] But note that the UNHCR Handbook recognises the human rights context and framework. However many states are reluctant to recognise its authority as other than 'mere' guidance.

[76] J-P Lavoyer, 'Forced Displacement: The Relevance of International Humanitarian Law' in Anne E Bayefsky and Joan Fitzpatrick (eds) *Human Rights and Forced Displacement* (Martinus Nijhoff Publishers, 2000), Chapter 3, 52.

[77] Rene Provost, *International Human Rights Law and Humanitarian Law* (Cambridge University Press, Cambridge, 2002) 5.

Jean Pictet famously identified seven core principles of humanitarianism for the purposes of the ICRC: humanity, impartiality, neutrality, independence, voluntary service, unity, and universality.[78]

Yet another use of the term 'humanitarian' in international law comes from the mooted doctrine of 'humanitarian intervention'. Article 2(7) of the United Nations Charter (the 'UN Charter')[79] recognises the power of the Security Council to mandate an intervention where there is a 'threat to peace' within the meaning of Chapter VII of the UN Charter (see Articles 39–42). Instances of the 'humanitarian' use by the Security Council of this power include Iraq, Somalia and Haiti, although dispute remains as to the weight accorded to humanitarian considerations in the decision to authorise intervention. There have also been arguments that states can engage in humanitarian intervention outside the auspices of the United Nations, as occurred with the NATO intervention in Kosovo.[80] Unsurprisingly, legal and policy debates around this issue have centred on the concept of state sovereignty and the politics of intervention, with some commentators pointing to inconsistencies in the use of the power to intervene in recent crises.[81]

On a broader level, the notion of humanitarian intervention has led to philosophical debates about the limits and ethics of intervention, and about the link between human rights abuse and humanitarian assistance.[82] It has

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78 See Jean Pictet, *The Fundamental Principles of the Red Cross* (Henry Dunant Institute, Geneva, 1979).

79 Charter of the United Nations, available at http://www.un.org/aboutun/charter at 20 March 2009 ('UN Charter').

80 See, generally, Chapter 1 at pp. 31–2.

81 Klinton L Alexander, 'Ignoring the Lessons of the Past: the Crisis in Darfur and the Case for Humanitarian Intervention' (2005) 15 *Journal of Transnational Law and Policy* 1; Chimni, above n 3, 256, points out that between 1991 and 1997 the Security Council made specific reference to UNHCR assuming a humanitarian role more than 30 times in contrast to a mere 4 times prior to 1991. Barnett and Weiss, above n 72, also highlight the role of the Security Council in the internal affairs of states in the name of humanitarianism, at 27.

82 E R McCleskey, 'Sovereignty and Humanitarian Intervention: A Conflict Between the Rights of States and Individuals' in Andrzej Bolesta (ed) *International Development and Assistance – where politics meet economy* (Leon Kozminski, Academy of Entrepreneurship and Management, Warsaw, 2004) Chapter 4; Simon Caney, '*Humanitarian Intervention, from Justice Beyond Borders: A Global Political Theory* (Oxford University Press, Oxford, 2005); K Luopajarvi, 'Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?' (2003) 15 *International Journal of Refugee Law* 678; J M Welsh, 'Taking Consequences Seriously: Objections to Humanitarian Intervention' in J M Welsh (ed) *Humanitarian Intervention and International Relations* (Oxford University Press, Oxford, 2004); Julie Mertus, 'Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo' (2000) 41 *William and Mary Law Review* 1743.

been suggested that the notion of humanitarian intervention has led to a move from 'sovereignty as authority' to 'sovereignty as responsibility'.[83] For example, Abiew says that 'Humanitarian intervention is based on the notion that sovereign jurisdiction is conditional upon compliance with minimum standards of human rights.'[84] In this context there is an uneasy alliance between human rights and Western security interests in the name of humanitarianism, which potentially undermines the original sense, or 'purity', of humanitarian protection.

At the level of practical guidance, the Guiding Principles are significant in promoting the normative basis for humanitarian assistance. They focus broadly on the human rights needs of displaced persons and on the need to protect IDPs from discrimination arising from displacement generally. Importantly, the Guiding Principles are not restricted to situations of armed conflict but apply to all internally displaced persons. Moreover, the Guiding Principles are based upon existing human rights protection. The Introductory Note, paragraph 9, states quite clearly:

> The purpose of the Guiding Principles is to address the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection. The Principles reflect and are consistent with international human rights law and international humanitarian law.

They are intended to provide not only practical guidance but also to be an instrument of public policy education and consciousness-raising.[85] It is also important to note that the Guiding Principles specifically recognise the rights of asylum seekers and refugees under the Refugee Convention. Principle 15 reasserts the right of internally displaced persons to seek asylum 'in another country'.

The key principles reflect the norms of 'sovereignty as responsibility'.[86] For example, Principle 3.1 states:

> National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.

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83 J M Welsh, 'Taking Consequences Seriously: Objections to Humanitarian Intervention' in J M Welsh (ed), *Humanitarian Intervention and International Relations* (Oxford University Press, Oxford, 2004) 52.

84 F W Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Kluwer, The Hague, 1999) 58.

85 Ibid [11].

86 Weiss and Korn, above n 61, 5.

The idea of 'sovereignty as responsibility' is a central concept of the Guiding Principles. For example, Principle 25 states as follows:

> 1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
> 2. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as . . . an interference in a State's internal affairs . . . Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.

Thus the Guiding Principles establish a normative framework for protection of IDPs and recognise that such may include asylum seekers. Importantly they also recognise that the causes of displacement arise from a broad range of circumstances including 'the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters'.[87] They recognise the need to protect displaced persons from discrimination 'in the enjoyment of *any* rights and freedoms' (Principle 1, emphasis added), which includes the denial of social and economic rights. The Guiding Principles contain repeated references to the need to respect human rights (Principles 5, 8, 18, 20). Principle 22 prohibits discrimination against IDPs on the basis of broad social and economic rights, including the rights to freedom of thought, conscience, religion or belief and the right to seek freely opportunities for employment and to participate in economic activities. And indeed it is because such rights are denied that IDPs flee and become asylum seekers and irregular international migrants.

As an international conference on the Ten Years of the Guiding Principles on Internal Displacement ('GP10') held in Oslo in October 2008 makes clear, although the Guiding Principles are accepted widely as spelling out the obligations of national authorities and the operational principles for protection of IDPs,[88] there are still challenges to acceptance of the normative framework of 'sovereignty as responsibility'.

Whilst the Guiding Principles recognise the 'humanitarian' needs of displaced persons, in the eyes of industrialised receiving states they are often 'economic refugees' or conflict-induced refugees who might become the objects of the exercise of humanitarian discretion. However, a proper reading

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[87] Guiding Principles on Internal Displacement – Introduction: Scope and Purpose, E/CN.4/1998/53/Add.2 (11 February 1998) 5.

[88] In 2005, more than 190 states adopted the World Summit Outcome document, which specifically recognised the Guiding Principles. See http://www.un.org/summit2005/presskit/fact_sheet.pdf.

of the Refugee Convention definition against a human rights background would lead to recognition of their legal status as refugees in destination states and be consistent with a broad 'humanitarian' reading of the Refugee Convention.

5 Into the future: the UNHCR's humanitarian role and state responses

In its November 2007 Discussion Paper, the UNHCR referred to the main causes of international flight as human rights violations and armed conflict (as noted above) and said:

> Given the uneven outcomes of the globalisation process, coupled with the growing impact of climate change on the sustainability of life in many parts of the planet, it seems likely that the issue of human mobility will become increasingly complex and assume a leading role on the global policy agenda.[89]

As noted above, one of the results of such complex movements, which include 'mixed flows' of asylum seekers and irregular migrants in search of work, has been to apply restrictive entry approaches to *all* movement, because of the 'asylum–migration nexus'. Due to the negative connotations associated with that term, recently the UNHCR has determined to avoid 'asylum–migration nexus' and instead to refer to 'refugee protection and durable solutions in the context of international migration'.[90] This solution-oriented approach to international migration includes implementation of the '10 Point Plan'[91] which was conceived and drafted in the context of the Mediterranean crisis with which this chapter began. That plan arose out of UNHCR's frustration at the lack of coordinated efforts between countries and agencies in that region.[92] But the ideas behind the 10 Point Plan are intended to be applied globally.

The 10 Point Plan is intended to assist with 'durable solutions in the context of international migration'. It has a strong emphasis on practical measures, upon cooperation, and sharing of data and information between countries and agencies. Some of the language of the 10 Point Plan is reminiscent of attempts to find 'solutions' in the 1980s, as for example in the preventing of secondary

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89 UNHCR, above n 21 [2].

90 Jeff Crisp, Research Paper No 155 April 2008, 'Beyond the nexus: UNHCR's evolving perspective on refugee protection and international migration'.

91 UNHCR, above n 21 [61].

92 See J van Selm, 'The Europeanization of Refugee Policy' in Susan Kneebone and Felicity Rawlings-Sanaei (eds) *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books, Oxford, 2007), Chapter 4, 96–9, for background to this issue. See also S Kneebone, 'The Legal and Ethical Implications of Extra-territorial Processing of Asylum Seekers' <http://arts.monash.edu.au/public-history-institute/conferences/2005-asylum/kneebone.pdf> at 20 March 2009.

movement, which is linked to policies of containment in regions of origin and restrictive entry measures by receiving states. Other parts of the 10 Point Plan hark back to the CPA for Indo-Chinese Refugees by referring to 'return arrangements' and 'alternative migration options'.

But what is also interesting for the present discussion is the way in which the UNHCR refers to its 'evolving role' in this context. The UNHCR refers to its 'precise mandate'[93] and describes itself as a 'rights-based organisation'.[94] In the November 2007 Discussion Paper it was said: the 'UNHCR's mandate is to provide protection and solutions for refugees and other persons who are of concern to the Office.'[95] It was stressed that the UNHCR's 'fundamental concern is the protection of refugees'.[96] But the UNHCR simultaneously stresses that its role is to provide humanitarian assistance and to address humanitarian concerns. Thus it is clear that the UNHCR does not see its role as involving a binary between the legal status of refugee and humanitarian protection – the former is an essential aspect of its broader role.

Yet states continue to apply the term 'humanitarian protection' to their schemes for complementary and temporary protection which by their very nature recognise the extra-legal quality of protection granted to persons who are considered to fall outside the legal definition of 'refugee'. Although schemes for complementary and temporary protection are in theory based upon the prohibition against torture contained in other human rights instruments,[97] their use has the potential to undermine the Refugee Convention. Further, in many states, the use of such forms of protection far outweighs the granting of refugee status.

As Jane McAdam has pointed out, the unique feature of the Refugee Convention in comparison with other human rights instruments is that international law requires that the person be granted the status of a refugee.[98] McAdam explains that whereas the grant of Refugee Convention status enti-

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93 Crisp, above n 90, 1.

94 UNHCR, above n 21 [18].

95 Ibid [10].

96 Ibid [13].

97 Eg *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art 7; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). Art 3. See Brian Gorlick, 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees' (1999) 11 *International Journal Of Refugee Law* 479.

98 Jane McAdam, 'The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection' in McAdam (ed) *Moving On* (2007) 267.

tles the person to a full range of rights under the Refugee Convention,[99] 'no comparable status arises from recognition of an individual's protection need under a human rights instrument'.[100] As Hathaway says: 'Refugee status is a categorical designation that reflects a unique ethical and consequential legal entitlement to make claims on the international community'.[101] Michelle Foster explains:

> Indeed, the key purpose of the Refugee Convention was not so much to define who constitutes a refugee but to provide for the rights and entitlements that follow from such recognition.[102]

In practice the Refugee Convention is bypassed in many jurisdictions, where there is an inclination to grant lesser forms of protection to recognised refugees or to deny rights due under the Refugee Convention. Increasingly, the status-conferring function of the state is used to marginalise the international system of refugee protection, and to diminish the status of refugees and asylum seekers within the community.

In some jurisdictions such as Australia and the UK there is a trend to grant what are essentially complementary forms of protection to recognised refugees. That is, such protection is treated as essentially 'humanitarian'. Australia's Temporary Protection Visa ('TPV') system, which was in place from 1999 until mid-2008,[103] is mirrored in the UK. In Australia TPV holders had less social and economic rights than other refugees.[104] In Australia there is currently no formal system of complementary protection, other than through the Minister's exercise of the so-called 'humanitarian' discretion under the *Migration Act 1958* (Cth), s. 417.[105]

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99 See, eg, Art 17 of the Refugee Convention: refugees lawfully staying are entitled to wage-earning employment. See S Kneebone, 'The Pacific Plan: the Provision of "Effective Protection"?' (2006) 18 *International Journal of Refugee Law* 696 at 703–5 for a summary of the entitlements under the Refugee Convention.

100 Ibid.

101 James C Hathaway, 'Forced Migration Studies: Could We Agree Just to "Date"?' (2007) 20 *Journal of Refugee Studies* 349, 352.

102 Foster, above n 30, 46.

103 In the May 2008 budget the Labor government announced its intention to abolish the TPV scheme, <http://www.minister.immi.gov.au/media/media-releases/2008/ce05-budget-08.htm> accessed 23 May 2008.

104 See S Kneebone 'The Pacific Plan: the Provision of "Effective Protection"?' (2006) 18 *International Journal of Refugee Law* 718–20.

105 There have been many critiques of this situation. The current government has introduced a Migration Amendment (Complementary Protection) Bill 2009 to establish a formalised system of complementary protection.

In the UK, applicants granted refugee status are given a five-year temporary residence permit, called 'limited leave to remain'. Near the end of this term applicants may apply for permanent settlement, that is, 'indefinite leave to remain' in the UK. Alternatively, an applicant may be found to be entitled to one of the two forms of complementary protection: Humanitarian Protection, which entitles the applicant to be granted leave to remain in the UK for a period of five years,[106] or Discretionary Leave, under which an applicant will be granted leave to remain for a period of no longer than three years.[107] Those applicants granted complementary protection are able to apply for indefinite leave to remain after meeting specific qualification criteria.[108]

The tendency to complementary 'humanitarian' protection is also present in the European Union asylum system. Council Directive 2004/83/EC of 29 April 2004, also known as the 'Qualification Directive', provides 'minimum standards for the qualification and status of third country nationals . . . as refugees or as persons who otherwise need international protection'. In particular the Qualification Directive lays down the criteria for 'subsidiary protection status', which is 'complementary and additional to the refugee protection enshrined in the' Refugee Convention.[109] McAdam has critiqued the Qualification Directive, saying:

> While it establishes a harmonised legal basis for complementary protection in the EU, it does so in a political environment that is suspicious of asylum-seekers, that seeks restrictive entrance policies and that is wary of large numbers of refugees.[110]

Another commentator on the Directive has said:

> European policies have changed from being primarily rooted in humanitarian considerations to becoming more focused on state interests. One of the conse-

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[106] Immigration Rules, para. 339E, http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11 at 20 March 2009.

[107] See Home Office, 'Asylum Policy Instructions: Discretionary Leave', 9 April 2008, <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/> at 19 April 2008.

[108] Applicants who have completed five years' Humanitarian Protection leave will be eligible to apply for Indefinite Leave to Remain: see Home Office, 'API: Humanitarian Protection', October 2006 [9]. Applicants on Discretionary Leave are eligible to apply for Indefinite Leave to remain after completing either six or ten continuous years of Discretionary Leave (depending on the reason the applicant was granted leave): see Home Office, 'API: Discretionary Leave'.

[109] Council Directive 2004/83/EC of 29 April 2004, Preamble clause 24.

[110] Jane McAdam, 'The European Union Qualification Directive: the Creation of a Subsidiary Protection Regime' (2005) 17 *International Journal of Refugee Law* 461, 465.

> quences of this change is that the human rights machinery today plays a stronger role than hitherto as an instrument to counterbalance state powers. Consequently, we are now witnessing a conflict between new refugee policies and human rights law.[111]

This statement demonstrates that one of the side effects of the binary between legal refugee status and the concept of humanitarian protection is that states use human rights instruments as their 'sword'. By relying upon the complementary protection route provided by these instruments, they undermine the Refugee Convention. As this statement recognises, humanitarian considerations morph with state interests.

6 Conclusion

In this chapter I have located the restrictive responses of industrialised states to refugees and asylum seekers within a binary between the legal status of a refugee (as envisaged by the Refugee Convention) and the notion of humanitarian protection as 'extra-legal'. In particular, I have referred to restrictive interpretations of the individualised Refugee Convention definition, as in the case of persons fleeing conflict or discrimination on the basis of denial of social and economic rights, to illustrate the point. I have also pointed to the tendency of industrialised states to use schemes for complementary and temporary protection as 'humanitarian protection' in place of granting refugee status as further evidence of the use of a binary.

I have pointed out that this binary appears in the UNHCR's mandate, but that the UNHCR has consistently considered refugee protection to be an aspect of its general humanitarian role. I have argued that there is a synergy between the legal definition of a refugee and 'humanitarianism', as indicated by the human rights context of the Refugee Convention. Restrictive responses to refugees and to interpretation of the refugee definition reflect a confused understanding of the meaning of 'humanitarian' and narrow readings of the Refugee Convention definition. It seems that in this context 'humanitarian' has become synonymous with state discretion and border protection, rather than with human rights protection. In other words, the use of the term 'humanitarian protection' by industrialised destination states in relation to refugees denies credence to the Refugee Convention.

In this chapter, I have put the refugee 'problem' into the broader political and international context of displaced persons. I argued, through an examination of the different uses of 'humanitarian' in the context of displaced persons,

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[111] Morten Kjaerum, 'Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?' (2002) 24 *Human Rights Quarterly* 513–36 at 513–14.

that a similar misunderstanding of the term exists at the international level. There also, the notion of humanitarian protection has become confused with state interests. This is reflected in critiques of the UNHCR's role as a humanitarian organisation. It is my central argument that, through conflation of ideas, 'humanitarianism' has become politicised and divorced from the original meaning of 'humanitarian'.

However, the IDP Guiding Principles are significant in promoting the normative basis for humanitarian assistance. Importantly, they recognise the complex causes for movement and the right to seek asylum. They should be looked to for guidance on the rights of refugees and for promoting interpretations of the Refugee Convention definition within a human rights framework.

10. International criminal law

Elies van Sliedregt and Desislava Stoitchkova

1 Introduction

The term 'international criminal law' harbours various meanings. Traditionally it refers to the international aspects of national criminal law. It concerns the legal issues that arise when prosecuting cross-border crime. States conclude agreements and treaties on how to proceed when prosecuting such crimes. State sovereignty plays an important role in this type of 'internationalised' criminal law. Various designations are used to refer to it: transnational criminal law, horizontal international criminal law, or *droit pénal international*. Topics that are typically part of this type of law are: (i) extraterritorial jurisdiction, (ii) extradition, (iii) police and judicial cooperation, (iv) transfer of criminal proceedings and (v) transfer and execution of foreign judicial decisions.

Many treaties have been concluded to shape such inter-State collaboration; some extradition treaties date back to the 16th century. Criminal cooperation agreements can be bilateral or multilateral. Multilateral treaties very often are the product of cooperation within a regional or international organisation such as the Council of Europe or the United Nations (the 'UN'). In recent years, the European Union (the 'EU') has been active in setting up a cooperation regime in criminal matters for its Member States. This more informal and efficient regime replaces the classical inter-State criminal cooperation regime of the Council of Europe and is based on the principle of 'mutual recognition' of foreign judicial decisions, which limits the exercise of State sovereignty and requires States to recognise foreign judicial decisions as if they were their own. In this chapter we will refer to this branch of international criminal law as 'transnational criminal law'.

The other type of international criminal law refers to the criminal law aspects of international law. It regulates the prosecution of a small class of 'core crimes': so-called international crimes. Genocide, crimes against humanity, war crimes, and aggression are regarded as universally condemned and can be the subject of prosecution at the international level.[1] All four

[1] See Statute of the International Criminal Tribunal for the former Yugoslavia ('ICTY Statute'), adopted on 25 May 1993 by UN Security Council Resolution 827, Articles 2 to 5; Statute of the International Criminal Tribunal for Rwanda ('ICTR

crimes have an international pedigree in that they are defined and developed in international treaty and customary law and/or the case law of the international criminal tribunals. In contrast, torture, as defined in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the 'CAT'),[2] is generally not regarded as belonging to the class of international crimes. Although it has an international pedigree by being defined in an international treaty, it is not part of an international criminal statute, at least not as a self-standing crime. When committed during an armed conflict, torture can be a war crime, or, as part of a widespread or systematic attack, it can be a crime against humanity.

More and more international crimes are prosecuted at the national level, often on the basis of universal jurisdiction. This branch of international criminal law differs from transnational criminal law in that it originates from international law. Moreover, State sovereignty plays a lesser, or less prominent, role than in transnational criminal law. This follows from the applicable cooperation regime that regulates the cooperation of States with international judicial institutions such as the *ad hoc* International Criminal Tribunals for the Former Yugoslavia ('ICTY') and Rwanda ('ICTR'), and the International Criminal Court ('ICC'). This type of international criminal law has been referred to as international criminal law *per se*, supranational criminal law, vertical international criminal law, and *droit international pénal*. In this chapter we will refer to it as 'international criminal law'.

What the two branches of international criminal law have in common is that they lie on the fault line between two fields of law: international law and criminal law. These two types of law are inherently different. The subjects of international law are States, while criminal law deals with individuals. Sources of international law include unwritten, fluid rules of customary international law. Criminal law, on the other hand, requires clear written rules,[3] as stipulated by the principle of legality. The combination of these two fields may result in an unfortunate position for the individual accused, as will be illustrated below.

In Section 2, we will explore the concepts and legal instruments that make up transnational criminal law. Extradition, mutual legal assistance, and the transfer of proceedings and execution of sentences will be discussed as part of

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Statute'), adopted on 8 November 1994 by UN Security Council Resolution 955, Articles 2 to 4; and *Rome Statute of the International Criminal Court*, opened for signature 17 June 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('ICC Statute') Articles 5 to 8.

[2] Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT').

[3] While codification is becoming the norm, with regard to certain offences, defences and modes of liability, common law countries still rely on unwritten rules in the sense of legislation, although public, written judgments are given.

the traditional inter-State cooperation in criminal matters in Subsection 2A. We will then consider a new form of inter-State cooperation, the European Arrest Warrant ('EAW') in Subsection 2B. Section 3 will focus on international criminal law (*per se*). Subsection 3A contains a historical introduction to prosecution at the international level, which is followed by an overview of the international(ised) courts and tribunals that try those accused of international crimes. In Subsection 3B, substantive international criminal law will be discussed, in particular definitions of international crimes, criminal responsibility and defences. Moving from substantive law to procedural law, Subsection 3C is concerned with international criminal procedure, an emerging discipline of international criminal law. Subsection 3D deals with the cooperation between States and the international courts and tribunals. This is where the two branches of international criminal law converge. Finally, in Section 4 the position of the individual will be highlighted in both transnational criminal law and international criminal law *per se*.

2 Transnational criminal law

A International legal cooperation

International legal cooperation concerns those powers that a State has at its disposal to cooperate with other States in investigating, prosecuting and adjudicating cross-border crimes, crimes committed by its nationals abroad, and crimes committed by foreigners within its borders. A distinction can be made between primary legal cooperation and secondary legal cooperation.[4] Primary legal cooperation comprises those measures that provide for the transfer of an essential part of the criminal procedure, for instance, the prosecution of a crime or the enforcement of a penalty. Secondary legal cooperation encompasses various forms of assistance to another State, for instance, the extradition of a suspect or convicted person. Another distinction between legal cooperation measures can be made between cooperation measures in the phase *before* a conviction has been entered, for instance extradition of suspects or the transfer of prosecution, and cooperation measures that can be taken *after* the conviction, such as extradition of convicted persons and the transfer of sentences. In the following we will discuss the four most important legal cooperation matters.

(i) Extradition Extradition is probably the oldest form of inter-State cooperation in penal matters. It is the surrender of a person by one State to another,

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[4] Harman G Van der Wilt, 'Internationaal Strafrecht', in N Horbach et al (eds) *Handboek Internationaal Recht* (TMC Asser Press, The Hague, 2007) 513.

the person being accused of a crime in the requesting State or unlawfully at large after conviction.[5] Some States only extradite persons on the basis of a treaty, as required by their constitution or extradition law. While international law does not require a treaty basis for extradition, many States have concluded extradition treaties. Such treaties create legal certainty and warrant reciprocity with regard to mutual obligations. Moreover, by concluding extradition treaties, States express the trust they have in each other's criminal justice system. When an extradition treaty has been concluded, the Judge and the Executive no longer have to scrutinise the criminal system of a State to determine whether extradition to that State is opportune or even allowed.[6]

(a) Refusal grounds Extradition treaties originate from the common interests of States in combating crimes. However, States generally still retain the power to refuse extradition requests. In fact, many States have limited their cooperation by adopting declarations, reservations and refusal grounds, so they can demand guarantees and safeguards before deciding on extradition requests. *Ne bis in idem*,[7] trials *in absentia*, prosecution of minors and extradition of nationals are all grounds upon which a refusal to cooperate can be based. This widespread practice of reservations and refusal grounds indicates that parties to an extradition treaty to a certain extent retain their sovereignty.

Many bilateral extradition treaties have been concluded between States. Multilateral extradition treaties have been signed in the context of regional and international organisations. In Europe, the most important treaties have been negotiated and endorsed under the auspices of the Council of Europe, such as the 1957 *European Extradition Convention*.[8] Since the terror attacks of 11 September 2001, there has been sufficient political support within the EU to implement a new, more efficient and expedited extradition scheme (referred to as 'surrender') by way of the EAW, discussed in subsection 2B below.

(b) Principles underlying extradition International cooperation in criminal matters requires trust in other States' criminal justice systems. Such trust is often presumed when an extradition treaty exists. In the words of Justice

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5 R Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2007) 79.

6 Albert H J Swart, *Nederlands Uitleveringsrecht* (WEJ Tjeenk Willink, Deventer, 1986) 56.

7 Literally 'not twice for the same' means that no legal action can be instituted twice for the same conduct. The concept originates in Roman civil law; in common law terms it is referred to as the double jeopardy rule.

8 *European Convention on Extradition*, opened for signature 13 December 1957, 359 UNTS 273 (entered into force 18 April 1960).

Holmes in *Glucksman v Henkel*, 'we are bound by the existence of an extradition treaty to assume that the trial will be fair'.[9] From this trust or 'good faith' principle stems the rule of non-inquiry, which prohibits a State from thoroughly scrutinising an extradition request and inquiring into the motives behind it.

On the other hand, there is no rule of international law that obliges States to trust another State blindly and to cooperate with it unconditionally, which explains the existence of refusal grounds as discussed above. Two other principles can be mentioned in this context, namely the tenet of double criminality and the rule of speciality. The principle of double criminality requires that the underlying act or omission is criminal in both the requesting and the requested State.[10] The rationale underlying this rule is primarily State sovereignty; a State should not be required to extradite a person to another State for an offence that would not amount to a crime under its own law. Some claim that the double criminality principle is closely linked to the legality precept (*nulla poena sine lege*),[11] while others hold that it serves to protect the human rights of the requested person.[12] Recently, cooperation agreements have been adopted within the EU that have abolished the double criminality requirement. The EAW, for instance, does away with double criminality for a limited number of crimes. These offences are thought to be so serious that they are considered crimes throughout the EU. We will discuss the EAW in more detail below.

The rule of speciality requires the requesting State to bring proceedings against the requested person only for the crime, or crimes, for which the person has been extradited. The rule of speciality may be waived when the requested State or the requested person consents to prosecution of, or execution of a sentence for, other offences.[13]

(c) Extradition procedure The extradition procedure is governed by the law and practice of the requested State. Generally, a two-tier decision-making process is in place. A court considers the formal requirements and

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9 *Glucksman v Henkel* (1911) 221 U.S. 508.

10 Generally see N Jareborg, *Double Criminality – Studies in International Criminal Law* (Iustus Förlag, Uppsala, 1989).

11 R Cryer et al, above n 5, 74.

12 M Plachta, 'The Role of Double Criminality in Penal Matters' in N Jareborg (ed) *Double Criminality – Studies in International Criminal Law* (Iustus Förlag, Uppsala, 1989) 128–9.

13 See C Nicholls and J Knowles, *The Law of Extradition and Mutual Assistance: International Criminal Law – Practice and Procedure* (Oxford University Press, Oxford, 2007, 2nd ed) 180. See also G Gilbert, *Aspects of Extradition Law* (Martinus Nijhoff, Dordrecht, 1991) 106.

the admissibility of the extradition request, while the actual surrender is an executive decision. This 'dual key' decision-making is especially relevant with regard to refusal grounds that touch on sensitive areas, such as another State's human rights situation. The Executive is thought to be best equipped to deal with such sensitivities. As we will see below, the EAW provides for a purely judicial procedure, with the Executive having been removed to make the procedure more efficient and expeditious.

An extradition procedure is not a regular criminal procedure; it is not a 'trial' in the sense of Article 6 of the *European Convention on Human Rights* ('ECHR').[14] The trial to determine guilt or innocence will already have occurred, in the case of a convicted person being extradited to serve a sentence, or will take place in the State requesting extradition. The requested person will normally have an opportunity to be heard and an opportunity to raise objections to extradition. However, the presumption of innocence does not apply; the prosecution in the requested State does not have the onus to prove that the requested person is guilty. Rather, the burden lies on the requested person to disprove guilt. Extradition will be refused when the requested person can unequivocally demonstrate that he or she is innocent.

(d) 'Alternatives' Extradition is a formal and rather lengthy procedure. It can take months before a person is extradited. Moreover, an extradition request does not necessarily guarantee the requested person's passage to the territory of the requesting State. After all, refusal grounds, such as the political offence exception, may pose an obstacle to extradition.[15] To circumvent ineffective extradition, or non-extradition, States have resorted to extra-judicial means to apprehend the fugitive and bring him or her before their courts.

Adolf Eichmann was abducted from Argentina by Israeli agents in order to be tried by an Israeli court for genocide.[16] Argentina, not having consented to

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[14] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 262 (entered into force 3 September 1953) ('ECHR').

[15] The political offence doctrine covers two types of crimes: 'relative' political offences, which are committed in connection with a political act or common crimes committed for political motives or in a political context, and 'pure' or 'absolute' political offences, such as treason, sedition and espionage. The latter category is covered by the exception to extradition.

[16] *Attorney-General of Israel v Eichmann* (District Court of Jerusalem, 1968) 36 ILR 5; *Attorney-General of Israel v Eichmann* (Supreme Court, 1968) 36 ILR 277; see H Silving 'In re Eichmann: A Dilemma of Law and Morality' (1961) 55 *American Journal of International Law* 307, and P O'Higgins 'Unlawful Seizure and Irregular Rendition' (1960) 36 *British Yearbook of International Law* 279.

the abduction, filed a complaint with the UN against Israel for violating its territorial sovereignty. More recently the US has relied on 'extraordinary rendition' as part of its fight against terrorism. Suspects of terrorism are captured and moved around the globe to be interrogated, and possibly tried. These 'alternatives' breach international law in terms of both State sovereignty and human rights provisions. When it comes to the human rights of the person who is subject to rendition or abduction, the rule is clear: no State may ever send a person to a place where the person is likely to be tortured, and certainly not with the intention of him or her being tortured. This has been confirmed in the *Alzery*[17] case before the Human Rights Committee and in *Agiza*[18] before the CAT committee.

The fact that extra-judicial alternatives to extradition violate international law does not mean that a court should divest itself of the power to try a person once he or she has been brought before it. The District Court of Jerusalem decided to exercise jurisdiction and try Eichmann.[19] In accordance with the maxim *male captus bene detentus*, some national courts have long been prepared to try accused persons regardless of the irregular means by which they have been apprehended.[20] In recent years the *male captus* rule has been superseded occasionally by the abuse of process doctrine, which requires a court to decline jurisdiction and stay proceedings when the defendant has been brought to court in an unlawful manner or because his human rights have been violated.[21] This doctrine has been applied by courts in New Zealand, South Africa and England.[22] The abuse of process doctrine is not recognised by the United States.

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[17] *Alzery v Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee (HRC), 10 November 2006.

[18] *Agiza v Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 20 May 2005.

[19] *Attorney-General of Israel v Eichmann* (District Court of Jerusalem, 1968) 36 ILR 5.

[20] This has been particularly the case in the United States: see for example *Ker v Illinois* (1886) 119 US 436; *Frisbie v Collins* (1952) 342 US 519; *United States v Alvarez-Machain* (1992) 31 ILM 900. A notable exception to the *male captus* reasoning was *United States v Toscanino* (2d Cir. 1974) 500 F. 2d 267. See R Rayfuse, 'International Abduction and the United States Supreme Court: The Law of the Jungle Reigns' (1993) 42 *The International and Comparative Law Quarterly* 882.

[21] Andrew L-T Choo, 'International Kidnapping, Disguised Extradition and Abuse of Process' (1994) 57 *The Modern Law Review* 626; C Warbrick, 'Judicial Jurisdiction and Abuse of Process' (2000) 49 *The International and Comparative Law Quarterly* 489.

[22] *Regina v Hartley* (C.A. 1978) 2 NZLR 199; *State v Ebrahim* (1992) 31 ILM 888; *R v Horseferry Road Magistrates' Court, ex p. Bennet* (1993) 3 All ER.

At the ICTY, the *male captus bene detentus* rule was adhered to in the case of a Bosnian Serb who was forcibly abducted from the Republika Srpska and handed over to NATO forces, who then brought him to the Tribunal in The Hague.[23] In balancing the interest of the accused and his human rights against the interest of the international community and the legitimate expectation that those accused of international crimes would be brought to justice, the Appeals Chamber held that since there was no evidence '[t]hat the rights of the accused were egregiously violated in the process of his arrest ... the procedure adopted for his arrest did not disable the Trial Chamber exercising its jurisdiction.'[24] The *Nikolic* case demonstrates that there is an 'Eichmann exception' to the abuse of process doctrine; that is, when it comes to universally condemned offences such as genocide, crimes against humanity or war crimes, a court will not easily divest itself of jurisdiction.

(ii) Mutual legal assistance Another form of (secondary) legal cooperation is mutual legal assistance ('MLA'), which can be best described as providing investigative and/or prosecutorial assistance at the request of a State for the purpose of a criminal investigation or prosecution in that State. MLA may consist of the taking of witness statements, search and seizure, cross-border pursuit and observation, or the serving of documents.

Originally, MLA was regulated alongside extradition as the instrument with which a requested person's goods or articles could be seized and subsequently used as evidence. It developed into an independent instrument from the 'Letters Rogatory', a system of requests for assistance with the taking of evidence or sending delegations to another State to conduct their own investigations.

MLA is regulated in bilateral and multilateral treaties, such as the 1959 *Council of Europe Convention on Mutual Assistance in Criminal Matters*[25] and the 2000 *Convention on Mutual Assistance in Criminal Matters* between the Member States of the EU. The latter instrument simplified existing procedures and introduced new forms of cooperation.[26] In a global context, MLA

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[23] *Prosecutor v Dragan Nikolic*, Case No. IT-94-02-AR73, T. Ch. II, ICTY (18 December 2003).

[24] Ibid [32].

[25] Opened for signature 20 April 1959, ETS No. 30 (entered into force on 12 June 1962).

[26] Such as 'joint investigation teams' where police and judicial authorities from different Member States work together in investigating and prosecuting transnational crime. See C R J Rijken and G Vermeulen, *Joint Investigation Teams in the European Union* (Cambridge University Press, Cambridge, 2006); M Plachta, 'Joint Investigation Teams' (2005) 13 *European Journal of Crime, Criminal Law and Criminal Justice* 284.

can be found in, *inter alia*, the 2003 *Corruption Convention*,[27] the 1984 *Torture Convention*,[28] and the *International Convention for the Suppression of the Financing of Terrorism*.[29]

From an individual defendant's and a State sovereignty point of view, MLA as a form of legal cooperation is less intrusive, or serious, than extradition. As a result, most legal systems provide for MLA procedures that are less formal than extradition proceedings. States may still retain the possibility to rely on refusal grounds, although the double criminality requirement is not as widely accepted a condition for MLA as it is for extradition. Moreover, in some States, MLA can be given without there being a treaty basis through informal MLA ('informal MLA').

The rule of non-inquiry also applies to MLA and this can be problematic when criminal justice systems differ with regard to certain prosecutorial and investigative powers. If, for example, the requested State has relied upon search and seizure powers that would be considered unlawful in the requesting State and the requested evidence has been produced as a result of those powers, the individual defendant cannot argue that the evidence is 'unlawful' and therefore precluded from being provided to the authorities of the requesting State (although it might still be open for the accused to argue at trial that the evidence obtained through MLA should be declared inadmissible.) MLA, like extradition, is considered an agreement between States that trust each other; the requesting State must assume that the requested State has collected the evidence in good faith and as a result it cannot be challenged in court.[30]

(iii) Transfer of proceedings and enforcement of penalties Transfer of proceedings and enforcement of penalties are two forms of legal cooperation that, unlike extradition and MLA, are *primary* forms of inter-State cooperation in criminal matters; a substantial part of the criminal procedure is transferred

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[27] Opened for signature 31 October 2003, UN General Assembly Resolution 58/4 (entered into force on 14 December 2005) ('Corruption Convention').

[28] Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('Torture Convention').

[29] Opened for signature 9 December 1999, 39 I.L.M. 270 (2000) (entered into force 10 April 2002).

[30] Consider the statement by Van Hoek and Luchtman: 'International criminal cooperation, being a part of foreign policy, is a matter that has to be dealt with by the executive . . . Therefore, the courts should not – as a rule – entertain questions concerning the legitimacy of the acts of foreign authorities.' A A H van Hoek and M J J P Luchtman, 'Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights' (2005) 1 (2) *Utrecht Law Review* 2, available at <www.utrechtlawreview.org>.

from one State to another. Due to the nature of these cooperation forms, both transfer of criminal proceedings and enforcement of penalties require double criminality.

Criminal proceedings may be transferred for reasons of 'prosecutorial economy', for instance when co-accused find themselves in the requesting State, or when the requesting State has already started prosecution against the accused. Another important reason for transferring proceedings is of a humanitarian nature, that is, to facilitate reintegration into society. It makes sense to transfer a trial to the country of which the accused is a national. The trial will be conducted in his or her mother tongue and relatives can easily visit. The most well-known multilateral instrument in this area is the 1972 *European Convention on the Transfer of Proceedings in Criminal Matters* ('ECTP').[31]

Enforcement of a penalty in a jurisdiction other than where the penalty was imposed may have various justifications. Firstly, there may be humanitarian reasons, since both the transfer of proceedings and the transfer of execution of sentences aim to bring suspects and sentenced persons back to their State of nationality or residence. Secondly, agreeing to transfer the enforcement of penalties may facilitate extradition. An otherwise reluctant State may agree to extradite on condition that the requested person is returned to serve the sentence imposed.[32] Two ways of enforcing a penalty may be discerned: direct enforcement and the conversion of penalties in the administering State where the penalty is to be enforced. Both bilateral and multilateral treaties have been concluded to provide for the enforcement of penalties. The most well-known treaties are the 1970 *European Convention on the International Validity of Criminal Judgments*[33] and the 1983 *Convention on the Transfer of Sentenced Persons* ('CTSP').[34]

The ECTP provides for refusal grounds, which mainly relate to the purpose of transferring proceedings. Transfer may be refused when the accused is a non-national or does not reside in the requested State. The CTSP does not provide for a catalogue of mandatory refusal grounds and thus leaves it up to States to declare, or not, in which circumstances they refuse to cooperate.

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[31] Opened for signature 15 May 1972, ETS No 73 (entered into force 30 March 1978).

[32] The Netherlands does not allow for the extradition and surrender of nationals, unless the penalty will be enforced in the Netherlands and converted to Dutch standards. See Section 4(2) of the *Dutch Extradition Act* ('*Extradition Act'*) and the judgment of the Dutch Supreme Court, 31 March 1995, *Nederlandse Jurisprudentie* 1996, nr 382.

[33] Opened for signature 28 May 1970, ETS 070 (entered into force 26 July 1974).

[34] Opened for signature 21 March 1983, ETS 112 (entered into force 1 July 1985).

B New forms: the European Arrest Warrant

The Framework Decision ('Decision') establishing the EAW entered into force on 1 January 2004.[35] Since the adoption of the Italian law transposing the Decision on 22 April 2005, the EAW has been operational throughout the EU and has largely replaced traditional extradition procedures. Mutual trust, or 'a high level of confidence', has been a key notion underlying the system of cooperation in criminal matters in the EU. Mutual trust has been referred to by the Council of the European Union as the 'bedrock' of the Decision on the EAW. It provides the basis for mutual recognition, which in turn is considered to be the 'cornerstone' of EU judicial cooperation in criminal matters.

In the context of the EAW, mutual trust has been the reason for abolishing the double criminality rule for a number of crimes and for removing the Executive from the decision-making process. In October 1999 the European Council in Tampere, Finland, asserted that mutual recognition (of judicial decisions and judgments) was to be the 'cornerstone' of judicial cooperation within the EU.[36] The concept of mutual recognition and mutual trust is premised on the assumption that the EU Member States share common values and rights. However, mutual trust has not resulted in the elimination of refusal grounds. While the European Commission sought to introduce a cooperation scheme that fundamentally differed from extradition, with only a limited number of refusal grounds and no double criminality requirement for *any* of the underlying crimes, the draft proposal Framework Decision was 'watered down' in negotiations by the Council of Ministers by the insertion of concepts and refusal grounds derived from extradition law.[37] Indeed, most refusal grounds listed in the Decision establishing the EAW reflect grounds of refusal that feature in extradition treaties and national extradition statutes. In that sense there is still room for 'distrust' and sovereignty concerns.

The above may prompt us to describe the EAW as 'extradition in transition' rather than a revolutionary new form of cross-border transfer of suspects and

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[35] *Council Framework Decision* (on the European Arrest Warrant and the Surrender Procedure between Member States, 2002/584/JHA, 13 June 2002).

[36] A programme was adopted shortly after the meeting: 'Programme of measures to implement the principle of mutual recognition of decisions in criminal matters', 2001/C12/02; *Official Journal of the European Communities*, C12/10, 15 January 2001.

[37] For instance the 'territoriality exception' whereby a State can refuse surrender in case the (alleged) crime has been committed on the territory of the executing (requested) Member State (Section 4 (7) *European Arrest Warrant Act* 2003) (the '*EAW Act'*), or where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing (requested) Member State and the acts fall within the jurisdiction of that Member State under its own criminal law (Section 4(4) *EAW Act*).

sentenced persons.[38] There is, however, one important difference with extradition: all refusal grounds are relied upon by the courts. The EAW scheme makes judicial authorities solely responsible for surrendering individuals to other Member States – a responsibility they (used to) share with the Executive with regard to extradition.

The Decision establishing the EAW, drawn up in the aftermath of the 9/11 attacks, emphasises efficiency and expediency as a result of the desire for an informal and swift surrender procedure. Experts in and practitioners of extradition law, however, have been critical. They have held that the emphasis on efficiency is to the detriment of the requested person's (human) rights.[39] In July 2005, the German Federal Constitutional Court annulled Germany's law transposing the Decision because it did not adequately protect German citizens' fundamental rights, a condition for extraditing German nationals.[40] The Dutch Extradition Chamber was creative in inserting a humanitarian refusal ground into the *EAW Act* by analogy with section 10(2) of the *Extradition Act*. Thus it enabled refusal on 'humanitarian grounds'.[41] However, the Dutch Supreme Court quashed the ruling. It held that the legislature never intended to include a humanitarian refusal ground in the *EAW Act*. According to the Supreme Court, section 35(3) only allows for humanitarian reasons to delay surrender proceedings, not to refuse them entirely.[42]

3 International criminal law

A Brief history of international prosecutions

The prosecution of international crimes finds its origins in the laws and customs of war, which have long entitled belligerent parties to put on trial nationals of the adversary for resorting to prohibited means and methods of warfare. The period following the end of the First World War was marked by several failed attempts to establish international criminal institutions for the

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38 E van Sliedregt, 'The European Arrest Warrant: Extradition in Transition' (2007) 3 *European Constitutional Law Review* 244–52.

39 S Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?', (2004) 41 *Common Market Law Review* 5–36. See also Chapters 11, 12 and 13 in R Blextoon and W Van Ballegooij (eds) *Handbook on the European Arrest Warrant* (Cambridge: TMC Asser Press, 2005) 167–209.

40 18 July 2005, 2 BvR 2236/04, available at <www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604.html> at 2 March 2009. See for a commentary C Tomuschat, 'Inconsistencies – The German Federal Constitutional Court on the European Arrest Warrant' (2006) 2 *European Constitutional Law Review* 209–26.

41 Amsterdam District Court (2 December 2005) LJN: AU8399.

42 Dutch Supreme Court (28 November 2006) LJN: AY6631.

prosecution of offences against the laws of nations and humanity.[43] It was not until 1945, however, that the first international tribunal was successfully established, as a reaction to the egregious crimes committed by the Nazis during the Second World War.

The Nuremberg Tribunal was set up by the Allied Powers to prosecute German military and political figures for crimes against peace, war crimes and crimes against humanity. Its jurisdiction also extended to organisations. Acknowledging the moral significance of bringing to trial not only the masterminds behind Nazi crimes but also the multitude of rank-and-file persons whose acquiescence in criminal activities ensured the smooth running of the German war machine, the Nuremberg Tribunal eventually declared the Nazi party leadership corps, the Gestapo/SD and the SS to be criminal organisations.[44] These declarations of criminality subsequently served as the basis for the prosecution of individual organisation members before the national military tribunals of the Allied Powers.

Mirroring the Nuremberg model, in 1946 the Allied Powers established the Tokyo Tribunal to prosecute crimes committed in South-East Asia between 1928 and 1945. Its subject-matter jurisdiction covered the same categories of crimes as the Nuremberg Tribunal, but there was no provision extending to organisations.[45]

Both the Nuremberg and the Tokyo Tribunals ('the Tribunals') have been heavily criticised for representing 'victors' justice'. The circumstances surrounding their set-up, the streamlined procedures and the selective prosecution of defendants cast a shadow on the impartiality and independence of the institutions. The arguably retrospective character of the Nuremberg and Tokyo Charters and the Tribunals' application of some rather unconventional legal doctrines (for example, on criminal organisations) have been viewed as unjustifiably geared towards meeting the needs of the trials and tainting the fairness of the judicial process.[46]

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43 See generally G Werle, *Principles of International Criminal Law* (TMC Asser Press, The Hague, 2005) 3–6.

44 Volume 1, *Trial of the Major War Criminals Before the International Military Tribunal* 29 (Washington, 1947) 257–62.

45 Compare Articles 9 and 10 of the Charter of the International Military Tribunal of Nuremberg (Document LX), London, 8 August 1945, *Report of Robert H. Jackson on the International Conference on Military Trials*, 420, with Article 5 of the Charter of the International Military Tribunal for the Far East, *reprinted in XV Trials of War Criminals before the Nurenberg Military Tribunals under Control Council Law No. 10* (Government Printing Office, Washington, 1950) 1218.

46 For a general overview of such critiques see, eg, E Borgwardt, 'Re-Examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Laws' (2005) 23 (2) *Berkeley Journal of International Law*

At the same time, however, the Nuremberg and Tokyo trials set an important precedent and gave a significant impetus to the development of international criminal law. Although a multitude of defendants could have easily been imprisoned or executed without resort to complex judicial procedures, those who stood trial were given due access to law.[47] The Tribunals were cautious in imposing criminal liability. Conscious of the context in which they were operating and the legal shortcomings of the process, they made an honest effort to avoid imposing any form of strict liability or collective punishment. The trials' greatest legacy, though, lies in their endorsement of the notion of individual responsibility for international crimes and the denunciation of the acts of State and superior orders defences. Nuremberg and Tokyo set in motion a new trend in the development of international standards for legal conduct and marked the beginning of the international criminal justice system.

The political tensions caused by the Cold War precluded all immediate efforts on the part of the international community to follow up on the Nuremberg and Tokyo precedents and set up more permanent institutions for the prosecution of international crimes.[48] It was not until the early 1990s, as a response to the atrocities committed during the conflicts in Yugoslavia and Rwanda, that the UN established the first genuinely international legal mechanisms for bringing to justice individuals who had committed the most serious crimes against humankind.

The ICTY and the ICTR were established by resolutions of the Security Council under Chapter VII of the UN Charter ('UN Charter').[49] While both institutions are subsidiary organs of the UN, they are largely operationally independent.[50] The ICTY has jurisdiction over grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, genocide and crimes against humanity perpetrated on the territory of the former Yugoslavia after 1 January 1991.[51] The subject-matter jurisdiction of the ICTR is somewhat different, reflecting the non-international nature of the Rwandan conflict. It extends to genocide, crimes against humanity, and violations of Common

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401–62, and G Ginsburgs and V N Kudriavtsev (eds) *The Nuremberg Trial and International Law* (Kluwer Academic Publishers, Dordrecht, 1990).

47 Borgwardt, above n 46, 457.

48 A Cassese, *International Criminal Law* (Oxford University Press, New York, 2008) 323–4.

49 Charter of the United Nations, 1 UNTS XVI, 24 October 1945.

50 D McGoldrick, 'Criminal Trials Before International Tribunals: Legality and Legitimacy' in D McGoldrick, P Rowe and E Donnelly (eds) *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, Portland, 2004) 24.

51 ICTY Statute, Articles 2 to 5.

Article 3 to the Geneva Conventions and their Additional Protocol II, committed in Rwanda or by Rwandan citizens in neighbouring countries between 1 January and 31 December 1994.[52]

Both the ICTY and the ICTR have concurrent but primary jurisdiction over domestic courts.[53] Thus they may hold a retrial when national proceedings are deemed not to have been impartial, independent or diligently conducted.[54] Domestic courts are furthermore obliged to defer their competence, should the tribunals request so.[55] However, as both institutions must complete all activities by 2010, in accordance with Security Council Resolutions 1503 and 1534, no new investigations are currently being opened and low-profile cases are in fact being referred back to domestic courts.

Since their inception, the ICTY and the ICTR have been subjected to continuous criticism. While defendants have questioned their legality and legitimacy, victims and the populations of the former Yugoslavia and Rwanda have raised doubts as to the tribunals' impartiality and independence. At the same time, legal scholars and practitioners have on various occasions condemned the institutions for their perceived inefficiency, maladministration and misplaced attempts to tackle adequately contentious issues of substantive or procedural law.[56] While some of these critiques may have merit, the impact

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52 ICTR Statute, Articles 2 to 4.

53 ICTY Statute, Article 9; ICTR Statute, Article 8.

54 G Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, (Intersentia, Antwerp, 2002) 81–8.

55 Rule 9 of the ICTY Rules of Procedure and Evidence sets out the conditions under which a deferral may be justified. It empowers the Prosecutor to request a deferral when (i) the act investigated or prosecuted at the domestic level is characterised as an ordinary, as opposed to an international, crime, (ii) the domestic proceedings are not impartial or, alternatively, are designed to shield the accused from international criminal responsibility, or (iii) the case before the domestic court involves a factual or legal issue of significant implication to the Tribunal. The conditions attached to the Prosecutor's application for a deferral are somewhat different under the ICTR Rules of Procedure and Evidence. Rule 8 allows for a deferral to the competence of the Tribunal when the crimes subject to the domestic proceedings (i) are already being investigated by the ICTR Prosecutor, (ii) should be investigated by the ICTR Prosecutor given *inter alia* their seriousness, or (iii) are contained in an indictment already issued by the Tribunal.

56 See, eg, E Stover, *The Witnesses. War Crimes and the Promise of Justice in the Hague* (University of Pennsylvania Press, Philadelphia, 2005); A M Danner and J S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 (1) *California Law Review* 75–169; A T O'Reilly, 'Command Responsibility: a Call to Realign Doctrine with Principles' (2004) 20 (1) *American University International Law Review* 71–107; P L Robinson, 'Ensuring Fair and Expeditious Trials at the ICTY' (2000) 11 (3) *European Journal of International Law*, 569–89.

of both institutions on the development of international criminal law and the current international criminal justice system cannot be denied. Along with promoting accountability, bringing justice to a multitude of victims and documenting historical truth, the jurisprudence and lessons learned from the ICTY and the ICTR have been the stepping-stone for the creation of a growing number of international courts and tribunals.

With the notable exception of the International Criminal Court ('ICC'), the myriad of institutions established by the international community for the prosecution of 'the most serious of crimes' over the past decade have been of an *ad hoc*, mixed nature. Also known as 'internationalised' courts and tribunals, these institutions are situated in the States within whose jurisdiction the crimes have been committed and comprise both international and domestic judges. Such courts and tribunals have thus far been established in Sierra Leone, Kosovo, East Timor, Cambodia and Bosnia and Herzegovina, as a result of either an agreement between the UN and post-conflict governments or a direct international intervention. The objective has generally been to bring justice closer to the victims, expedite proceedings and assist in the restoration of the domestic legal systems. Internationalised courts and tribunals are in principle viewed as less intrusive, that is, deferential to State sovereignty, but nonetheless remain governed by international criminal law standards.

The ICC, which is the only permanent legal institution in the world for the prosecution of grave international crimes, was set up by an international agreement in 1998.[57] It is an independent treaty body, whose Rome Statute ('ICC Statute') has currently been ratified by 110 States.[58] Compared with those of the *ad hoc* ICTY and ICTR and the various internationalised courts that exist at present, the jurisdiction of the ICC is considerably more expansive. Situations may be referred to the ICC for investigation by either States Parties or the Security Council acting under Chapter VII of the UN Charter, although the ICC Prosecutor may also initiate investigations *proprio motu*.[59] Its personal jurisdiction is based on the principles of nationality and territoriality.[60] The subject-matter jurisdiction of the ICC extends to the same categories of crimes as those applicable to the temporary *ad hoc* courts and tribunals,

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57 Opened for signature 17 June 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('ICC Statute').

58 As of 21 July 2009. For the complete list of States Parties to the Rome Statute, see the official website of the International Criminal Court at <http://www.icc-cpi.int/Menus/ASP/states+parties/> at 13 November 2009.

59 ICC Statute, Article 15.

60 ICC Statute, Article 12.

namely genocide, crimes against humanity and war crimes.[61] The codification of crimes against humanity and war crimes in the ICC Statute, however, is not only more detailed but also somewhat broader than the definitions adopted by its predecessors.[62] The ICC may furthermore exercise jurisdiction over the crime of aggression once a definition of the crime has been agreed upon by States Parties and the ICC Statute has been accordingly amended.[63] With regard to genocide, crimes against humanity and war crimes, the ICC's temporal jurisdiction is limited to crimes committed after 1 July 2002.[64]

Although the ICC has thus far benefited from strong support on the part of the international community, it has not been without its opponents. The principal objection raised against the ICC relates to its power to assume jurisdiction over the nationals of non-States Parties without those States' consent, particularly when the nationals concerned are military personnel.[65] The argument made largely reflects a somewhat misplaced distrust of the ICC's ability to impartially apply the principle of complementarity.[66] Being one of the most innovative and important legal features of the ICC, the principle of complementarity is intended to ensure that the ICC's jurisdiction is only secondary to domestic courts. The ICC will therefore exercise its jurisdiction only when national authorities are either unable or unwilling to genuinely investigate and prosecute the crimes committed.[67]

In order to rely on the complementarity principle, however, States must incorporate in their domestic legislation the crimes envisaged in the ICC Statute. Despite the obligation incumbent on States Parties to the Statute to do so, progress has been slow. The situation with respect to non-States Parties is even bleaker. National jurisdiction over genocide and war crimes is not a rarity. The former though has seldom been exercised, while the latter varies greatly in its scope as States differ in the type of war crimes they criminalise. With regard to crimes against humanity, only a few States have assumed jurisdiction over those as such.[68] Thus although national prosecutions of grave international crimes have been increasing in number over the past decade, they

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61 ICC Statute, Articles 6, 7 and 8 respectively.

62 See below B(i), Definitions of crimes.

63 ICC Statute, Article 5(2).

64 ICC Statute, Article 11. For States who have become Parties to the Statute after 1 July 2002, the Court's jurisdiction extends only to crimes committed after the Statute's entry into force for those States (Article 11(2)).

65 For an overview and critical assessment of the argument, see, eg, D Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2004) 1 (3) *Journal of International Criminal Justice* 618–50.

66 Cryer et al, above n 5, 141.

67 ICC Statute, Article 17.

68 McGoldrick, above n 50, 12.

remain largely sporadic occurrences. Relatively few States have adopted universal jurisdiction with regard to genocide, crimes against humanity and the most serious of war crimes, even though these crimes and the obligation to prosecute them, irrespective of nationality and territoriality considerations, are generally regarded as *jus cogens*, or peremptory norms of international law.[69] With respect to such crimes though, States remain obliged to adopt legislative measures necessary for the effective prosecution of alleged perpetrators, including measures conferring jurisdiction upon the domestic judiciary. Unwillingness or inability to prosecute may be offset by adhering to the principle of *aut dedere aut judicare*; for instance, by extraditing the alleged perpetrator to a State which is capable of prosecution and which has requested that the suspect be handed over, or alternatively by the suspect's surrender to an international judicial institution like the ICC. Extradition or surrender in such circumstances, however, does not negate the overarching obligation to adopt measures enabling the national authorities to exercise jurisdiction themselves.[70]

B Substantive international criminal law

(i) Definitions of crimes The term 'genocide' was coined in 1944 as a reaction to the Nazi crimes committed during the Second World War.[71] The Nuremberg and the Tokyo Tribunals, however, did not recognise it as a legal concept. Genocide attained the status of a separate international crime in 1946 with the adoption of UN General Assembly Resolution 96(1). In 1951, shortly after the *Convention for the Prevention and Punishment of the Crime of Genocide* ('Genocide Convention')[72] had come into force, the International Court of Justice ('ICJ') declared the prohibition on genocide to be part of customary international law.

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[69] See, eg, C Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 (4) *Law and Contemporary Problems* 63–74.

[70] In *Guengueng et al v Senegal*, U.N. Doc. CAT/C/36/D/181/2001, 19 May 2006, a case before the CAT Committee, Senegal was held to have failed to comply with its obligations under Article 7 of the *Torture Convention* for refusing to comply with the extradition request of Belgium and for not initiating proceedings against Habré (i.e. violation of the *aut dedere aut judicare* principle).

[71] R Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington DC: Carnegie Endowment for International Peace, 1944) 79.

[72] Opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

The definition of the crime of genocide set forth in Article 2 of the Genocide Convention has since been reproduced verbatim in the ICTY, ICTR and ICC Statutes. It encompasses a number of acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such. The prohibited acts include the killing or causing of serious bodily or mental harm to members of the group, inflicting on the group conditions of life calculated to bring about its destruction, imposing measures intended to prevent births within the group or forcibly transferring children from one group to another. Although the harm suffered need not necessarily be permanent or irremediable,[73] it must be serious[74] and it may involve but not be limited to torture, starvation, sexual violence and systematic expulsion from homes.

In order to constitute genocide, the prohibited acts must be carried out with the special intent to bring about the physical or biological destruction of the group targeted. The *dolus specialis* requirement is what sets genocide apart from other international crimes. It is a crime committed against individual victims by virtue of their belonging to a national, ethnic, racial or religious group. Although the group must be objectively identifiable by reason of a common trait shared by its members, the subjective perception of the perpetrators is generally also factored in by the international criminal tribunals when determining on a case-by-case basis what constitutes a protected group.[75]

Genocide is a crime of a collective nature, committed by and against a multitude of individuals. The perpetrator must be shown to have intended or attempted the destruction of a substantial number of persons belonging to the protected group targeted.[76] The determination of the meaning of 'substantial' is a matter of judicial discretion and depends on the circumstances of each particular case. It is however generally understood to designate a part of the group whose number or significance is such that its destruction would have impacted on the survival of the group as a whole.[77] Although the existence of a plan or policy to perpetrate genocide is not a formal element of the crime and

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[73] *Prosecutor v Akayesu*, Case No. ICTR-95-4, T. Ch. I, ICTR (2 September 1998) [502].

[74] *Prosecutor v Kayishema*, Case No. ICTR-95-1, T. Ch. II, ICTR (21 May 1999) [109].

[75] *Prosecutor v Jelisić*, Case No. IT-95-10, T. Ch. I, ICTY (14 December 1999) [69–72]; *Prosecutor v Bagilishema*, Case No. ICTR-95-1A, T. Ch. I, ICTR (7 June 2001) [65]; *Prosecutor v Semanza*, Case No. ICTR-97-20, T. Ch. III, ICTR (15 May 2003) [317].

[76] *Prosecutor v Jelisić*, Case No. IT-95-10, T. Ch. I, ICTY (14 December 1999) [82].

[77] *Prosecutor v Krštić*, Case No. IT-98-33, A. Ch., ICTY(19 April 2004) [12].

even though genocide may be committed by a single individual, the *ad hoc* tribunals and more recently the ICC have favoured an additional contextual requirement stipulating that the prohibited conduct take place in the context of a manifest pattern of similar behaviour.[78]

Until its recognition as a separate international crime in 1946, genocide was regarded as a form of crime against humanity. Even nowadays most instances of genocide would readily meet the requirements of crimes against humanity. Both categories of crimes are punishable when committed in times of war as in peace[79] and form part of customary international law. There are, however, several important differences. Unlike genocide, crimes against humanity (with the exception of persecution) do not require discriminatory intent on racial, ethnic, national or religious grounds.[80] Irrespective of their motive, certain inhumane acts constitute crimes against humanity when committed in the context of a widespread or systematic attack directed against a civilian population. The prohibited acts include *inter alia* murder, extermination, enslavement, deportation and persecution. To this list of crimes, originally codified in the *Nuremberg Charter*,[81] the ICTY and ICTR Statutes subsequently added rape, imprisonment and torture. With the adoption of the ICC Statute in 1998, enforced disappearances and apartheid were also explicitly recognised as crimes against humanity, while the list of gender crimes was expanded to also include sexual slavery, enforced prostitution, forced pregnancies and other forms of sexual violence.

To engage the criminal liability of the perpetrator for crimes against humanity, the prohibited acts must not only be committed with the requisite *mens rea* but also be directed against non-combatants in the context of a military attack or a broader mistreatment campaign. Although the perpetrator need not share in the purpose of the overall attack, he must act with knowledge of its widespread or systematic nature and its targeting of civilians. The widespread or systematic requirement is disjunctive, referring respectively to the

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78 *Prosecutor v Kayishema and Ruzindana*, Case No. ICTR-95-1, T. Ch. II, ICTR (21 May 1999) [94]; ICC Elements of Crimes – Article 6.

79 Although the ICTY Statute formally requires a link to an armed conflict, in *Tadić*, the first case to be dealt with by the tribunal, the ICTY acknowledged that such a requirement with regard to crimes against humanity was inconsistent with customary international law. See *Prosecutor v Tadić*, Case No. IT-94-1, T. Ch. II, ICTY (7 May 1997) [627].

80 The ICTR constitutes an exception in this regard. Article 3 of the ICTR Statute defines crimes against humanity as acts committed 'as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'.

81 *Charter of the International Military Tribunal*, opened for signature 8 August 1945, 82 UNTS 279 (entered into force 8 August 1945) ('*Nuremberg Charter*').

large-scale effect of the attack and its methodological organisation.[82] The threshold thus established sets crimes against humanity apart from both genocide and war crimes although the underlying acts may occasionally overlap. Although currently international criminal law remains unsettled as to the requirement of a plan or policy as a formal element, there is general agreement that isolated acts of individual criminality cannot constitute an 'attack' within the meaning of crimes against humanity.[83]

Such isolated criminal acts, however, may constitute war crimes when committed in the course of either international or internal armed conflict. War crimes are serious violations of international humanitarian law. The latter regulates the permissible means and methods of warfare with regard to combatants and further seeks to protect civilians and *hors de combat* in the course of armed conflict. The jurisdiction of the different international criminal courts and tribunals over war crimes varies according to the type of conflict that the particular legal institution has been set up to deal with and the degree of acceptance that the various norms have gained as part of customary international law at the time of the institution's establishment.

Grave breaches of the 1949 Geneva Conventions and violations of their Common Article 3 form part of *jus cogens* and constitute war crimes, irrespective of whether they are perpetrated in an international or an internal armed conflict. The situation with regard to violations of Additional Protocol II to the Geneva Conventions and other serious violations of the laws and customs of war remains unsettled and their qualifying as war crimes largely depends on the nature of the conflict in the course of which they occur.

The nexus requirement with armed conflict – international or internal – is what sets war crimes apart from crimes against humanity and other international crimes. In order to incur individual criminal responsibility, the perpetrator must have committed the prohibited act with awareness of the factual circumstances establishing the existence of the conflict. Prohibited acts fall under several broad categories, relating to violence against civilians and other protected persons, attacks on protected targets or inflicting excessive damage on civilian property, and the use of proscribed means and methods of warfare.

(ii) Modes of individual criminal responsibility The substantive definitions of crimes, referring to a number of physical and mental elements which need to be satisfied if the individual criminal responsibility of the offender under international law is to be engaged, provide only a preliminary jurisdictional threshold.

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[82] *Prosecutor v Akayesu*, Case No. ICTR-95-4, T. Ch. I, ICTR (2 September 1998) [579].

[83] Cryer et al, above n 5, 195–8.

Different modes of liability, with their own conduct and *mens rea* requirements, apply across the offences falling within the jurisdiction of the international courts and tribunals. They can be clustered in several broad categories: primary liability, secondary liability, liability for omission and liability for inchoate offences. This categorisation, however, is not straightforward as there are overlaps between the different liability modes and also variations of approach among the international courts and tribunals.

Primary liability follows the commission of a crime by a person acting alone, jointly with or through another individual, or as part of a joint criminal enterprise. The joint criminal enterprise ('JCE') doctrine is the most complex and controversial liability theory recognised by contemporary international criminal law. It was first developed in the jurisprudence of the ICTY as a means to address the challenge of attributing liability in a manner which accurately describes the relative responsibility of individuals for their contribution to large-scale criminal activities of a collective nature.[84] JCE entails the criminal responsibility of individuals who participate in the perpetration of a crime as part of a group of persons acting pursuant to a common purpose.

With reference to customary international law, a rather contentious observation in itself, the ICTY has identified three different types of JCE: basic, systematic and extended.[85] Of these, extended JCE is the most contentious and far-reaching variant. It involves criminal responsibility for crimes which fall outside the common plan and which have been neither intended nor even anticipated by the JCE participant charged.[86] Thus liability is incurred for failure to reasonably foresee that, in executing the common criminal design, an offence not a part of the design but a likely consequence of its execution may be committed. The jurisprudence of the *ad hoc* tribunals grounding individual criminal responsibility on recklessness for unlawful acts physically perpetrated by others has been subjected to vigorous criticism.[87] Not only do inter-

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[84] The concept of JCE was first used by judges and prosecutors in ICTY, *Prosecutor v Tadić*, Case No. IT-94-1, T. Ch. II, ICTY (7 May 1997). See also E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (TMC Asser Press, The Hague, 2003) 94–109.

[85] See *Prosecutor v Tadić*, Case No. IT-94-1, A. Ch. (15 July 1999) [195]. Basic JCE concerns cases of co-perpetration where all participants in the common criminal design share the intent to commit a particular crime (*Tadić Appeal* [196]. Systematic JCE, on the other hand, generally applies to the so-called 'concentration camp' cases. It relates to instances in which a person knowingly participates in a system of ill-treatment with the general intent to further the system (*Tadić Appeal* [202]).

[86] Ibid [204].

[87] See, eg, A Marston Danner and J S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law' (2005) 93 (1) *California Law Review* 75–169; M J Osiel, 'Modes of Participation in Mass Atrocity' (2005) 38 (3) *Cornell International Law Journal*

national prosecutors rely extensively on the JCE doctrine but they also enjoy considerable discretion in defining the geographic and temporal scope of the enterprise in each particular case. The larger the JCE, the more removed from each other the participants therein and the weaker the linkage among them. Such circumstances notwithstanding, extended JCE effectively allows for the conviction of individuals for crimes unintended and by persons unknown. From the perspective of victims and the objective of international criminal law to end impunity, the JCE doctrine in its extended variant facilitates prosecution and ensures that no contribution to mass crimes goes unpunished. At the same time, from a human rights law point of view, extended JCE poses a challenge to the right of the accused to a fair trial and the overall legitimacy of the international criminal justice process. The notion of JCE has also been incorporated in the Statute of the ICC, albeit under a different name and of a somewhat dissimilar scope. Remarkably, the extended JCE variant has not been included within the scope of the 'common purpose' provision contained in Article 25(3)(d) of the Statute.[88]

Secondary liability in international criminal law encompasses several forms of criminal participation, including ordering, instigating (for example, soliciting, inducing, inciting) and aiding and abetting. Planning, preparing or attempting a grave international crime is also punishable in itself, even when the crime does not materialise in the end. Conspiracy, in the sense of the inchoate crime of agreeing to commit an offence and requiring no proof of the offence occurring, is a mode of liability applicable to genocide only. Conspiracy to commit crimes against humanity or war crimes is not subject to punishment under current international criminal law. Instigation to commit genocide is an inchoate crime in itself, giving rise to individual criminal responsibility, although it does not constitute a form of liability *stricto sensu*.

The broad range of liability modes discussed above with reference to international crimes is supplemented by the inculpatory principle of command responsibility. As a mode of criminal participation entailing individual responsibility, this principle is specific to international law and it has no corresponding paradigms in domestic legal systems. Although effectively, and somewhat contentiously, applied by the Nuremberg and Tokyo Tribunals, the concept of command responsibility was first recognised by international law as a positive

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793–822; S Powles, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity or Judicial Creativity?' (2004) 2 (2) *Journal of International Criminal Justice* 606–19.

[88] See generally K Ambos, 'Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis – From Nuremberg to The Hague' in G K McDonald and O Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (Kluwer Law International, The Hague/London/Boston, 2000).

legal norm in 1977 by Additional Protocol I to the 1949 Geneva Conventions.[89] The jurisprudence of the *ad hoc* tribunals delineated its scope of application and tailored it to meet the exigencies of modern welfare. Since then, command responsibility as a mode of liability has become firmly anchored in customary international law and as such it has been incorporated in the ICC Statute. It entails the individual criminal liability of military and civilian superiors for omissions, that is, for failing to prevent and/or punish the commission of international crimes by their subordinates.[90] Notably the superiors incur responsibility not merely for dereliction of duty or inability to control their subordinates but for the actual crimes committed by the subordinates themselves. Although the substantive elements vary in interpretation among the international criminal courts and tribunals and are somewhat different for military and civilian superiors, the general requirements entail the existence of a superior–subordinate relationship, a certain degree of knowledge on the part of the superior as to the crimes contemplated by his or her subordinates, and a failure to take adequate measures in response. International jurisprudence has evidenced the lowering of the requisite knowledge threshold to recklessness and even gross negligence. Similarly to JCE, therefore, command responsibility has been criticised for failing to take due cognisance of the degree of personal culpability, particularly when individuals are prosecuted for specific intent crimes, such as genocide, contemplated and physically committed by others.[91]

The ICC Statute expressly criminalises omissions with regard to command responsibility only, although the question of whether liability for omissions is categorically excluded from the ambit of other participation modes remains largely unsettled. Prior to the adoption of the ICC Statute there was little disagreement in international criminal law on the matter and it was generally accepted that international crimes could be committed by either acts or omissions, as long as the charge related to a failure of a positive duty to act. The international *ad hoc* tribunals have long recognised omissions as part of the objective elements of a variety of liability modes, including preparation, aiding and abetting, and even direct perpetration. Given the pre-existing support in international criminal law for omissions liability, it is suggested that the ICC should interpretatively extend the scope of punishable criminal conduct to also include omissions and thus close the existing loophole, which may otherwise potentially allow for a range of wrongful conduct to go unpunished.

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89 Additional Protocol I to the 1949 Geneva Conventions, Article 86(2).

90 ICC Statute, Article 28.

91 See, eg, A T O'Reilly, 'Command Responsibility: A Call to Realign Doctrine with Principles' (2004) 20 (1) *American University International Law Review* 71–107.

(iii) Defences There is a certain psychological aversion towards the idea that perpetrators of grave international crimes may escape liability. In contrast to national legal systems, international criminal law pays relatively little attention to the concept of defences, many aspects of which remain unsettled. Similarly to domestic courts, though, the international criminal courts and tribunals generally differentiate between substantive and procedural defences. While the former relate to the merits of the case, the latter refer to the violation of procedural rules, which renders further substantive review of the case unwarranted. Procedural defences dealt with in international jurisprudence include, *inter alia*, statutory limitations, *ne bis in idem*, retroactivity of the law and abuse of process. By safeguarding the accused against arbitrary treatment during criminal proceedings, they form an essential component of the right to a fair trial. Substantive defences, on the other hand, encompass both justifications and excuses, although the distinction drawn between these two categories in international criminal law is less clear-cut than in domestic legal systems. Mitigating factors do not, strictly speaking, constitute defences, as they influence the sentencing rather than the criminal responsibility of the perpetrator.

Among the substantive defences applicable before the international criminal courts and tribunals and excluding the criminal responsibility of the accused are insanity, intoxication, self-defence, duress, necessity, mistake of fact or law and obedience to superior orders.[92] Diminished capacity, as opposed to mental incapacity to comprehend the nature of one's conduct, is not a defence but a mitigating factor to be taken into consideration at the sentencing stage.[93] Similarly, voluntary intoxication giving rise to diminished capacity does not exclude criminal responsibility but may mitigate the sentence.[94]

Self-defence,[95] duress and necessity apply to crimes committed under an imminent threat and are closely related to considerations of proportionality. While self-defence applies to protected persons and essential property threatened by the unlawful use of force, duress and necessity relate to threats of

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[92] Unlike the *ad hoc* tribunals, which recognised the applicability of defences through their case law, the ICC Statute explicitly codifies the permissible defences in Articles 31, 32 and 33.

[93] *Prosecutor v Delalić, Mučić, Delić and Landžo*, Case No. IT-96-21, A. Ch., ICTY (20 February 2001) [580–90].

[94] Evidence of voluntary intoxication may raise doubts as to the existence of the requisite *mens rea* (eg premeditated intent, actual knowledge). However, in some circumstances, voluntary intoxication may be considered an aggravating rather than a mitigating factor. See, eg, *Prosecutor v Kvočka*, Case No. IT-98-30/1, T. Ch. I, ICTY (2 November 2001) [706].

[95] Self-defence as a substantive defence in international criminal law should not to be confused with collective self-defence by States provided for by Article 51 of the UN Charter.

death and serious bodily harm emanating from persons or circumstances beyond one's control. Unlike self-defence, in the case of duress or necessity there is no requirement of a relationship between the accused and the persons threatened. As with self-defence, however, the conduct forced must be proportionate to the degree of danger faced.[96] Notwithstanding, duress and necessity cannot provide a complete defence in cases of genocide as coercion does not negate the genocidal intent of the perpetrator. The *ad hoc* tribunals have also ruled these two categories of defences inapplicable to war crimes and crimes against humanity, where the underlying offences relate to the killing of innocent people.[97] The ICC Statute, however, does not expressly codify any exceptions, while duress and necessity are regarded as absolute defences.[98]

As for mistake of fact or law, liability is excluded only when the mistake serves to negate the requisite *mens rea*. Nevertheless, mistake of law cannot be pleaded with regard to genocide and crimes against humanity.[99] Considered 'manifestly unlawful', these two categories of crimes also cannot be excused when committed under superior orders.[100] When successfully coupled with a number of other defences, particularly duress and mistake of fact or law, the defence of obedience to superior orders may, however, exonerate from responsibility the perpetrators of war crimes. For the defence to apply, the accused must have been under a legal duty to obey the superior order and must be shown to have lacked knowledge as to the unlawfulness of the order.[101] Although the aforementioned requirements for the applicability of the defence have attained customary status in international law,[102] their practical application remains both difficult and controversial.

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96 For a description of the proportionality test, see Separate and Dissenting Opinion of Judge Cassese, *Prosecutor v Erdemović*, Case No. IT-96-22, A. Ch., ICTY (7 October 1997) [16].

97 Ibid. See also the Joint Separate Opinion of Judge McDonald and Judge Vohrah, and the Separate and Dissenting Opinions of Judge Li and Judge Cassese to the Judgment.

98 ICC Statute, Article 31(1)(d).

99 Article 33(2) of the ICC Statute explicitly defines orders to commit genocide and crimes against humanity as 'manifestly unlawful'. Hence, individuals accused of having committed genocide or crimes against humanity cannot plead ignorance as to the unlawfulness of the order and, accordingly, the illegality of the act.

100 ICC Statute, Article 33(2).

101 ICC Statute, Article 33(1).

102 I Bantekas, 'Defences in International Criminal Law' in D McGoldrick, P Rowe and E Donnelly (eds) *The Permanent International Criminal Court. Legal and Policy Issues* (Hart Publishing, Portland, 2004) 273.

C International criminal procedure

The procedural rules applicable to international criminal trials constitute a *sui generis* system, comprising elements of both the common law and the civil law tradition. While the blending of adversarial and inquisitorial facets is in part the outcome of political negotiations surrounding the establishment of the supranational justice mechanisms, it is also tailored to meet the specific needs of international trials and optimise the fairness and efficiency of proceedings. The extent to which the resulting procedural amalgam attains this objective, however, is a matter of ongoing debate.

Albeit predominantly adversarial in nature, the basic procedural framework of the *ad hoc* tribunals has been methodically supplemented in the course of the tribunals' existence with various civil law elements. Inquisitorial aspects of procedure also feature prominently in the ICC Statute. These relate, *inter alia*, to the special role of the Pre-Trial Chamber in supervising the actions of the Prosecutor, the Prosecutor's obligation to investigate equally both incriminating and exonerating circumstances, the compilation of a case file handed over to the judges before the commencement of the trial and the Court's enhanced powers of control over the proceedings (for example, the ability to call additional evidence and summon witnesses *proprio motu*).[103]

The essential underpinnings of international criminal procedure are firmly rooted in fundamental human rights standards, recognised in international treaties[104] as well as by domestic legal systems. Geared towards safeguarding the rights of the accused, these general principles of criminal process relate to the presumption of innocence, the independence and impartiality of the judicial institution, the right to fair, public and expeditious proceedings, and the prohibition on trials *in absentia*. Some of their practical manifestations, however, and in particular those pertaining to fair trial and with regard to the *ad hoc* tribunals, have not been devoid of criticism. Rules authorising mandatory pre-trial detention,[105] regulating the disclosure of evidence and acknowledging the

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[103] Cassese, above n 48, 386.

[104] See, eg, the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR') (Articles 9, 14 and 15), and the ECHR (Articles 5, 6 and 7). Similar provisions pertaining to the right to security of person and to fair trial are also contained in eg the *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978)(Articles 7, 8 and 9), and the *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 21 ILM 58 (entered into force 21 October 1986) (Articles 6 and 7).

[105] In accordance with the principle of the presumption of innocence, pre-trial detention should not be mandatory. In its General Comment 8 concerning the implementation and application of Article 9 of the ICCPR the UN Committee on Civil and Political Rights has stated that 'pre-trial detention should be an exception and as short

permissibility of plea-bargaining have been among the most contentious.[106] The ICC Statute and the ICC's *Rules of Procedure and Evidence*[107] do not make significant progress in this regard as they leave many of the provisions relating to disclosure obligations subject to judicial interpretation and do not dispense categorically with the notion of plea-bargaining. On the other hand, unlike the ICTY and the ICTR, the ICC considers provisional release, provided certain specific requirements are met, as the rule rather than the exception.[108] It also enhances the role of victims, elevating their status from that of witnesses to actual participants in the proceedings, enjoying a broad range of procedural rights[109] as well as a right to reparations.[110]

D Cooperation regime with States

The overall effectiveness of the international judicial process ultimately depends on State cooperation. Lacking their own enforcement agencies, the international courts and tribunals must rely on domestic systems in relation to on-site investigations, summoning of witnesses, arrest and surrender of

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as possible'. Similarly, Article 5 of the ECHR permits pre-trial detention only if the measure is considered resonably necessary to prevent an offence or to prevent flight after an offence has been committed. For a discussion of the relevant case law of the European Court of Human Rights, see eg P Van Dijk, F Van Hoof, A Van Rijn and L Zwaak (eds) *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen, 2006) 471–5.

106 S Negri, 'Equality of Arms – Guiding Light or Empty Shell?' in M Bohlander (ed) *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May Ltd, London, 2007); J Cook, 'Plea Bargaining at the Hague' (2005) 30 (2) *Yale Journal of International Law* 473–506; A-M La Rosa, 'A Tremendous Challenge for the International Criminal Tribunals: Reconciling the Requirements of International Humanitarian Law with Those of Fair Trial' (1997) 321 *International Review of the Red Cross* 635–50.

107 ICC Rules of Procedure and Evidence, UN Doc PCNICC/2000/1/Add.1 (2000).

108 ICC Statute, Article 60 and ICC Rules of Procedure and Evidence, UN Doc PCNICC/2000/1/Add.1 (2000) Rule 118.

109 See ICC Appeals Chamber Decision on the Appeal of Mr Lubanga Dyilo against the Oral Decision of the Trial Chamber of 18 January 2008, ICC-01/04-01/06 OA 11, 11 July 2008; ICC Trial Chamber I Decision on Victims' Participation in the Trial, ICC-01/04-01/06, *Prosecutor v Thomas Lubanga Dyilo*, 18 January 2008; ICC Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 13 May 2008; and ICC Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public Redacted Version), ICC-01/04, *Situation in the Democratic Republic of the Congo*, 17 January 2006 (concerning the procedural rights of victims at the investigation of a situation stage).

110 ICC Statute, Article 75.

accused, and enforcement of penalties. In contrast to inter-State cooperation, which is of a horizontal nature, cooperation between States and international jurisdictions is often described as vertical. The relationship is non-reciprocal and the prerogative to unilaterally interpret the duty of cooperation incumbent on States is vested with the international courts and tribunals.[111] The obligation to cooperate is not confined to States only; it may address international organisations and individuals as well.

The capacity of international jurisdictions to effectuate this obligation, however, is circumscribed and has given rise to many difficulties in practice.[112] In the context of the ICC, problems may arise for instance in the case of conflicting international obligations of States, as unless explicitly imposed by the Security Council acting under Chapter VII of the UN Charter, States' duty of cooperation with the Court will not automatically prevail over competing cooperation obligations.[113] Procedural requirements attached to extradition may also interfere with the surrender of suspects to the Court. Traditionally accepted formal grounds for denying inter-State legal assistance, such as the principle of double criminality, do not apply to State cooperation with the international criminal courts and tribunals. The only permissible exception relates to national security objections.[114] Nevertheless, international jurisdictions remain severely constrained in their practical ability to effectuate State cooperation. Existing mechanisms for addressing non-compliance with the duty to cooperate (for example, collective sanctions) are rarely used due to their political sensitivity and are in any case often dependent on States' willingness to implement.

4 Concluding observations

International criminal law consists of two main bodies of law: transnational criminal law and international criminal law (*per se*). Coming to the end of this

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111 Sluiter, above n 54, 82–8.

112 See generally M Harmon and F Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings' (2004) 2 (2) *Journal of International Criminal Justice* 403–26.

113 See, eg, ICC Statute, Article 90(7)(b). Competing cooperation obligations may arise when a State Party to the Statute receives a request from the Court to surrender an alleged perpetrator found on its territory and at the same time a request from a State not a Party to the Statute for the extradition of the same person for conduct other than the one motivating the Court's request. If the requested State has concluded an extradition agreement with the requesting State which relates to the conduct in question and is aligned with general principles of extradition law, the requested State is under no obligation to automatically give priority to the Court's request.

114 See, eg, ICTY Rules of Procedure and Evidence UN Doc IT/32/Rev.7 (1996), Rules 54*bis* and 70; ICC Statute, Articles 72, 73 and 93(4)–(6).

chapter, the question arises as to what the relationship is between the aforementioned limbs and human rights law. This requires us to look into the position of the individual under each respective body of law.

The position of the individual in transnational criminal law is that of *object* rather than subject of law. The rule of non-inquiry and the concomitant impossibility to challenge certain evidence in court because of the inter-State 'good faith' principle and the presumption of trust illustrate this position. Transnational criminal law, consisting of procedural rules governing inter-State police and judicial cooperation, is not directly concerned with individual rights. Admittedly, human rights considerations have brought about a certain shift in the dynamics of cooperation relationships. For instance, one can think of the transfer of sentenced persons from one State to another; such transfer may be requested by individuals and granted for humanitarian reasons.[115] Still, the State-centred approach that underlies these forms of collaboration remains unaltered; it is States' right to determine the scope of their jurisdictional reach over offenders.

However, there are signs that the dominant State position is changing, for State concerns are yielding to individual concerns. One can point to the erosion of the *male captus bene detentus* rule in some jurisdictions because of human rights considerations. Moreover, human rights bodies have played an important role in setting limits to State obligations that override individual human rights. Illustrative is the landmark ruling in *Soering v United Kingdom* ('*Soering*')[116] where the European Court of Human Rights ('ECtHR') held that the extradition of a German national to the United States to face charges of capital murder would violate Article 3 of the ECHR. The latter provision contains a ban on inhuman and degrading treatment, which would have been violated as a result of Soering's extradition since this would have meant exposing him to death row in the US. Thus, Soering's right under Article 3 ECHR, and the United Kingdom's obligation to respect that right, prevailed over the UK's obligation to extradite Soering to the US.

In international criminal law, the individual is regarded as a *subject* of law and is endowed with rights and duties. The famous quote from the Nuremberg Judgment that 'crimes against international law are committed by men, not by abstract legal entities'[117] is often cited to substantiate the existence of the prin-

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115 See Articles 2(2) and 5 (sentenced person may express interest/request to be transferred) of the *Convention on the Transfer of Sentenced Persons*, opened for signature 21 March 1983, ETS 112 (entered into force 1 July 1985). See further Section 2A(iii).

116 *Soering v United Kingdom* (7 July 1989) Series A no. 161(1989), 11 EHRR 439.

117 L Friedman, 'Trial of the Major War Criminals before the International

ciple of individual criminal responsibility. Individuals have the duty to refrain from conduct which offends the common values and norms of the international community. If they violate those norms they can be prosecuted before national or international courts for a limited class of international crimes: aggression, genocide, crimes against humanity and war crimes. States are politically bound to prosecute such crimes and in the case of war crimes even legally bound to do so.[118]

Those accused before international courts and tribunals invariably benefit from 'rights of the accused'.[119] Fair trial rights have been incorporated in the statutes of all international courts and tribunals. International judicial institutions do not consider themselves (directly) bound by human rights treaties like the ICCPR and the ECHR, as they are not Parties to such treaties. However, from ICTY and ICTR case law, it appears that human rights norms are applied as general principles of law. In ruling on issues such as *in absentia* proceedings, the right to an independent and impartial tribunal, and self-representation, the ICTY and ICTR frequently rely on case law and communications of universal and regional human rights bodies, such as the Human Rights Committee and the ECtHR. The biggest challenge facing international courts and tribunals lies in guaranteeing defendants trials 'without undue delay'.[120] Pre-trial detention at the ICTY and ICTR has proved lengthy; at the ICTR it has lasted as long as nine years.[121] Admittedly, these courts face unique difficulties – difficulties that relate to translation, protected witnesses, and proceedings conducted far removed from the scene of the crimes. Nevertheless nine years of pre-trial detention is hardly justifiable and the *ad hoc* tribunals have been rightly criticised for it. Let us hope that the ICC, once it is fully operational, will learn from past experiences and manage to keep the length of proceedings within reasonable limits.[122]

Military Tribunal, The Nuremberg Judgment 1945–46' (New York, 1972) II *The Law of War. A Documentary History* 940.

118 As a result of the 'aut dedere aut judicare' clause that can be found in the Geneva Conventions (1949) and Additional Protocol I (1977) with regard to 'grave breaches' of the Conventions and API. See Articles 50, 51, 130, and 149 of the Geneva Conventions I–IV respectively, and Article 85 of Additional Protocol I.

119 ICTR Statute, Article 20; ICTY Statute, Article 21; ICC Statute, Articles 55, 66 and 67. See further section 3.3.

120 ICTY Statute, Article 21(4)(c); ICTR Statute, Article 20(4)(c).

121 *Prosecutor v Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, ICTR (17 November 2006).

122 See informal expert paper, 'Measures available to the International Criminal Court to reduce the length of proceedings', available at www.icc-cpi.int/library/organs/otp/length_of_proceedings.pdf> at 2 March 2009.

11. The four pillars of transitional justice: a gender-sensitive analysis

Ronli Sifris

1 What is transitional justice?

A A general definition

The term 'transitional justice' refers to a holistic, restorative approach to justice which applies in the context of societies confronting a legacy of systematic or widespread human rights abuse. It is an approach to justice which seeks to balance the need for accountability and for recognition of victims' suffering with the desire to achieve a lasting peace and true reconciliation. The types of transitions which a society may undergo differ according to the particular context. Transitional justice has traditionally been understood as applying to countries transitioning from an authoritarian, violent past to a democratic, non-violent future. Examples of such transitions include those of many Latin American countries from military to civilian rule.[1] However, the term may also be used to refer to 'conflicted democracies'; '[i]n this context, the transition becomes one of: (a) from procedural to substantive democracy, or at least involving a deepening of substantive democracy, and (b) from violence to peace.'[2] One example of this is the Northern Ireland transition.[3]

There is no 'one size fits all' approach to transitional justice. While generalizations can be made in terms of what is necessary to institute a comprehensive transitional justice process, ultimately each society confronting a legacy of human rights abuses is different from other societies which have also had to deal with such a past. Thus while there will be common elements in the construction of a path towards justice and reconciliation, the individual nature of a society and its history will frequently determine the precise nature of the transitional justice process.

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1 Fionnuala Ni Aolain and Colm Campbell, 'The Paradox of Transition in Conflicted Democracies' (2005) 27 *Human Rights Quarterly* 172, 173.

2 Ibid 179.

3 For a detailed discussion see generally ibid.

It is often said that there are four pillars of transitional justice: prosecutions, truth commissions, reparations, and institutional reform.[4] It is commonly thought that all of these four transitional justice mechanisms must be implemented for a transitional society to confront past atrocities, deal with them, and move towards reconciliation. The core notion underpinning a comprehensive transitional justice process is that, for justice and reconciliation to be achieved, retribution alone is not enough; it must be accompanied by a thorough truth-telling exercise, damage must be repaired, and concrete changes must be made to key institutions.

Even on the assumption that retribution is the only necessary ingredient for securing justice and reconciliation, pragmatism dictates that it would be unrealistic to prosecute all perpetrators of human rights abuses in circumstances such as those which existed in Nazi Germany, the former Yugoslavia, Rwanda and Sudan. The resources simply do not exist, on a local, regional or global level, to prosecute all perpetrators. Further, it is doubtful whether a society confronting a legacy of human rights abuses would in fact benefit from a process which sought to prosecute every perpetrator irrespective of the strain on state resources and irrespective of the time-consuming nature of this exercise. Thus it is necessary, in a transitional justice context, to view justice in a holistic, restorative sense.

B The link between transitional justice and human rights discourse

The field of transitional justice falls within the blurry space between international human rights and international criminal law. It overlaps with international criminal law in that prosecutions are an important component of the field of transitional justice. Thus whilst, for example, the prosecution of alleged or actual war criminals in the International Criminal Tribunal for the former Yugoslavia constitutes both the implementation and development of international criminal law, it also constitutes a key component of the transitional justice process in the former Yugoslavia. So too, whilst the internal conflict in the former Yugoslavia which took place during the 1990s gave rise to heinous violations of international human rights law, transitional justice governs the process for dealing with those violations *ex post facto*.

In a lecture on transitional justice, Louise Arbour, the then United Nations High Commissioner for Human Rights, pushed traditional boundaries in transitional justice discourse by circumventing the more prevalent focus on civil

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[4] Office of the High Commissioner for Human Rights (Nepal) *What is Transitional Justice?* (United Nations, Geneva, 2007). It should be noted that using the framework of 'four pillars of transitional justice' to discuss this very complex field raises the risk of oversimplification. Nevertheless, for the purpose of obtaining a useful overview, analysis of the field in terms of these core aspects is extremely helpful.

and political rights and instead concentrating her lecture on 'Economic and Social Justice for Societies in Transition'.[5] She emphasized the oft-repeated refrain that human rights are indivisible and inter-dependent and argued that, economic, social and cultural rights must therefore be addressed in the transitional justice context. She firmly rejected the view that the enforcement of economic, social and cultural rights constitutes an unjustified drain on state resources and asserted that they should be viewed as legally binding and enforceable. According to Arbour, economic, social and cultural rights should be addressed across the transitional justice framework, in contexts such as peace agreements, transitional constitutions, legislation, the judicial process, truth commissions and public sector reform. Arbour concluded her lecture by stating that:

> Transitional justice, as a dynamic and cutting edge field, could serve as [a] springboard for the systematic anchoring of economic, social and cultural rights in the political, legal and social construct of societies. By reaching beyond its criminal law-rooted mechanisms to achieve social justice, transitional justice could contribute to expand our traditional and reductive understanding of 'justice' by rendering it its full meaning.

Thus it is clear that, despite the fact that transitional justice has its initial roots in international criminal law,[6] human rights discourse is extremely relevant in the transitional justice context given that the fundamental purpose of transitional justice is to institute a process for dealing with a legacy of human rights abuse.

The (now former) High Commissioner's emphasis on expanding traditional notions of transitional justice so as to work towards the achievement of true social justice is particularly relevant when considering the field from a gendered perspective. The oft-repeated refrain that 'women's rights are human rights' takes on particular significance in the realm of transitional justice, where mechanisms have traditionally addressed the sorts of harms which are customarily suffered by men and have failed to adequately focus on the harms suffered by women. Arbour's focus on economic, social and cultural rights is

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[5] Louise Arbour, 'Economic and Social Justice for Societies in Transition' (Speech delivered as the 2006 Annual Lecture on Transitional Justice at New York University School of Law, 25 October 2006) http://www.chrgj.org/docs/Arbour_25_October_2006.pdf at 15 December 2008.

[6] The Nuremberg and Tokyo Tribunals established in the aftermath of World War II are the first examples of non-national or multi-national institutions being established for the purpose of prosecuting or punishing crimes with an international dimension and scope: Antonio Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2003) 323.

especially pertinent in this context. Transitional justice mechanisms generally prioritize addressing civil and political harms, those harms which are suffered in the public space and which, in patriarchal societies where women are frequently relegated to the private space, are ordinarily suffered by men. Transitional justice mechanisms need to evolve so as to satisfactorily address economic, social and cultural rights which tend to be violated in the private realm, the space traditionally occupied by women.

In times of conflict, women suffer various types of harm both in the public and private space, both in the civil and political realm and in the economic, social and cultural realm. Women are subjected to the same sorts of violent conduct as men, including torture and enforced disappearances. In addition, women are subjected to sexual violence as a tool of war; their lack of social standing, frequent low levels of education, and inability to protect their own property and resources often result in economic victimization; women are more likely than men to be displaced and to become refugees; women bear the brunt of the responsibility of caring for children and elderly family members, a responsibility which is an extreme burden when seeking food to cook is itself a danger.

The United Nations Secretary-General recognized the need for a gender-sensitive approach to reconstruction and rehabilitation in his 2002 report on women, peace and security.[7] He explicitly addressed the need for economic reconstruction to be informed by the specific needs of women and the importance of including women in decision-making processes. Further, when discussing social reconstruction the report specifically mentions health care, education and social services and is unambiguous in its statement that '[a]ddressing the needs and priorities of women and girls should be an integral part in the design and implementation of social healing processes'.[8]

In this chapter, the four pillars of transitional justice (prosecutions, truth commissions, reparations, and institutional reform) will now be considered in turn from a gender-sensitive perspective, culminating in a brief discussion of the broader concept of reconciliation.

2 Prosecutions

In his opening statement before the International Military Tribunal at Nuremburg, Justice Robert H Jackson asserted:

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[7] Secretary-General, *Report of the Secretary-General on Women, Peace and Security*, UN Doc S/2002/1154 (16 October 2002) [54]–[60].

[8] Ibid [58].

> That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.[9]

Prosecutions are an extremely important component of transitional justice. They help to achieve a number of key objectives such as: holding perpetrators accountable for their actions; restoring the dignity of victims; establishing a historical record of the atrocities which were committed; providing a public forum for the society as a whole to confront, condemn and deal with the legacy of human rights abuse; re-establishing faith in the rule of law and in the State's willingness to enforce the law; and deterring future violations of human rights. As well as having these practical effects, the prosecution of those responsible for gross infringements of human rights is also significant on a symbolic level; such prosecutions mark a turning point in a society – from one devoid of respect for human rights to one where human rights form a part of the established order.[10] The courts in which perpetrators of human rights abuses are prosecuted can take a number of forms. They can be wholly international, wholly domestic, or a hybrid of the two. In light of the fact that a chapter of this book is dedicated to a discussion of international criminal law and the various courts and tribunals,[11] this section will simply provide a basic overview from a gendered perspective.

A International tribunals

Decades after the establishment of the Nuremberg and Tokyo tribunals following World War II, the end of the Cold War and the increased prominence of international human rights doctrine, as well as renewed atrocities, precipitated the emergence of a reinvigorated commitment to international criminal law.[12] This resulted in the establishment of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR') in the early 1990s. Following the establishment of these *ad*

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[9] Robert H Jackson, *Opening Statement before the International Military Tribunal, 21 November 1945* (1945) http://www.roberthjackson.org/Man/theman2-7-8-1/ at 15 December 2009.

[10] For an interesting discussion of the nature and purpose of prosecutions in the transitional context see the debate between Diane Orentlicher and Carlos Nino: Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537; Carlos Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 *Yale Law Journal* 2619; Diane Orentlicher, 'A Reply to Professor Nino' (1991) 100 *Yale Law Journal* 2641.

[11] See Chapter 10.

[12] Cassese, above n 6, 324–5.

hoc tribunals was the momentous creation of the International Criminal Court ('ICC').

B The ad hoc *tribunals*

The ICTY (established in 1993) and the ICTR (established in 1994) were both created by United Nations Security Council Resolutions,[13] pursuant to the Security Council's power to decide on measures necessary to maintain or restore international peace and security.[14] The ICTY and the ICTR have made significant contributions to the advancement of international criminal law. One notable area is in the prosecution of gender-based crimes. The Statutes establishing both the ICTY and the ICTR specifically include rape in the definition of 'crimes against humanity'.[15] The Statute establishing the ICTR also includes rape in its definition of 'violations of Article 3 common to the Geneva Conventions'.[16]

In a number of important decisions, the *ad hoc* tribunals have explicitly applied these significant provisions. For example, in *Prosecutor v Delalic, Mucic, Delic and Landžo*,[17] the Appeals Chamber dismissed a challenge by Delic to a number of counts of wilful killing and torture (constituted by rape and repeated incidents of forcible sexual intercourse). In *Prosecutor v Furundzija*[18] the Appeals Chamber confirmed that the appellant was guilty as an aider and abettor of outrages upon personal dignity, including rape, as a violation of the laws or customs of war. Further, the case of *Prosecutor v Kunarac, Kovac and Vukovic*[19] was the first case to be brought before an international criminal tribunal which rested solely on crimes of sexual violence against women. The ICTY has also committed resources to ensuring that prosecutions are dealt with in a gender-sensitive manner. For example, there is a legal advisor specifically for gender-related crimes, and the Rules of Procedure and Evidence also provide protection for women appearing before the tribunal in relation to gender-based crimes.[20]

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13 SC Res 827, UN SCOR, 3217th mtg, UN Doc S/RES/827 (1993) (25 May 1993) and SC Res 955, UN SCOR, 3453rd mtg, UN Doc S/RES/955 (1994) (8 November 1994).

14 See *Charter of the United Nations* Chapter VII.

15 *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res 827, UN SCOR, 3217th mtg, UN Doc S/RES/827 (1993) (25 May 1993) Annex, Article 5(g); *Statute of the International Criminal Tribunal for Rwanda*, SC Res 955, UN SCOR, 3453rd mtg, UN Doc S/RES/955 (1994) (8 November 1994), Annex, Article 3(g).

16 *Statute of the International Criminal Tribunal for Rwanda* Article 4(e).

17 Case No IT-96-21, Judgment of 20 Feb 2001.

18 Case No IT-95-17/1, Judgment of 21 July 2000.

19 Case No IT-96-23, IT-96-23/1, Judgment of 12 June 2002.

20 For example Rule 96 of the *Rules of Procedure and Evidence* eliminates the

In the ground-breaking ICTR case of *Prosecutor v Akayesu*,[21] the court held Akayesu guilty of genocide, in part on the basis of his encouragement of sexual violence against Tutsi woman. However, despite this significant decision, the ICTR has been less than vigorous in its subsequent prosecution of crimes of sexual violence. Further, the tribunal has not instituted adequate structural procedures for addressing the issues that women face when appearing as victims or witnesses.[22] For example, the ICTR has gained some notoriety for not properly explaining its processes to witnesses, failing to provide translators and psychological support where necessary, and failing to provide the same medical care to witnesses as it provides to alleged perpetrators.[23] In addition, instances have been recorded of witnesses who have testified under a banner of confidentiality in the courtroom but whose identities have been leaked outside the courtroom.[24]

Notably, the Secretary-General has explicitly recognized the importance of international tribunals operating in a gender-sensitive manner. Specifically, in his 2002 report on women, peace and security the Secretary-General submitted that the Security Council should:

> Ensure that future ad hoc tribunals created by the Security Council build on existing statutes and include judges and advisers with legal expertise on specific issues, such as violations of the rights of women and girls, including gender-based and sexual violence; ensure that prosecutors of such ad hoc international tribunals respect the interests and personal circumstances of women and girls victims [sic] and witnesses and take into account the nature of crimes involving gender-based violence, sexual violence and violence against children.[25]

Despite being lauded as proof of a growing global commitment to prosecuting those responsible for fundamental human rights violations, it should be noted that serious criticism has been levelled at both the ICTY and the ICTR. For example, both tribunals have been viewed as illustrations of the global community acting too late and dispensing 'justice' to assuage the guilt of

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need for corroboration of the victim's testimony, limits the availability of the defence of consent and prohibits evidence of the victim's prior sexual conduct.

[21] Case No ICTR-96-4-T, Judgment of 2 September 1998.

[22] Katherine M Franke, 'Gendered Subjects of Transitional Justice' (2006) 15 *Columbia Journal of Gender and Law* 813, 818.

[23] Anne Saris, *Transition for Whom? – The Involvement of Victims in International Criminal Processes: a Gender-Based Analysis* (on file with author) 38–64.

[24] Binaifer Nowrojee, 'Your Justice is Too Slow: Will the ICTR Fail Rwanda's Rape Victims?' (Occasional Paper, United Nations Institute for Social Development, 2005).

[25] Secretary-General, above n 7, [25].

having failed to prevent the commission of egregious human rights violations;[26] both tribunals have been regarded as paying inadequate attention to the rights of the accused, for example the right to a 'fair and expeditious trial';[27] and both tribunals have been accused of dispensing 'selective justice'.[28] From a gendered perspective, whilst significant improvements have been made in terms of criminalizing and prosecuting sexual violence, it is important to recognize that focusing only on sexual violence 'has had the effect of sexualizing women in ways that fail to capture both the array of manners in which women suffer gross injustice, as well as the ways in which men suffer gendered violence as well'.[29]

C The International Criminal Court

On 17 July 1998, after years of discussion and negotiation, the ICC was established by the Rome Statute of the International Criminal Court as a permanent, independent court 'to exercise its jurisdiction over persons for the most serious crimes of international concern' and to 'be complementary to national criminal jurisdictions'.[30] The ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression (which is as yet undefined).[31] Being such a young institution, it is unclear precisely how the ICC will operate and how it will deal with the numerous difficulties which it faces. For example, it will be interesting to observe precisely how the ICC decides which cases to prosecute; it is unclear how the ICC will approach the issue of states granting amnesty to perpetrators of human rights violations;[32] and whether it will become more of a political institution than a judicial institution is an ongoing concern.[33] This last point is based in part on the power of

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26 Cassese, above n 6, 326–7.

27 Ibid 444.

28 Ibid.

29 Franke above n 22, 823.

30 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*') Article 1. The notion of an international court's jurisdiction being complementary to that of national courts was a novel idea; it is set out in Article 17 of the *Rome Statute*. For a more detailed discussion of the principle of complementarity, see Cassese, above n 6, 342–4.

31 *Rome Statute* Article 5.

32 For a discussion of the issue of the ICC's approach to national amnesty programs, see Michael P Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 *Cornell International Law Journal* 447.

33 For a discussion of the issue of the political versus the judicial nature of the ICC, see Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510.

the Security Council both to refer a case to the ICC and to suspend an investigation or prosecution. However, it is interesting to note that a core component of the United States' objections to the ICC rests on the argument that it is not sufficiently accountable to the Security Council.[34]

The *Rome Statute*, like the Statutes of the ICTY and ICTR before it, has made significant advances in the way in which various international crimes are defined. As stated above, one of the significant recent developments in international criminal law has been the increased focus on gender-based offences. Whilst the statutes of the *ad hoc* tribunals made important advances in recognizing the gravity of such offences, the *Rome Statute* expands upon the punishable sorts of gender-based offences. In its definition of 'crimes against humanity' the *Rome Statute* includes '[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'.[35] It also includes as a crime against humanity '[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, *gender* as defined in [Article 7(3)] or any other grounds that are universally recognized as impermissible under international law'.[36] In addition, the Rome Statute includes in its definition of 'war crimes' '[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in [Article 7(2)(f)], enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions or a violation of Common Article 3.'[37]

D Hybrid tribunals

Recent years have seen the emergence of so-called 'hybrid' tribunals – tribunals that combine aspects of international and domestic law and whose judicial body is composed of both international judges and local judges. Such tribunals have been established in Sierra Leone, East Timor, Bosnia, Kosovo and Cambodia. Hybrid tribunals differ from international tribunals in the form of their establishment and in the level of international involvement.

Cassese points out a number of advantages which a hybrid tribunal has over a purely international tribunal. It assuages the nationalistic demands of local authorities, loath to hand over the administration of justice to international

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[34] Ronli Sifris, 'Weighing Judicial Independence against Judicial Accountability: Do the Scales of the International Criminal Court Balance?' (2008) 8 *Chicago-Kent Journal of International and Comparative Law* 88.

[35] *Rome Statute* Article 7(1)(g).

[36] *Rome Statute* Article 7(1)(h) (emphasis added). It should be noted that pursuant to Article 7(3) the term 'gender' refers to the two sexes, male and female, within the context of society.

[37] *Rome Statute* Articles 2(b)(xxii), 2(e)(vi).

bodies, and it involves persons familiar with the culture of the accused in the rendering of justice. Further, by holding trials in the territory where the crimes have been perpetrated, it exposes the local population to past atrocities, thereby publicly stigmatizing the perpetrators and providing a cathartic process for the victim. In addition, a hybrid tribunal may expedite prosecutions and trials without compromising respect for international standards and international law in general. It may also produce a significant spill-over effect in its influence on local members of the prosecution and the judiciary.[38]

Nonetheless, despite the fact that there are well-founded reasons for establishing hybrid tribunals, there are also a number of problems associated with this form of tribunal. Differences in culture and experience may cause tension between local and international members of both the prosecution and the judicial body. Funding is another never-ending source of anxiety and there are constant security concerns when tribunals are established in countries where undercurrents of social discord remain.[39]

E Domestic tribunals

It should be noted that, whilst commentators on international criminal law generally focus on international tribunals, there are many instances of states conducting prosecutions for violations of human rights in the transitional context pursuant to their own domestic law in their own domestic courts. Such prosecutions have taken place in numerous countries as diverse as Mexico, Indonesia, Bosnia and Argentina. Each state has a completely different political landscape and legal system and each has faced different challenges and enjoyed different levels of prosecutorial success. Space precludes a thorough evaluation of 'domestic tribunals' as a whole. Suffice to say, there are clear advantages in having prosecutions take place at the domestic level. For example, the state and the society take ownership over their own transitional justice process; domestic prosecutions help to strengthen the domestic legal system and respect for the rule of law; aspects of local culture can be taken into account and incorporated into the judicial process; domestic prosecutions allow for easier access to witnesses and evidence than international prosecutions; and domestic tribunals do not require the same level of funding as international tribunals. However, domestic prosecutorial initiatives frequently encounter a number of problems such as lack of capacity or political will, an inadequate legal system, and lack of respect for the rule of law.[40] Further,

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38 Cassese, above n 6, 333–4.

39 Ibid 334–5.

40 Steven R Ratner and Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press, Oxford, 2003) 340.

domestic tribunals may serve to invalidate the suffering of women by regarding oppression of women as a social norm rather than a criminal activity.[41]

3 Truth commissions

Concluding his introduction to the Report of the Chilean National Commission on Truth and Reconciliation, José Zalaquett wrote in reference to those interviewed by the Commission:

> [M]any of them asked for justice. Hardly anyone, however, showed a desire for vengeance. Most of them stressed that in the end, what really mattered to them was to know the truth, that the memory of their loved ones would not be denigrated or forgotten, and that such terrible things would never happen again.[42]

A Definition and purpose

Truth commissions have evolved to become a widely recognized part of the path towards reconciliation in transitioning societies. Whilst an inquiry into widespread abuses can be undertaken by bodies which are not truth commissions, truth commissions share certain characteristics: they focus on the past, investigating a pattern of abuses over a period of time, rather than a specific event; they are temporary bodies, typically in operation for six months to two years, which complete their work with the submission of a report; and they are officially sanctioned, authorized, or empowered by the state.[43] In addition, truth commissions are generally created to inquire into recent events; they generally focus on violence committed to achieve political objectives; and the abuses investigated are generally widespread as opposed to *ad hoc* instances.[44]

There are a number of reasons why a state may choose to create a truth commission as a supplement to prosecutions when confronting a legacy of human rights abuse. First, as the name suggests, perhaps the most fundamental purpose of a truth commission is to clarify and acknowledge the truth.[45]

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41 For an in-depth discussion of the systemic nature of discrimination against women (in both peacetime and times of conflict) and the failure to properly recognize so-called 'ordinary violence' as punishable by law, see Vasuki Nesiah et al, 'Truth Commissions and Gender: Principles, Policies, and Procedures' (Gender Justice Series Working Paper, International Center for Transitional Justice, 2006) http://www.ictj.org/static/Gender/GendHandbook.eng.pdf at 16 December 2008.

42 José Zalaquett, 'Introduction' in National Commission on Truth and Reconciliation, *Report of the Chilean National Commission on Truth and Reconciliation* (University of Notre Dame Press, Notre Dame, Phillip E Berryman trans, 1993 ed).

43 Priscilla B Hayner, *Unspeakable Truths: Facing the Challenges of Truth Commissions* (Routledge, New York, 2001) 14.

44 Ibid 17.

45 Ibid 24.

Whereas truth may be a by-product of prosecutions and a subsidiary objective, it is not the primary aim of a prosecutorial process. In contrast, truth commissions are specifically created to formulate a formal record of what abuses occurred, how they occurred, who were the perpetrators, and who were the victims.

Another purpose of a truth commission is to respond to the needs and interests of victims. The acknowledgment of suffering is an extremely important part of the healing process. Likewise, lack of knowledge of what happened to loved ones can have a stultifying effect, preventing relatives and friends of victims from being able to forgive or move forward. This is not to say that with the revelation and acknowledgment of truth automatically come forgiveness and reconciliation, but without such revelation it is extremely difficult for a society to move forward. A formal recording of the truth helps to provide closure to victims, and it is only with such closure that true reconciliation can occur. Further, in contrast to prosecutions which focus on the accused, the focus of a truth commission is on the testimony of victims. This provides victims with a public voice and results in an increasing awareness of the specific needs of victims amongst the community at large. From a more practical perspective, truth commissions also help victims by recommending reparations or by officially establishing the legal status of victims such as those who have disappeared.[46]

An additional purpose of a truth commission is to promote reconciliation and reduce tensions resulting from past violence.[47] Ultimately, all transitional justice mechanisms have as a primary objective the achievement of reconciliation, but truth commissions, perhaps more than any other transitional justice mechanism, actively seek to reduce tensions by bringing out into the open all the anger, pain and suffering which has been experienced and forcing society to confront this legacy of abuse and to deal with it.

From a gendered perspective, the fact that truth commissions provide women (who as a group have traditionally been relegated to the private realm and prevented from speaking out in public) with the opportunity to tell their stories in a public forum is validating and empowering. However, according to Vasuki Nesiah:

> Most truth commissions share the phenomenon that the vast majority of people who come forward and provide testimony are women; however the majority of those women do not speak of the violations they suffered but the harm that befell their husbands, sons, brothers and fathers – the men in their lives.[48]

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46 Ibid 28.

47 Ibid 30.

48 Vasuki Nesiah, 'Gender and Truth Commission Mandates' (International Centre for Transnational Justice) http://www.ictj.org/static/Gender/0602.GenderTRC.eng.pdf at 16 December 2008.

Even where women have testified as to their own personal experiences, the focus of truth commissions has generally been on sexual violence alone.[49] Whilst it is obviously extremely important to expose the various forms of sexual violence endured by women, such a focus unfortunately frequently results in a lack of attention to other forms of harm which are inflicted on women and reduces women to sexual beings. To once again invoke the civil and political versus the economic, social and cultural distinction – truth commissions tend to tell the truth about violations of civil and political rights whilst by-passing violations of economic, social and cultural rights. This is so despite the fact that women are disproportionately affected by violations of rights in the private sphere and despite the fact that, for women, their individual narratives of suffering will frequently include violations of both forms of rights and will not be truly capable of relegation to one specific event of sexual violence.

B South Africa as an example

In April 1994 South Africa held its first truly democratic election. The formerly banned African National Congress ('ANC'), led by Nelson Mandela, won the election and in July 1995 Parliament passed the *Promotion of National Unity and Reconciliation Act* ('*TRC Act*') establishing the Truth and Reconciliation Commission ('TRC'). The TRC was charged with exposing atrocities committed from 1 March 1960 onwards. It consisted of three committees: the Committee on Human Rights Violations, the Committee on Amnesty, and the Committee on Reparation and Rehabilitation.

The role of the Committee on Human Rights Violations was to gather testimony from victims and construct an accurate record of the atrocities committed during apartheid.[50] The Committee on Reparation and Rehabilitation was charged with formulating recommendations for the awarding of reparations.[51] Such recommendations included both individual as well as collective reparations and financial as well as non-financial reparations. It also made recommendations for the reform of institutions to ensure the non-repetition of abuses.[52] This is one example of the inter-relatedness of the different transitional justice mechanisms. Perhaps the most controversial aspect of the South African Truth and Reconciliation Commission concerned the Committee on

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49 Nesiah et al, above n 41, 8–9.

50 *TRC Act* s 14.

51 *TRC Act* s 25.

52 Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report* (2003) South African Government Information, http://www.info.gov.za/otherdocs/2003/trc/ at 16 December 2008, section 2.