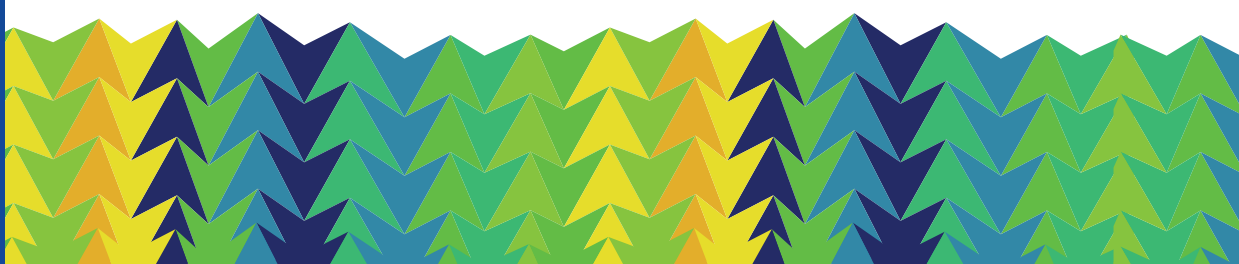
ANTÔNIO AUGUSTO CANÇADO TRINDADE
CÉSAR BARROS LEAL

Coordinators

THE HUMAN RIGHTS OF THE VULNERABLE, MARGINALIZED AND EXCLUDED

VIII

Brazilian Interdisciplinary Course in Human Rights



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THE HUMAN RIGHTS OF THE VULNERABLE, MARGINALIZED AND EXCLUDED

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PREFACE

Due to the pandemic, we did not have the Brazilian Interdisciplinary Course on Human Rights in 2021. But behold, it reappears with all its strength this year, scheduled to take place from 15 to 26 August 2022, with the central theme *The Human Rights of the Vulnerable, Marginalized and Excluded*. It will be the eighth, in the same city, Fortaleza, Ceará, and in the same hotel (Praia Centro), with the same format (immersion), for two weeks, with a difference from the previous ones: it will be hybrid, with the virtual participation of students from different states, and countries, which makes even greater the challenge we took on in 2012 to replicate, with some adjustments, every two years, the academic activity that for more than three decades has been successfully offered by the Inter-American Institute of Human Rights, based in San José, Costa Rica.

The thematic books of this collection, which also have the seal of the Centro Universitário Farias Brito FB UNI, our main partner (which will also guarantee the online transmission of the VIII Course lectures), are written in Portuguese, Spanish, French and English, and will be distributed free of charge to its participants, as well as the journal of the Brazilian Institute of Human Rights (revista.ibdh.org.br), now in its 22nd issue

Many of the authors who appear in these works have regularly contributed to our publications and/or given lectures in previous editions of the event. The selected articles, among dozens that were sent to us, perceptively analyze, under multiple approaches, the issue of vulnerability, marginalization and exclusion of vast segments of the population, which, in different latitudes, to a greater or lesser extent, has challenged those who have the ability to make changes. This is the main purpose of our project, which is not limited to stimulating reflection and debate, but also to presenting concrete proposals at the federal, state and municipal levels, forwarded, after the completion of each course, to the relevant sectors.

We take the liberty, by the way, to suggest the reading of two documents, included in this collection, namely: Brasilia Rules on Access

to Justice for Persons in Vulnerable Condition and the International Convention on the Rights of Persons with Disabilities and its Optional Protocol, in addition to a plethora of sentences handed down, in cases of enormous national and international repercussion (as well as the separate votes of their respective judges) of the Inter-American Court of Human Rights, European Court of Human Rights and Constitutional Courts (among them, for example, those from Colombia and Costa Rica), which dealt directly or transversally with the themes of the VIII Course.

It's important to thank those who, in a solidary way, have indicated texts of excellence and intermediated the contact with authors of various nationalities, with a view to ensuring their collaboration. Among these people, we mention, once again, Professor Juana María Ibañez Rivas, a Peruvian lawyer with extensive experience in international law and human rights, to whom we pay our gratitude.

The reader is invited to read this and other titles, on universal themes, in the area of human rights, published by the IBDH and accessible on its website (ibdh.org.br), being possible to download, free of charge, any one of your articles. It is a very rich collection, whose consultation is recommended for scholars of all ages and areas of activity.

Good reading!

Antônio Augusto Cançado Trindade and César Barros Leal
The Hague/Fortaleza, julho de 2022

REFLECTIONS ON THE PRINCIPLE OF HUMANITY IN ITS WIDE DIMENSION TAKING INTO ACCOUNT THE VULNERABILITY OF HUMAN BEINGS

Antônio Augusto Cançado Trindade
Judge of the International Court of Justice (The Hague); Former President of the Inter-American Court of Human Rights; Emeritus Professor of International Law of the University of Brasilia; Doctor *Honoris Causa* of several Universities in Latin America, Europe, and Asia; Member of the *Institut de Droit International*, and the *Curatorium* of The Hague Academy of International Law.

1. INTRODUCTION

In the reflections which follow, the principle of humanity will be addressed in its wide dimension, encompassing the whole *corpus juris* of international protection of the human person, in any circumstances, and particularly in those of great adversity. The principle of humanity, in line with the longstanding thinking of natural law, will then be considered as an emanation of human conscience, projecting itself into conventional as well as customary international law. Attention will then be turned to its presence in the framework of the Law of the United Nations, as well as to its judicial recognition in the case-law of contemporary international tribunals. The way will thus be paved for the presentation of my concluding observations on the matter. The relevance of the present study extends itself to the protection to those who find themselves in situations of vulnerability, if not defencelessness.

2. THE PRINCIPLE OF HUMANITY: ITS WIDE DIMENSION

When one evokes the principle of humanity, there is a tendency to consider it in the framework of International Humanitarian Law. It is beyond doubt that, in this framework, for example, civilians and persons hors de combat are to be treated with humanity. The principle of humane treatment of civilians and persons *hors de combat* is provided for in the 1949 Geneva Conventions on International Humanitarian Law (common Article 3, and Articles 12(1)/12(1)/13/5 and 27(1)), and their Additional Protocols I (Article 75(1)) and II (Article 4(1)).

Such principle, moreover, is generally regarded as one of customary International Humanitarian Law.

My own understanding is in the sense that the principle of humanity is endowed with an even wider dimension[1]: it applies in the most distinct circumstances, in times both of armed conflict and of peace, in the relations between public power and all persons subject to the jurisdiction of the State concerned. That principle has a notorious incidence when these latter are in a situation of vulnerability or great adversity, or even *defencelessness*, as evidenced by relevant provisions of distinct treaties integrating the International Law of Human Rights.

Thus, for example, at the U.N. level, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides, *inter alia*, in its Article 17(1), that "[m]igrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and their cultural identity". Likewise, the 1989 U.N. Convention on the Rights of the Child stipulates that "States Parties shall ensure that [e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age (...)" (Article 37(b)). Provisions of the kind can also be found in human rights treaties at the regional level.

To recall but a couple of examples, the 1969 American Convention on Human Rights, in providing for the right to humane treatment (Article 5), determines *inter alia* that "[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person" (para. 2). Likewise, the 1981 African Charter on Human and Peoples´ Rights disposes of *inter alia* that "[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status" (Article 5). And the 1969 Convention on the Specific Aspects of Refugee Problems in Africa sets forth, *inter alia*, that "[t]he grant of asylum to refugees is a peaceful and humanitarian act (...)" (Article II (2)). And the examples to the same effect multiply.

1. This is the position I upheld in my lengthy Separate Opinion in the recent decision of the International Court of Justice in the case A.S. Diallo (merits, Guinea vs. D.R. Congo, Judgment of 30.11.2010). I devoted part V of my Separate Opinion specifically to the principle of humanity in its wide dimension (paras. 93-106), and further considerations related thereto permeated part VI of my Separate Opinion, on the pprohibition of arbitrariness in the International Law of Human Rights (paras. 107-142).

3. THE PRINCIPLE OF HUMANITY IN THE WHOLE *CORPUS JURIS* OF INTERNATIONAL PROTECTION OF THE HUMAN PERSON

The treatment dispensed to human beings, in any circumstances, ought to abide by the *principle of humanity*, which permeates the whole *corpus juris* of the international protection of the rights of the human person (encompassing International Humanitarian Law, the International Law of Human Rights, and International Refugee Law), conventional as well as customary, at global (U.N.) and regional levels. The principle of humanity, in effect, underlies the two *general comments*, n. 9 (of 1982, para. 3) and n. 21 (of 1992, para. 4) of the U.N. Human Rights Committee, on Article 10 of the U.N. Covenant on Civil and Political Rights (humane treatment of persons deprived of their liberty)[2]. The principle of humanity, usually invoked in the domain of International Humanitarian Law, thus extends itself also to that of International Human Rights Law. And, as the Human Rights Committee rightly stated in its *general comment* n. 31 (of 2004), "both spheres of law are complementary, not mutually exclusive" (para. 11).

International law is not at all insensitive to the pressing need of humane treatment of persons, and the principle at issue applies in any circumstances, so as to prohibit inhuman treatment, by reference to humanity as a whole, in order to secure protection to all, including those in a situation of great vulnerability (paras. 17-20). *Humaneness* is to condition human behavior in all circumstances, in times of peace as well as of disturbances and armed conflict. The principle of humanity permeates the whole *corpus juris* of protection of the human person, providing one of the illustrations of the approximations or convergences between its distinct and complementary branches (International Humanitarian Law, the International Law of Human Rights, and International Refugee Law), at the hermeneutic level, and also manifested at the normative and the operational levels[3].

2. In respect of the recent case A.S. *Diallo* (Guinea *versus* D.R. Congo), resolved by the ICJ, I saw it fit to point out, in my Separate Opinion, *inter alia*, that the principle of humanity underlies, e.g., Article 7 of the U.N. Covenant on Civil and Political Rights, which protects the individual´s personal integrity, against mistreatment, as well as Article 10 of the Covenant (concerning persons under detention), which begins by stating that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" (para. 1). This comprises not only the negative obligation not to mistreat (Article 7), but also the positive obligation to ensure that a detainee, under the custody of the State, is treated with humanity and due respect for his inherent dignity as a human person (para. 98).

3. Cf., on this particular point, e.g., A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario - Aproximaciones y Convergencias*, Geneva, ICRC, [2000], pp. 1-66.

In faithfulness to my own conception, I have, in recent decisions of the International Court of Justice (and, earlier on, of the Inter-American Court of Human Rights as well), deemed it fit to develop some reflections on the basis of the principle of humanity *lato sensu*. I have lately done so, e.g., in my Dissenting Opinion[4] in the case of the *Obligation to Prosecute or Extradite* (Belgium *versus* Senegal, Request for Provisional Measures, Order of 28.05.2009), and in my Dissenting Opinion[5] in the case of *Jurisdictional Immunities of the State* (Counter-Claim, Germany versus Italy, Order of 06.07.2010), as well as in my Separate Opinion in the Court's Advisory Opinion on *Accordance with International Law of the Declaration of Independence of Kosovo* (of 22.07.2010)[6].

4. THE PRINCIPLE OF HUMANITY IN THE HERITAGE OF NATURAL LAW THINKING

It should not pass unnoticed that the principle of humanity is in line with natural law thinking. It underlies classic thinking on humane treatment and the maintenance of sociable relationships, also at the international level. Humaneness came to the fore even more forcefully in the treatment of persons in situation of vulnerability, or even defencelessness, such as those deprived of their personal freedom, for whatever reason. The *jus gentium*, when it began to correspond to the law of nations, came then to be conceived by its "founding fathers" (F. de Vitoria, A. Gentili, F. Suárez, H. Grotius, S. Pufendorf, C. Wolff) as regulating the international community constituted by human beings socially organized in the (emerging) States and co-extensive with

4. Paragraphs 24-25 and 61.

5. Paragraphs 116, 118, 125, 136-139 and 179. In this lengthy Dissenting Opinion, my reflections relating to the principle of humanity are found particularly in its part XII, on human beings as the true bearers (*titulaires*) of the originally violated rights and the pitfalls of State voluntarism (paras.112-123), as well as in its part XIII, on the incidence of jus cogens (paras. 126-146), besides the Conclusions (mainly paras. 178-179).

6. In the Court´s recent Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (of 22.07.2010), I devoted one entire section (XIII(4)) of my lengthy Separate Opinion expressly to the "fundamental principle of humanity" (paras. 196-211) in the framework of the law of nations itself. I saw it fit to recall that the "founding fathers" of international law (F. de Vitoria, A. Gentili, F. Suárez, H. Grotius, S. Pufendorf, C. Wolff) propounded a *jus gentium* inspired by the principle of humanity *lato sensu* (paras. 73-74). My aforementioned Separate Opinion is permeated with my personal reflections on basic considerations of humanity in the treatment of peoples under the law of nations (paras. 67-74); part VI is centred on the contemporaneity of the `*droit des gens*´, with particular attention to the humanist vision of the international legal order (paras. 75-96); part XII is focused on the people-centered outlook in contemporary International Law (paras. 169-176), part XIV on a comprehensive conception of the incidence of *jus cogens* (paras. 212-217); and part XIII, on principles of international law, the Law of the United Nations and the humane ends of the State (paras. 177-211), wherein I address specifically the fundamental principle of humanity, in the framework of the Law of the United Nations (paras. 196-211 - and cf. *infra*).

humankind, thus conforming the *necessary* law of the *societas gentium*. This latter prevailed over the will of individual States, respectful of the human person, to the benefit of the common good[7].

The precious legacy of natural law thinking, evoking the natural law of the right human reason (*recta ratio*), has never faded away, and this should be stressed time and time again, particularly in face of the indifference and pragmatism of the "strategic" *droit d'étatistes*, so numerous in the legal profession in our days. In so far as the International Law of Human Rights is concerned, it may further be recalled that, in the aftermath of the II World War, the 1948 Universal Declaration of Human Rights proclaimed that "[a]ll human beings are born free and equal in dignity and rights" (Article 1). The fundamental principle of equality and non-discrimination, according to the Advisory Opinion n. 18 of the Inter-American Court of Human Rights [IACtHR] on the *Juridical Condition and Rights of Undocumented Migrants* (of 17 September 2003), belongs to the domain of *jus cogens*.

In that transcendental Advisory Opinion of 2003, the IACtHR, in line with the humanist teachings of the "founding fathers" of the *droit des gens* (*jus gentium*), pointed out that, under that fundamental principle, the element of equality can hardly be separated from non-discri mination, and equality is to be guaranteed without discrimination of any kind. This is closely linked to the essential dignity of the human person, ensuing from the unity of humankind. The basic principle of equality before the law and non-discrimination permeates the whole operation of the State power, having nowadays entered the domain of *jus cogens*[8].

7. A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brazil, Edit. Del Rey, 2006, pp. 9-14, 172, 318-319, 393 and 408.

8. IACtHR, Advisory Opinion n. 18 (of 17.09.2003), on the *Juridical Condition and Rights of Undocumented Migrants*, Series A, n. 18, paras. 83, 97-99 and 100-101. In my Concurring Opinion, I stressed that the fundamental principle of equality and non-discrimination permeates the whole *corpus juris* of the International Law of Human Rights, has an impact in Public International Law, and projects itself onto general or customary international law itself, and integrates nowadays the expanding material content of *jus cogens* (paras. 59-64 and 65-73). - In recent years, the IACtHR, together with the ad hoc International Criminal Tribunal for the Former Yugoslavia, have been the contemporary international tribunals which have most contributed, in their case-law, to the conceptual evolution of *jus cogens* (well beyond the law of treaties), and to the gradual expansion of its material content; cf. A.A. Cançado Trindade, *"Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law", in XXXV *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* – OAS (2008) pp. 3-29.

5. PRINCIPLES OF HUMANITY AND THE DICTATES OF PUBLIC CONSCIENCE: THE MARTENS CLAUSE

In so far as International Humanitarian Law is concerned, one may recall that, as early as 1907, the IV Hague Convention contained, in its preamble, the *célèbre Martens clause*, whereby in cases not included in the adopted Regulations annexed to it, "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the principles of humanity, and the dictates of the public conscience" (para. 8). The *Martens clause*, inserted into the preamble of the IV Hague Convention of 1907, - and, even before that, also in the preamble of the II Hague Convention of 1899 (para. 9)[9], both Conventions pertaining to the laws and customs of land warfare, - invoked the "principles of the law of nations" derived from "established" custom, as well as the "principles of humanity" and the "dictates of the public conscience".

Subsequently, the Martens clause was again to appear in the common provision, concerning denunciation, of the four Geneva Conventions of International Humanitarian Law of 1949 (Article 63/62/142/158), as well as in the Additional Protocol I (of 1977) to those Conventions (Article 1(2)), - to refer to a couple of the main Conventions of International Humanitarian Law[10]. The fact that, throughout more than a century, the draftsmen of the Conventions of 1899, 1907, and 1949 and of Protocol I of 1977 have repeatedly asserted the elements of the Martens clause in those international instruments reckons that clause as an emanation of human conscience as the ultimate material source of International Humanitarian Law and International Law in general.

In this way, it exerts a continuous influence in the spontaneous formation of the contents of new rules of International Humanitarian Law. By intertwining the principles of humanity and the dictates of public conscience, the Martens clause establishes an "organic interdependence"

9. It was originally presented by the Delegate of Russia (Friedrich von Martens) to the I Hague Peace Conference (of 1899).

10. The Martens clause has thus been endowed, along more than a century, with continuing validity, in its invocation of public conscience, and it keeps on warning against the assumption that whatever is not expressly prohibited by the Conventions on International Humanitarian Law would be allowed; quite on the contrary, the Martens clause sustains the continued applicability of the principles of the law of nations, the principles of humanity, and the dictates of the public conscience, independently of the emergence of new situations. The Martens clause impedes, thus, the *non liquet*, and exerts an important role in the hermeneutics and the application of humanitarian norms.

of the legality of protection with its legitimacy, to the benefit of all human beings[11]. The legacy of Martens is also related to the primacy of Law in the settlement of disputes and the search for peace.

The contemporary juridical doctrine has also characterized the Martens clause as a source of general international law itself[12], and no one would dare today to deny that the "principles of humanity" and the "dictates of the public conscience" invoked by the Martens clause belong to the domain of *jus cogens*[13]. The aforementioned clause, as a whole, has been conceived and reiteratedly affirmed, ultimately, to the benefit of humankind as a whole, thus maintaining its topicality. The clause may be considered as an expression of the *raison d'humanité* imposing limits on the *raison d'État*.[14]

VI. THE FUNDAMENTAL PRINCIPLE OF HUMANITY IN THE FRAMEWORK OF THE LAW OF THE UNITED NATIONS

In my lengthy Separate Opinion in the recent Advisory Opinion of the ICJ on the *Accordance with International Law of the Declaration of Independence of Kosovo* (of 22.07.2010), I dwelt, *inter alia*, upon the fundamental principle of humanity, in the framework of the law of international organizations, and in particular of the Law of the United Nations (paras. 196-211). I recalled therein that the experiments of international organizations of *mandates*, *minorities* protection, *trust* territories, and, nowadays, *international administration* of the territory, have not only turned closer attention to the "people" or the "population" concerned, to the fulfillment of the needs, and the empowerment, of the inhabitants, but have also fostered - each one in its own way – their access to justice at international level (para. 90).

11. C. Swinarski, "Préface", in V.V. Pustogarov, *Fedor Fedorovitch Martens - Jurist i Diplomat*, Moscow, Ed. Mezdunarodinye Otnoscheniya, 1999, p. XI. And cf. also, e.g., B. Zimmermann, "Protocol I - Article 1", *in Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949* (eds. Y. Sandoz, Ch. Swinarski and B. Zimmermann), Geneva, ICRC/ Nijhoff, 1987, p. 39; H. Meyrowitz, "Réflexions sur le fondement du droit de la guerre", *in Études et essais sur le Droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (ed. Ch. Swinarski), Genève/La Haye, CICR/Nijhoff, 1984, pp. 423-424; and cf. H. Strebel, "Martens' Clause", *in Encyclopedia of Public International Law* (ed. R. Bernhardt), vol. 3, Amsterdam, North-Holland Publ. Co., 1982, pp. 252-253.

12. F. Münch, "Le rôle du droit spontané", *in Pensamiento Jurídico y Sociedad Internacional - Libro-Homenaje al Prof. D. A. Truyol y Serra*, vol. II, Madrid, Univ. Complutense, 1986, p. 836.

13. S. Miyazaki, "The Martens Clause and International Humanitarian Law", *in Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de J. Pictet* (ed. C. Swinarski), Geneva/The Hague, CICR/ Nijhoff, 1984, pp. 438 and 440.

14. A.A. Cançado Trindade, *International Law for Humankind – Towards a New Jus Gentium*, Leiden, Nijhoff, 2010, pp. 150-152 and 275-285.

Such access to justice is understood *lato sensu*, i.e., as encompassing the *realization of justice*. Those experiments of international organizations (rendered possible by the contemporary expansion of the international legal personality, no longer a monopoly of States) have contributed to the vindication by individuals of their own rights, emanated directly from the *droit des gens*, from the law of nations itself (para. 196). In my perception, this is one of the basic features of the new *jus gentium* of our times. After all, every human being is an end in himself or herself, and, individually or collectively, is entitled to enjoy the freedom of belief and "freedom from fear and want", as proclaimed in the preamble of the Universal Declaration of Human Rights (para. 2).

Every human person has the right to respect for his or her dignity, as part of the humankind[15]. The recognition of this fundamental *principle of humanity* – I added in my aforementioned Separate Opinion - is one of the great and irreversible achievements of the *jus gentium* of our times (para. 197). At the end of this first decade of the XXIst century, the time has come to derive the consequences of the manifest non-compliance with this fundamental principle of humanity[16]. States, created by human beings gathered in their social *milieu*, are bound to protect, and not at all to oppress, all those who are under their respective jurisdictions (para. 199).

This corresponds to the minimum ethical, universally reckoned by the international community of our times. States are bound to safeguard the integrity of the human person from repression and systematic violence, from discriminatory and arbitrary treatment. The conception of fundamental and inalienable human rights is deeply-engraved in the universal juridical conscience; in spite of variations in their enunciation or formulation, their conception marks a presence in all cultures and the history of human thinking of all peoples[17].

15. B. Maurer, *Le principe de respect de la dignité humaine et la Convention Européenne des Droits de l'Homme*, Paris, CERIC/Univ. d'Aix-Marseille, 1999, p. 18.

16. I further added that: "Rights inherent to the human person are endowed with universality (the unity of the human kind) and timelessness, in the sense that, rather than being "conceded" by the public power, they truly precede the formation of the society and of the State. Those rights are independent of any forms of socio-political organization, including the State created by society. The rights inherent to the human person precede, and are superior to, the State. All human beings are to enjoy the rights inherent to them, for belonging to humankind. As a corollary of this, the safeguarding of such rights is not exhausted - it cannot be exhausted - in the action of States. By the same token, States are not to avail themselves of their entitlement to territorial integrity to violate systematically the personal integrity of human beings subject to their respective jurisdictions" (para. 198).

17. Cf., e.g., [Various Authors,] *Universality of Human Rights in a Pluralistic World* (Proceedings of the 1989 Strasbourg Colloquy), Strasbourg/Kehl, N.P. Engel Verlag, 1990, pp. 45, 57, 103, 138, 143 and 155.

It should be kept in mind that the acknowledgment of the principle of respect for human dignity was introduced by the 1948 Universal Declaration, and is at the core of its basic outlook. It firmly asserts : - "All human beings are born free and equal in dignity and rights" (Article 1). And it recalls that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" (preamble, para. 2). The Universal Declaration warns that "it is essential if the man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law" (preamble, para. 3). And it further acknowledges that "recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world" (preamble, para. 1).

Since the adoption of the Universal Declaration in 1948, one could hardly anticipate that a historical process of generalization of the international protection of human rights was being launched, on a truly universal scale[18]. Throughout more than six decades, of remarkable historical projection, the Declaration has gradually acquired an authority that its draftsmen could not have foreseen. This happened mainly because successive generations of human beings, from distinct cultures and all over the world, recognized in it a "common standard of achievement" (as originally proclaimed), which corresponded to their deepest and most legitimate aspirations.

18. Already throughout the *travaux préparatoires* of the Universal Declaration (particularly in the thirteen months between May 1947 and June 1948), the holistic view of all rights to be proclaimed promptly prevailed. Such outlook was espoused in the official preparatory work of the Declaration, i.e., the debates and drafting in the former U.N. Commission on Human Rights (*rapporteur*, René Cassin) and subsequently in the Third Committee of the General Assembly. In addition, in 1947, in a contribution to the work then in course in the U.N. Commission on Human Rights, UNESCO undertook an examination of the main theoretical problems raised by the elaboration of the Universal Declaration; it circulated, to some of the most influential thinkers of the time around the world, a questionnaire on the relations between rights of individuals and groups in societies of different kinds and in distinct historical circumstances, as well as the relations between individual freedoms and social or collective responsibilities. For the answers provided, cf. *Los Derechos del Hombre - Estudios y Comentarios en torno a la Nueva Declaración Universal Reunidos por la UNESCO*, Mexico/Buenos Aires, Fondo de Cultura Económica, 1949, pp. 97-98 (Teilhard de Chardin), 181-185 (Aldous Huxley), 14-22 and 69-74 (Jacques Maritain), 24-27 (E.H. Carr), 129-136 (Quincy Wright), 160-164 (Levi Carneiro), 90-96 (J. Haesaert), 75-87 (H. Laski), 143-159 (B. Tchechko), 169-172 (Chung-Shu Lo), 23 (M.K. Gandhi), 177-180 (S.V. Puntambekar), and 173-176 (H. Kabir). The two U.N. World Conferences on Human Rights (Teheran, 1968; and Vienna, 1993) have given concrete expression to the interdependence of all human rights and to their universality, enriched by cultural diversity.

VII. THE FUNDAMENTAL PRINCIPLE OF HUMANITY IN THE CASE-LAW OF CONTEMPORARY INTERNATIONAL TRIBUNALS

Last but not least, the fundamental principle of humanity has been asserted also in the case-law of contemporary international tribunals. It has met with full judicial recognition[19]. May I recall, on the basis of my own experience, the *jurisprudence constante* of the Inter-American Court of Human Rights [IACtHR] in this respect, which has properly warned - during the period I had the honor to preside the IACtHR - that the principle of humanity, inspiring the right to humane treatment (Article 5 of the American Convention on Human Rights), applies even more forcefully when a person is unlawfully detained, and kept in an "*exacerbated situation of vulnerability*"[20].

In my Separate Opinion in the Judgment of the IACtHR in the case of the *Massacre of Plan de Sánchez (of 29.04.2004), concerning Guatemala, I devoted a whole section* (III, paras. 9-23) of it to the judicial acknowledgment of the principle of humanity in the recent case-law of that Court as well as of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia. Furthermore, I expressed therein my understanding that the principle of humanity, orienting the way one treats the others (*el trato humano*), "encompasses all forms of human behavior and the totality of the condition of the vulnerable human existence" (para. 9).

In the case of the *Massacre of Plan de Sánchez* (Judgment of 29.04.2004), at a certain stage of the proceedings before the IACtHR, the respondent State accepted its international responsibility for violations of rights guaranteed under the American Convention on Human Rights, and, in particular, for "not guaranteeing the right of the relatives of the (...) victims and members of the community to express their religious, spiritual and cultural beliefs" (para. 36). In my Separate Opinion in that case, I pondered that the primacy of the principle of humanity is identified with the very end or ultimate goal of the Law, of the whole legal order, both domestic and international, in recognizing the inalienability of all rights inherent to the human person (para. 17).

19. Cf. A.A. Cançado Trindade, "Le déracinement et la protection des migrants dans le droit international des droits de l´homme", 19 *Revue trimestrielle des droits de l´homme* - Bruxelles (2008) pp. 289-328, esp. pp. 295 and 308-316.

20. Inter-American Court of Human Rights [IACtHR], Judgments in the cases of *Maritza Urrutia vs. Guatemala*, of 27.11.2003, para. 87; of *Juan Humberto Sánchez vs. Honduras*, of 07.06.2003, para. 96; *Cantoral Benavides vs. Peru,* of 18.08.2000, para. 90; and cf. *Bámaca Velásquez vs. Guatemala*, of 25.11.2000, para. 150.

That principle marks presence - I added - not only in the International Law of Human Rights but also in International Humanitarian Law, being applied in all circumstances. Whether it is regarded as underlying the prohibition of inhuman treatment (established by Article 3 common to the four Geneva Conventions on International Humanitarian Law of 1949), or else as by reference to humankind as a whole, or still to qualify a given quality of human behavior (*humaneness*), the principle of humanity is always and ineluctably present (paras. 18-20). The same principle of humanity, - I concluded in the aforementioned Separate Opinion in the case of the *Massacre of Plan de Sánchez,* - also has an incidence in the domain of International Refugee Law, as disclosed by the facts of the *cas d'espèce*, involving massacres and the State-policy of *tierra arrasada*, i.e., the destruction and burning of homes, which generated a massive forced displacement of persons (para. 23).

Cruelties of the kind, unfortunately, occur in different latitudes, and distinct regions of the world, - human nature being what it is. The point to be here made - may I insist upon it - is that the principle of humanity operates, in my view, in a way to foster the convergences among the three trends of the international protection of the rights inherent to the human person (International Law of Human Rights, International Humanitarian Law, and International Refugee Law - cf. *supra*).

Likewise, the ad hoc International Criminal Tribunal for the Former Yugoslavia [ICTFY] likewise devoted attention to the principle of humanity in its Judgments in, e.g., the cases of *Mucic et alii* (2001) and Celebici (1998). The ICTFY (Appeals Chamber), in the *Mucic et allii* case (Judgment of 20.02.2001), pondered that both International Humanitarian Law and the International Law of Human Rights take as a "starting point" their common concern to safeguard human dignity, which forms the basis of their minimum standards of humanity[21]. In fact, the principle of humanity can be understood in distinct ways. Firstly, it can be conceived as a principle underlying the prohibition of inhuman treatment, established by Article 3 common to the four Geneva Conventions of 1949. Secondly, the principle referred to can be invoked by reference to humankind as a whole, in relation to matters of common, general, and direct interest to it. And thirdly, the same principle can be employed to qualify a given quality of human behavior (humaneness).

21. Paragraph 149 of that Judgment.

Earlier on, in the *Celebici* case (Judgment of 16.11.1998), the ICTFY (Trial Chamber) qualified as an *inhuman treatment* an intentional or deliberate act or omission which causes serious suffering (or mental or physical damage), or constitutes a serious attack on human dignity; thus, - the Tribunal added, - "inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed `grave breaches´ in the Conventions fall"[22]. Subsequently, in the *T. Blaskic* case (Judgment of 03.03.2000), the same Tribunal (Trial Chamber) reiterated this position[23].

For its part, the *ad hoc* International Criminal Tribunal for Rwanda [ICTR] rightly pondered, in the case of *J.-P. Akayesu* (Judgment of 02.09.1998), that the concept of crimes against humanity had already been recognized well before the Nuremberg Tribunal itself (1945-1946). The Martens clause contributed to that effect (cf. *supra*); in fact, expressions similar to that of those crimes, invoking victimized humanity, appeared much earlier in human history[24]. The same ICTR pointed out, in the case *J. Kambanda* (Judgment of 04.09.1998), that in all periods of human history genocide has inflicted great losses to humankind, the victims being not only the persons slaughtered but humanity itself (in acts of genocide as well as in crimes against humanity)[25].

VIII. CONCLUDING OBSERVATIONS

Contemporary (conventional and general) international law has been characterized to a large extent by the emergence and evolution of its peremptory norms (*the jus cogens*), and greater consciousness, in a virtually universal scale, of the principle of humanity. Grave violations of human rights, acts of genocide, crimes against humanity, among other atrocities, are in breach of absolute prohibitions of *jus cogens*. The feeling of *humaneness* - proper of a new *jus gentium*, of the XXIst century, - comes to permeate the whole *corpus juris* of contemporary International Law. I have called this development, - *inter alia* in my Concurring

22. Paragraph 543 of that Judgment.
23. Paragraph 154 of that Judgment.
24. Paragraphs 565-566 of that Judgment
25. Paragraphs 15-16 of that Judgment. An equal reasoning is found in the Judgments of the same Tribunal in the aforementioned case *J.P. Akayesu*, as well as in the case *O. Serushago* (Judgment of 05.02.1999, par. 15).

Opinion in the Advisory Opinion n. 16 (of 01.10.1999), of the IACtHR, on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, - a historical process of a true *humanization* of International Law[26].

The prevalence of the principle of respect for the dignity of the human person is identified with the ultimate aim itself of Law, of the legal order, both national and international. By virtue of this fundamental principle, every person ought to be respected (in her honor and her beliefs) by the simple fact of belonging to humankind, irrespective of any circumstance. The principle of the inalienability of the rights inherent to the human being, in its turn, is identified with a basic assumption of the construction of the whole *corpus juris* of the International Law of Human Rights.

In its application in any circumstances (in times both of armed conflict and of peace), in the relations between public power and human beings subject to the jurisdiction of the State concerned, the principle of humanity permeates the whole *corpus juris* of the international protection of the rights of the human person (encompassing International Humanitarian Law, the International Law of Human Rights, and International Refugee Law), conventional as well as customary. The principle, emanating from human conscience, in the line of natural law thinking, has further projected itself into the law of international organizations (and in particular into the Law of the United Nations) and has met with judicial recognition on the part of contemporary international tribunals. It has given expression to the *raison d'humanité*, imposing limits on the *raison d'État*, so as to secure protection to all those who need it, including the ones who find themselves in situations of vulnerability, if not defencelessness.

26. Paragraph 35 of the Concurring Opinion.

REVISITING THE MANDELA RULES AND BANGKOK RULES MODEL: A STUDY ON THE VULNERABLE DEPRIVED OF FREEDOM

César Barros Leal
Attorney of the State of Ceará; Retired professor at the Faculty of Law of the Federal University of Ceará; President of the Brazilian Institute of Human Rights; Ph.D. in Law from the National Autonomous University of Mexico; Post-doctor in Latin American Studies (Political and Social Sciences School of UNAM); Post-doctor in Law from the Federal University of Santa Catarina (Brazil); Post-doctor in Human Rights from the University of Salamanca.

1. INTRODUCTION

Some questions are often asked by those who try to understand the meaning and relevance of the United Nations Minimum Rules for the Treatment of Prisoners, the Mandela Rules: What is their story, from the first version to the present one? What do they consist of? What is their relevance to administrative staff and how to treat prisoners, sentenced, with disabilities or mental problems, on trial, or imprisoned for civil reasons? How familiar are administrators, technicians (social workers, doctors, psychologists) and custodians with their content? Do those who know them guide their activities according to the principles defined in the Mandela Rules? How are they viewed by lawyers, public defenders, prosecutors, and judges? Do prisoners know the Mandela Rules? Do you have any notion of them? In the next few lines, I hope to answer these questions.

2. HISTORICAL BACKGROUND

In 1929, the International Criminal and Penitentiary Commission drafted rules on the treatment of prisoners, adopted five years later by the League of Nations. Subsequently, in Geneva, in 1955, at the First Congress on Crime Prevention and Treatment of Offenders, the UN approved them under the name: United Nations Minimum Rules for the Treatment of Prisoners.

In 1955, they were approved by the United Nations Economic and Social Council. In 1971, the UN Assembly concluded that the Minimum Rules, an expression of universal values considered to be immutable in the legal heritage of man, should be implemented in the administration of criminal institutions, by the governments of all Member States. In subsequent years, many documents supplemented the Minimum Rules regarding the administration of prisons and the treatment of their inhabitants: Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador, 1988; Set of Principles for the Protection of all Persons Subjected to Any Form of Detention or Imprisonment, 1988; Basic Principles for the Treatment of Prisoners, 1990; International Covenant on Economic, Social and Cultural Rights, 1996, Principles and Best Practices for the Protection of Persons Deprived of Liberty in the Americas, 2008 and United Nations Rules for the Treatment of Women in Prison and Non-custodial Measures for Women Offenders (Bangkok Rules), 2010.

3. THE REVISIONAL PROCESS

The Minimum Rules have remained unchanged for sixty years. The United Nations decided that it should be reviewed by an intergovernmental group of experts in 2010. Obsolete in many areas, the urge to update them was recognized. The idea was that they should reflect advances in penitentiary sciences, political sciences, and good practices, to promote security and decency for all persons deprived of their liberty.

Penal Reform International was one of the organizations involved in this process. It participated in all meetings of the Expert Group and coordinated the NGOs, including Amnesty International, American Union for Civil Liberties, World Committee for the Consultation of Friends, Center for Legal and Social Studies (Argentina), Regional Center for Human Rights and Gender Justice (Chile), International Commission for Catholic Pastoral Care and Conectas Human Rights.

After five years of review (consultations and negotiations), they were unanimously adopted by the 70th session of the UN General

Assembly, through Resolution A / RES / 70/175. Then, they came to be named Mandela Rules in tribute to one of the most respected men in our contemporary history, imprisoned for twenty-seven years, who received the Nobel Peace Prize in 1993 (for his confrontation with apartheid, his non-violent resistance, his struggle for freedom, equality, and democracy) and became President of South Africa.

Nine areas were specially reviewed by the Expert Group: respect for the dignity[1] and value inherent to prisoners as human beings; medical and health services; disciplinary measures and sanctions, including the role of medical personnel, seclusion in isolation, and food shortages; the investigation of all prisoner deaths, as well as any evidence or report of torture or inhuman or degrading treatment or punishment; the protection and special needs of vulnerable groups deprived of their liberty, taking into account countries that are facing difficult circumstances; the right to represent a lawyer; the replacement of obsolete terminology; training of the relevant personnel to apply the Minimum Rules.

These adjustments did not seek to repress the scope of any of the existing rules, but to reflect the evolution of prison studies and good practices. Something necessary and was greeted with respect and enthusiasm.

4. PARTICULARITIES AND EXAMPLES

The Mandela Rules recommend that the Member States continue to pursue to limit agglomeration at the end and, where appropriate, use non-custodial measures as alternatives to pre-trial detention[2]. Also, its non-binding characteristic (soft-law) is reaffirmed[3].

1. According to The Constitutional Court of Colombia: "The person held in a prison center maintains his or her human dignity, as recognized in Article 5 of the Constitution by expressing that 'the State recognizes, without any discrimination, the primacy of the inalienable rights of the person'. The fact of seclusion does not imply the loss of one's condition as a human being, because, as the function and purpose of the sentence indicate, it is carried out for the protection of society, the prevention of crime and, mainly, as a process of resocialization of the person responsible for the punishable fact." (Constitutional Court, sent. T-065, 1995).
2. We suggest reading: "Despite the provisions of international law, which restricts the use of pretrial detention to strictly prescribed circumstances, overuse and long periods of pretrial detention are endemic in many countries. It is known that there were two million two hundred and fifty thousand people in pretrial detention and other forms of incarceration in the world in 2008. It was estimated that another quarter of a million were held in pretrial detention in countries where no information was available. During the course of an average year, at least 10 million people were admitted to preventive detention. The high proportion of pretrial detainees is a particularly serious problem in Africa, Latin America and South Asia, where, in some countries, the proportion of pretrial detainees reaches 70-90%." (Handbook on Strategies to Reduce Overpopulation in Prison, op. cit., p. 28)
3. For further clarification: "Despite their legal nature as soft law (without binding force for Member States), the rules and norms have made a significant contribution to the promotion of more effective and fair criminal justice structures in three dimensions. First, they can be used at the national level by promoting more specific diagnoses of prison systems, which may

What the United Nations Minimum Rules do is to consolidate certain fundamental principles regarding the administration of prisons and the treatment of prisoners, calling attention to the profusion of socioeconomic and legal conditions observable in the countries for which they are destined.

They are divided into two parts: the first ones refer to the general administration of prisons and comprise rules applicable to all categories of prisoners, from criminal or civil orbit, convicted or provisional, including those subjected to security measures or correctional measures established by the judicial authority; the second one, in turn, deals with each of the special categories.

> Some of the Rules of General Application:
>
> Fundamental Principles
>
> Rule 1
>
> All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman, or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers, and visitors shall be ensured at all times.
>
> Rule 2 (1)
>
> The present rules shall be applied impartially. There shall be no discrimination on the grounds of race, color, sex, language, religion, political or another opinion, national or social origin, property, birth, or any other status. The

lead to the adoption of a corresponding reform of criminal justice. Second, they can help countries to develop subregional and regional penitentiary strategies. Third, they provide guidance to States to improve their practices in line with internationally recommended standards. It is important to mention the existence of many other international instruments that include both legally binding treaties (international hard law) and declarations, rules and guidelines that are directly relevant to the UNODC mandate in the context of criminal justice reform, and to prison reform as an integral component of criminal justice reform." (Penitentiary Reform and Alternative Measures in the Latin American Context, *Ex-officio* Technical Advisory Opinion No. 006/2013, addressed to the States of the Latin American region. United Nations Regional Office against Drugs and Crime for Central America and the Caribbean - UNODC ROPAN, p. 5).

religious beliefs and moral precepts of prisoners shall be respected.

Rule 25

1. Every prison shall have in place a health-care service tasked with evaluating, promoting, protecting, and improving the physical and mental health of prisoners, paying particular attention to prisoners with special health-care needs or with health issues that hamper their rehabilitation.

2. The health-care service shall consist of an interdisciplinary team with sufficient qualified personnel acting in full clinical independence and shall encompass sufficient expertise in psychology and psychiatry. The services of a qualified dentist shall be available to every prisoner.

Rule 43

1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman, or degrading treatment or punishment. The following practices, in particular, shall be prohibited: (*a*) Indefinite solitary confinement; (*b*) Prolonged solitary confinement; (*c*) Placement of a prisoner in a dark or constantly lit cell; (*d*) Corporal punishment or the reduction of a prisoner's diet or drinking
water; (*e*) Collective punishment.

Rule 74

1. The prison administration shall provide for the careful selection of every grade of the personnel since it is on their integrity, humanity, professional capacity, and personal suitability for the work that the proper administration of prisons depends.

2. The prison administration shall constantly seek to awaken and maintain in the minds both of the personnel and the

public the conviction that this work is a social service of great importance, and to this end, all appropriate means of informing the public should be used.

Among the Rules Applicable to Special Categories:

A. Prisoners under Sentence

Rule 87

Before the completion of the sentence, the necessary steps should be taken to ensure for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same prison or another appropriate institution, or by the release on trial under some kind of supervision which must not be

B. Prisoners with mental disabilities and/or health conditions

Rule 109 (1)

Persons who are found to be not criminally responsible, or who are later diagnosed with severe mental disabilities and/or health conditions, for whom staying in prison would mean an exacerbation of their condition, shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities as soon as possible.

C. Prisoners under arrest or awaiting trial

Rule 111(2)

Unconvicted prisoners are presumed to be innocent and shall be treated as such.

D. Civil Prisoners

Rule 121

In countries where the law permits imprisonment for debt, or by order of a court under any other non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody

and good order. Their treatment shall be not less favorable than that of untried prisoners, with the reservation, however, that they may be required to work.

5. IN SEARCH OF A MINIMUM MODEL

The Mandela Rules do not propose a model of perfection, even because it is recognized, without any discrepancy, that its full compliance is not observed in any country and many are light-years away from its implementation.

For the United Nations Office on Drugs and Crime, a model prison is literally that one: administered based on justice and humanity, in which people deprived of their freedom spend time dedicated to useful activities, such as education and professional training, which contribute to their reintegration after release; where **vulnerable groups** are not discriminated against or mistreated; where prison staff perform their professional functions following the United Nations rules and regulations; where health services respond to the basic needs of those deprived of liberty; and ensure an adequate approach to the outside world. That is why more important than the physical construction of a model prison is how prisons are administered; how people deprived of freedom spend their time; the behavior of prison staff; the quality of health services and the level of communication with civil society. Prison examples that have many characteristics of those models can be found in different countries, including those of low or medium-income in Latin America and Asia. Thus, the determining elements for a prison to be considered a model prison are the technical quality and preparation of the director of the penal center and the support it receives from the director of the prison system, within the integral plan management of the system, which is reflected in good planning, staff training or the development of strong links with civil society. "

In their Preliminary Observations 1 and 2.1, the Rules add:

Preliminary observation 1 (The following rules are not intended to describe in detail a model system of penal institutions. They seek only, based on the consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principles and practice in the treatment of prisoners and prison management.);

Preliminary Observation 2.1 (Given the great variety of legal, social, economic, and geographical conditions in the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavor to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.).

In this respect, it is up to give room once again to the *Handbook on Best Prison Practices*, according to which the Minimum Rules should not be seen as prescribing a perfect model. This stems from the fact that "such a determination would be unreal since it presupposes greater knowledge and skill than that available; it would not take into account the economic, social, historical and political variation among different countries and, since no system can achieve and maintain permanent perfection, it would deny the need to strive for continuous positive change." It also reads in the Manual that MR "comprise only basic and minimum requirements, necessary conditions for a penitentiary system to achieve minimally human and effective levels".

6. RESPONDING TO INTERROGATIONS

Finally, giving the missing answers to the questions asked at the beginning of this text, I would say, after keeping in touch with professionals working in the area, as well as prisoners of both sexes, who serve time in medium and high-security prisons:

Most managers, technicians, and custodians in Latin America are not familiar with the Mandela Rules. They have a slight idea of their content and nothing more than that; no interest is shown to know them and guide their work based on their dispositions. They argue that there is no way to apply them in their daily routine. They refer to them in a pejorative way.

Lawyers also see them as a mere list of sterile and innocuous recommendations. His opinion is shared by most public defenders, prosecutors, and judges, for whom the Rules are powerless to change the profile of the prison system.

As far as prisoners are concerned, they usually have no idea what they consist of and what they mean. For the few who are aware of them, they only reinvigorate the government's inability to serve them at appropriate levels and guarantee respect for their human rights.

7. THE BANGKOK RULES

One of the international documents for the protection of human rights is the Bangkok Rules, that is, the United Nations Rules for the Treatment of Women in Prison and Non-custodial Measures for Women Offenders.

Consider that they reinforce, for example, the content of the Minimum Rules for the Treatment of Prisoners (Mandela Rules), the Set of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the Principles Basics for the Treatment of Prisoners.

The Bangkok Rules are divided into 4 sections: Section I contains the Basic Rules that comprise the general administration of institutions, applicable to all categories of women deprived of liberty. Section II contains rules applicable only to special categories treated in each situation. (Two of the subsections contain additional rules for the treatment of adolescents deprived of their liberty). Section III embodies rules that include the application of non-custodial sanctions and measures for adult female offenders and adolescents in conflict with the law. Section IV embraces rules on an investigation, planning, evaluation, public awareness, and information exchange, and applies to all categories of female offenders.

Let us mention, below, no more than five of those Rules, excluding the ones that are not related to the examined topic (rules for adolescents and which are concerned to non-custodial sanctions):

> **Section I – Rules of General Application**
>
> Rule 1
>
> For the principle of non-discrimination embodied in rule 6 of the Standard Minimum Rules for the Treatment of Prisoners to be put into practice, the account shall be taken of

the distinctive needs of women prisoners in the application of the Rules. Providing for such needs to accomplish substantial gender equality shall not be regarded as discriminatory.

Rule 5

The accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs, including sanitary towels, provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating;

Section II – Rules applicable to special categories

A. Prisoners under sentence

Rule 40

Prison administrators shall develop and implement classification methods addressing the gender-specific needs and circumstances of women prisoners to ensure appropriate and individualized planning and implementation towards those prisoners' early rehabilitation, treatment, and reintegration into society.

B. Prisoners under arrest or awaiting trial

Rule 56

The particular risk of abuse that women face in pretrial detention shall be recognized by relevant authorities, which shall adopt appropriate measures in policies and practices to guarantee such women's safety at this time.

Section IV – Research, planning, evaluation, and public awareness-raising

Rule 68

Efforts shall be made to organize and promote research on the number of children affected by their mothers'

> confrontation with the criminal justice system, and imprisonment in particular, and the impact of this on the children, to contribute to policy formulation and program development, taking into account the best interests of the children.

Here are some of the preliminary observations of the Bangkok Rules: 1. The Standard Minimum Rules for the Treatment of Prisoners apply to all prisoners without discrimination; therefore, the specific needs and realities of all prisoners, including women prisoners, should be considered in their application. The Rules adopted more than 50 years ago, did not, however, draw enough attention to women's needs. 4. These rules are inspired by principles contained in various United Nations conventions and declarations and are therefore consistent with the provisions of existing international law. They are addressed to prison authorities and criminal justice agencies (including policymakers, legislators, the prosecution service, the judiciary, and the probation service) involved in the administration of non-custodial sanctions and community-based measures. 7. In the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century. adopted by the Tenth Congress, Member States committed themselves to considering and addressing, within the United Nations crime prevention and criminal justice program, as well as within national crime prevention and cri minal justice strategies, any disparate impact of programs and policies on women and men (para. 11); and to the development of action-oriented policy recommendations based on the special needs of women as prisoners and offenders (para. 12). The plans of action for the implementation of the Vienna Declaration contain a separate section (sect. XIII) devoted to specific recommended measures to follow up on the commitments undertaken in paragraphs 11 and 12 of the Declaration, including that of States reviewing, evaluating, and, if necessary, modifying their legislation, policies, procedures, and practices relating to criminal matters, in a manner consistent with the Bangkok Rules, which reaffirm that prisoners are part of a group with particular needs and requirements, reinforcing the information that, unfortunately, in many countries, penitentiary

facilities have been designed to accommodate male inmates. What is more, they warn that they do not usually represent risks to society and are able, more than men, to social reintegration.

In addition to the Bangkok and Mandela Rules, conventions, declarations and resolutions are added to recommend that women prisoners and their children be properly assisted, emphasizing the rejection of any form of discrimination and ruthless and demeaning treatment.

8. THE ABYSS BETWEEN RULES AND REALITY. THE CASE OF BRAZIL

For many, the discrepancy between such rich manifestations of principles and the concrete situation of most prisons in Latin America, male and female, seems to be strangled by endless problems.

There is no dispute about that. The gap is indisputable. What should prevail is not resigning oneself to what is set, what exists, but the courage to adjust to an ideal. The change involves norms, but also the political will to implement them and the involvement of society at different levels (support, inspection) and the firm and resolute action of judges and prosecutors.

Something must be done to bridge this distance and the apathy towards the sinking of dignity, the continuous disregard for the physical and moral integrity of the detainees and the failure to comply with: a) the principles inscribed in Federal Constitution of 1988 (among which: the law shall regulate individualization of the penalty and shall adopt, among others, the following: deprivation or restriction of freedom and alternative social benefit; there will be no perpetual and forced labor penalties; the penalty shall be served in different establishments, according to the nature of the crime, the age and sex of the convict); b) the Penal Enforcement Law, strongly influenced by the Minimum Rules, in which the Explanatory Memorandum (item 65) states that the fight against the effects of imprisonment will become useless without establishing the legal guarantee of the convicted person's rights (art. 3): the convict and the inmate shall be guaranteed all rights not affected by the sentence or the law; rights that are provided for in article 41: sufficient food and clothing; assignment of work and remuneration;

social security; constitution of security; proportionality in the distribution of time for work, rest and recreation; exercise of previous professional, intellectual, artistic and sporting activities, provided they are compatible with the enforcement of the sentence; material, health, legal, educational, social and religious assistance; protection against any form of sensationalism; personal and reserved interview with the lawyer; visit of the partner, relatives and friends, on certain days; nominal call; equal treatment, except for the requirements of individualization of the sentence; special audience with the center's director; representation and petition to any authority, in defense of rights; contact with the outside world through written correspondence, reading and other means of information that do not compromise morals and good customs); and c) the Minimum Rules for the Treatment of Prisoners in Brazil (also divided into two parts and approved at the regular meeting of October 17, 1994 of the National Council for Criminal and Penitentiary Policy and now pending aggiornamento).

9. FINAL CONSIDERATIONS

The Mandela Rules and the Bangkok Rules seek to influence doctrine, jurisprudence, and the drafting of penitentiary laws, worldwide, to provide prisoners with dignified treatment. This, in addition to the insistence on implementation (we know that the drop pierces the stone not exactly because of its strength, but thanks to its constancy), is undoubtedly a real step to change mentalities and make them present within the walls.

Emphasizing what I said before: what matters is to reduce the gap between their predictions and the day-to-day lives of most prisons, especially in Latin America, which reminds us of Professor María de la Paz Pando Ballesteros, in the introduction to the book *Past and Present of Human Rights: Looking to the Future*, referring to one of the great challenges of today, that is, the contradiction between theory and practice, between the recognition and the real protection of the rights of people and the collective.

With this spirit, stimulated by responsible optimism (I gave a lecture under the title *The Penitentiary System. From Hopelessness to*

Responsible Optimism: A Human Rights Perspective, at the University of Salamanca, on January 22, 2019, during the International Postdoctoral Seminar: Interdisciplinary Studies on Human Rights) and with the expectation of a new era, I remember the warning both Nelson Mandela and Fiódor Dostoiévski gave, that a nation is only known when its prisons are visited because the parameter should not be how this nation treats its citizens at the highest level, but the way it treats members of the lower strata of society.

THE PROMOTION OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS OF VULNERABLE GROUPS IN AFRICA PURSUANT TO TREATY OBLIGATIONS: CRC, CEDAW, CERD, & CRPD*

Connie De la Vega
Professor of Law at the University of San Francisco; he has written extensively on international human rights law and directs the Frank C. Newman International Human Rights Law Clinic.

Kokeb Zeleke and **Esther Wilch**
Kokeb Zeleke and Esther Wilch participated in the Clinic and graduated from the University of San Francisco School of Law.

1. INTRODUCTION

This article will examine the promotion of the economic, social, and cultural rights of vulnerable groups, such as women, children, persons with disabilities, and racial minorities through the human rights treaty body review process. It will highlight the range of mechanisms at the international level that can be used to enforce the rights of vulnerable communities in Africa and the extent to which these mechanisms have been utilized by the African States, with a focus on four applicable international treaties. These treaties are the Convention for the Rights of the Child (CRC),[1] the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW),[2] the Convention for the Elimination of All Forms of Racial Discrimination (CERD),[3] and the International Convention on the Promotion and Protection of the Rights and Dignity of Persons with Disabilities (CRPD).[4] These treaties are monitored by committees bearing names similar to the treaties and thus the same initials will be used: Committee on the Rights of the Child (CRC); Committee on the Elimination of Discrimination Against Women (CEDAW); Committee for the Elimination of Racial

1. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* http://www.refworld.org/docid/3ae6b38f0.html (last visited May 31, 2015) [hereinafter CRC].
2. United Nations Convention on the Elimination of all forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13 *available at* http://www.un.org/womenwatch/daw/cedaw/(last visited May 31, 2015) [hereinafter CEDAW].
3. United Nations International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 *available at* http://www.refworld.org/docid/3ae6b3940.html (last visited May 31, 2015) [hereinafter CERD].
4. United Nations Conventions on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3, *available at* http://www.un.org/disabilities/convention/conventionfull.shtml (last visited May 31, 2015) [hereinafter CRPD].

Discrimination (CERD); and the Committee on the Rights of Persons with Disabilities (CRPD). This article will analyze the participation of African states in the treaty bodies and the articulation and implementation of the rights under those treaties for the identified vulnerable groups. The purpose of the review of African countries is to consider the effect that treaty participation has had on the continent, with the view of assessing the capacity that the treaty bodies have for promoting and protecting human rights by documenting laws and practices in various countries. It is hoped that the article will provide an overview of the laws as well as some positive practices that have been adopted by various African countries in line with the human rights treaties.

The adoption and implementation of the treaties reveal that the African continent is the center of the focus of this analysis because of its vast diversity and relative lack of information in regards to the adoption and implementation of UN agreements. Rather than lumping the different countries into a single narrative, this Article gives a cursory look at various issues and how they are being approached in the context of individual countries.

Because it is often difficult to get information in these countries, the research is based primarily on the Concluding Observations of four treaty body committees, and on other resources from governmental and non-governmental organizations. Concluding Observations report on individual countries' compliance with the relevant treaty, taking into account the states' reports, dialogues, and other information received from Civil Society.[5]

The countries reviewed, and the issues discussed, are a reflection of some of the most positive changes in law and practice that have occurred in the last several years. The countries covered, along with the solutions offered, are not representative of the continent as a whole, and are not intended to be taken as such. The primary principle for the selection of the countries included reflects the availability of reports that address both the situation of vulnerable groups and the protection of economic, social, and cultural rights. Within the constraints of the reporting system, there is a variety of geographic, demographic, and governmental structures covered that show model of successful implementation.

5. Civil Society is a term of art at the UN and refers to participants other than governments and United Nations agencies and staff.

While it is difficult to document the connection between participation of countries in the treaty body system and their subsequent human rights record, it is postulated that the system is affecting legislation and programs aimed at protecting the rights of vulnerable people. Besides, the system allows for reporting of practices, both of which can be emulated by other countries.

2. CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child (CRC) is an international treaty adopted by the United Nations General Assembly.[6] Adopted in 1989, 195 countries are parties to the CRC.[7] The United States of America and Somalia are the only two countries that have signed the treaty but have not yet ratified it,[8] while South Sudan, which seceded from Sudan in 2011, has yet to sign or ratify the Convention.[9]

This part will focus on six countries, including those that have made significant progress, as well as those that require stronger laws and practices to ensure the protection of children. The countries are Botswana, Liberia, Mali, Namibia, Algeria, and Cameroon, based on Concluding Observations by the CRC in 2004 for Botswana,[10] 2007 for Mali,[11] 2010 for Cameroon,[12] and 2012 for Liberia,[13] Namibia,[14] and Algeria.[15]

6. CRC, *supra* note 1.

7. United Nations Treaty Collections, Chapter IV Human Rights, 11. *Convention on the Rights of the Child*, Nov. 20, 1989 *available at* http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en (last visited May 18, 2015).

8. *Id*.

9. U.N. *Human Rights Treaties, Status of Ratification: CRC, available at* http://www.bayefsky.com/pdf/crc_ratif_table.pdf (last visited May 31, 2015).

10. U.N. Committee on the Rights of the Child (CRC), *Concluding Observations: Botswana,* Nov. 3, 2004, CRC/C/15/Add.242, *available at* http://www.refworld.org/docid/42d2888b4.html (last visited May 31, 2015) [hereinafter *CRC: CO: Botswana*].

11. U.N. Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child: concluding observations: Mali,* 3 May 2007, CRC/C/MLI/CO/2, available at http://www.refworld.org/docid/478ca72a2.html (last visited May 31, 2015) [hereinafter *CRC: CO: Mali*].

12. U.N. Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child: concluding observations: Cameroon,* 11–29 Jan. 2010, CRC/C/CMR/CO/2, available at http://www.bayefsky.com/pdf/cameroon_t4_crc_53.pdf (last visited May 31, 2015) [hereinafter *CRC: CO: Cameroon*].

13. U.N. Committee on the Rights of the Child (CRC), *Concluding observations on the combined second to fourth periodic reports of Liberia, adopted by the Committee at its sixty-first session* (17 Sept.–5 Oct. 2012), 13 Dec. 2012, CRC/C/LBR/CO/2-4, available at http://www.bayefsky.com//pdf/liberia_t4_crc_61_2012_adv.pdf (last visited May 31, 2015) [hereinafter *CRC: CO: Liberia*].

14. U.N. Committee on the Rights of the Child (CRC), *Concluding observations on the consolidated second and third periodic reports of Namibia, adopted by the Committee at its sixty-first session* (17 September–5 October 2012), 13 Dec. 2012, CRC/C/NAM/CO/2-3, available at http://www.bayefsky.com//pdf/namibia_t4_crc_61_2012_adv.pdf (last visited May 31, 2015) [hereinafter *CRC: CO: Namibia*].

15. UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child: concluding observations: Algeria*, 18 July 2012, CRC/C/DZA/CO/3-

The rights of children encompass a wide variety of issues, and the following will focus on themes that are presently addressed in multiple African countries, with a focus on positive changes, as well as shortcomings, and how they can be remedied. These issues are child labor, trafficking, and sex tourism of children, educational standards, corporal punishment, health care affecting children, and the formulation of the justice system as it applies to minors.

A. CHILD LABOR, TRAFFICKING, AND SEX TOURISM

In regards to child labor, Article 32 of the CRC states that children have the right to be "protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, . . . health, or physical, mental, spiritual, moral, or social development."[16] The same article also states that parties to the CRC must establish a minimum age for employment, regulate hours and conditions of work, and establish and enforce penalties for those who violate standards and/or subject children to child labor.[17]

Namibia is one of the African countries that has made positive progress in this respect. In 2012, the state launched a five-year (2012–2016) call of action to implement the constitutional mandate that reflects the obligations outlined in the CRC.[18] Enacted in June 2012, the Namibia National Agenda for Children centers on five principles: "health and nourishment; early childhood development and schooling; HIV prevention, treatment, care, and support; an adequate standard of living and legal identity; and protection against neglect and abuse."[19] Namibia promoted education and awareness of children's rights through various initiatives including the "Day of the African Child" and the "Day of the Namibian Child".[20] Namibia also printed child-friendly versions of the CRC, although only in English so far.[21]

4, *available at* http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_DZA_CO_3-4.pdf (last visited May 31, 2015) [hereinafter *CRC: CO: Algeria*].

16. *CRC*, *supra* note 1, art. 32(1).

17. *CRC*, *supra* note 1, art. 32(2).

18. *CRC: CO: Namibia*, *supra* note 14, § 12.

19. Eastern & Southern Africa Regional Inter Agency Task Team on Children and AIDS, *Namibia National Agenda for Children 2012-2016*, at ii, June 2012, *available at* http://www.riattesa.org/resources/namibia-national-agenda-children-2012-2016 (last visited May 31, 2015).

20. *CRC: CO: Namibia*, *supra* note 14, § 22.

21. *Id*.

Algeria has implemented numerous initiatives to eradicate child labor, some of which were focused on raising awareness about the dangers of this practice, and involved around 300,000 children in educational and vocational training establishments.[22] Although the minimum legal age to work is 16, the government cannot enforce such laws when they apply to children employed in the informal sector. This has resulted in the age restriction having little or no substantial impact.

For trafficking, Article 35 of the CRC provides that "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."[23] Algeria passed a law in 2009 that criminalizes human trafficking, with increased penalties for those who are involved in the trafficking of children.[24] A network of civil society organizations also manages a helpline specifically for children.[25] Despite these laws and the efforts of non-governmental organizations, Algeria is still lacking in terms of the implementation and enforcement of these laws.[26] Cameroon, for its part, has a few measures in place to fight this problem including laws that criminalize the trafficking and smuggling of children and the National Plan to Combat Trafficking and Sexual Exploitation, approved in 2009, as well as other measures taken to address this human rights violation specifically in the context of tourism.[27]

B. EDUCATION STANDARDS

Article 28 of the CRC provides that children have the right to education.[28] To afford this positive right, the CRC lists potential party actions, including implementing "measures to encourage regular attendance at schools and the reduction of drop-out rates," and making "primary education compulsory and available free for all."[29] Algeria is a country that shows significant advancement in this respect. In 2007, Algeria reached a 98% primary education enrollment rate.[30] In 2009,

22. *CRC: CO: Algeria, supra* note 15, § 71.
23. *CRC, supra* note 1, art. 35.
24. *CRC: CO: Algeria*, *supra* note 15, § 77.
25. *Id.* § 79.
26. *Id.* § 77.
27. *CRC: CO: Cameroon, supra* note 12, § 73.
28. *CRC, supra note* 1, art. 28
29. *Id.*
30. *CRC: CO: Algeria, supra* note 15, § 63.

Algeria implemented a strategy to eliminate illiteracy by 2015 and achieved a girl's right to education by making education compulsory for boys and girls between the ages of 6 and 16;[31] however, education in Algeria is still not free as required by the CRC.[32] Families still have to pay 10% of school fees at the primary level and around 21% at the secondary level.[33]

C. CORPORAL PUNISHMENT

In regards to corporal punishment and various types of abuses that are often legitimized by local cultures, Article 19 of the CRC states in part that countries need to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation."[34] In some societies, corporal punishment is seen as an appropriate vehicle for influencing and teaching behaviors to children. In addition to its use in the nuclear family structure, corporal punishment is also used in schools to discipline young children; [35]however, as parties to the CRC, States are required to take measures to protect children from any form of physical abuse.[36]

Mali is commendable in this regard for implementing various legislative, administrative, social, and educational measures to outlaw many forms of corporal punishment.[37] Corporal punishment is prohibited in schools through internal regulations, and it is an unlawful criminal sentence or disciplinary method within penal institutions;[38] however, corporal punishment still exists in settings beyond the reach of the state's legislative authority.[39] Mali recently replaced the Family Relations Code (1973), in which Article 84 explicitly gave fathers the right to "custody, [...] management, surveillance, and correction" of their children.[40] Article 565 of the new Family Code (2009) (later amended in

31. *Id*.
32. *CRC, supra* note 1, art. 28.
33. *CRC: CO: Algeria, supra* note 15, § 63.
34. *CRC, supra* note 1, art. 19(1).
35. Global Initiative to End All Corporal Punishment, *Mali—Country Report*, Feb. 2013, at 2, *available at* http://www.endcorporalpunishment.org/pages/pdfs/states-reports/Mali.pdf (last visited May 31, 2015) [hereinafter *Mali—Country Report*].
36. *CRC, supra* note 1, art. 19.
37. *CRC: CO: Mali, supra* note 11, § 39.
38. *Mali—Country Report, supra* note 35.
39. *CRC: CO: Mali, supra* note 11, § 39.
40. *Mali—Country Report, supra* note 35, at 2.

2011) silently repealed the inference of legality for corporal punishment, now only providing that parents are responsible for the "maintenance and education" of their children and eliminating the "right of correction."[41] Even so, corporal punishment is still practiced within the privacy of families and in Koranic schools.[42] A 2001–2007 UNICEF study of women between the ages of 15 to 49, indicated that 75% of women believed a husband's violent physical behavior toward his wife is justified in certain circumstances.[43] In contrast, Liberia, which made corporal punishment illegal in all correctional facilities, has yet to extend the same requirement to schools, homes, or alternative care settings.[44]

Algeria is another encouraging example in this area. Not only did Algeria prohibit all forms of corporal punishment in educational settings, but it also outlawed any psychological ill-treatment and all forms of bullying in schools as of January 2008.[45] Of course, the cultural norms have yet to fully adapt to the law as corporal punishment is still widely accepted in society and remains lawful in the home and alternative care settings;[46] however, a United Nations Children's Fund (UNICEF) report[47] on disciplinary practices of families at home in 11 African countries, including Algeria, showed that many caregivers and parents use a combination of violent and non-violent means to discipline children, even if most of them do not believe corporal punishment is a necessity.[48] This report notes that it is not sufficient to focus only on changing people's attitudes towards corporal punishment.[49] A legislative reform prohibiting all forms of violence is a necessary step for preventing corporal punishment in all contexts.[50]

At the other extreme, Botswana is a country where corporal punishment is still legal.[51] It continues to be used as a disciplinary method for children, whether in the intimacy of home, at school by teachers, or as

41. *Id*.
42. *CRC: CO: Mali, supra* note 11, § 39.
43. *Mali—Country Report, supra* note 35, at 2.
44. *CRC: CO: Liberia, supra* note 13, § 45.
45. *CRC: CO: Algeria, supra* note 15, § 43.
46. *Id*.
47. African Committee of Experts on the Rights and Welfare of the Child, *Ending Corporal Punishment of Children: Africa E-Newsletter*, May 2011, at 5, *available at* http://www.endcorporalpunishment.org/pages/pdfs/newsletters/Africa-newsletter-May-2011-EN.pdf (last visited May 31, 2015).
48. *Id*.
49. *Id*.
50. *Id*.
51. *CRC: CO: Botswana, supra* note 10, § 36.

a sanction in the juvenile justice system.[52] Botswana could remedy this by following the examples of other African countries. Its obligations under the CRC dictate that it should take steps to outlaw all forms of abuse towards children, whether it is corporal punishment or psychological and emotional abuse.

D. PRIMARY HEALTH CARE

Primary health care is mainly dealt with in the part of this Article covering CEDAW; however, the CRC specifies a child's right to "the highest attainable standard of health" and requires states to maintain certain facilities that provide "treatment of illness and rehabilitation of health."[53]

Botswana is a notable example in this field. By decentralizing the healthcare system and establishing mobile units, Botswana has made healthcare more accessible to many in need.[54] Botswana has also engaged in dialogues with traditional leaders to ensure health care strategies are compatible with local ideologies.[55] Botswana was also successful in establishing the National AIDS Council[56] to combat the HIV/AIDS epidemic that has stifled the development of the state and the implementation of children's rights.[57] The government has reported that based on lessons learned from its earlier years of existence, the National AIDS Council has become one of the highest-ranked institutions in the State and ensures that HIV/AIDS issues are a priority on the political and economic agenda of the country.[58]

The CRC has commended Liberia's "high-level commitment to the fight against HIV/AIDS through the National AIDS Commission,"[59] and its continued efforts to reach a wider population in the education and prevention of HIV testing through clinics and the availability of antiretroviral drugs to those who need it.[60] More outreach is still

52. *Id*.
53. *CRC, supra* note 1, art. 24.
54. *CRC: CO: Botswana, supra* note 10, § 48.
55. *Id*.
56. *Id*. § 4.
57. *Id*. § 7.
58. Republic of Botswana: Botswana 2013 Global AIDS Response Report, *Progress Report of the National Response to the 2011 Declaration of Commitments on HIV/AIDS*, National AIDS Coordinating Agency, Mar. 31, 2012, *available at* http://www.unaids.org/sites/default/files/country/documents/BWA_narrative_report_2014.pdf (last visited Mar. 15, 2015).
59. *CRC: CO: Liberia, supra* note 13, § 68.
60. *Id*.

necessary, however, to provide essential coverage throughout the country and to reach everyone who needs it.[61] Liberia has also increased access to primary health-care services and has recently shown improvements in child health indicators.[62] Similarly, Mali is another African state that is providing free antiretroviral drugs.[63]

E. JUSTICE SYSTEM

Article 37(a) of the CRC prohibits torture or other cruel, inhuman, or degrading treatment or punishment of any child.[64] It also prohibits the death penalty, as well as life imprisonment without the possibility of release, for crimes committed by those who are younger than 18 years old.[65] As a principle to be applied for children in the justice system, Article 3 of the CRC states that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[66] The Committee has commended Algeria in this respect as it incorporated this principle in the Family Code in 2005 as a standard to be applied in family-related matters.[67] Besides, as of 2008, magistrates are obligated to consider this standard in any civil or administrative proceedings.[68] All juvenile court judges are also given specific training on the CRC and all its requirements.[69]

Cameroon has attempted to take into account the standard for the best interest of the child by allowing this standard to be used at the discretion of officials, including in administrative matters and judicial and penal procedures.[70] Still, the Committee has noted that stronger efforts are needed to fully incorporate these standards where applicable and successfully implement the laws.[71]

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61. *Id.*
62. *Id.* § 62.
63. *CRC: CO: Mali, supra* note 11, § 56.
64. *CRC, supra* note 1, art. 37(a).
65. *Id.*
66. *Id.* art. 3.
67. *CRC: CO: Algeria, supra* note 15, § 31.
68. *Id.*
69. *Id.* at § 25.
70. *CRC: CO: Cameroon, supra* note 12, § 66.
71. *Id.* § 29.

3. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is an international treaty adopted in 1979 by the United Nations General Assembly.[72] 188 countries are parties to the CEDAW,[73] while the United States and Palau are the only two countries that have signed but not yet ratified the treaty.[74]

> The CEDAW defines discrimination against women as: [A]ny distinction, exclusion or restriction made based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[75]

This part will focus on a few countries that have made significant progress, as well as a few that require stronger laws and practices to ensure gender equality, both *de jure and de facto*. The countries in need of improvement are Ethiopia, Burkina Faso, Kenya, Chad, Rwanda, and South Africa, based on Concluding Observations by the CEDAW adopted in 2004 for Ethiopia,[76] 2009 for Rwanda,[77] 2010 for Burkina Faso[78], and 2011 for Kenya,[79] Chad,[80] and South Africa.[81]

72. *CEDAW, supra* note 2.

73. United Nations Treaty Collection, Chapter IV Human Rights, *Convention on the Elimination of all forms of Discrimination Against Women, available at* https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&lang=en (last visited May 31, 2015).

74. *Id*.

75. *CEDAW, supra* note 2, art. 1.

76. U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *Report of the Committee on the Elimination of Discrimination against Women: Thirtieth session (12–30 January 2004), Thirty-first session (6–23 July 2004)*, §§ 235–273, U.N. Doc. A/59/38 (2004), *available at* http://www.refworld.org/docid/4ef9ec682.html (last visited May 31, 2015) [hereinafter *CEDAW: CO: Ethiopia*].

77. U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *Draft concluding observations of the Committee on the Elimination of Discrimination against Women*: *Rwanda*, U.N. Doc. CEDAW/C/RWA/CO/6 (Feb. 12, 2009), *available at* http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-RWA-CO6.pdf (last visited May 31, 2015) [hereinafter CEDAW: CO: Rwanda].

78. U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *Consideration of reports submitted by States parties under article 18 of the Convention: Concluding observations of the Committee on the Elimination of Discrimination against Women: Burkina Faso,* U.N. Doc. CEDAW/C/BFA/CO/6 (Nov. 5, 2010), *available* at http://www.bayefsky.com//pdf/burkinafaso_t4_cedaw_47.pdf (last visited May 31, 2015) [hereinafter *CEDAW: CO: Burkina Faso*].

79. U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women-Kenya*, U.N. Doc. CEDAW/C/KEN/CO/7 (Apr. 5, 2011) *available at* http://www.refworld.org/docid/4eeb60b12.html (last visited May 31, 2015) [hereinafter *CEDAW: CO: Kenya*].

80. U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Chad*, U.N. Doc. CEDAW/C/TCD/CO/1-4 (Nov. 4, 2011) available at http://www.refworld.org/docid/4eea1e3f2.html (last visited May 31, 2015) [hereinafter *CEDAW: CO: Chad*].

81. U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on*

Although the rights associated with gender equality implicate various issues, the following will present some of the more prominent themes, and how the African states have addressed them through legislative change, civil advocacy, and cooperation with other organizations. The themes will include special measures such as quotas in government and education, primary education for girls and gaps in their post-primary education, equal rights in marriage, women's access to family planning and reproductive health clinics, women's access to legal aid and justice, equal pay and employment, female genital mutilation (FGM), and HIV/AIDS prevention.

A. SPECIAL MEASURES: QUOTAS IN GOVERNMENT AND EDUCATION

Article 4, Section 1 of the CEDAW mandates the use of special measures to promote women's participation in various aspects of public life and to counteract already existing systems that prevent the advancement of women.[82] Further, it provides that "[a]doption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention [...]"[83] The CEDAW Committee has noted that Norway's quota system in the area of education "is in line with the Women's Convention, wherein access to a radical quota system is available when the purpose is to further real gender equality."[84]

African states have made significant improvements in the advancement of women's rights. Some of the most notable examples include quotas instituted for women to make up for the discriminatory cultural biases that may exist and discourage women from pursuing higher education or advancement in their careers, holding governmental positions, or successfully contributing to their respective societies. Four of the top ten countries in the world with the highest percentage representation of women in their governments are African countries.[85]

the Elimination of Discrimination against Women-South Africa, U.N. Doc. CEDAW/C/ZAF/CO/4, (Dec. 16, 2011), *available at* http://www.refworld.org/docid/4eeb5fbe2.html [(last visited May 31, 2015) [hereinafter *CEDAW: CO: South Africa*].

82. *CEDAW, supra* note 2, art. 2(b).

83. *Id*. art. 4(1). The CEDAW Committee has noted that Norway's quota system in the area of education "is in line with the Women's Convention, wherein access to a radical quota.

84. Committee on the Elimination of All Forms of Discrimination against Women, Consideration of Reports submitted by State Parties under Article 18 of the Convention of All Forms of Discrimination Against Women, *Sixth Periodic Report of State Parties,* at 7, U.N. Doc. CEDAW/C/NOR/6 (June 5, 2002).

85. Inter-Parliamentary Union, *Women in National Parliaments, World Classification*, *available at* http://www.ipu.org/wmn-e/classif.htm#1 (last visited May 31, 2015) [hereinafter CEDAW: Inter-Parliamentary Union].

Rwanda is an exemplary country that utilized temporary special measures to achieve equality for women in its legislatures. Rwanda has the highest representation of women in Parliament in the entire world,[86] with women holding 63.8% of parliamentary positions.[87] The use of quotas has been provided for in the Constitution as well as in electoral laws that ensure the representation of women in Parliament and national level placements.[88] Similarly, Seychelles has the fifth-highest rate of representation of women at 43.8%; Senegal has the sixth-highest representation at 43.3%, and South Africa has the tenth highest representation at 40.8% (out of 54 permanent seats).[89]

The CEDAW also reviewed the combined fourth and fifth periodic report of Ethiopia in January of 2004.[90] One of the developments was that Ethiopia took direct action to promote gender equality by establishing the Women's Affairs Department in 1995 at the federal level[91] with branches in all regional governments created to facilitate gender equality. This is part of an extensive structure that includes Women's Affairs Departments in respective ministries, Regional Women's Affairs Bureaus at the regional and local level, and women's coordination and desk officers within each zone.[92]

Ethiopia has made great strides towards recognizing and promoting women's participation in political matters, especially noting the crucial effect that political participation has on gender equality, identity, and empowerment. In its periodic report, Ethiopia stated that large numbers of women had participated as voters and that others have been elected to the parliament and the regional councils.[93] Ethiopia has a 27.8% rate of representation of women in its government, ranking 40th among countries in the world with the highest representation of women.[94]

86. *CEDAW: CO: Rwanda, supra* note 77, § 7.
87. *CEDAW: Inter-Parliamentary Union, supra* note 85.
88. *CEDAW: CO: Rwanda, supra* note 77, § 19.
89. *CEDAW: Inter-Parliamentary Union, supra* note 85.
90. *CEDAW: CO: Ethiopia, supra* note 76.
91. *A National Report On: Progress made in the implementation of the Beijing Platform for action (Beijing +10) Ethiopia*, ETHIOPIA PRIME MINISTER OFFICE/WOMEN'S AFFAIRS SUB SECTOR 3 (Mar. 2004), http://www.un.org/womenwatch/daw/Review/responses/ETHIOPIA-English.pdf.
92. *Appraisal Report Institutional Support Project to the Women's Affairs Office: Federal Republic of Ethiopia*, AFRICAN DEVELOPMENT BANK (Jan. 2004), at 16, *available at* http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Ethiopia_-_Institutional_Support_for_Women_Affairts_Office_-_Appraisal_Report.pdf.
93. *CEDAW: CO: Ethiopia, supra* note 76, § 231.
94. *CEDAW: Inter-Parliamentary Union, supra* note 85.

In regards to mainstreaming gender equality, like Ethiopia, Burkina Faso also has implemented a similar approach by creating the Gender Caucus in 2005.[95] Responsible for developing a national action plan, the Gender Caucus' main goal is to promote gender parity in politics by raising awareness of the importance of gender mainstreaming and by undertaking appropriate initiatives aimed at promoting the gender equality approach.[96] The Committee also commended "civil society working with governments at the local level for their active role in promoting the participation of women in political life and decision making in the State party."[97]

While Burkina Faso reported on a new law on the implementation of quotas, there are still concerns regarding the "underrepresentation of women in all areas of public, political and professional life and the existing challenges to the implementation of measures to address the situation."[98] Although some advances have been made, there is a discrepancy between the implementation of the Committee's recommendations and existing measures to achieve gender equality and the practical implications of both for Burkinabe women.[99] A similar concern exists in Rwanda, which, although reporting the highest number of women in parliament in the world, still has an underrepresentation of women in other areas such as local public administration and senior managerial positions in the private sector.[100] This indicates that, despite its successful use of quotas in one area, gender equality has yet to be reached at all levels of society. This may indicate the need for quotas in employment as well as governmental bodies.

B. PRIMARY EDUCATION FOR GIRLS AND GAPS IN POST-PRIMARY EDUCATION

Ethiopia introduced temporary special measures in the civil service and education sectors.[101] These included setting up a specific quota of 30% of the total number of university seats for women,[102] the reservation of

95. *CEDAW: CO: Burkina Faso, supra* note 78.
96. *Id.* § 29.
97. *Id.*
98. *Id.* § 17.
99. *See id.*
100. *CEDAW: CO: Rwanda, supra* note 77, § 29.
101. *CEDAW: CO: Ethiopia, supra* note 76.
102. *Id.* § 240.

50% of seats at the Teachers Training Institute for women,[103] introducing a scholarship program for girls covering 28 different schools in 7 regions,[104] as well as gender mainstreaming through the inclusion of gender as the main component of civic education in the schools' curriculum starting in primary school.[105] Other notable measures include "higher budget allocations for regional schools that increase the enrollment of girls and decrease the drop-out and repetition rates,"[106] encouraging equal access of girls to education and incentivizing schools to promote primary education to more girls.

Chad also took positive measures to address gaps in education between boys and girls. Concerning primary and secondary education, one of the measures taken was to reduce school fees for girls compared to those for boys to encourage higher education enrollment and retention by girls.[107] Rwanda also merits notable mention in the promotion of education for girls. By instituting a free and compulsory nine-year public-school education, Rwanda was able to reduce female illiteracy and achieve parity in primary education.[108]

Further steps can be taken to ensure that all women in rural and urban areas have equal access to all levels of education and vocational training. More incentives can be provided to families, especially since gender role stereotypes can be perpetuated at the family level, discouraging girls to pursue education and enter the workforce.[109] More attention should also be given to continuing education to the secondary and post-secondary level to further career opportunities and decrease the drop-out rates of young girls.[110] Other problems continue to persist as constant obstacles for girls to reach their full potential through education, including sexual harassment, violence against girls, teenage pregnancies, and involvement in income-generating activities for their families.[111]

103. *Id.* § 232.
104. *Id.* § 240.
105. *Id.* §§ 232, 240.
106. *Id.* § 232.
107. *CEDAW: CO: Chad, supra* note 80, § 30.
108. *CEDAW: CO: Rwanda, supra* note 77, § 31.
109. *CEDAW: CO: Ethiopia, supra* note 76, § 250.
110. *CEDAW: CO: Rwanda, supra* note 77, § 31.
111. *CEDAW: CO: Chad, supra* note 80, § 30.

C. EQUAL RIGHTS IN MARRIAGE, WOMEN'S ACCESS TO FAMILY PLANNING, AND REPRODUCTIVE HEALTH CLINICS

Consistent with other positive steps in advancing gender equality, Ethiopia has made significant changes both in law and in practice for female rights in marriage and their access to family planning and reproductive health clinics.[112] The State revised the family code regulating marriage and family relations to be in line with the standards set by the CEDAW, although more action is required to implement those new provisions within all regional governments and to raise awareness of the new laws amongst the population.[113] For example, the age of marriage has been set at 18 years for both men and women; however, there is still a persistent practice of early marriage, especially for girls.[114]

In regards to women's access to family planning and health services, Ethiopia improved its practices by expanding the delivery of health services to women through a referral system that targeted women.[115] Maternity leave was instituted, and women in civil service are now entitled to paid leave both before and after their delivery.[116] The Government initiated another notable project that targeted the reduction of women's vulnerability in society by providing free anti-retroviral drugs to pregnant women living with HIV/AIDS.[117]

In 2006, Kenya enacted the Sexual Offences Act, which is an act "to make provision about sexual offenses, their definition, prevention and the protection of all persons from harm from unlawful sexual acts. . . ."[118] Although commendable, the act has a few inconsistencies from the CEDAW guidelines, including exposing victims to prosecution in certain circumstances,[119] as well as lacking recognition of marital rape as a criminal offense.[120] There is still a very high prevalence of violence against women and girls, including sexual violence, accompanied by a culture of silence and underreporting, which requires that additional steps be taken to address these violations.[121]

112. *CEDAW: CO: Ethiopia, supra* note 76.
113. *CEDAW: CO: Ethiopia, supra* note 76, §§ 243, 244.
114. *Id.* § 253.
115. *Id.* § 233.
116. *Id.* § 232.
117. *Id.* § 233.
118. The Sexual Offences Act, No. 3 (2006), KENYA GAZETTE SUPPLEMENT No. 52 Preamble, *available at* http://www.refworld.org/docid/467942932.html (last visited May 31, 2015).
119. *Id.* § 21.
120. *CEDAW: CO: Kenya, supra* note 79, § 21.
121. *Id.*

D. ACCESS TO LEGAL AID, EQUAL PAY AND EMPLOYMENT OPPORTUNITIES

Kenya established a pilot program called the National Legal Aid and Awareness Programme[122] in 2008 in six regions, which focuses on specific and critical issues that limit women's access to justice. Another commendable step for Kenya was the implementation of the Employment Act of 2007, which criminalizes discrimination based on sex and pregnancy, instituting regulations of equal pay for equal work for all genders.[123] This is an important step as there is a low rate of women engagement in paid work, and a higher concentration of women in the informal sector.

Chad, in cooperation with some U.N. agencies, promoted women's access to legal aid and access to justice by providing training on sexual and gender-based violence prevention and response to its national police, and top officials of the Détachement Intégré de Sécurité (DIS), a U.N. supported security force in eastern Chad responsible for securing internally displaced persons.[124] Chad also made advances in this area by "recruiting female police officers and by opening gender-unit posts in the refugee camps."[125]

South Africa instituted the Employment Equity Act (1998)[126] and established the Employment Conditions Commission to eliminate discrimination against women in employment.[127] In addition to the Employment Equity Act, South Africa passed the Equality Act of 2000.[128] Both acts prohibit discrimination on the grounds of pregnancy, while the Basic Conditions of Employment Act of 1997 protects maternity leave.[129]

122. Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors, THE DANISH INSTITUTE FOR HUMAN RIGHTS, December 2011, Government of Kenya: Department of Justice, *National Legal Awareness Program (NALEAP)*, at 30, *available at:* http://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihr_study_final.pdf (last visited May 24, 2015).
123. *CEDAW: CO Kenya, supra* note 79, § 33.
124. *CEDAW: CO: Chad, supra* note 80, § 6.
125. *Id.* (This is an example of the difficulties of obtaining information in some countries. While it would be helpful to know the date when this legislation was passed, it is not readily available.)
126. *CEDAW: CO South Africa, supra* note 81, § 33, citing to Employment Equity Amendment Act 47 of 2013 (S.Afr.), *available at* http://www.labour. gov.za/DOL/legislation/acts/employmentequity/employment-equity-act.
127. *CEDAW: CO South Africa, supra* note 81, § 33.
128. *Id.*
129. *Id.*

E. FEMALE GENITAL MUTILATION (FGM), HEALTH ACCESS AND HIV/AIDS PREVENTION

Unfortunately, healthcare is an area in which some African states seem to be having difficulty enforcing applicable laws, creating a big discrepancy between de jure and de facto protection. For example, Chad adopted a law in April 2002 that addressed reproductive health by outlawing domestic and sexual violence, as well as female genital mutilation (FGM);[130] however, there is still a very high rate of gender-based violence. The tradition of silence surrounding these issues prevents the punishment of perpetrators, in addition to undermining existing enforcement mechanisms.[131] Estimates indicate that at least 45% of Chadian women have been subjected to FGM,[132] and 80% of Ethiopian girls and women.[133]

In 2009, Burkina Faso adopted the National Action Plan for 2009-2013, "Zero Tolerance for Female Genital Mutilation."[134] Burkina Faso's continued commitment to eradicating FGM, whether through tough laws and enforcement or campaigns to raise awareness, seems to have resulted in decreases of instances of FGM.[135] It has not been completely eradicated, as FGM is a practice entrenched within the culture and tradition of the Burkinabe;[136] however, because of initiatives such as those instituted by the National Committee to Combat the Practice of Excision, Burkina Faso has reduced the incidence of the practice,[137] and only 9% of Burkinabe women are now in favor of this practice.[138]

F. CONCLUSION

Although there is no one African country that has fully achieved the protection of equal rights of men and women in all respects, there are many countries that are relentlessly working towards this goal. Some specific

130. *CEDAW: CO: Chad, supra* note 80, § 5.
131. *Id*. § 22.
132. *Id*.
133. *CEDAW: CO: Ethiopia, supra* note 76, § 251.
134. *CEDAW: CO: Burkina Faso, supra* note 78, § 4.
135. Jessica Colombo, *Burkina Faso as a leader in the elimination of female genital mutilation*, CONSULTANCY AFRICA INTELLIGENCE (Mar. 4, 2013), http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1243:burkina-faso-as-a-leader-in-the-elimination-of-femalegenital-mutilation-&catid=91:rights-in-focus&Itemid=296.
136. *Id*.
137. *CEDAW: CO: Burkina Faso, supra* note 78, § 25.
138. UNICEF, *Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change* (July 2013), http://www.unicef.org/media/files/FGCM_Lo_res.pdf.

ways States can achieve gender equality include special measures, such as quotas set aside for women to enter government sectors and education. This is especially important because it counteracts the discouraging practices and immense burdens that already exist for women and girls seeking education and professional careers. While some countries have made progress by making use of quotas for some rights such as education and government employment, they have not done so concerning equal rights in marriage, women's access to family planning, access to health, access to legal aid, equality in salary, and employment opportunities. Another discrepancy is also found between the laws that are under the CEDAW and exist to promote equality and the entrenched beliefs of people on gender roles. This consequently leads to weak enforcement of the laws and continuing discrimination of women in various areas.

4. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION (CERD)

The Convention on the Elimination of all Forms of Racial Discrimination (CERD) is an international treaty adopted by the United Nations General Assembly in 1966 and has 177 parties.[139] This treaty defines racial discrimination as:

> [A]ny distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[140]

Accordingly, each party to the Convention has the responsibility to ensure that its people enjoy a life that is free of discrimination, whether by prohibiting discrimination or by taking special measures to guarantee full and equal enjoyment of human rights and fundamental

139. United Nations Treaty Collections, Chapter IV Human Rights, 2. *International Convention on the Elimination of All Forms of Racial Discrimination* (Mar. 7, 1966), https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-2&chapter=4&lang=en.
140. *CERD, supra* note 3 art. 1(1).

freedoms.[141] Although racial discrimination is an issue that affects the entire world, some countries may have a history of acute racial and ethnic discrimination and exclusion that significantly affects the relations of its people, which poses a threat to the safety and/or the exercise of fundamental human rights.

The following part will analyze how six countries in Africa have complied with the standards set by the CERD concerning the measures that have been taken to ensure a life free of discrimination, in addition to considering areas for improvement. The countries addressed are Senegal, Morocco, Togo, Zambia, Tanzania, and Nigeria, based on Concluding Observations from the CERD written in 2012 for Senegal,[142] 2010 for Morocco,[143] 2008 for Togo,[144] and 2007 for Tanzania,[145] Zambia[146], and Nigeria.[147] After giving a brief overview of the history of these countries, this part will address the level of awareness people have of their human rights, as well as efforts taken by the states to promote their language, culture, peaceful environment, and treatment of refugees and asylum seekers.

A. HISTORY OF THE COUNTRIES

To understand the impact that different types of discrimination can have on the stability of a country and the safety of the people living there, it is helpful to recognize the level of diversity that is involved in each state.

141. *Id*. art. 2(2).

142. U.N. Committee on the Elimination of Racial Discrimination (CERD), *Reports submitted by States parties under article 9 of the Convention : International Convention on the Elimination of All Forms of Racial Discrimination: 16th to 18th periodic reports of States parties due in 2007: Senegal*, U.N. Doc. CERD/C/SEN/16-18 (Oct. 31, 2011), *available at* http://www.refworld.org/docid/506403802.html [hereinafter *CERD: CO: Senegal*].

143. U.N. Committee on the Elimination of Racial Discrimination (CERD), *Consideration of reports submitted by States Parties under article 9 of the Convention: concluding observations of the Committee on the Elimination of Racial Discrimination:* Morocco, U.N. Doc. CERD/C/MAR/CO/17-18 (Sept. 13, 2010), *available at* http://www.refworld.org/docid/4d2c5f112.html [hereinafter *CERD: CO: Morocco*].

144. U.N. Committee on the Elimination of Racial Discrimination (CERD), *Reports submitted by States parties under article 9 of the Convention: information provided by the Government of Togo on the implementation of the concluding observations of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. CERD/C/TGO/CO/17 (Oct. 13, 2009), *available at* http://www.refworld.org/docid/4b7957460.html [hereinafter *CERD: CO: Togo*].

145. U.N. Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, United Republic of Tanzania*, U.N. Doc. CERD/C/TZA/CO/16 (Mar. 27, 2007), available at http://www.refworld.org/docid/461ba62e2.html [hereinafter *CERD: CO: Tanzania*].

146. U.N. Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Zambia,* U.N. Doc. CERD/C/ZMB/CO/16 (Mar. 27, 2007), *available at* http://www.refworld.org/docid/461ba76d2.html [hereinafter *CERD: CO: Zambia*].

147. U.N. Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Nigeria*, U.N. Doc. CERD/C/NGA/CO/18 (Mar. 27, 2007), *available at* http://www.refworld.org/docid/462f5dea2.html [hereinafter *CERD: CO: Nigeria*].

Although a deeper study of the history and the relations between the various groups is necessary for a complete understanding of the challenges involved, this part will provide an overview of the ethnic and religious diversity present in the countries that are analyzed.

The majority of Senegalese are Muslim (94%), while 5% identify as Christian, mostly Roman Catholic, and 1% of the population hold indigenous beliefs.[148] Although French is the official language of Senegal, Wolof, Pulaar, Jola, and Madinka are also spoken as their combined ethnic groups comprise over 73% of the Senegalese population.[149]

Morocco has a mix of ethnic Arab and Berber people comprising 99% of the population, with Arabic and Tamazight (one of the Berber languages) as the official languages;[150] however, there are a few other languages spoken in the country. Morocco is home to a population that is 99% Muslim, and the remaining 1% includes Christians, Bahai, and a very small Jewish minority.[151]

With over 7 million people, Togo is home to 37 tribes of African descent as well as other non-African communities.[152] The biggest tribes are Ewe, Mina, and Kabre, with their respective languages being the most popularly spoken in the country, along with Dagomba; however, French is the official language of commerce.[153] Similarly, the majority of people (51%) practice religion aligned with their indigenous beliefs, while almost 29% are Christians and 20% are Muslim.[154]

Tanzania is another African country with immense diversity within its borders. It is home to over 130 different tribes of the Bantu people, as well as communities of European, Asian, and Arab descent.[155] Both Swahili and English are the official languages of the country.[156] While mainland Tanzania is around 30% Christian, 35% Muslim, and another 35% with indigenous beliefs, the nation's Zanzibar island has a population

148. *The World Factbook: Senegal*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/sg.html (last visited May 31, 2015).
149. *Id.*
150. *The World Factbook: Morocco*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/mo.html (last visited May 31, 2015).
151. *Id.*
152. *The World Factbook: Togo*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/to.html (last visited May 31, 2015).
153. *Id.*
154. *Id.*
155. *The World Factbook: Tanzania*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/tz.html (last visited May 31, 2015).
156. *Id.*

that is 99% Muslim with a mix of ethnic Arab and African people.[157]

The majority of Zambians are Christian, while the remainder is a combination of Muslim and Hindu; only a very small minority hold indigenous beliefs.[158] An extremely diverse country, Zambia has over 10 different ethnic tribes, as well as a minority of Americans, Europeans, and Asians.[159] The languages of Zambia are as diverse as the people and include English, Bemba, Nyanja, Tonga, Lozi, Lunda, Kaonde, Lala, and Luvale.[160]

The most populous country in Africa, Nigeria, is composed of over 250 ethnic groups, half of which are Muslim, 40% are Christian, and the remaining 10% hold indigenous beliefs.[161] With over 500 languages spoken, the country is home to more languages than ethnic groups; some of the most popular languages are Hausa, Yoruba, Igbo, and Fulani, though the official language is English.[162]

B. AWARENESS OF HUMAN RIGHTS

Signatories to the CERD must promote and raise awareness about human rights, as well to ensure that everyone in the state has the knowledge and ability to exercise their rights.[163] Morocco is an example of a party that has taken positive steps to promote human rights, including the adoption of various plans and programs., The Committee recognized Morocco, in particular, for its efforts relating to democracy and human rights in 2009.[164] An initiative worth noting is Morocco's national plan of action to promote a culture of human rights, which was launched in 2006;[165] however, even if these laws exist *de jure*, the *de facto* application of them is not yet complete, as there are still concerns about racist behaviors towards specific ethnic groups, especially the Amazigh, Sahraouis, and Blacks, as well as refugees and non-nationals.[166]

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157. *Id*.
158. *The World Factbook: Zambia*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/za.html (last visited May 31, 2015).
159. *Id*.
160. *Id*.
161. *The World Factbook: Nigeria,* CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html (last visited May 31, 2015).
162. *Id*.
163. *CERD, supra* note 3, art. 7.
164. *CERD: CO: Morocco, supra* note 143, § 5.
165. *Id*. § 20.
166. *Id*.

Zambia has also made positive steps in the area of human rights. By establishing the Human Rights Commission of Zambia in 1997 in cooperation with the U.N., the country began to make progress towards securing justice for everyone.[167] This Commission can conduct investigations of complaints relating to human rights violations, as well as spread awareness and information about human rights.[168] The Human Rights Commission of Zambia is also involved in the rehabilitation of victims of human rights violations, educating communities, and advocating for policy and legal reforms where it is necessary. Tanzania, in particular, is promoting awareness of human rights through ward tribunals, justice at the grassroots level, and providing access to the justice system to a wider range of people.[169] It is hoped that these efforts to raise awareness will help to advance the promotion and protection of human rights.

C. PROMOTION OF LANGUAGE AND CULTURE

The official acknowledgment of multiple ethnic languages serves many purposes, including the ability for those who only speak a single language to understand governing laws; however, since many states have hundreds of different ethnic groups, and cannot cater to all of them, the same goal can be reached by different means. For example, Morocco has taken some steps to promote the Amazigh language and culture by increasing the resources of the Royal Institute for Amazigh Culture.[170] Nigeria has established mobile schools for children of nomadic communities to cater to diverse cultural needs.[171] Although Nigeria has legislated the abolition of any work and descent-based discrimination, a discrepancy still exists between the law and its enforcement, as evidenced by the Osu and other communities suffering from discrimination and mistreatment in both social and professional spheres.[172]

To promote harmony, Senegal has various options for those who wish to bring a claim of discrimination. The Committee has noted

167. *History*, ZAMBIA HUMAN RIGHTS COMMISSION (Sept. 30, 2014), http://www.hrc.org.zm/index.php/our-history.
168. *Id.*
169. *CERD: CO Tanzania, supra* note 145, § 8.
170. *CERD: CO: Morocco, supra* note 143, § 11.
171. *CERD: CO: Nigeria, supra* note 147, § 9.
172. *Id.* § 15.

Senegal's efforts to foster an environment of tolerance and social harmony between its various ethnicities and religions.[173] Another laudable example is Tanzania,[174] an extremely diverse State with more than 120 ethnic and minority groups, which has made continuous efforts to maintain an environment where all live in harmony.[175]

D. TREATMENT OF REFUGEES

Tanzania hosts the largest number of refugees in Africa with over 600,000 who have sought refuge[176] from neighboring countries.[177] Tanzania is a preferred destination by many seeking refuge from conflicts within their own countries, namely Burundi, Somalia, and the Democratic Republic of Congo.[178] Refugee treatment as of late has been less than ideal, as Tanzania is engaged in restructuring its refugee and asylum policies, including the suspension of the local integration of over 160,000 refugees, as well as the closing down of one of the refugee camps, forcing the relocation of numerous people to other camps.[179] Unfortunately, there is an increasing tendency in Tanzania to promote a "refugee-free zone," hindering local and international efforts to aid refugees.[180]

Senegal also hosts a significant number of refugees from neighboring countries, especially Mauritania; however, in contrast to Tanzania's lack of efforts to aid refugees in recent years, Senegal implemented a program for the voluntary repatriation of Mauritanian refugees around 2007, and in the following five years, approximately 24,500 Mauritanians took advantage of this program.[181] Those that remained in Senegal were supported by the government with its plan to issue identity cards to all refugees.[182] This policy would allow refugees to enjoy their basic rights of education and employment.

Similarly, Zambia is another country that has hosted and provided

173. *CERD: CO: Senegal, supra* note 142, § 46.
174. *CERD: CO: Tanzania, supra* note 145, § 6.
175. *Id*.
176. *CERD: CO: Tanzania, supra* note 145, § 5.
177. *2013 UNHCR Country Operations Profile: United Republic of Tanzania*, UNHCR: THE UN REFUGEE AGENCY, http://www.unhcr.org/pages/49e45c736.html (last visited May 31, 2015).
178. *Id*.
179. *Id*.
180. *Id*.
181. *CERD: CO: Senegal, supra* note 142, § 16.
182. *Id*.

protection for over 270,000 refugees from neighboring countries over several years.[183] Zambia has the initiative to address the needs of thousands of their refugees on issues such as education, health care, food, and other matters of concern to refugees;[184] however, Zambia still has an old law from the 1970s Similarly, Zambia is another country that has hosted and provided protection for over 270,000 refugees from neighboring countries over several years. Zambia has the initiative to address the needs of thousands of their refugees on issues such as education, health care, food, and other matters of concern to refugees; however, Zambia still has an old law from the 1970s called the Zambian Refugee Control Act, which does not encourage the local integration of some refugees, and this is hindering the full enjoyment of human rights by Angolan refugees, among others, who cannot repatriate.[185]

E. CONCLUSION

While extremely diverse populations in some countries have been beneficial for the state and the people, if discrimination is fostered among different groups, it can be detrimental not only to the state but also to the individuals who are the victims of the discrimination. The CERD provides standards for states to ensure that all people can enjoy a life free of discrimination based on their ethnicity, religion, or race. The struggle to achieve this harmony has varied from country to country, depending on its history and treatment of its people; however, some of the positive indicators include efforts taken by states to raise awareness among the people of their human rights, promote harmony by recognizing languages, protect culture and customs, and care for refugees and asylum-seekers.

5. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The Convention on the Rights of Persons with Disabilities (CRPD) is an international treaty adopted by the United Nations General Assembly in December 2006 with 159 signatories and 151 parties.[186] The main purpose of this convention is to "promote, protect and ensure the

183. *CERD: CO: Zambia, supra* note 146, § 7.
184. *Id.* § 14.
185. *Id.*
186. *United Nations Treaty Collections, Chapter IV Human Rights, 15. Convention on the Rights of Persons with Disabilities* (Dec. 13, 2006), *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en.

full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[187] Because of its relatively recent adoption as an international convention, not many countries have submitted their state reports.[188] Consequently, the Committee for the Rights of Persons with Disabilities has issued only twenty-seven Concluding Observations.[189] Tunisia is the only African state for which Concluding Observations have been issued.[190]

The CRPD defines persons with disabilities as "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."[191] This part will address a few examples of best practices in three African States—Ghana, Uganda, and Zimbabwe—related to the promotion of the rights of these individuals.[192]

A. BEST PRACTICE PROGRAMS

Ghana's best practice in regards to persons with disabilities was a direct child assistance program through an organization called Hope for Life.[193] The beneficiaries of this program were children and young adults with disabilities, and their parents and guardians.[194] Ghana has around 2.4 million people living with various types of disabilities, and less than 5% of this population has direct access to rehabilitation or educational services because of a lack of resources as well as negative traditional beliefs within Ghanaian communities.[195] The purpose of this program was to "ensure the application of a direct and holistic approach by promoting the rehabilitation, human rights, and social inclusion of these individuals to enable them to overcome physical, social, and economic barriers that confront them in their lives."[196] Hope for Life was able to successfully

187. *CRPD, supra* note 4, art. 1.
188. *Id*.
189. *CRPD: Concluding Observations/Comments,* UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, http://tbinternet.ohchr.org/_layouts/treatybody external/TBSearch.aspx?TreatyID=4&DocTypeID=5 (last visited at May 18, 2015). There are 27 Concluding Observations, however, 7 of them are advance unedited versions. *Id*.
190. *Id*.
191. *CRPD, supra* note 4, art. 1.
192. *Best Practices for Including Persons with Disabilities in All Aspects of Development Efforts*, UNITED NATIONS (Apr. 2011), http://www.un.org/disabilities/documents/best_practices_publication_2011.pdf.
193. *Id*. at 18.
194. *Id*.
195. *Id*. at 18–19.
196. *Id*. at 19.

raise awareness, as more than 65% of families that were targeted were able to understand and accept their children with disabilities and care for them in the same ways as their non-disabled children.[197] Also, all young disabled girls of appropriate age in the group are pursuing their education.[198]

Uganda's best practice program targeted people with disabilities living with HIV and AIDS through the Action on Disability and Development (ADD) organization.[199] While working with a very specific group of people, ADD was able to improve the levels of awareness within certain communities. Through ADD's advocacy for disabled people living with HIV/AIDS, these individuals can now actively participate in activities, such as World Aids Day and International Day of Persons with Disabilities, that provide more opportunities to raise awareness and communicate their needs and rights more broadly.[200]

Zimbabwe's program, led by the Catholic Agency for Overseas Development (CAFOD), is also notable, as it focuses on disability advocacy and awareness through livelihood programs and the promotion of increased accessibility.[201] For example, by offering transportation to already established government rehabilitation services, the CAFOD was able to bring these services to various communities that previously lacked access due to distance or cost to the district centers.[202] By raising awareness, this program was also able to increase the attendance and participation of people with disabilities in different development activities, as well as district and community leadership positions.[203] Another notable success is the promotion of access to water for persons with disabilities, as the CAFOD, in partnership with others, was able to modify latrines and add ramps to various structures.[204]

Article 5(2) of the CRPD states that discrimination must be prohibited "based on disability and [States Parties shall] guarantee to persons with disabilities equal and effective legal protection against

197. *Id.* at 20.
198. *Id.*
199. *Id.* at 28.
200. *Id.* at 29.
201. *Id.* at 31.
202. *Id.* at 41.
203. *Id.* at 33.
204. *Id.* at 33.

discrimination on all grounds."[205] To accomplish this, States need to take appropriate measures to "ensure that reasonable accommodation is provided."[206] Thus, States should evaluate some of these examples of best practices, and learn how they can provide similar outcomes within their communities to ensure that persons with disabilities can benefit from the full enjoyment of all their human rights.

6. CONCLUSION

The reporting mechanisms under international human rights treaties can be utilized and referred to when countries are addressing the promotion and protection of the economic, social, and cultural rights of vulnerable groups within their States. Not only are these mechanisms a guiding tool for governments to bring about legislative change where needed, but they also provide specific and practical tools to supplement these legislative changes. African countries provide good examples of how taking steps under the treaty bodies they are party to can help to promote and protect human rights. Their experiences in implementing some of these steps also provide some lessons on how to best accomplish these goals. Through reporting experiences, the system can make lessons useful to other countries as well. This is based on a theory of regulation called "reflexive law" that views requirements for governments to produce and publicize information as a means of regulation.[207] One way of explaining it is that these requirements "change the informal rules (or norms) by which decisions are made."[208]

Legislative change seems to be one of the most positive developments resulting from the ratification of human rights treaties by African countries. The laws of a state, however, must accompany and reflect the advocacy efforts applied on the ground to be effective. While the promotion of the rights of vulnerable groups often requires that a country change its laws to reflect the standards of the international treaties to which it is a party, the implementation of these laws will not

205. *CRPD, supra* note 4, art. 5.2.
206. *Id*. art. 5.3.
207. Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Assessments: Opening New Doors for State Housing Regulation While Localism Persists*, 82 OREGON L. REV. 433, 468 (2003).
208. *Id*.

take full effect, especially in environments where the government has little control (such as within families or the informal employment sector) unless accompanied by education and advocacy. Legislation, however, is often needed to support such efforts.

One example where legislation and advocacy can work together to improve the rights of vulnerable groups is in the use of quotas for persons in disadvantaged groups. While legislation can result in actual changes it also gives members of disadvantaged groups the ability to claim their socio-economic and cultural rights; however, as evidenced by the effects of quotas for women in government, while participation in legislatures increased dramatically, gender equality has yet to be realized in other sectors of society, which will need to be improved through other means.

Africa is a continent with immense diversity, and States can foster the strength of this diversity to promote their political and economic development while enhancing and protecting the fundamental socio-economic and cultural rights of vulnerable communities. This diversity has assisted in the promotion of vulnerable populations concerning raising awareness of human rights and promoting language and culture in many countries. There have also been some positive indicators in the treatment of refugees, despite recent negative developments in Tanzania, the country with the largest number of refugees.

Overall, the information reviewed in this article supports the conclusion that the ratification of international human rights treaties by African countries has resulted in positive developments in the promotion and protection of human rights. Hopefully, legislation and other best practices that have resulted from this process can be used to promote further positive change in Africa and the rest of the world. The reporting system of the treaty bodies is a useful tool for accomplishing this goal both by making information regarding laws and practices in countries available and promoting the economic, social, and cultural rights of vulnerable groups; however, this Article is just a beginning for assessing these effects of the treaty system and more reporting, compiling, and comparing are needed.

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REFUGEE LAW AS A MEANS TO PROTECT VICTIMS OF TRAFFICKING IN PERSONS

Danielle Annoni
Researcher in International Human Rights Law, Geopolitics & Forced Migration; Full Professor at the UFPR Law School and the PhD Program of Public Policy; PhD in International Public Law and Human Rights Law.

1. INTRODUCTION

It is that the Refugee Convention (1951) stands out among the pillars of International Human Rights Law for its impact and importance. While the other systems are composed of a set of treaties and resolutions from which global and regional organizations and agencies have been multiplying throughout the globe, the Refugee Convention, and its only Protocol in 1967, remain practically unchanged in its contents, but with a rich and wide doctrinal and jurisprudential construction on its reflexes.

Indeed, the consolidation of its fundamental principle, non-refoulement, as a norm of *jus cogens* among a large part of its actors, enabled the Convention to establish as an indispensable link between Humanitarian Law, International Criminal Law and the International Courts of Justice on Human Rights, also serving as a complementary source for the control of conventionality in the texts of national laws on refuge and migration, especially in Latin America.

In Brazil, and not only in this country, the Refugee Convention has been invoked many times in the interpretation and creation of national organisms to combat trafficking in persons. The reason is the Palermo Protocol,[1] as part of the United Nations Convention against Transnational Organized Crime,[2] ended up absorbing the punitive perspective of the topic in its contents, without properly considering the situation of the victims.

Human societies are always reinventing old practices, for better or for worse. Trafficking in persons is one of such practices. The end of the

1. UNODC. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Unites Nations Conventions against Transnational Organized Crime*. 2003. Available at: unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. Accessed on: 05.19.22.
2. UNODC. *United Nations Convention against Transnational Organized Crime*. 2003. Available at: unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. Accessed on: 05.19.22.

transatlantic trafficking in Africans in the 19th century was not an end to the trade in human beings. According to UNODC,[3] in 2016, more than 250,000 victims of human trafficking were identified worldwide. The actual number of victims will never be known, though.

Trafficking in persons was one of the criminal modalities that grew the most by the end of the last century, favoured by several factors such as civil wars, economic crises, and technological development, which enabled for more efficient communication and international mobility. Despite its severity, the topic was incorporated into the scope of the United Nations Convention against Transnational Organized Crime[4] as one of its complementary protocols,[5] shifting the focus from protecting victims to punishing those who profit from crime.

Since then, the topic has entered the agenda of combating international crimes. States and International agencies began to cooperate through their military and police network in the pursuit and punishment of criminals. Nevertheless, a few of these sharing procedures, logistics and training of human resources have been used for approaching the perspective of the victims, who are often deported as undocumented immigrants to their countries of origin. This practice feeds the re-trafficking chain. In other cases, victims are imprisoned and serve time for prostitution, an activity that is considered illegal in several States.

Some States-parties of the Protocol have even created internal policies to resettle victims of trafficking in persons, but they have not yet managed to overcome the difficulties that arise from the context itself, such as the requirement of some States that victims testify against their recruiters; the authorities' suspicion on whether these persons are in fact undocumented immigrants, or the misinterpretation that they would not fit into the concept of trafficking due to voluntary migration. Finally, another difficulty is the lack of State resources to invest on refugee reception centres and, therefore, the absence of qualified professionals to assist cases according to their needs.

3. UNODC. *Global Report on Trafficking in Persons 2018.* 2018. Available at: unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf. Accessed on: 05.19.22

4. UNODC. *United Nations Convention against Transnational Organized Crime.* 2003. Available at: unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. Accessed on: 05.19.22.

5. UNODC. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Unites Nations Conventions against Transnational Organized Crime*. 2003. Available at: unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. Accessed on: 05.19.22.

In this sense, there have been many cases in which local agencies and experts in the field of asylum and refuge have responded to and demanded in favour of victims of trafficking, thus demonstrating their vulnerability to the State and, depending on the case, their impossibility to return to their State of origin. Having verified the proximity of the vulnerabilities of many victims of trafficking to those of refugees, this article aims to present the approaches and possibilities of applying refugee law to victims of trafficking in persons, demonstrating the major importance of the Refugee Convention as a complementary source of International Human Rights Law.

2. PALERMO PROTOCOL AND PROTECTION OF VICTIMS BY STATES: SOME CASES

The Palermo Convention and the Protocol[6] mostly contain provisions for combating and punishing criminals. In a less abiding language, the provisions on the protection of victims are maintaining the discretion of States to legislate on how to treat them, always "within their means".

The protocol lists the following measures to be taken by States in order to protect victims: protection of privacy, intimacy and confidentiality of judicial proceedings (art. 6.1); right of access to information on judicial and administrative proceedings as well as assistance in manifesting during the handling of these proceedings (art. 6.2); assistance for physical, psychological and social recovery of victims, including accommodation, counselling, information, medical, psychological and material assistance, as well as employment opportunities, education and training (art. 6.3); special care for the specific needs of the victims, mainly for children (art. 6.4); guarantee of security while they remain in their territory (art. 6.5); possibility of obtaining judicial compensation (art.6.6); possibility of staying temporarily or permanently in that territory, taking into account humanitarian and personal factors (art. 7); feasibility to repatriation, preferably voluntary, ensuring the safety of the victim during the process (art. 8).

From the illustrative analysis of the legislation on the subject, carried

6. UNODC. *United Nations Convention against Transnational Organized Crime*. 2003. Available at: unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. Accessed on: 05.19.22.

out subsequently, it can be seen that the States maintain the same pattern: priority is given to combating and punishing agents at the expense of properly treating and protecting victims. Despite the importance of this approach, it is noticeable that it does not bring long-term results, since trafficking (and other crimes practiced by criminal organizations, in general) works according to the logics of the market: if there is demand, someone will be willing to take business risks and promote offer. The objectification of the victims is, then, one more consequence of the State punitivism that prevails in the world.

In order to exemplify what has been presented so far, the internal rules regarding the fight against trafficking in persons will be described below. The selected countries and regions are relevant for the trafficking scenario and committed to tackling the problem, namely: USA, European Union, Australia, South Africa and Brazil.

In the year 2000, even before the Trafficking in Persons Protocol was completed, the US passed the Victims of Trafficking and Violence Protection Act (TVPA),[7] which has been reauthorized ever since, undergoing updates over the years. The law is quite complete and, although being issued prior to the Protocol,[8] it is in line with it. With regard to victims, the TVPA provides for a specific program to protect victims and witnesses, but the main innovation is the creation of a specific visa for victims of severe forms of trafficking,[9] called T-Visa.[10]

According to the U.S. Citizenship and Immigration Services, this visa allows some victims of severe trafficking to stay in the U.S for as long as four years if they have cooperated with the investigation and prosecution of the crime. The visa can be extended to the victims' relatives and make

7. UNITED STATES OF AMERICA. *Victims of Trafficking and Violence Protection, Act of 2000*. USA Public Law 106-386, 2000. Available at: 2009-2017.state.gov/documents/organization/10492.pdf. Accessed on: 05.19.22.

8. The USA played an important role in drafting the Protocol; not surprisingly that it follows the same guidelines as its national law. However, the new migratory guidelines have weakened the mechanisms to deal with human trafficking, especially in terms of protecting victims.

9. Section 103, paragraph (8) provides 'Severe forms of trafficking in persons. – The term 'severe forms of trafficking in persons' means – (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.'

10. Section 107 (c) (3) provides that 'Authority to permit continued presence in the United States. – Federal law enforcement officials may permit an alien individual's continued presence in the United States, if after an assessment, it is determined that such individual is a victim of a severe force of trafficking and a potential witness to such trafficking in order to effectuate prosecution of those responsible, and such officials in investigating and prosecuting traffickers shall protect the safety of trafficking victims, including taking measures to protect trafficked persons and their family members from intimidation threats of reprisals, and reprisals from traffickers and other associates'.

people eligible for work permits, as well as for some public benefits and services. In addition, people who meet the requirements are eligible to become permanent residents.[11] The benefits to which the victims are eligible are the same as those for persons resettled as refugees.[12]

The main problem that can be pointed out concerning this legislation is that the interest in punishing the criminal over the protection of the victim still predominates. The victim who has no physical, psychological or even witness evidence is not formally eligible for the benefits listed and might even be subject to criminalization in some US states according to local prostitution legislation, for instance. Also, when they have an irregular migratory situation, they are liable to be deported, without the necessary attention to their vulnerability.

The European Union, on its turn, presents a very advanced legal framework on trafficking in persons, by combining determinations from the Council Convention on Combating Trafficking in Persons[13] with Parliament's directives. It is set that a period of reflection should be allowed for the victims to recover and decide on whether they want to collaborate with the investigations. Furthermore, it is recommended that States provide assistance to victims, regardless of their willingness or ability to testify, though each country[14] will have responsibility over this. The peremptory decision about the victims' permanence is linked to collaboration with the investigations. In other words, although the European documents demonstrate the care and concern for the victims, it only requires that States defend a person's permanence when it is useful for the prosecution. The following comment made by Gallagher on the European Union regulations for the protection of victims of trafficking covers all the cases analysed here:

> However, the trade-off is most likely to be felt by victims of

11. U.S. CITIZENSHIP AND IMMIGRATION SERVICES. *Victims of Human Trafficking:* T Nonimmigrant Status, 2018. Available at: uscis.gov/humanitarian/victims-human-trafficking-and-other-crimes/victims-human-trafficking-t-nonimmigrant-status. Accessed on: 05.19.22.

12. Section 107 (b) (1) (A) provides 'Eligibility for Benefits and Services. – Notwithstanding title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, an alien Who is a victim of a severe form of trafficking in persons shall be eligible for benefits and services under any Federal or State program or activity funded or administered by any official or agency described in subparagraph (B) to the same extent as an alien who is admitted to the United States as a refugee under section 207 of the Immigration and Nationality Act'.

13. COUNCIL OF EUROPE. *Convention on Action against Trafficking in Human Beings.* 2005. Available at: rm.coe.int/168008371d. Accessed on: 05.19.22.

14. GALLAGHER. Anne T. *The International Law of Human Trafficking. Cambridge*: Cambridge University Press, 2010, p. 102.

trafficking: those who, for one reason or another, are unable or not required to give testimony or otherwise cooperated, benefited from the regime, and are then repatriated against their Will. For the former category, likely to include the most vulnerable, including the deeply traumatized, the absence of substantive victim protection provisions in the 2002 Framework Decision on Trafficking ultimately means, at least under the EU regime, little or no entitlement to basic assistance and support and inevitable deportation. For the beneficiaries of the new visa regime, important protection concerns will remain. As some have pointed out, safety risks are not necessarily ameliorated by criminal proceedings, and trafficked persons who have cooperated in a prosecution are much more likely than others to compromise the safety of themselves and their families. The failure of the proposal to prohibit or at least warn against return in cases where the victim is likely to be subjected to serious human rights violations is another serious omission. However, the trade-off is most likely to be felt by victims of trafficking: those who, for one reason or another, are unable or not required to give testimony or otherwise cooperated, benefited from the regime, and are then repatriated against their Will. For the former category, likely to include the most vulnerable, including the deeply traumatized, the absence of substantive victim protection provisions in the 2002 Framework Decision on Trafficking ultimately means, at least under the EU regime, little or no entitlement to basic assistance and support and inevitable deportation. For the beneficiaries of the new visa regime, important protection concerns will remain. As some have pointed out, safety risks are not necessarily ameliorated by criminal proceedings, and trafficked persons who have cooperated in a prosecution are much more likely than others to compromise the safety of themselves and their families. The failure of the proposal to prohibit or at least warn against return in cases where the victim is likely to be subjected to serious human rights

violations is another serious omission.[15]

In South Africa,[16][17][18] one of the countries with the highest reception and transit rate of victims of trafficking in persons on the African continent, the law for prevention and combating of trafficking is from 2013. This legislation follows the parameters outlined in the Palermo Protocol. Once cases are identified, medical assistance, treatment and accommodation for victims of trafficking should be provided. However, after that initial moment, the law only provides for continued protection if the victim cooperates with the police authorities. Otherwise, the victim may be returned to the place of origin, but the authorities must take every precaution to prevent people from returning to a risky situation. Therefore, in the same way as other countries, the South African legislation guarantees the maintenance of the person in the territory with the support of the State only if the victim cooperates with investigations.

Australia[19] currently has the National Action Plan to Combat Human Trafficking and Slavery 2015-2019. There is no specific law on the subject, but since the Protocol was ratified, the country has been implementing actions to face crime and also to assist victims. Initially, the country had created a Trafficking Visa Framework composed of four types of visas. Since 2016, under pressure from civil society, and in order to reduce the stigmatization of victims, only two visas have been available: The Bridging F Visa and the Referred Stay (Permanent) Visa.

Bridging F Visa is a short-stay visa (ninety days) that allows the person suspected of being a victim of trafficking to receive initial assistance and to decide whether or not to cooperate with crime investigations. The visa can be revoked, however, once the person is no longer considered a possible victim. The Referred Stay (Permanent) Visa is granted to the victim who fulfils numerous requirements, among them the risk of returning to their place of origin, as well as evidence that they contributed to the investigations and prosecution of the person's traffickers.[20]

15. Ibidem.

16. REPUBLIC OF SOUTH AFRICA. Act n. 7 of 2013: *Prevention and Combating of Trafficking in Persons Act*. 2013. Available at: justice.gov.za/legislation/acts/2013-007.pdf . Accessed on: 05.19.2022.

17. REPUBLIC OF SOUTH AFRICA. *Act n. 24 of 2015: Judicial Matters Amendment Act.* 2015. Available at: gov.za/sites/default/files/gcis_document/201601/395878-1act24of2015judicinalmattersamenda.pdf. Accessed on: 05.19.2022.

18. REPUBLIC OF SOUTH AFRICA. *Act n. 8 of 2017: Judicial Matters Amendment Act, 2017*. Available at: gov.za/sites/default/files/gcis_document/201708/41018gon770.pdf. Accessed on: 05.19.2022.

19. AUSTRALIA. *National Action Plan to Combat Human Trafficking and Slavery 2015-19*. 2014. Available at: homeaffairs.gov.au/criminal-justice/files/trafficking-national-action-plan-combat-human-trafficking-slavery-2015-19.pdf. Accessed on: 05.19.2022.

20. THE UNIVERSITY OF QUEENSLAND. *Visas for Victims*. 2016. Available at: law.uq.edu.au/research/research-activities/

In summary, once again the State commits to resettling those victims that are able to cooperate with the aims of penal justice. Thus, it must be considered that since the implementation of such visas the number of permanent visas has been much lower than the number of temporary ones. Dorevitch and Foster point out that:

> Rather than protecting victims and allaying their fears of reprisal, the Australian Government is paradoxically emulating a tactic of traffickers by enticing women to cooperate, using the women for their own ends and abandoning them once their services are spent.[21]

Although the Protocol was ratified in 2004, Brazil only passed a specific law on this matter in 2016.[22][23] Before that, the issue was approached from the National Policy against Trafficking in Persons and the National Plans to face Trafficking in Persons.

In 2017, the Migration Law[24] in Brazil, which provides for the granting of residence to victims of trafficking, was passed. The issue was regulated on March 20th, 2020 through Ordinance No. 87 of the

human-trafficking/visas. Accessed on: 05.19.2022.

21. DOREVITCH, Anna. FOSTER, Michelle. Recent Obstacles on the Road to protection: Assessing the treatment of sex-trafficking victims under Australia's migration and refugee law. 9(1) *Melbourne Journal of International Law,* v. 9, n. 1, 2008. Available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=1371944. Accessed on: 05.19.2022.

22. BRAZIL. Law n. 13344: Provides for the prevention and repression of internal and international human trafficking and measures for the care of victims; amends Law n. 6815, of August 19, 1980, Decree-Law n. 3689, of October 3, 1941 (Code of Criminal Procedure), and Decree-Law n. 2848, of December 7, 1940; and repeals provisions of Decree-Law n. 2848, of December 7, 1940. 2016. Available at: planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/l13344.htm#:~:text=1%C2%BA%20Esta%20Lei%20disp%C3%B5e%20sobre,a%20aten%C3%A7%C3%A3o%20%C3%A0s%20suas%20v%C3%Adtimas. Accessed on: 05.19.2022.

23. Law No. 13344/16 provides for the prevention and repression of internal and international trafficking in persons and measures for the care of victims, in addition to promoting changes to the Brazilian Penal Code and Code of Criminal Procedure. The law provides for the care and parameters that must be observed in the treatment of victims of trafficking in persons, respecting and even expanding the provisions of the Palermo Convention and Protocol. With regard specifically to foreign victims, the new law modified the Foreigner's Statute (still in force at the time) to provide for the possibility of granting permanent residence to victims of trafficking in persons in the national territory, regardless of their migratory situation and collaboration in administrative, police or judicial procedure. It happens that, a few months after the approval of this amendment, the Foreigner's Statute was revoked, and the so-called Migration Law came into force in May 2017. The new law did not incorporate the provision that had been included in the Foreigner's Statute and provides, only that a residence permit can be granted to a person who "has been a victim of human trafficking, slave labor or a violation of rights aggravated by his migratory condition". The provision brought by Law No. 13344/16 to amend the Foreigner's Statute had been regulated by Normative Resolution n. 122, of August 32016, of the National Immigration Council. The resolution, of course, did not provide for any requirement regarding cooperation with investigations for the granting of residence. The only limitation envisaged concerned the fixing of the five-year period of conditioning to fixing in the national territory. The new regulation, therefore, is a clear step backwards in terms of the reception of victims of trafficking in persons in the country.

24. BRAZIL. Law n. 13445: Institutes Migration Law. 2017. Available at: planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/l13445.htm. Accessed on: 05.19.2022.

Ministry of Justice and Public Security.[25] In the document, as a setback to what had previously been established, it is stated that in addition to the presentation of mandatory documents, the migratory authority will take into consideration, whenever possible, the effective collaboration of the immigrant with the authorities to elucidate the crime they were victim of. Consequently, with the enactment of such a law, Brazil joins the other countries in placing punitivism over the protection of the human person.

Within this scenario, refugee law appears as a possibility to expand the protection of victims of human trafficking through a more humanitarian and less utilitarian approach than that of combating crime.

4. CHALLENGES FOR THE APPLICATION OF REFUGEES LAW ON VICTIMS OF HUMAN TRAFFICKING

Treaties on trafficking in persons and those on the rights of refugees are documents of a different nature and have different objectives. Thus, it is important to bear in mind that their approach has limits, at the same time that it presents new possibilities for the application of the rights therein, within their convergences.

The Palermo Convention and Protocol are documents in criminal matters that aim at promoting cooperation between States in order to prevent and combat the crimes provided for and related to them. The inclusion of the crime of human trafficking in the scope of the Convention was pertinent and relevant, especially as a means to increase knowledge about the subject and to include it in the public policies of the States. On the other hand, the opportunity was missed to create a more complete document that could more adequately address the needs of the victims.

Bearing in mind that individuals are the direct victims of the crime of trafficking in persons, the need to apply the Protocol cannot be neglected. That is true not only in its strict terms, but also with respect to human rights standards, to which the absolute majority of countries in the world is in some way linked, either by participating in conventions on the subject, or simply by being a member of the UN.

25. BRAZIL. Ordinance n. 87 of the Ministry of Justice and Public Security: Provides for the granting and procedures of residence authorization to the person who has been a victim of human trafficking, slave labour or violation of rights aggravated by his migratory condition. 2020. Available at: in.gov.br/en/web/dou/-/portaria-n-87-de-23-de-marco-de-2020-249440047. Accessed on: 05.19.2022.

Therefore, the reading and application of the Protocol with a view only to criminal and security issues is incomplete and insufficient to achieve the ends of an international community committed to peace, security and human rights.

On the other hand, the Refugee Convention and the 1967 Protocol are documents for the protection of the human person. International refugee law is a right that interferes in the sovereignty of States by listing objective obligations and even binding obligations, such as non-refoulement but with respect to a specific group of people, whose situation is very similar to that of victims of trafficking.

In this way, there are still no laws arising from States that can guarantee the human rights of victims of trafficking in persons more broadly and in line with the minimum parameters of dignity that must be taken into account when treating a migrant, especially in situations of great fragility. Refugee law is an alternative that, when possibly applicable, is able to guarantee wider protection to victims of trafficking than what is provided for in the Palermo Convention and Protocol and, especially, than those provided for or not within the domestic laws of the States.

International human rights law should serve as guidelines for carrying out any analysis of documents that may involve the duties of States in relation to the human person. The application of precepts extracted from the right of refugees to victims of trafficking in persons is not a proposal to expand the rights provided in international documents, but rather a means to complement them.

Refugee law, as a mechanism to protect victims of persecution and human rights violations, allows victims of trafficking in persons to fit the required conditions to be given the rights provided for refugees. On the other hand, even when they do not have the necessary conditions to fulfil the status of refugees, the principle of non-refoulement, which is provided in the Refugee Convention, must be respected, as it has already become the norm of *jus cogens*. This interpretation, however, has some practical and legal limitations.[26]

26. "While acknowledging the very real progress that has been made in linking trafficking with international refugee law, it is important not to underestimate the challenges to developing a reliable and consistent practice in this area. The lack of verifiable information on trafficking renders extremely difficult the making of an accurate assessment as to the nature of the risk faced by an individual asylum-seeker. Refugee determination procedures have been found to be using incomplete, unverified, and sometimes unreliable information to decide critical questions such as whether there is a risk of reprisals or re-trafficking and whether effective State protection is available. In addition, the capacity of an individual to exercise a right to seek and receive

One of such limitations is the fact that not all States are at the same time signatories to the Refugee Convention and / or the 1967 Protocol and the Palermo Protocol. Thus, those countries that are not bound by the refugee treaties cannot apply the rules listed there. However, due to the widespread recognition of the principle of non-refoulement as a norm of jus cogens as opposed to erga omnes, it is possible to affirm that at least in theory even States that are not part of the international refugee protection system cannot evade the application of this principle to victims of serious human rights violations, such as victims of human trafficking.

Another identified limitation is the definition of a refugee. Refuge was created to protect a very limited population, including geographically and temporally. Although most States have adopted the 1967 Protocol that established these restrictions, the remaining requirements for recognizing refugee status remain the same as in the middle of the last century. This limitation is not at all negative, for an excessive relaxation of requirements could weaken that institution.

The case of victims of human trafficking, although specific, is often confused with that of other groups of displaced persons, such as internally displaced persons, "environmental refugees" or "economic refugees". On the other hand, due to their condition as victims of trafficking, they have a differentiation that may mean more risk, as well as it may qualify them as refugees. There is no attempt to forcefully include them in this definition, though. As explained, the recognition of victims of trafficking as refugees must be in accordance with the rules that are relevant.

In this sense, the definition of refugee is shown as a limitation – when it is not possible to determine the refugee status of a victim of trafficking, its treatment must be carried out within the limits determined by national laws. These, however, should observe the rules and principles of international human rights law, which is not always the case.

asylum from persecution depends on that person's knowledge of the existence of such a right and its applicability to his or her situation. States are adept at avoiding their responsibilities through both omission (for example, failing to require relevant officials to inform trafficked persons of their right to seek asylum or failing to provide access to the specialist legal advice that may be required) and commission (for example, actively screening out potential applicants from refugee determination). Obstacles to rapid and accurate victim of trafficked persons […] undermine effective procedures for determining international protection needs of individuals who have been trafficked. While agencies such as UNHCR and the UN High Commissioner for Human Rights have recognized the importance of access, this aspect is yet to be formally integrated into the international legal framework in any meaningful way." GALLAGHER, Anne T. The International Law of Human Trafficking. Cambridge: Cambridge University Press, 2010, p. 206-207.

The third limitation is the refugee exclusion clause for committing common serious crimes. Such a limitation, though it should not exist in most cases of victims of trafficking in persons, can be a real obstacle to the recognition of the status of refugee.

The non-incrimination of victims for the crimes committed in the trafficking process, despite being a logical consequence of their condition, is not yet a right expressly guaranteed in most countries; only specific crimes subject to disregard are sometimes listed. Likewise, the Refugee Convention only determines non-incrimination for irregular entry into the territory of a country of those people who immediately report to the authorities. Therefore, the determination of crimes that can be considered serious for the purpose of incrimination, as well as the exclusion from the status of refugee to victims of trafficking in persons will actually depend on each State.

In practical terms, the limitations are even greater. One of the obstacles to the identification of trafficking victims as possible refugees is the identification itself. For not being recognized as victims, these people are likely to fall into the categories of migrants and will have much more difficulty to access any information about the possibility of gaining recognition as refugees.

Therefore, the very training of the police and other state agents who deal directly with foreigners is essential, so that the few existing rights for victims of trafficking are not limited, and any possibility to recognize them as refugees is not nullified.

Even when identification is properly carried out, there is usually some resistance from States to grant broader rights to these people, including refuge there. Without adequate legal assistance, a victim of trafficking is unlikely to achieve recognition as a refugee because the reasons for such recognition are not among the most common and easily visible ones. It is mandatory that we understand the full extent of the problem of human trafficking in order to be able to add the necessary elements for recognizing these victims as refugees.

Finally, the main practical limitation results from the authorities' attachment to State sovereignty. In the Palermo Convention and Protocol, this fact is clear. The provisions, especially regarding the measures to be

taken in relation to the victims and the possibility of maintaining them in their territory, were written by means of a suggestive language, regardless of a concrete and objective duty of the States.

As for refugee victims, even though the rights arising from this condition are concrete and objective duties of the signatory States to the Refugee Convention and / or the 1967 Protocol, the form and scope of the application end up being maintained within the scope of domestic policies. Although UNHCR can assist in determining refugee status, the competence to declare one as a refugee or not is a matter decided by the States.

Therefore, the last interpretation of the definition of refugee is made by State agencies, which may adopt more extensive or more restrictive positions, depending not only on technical issues, but also on political orientations.

5. REFUGEES AS VICTIMS OF TRAFFICKING IN PERSONS

Despite the limitations presented so far, the protection of human trafficking victims under refugee law presents some possibilities. The two direct possibilities are: (i) the application of non-refoulement to victims of trafficking in persons, regardless of their contribution to criminal investigations or requesting asylum, with the possibility of risk if they are returned to the place from which they came; (ii) the recognition of human trafficking victims as refugees, when they meet the corresponding requirements.

These possibilities are gradually being recognized by the international community. The mention of refugee rights in the Palermo Protocol (art. 14) and the emphasis on the principle of non-refoulement were one of the boosters for a better analysis regarding these possibilities. If the issue of granting asylum to victims of trafficking in persons is barely debated today, there was almost nothing available to protect these victims before.

The issuing of the Guidelines on International Protection: The application of Article 1ª (2) of the Refugee Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked was also extremely important for clarifying and guiding authorities that have some contact with potential

victims of human trafficking and also analyse their requests. This way, authorities may provide such people with a better chance to receive given special protection in many cases.

Victims of human trafficking can also be refugees. Many of the factors that make certain people vulnerable to trafficking are confused with the reasons for seeking asylum under the Refugee Convention, especially when the factor allows for discrimination against the rest of society. As it can be noticed, there are many situations in which traffickers take advantage of these elements of instability to approach their target victims and thus become themselves, in many cases, the persecuting agent.[27]

Considering this relation, in 2006 the UNHCR elaborated the Guidelines on International Protection: The application of Article 1ª (2) of the Refugee Convention and/or the 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked. It highlights that in certain circumstances, the trafficking in persons may constitute a crime against humanity or even a war crime.[28]

Despite the severity of the situations to which victims of trafficking may be subjected, in order to be recognized as refugees they must fulfil the requirements of the Refugee Convention.[29] [30] The situation generating the well-founded fear has no need to be recent or imminent. Even when the trafficking situation ceased long ago, or when it was an isolated fact that would hardly be repeated, the traumatic situation suffered by the victim, due to serious violations of his human rights, depending on the victim's particular psychological state, can make the return to the country

27. "Gender, age, migration status, ethno-linguistic background and poverty [...] are by themselves insufficient explanations of vulnerability, but they tend to become factors of vulnerability if they provide grounds for discrimination from the rest of the community. While anyone could become a trafficking victim, persons who lack protection, who are not integrated in the surrounding community and who are isolated by the national authorities or by the societies where they live are at greater risk of human trafficking. In these areas of discrimination and marginalization, traffickers find the space to exploit the vulnerable situation of potential victims." UNODC. Global Report on Trafficking in Persons. 2012, p. 15. Available at: unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf. Accessed on: 05.19.2022.

28. UNHCR. Guidelines on International Protection: The application of Article 1ª (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked. 2006, p. 2-3. Available at: unhcr.org/publications/legal/443b626b2/guidelines-international-protection-7-application-article-1a2-1951-convention.html. Accessed on: 05.19.2022.

29. JUBILUT, Liliana Lyra. *O Direito Internacional dos Refugiados e sua Aplicação no Ordenamento Jurídico Brasileiro*. São Paulo: Editora Método e ACNUR, 2007. Available at: acnur.org/portugues/wp-content/uploads/2018/02/O-Direito-Internacional-dos-Refugiados-e-sua-Aplica%C3%A7%C3%A3o-no-Ordenamento-Jur%C3%Addico-Brasileiro.pdf. Accessed on: 05.19.2022.

30. UNHCR. *Handbook On Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*. 1979. Available at: unhcr.org/4d93528a9.pdf. Accessed on: 05.19.2022

of origin unbearable.[31] In addition, the fact that a person has been a victim of trafficking can make them be considered part of a particular social group.

According to the Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the Refugee Convention and/or its 1967 Protocol relating to the Status of Refugees the expression particular social group "should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms".[32] Characterizing a person as part of a social group is usually done from two approaches: one that considers the immutability of such characteristics[33] and one that considers the social perception of the characteristic that turns a person into a member of a group.[34]

Human trafficking victims can fit as a social group in either one or the other approach, since the fact of being a victim of trafficking is an experience that cannot be changed; and also because, in some societies, this fact can stigmatize the person and lead to suffering discrimination and violence. The same document emphasizes that people do not necessarily need to recognize themselves as a group, nor are they all subject to persecution.[35]

31. Ibidem.

32. UNHCR. Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees'. 2002. Available at: unhcr.org/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html. Accessed on: 05.19.2022.

33. "The first, the "protected characteristics" approach (sometimes referred to as an "immutability" approach), examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status). Human rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them. A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it. Applying this approach, courts and administrative bodies in a number of jurisdictions have concluded that women, homosexuals, and families, for example, can constitute a particular social group within the meaning of Article 1A (2)." UNHCR. Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees'. 2002. Available at: unhcr.org/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html. Accessed on: 05.19.2022.

34. "The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. This has been referred to as the "social perception" approach. Again, women, families and homosexuals have been recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist." UNHCR. Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees'. 2002. Available at: unhcr.org/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html. Accessed on: 05.19.2022.

35. UNHCR. Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees'. 2002. Available at: unhcr.org/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html. Accessed on: 05.19.2022.

Women are one of the groups mostly considered to be a particular social group. They are also the absolute majority of victims of human trafficking.[36] This coincidence is significant. Naturally, it is not enough to be a woman in order to be considered a refugee, for she must demonstrate the well-founded fear of some kind of persecution caused by her condition of being a woman. In regions where women are frequently recruited for human trafficking by organized criminal groups, the fact that she is a young woman, for example, may be recognized as a risk factor that is serious enough to warrant recognition of refugee status. Thus, belonging to a particular social group, due to gender, is usually the only option for request in such cases.[37] [38]

As previously mentioned, the agents of persecution do not need to be the State; it can be a private agent, either formal or informal. However, considering the latter, it is necessary to characterize the State's tolerance or its inability to prevent persecution. Even when a State has shown its commitment to combating the trafficking in persons, it is paramount that the effectiveness of actions be taken into account more than the formality of the laws when verifying the possibility of that its nationals are victims of some type of persecution related to this crime. In certain cases, more serious ones, the State itself can be considered an agent of persecution due to its collusion or omission.[39]

36. The 2018 UNDOC Report indicates that in the period analysed 49% of the identified victims were women and 23% were girls, while 21% were men and 7% boys; 50% of detected victims were trafficked for sexual exploitation, 34% for forced labour and 7% for other purposes. UNODC. Global Report on Trafficking in Persons 2018. 2018. Available at: unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf. Accessed on: 05.19.22.

37. "Some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identifying documents. In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm." UNHCR. Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. 2002. Avaiable at: unhcr.org/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html. Accessed on: 05.19.22.

38. CHRISTENSEN, Tyler Marie. Trata con fines de explotación sexual: Protección de las víctimas en la legislación nacional e internacional de asilo. Nuevos temas en la investigación sobre refugiados. Informe de investigación n. 206, ACNUR, 2011. Avaiable at: violenciagenero.igualdad.gob.es/otrasFormas/trata/datosExplotacionSexual/estudios/DOC/TSHconFESproteccionNacionalInternacionalAsiloUNHCR_ACNUR.pdf. Accessed on: 05.19.22.

39. UNHCR. Guidelines on International Protection: The application of Article 1ª (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked. 2006. Available at: unhcr.org/publications/legal/443b626b2/guidelines-international-protection-7-application-article-1a2-1951-convention.html. Accessed on: 05.19.22.

Although it is necessary that the person be outside their country to be considered a refugee, it should be noted that the fear may arise after the person has crossed the border. This is what usually happens in the case of victims of international trafficking. It is essential, however, to demonstrate that the fear is related to the victim's place of origin, because once the person is safe, the condition of refugee will not be characterized. The analysis of this circumstance must consider the fact that criminal organizations trafficking in persons are often complex and diffuse, with potential agents of persecution at various levels and in the most diverse locations.[40]

The expanded definitions of refugees, presented in the African Refugee Convention[41] and the Cartagena Declaration,[42] can also be applied to victims of trafficking in many cases. These definitions allow for the inclusion of people who have left their countries due to public order disturbances, systematic violence and serious human rights violations in the definition of refugee.

Thus, in the American and African spheres, people coming from places with these types of problems can also be recognized as refugees, since returning to their place of origin will bring a great risk to their security; this usually includes the possibility of re-trafficking. Although this is not directly related to the reasons listed in the Refugee Convention, it is enough to demonstrate the serious and massive violations of human

40. UNHCR. Guidelines on International Protection: The application of Article 1ª (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked. 2006. Available at: unhcr.org/publications/legal/443b626b2/guidelines-international-protection-7-application-article-1a2-1951-convention.html. Accessed on: 05.19.22.

41. Article 1 provides, 'Definition of the term "Refugee" [...] 2. 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.' ORGANIZATION OF AFRICAN UNITY. Convention Governing the Specific Aspects of Refugee Problems in Africa. 1969. Available at: au.int/en/treaties/oau-convention-governing-specific-aspects-refugee-problems-africa. Accessed on: 05.19.22.

42. "3. To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order." CARTAGENA Declaration on Refugees, 1984. Available at: oas.org/dil/1984_cartagena_declaration_on_refugees.pdf. Accessed on: 05.19.22.

rights that occurred in the region, and that they can affect the person in question due to their characteristics and vulnerabilities.[43]

It is undeniable that the recognition of the trafficking victim as a refugee, by itself, already enables the immediate application of the rights offered to asylum seekers. The first one, as mentioned, is non-refoulement. Thereafter, States must apply the rights provided either in the Palermo Protocol or in the Refugee Convention and / or the 1967 Protocol, in addition to the relevant provisions of their domestic legislation that guarantee the dignity of these people and offer them adequate treatment for their condition. Thus, one must always observe which provision is the most beneficial one, respecting the principle of primacy of the norm most favourable to the individual.

Regarding the rights provided in the Refugee Convention that can be applied to victims of trafficking in persons, as there is no equivalent in the Palermo Protocol, or because it is more beneficial, it is the determination of article 31 that no sanctions should be applied to refugees arriving irregularly in a territory as they report to the authorities.

Naturally, the requirement on reporting to the authorities must be interpreted with caution, since victims of trafficking do not have the autonomy to move freely, and, in the event that they flee from their exploiters, they usually fear the authorities precisely because they are not in a regular situation or for having engaged in a conduct that is considered a criminal one. Thus, sanctions for irregular entry, as well as other conduct practiced by victims in the course of the trafficking process, must be relativized or even disregarded according to each case.

6. THE PRINCIPLE OF *NON-REFOULEMENT* AS A LINK FOR PROTECTION OF REFUGEES AND VICTIMS OF TRAFFICKING IN PERSONS

Refugees are a very specific group of migrants. They leave their homes out of fear of persecution, whether because of their race, nationality, religion, political opinions or for belonging to a particular social group. These circumstances, which turn certain people into refugees, are often

43. Regarding the African Convention, countries that have ratified it are bound by this definition. On the other hand, in the Americas, since the Declaration is not a binding document, the adoption of this expanded definition of refugee depends on each country's reception of guidance. Brazil, for example, included in Law 9474 / 97 that deals with the implementation of the 1951 Convention internally the definition that someone will also be recognized as a refugee if forced to leave his country of nationality to seek refuge in another country due to serious and widespread violation of human rights.

confused with the causes of vulnerability of victims of trafficking. The right to refuge allows people to have temporary protection, as long as it is not safe to return to their place of origin. Although the condition of refugee is, in itself, a factor of vulnerability, when recognized by the host State, it causes the State to have the duty to guarantee a minimum security and dignity.[44]

Victims of human trafficking, likewise, are victims of their social reality. They are also in situations of vulnerability whether economic, political, social, psychological or cultural by the time they are captured or enticed. Economic problems and a lack of prospects in many countries and regions make people look for opportunities elsewhere to support their families and themselves. But it is not just economic migration that entices victims to the international trafficking network. Inequality in treatment between genders or between ethnic groups, civil wars and disputes over territory, as well as natural disasters, climate change and epidemics, leave thousands of people at the mercy of traffickers, who in turn supply the demand for soldiers and for women who will suffer sexual exploitation.[45]

Indeed, the scenario that enhances trafficking does not differ from the reasons listed in the Refugee Convention for the recognition of refugee status. And it is no news that many of the refugees from armed conflicts do not reach their destination, being recruited for trafficking or simply kidnapped and enslaved during their crossing of borders. But here lies part of the problem. Even the states that ratified the Refugee Convention, and therefore cannot claim to be unaware of the reasons for persecution, the rights of likely asylum seekers and the duties of the States towards these people, often creates migratory barriers. This is a posture that goes against the respect to the principle of non-refoulement and end up helping criminal organizations.

The principle of non-refoulement is recognized by experts and by international jurisprudence on human rights as a norm of *jus cogens*, thus

44. TRINDADE, Antônio Augusto Cançado. *A humanização do direito internacional*. Belo Horizonte: Del Rey, 2006, p. 339

45. See: SHELLEY, Louise. Human Trafficking: A Global Perspective. Cambridge: Cambridge University Press 2010; SHELLEY, Louise. Human trafficking as a form of transnational crime. In Maggy Lee (ed.), *Human Trafficking*. Devon: Willan Publishing, 2007; MORAWSKA, Ewa. Trafficking into and from Eastern Europe. In Maggy Lee (ed.), *Human Trafficking*. Devon: Willan Publishing, 2007; KELLY, Liz. A conducive context: Trafficking in persons in Central Asia. In Maggy Lee (ed.), *Human Trafficking*. Devon: Willan Publishing, 2007; MATTAR, Mohamed Y. Trafficking in Persons: Global overview, current trands and pathways forward. Baltimore: John Hopkins University, 2008. Available at: christusliberat.org/journal/wp-content/uploads/2017/10/Trafficking-in-Persons-Global-Overview-Current-Trends-and-Pathways-Forward.pdf . Accessed on: 05.19.22.

it is binding and it is consequently mandatory to the signatory State. Thus, it would not be up to the State to use its internal laws and border control policies with the aim to prevent access to its territory by people in situations of extreme vulnerability, contrary to the application of a protective international treaty to which the State is a party. Therefore, the principle of non-refoulement does not depend on any formal recognition of refugee status and should be applied to anyone who seeks refuge or not, provided that it is noticeable that the person is in a serious situation of risk in case of return to their country of origin. According to Lauterpacht and Benthlehem:

> [...] the words 'where his life or freedom would be threatened' must be construed to encompass circumstances in which a refugee or asylum seeker (a) has a well-founded fear of being persecuted, (b) faces a real risk of torture or cruel, inhuman or degrading treatment or punishment, or (c) faces other threats to life, physical integrity, or liberty.[46]

Indeed, the Refugee Convention was innovative in enshrining the principle of non-refoulement as one of the most important pillars for protecting the rights of refugees. This principle has since then become part of the list of mandatory norms and it has been adopted in other international instruments for the protection of human rights, such as the United Nations Convention against Torture of 1984. However, the most important reference is the Protocol of Palermo on Trafficking in Persons[47], which contains the following provision:

> Article 14. Saving clause
> 1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and,

46. LAUTERPACHT, Elihu. BETHLEHEM, Daniel. The scope and content of the principle of non-refoulement: Opinion. In FELLER, Erika. TÜRK, Volker. NICHOLSON, Frances (eds.). *Refugee Protection in International Law*. Cambridge: Cambridge University Press and UNHCR, 2003, p. 87-177. Available at: unhcr.org/419c75ce4.html. Accessed on: 05.19.22.

47. UNODC. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Unites Nations Conventions against Transnational Organized Crime. 2003. Available at: unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. Accessed on: 05.19.22.

> in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

It is important to note that this article does not create a new hypothesis for applying the principle of non-refoulement, but it highlights the possibility that victims of trafficking may also qualify as refugee status and, therefore, should not be deported or imprisoned without respect to all legal guarantees provided in the Refugee Convention.

With regard to the victim's temporary or permanent stay in the territory of the State they were identified, the Palermo Convention and Protocol only make suggestions. It leaves to each country the regulations that usually bind the conditions of this stay to the cooperation with law enforcement authorities and judicial authorities. The temporary stay in the country, with the due assistance of the State, allows the victim to recover physically and mentally. Only then will they be able to understand the situation and, through appropriate information, even request their recognition as a refugee, if applicable.

Article 8 of the Trafficking in Persons Protocol provides for the repatriation of victims. Both the State from where the victim is a national or where it has a permanent residence and to where he/she is being repatriated, as well as the one where he/she is, should facilitate the process. This should include the provision of identification and documentation, and should especially take into account the person's safety. It is also mentioned that repatriation should preferably be done on a voluntary basis.[48]

Voluntary repatriation, integration with the local community and resettlement are the permanent solutions sought by refugees. These, which are among UNHCR's objectives, are solutions that can be

48. "As noted previously, trafficked persons are routinely deported from countries of transit and destination. While States are able to point to a legal entitlement to control their own borders (and the absence of an obligation to permit all persons identified as having been trafficked to stay), there can be no doubt that forced repatriation to the country of origin or to a third country can have serious consequences for victims of trafficking. They may be subject to punishment from national authorities for unauthorized departure or other alleged offenses; they may face social isolation or stigmatization and be rejected by their families and communities; they may be subject to violence and intimidation from traffickers – particularly if they have cooperated with criminal justice agencies or owe money that cannot be repaid. Victims of trafficking who are forcibly repatriated, particularly without the benefit of supported reintegration, are at great risk of re-trafficking. From a legal perspective, the issue of repatriation is a controversial one, involving consideration of complex issues such as entitlement to return and the principle of non-refoulement." Anne T. Gallagher. The International Law of Human Trafficking. Cambridge: Cambridge University Press, 2010, p. 337.

pertinently applied to victims of trafficking in persons, even when these do not qualify as refugees by the agencies responsible for their assistance. In this sense, the law and practice related to refugees can serve as an example and as parameter for the treatment of victims of trafficking.

In the Palermo Protocol, only integration with society is established, with the possibility of remaining in the territory, as well as repatriation, which is placed as "preferentially" voluntary. In the case of refugees, repatriation must be voluntary; otherwise, it will be in violation of Article 33 of the Refugee Convention, which is the affirmation of non-refoulement. Repatriation has been considered the ideal solution, and it is encouraged by UNHCR, not for being the most adequate but because of the difficulty for these foreigners to be accepted by States, especially by the more developed ones.[49]

Nevertheless, "as soon as the refugee is repatriated, they cease to be under international protection deriving from the refuge",[50] so it is essential that they be aware of this situation, as it is also paramount that it is known that any threat to their integrity and life in the country of origin have ceased. Such points are also relevant to victims of trafficking, whether or they are recognized as refugees or not. In this case, under the Palermo Convention and Protocol, States may be required, when in joint operations to investigate suspects and to promote the protection of these victims, whether they are witnesses or not.

Local integration may be the solution when repatriation is not feasible. For victims of trafficking, as previously shown, there is provision for them to remain in the territory of most States only for those who collaborate with the police and justice. Nevertheless, with respect to non-refoulement, States should guarantee this possibility for any victim, whenever it is shown that they may suffer serious violations of their human rights in the country of origin.

Although resettlement in another country may be one of the measures that best guarantees safety to the victim of trafficking, there is no mechanism in set for this. There is no provision for resettlement in

49. JUBILUT, Liliana Lyra. *O Direito Internacional dos Refugiados e sua Aplicação no Ordenamento Jurídico Brasileiro*. São Paulo: Editora Método e ACNUR, 2007. Available at: acnur.org/portugues/wp-content/uploads/2018/02/O-Direito-Internacional-dos-Refugiados-e-sua-Aplica%C3%A7%C3%A3o-no-Ordenamento-Jur%C3%Addico-Brasileiro.pdf. Accessed on: 05.19.2022.

50. JUBILUT, Liliana Lyra. *O Direito Internacional dos Refugiados e sua Aplicação no Ordenamento Jurídico Brasileiro*. São Paulo: Editora Método e ACNUR, 2007. Available at: acnur.org/portugues/wp-content/uploads/2018/02/O-Direito-Internacional-dos-Refugiados-e-sua-Aplica%C3%A7%C3%A3o-no-Ordenamento-Jur%C3%Addico-Brasileiro.pdf. Accessed on: 05.19.2022.

the Palermo Protocol. Only in Article 24 of the Convention, which deals with the protection of witnesses, is it set that "States will consider the possibility of entering into agreements with other States to provide a new home for the persons referred to in paragraph 1 of this article [witnesses and their families]".

In the case of refugees, they use the UNHCR structure to provide such a measure in a safe way. For victims of trafficking who are not recognized as refugees, the possibility of going legally and safely to a third country will only exist in those countries that accept the Palermo Convention's suggestion and, even so, if they have been witnesses in the proceedings against traffickers.

In 2009, OSCE performed a study concluding that:

> No country examined [UK, Germany, Spain and Italy] provided for permanent residency for identified victims. Trafficked persons are ultimately always obliged to return to their country of origin. Programmes to assist in their 'voluntary' return, which some argue would better be referred to as 'mandatory' return, were in place in all countries. Failing voluntary return, trafficked persons could be forcibly returned. No country examined had developed clear procedures to ensure that the return was conducted with due regard for the rights and safety of the person concerned. Instead issues of safety were only systematically considered in countries where the person had applied for asylum or other forms of international protection. The prevalence of re-trafficking, although not the focus of the papers, was reference in all, which was seen to result in some measure from failed return policies.[51]

From this extract, it can be seen that the return of victims of trafficking in persons was not being carried out with the necessary precautions, thus giving rise to re-trafficking events; that is, allowing the person to return to a situation of serious violations of their human

51. OSCE. *First Expert Meeting on Human Rights Protection in the return of trafficked persons to countries of origin*. 2099. Available at: osce.org/odihr/40796. Accessed on: 05.19.2022.

rights. Such a practice violates non-refoulement and thus proves to be ineffective even in combating this crime, since it returns victims to their executioners, who will have more profit by renegotiating them.

The rapprochement between victims of trafficking in persons and refugees goes beyond the migratory aspect itself, to persecution and also to death threats. Helplessness, fear, the marks of a traumatic trip, illness, and hope, are often common in the statements made by groups.

However, the provisions on the protection of victims of trafficking in persons in the Palermo Protocol are generic and conservative, and allow States to regulate their assistance and protection conditionally.[52] On the other hand, at least from the perspective of legal protection, refugee law brings a concrete set of obligations that States have a duty to respect before the international community. By recognizing the application of the Refugee Convention to victims of trafficking in persons, the discretion of States is reduced, expanding the scope of protection to victims of trafficking in persons, whose vulnerability and insecurity are not different from those protected by the Statute of Refugees as of their origin.

From the review of the literature on international instruments on refugee law and trafficking in persons, it is possible to see that there are many convergences between the needs and rights of victims of trafficking and refugees, which can be confusing when the victim of trafficking is also a refugee. Although there is no ideal international normative framework for the treatment of these people, and that States have not yet adapted adequately, international instruments can present solutions that provide minimal protection in order to guarantee the basic human rights of victims of trafficking in persons. But to achieve that they must be interpreted from the perspective of protecting the human person and must be applied with due attention and care.

7. FINAL CONSIDERATIONS

Refugee law has its limits, but above all it also offers possibilities of application to victims of human trafficking that can strengthen protection of this vulnerable group. The definition of refugee, even being expanded,

52. UNODC. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Unites Nations Conventions against Transnational Organized Crime. 2003. Available at: unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. Accessed on: 05.19.22.

as in the African and American regional systems, is the main limitation to the application of this right. However, it was found that trafficking in people in various situations, especially with regard to women, is a practice that violates human rights and can be equivalent to persecution in some situations. In addition, the reasons that lead people to be victims of trafficking are often in line with those that generate refugee flows, such as exacerbated discrimination and violence against certain groups.

The trafficking situation itself may give rise to a reason for persecution, namely, belonging to a group – victims of trafficking – who in certain societies suffer discrimination, as they are also targeted by criminals for retaliation or new trafficking processes. Furthermore, even when they are not eligible for recognition as refugees, victims of trafficking should have non-refoulement guaranteed, a principle originated from refugee law, if applicable.

Such facts demonstrate that, over time, new themes related to human rights emerge and, with the appropriate interpretations, existing instruments can be useful to guarantee the protection of these rights. Although it does not cover all victims of human trafficking, the refuge is able to guarantee the protection of the dignity of at least part of this group of people.

While little was said about any protection for victims of human trafficking a few years ago,[53] cases are increasingly being reported in which they have been granted rights, including asylum. In the case of women victims of sex trafficking, their recognition as a specific social group has been more frequently recurrent, both for their condition as women, especially those from countries with significant inequalities between genders, and for the very fact of being victims of trafficking. This makes them a particular social group vis-à-vis the society of origin.[54]

53. TIEFENBRUN, Susan. The saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Act of 2000. *Utah Law Review*, v.1, n. 1, 2002.

54. "It is also important to note that even if her initial departure was 'voluntary' and/or for 'economic' reasons, this does not preclude a refugee claim where a woman is at risk of future harm as a result of having been trafficked. For example, in granting refugee status to a woman from Uzbekistan, the Refugee Review Tribunal ('RRT') recognizes that the applicant left her country 'to improve her economic situation in the context of a declining economy and consequent limited employment opportunities in Uzbekistan, especially for women'. Nonetheless, the RRT 'considered whether her subsequent experience of being trafficked and the risk of harm that followed from that experience constitute persecution'. This is clearly in line with the Refugee Convention, which always requires a prospective assessment of risk." DOREVITCH, Anna. FOSTER, Michelle. Recent Obstacles on the Road to protection: Assessing the treatment of sex-trafficking victims under Australia's migration and refugee law. 9(1) *Melbourne Journal of International Law*, v. 9, n. 1, 2008. Available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=1371944. Accessed on: 05.19.2022; In United Kingdom it was already decided that "(ii) [...] in cases where the members of a social group share a common background which is an immutable characteristic and which they cannot

In other words, States have recognized that victims of trafficking can represent a particular social group and that the risk they run is compatible with the fear of persecution required by international refugee law to grant international protection. Therefore, there is an increasing movement towards an evolutionary interpretation of refugee law for new categories of people at risk, such as victims of human trafficking. In this sense, the application of refugee rights to victims of trafficking in persons allows protection to be extended to a specific group of vulnerable people in order to safeguard their most fundamental human rights, such as life and freedom.

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BRAZIL. Law n. 13344: Provides for the prevention and repression of internal and international human trafficking and measures for the care of victims; amends Law n. 6815, of August 19, 1980, Decree-Law n. 3689, of October 3, 1941 (Code of Criminal Procedure), and Decree-Law n. 2848, of December 7, 1940; and repeals provisions of Decree-Law n. 2848,

change (for example, the sharing of a common past experience) or they ought not to be required to change, then if the common background defines the group by giving it a distinct identity in the society in question which has nothing to do with the actions of the future persecutors, then the group exists independently of the feared future act(s) of persecution and circularity is avoided. It is not necessary to show general discrimination as an identifying characteristic of the group. If an element of discrimination is necessary, it can be provided by the fear act(s) of persecution without leading to circularity. (b) Where the particular social group relied upon is the broad one of gender or a group with gender-based identifying features, then discrimination in the wider sense against the gender must be shown to exist as an identifying feature of the group. (c) "Former victims of trafficking" and "former victims of trafficking for sexual exploitation" are capable of being members of a particular social group within regulation 6(1)(d) because of their shared common background or past experience of having been trafficked. [...]. However, we emphasise that, in order for "former victims of trafficking" or "former victims of trafficking for sexual exploitation" to be members of a particular social group, the group in question must have a distinct identity in the society in question.[...] (e) In the context of Moldovan society, a woman who has been trafficked for the purposes of sexual exploitation is a member of a particular social group within regulation 6(1)(d), the particular social group in question being "former victims of trafficking for sexual exploitation."
SB (PSG - PROTECTION REGULATIONS). Asylum and Immigration Tribunal / Immigration Appellate Authority. 2007. Available at: refworld.org/cases, GBR_AIT, 47837c902.html. Accessed on: 05.19.22; The protection of victims of trafficking in persons by the refugee law was also recognized in an important UNHCR meeting in Latin America: "6. To consider the possibility of adopting appropriate national protection mechanisms to address new situations not foreseen by the international instruments for the protection of refugees, giving due consideration to the protection needs of migrants and victims of trafficking, including whether they are in need of international protection as refugees." BRAZIL. Declaration on the Protection of Refugees and Stateless Persons in the Americas. 2010. Available at: unhcr.org/4cdd3fac6.pdf. Accessed on: 05.19.2022.

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VIOLENCE AGAINST VULNERABLE GROUPS

Hilary Brown
Assistant Professor in the Interdisciplinary Centre for Health 'and Society at the University of Toronto Scarborough.

1. A PRINCIPLED MANDATE. INTRODUCTION

This report is produced as part of the Council of Europe's integrated project on "Responses to violence in everyday life in a democratic society". The project is designed to look at violence in its many forms, including domestic violence and how this affects children, women, and men. As such it also provides, from within the Council of Europe, a model of coordination and lateral thinking, which has much in common with national initiatives designed to protect children and vulnerable adults from abuse and to uphold their rights.

As the title of this report suggests, violence against vulnerable people is commonplace; it occurs in homes, schools, workplaces, and neighborhoods. Our communities are diminished each time a child is hit in a supermarket queue, each time a person with a disability is taunted in the street, whenever someone with a mental health problem is homeless or an older person isolated because they are afraid to go out. While incidents like this are treated as nothing out of the ordinary, taken together they represent a cumulative erosion of the human rights and dignity of people who already face barriers and have difficulties to overcome.

Protection as an equal rights issue

However, protection is not a special privilege, only of concern to vulnerable groups; all citizens take steps to protect themselves while expecting that the state will also take reasonable measures to assure their safety and to seek redress on their behalf if they are victims of violence.

This report highlights the duty of member states to act equitably in respect of all its citizens, including children, older people, and people with physical or mental disabilities. It aims to provide an account of the work that has been done across these boundaries, pooling ideas, without obscuring important differences. Comparing conceptual frameworks

and examples of best practice increase understanding about what these groups have in common, and allows us to interrogate the nature and sources of vulnerability, to search for explanations of the predisposing factors and dynamics which underlie everyday violence and to see if solutions derived in one setting can help those seeking answers in another.

The report reflects the Council of Europe's strong commitment to human rights and views these issues through that lens. Here there are no questions about whether certain punishments or treatments might "work" if they represent a violation of the integrity of those concerned. The Committee of Ministers has emphasized that it is committed to a proactive stance and uses strong language to signal that determination, stating, for example, that its goal is "promoting children's rights as the term promotion is broader than protection" (European Convention on the Exercise of Children's Rights, 1996, p. 18).

A note about "labels"

Across Europe different terminology is used to describe people with disabilities, each with its nuanced meaning and inferences. In this report the term "people with disabilities"[1] is used, and "people with intellectual disabilities" is the term used to describe people also sometimes referred to as people with mental handicaps, learning disabilities, or learning difficulties. "Older people" is the preferred term for people who are sometimes referred to as elderly, or as senior citizens.

Individuals and groups might dispute the term "vulnerable" when applied to them, or to a group they identify with: not all people with disabilities or older people are especially "vulnerable" and many have fought assertive and hardwon campaigns to establish their rights as ordinary adults in society. In some cultures, vulnerability is stigmatized and it is certainly at odds with the image projected by the disability movement who are actively campaigning on their behalf to have their rights respected and to live their lives free from discrimination.

1. Throughout this report the term "people with disabilities" is taken to include children with disabilities, where only adults are concerned this is made clear.

A social model of vulnerability

Nevertheless, these groups do share, with children, young people, women, refugees, and ethnic minorities, certain disadvantages when they are the victims of violence and it is for this reason that they are grouped in this report. Chapter III explores the roots of this additional vulnerability, which is not necessarily located in a person's impairment, but in the way others, including responsible agencies, treat them. Nor is protection advocated as a retreat from empowering service provision. On the contrary, it should be seen as an essential element in new models of assistance, support, and community living. It is to be achieved, wherever possible, through ordinary routes and mainstream agencies. The protection of an institution is not the kind of protection offered to other citizens.

A commitment to take all violence seriously

The work described in this report can, therefore, be seen as part of the Council's commitment to challenging all forms of discrimination, with the goal that violence against these groups is taken as seriously as it is concerning other citizens. If there is one idea to take away from the projects described in this report, it is that these groups are asking their countries to provide them with equal not special protection. Although a few individuals[2] have particular needs and may require special measures to be in place, for most these agenda is not a plea for kid gloves but equal rights.

There is now, across all these groups and throughout the agencies that advocate on their behalf, a determination that violence and abuse against vulnerable people will no longer be justified, minimized, or tolerated; and that powerful individuals and agencies will be held to account for human rights violations and acts of cruelty or negligence. This commitment is backed up by a strong international consensus. The Council of Europe's work across all these sectors provides instruments, guidance, and exemplars to assist member states to translate this commitment into a reality.

2. Specifically, young children and adults who lack mental capacity and are therefore unable to make their own decisions or act in their own best interests.

Finding your way around the report

The report is divided into three chapters: Chapter I explores the remit and mandate of the Council of Europe about prevention of violence; Chapter II explores the definition of violence and the labeling of certain groups as "vulnerable"; and Chapter III looks at what is known about such violence and its causes, which will contribute to finding shared solutions.

A list of documents issued by the Council of Europe is included with other references at the end of the report.

The human rights mandate of the Council of Europe

The mandate for the Council of Europe's work concerning abuse derives from the European Convention on Human Rights, the European Social Charter, the United Nations Declaration on the Rights of the Child, and the UN Standard Rules on Equalisation of Opportunities for Persons with Disabilities interpreted in Committee of Ministers Recommendation No. R (92) 6 on a coherent policy for people with disabilities.

Children's rights

Children's rights are spelled out in the UN Convention on the Rights of the Child; backed up for member states by the European Convention on Human Rights, which applies equally to children. The European Convention on the Exercise of Children's Rights was opened for signature in 1996 to provide the legal instrument enforcing and supplementing the UN declaration, particularly concerning children's rights in legal proceedings concerning them. It establishes their rights to be informed, represented, and to participate in proceedings in family courts. Consideration had been given to the creation of a separate European convention on children's rights but bodies within the Council of Europe have stated a preference for putting their energies into implementing the instruments that already exist rather than enacting new ones that might inadvertently lead to duplication or dilution.

Rights of people with disabilities

The Council's activities in the sphere of disability are supervised by the Committee on the Rehabilitation and Integration of People with Disabilities and guided by the Committee of Ministers Recommendation No. R (92) 6 on a coherent policy for people with disabilities, which advocates the integration and full participation of people with disabilities in society. Such a commitment should also be seen against the background of the European Convention on Human Rights and the European Social Charter and in particular anti-discrimination protocols.

Rights of people with mental health problems

The actions of governments concerning people with mental health problems are strictly governed by the European Convention on Human Rights, which sets out the conditions under which detention may be authorized: Article 5, paragraph 1.e, sets out the right of "persons of unsound mind" not to be deprived of their liberty except under a procedure prescribed by law. According to the European Court of Human Rights the detention of a person of unsound mind is lawful only where:

– a true mental disorder is objectively established;
– the disorder warrants detention;
– the detention continues no longer than the disorder.

The article also asserts that compulsory treatment in the community will be lawful if it is "proportionate" and "necessary for the protection of health". Article 5, paragraph 4, concerns the right of a detained person to take legal proceedings to appeal the lawfulness of his detention and states that such an appeal should be decided "speedily" by the court. Article 3 of Protocol No. 1 assures that even detained patients retain the right to vote.

A brief overview of the work of the Council with vulnerable groups

A range of projects

Work on violence against vulnerable groups has taken place under the aegis of several groups across the Council and has included work to address:

– conditions in institutions, detention centers, and penal establishments;

– abuse against older people in their families;

– access to health care for people living in institutions including residential homes;

– equitable access to health care, justice, and public amenities;

– sexual exploitation, trafficking, and risks of the Internet;

– gender-based violence and all forms of domestic violence;

– trafficking in children and women, whether for sexual exploitation, organ donation or trading in babies and children for adoption;

– abduction of children by one parent;

– unaccompanied children, people disabled by war and disabled refugees;

– orphaned and abandoned children;

– children at war including the use of child soldiers;

– Internet exploitation;

– drug and alcohol issues for young people;

– children's rights, protection from abuse and exploitation, corporal punishment and sexual exploitation;

– abuse and violence against disabled children and adults;

– rights of people who cannot represent themselves and/or are subject to mental incapacity legislation;

– measures to combat social exclusion, including universal design of the built environment, inclusive education and mainstreaming for disabled people in other public services;

– bullying and violence in schools and amongst vulnerable and alienated youth in urban settings;

– violence, bullying, and exploitation of young people in sport.

Several groups have shared the responsibility for working on this broad range of violence against vulnerable groups within the Council of Europe:[3] this creates strength but also requires co-ordination if it is not to leave gaps or to create uncertainty about which bodies are responsible for taking actions forward.

The Council of Europe's work on children

Work on the rights of children is primarily carried out by the Forum for Children and Families, working as a sub-committee of the European Committee for Social Cohesion (CDCS). The Assembly sees the role of the Council of Europe as "a champion of human rights, in defending and promoting the rights of the child"; and in its recent statement to the United Nations General Assembly Special Session (UNGASS) the Council stated that its work would "concentrate on the legal status of children, improved protection against exploitation and abuse ... and work to make Europe a child-friendly area in which member states apply all treaties and standards promoting the best interests of children and young people".

The forum prioritizes work on implementation rather than on developing new instruments and aims to achieve these ends by creating strong links with existing groups rather than by setting up new structures, such as instituting an independent European children's ombudsman. Specifically, it seeks to set up strong links between the Council and the European Union, and with the Committee on Children's Rights set up under Article 43 of the United Nations convention. Similarly, when asked to consider setting up a register of missing children the forum expressed caution, seeking to work with Interpol to mobilize existing structures and expertise (CDCS (2002) 66). As an example of its work, a recent seminar was held on abolishing corporal punishment of children under the guise of discipline: a move already deemed to be overdue in the light of recent judgments from the European Court of Human Rights.

3. This report draws on a review conducted for the European Committee for Social Cohesion (CDCS) by Professor Stuart Asquith on "The relevance of work on children's issues conducted in other intergovernmental bodies in the Council of Europe to the work of the Forum for Children and Families", CS-Forum (2002) 9.

In 2000, following its report to the United Nations committee, the Council took steps to implement the European Convention on the Exercise of Children's Rights by promoting national cross-ministerial bodies for children and ombudsmen schemes at the national level as a medium through which these rights could be enacted. Cross-ministerial units should also seek to anticipate issues for children and young people arising out of all generic legislation and monitor the impact of particular legislative change on their behalf across a raft of mainstream agencies and provision.

Disabled children are often marginalized and poorly served within generic child protection frameworks or blamed for inviting abuse as if the cause lay with them and their impairments rather than within the systems which have grown up to serve them. The task of campaigners is to counter such assumptions and make disabled children visible as a minority group with distinct needs within mainstream child protection processes.

The Council of Europe's work on people with disabilities

Work on disability has focused on integration and anti-discrimination but due to mounting concerns about violence perpetrated against people with disabilities, the Committee on the Rehabilitation and Integration of People with Disabilities (CD-P-RR) set up a Working Group on Violence against and Ill-treatment as well as Abuse of Persons with Disabilities (P-RR-VIA) in 1998, which met five times between 1999 and 2001. In 2002, the Council published *Safeguarding disabled children and adults against abuse*, which was prepared by the working group.

The Council has also done work to improve the lives of disabled people by advocating the move to small, community-based living and away from the institutional provision, supporting independent living schemes and direct payments, and urging the development of more mainstream support services and universal design to minimize barriers in the built environment. Recent work has included addressing the needs of people in need of a high level of support and their carers, and pioneering

work on promoting equitable access to technical aids and assistance.

The Council of Europe's work on violence as it affects older people and families

Under the auspices of the Steering Committee on Social Policy, the Social Cohesion Directorate initiated work on prevention of violence against older people, leading in 1992 to the publication of *Violence against elderly people*. It was compiled from a coordinated research project that explored violence against older people in a family context. This began the important process of information sharing and collaboration on methodologies for further research and service development. It was published as part of the 1990-91 Coordinated Research Programme in the Social Field by the Study Group on Violence against Elderly People, working under the aegis of the Steering Committee on Social Policy.

According to the above publication (p. 23), a person is recognized as "old" at a different age across countries and usually within countries men and women reach "old age" differentially so that this boundary varies from 60-67 and makes it difficult to do comparative research or to record cases consistently. Concepts of "old age" which refer to "loss of social and economic status and the fact of being retired" (ibid., p. 32) are conceptually more coherent but may be difficult to codify across member states with very different levels and patterns of employment and inclusion.

The Council has also worked on the development of positive alternatives for older people, including the publication of *Improving the quality of life of elderly persons in situations of dependency* (O'Shea, 2002) and the improvement of home help services.

The Steering Committee on Social Policy also oversees the work of the Forum on Children and Families, which includes representatives from the legal experts on the family law group and the disability field. The Steering Committee for Equality between Women and Men (CDEG) has taken a lead in addressing domestic violence and in making links around this issue into the Forum on Children and Families. The forum has taken a lead in addressing child protection issues and most recently corporal punishment (physical assault) of children.[4]

4. Work on children and families has been mapped across other Council of Europe intergovernmental bodies in document CS-Forum (2002) 11.

Work on the prohibition of torture and inhuman or degrading punishment

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment works on behalf of all these vulnerable groups in so far as they are liable to be detained or to live in institutional or residential settings. Specifically, it enforces the rights of young people and people with mental health problems held in institutions, prisons, residential centers, and detention centers and makes regular visits to such centers and psychiatric institutions to examine the treatment of persons deprived of their liberty.

Instruments and mechanisms

The Council works through several different routes, mechanisms, and documents:

– it enacts legal instruments and holds member states to account through the European Court of Human Rights;

– it makes recommendations and guides implementation, policy-making and service provision;

– it brings experts and government representatives together to share best practice and create consensus;

– it sets up opportunities for researchers to meet to build theory and share methodology;

– the Court adjudicates and creates case-law based on precedent.

This report draws on a range of such documents relating to the abuse of vulnerable groups — children and young people, women, people with disabilities, and older people. Through its work in these spheres, there can be no doubt that the Council of Europe plays a vital role in enacting, disseminating, and guiding member states as to how they can implement legal instruments, bring about legislative change, and promote service development in their own countries. Under its aegis, the Council brings together groups of experts and representatives to share best practices and reflect together theoretically, strategically, and practically. Moreover, its activities include consultation with NGOs and advocacy groups, ensuring that the voices of vulnerable people are represented at the highest levels of policy-making and government.

Underlying principles

These explicit human rights commitments must be viewed against the backdrop of other important values and principles in policy and service development.

Inclusion

The Council is committed to promoting social inclusion, excellent service provision, and high quality of life for all, but particularly for vulnerable people:

> As members of an Organisation that promotes social cohesion, we are committed to building a child-friendly society in which parents or those caring for children can provide safe, stable, and supportive environments for their development. (CDCS (2002) 66, p. 15)

The drive to create inclusive facilities, spaces, and places are expressed most fully concerning disabled people and in the principles of universal design. The term "universal design" is used to convey the idea that public amenities should be designed to be inclusive from the outset and not adapted for disabled people as an afterthought. According to the "Tomar" Resolution[5] (Committee of Ministers Resolution ResAP (2001)1, p. 17):

> Universal design is a strategy, which aims to make the design and composition of different environments and products accessible and understandable to, as well as usable by, everyone, to the greatest extent most independently and naturally possible, without the need for adaptation or specialized design solutions.

Hence the aim is to prevent barriers from being erected before they affect individuals and families who might otherwise have to strive to overcome them.

5. For a comprehensive description of the principle of universal design see Resolution ResAP (2001)1 on the introduction of the principles of universal design into the curricula of all occupations working on the built environment.

Mainstreaming

Service provision is also predicated on accessing mainstream public provision: in Scandinavian countries this principle is referred to as providing "sector responsibility" in that the authorities responsible for any given function for disabled people should be the same as for all citizens, ensuring, for example, that the education of disabled children is supervised by the same authorities who manage education for all children and that disabled people receive health care through ordinary health services, but this requires a very proactive approach on the part of these services if inclusion is to be real and provision equitable. "Marketisation" of public services may set up contingencies that work against the inclusion of people who are difficult and/or expensive to serve and this needs to be the focus of monitoring, evaluation, and regulation (see Bengtsson, 2002).

Participation

Another important principle enacted throughout the work of the Council is that of participation, expressed by one UK agency working with people with intellectual disabilities as "nothing about us without us".[6] The Forum for Children and Families has a children's panel and young people take part in its seminars and are consulted widely.

In two very important areas of its work – domestic violence and corporal punishment – the Council has ensured that the voices of children and young people are heard. Weinehall (1999) presents vivid accounts from children and young people about the daily realities of living with family violence, which includes instability and fear, often engendering hatred, suicidal thoughts, escape into fantasy, drugs or alcohol, and complicated by other forms of violence with boy/girlfriends or at school. Their only hope seemed to lie in creative expression through writing, art, and drama, and in the possibility of encountering adults who are prepared to listen and support them.

Of equal importance was the participation of young people at a recent seminar on corporal punishment to represent children's views

6. Norah Fry Research Centre, University of Bristol.

and to present research (see, Save the Children, 2001), which strongly counteracted any tendency to minimize the physical and emotional hurt caused by physical punishment. This principle has illuminated other research into areas of concern, for example, a recent paper (Sequeira and Halstead, 2002) documented the distressing views and experiences of women with mental health problems who had been subject to control and restraint.

The working groups of the Committee on the Rehabilitation and Integration of People with Disabilities (CD-P-RR) consult with disability networks through the European Disability Forum (EDF), which contributed to recent work on abuse and service provision for people in need of a high level of support, arguing specifically for the introduction of proper advocacy and legal measures to formalize provision for those who are unable to represent themselves in decisions made about their lives.

People who use services or are themselves vulnerable also have views about how the issue of violence and abuse should be addressed in ways that do not inadvertently disempower or further stigmatize them. Many groups are justifiably wary of inviting patronizing responses by acknowledging violence committed against them. The European Disability Forum voiced the following priorities in taking action against abuse:

– that abuses be seen in the context of more widespread discrimination against people with disabilities;

– that these should be conceptualized as a basic human rights issue;

– that a sounder knowledge base needs to be built up through the collection of more reliable information and the introduction of more sensitive systems to encourage reporting and advocacy;

– that member states take holistic and systematic steps to challenge all abuse and mistreatment as a matter of principle and urgency (EDF, 1999).

Summary

These important principles form a backdrop to the work of the Council in combating everyday violence against vulnerable people but they also determine how the Council seeks to implement its policies through:

– action against discrimination at all levels and in all walks of life;

– negotiation with, and participation of, vulnerable people in discussion about policies which affect them;

– encouraging mainstream agencies to adopt inclusive policies and practice;

– assuring representation and equality in the criminal justice system and before the law;

– ensuring that special measures are not applied in ways that diminish or contravene the human rights of individuals or their status as a group within their communities.

2. DEFINING VIOLENCE, ABUSE, AND VULNERABILITY

Putting boundaries around definitions of abuse and vulnerability

The process of defining "vulnerability", "violence" and "abuse" is not a matter of hair-splitting or academic precision; it is a way of describing and making visible the abuse of people who are often not able to bring their experiences into the public domain or onto a public agenda. Not being "able" in this context may be – but is often not – a direct result of impairment, immaturity, or physical or mental frailty but normally has a strong social dimension encompassing the fact that less powerful groups are often actively discouraged or prevented from bringing charges or complaints, and their experiences of violence are minimized or excused.

Deciding which groups are "vulnerable" is complex and value-laden. The groups considered in this report are not at all homogenous. "Vulnerable" people in this context are children and young people, people with disabilities (including mental health problems), and older people. There is enormous variation between the groups and within them, with the risks of abuse they face and what are appropriate preventative measures and interventions.

Comparing definitions allows us to make important connections and see shared dynamics. Issues of violence and abuse facing disadvantaged groups overlap with those addressed within more generic programs on violence and crime prevention within the Council of Europe – specifically work on domestic violence against women, as older women and disabled women are also victims of domestic violence. Work on disabled children is in theory part of the work done to protect all children and young people, for example, work on violence in schools, in sport, and urban environments; although it is sometimes difficult to see if they are being included, subsumed or ignored in many texts.

The unequal power that accrues to adults in our society and particularly to adults in care-giving positions is an important factor in conceptualizing abuse of children and vulnerable adults. Both families and institutional settings, with their hierarchical structures and unequal relationships, are identified as sites of physical violence. These groups share heightened risks of being isolated within their families or of being housed in institutional or residential facilities but despite this common ground, there are many differences in approach and priorities.

Defining abuse

Moreover, the risks they face also vary, arising as they do in different relationships and contexts, and out of a range of personal, interpersonal, social, and structural dynamics. There is a constant tension about how to draw a boundary around which actions to name as "violent".

The main forms of harm included in the Council's work on safeguards for disabled adults and children (2002) were:

– physical violence, including abusive use of corporal punishment, incarceration including being locked in one's home or not allowed out, and overuse or misuse of medication, medical experimentation or involvement in invasive research without consent;

– sexual abuse and exploitation, including rape, sexual aggression, indecent assault, indecent exposure, and involvement in pornography or prostitution;

– psychological threats and harm usually consisting of verbal abuse, intimidation, harassment, humiliation or threats of punishment or

abandonment, emotional blackmail, arbitrariness, withholding adult status and infantilizing disabled persons;

– interventions which violate the integrity of the person, including educational, therapeutic and behavioral programs;

– financial abuse, fraud, and theft of belongings, money or property;

– neglect, abandonment, and deprivation; this may be physical or emotional and includes an often-cumulative lack of health care or negligent risk-taking, withdrawal of food or drink, or other necessities of daily living, including in the context of educational or behavioral programs.

The European Disability Forum (1999, paragraph 1.3, p. 7) had previously set out a similar typology.

The Parliamentary Assembly drew up a list of recommendations relating to all children (Recommendation 1371 (1998)) asking that member states incorporate protection of children against a range of abuses into their national legislation including:

– sexual abuses including pedophilia, exploitation, and involvement in pornography, incest, and prostitution;

– abuse, including abuse within the family;

– refusal of necessary care;

– inappropriate criminal proceedings;

– abusive sterilization, violence, and mutilation of girls.

Subsequently, it has intensified its focus on corporal punishment and also on the impact of domestic violence on children. Trafficking, whether for sexual exploitation, adoption, or commercial trading in body parts, has also been identified in recent work of the Council, with special reference to Eastern Europe (see Parliamentary Assembly Recommendation 1526 (2001) and Committee of Ministers Recommendation Rec (2001)16). It must be noted that disabled children are particularly at risk in this regard.

There are particular issues involved in defining sexual abuse while at the same time supporting the equal sexual rights of adults with disabilities and older people. Sexual acts which are defined as abusive include those which take place in the context of a fiduciary (professional or paid for) relationship or one in which one person holds a position of power – for example, a state official (Valiente, 1999) or clergy (Kennedy, 2002).

Sexual acts are also deemed to be abusive if the person cannot give their consent to the act because of their understanding and/or any cognitive impairment and hence mental incapacity; a legal concept itself the subject of guidance from the Council. Assessing "competence" to decide such matters is a shared issue for the young, for older people with mental health problems including dementia, people with serious mental health problems including cyclical conditions, and people with intellectual disabilities some of whom may not be able to make these decisions by, or for, themselves. These considerations also impact on the assessment of capacity about financial transactions.

On the same grounds, minors are to be protected from sexual relationships to which they cannot consent even if they appear to do so. As an example, Parliamentary Assembly Recommendation 1371 (1998) urges member states to declare unequivocally that prostitution of minors (under 15) "always constitutes rape or sexual abuse and that, even where money has been handed over, there is a presumption of violence since a child cannot be regarded as a consenting party". It is hoped that this will act as a deterrent and have the effect of reducing demand for sex which exploits children and women.

Settings

Vulnerable people are at risk in their own homes, their family homes, foster or group living situations, ordinary community situations such as places of leisure or employment, schools, large-scale institutions and day centers, hospitals, and nursing homes. Upholding the rights of people with disabilities in prisons and other secure or restricted settings is of particular concern especially when people have mental illnesses or dual diagnoses. Abuse in institutional settings, which affects children and adults, is regarded by many to be endemic and can take place against a pervasive culture of depersonalization, lack of privacy, inactivity, inadequate food and heating, poorly trained and supervised staff, and isolation from community activities.

Relationships

Vulnerable people may be abused by people they know or by those who are responsible for their care; they may also be abused by their peers, by other young people, or by other disabled service users, whose abusing behavior will need to be addressed by responsible authorities. They may also be the target of abuse by strangers, random violence, or hate crimes. The Council has paid particular attention to domestic violence as this affects both women and children: family violence also impacts hugely on older people and people with disabilities whether they are the direct victims of such violence or onlookers. Violence may be differentially dealt with within these different settings with different authorities and agencies responsible. Police may treat domestic violence and street violence differently, while they may treat residential homes and institutions as completely outside their sphere of influence, leading to lesser protection for residents and inmates.

Rules may be in force in institutions which are not following international law: for example, there may be discrimination on grounds of sexual orientation in the way institutions "allow" relationships between patients; rights to privacy, to receive mail or make telephone calls may be breached routinely; or people may be informally (that is, without due process or independent scrutiny) detained or restrained. Even where these practices are not explicitly condoned by member states they may still occur on a widespread basis (P-RR-VIA, 2002, p. 24).

Other so-called "professional" practices may be accepted as legitimate without challenge in certain member states, including:

– solitary confinement;
– control and restraint;
– medical castration;
– over-reliance on sedation as a means of control;
– punishment or deprivation as part of a behavioral program;
– unmodified ECT (that is, without the use of anesthesia).

State-condoned or legitimated violence

There are clear parallels between the extent to which violence is condoned against children, women, people with disabilities, and older people. Only nine countries have fully abolished corporal punishment of children despite rulings from the European Court of Human rights dismissing appeals that to do so contravenes either the right to privacy or religious observance. The Council produced a report in October 2002 summarising progress towards this goal and reporting on the status of countries that have not yet abided by their international obligations in this matter ("Corporal punishment of children").

State-condoned violence against people with disabilities has included and may still include:

– incarceration without due process or avenues for appeal or review;

– enforced sterilization or compulsory abortions when pregnant;

– not being allowed to marry or engage in sexual relationships, including gay or lesbian relationships;

– not being assisted to bring up children, or having those children removed without formal assessment or care planning;

– inappropriate groupings and lack of choice about whom to live with or options to leave group settings in which violence is a daily occurrence as highlighted in several case studies submitted to the working group;

– being forced to observe religious rules which are not of their choosing because religious organizations are their only source of practical assistance and accommodation; or conversely being hindered from following their religion when it is of their choosing, for example when people with disabilities from ethnic minorities are placed in congregate residential settings;

– exclusion from workplaces and public places on account of non-accessible public buildings and public transport (adapted from P-RR-VIA, 2002).

Clearer definitions needed for research

Categories may be more or less difficult to define operationally or for research purposes: psychological abuse, for example, might be inferred from verbal abuse. Neglect is more difficult to establish in countries/cultures where there is no consistent reference point for what is expected from parents as regards their children, where children are still conceptualized as possessions of their parents, or where filial responsibilities of adult children to their parents both practically and in terms of financial provision are not set out. This issue is dealt with in Chapter III of this report.

Does a broad definition dilute concern?

There is understandably much debate about whether it is helpful to consider all these types of harm under the same rubric. The imputed violence ranges from direct physical harm and brutality to deprivation and lack of care or support which, even though culpable, may arise out of stress or distress as well as cruelty. Reports and projects of the Council of Europe have used different and sometimes inconsistent terms to reflect the range of acts and omissions that harm children, women, disabled people, and older people. "Violence", "mistreatment", "abuse" and "punishment" are all terms that have been used. The Steering Committee on Social Policy, in its *Violence against elderly people* (p. 16), reviewed terminology ranging from "elder abuse" to "granny bashing" and "battered old person" and, in defining types of abuse, drew a wide circle but omitted sexual abuse.

The work on disability embraced the following issues:

– seriously inadequate care and attention to basic needs including nutrition, health care and access to educational and social opportunities;

– individual acts of cruelty or sexual aggression by caregivers;

– breaches of civil liberties such as incarceration without due process, "enforced cohabitation" in group homes or institutions, the prohibition of sexual relationships or marriage, lack of privacy or intrusion into, or interruption of, mail or telephone calls or visits, in institutional or family settings and/or continued isolation from sources of support or advocacy;

– acts of bullying or random violence within community settings, some of which may represent more extreme forms of generally held prejudice against people with disabilities or, of greater concern, global ideologies which are inimical to disabled persons;

– practices by individual staff which fall well outside, or below, accepted professional norms;

– abuses by other service users within service settings where attention has not been paid to safe groupings or sufficient supervision to ensure safe placements;

– authorized treatments and interventions which are not in the person's best interests and/or which rest on an inaccurate or incomplete understanding of their condition and needs, for example, punitive responses to challenging behavior, seclusion, ECT without consent, or aversive behavioral programs;

– abuses caused by the structure of services and abusive treatments, for example through unwarranted detention, inappropriate or enforced treatment, over-medication, use of ECT, and loss of civil liberties, of particular concern to people with mental health problems.

It is generally agreed that violence is not only physical and that it is possible to abuse someone verbally, torture them emotionally, or punish them psychologically. Hence the term "violence" is open to interpretation and there is a constant tension as to whether a broad approach that aligns physical violence with other forms of mistreatment, including exploitation, neglect, and/or extremely poor care, is helpful or if it deflects from an unambiguous focus on, and the awfulness of, physical violence.

Defining thresholds which warrant intervention

Even where there is agreement about the kinds of act or harm that should be considered there are difficult judgments to make about how serious an incident or ongoing abusive relationship would need to be to warrant intervention. This is in itself highly dependent on the reference point against which the conditions of children, young people, people with disabilities, or older people are judged. Often children and adults

with disabilities are assessed against quite different norms than their peers, so those very abnormal or inadequate surroundings are judged "normal" for them. This traps them in a cycle of discriminatory expectations from which it is difficult to escape. People with disabilities themselves have highlighted the link between abuse and discrimination and the UK Government included the term "discriminatory abuse" in a recent policy document (Department of Health, 2000).

For children, the universally accepted standard is that the child will sustain "significant harm" as a result of the action or inaction. Some criteria for assessing seriousness were put forward in the report on disability and these included:

– the vulnerability of the victim, for example, their frailty, and the extent of their impairments and/or cognitive or communication difficulties;

– how extensive the abusive act(s) were, for example, French criminal law defines physical violence to be a serious offense when it results in at least eight days' sick-leave for the victim";

– whether the abuse was a single incident or part of a long-standing pattern or relationship;

– what impact the abuse had on the vulnerable person;

– whether others in the family or setting were badly affected by, or drawn into, the abuse;

– the intent of the abuser – whether the abuse was intended or inadvertent, arising out of stress or ignorance; or if the abuser had set out to exploit this individual by targeting them specifically on account of their perceived disabilities. A view would need to be taken about whether the abuse was passive or active, wilful or accidental;

– the authority of the abuser and the extent to which they abused a "position of trust", for example where abuse was perpetrated by someone with standing in the community such as a priest, teacher, doctor, nurse or social worker;

– whether the abuse was such that it constituted a criminal offense;

– whether there is a risk of repeated abuse by this abuser towards this victim: for example, a sexual crime against either children or adults is more likely to be part of a pattern of serial offending rather than a one-off lapse of good character;

– whether there is a risk that this abuser or this setting will cause harm to other children or vulnerable adults (adapted from the AIMS Project, 1998) The Steering Committee on Social Policy, in *Violence against elderly people*, also addressed this issue of seriousness in terms of severity, cultural context and also what they termed "density", which they defined as the frequency, duration and intensity of violent acts against the elderly person.

Pragmatic decisions

These dilemmas are usually resolved on pragmatic grounds with attention paid to the different agendas that need to be influenced by different configurations of action and inaction, individual and systemic cruelty or indifference. Sometimes it is helpful to focus on one particular form or context of violence to prioritize coherent action in one field or by one agency.

In *Violence against elderly people*, a focus on family violence was thought most appropriate, and the Steering Committee on Social Policy defined violence as:

> any act or omission committed within the family by one of its members that undermines the life, the bodily or psychological integrity or the liberty of another member of the same family or that seriously harms the development of his or her personality and/or undermines or damages his or her financial security. (Steering Committee on Social Policy, 1992, p. 21)

Since that time, violence against older people at the hands of paid care workers, neighbors, and in community settings has been more widely acknowledged and theorized.

For the most part, there is the agreement that abuse occurs whenever the integrity of any person is violated by another person, physically or psychologically, or in situations where an individual's civil rights are breached, negated, or ignored. The following comprehensive definition was offered in *Safeguarding adults and children with disabilities against abuse* (P-RR-VIA, 2002):

any act, or failure to act, which results in a significant breach of a vulnerable person's human rights, civil liberties, bodily integrity, dignity, or well-being; including exploitative sexual relationships and financial transactions to which the person has not, or cannot, validly consent.
Abuse, whether intended or inadvertent, may be perpetrated by any person (including another person with disabilities) and raises particular concern within a relationship based on:
– a position of trust such as one with legal, professional or authority status;
– unequal physical, economic or social power;
– inequalities of gender, race, religion or sexual orientation;
– responsibility for, and control over, day-to-day care.

From this definition, it is clear that while all citizens are at risk of violence, vulnerable people are particularly at risk because they are more likely to be isolated within their families or within various forms of service provision where they may be relatively powerless concerning those on whom they depend. Understanding the roots of such vulnerability is the key to deciding how best to protect and support people in abusive situations and relationships.

Defining vulnerability using a social model of vulnerability

Borrowing from the health field can provide useful models for analyzing the vulnerability of individuals and populations. Yodanis and Godenzi (1999) draw on a model in which homicide is construed as "the outcome of the disease of violence" (p. 118) and the P-RR-VIA (2002, p. 83) analyses options for prevention using a model of health promotion which separates primary prevention (stopping the abuse from occurring at all) from secondary prevention (prompt identification and reporting) and also from tertiary prevention (treatment and amelioration of the effects of abuse and violence).

A structural model of vulnerability focuses away from individual characteristics such as youth, impairment, or older age as causes of

"weakness", to highlight the impact of inequality in exacerbating the ordinary risks faced by disadvantaged groups, including the discriminatory response to violence and abuse they suffer and the lack of redress and support which others might expect had they suffered similar degrees of harm. This also opens up the possibility of establishing links with programs exploring violence against other groups that have been made vulnerable by social disadvantage and discrimination: programs focusing on racial violence, homophobia, and crimes against Roma/Gypsy peoples, all of which highlight the social dimensions of such vulnerability.

Minimizing

One way in which this discriminatory cycle can be seen is in the way that acts of violence are minimized when carried out against victims from disadvantaged groups. It is clear that the language within which violence and abuses of human rights are framed signal the seriousness with which they are viewed. Disability rights campaigners have argued that the term "abuse" plays down acts that would be treated as crimes if they had been done to non-disabled children or adults. Sexual abuse, for example, would be called "rape" and physical abuse named as an "assault" or as "grievous bodily harm". Similarly, to corporal punishment, children themselves and their advocates point to the way violence against children is downplayed:

> The use of words such as "a good spanking", "whooping" and "licking" is used instead of "hitting". They signal that hitting children is an approved disciplinary strategy. Consequently, child maltreatment professionals ... have to insist on terms such as "hitting" and "physically attacking" which condemn rather than support such behavior by parents, just as we found it necessary to rid our culture of terms that implicitly justify inequality between races and between men and women. (Strauss, 2000)

Valiente (1999) notes how the Spanish Penal Code categorized sexual assaults against women as attacks against the purity, decency, or chastity of a woman rather than assaults against the woman herself. Specific forms of abuse may also be crimes in member states, for example, physical and sexual assaults, theft, deception, and false imprisonment. Describing these acts as "abuse" may make them seem less serious or lead to them being dealt with through informal channels or in such a way that they attract less serious penalties or opprobrium than if their victims had been adults or non-disabled.

The choice of words is of enormous importance and is highly valued. Naming abuses as "crimes" may have contradictory consequences, because while it confronts attitudes that tend to minimize offenses against vulnerable people it may also lead to under-reporting of incidents. Campaigners in the field have to decide when to amplify the message they are giving by naming acts accurately and when, for example in conversations with research participants or other informers, they may need to tread more gently (see Chapter III which explores language as one of several methodological issues in research).

Victim blaming

But in addition to the minimizing and disguise, which occurs through language, these abuses are also justified both implicitly and explicitly, and thereby made socially acceptable and sometimes legally defensible, because the person who is victimized is from a so-called "vulnerable" group. Hence the notion of "reasonable chastisement" – which is used to justify hitting children and, until relatively recently in many cultures, hitting women – which creates and shores up accepted patterns of dominance and control at the expense of women, children, older people, and people with disabilities. Similarly, practices such as "control and restraint" are used to legitimate violence against people with challenging behaviors and mental health problems. These explanations usually have the effect of shifting the focus from the behavior of the abuser to that of the victim, with a corresponding shift in responsibility and victim-blaming.

Undermining credibility

Another occasion on which children and vulnerable people are made more defenseless is when their credibility – which typically depends on status and conformity – is (often spuriously) challenged. In *Violence against elderly people*, a case study was cited in which a woman whose son had been acquitted for lack of evidence would later taunt her whenever she made further complaints to her social worker that no one would believe her. The issue of evidence has over the years led to efforts in many countries to make sure that courtroom practice is not weighted against vulnerable or intimidated witnesses. Practice about child protection has taken the lead in this respect, pioneering video interviews and video-link evidence in chief and cross-questioning. Family courts have proved a more child-friendly place to be and lead the way for cases involving other vulnerable people.

Recognizing and respecting difference

Although we have looked for common ground there are also significant differences that should not be glossed over. There are valid issues about the extent to which some individuals can understand or take action in their interests and the complexity of taking decisions in extreme situations to protect someone unable to represent themselves. In its message to the United Nations (2001), the Parliamentary Assembly recognized the vulnerability of children and their entitlement to protection, "Since, due to their age, they are vulnerable and have special needs, they need specific protection" (Recommendation 1551 (2002)). People with intellectual disabilities, including older people with dementia, are accorded special status in some legislation with different sentencing guidelines on the basis that they are vulnerable and may not be able to make certain decisions or enter into sexual relationships or financial transactions.

It is important to distinguish between the impact of physical or sensory impairments and intellectual disabilities or mental illness, and also to acknowledge varying degrees of severity of different impairments.

While adults with physical impairments will usually be able to make decisions for themselves, they are often not given adequate practical and financial assistance and access to appropriate information. In contrast, people with significant degrees of intellectual disability may need others to make complex decisions on their behalf as well as to act for them to put these into practice. Mentally-ill people, or those with disordered thought states, may move in and out of states of vulnerability and need varying levels of help with decisionmaking. An undifferentiated approach to a disability may mean that individuals are offered inappropriate help and/or that they are burdened with inaccurate stereotypes and accumulated prejudices. People with profound impairments, including those who are unable to communicate, may require very specific safeguards.

Nor should the characteristics of victims, such as age, sickness, gender, civil and marital status, widowhood, or dementia be seen necessarily as predispositions or risk factors since the person may only be at risk in the presence of a putative abuser or if being served in an abusive setting. These characteristics may primarily describe the whole population under consideration and not only those at risk. A rigorous study of elder abuse carried out in the city of Boston by Pillimer and Finkelhor (1988) showed up counter-intuitive trends such as that older men are more at risk than older women even though women vastly outnumber men in the population of older people – a trend linked to variation in household patterns whereby men are more likely to be living with another person (spouse or adult child) than women who often live alone as widows.

A functional definition

Although at the outset a focus on children, older people, and those with disabilities might suggest a model of vulnerability as an inherent characteristic and almost inevitable consequence of impairment, this report takes the view that vulnerability is, at least in part, socially produced to the extent that any personal difficulties are magnified by placing people at additional risk, turning away from any signals that they might be being harmed and then responding with less determined

interventions than would be the case for other, more valued and more powerful, citizens.

If a functional approach to the definition is taken then these areas of concern might be grouped according to the systems that have responsibility for action rather than arbitrary "types" or descriptors of acts within different settings, relationships, and arising out of different dynamics. We can see that vulnerable people face several different kinds of risk:

– ordinary risks such as family or domestic violence and street crime just because they are in the same places, neighborhoods, and communities as all citizens;

– special or heightened risks arising out of:

– discriminatory expectations or access to resources, facilities or services;

– special situations arising out of the difficulty of caring for them or not knowing how far they need help in making decisions or acting in their own best interests;

– situations arising specifically out of the conditions in institutions or other forms of group living and service provision;

– situations in which they are deliberately targeted because they form a distinct and visible minority who can be taken advantage of.

The social model of disability holds that an adult or child is only "handicapped" to the extent that "shortcomings in the environment lead to loss or limitation of opportunities to take part in the life of the community on an equal level with others".[7] We would argue that a person might also only be "vulnerable" to the extent that their rights are not upheld or in so far as they are excluded from, or unable to gain access to, mainstream mechanisms for protection and redress. Hence there is strong resistance to the creation of "special" or segregated legislation as a tactic that runs counter to the engagement of mainstream agencies in combating vulnerability and empowering people through programs that appeal to social justice and principles of equality.

One important split emerges from these definitions and that concerns the context of abuse: domestic abuse tends to be treated as a private matter, whether that concerns corporal punishment of children,

7. UN World Programme of Action concerning Disabled Persons.

men beating their wives, or so-called "carers" harming older relatives in their care. Even to sexual abuse, public disapproval is much higher when crimes have been committed by strangers than when it is the same offenses perpetrated by family members. "Keeping safe" educational programs tend to focus more on abuse by strangers than on how to handle abuse at home at the hands of adults who know you and probably know or are part of your family. Evidence is emerging which challenges this neat divide. Elder abuse is shown to be much more a product of mental ill-health, alcohol, and debt than of "carer" stress, while some forms of sexual abuse have been shown to have similar patterns within, as outside, the family home.

3. UNDERSTANDING VIOLENCE AND REACHING FOR SOLUTIONS

Different levels of explanation

Explanations of violence come from many different disciplines and discourses. These should be seen as complementary rather than contradictory, ranging from explanations that focus on intra-personal or interpersonal dynamics to those which derive from what Sørensen (1999, p. 146) refers to as a "master narrative" – the sweeping tides of history and nations. Summing up the theoretical inputs to the Seminar on Men and Violence against Women, the rapporteur, Dr. Klein (1999), pointed to four levels of explanation:

– internal processes, such as gender identity, social learning, and development;

– external circumstances including rapid social change, instability, and war;

– analysis of risk factors for both victim and perpetrator;

– deliberate social enterprises such as militarisation and its fall-out on masculine identities.

Inequality is also rife within institutions and other service settings. Zijdel, in her contribution to a conference marking the 1999 European Day of Disabled People, identified factors at all levels including lack of education, isolation, deprivation of information, economic dependence, low self-esteem, and political and legislative unawareness.

In the Council's *Violence against elderly people*, several explanatory models were identified from the literature:

– family dynamics and situations where violence is learned as a response to stress;

– reaction to dependence and impairment of the victim;

– psychologically problematic personality traits of the perpetrator in the context of their dependence on the victim;

– prolonged and profound intimacy between adult offspring and elder parents, over-exposure;

– filial crisis category;

– internal and external stress;

– social isolation, and inadequate community services and resources;

– age discrimination and ageism;

– sociocultural changes, for example in mobility and family structure.

Biggs, Phillipson, and Kingston (1995, p. 44) synthesize risk factors into intraindividual dynamics (psychopathology of the abuser), dependency and exchange relationships, and social isolation. Older people are also at risk of ordinary crimes by those in their households and networks and may not be able to bring this into the open through "fear of reprisals, shame, and financial dependency" (ibid., p. 29). Since that date, a clearer focus has been placed on the abuser rather than the older person with growing evidence of problems in the mental health of the "carer", debt, alcohol, and marital problems put forward in a report by McCreadie (1996). According to a recent report produced by the WHO using epidemiological studies of violence, about 60% of all violent acts are associated with the consumption of alcohol (Guerrero, 2002, p. 767). Parallel sets of issues arise with other vulnerable and/or discriminated against groups.

Extremes of poverty

An initial reading of the issues tends to favor individualized explanations that focus on the impact of immaturity, old age, impairment, the behavior of individual offenders, or cruelty within particular families.

But social factors can be seen to exacerbate these tendencies.

Poverty and inequality contribute, as stressors, to acts of abuse and also at extremes can be considered as a kind of violence:

> There should be no doubt: ... the speedy reform of society in Russia has destroyed social guarantees which permitted those with the lowest incomes, the elderly and disabled, orphans, and women to survive. These guarantees have not been replaced by other effective means. (Gracheva, 1999, p. 80)

This contributor reported that this economic distress was translated into murders, which increased tenfold within three years, increased rates of domestic violence, suicide, children leaving, or being ejected from their family homes, and prostitution.

In Romania, it was noted that:

> Against the background of the growth in the poverty rate, children represent an extremely vulnerable social category. (Dumitrescu and Penteleiciuc, 1999, p. 73)

but that this has also given rise to violence against other vulnerable groups including "the increasing incidence of robbery and violent assaults on elderly people, especially single women in towns and villages".

The Committee of Ministers reported to the United Nations in 2001 its pledge to "promote the well-being of girls and boys and to address, both in Europe and elsewhere, the problems of distress deriving from poverty, discrimination and violence". In his review of the work of the Forum for Children and Families (CS-Forum (2002) 9), Professor Asquith highlights some structural issues which fall between committees and/or which merit further work. These are poverty, parenting, migration, war, the environment, and making children aware of their rights.

Discrimination and inequality

At these extremes, inequality can be seen not only as a form of violence in itself but also as an important backdrop to, and explanation of, other forms of violence. Inequality works to constrain some groups at the same time as it exonerates others. McWilliams (1998, p. 138), speaking from a Northern Ireland perspective, noted the effects of stressed societies on violence against women, attributing this to "fewer options for women and fewer controls on men".

In addressing specific issues of violence against vulnerable groups, for example, corporal punishment or sexual violence, it is impossible not to examine the backdrop of discrimination and limited options that face disempowered groups (P-RR-LADI, 2000). Yfantopoulous (2002), for example, recently spoke of the links between disability, social exclusion, and poverty. Nevertheless, violence usually has a more direct and personal face. We have seen how the vulnerability is compounded by additional risk, unwillingness to recognize and refusal to take action or provide support, but tendencies towards violence are also exacerbated by a poverty of opportunity, low pay, poor prospects, little knowledge of alternatives or help to question the ingrained values of one's upbringing. Studies of corporal punishment suggest that its use is linked to family poverty and that it is more common amongst communities whose religion provides a rationale for such behavior.

Gender and racial inequality

Unequal power is acknowledged to play a significant part in the etiology of domestic violence, which is thought to account for a quarter of all violent crime; in most cases, it is perpetrated by a man who is known to the woman, and half of all female murder victims are killed by their partner or ex-partner. The report goes on, "Such violence may be linked to unequal relationships between the sexes and the continuing patriarchal aspects of our societies" (ibid., p. 29)

Some forms of violence, especially those linked to gender inequality, are also sanctioned by powerful social and religious beliefs giving rise to

genuine tension about how far abuse can or should be judged from an "outside" perspective. What happens when the right to bodily integrity is violated as a result of religious teaching, as happens with circumcision and female genital mutilation? How far should member states intervene to outlaw these traditional practices – balancing such intervention with a need to demonstrate cultural plurality and both respect and tolerance of different belief systems?

Inequality in families and care settings

These patterns are deeply ingrained in the culture, and particularly in the gendered expectations which order family life and sexual relationships and determine who does the caring work in society and how social care agencies are organized with their largely male management and female workforce (see, for example, Hanmer and Hearn, 1999, pp. 32-40). Gendered inequality is played out in particular ways in homes, families, and care settings, which have at their core common entrenched inequalities leading to the comment that:

> What is common to these is a combination of gender and other power/authority relations, father/husband, professional, state functionary. (Group of Specialists for Combating Violence against Women, 1997, paragraph 2.17, p. 15)

Ironically, the movement to close institutions for children and adults with disabilities did so as an antidote to the violence endemic in large institutions without sufficiently taking into account the violence endemic in family homes.

Smaller group homes and nursing homes may look more homely and are sited more locally but they may still operate as closed systems with little contact from outside agencies and/or with inadequate accountability. Their hierarchies may reflect sexual or racial inequalities rather than knowledge or experience. Conditions of employment may be poor with staff working long hours without union representation, proper

contracts, benefits, or supervision. In some cases, de-professionalization has resulted in a casual and unregulated workforce. Care workers are often untrained and poorly paid, and they may be subject to sexual harassment or bullying themselves, recycling this onto their clients. If gender is missed out of the analyses of violence and abuse against vulnerable people these structural inequalities get overlooked leading to interpretations which do not pay attention to the division of emotional labor or the different kinds of caring tasks undertaken differentially by men and women, which in turn affect the stress of the role and the way individuals "perform" or are excused from caregiving.

The functions of violence

Men's violence against women may be construed as expressive or instrumental, that is it both reflects the relative powerlessness of women ("their lack of options", McWilliams, 1998) and creates or enforces it; women leaving violent relationships are much more at risk at the point where they decide to do something. The behavior of carers concerning older people or people with disabilities similarly reflects their lack of options within service settings but also enforces such passivity. Youth violence may also be expressive and contradictory, (Parliamentary Assembly Recommendation 1532 (2001), p. 3) and does not always aim at "misappropriation but most often as a means of protest and self-assertion. It takes different forms: against oneself (suicide, drug use), within groups (bullying at school, youth gangs in ghettos), or against society at large in the form of 'hate crime'". The Council's recent publication on urban crime prevention remarks:

> Particularly disturbing is the rise in crime linked to intolerance, whether this is linked to foreign cultures, other races, sexual preferences, or physical peculiarities. (*Urban crime prevention – A guide for local authorities*, p. 10)

Also, there is common ground between these arenas for violence between the unequal, as Penhale (1999, p. 103) points out:

> The growth of interest in elder abuse shares several common features with these other areas of violence [child protection and abuse of people with disabilities] – slow recognition and acceptance, difficulties with definitions and concepts, an emphasis perhaps on stress and pathology as opposed to gender/power and male violence.

But it also manifests itself with distinct forms of oppression and exclusion, for example, negative and stigmatizing attitudes to aging as a factor in elder abuse. The Council's *Violence against elderly people* (1992, p. 66) concluded that:

> Elderly people's lack of rights in society is highlighted in a special way when they are maltreated.... For true prevention, cultural values respecting the dignity of elderly people need to be well integrated with norms and social institutions.

What is known about the nature and extent of violence?

One large-scale Spanish investigation of parenting revealed that almost half of the parents acknowledged at least the occasional use of corporal punishment and that disabled children were not exempt. Some 6.7% of the children ill-treated by these parents had delayed development or intellectual disabilities and 5.4% behavioral problems (Ortega, González and Cabanillas, 1997). Children are also subject to bullying and harassment in their schools and neighborhoods.

Domestic violence accounts for one-quarter of all violent crime (British Crime Survey, 1998). In over half of reported domestic violence cases a child witnesses the assault, and one-third of children present to try

to intervene to protect their mother. Domestic violence is rarely a one-off event – 98% of victims are women and it is estimated that it takes a woman, on average, seven to ten years to leave a violent relationship. The psychological sequelae to domestic violence for survivors and children are significant (McGee, 2002).

It is estimated that every three days one woman dies as a result of domestic violence – the consequences for families, particularly children, are very serious in terms of social, financial, and psychological damage. Several sources suggest that deaf children and adults are particularly at risk and that deaf women are at greater risk of domestic violence than other women (Merkin and Smith, 1995). Domestic violence often continues into older age merging with elder abuse and abuse of other vulnerable adults, including women with learning disabilities.

Van Berlo's (1995) study in the Netherlands found that of a total population of approximately 100 000 people with intellectual disabilities, 1100 people had been victims of sexual abuse in the previous two years and a further 1200 of suspected sexual abuse. Of the victims, four-fifths were women while the perpetrators were predominantly men. As to the perpetrators, one-third in Van Berlo's study were other service users as were one-half of those in the UK study where they were seen to have offended against more male victims proportionately (see also Van den Bergh, Hoekman, and Van der Ploeg, 1997) than other sex offenders. Other offenders included parents, spouses, relatives, neighbors, service personnel, transport, and domestic workers, professionals, church workers, and educators (ibid.)

Similar patterns of abusing, often featuring active targeting and grooming of potential victims, were reported even where the offenders were learning disabled themselves (see Thompson and Brown, 1997) although there was evidence that learning disabled men were less sophisticated/successful and more likely to be witnessed in their offending behavior (Brown and Stein, 1997).

There is much which can be learned about methodology across these fields and lessons must be applied so that the violence which is perpetrated against vulnerable people is made visible in generic statistics and specific studies.

There are complex methodological difficulties in both quantitative and qualitative studies of abuse, abusing, violence, and poor care practice as in studies of any phenomenon which is covert and/or taboo in our communities. A great deal of evidence points to a hidden and submerged pool of incidents only some of which come to public attention or are noted in the public domain. In this respect research into child abuse, elder abuse and abuse of people with disabilities have much in common with research into domestic violence. A study of elder abuse carried out in Massachusetts (Pillimer and Finkelhor, 1988) suggested an incidence figure of 3% of the population aged 65 and over who had been a victim of abuse but that only one in fourteen cases were reported to statutory authorities, supporting this "tip of an iceberg" model.

The iceberg metaphor is not only apt in that there is a lot hidden from view but in that it presents a different face to those approaching from different directions – most data sets will illuminate only certain aspects of the problem under consideration. For example, contrasting UK studies of sexual abuse of adults with intellectual disabilities predominantly revealed abuse by other service users and staff when relying on information from service providers in contrast to another study which reported higher rates of abuse by family members when interviewing women with intellectual disabilities in community settings (Brown, Stein and Turk, 1995; McCarthy and Thompson, 1997).

Using this metaphor, the waterline rises or falls according to the thresholds adopted and studies of reported cases are best read as studies of reporting behavior rather than as incidence studies. Brown and Stein (1998) analyzed reports of abuse against vulnerable adults made to two large local authorities in south-east England, subsequently replicated in ten further authorities (Brown and Stein, 2000). They documented a reporting rate of 20-25 cases per 100 000 of the general population over

the age of 18, per annum, of which about one-third of referrals concerned people with intellectual disabilities, one-third were older people, and a further one-third of cases covered people with physical, sensory and mental health problems and people who were ill.

Increased risk does not always filter through as increased reporting. In a study by Kvam (2000), sexual abuse of children in Norway was monitored through the pediatric units to which they are referred for medical examination. Drawing on an American study by Crosse, Kaye, and Ratnofsky (1993), whose data demonstrated an increased risk of child abuse to disabled children (1.7 times the risk of all children), she had expected to see a higher rate of referrals for disabled children but found instead a much lower rate. Overall disabled children formed 11% of the relevant population and, if the increased risk were reflected, would have accounted for about a third of reports but only 6.4% of the total sample of reported cases concerned children with disabilities. The discrepancy was particularly evident for the 4% of the total population of children with severe disabilities who accounted for only 1.7% of referrals. The author suggests that as a group disabled children may be less likely to disclose or to have their disclosures listened to and also that abuse against them is minimized and not taken seriously.

Some factors are thought to influence whether a particular case is likely to come to the attention of service providers. Wolf and Donglin (1999) suggested that elders were more likely to feature in reports to statutory services if they were poor and already in contact with statutory service providers. These known welfare clients were already under scrutiny from people with a mandate to pass on concerns. Brown and Stein (1998) in their study of reports of all vulnerable adults also found that 80% of referrals concerned people who were already in touch with social services. Paradoxically, high rates of reporting within services or institutions may be a sign of good (namely, alert) services while abusive ones "see no evil" and certainly "report no evil".

These issues were addressed in detail at the Seminar on Men and Violence against Women organized by the Committee for Equality between Women and Men (CDEG) within the Directorate of Human Rights in 1999 (EG/SEM/VIO (99) 21). Sampling is a key issue as

important slices of the populations under consideration may be removed from the equation, leading to very significant under-reporting: Walby's contribution mentions the way an insistence on a fixed address in studies of domestic violence excludes women who live in refuges or temporary accommodation from surveys designed to ascertain the extent of domestic violence, but the same might also be said of studies which do not, or cannot, include people with severe intellectual disabilities, people who experience difficulties in communication or older people who have additional mental health problems when these might be the very people most at risk of the phenomena under examination.

Walby (1999) and the P-RR-VIA (2002) both point to difficulties in quantifying violence or abuse and the simplifications and distortions that take place as a result of recording single incidents rather than patterns over time:

> Most crime surveys are oriented to discrete events, but domestic violence and sexual violence ... is more frequently characterized by a series of events rather than a one-off event. (Walby, 1999, p. 17)

This obscures the long-term and often escalating, patterns of violence so that only static factors are brought to the surface, which in turn hinders the identification of factors that could lead to more accurate risk assessment.

Skilled interviewing

Walby (op. cit.) also noted the importance of carefully framing the problems of violence in conversations with those who are research subjects. The topic must be explored gradually rather than with one off-putting "gateway" question at the beginning of an interview or survey. She remarks that there is "no commonly available unstigmatized vocabulary" (ibid., p. 15).

Walby also notes the importance of women acting as interviewers and of interviewing women alone and not in the company of someone who might have abused them (a problem which also arises in the context of people with disabilities or older people if they are interviewed in the presence of relatives or paid carers, or who are being invited to complain about a service on which they depend).

Child and adult protection specialists have developed strategies for enabling children who use alternative forms of communication to make statements and testify against their abusers (Marchant and Page, 1992). Skilled interpreters in minority languages and sign language for deaf people should have awareness of the effects of abuse and the demands of the court system so that these groups are not disenfranchised.

Making vulnerable groups visible

For all these reasons, data about disadvantaged groups are often not identifiable in official statistics and returns, for example where figures are compiled about general populations, disabled children and adults may not be identified, or victims from minority ethnic or religious communities might not be visible. To facilitate research within countries it is recommended that generic data sets include markers of age, gender, and disability, so that vulnerable victims can be identified in these audits and where they are not being reported this should be tackled since it is far more likely to indicate that they are not being helped than that they are not being abused.

This request has been made across several of these fields. For example, routine data arising from child protection registers often do not identify children with disabilities or note the nature of their disability (Cooke, 1999). Yodanis and Godenzi (1999) call for this to violence against women; and this is also recommended within the field of disability with national crime surveys where a minimal adjustment to the routine data set would allow cases involving vulnerable victims to be tracked.

International conventions to aid collaborative research

Detailed research agendas have been attached to many of the Council's reports emphasizing the benefits of standardized definitions and data gathering conventions to make cross-national comparisons possible and also identifying areas of the work which would be best carried out at the European level. This includes, for example, work on disability-related to rare syndromes where new knowledge could facilitate alliances between disabled people themselves, families, and professionals and hence provide a stronger lobby (EDF, 2000).

To facilitate international collaboration and comparisons in research it is recommended that the Council of Europe produce a set of standard definitions and conventions to include:

– age-related boundaries, that is the age at which someone stops being a child and starts being an adult, and also the boundary between an ordinary and an "older" adult;

– agreements about which instruments to use as a reference point for defining types and levels of disability;

– definitions of categories and subsets of abuse;

– separation of children's and adults' issues so that disabled children's issues can be addressed about other children and disabled or older adults' issues looked at using ordinary reference points;

– details of the gender, age, ethnicity, and disability of both victim and perpetrator.

Funding should be earmarked for more longitudinal studies that focus on the impact of violence and which evaluate different responses and models of intervention. Research centers in this field need to be securely funded so that they can develop and sustain infrastructure, not only sponsor short-term projects, and thereby foster expertise and commitment to seeking solutions. Accurate and well-designed research serves to make violence against children and vulnerable adults visible. When all other factors conspire to keep it underground, research makes it less possible to ignore it.

Reaching for solutions

A range of strategies

Chapter II explored different forms and contexts of violence – including risks of personal and sexual violence which are unfortunately endemic in our communities as well as additional risks which are attendant on the person's particular situation or disadvantages, their dependence on service provision, or their exposure to hate crime. Each of these different constellations of violence will require the systematic engagement of different systems:

– ordinary crime requires action from ordinary criminal justice agencies acting with particular sensitivity and skill towards victims who happen to be vulnerable because they are young, old, or have a disability. Individual victims or witnesses may require help in facilitating access to the criminal justice system and appropriate courtroom procedures to enable them to participate flexibly without jeopardizing the defendant's right to a fair trial;

– discrimination needs to be tackled by proactive advocacy and campaigning;

– special needs and dilemmas must be adjudicated in proper, accountable, multidisciplinary forums with recourse to judicial review if the issues are sufficiently serious. These interventions are particularly likely in situations involving children or adults who are deemed to lack mental capacity (see below);

– service provision and particular practices and treatments (such as control and restraint or ECT, which should never be given in its unmodified form) need to be properly overseen and regulated by independent bodies;

– hate crime must be treated as a hate crime and not minimized or glossed over: it requires concerted and intelligent policing coupled with measures to ensure that unsuitable people are screened out of the workforce.

Nor is it sufficient to focus on victims when the key to preventing abuse and exploitation lies in understanding perpetrators: for example, the recent Parliamentary Assembly recommendation on trafficking in minors acknowledged the need to effect economic and structural change

(in this case in Moldova) and at the same time to conduct research into clients of the sex trade and explore options for reducing demand (Recommendation 1526 (2001)).

Different levels and stages

Multiple interventions are needed, each with a different focus and each addressing a different component of the prevention agenda. Dubet and Vettenburg (2000), in work for the Council on violence in schools, commented that:

Like "violence", "prevention" is a term which has many connotations and therefore needs to be described and defined clearly. (p. 43)

Many social theorists have looked to the model used in health programs which categorize interventions in terms of different stages:

– at the primary stage, which would prevent violence from happening at all;

– at a secondary stage to ensure that violence is promptly identified and referred to appropriate agencies who will intervene to stop it recurring;

– at the tertiary stage to treat individuals who have been harmed and help them to recover without sustaining long-term problems related to trauma and distress.

But the focus also needs to be at different levels, balancing programs that assist individuals with those addressing change in the wider community, in responsible agencies or in government departments aiming to create safer services and communities through structural change.

The Council's report on safeguarding disabled people combined these two dimensions into a matrix against which programs could be mapped. Examples of the kind of programs in each part of the grid are noted (adapted from P-RR-VIA, 2002).

Level of the initiative	Stage of intervention		
	Preventing abuse from occurring at all	Arrangements to ensure a prompt response	Treatment and support in the aftermath of abuse
Individual children and adults	Self-help and assertiveness training	Information about rights Accessible information on how to make a complaint	Individualized programs of treatment and support
Service providers (including mainstream agencies)	Workforce screening Proper regulation of service provision Staff training	Provision for refuge and investigation Clear routes for referral, investigation and formal decision-making Multi-agency committees and policies	Flexible courtroom procedures Inclusive "sector-specific" programs inclusive for children and adults with physical, mental or intellectual disabilities
Government and community	Positive campaigns about inclusiveness, anti-racism, and gender Publicised laws to educate and influence away from family violence Legislation to define mental incapacity and safe proxy decision-making Anti-discriminatory legislation	Public education campaigns such as zero-tolerance campaigns	Education and support for people who have been abused Commissioners for children, women or people with disabilities to "join-up" work across government departments Legislative programs and sentencing policies which underline the importance attached to violence against disadvantaged groups including children Ombudsmen schemes to uphold human rights

Countries should aim for a balance of programs relating to different groups and different contexts. Interventions which focus on helping individuals to report crime might not be perceived as helpful if the crime itself continues unabated or if once reported the process of an investigation or a court case is felt to be more abusive than the crime itself (as sometimes is the case for women who have reported sexual assaults). A program that only addresses the information needs of individuals without addressing how agencies should work together may leave individuals in the aftermath of hurt responsible for finding their way around a complicated and uncoordinated system.

Dubet and Vettenburg (2000) noted four distinct "prototypes" in the range of preventative strategies submitted:

– situational prevention, by creating environments in which violence is less likely through, for example, the design of establishments or staff supervision;

– punitive prevention, whereby attention to detection, prosecution, and appropriately serious punishment sets up a sufficient deterrent;

– treatment-based prevention which conceptualizes abuse as a consequence of individual or family dysfunction or prior victimization of the perpetrator;

– social prevention, which deals with the problem in the broader social context, for example by tackling discrimination, racism, and gender inequality.

These different approaches tend to become identified with the remit of specific agencies, which also accounts for tensions in multi-agency working in this context. In particular, sanctions-based approaches and therapeutic/support-based approaches often co-exist but are not synthesized in policy frameworks and public information. Tension can, however, be dynamic and give rise to new ways of working. Parliamentary Assembly Recommendation 1532 (2001) refers (sub-paragraph 16.ii.d) to:

> – ...alternative forms of dispute resolution: alternatives to judicial processes; alternatives to custody; and community-based measures in line with internationally recognized standards for children in the justice system;
> – harmonized standards and practices (for example, specialized courts for minors) in all the Council of Europe member states concerning children who commit, or who are victims of, offenses (for example, family violence, sexual abuse).

Dubet and Vettenburg (2000) also pick up on the orientation of the intervention. A defensive (reactive) strategy would be one that seeks to avert danger, for example by excluding pupils who are potentially violent or limiting the number of times children are unsupervised or installing CCTV. In contrast, an offensive (proactive) strategy would tackle risks

by promoting positives through, for example, enhancing participation in school councils, improving key areas of the curriculum, and implementing quality assurance programs. Dubet and Vettenburg argue that in their field, a set of preferred options have emerged which consist of primary prevention at a structural level with proactive orientation.

This multi-layered approach is also appropriate to protect children where it is recognized that:

> A dynamic social policy for children and adolescents should not only focus on children who offend, who have been abused, or who experience poverty but equally on preventive measures for all children at risk (targeting violent households, poor parental support, negative early life experiences, etc.). (Recommendation 1532 (2001), paragraph 11)

Co-ordinating support for individuals at the level of service provision

Co-ordination is key to both child and adult protection. Concerning elder abuse, the Steering Committee on Social Policy, in *Violence against elderly people*, has suggested policies in common with those for other victims of family violence designed to ensure:

– emergency help to meet immediate needs, including protection against retaliation by the offender;

– continuing medical, psychological, social and material help;

– advice to prevent further victimization;

– information on the victim's rights;

– assistance during the criminal process, with due respect to the defense;

– assistance in obtaining effective reparation of the damage from the offender, payments from insurance companies, or any other agency and when possible compensation by the state.

One critical issue addressed in these policies is to offer guidance about the circumstances within which individual practitioners should and/or must pass on concerns about abuse involving children or vulnerable adults. Mandatory reporting is an established principle with

child protection but there is less clarity when victims are adults, even if they are not able to act on their behalf to abuse. Confidentiality is an important principle enshrined in human rights law and professional codes of conduct so that if this is to be set aside in cases of abuse involving vulnerable children or adults it should be as the result of formal processes. There is compelling evidence that this should happen wherever abuse is likely to be serial and therefore to present a future risk as is the case of sexual abuse or financial scams.

There is also an important need to make services safer so that women, in particular, are not at risk once they have entered a refuge or psychiatric service as a result of indiscriminate groupings of patients or residents. Separate spaces for women or other vulnerable groups in asylums and day services are one safeguard against sexual harassment and violence by other service users.

There is much to be learned from child protection, domestic violence services, and services for vulnerable adults about the processes of protection and challenge to violent family members to ensure an effective but appropriate response. A feature of the response in many cases involving older people is that the person ends up in more restrictive housing and/or institutional placements: as an outcome, this would seem to punish the wrong person and may lead older people to decide against reporting incidents of abusive behavior towards them.

Co-ordinating support at a governmental level

At the national level, an important set of initiatives have emerged to champion the rights of children, people with disabilities, and older people across government departments through the setting up of ombudsman schemes and national commissions. These schemes have varying remits but most include a monitoring or reporting function on behalf of the whole group and some include a role with individuals who need assistance to take legal challenges to court and act on their behalf concerning official agencies.

Prominence has been given to recommendations urging national governments to institute:

– a national ombudsman for children to foster children's rights and supervise their application;

– a permanent inter-ministerial body at the national level with authority to deal with all matters relating to children's rights. Its remit would include coordinating a national policy and producing an annual report for discussion in parliament, including the production of "child impact evaluations" (Recommendation 1551 (2002)).

The idea of an ombudsman for citizens to voice their concerns to the government originated in Scandinavia in the nineteenth century. In contemporary terms, the role tends to refer to a trusted commissioner who represents and looks after the interests of a particular group. The Council's Forum for Children and Families serves as an informal "observatory" for children's rights and the European Union has set up a Network of Observatories for Child Policy. Commissioners or ombudsmen have had a significant impact on children's well-being in several European countries.

Similarly, the Office of the Commissioner for Human Rights (2001, p. 4) has welcomed the suggestion of a European observatory for older people to allow for the exchange of information and good practice including knowledge about the way inspections are undertaken in different countries. Other countries have equivalents to represent the interests of people with disabilities and which are concerned with enforcement, thus securing civil rights for disabled people. These powers might include the conducting of formal investigations, serving non-discriminatory notices, acting against persistent discrimination, providing assistance, issuing codes of practice, and conciliating disputes. However, the UK Disability Rights Commission (DRC) also works to promote good practice and educate public opinion.

These schemes operate differently in different countries and jurisdictions. The Children's Rights Alliance for England points to the fact that the establishment of the DRC (in April 2000) "set an important precedent for independent rights-based bodies campaigning for groups whose basic human rights are consistently and seriously ignored or violated". Campaigners in the UK note that whilst on the continent a growing number of countries have set up commissioners with wide-ranging powers to protect the young, developments in the UK are lagging.

Unicef highlighted the fact that, whilst Wales appointed its first children's commissioner in May 2000, and both the Scottish Parliament and the Northern Ireland Assembly has indicated that children's rights commissioners will be appointed by 2003, no debate or consultation has taken place with the 11.3 million children in England. They also point out that an independent commissioner would provide a link between government and children, and perform a similar function to that of the Commission for Racial Equality and the DRC.

The significance of the law

The law works at several different stages to define, resolve, educate, and influence, as well as to punish and recompense. The legal framework and enforcement process play an important part in the prevention of violence and abuse against all vulnerable people by enshrining rights and safeguards in legislation and by providing important avenues through which they seek redress. The European Convention on Human Rights sets out these principles:

– formal equality of disabled children and adults and entitlement to equivalent treatment in law and health care with whatever assistance they need to pursue and uphold this;

– proportionality and independent scrutiny of any controlling, protective, or limiting approach, for example where detention or restraint is thought to be in the best interests of a disabled person and/or necessary to secure their immediate safety or the protection of others, or where disabled people might be considered to be at risk of exploitation and unable to consent to certain transactions.

Weighing up principles

Recent judgments of the European Court of Human Rights make clear that when it comes to competing principles the rights of children to protection from corporal punishment outweigh, and are not incompatible with, rights to privacy or religious freedom: the UK

defense of "reasonable chastisement" has thereby been discredited. Save the Children (2001, p. 17) cites the United Nations Committee on the Rights of the Child:

> The committee has repeatedly made clear ... that the use of corporal punishment does not respect the inherent dignity of the child.

Its Committee on Economic, Social, and Cultural Rights confirms that:

> Corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the preamble to the Universal Declaration of Human Rights.

Guidance may be needed to spell out the fact that disabled children are included in these directives, to highlight potentially abusive practices, and to specify what methods of restraint (as opposed to punishment) are acceptable in different circumstances. This principle should also be extended to adults, especially people with disabilities, but also clearly to practices such as female genital mutilation and circumcision because a hierarchy of principles has been established which places bodily integrity above religious belief. Although case-law has not clarified the position to this extent concerning older people and people with intellectual disabilities, social work and legal professionals should refer to this as a precedent in prioritizing welfare and safety from abuse over other principles, particularly when it comes to intervening about violence where choice, consent, privacy or confidentiality are sometimes claimed as equal, not a subsidiary, principles.

Inclusion in generic legislation preferred

Although it is generally accepted that children should be treated differently at law, on the whole, there has been a movement (Steering

Committee on Social Policy, 1992, p. 40) away from segregated legislation. Where specific offenses are defined these may provide additional safeguards for children, for example in countries that have made corporal punishment illegal. Other vulnerable people may be specifically protected or settings and situations, such as those of detention or residential care, regulated. In some countries, women, and minority ethnic groups may be protected by additional specific legislation. Attitudes to domestic violence vary among member states (see the Swedish Social Services Act 1998, section 8a, which promises support to women who are victims of domestic violence).

Otherwise, it should be taken as read that older people and people with disabilities are included, alongside all citizens, in the general criminal code which outlaws personal and sexual violence, theft, and other threatening behavior. A Dutch association of elderly people cited in *Violence against elderly people* said that:

> Elderly people do not consider themselves to be a special category in society and so do not want a policy on the aged ... if a policy for a special group is indeed necessary and right, because of a situation of deprivation, this policy should be geared to eliminate this deprivation. Nothing less will suffice.

In some situations and countries, children and people with disabilities are "protected" through differential sentencing policies, or by having their impairment treated as an aggravating factor as it is defined concerning hate crime. But sometimes the boot is on the other foot and specific sexual offenses applying to people with intellectual disabilities carry lesser penalties than their generic equivalents (namely, rape). In other contexts, the legal code is underlined concerning children or vulnerable adults by stricter penalties especially for sexual offenses against children and those who have committed their offenses while in a position of trust or authority.

Mandatory reporting

Where violence against people with disabilities is specifically mentioned there may be a responsibility to report concerns to the relevant authorities (see the Swedish Social Services Act 1998, section 71a). Mandatory reporting has been a central plank of the American Vulnerable Adults' Statutes and child protection systems. What is at issue here is a balancing act between protection, on the one hand, and autonomy and freedom from intrusion, on the other. As stated by the Office of the Commissioner for Human Rights (2001, p. 2), "Growing old is not an illness, and people's age must not be used as justification for restricting their rights in any way". Hence, the Commissioner argues, any restrictions on the rights of older people must be prescribed by law and open to transparent judicial review.

There is undoubtedly a stronger societal mandate to act to protect children than there is for older people or people with disabilities. Consent and capacity legislation work from the position that although older children must be consulted in matters which concern them (European Convention on the Exercise of Children's Rights) the state has a legitimate role in initiating action on their behalf. But even when adults are formally assessed as lacking mental capacity this function may not be exercised on their behalf, except in exceptional circumstances. Most countries have guardianship arrangements to expedite or oversee the management of financial matters on behalf of those unable to act in their interests, but the role of these bodies is not as clearly defined when it comes to bringing complaints or seeking independent judicial review on their behalf.

But the Commissioner is also clear that provision must be made to report ill-treatment without fear of reprisals and argues that there should be a mandatory obligation for carers to report any abuses. The contingencies of complaining are complex, given the closed nature of many retirement homes or older people's institutions, and the vulnerability that comes from needing personal and intimate care, which can lead to dependence on relatives, paid carers, and the managers of homes. Figures vary as to how many older people live at home on their own, with families or in various forms of residential care: in the UK

about 40% of older people live in residential care for some time, in France almost half of older people with disabilities receive help only from their families. Although the situations vary, what they have in common is that they tend to be closed and that creates enormous difficulty if relationships become abusive. In situations of domestic violence, this "sealing off" is created and enforced by abusers as isolation exaggerates dependence and cuts off independent avenues for assistance or protection.

The actuality of reporting abuse is therefore very difficult for older people themselves and their carers who may not know of alternative placements and/or be afraid that singling out their relatives by making a complaint might lead them to have a lesser service or be subjected to humiliation or threat. Hence the Commissioner's stance that "Elderly people, for their part, must be free to decide whether or not they wish to report any ill-treatment they suffer" is problematic as this choice may well be made under duress contradicting the notion that they are indeed free to make a complaint without fear.

Whose role is it to bring a prosecution?

Countries vary as to whether it is the role of the victim to bring any prosecution or if the police or public prosecutor brings it on their behalf. Even where there is no question that a person who has been victimized lacks the mental capacity to make their own decisions there is contention about whether a prosecution should be state-led or victim-led. As Stanko (2000, p. 250) remarks:

> In many cases, the burden of responsibility to initiate intervention and then to be steadfastly committed to seeing this intervention through is displaced onto the individuals.

Article 8 of the European Convention on the Exercise of Children's Rights makes it clear that the judicial authority in each country has the power to act on its motion (that is, to take the initiative in pursuing a case) where the welfare of a child is in "danger" while noting that this risks interference in family life and should, therefore, be limited to the most serious cases.

This is an important principle that might be adapted to the needs of other vulnerable groups who may miss out on justice if they are unable to make a complaint, seek redress, or are too intimidated to do so. Police sometimes act as if they have to have the victim's agreement to initiate a prosecution and defer to a frightened person to not proceed against an aggressor, even if by doing so they leave the person in danger and convey the impression that it is safe to offend against vulnerable groups because their rights will not be independently upheld.

This is an area of work that the Council could look into further, including an assessment of the merits of mandatory reporting of abuse of older or vulnerable adults and a review of possible mechanisms for acting independently on behalf of individual older or disabled people with abuse if it crosses a certain threshold of seriousness. The question is whether older people would be better off if service providers and caregivers were clear that legal action could be brought irrespective of the vulnerable adult's wishes in cases of serious abuse or whether this would unacceptably infringe their rights.

If it were decided to allocate responsibility to a body or bodies to act in this context then a further consideration might be for them to pursue complaints, justice, and applications for compensation on behalf of older people who have died before their case could be concluded. At present nearness to death creates an additional layer of vulnerability in that wilful abusers know the person they are harming will probably die before they could be brought to account.

These dilemmas also arise with people with intellectual disabilities, some of whom will be able to make their own decisions even in the face of serious harm while others may be unable to make decisions and/or be easily pressurized or deceived by someone intent on harming them or someone they perceive to be in a position of authority. Independent advocacy is again of enormous assistance in these situations. People with physical disabilities are well able to make such decisions for themselves and them the issue is far more likely to be about overcoming prejudice in the court system, the tendency for their credibility to be impugned, the physical barriers to access and communication, and the lack of knowledge on the part of jurors.

The law must also provide safeguards for people who are vulnerable within the criminal justice system by attending to the situation of children and vulnerable adults who have or are alleged to have committed offenses. The right to a fair trial extends to "unpopular" defendants such as children tried as adults in adult courtrooms even when they are unable to comprehend the proceedings or their implications, and to people with serious mental health problems.

Incapacity legislation

Incapacity legislation has a particular role in vulnerable victims. The notion of valid and informed consent hinges on the capacity to:

– indicate consent in a given situation;

– to be adequately informed and understand enough about the consequences of the decision (for example, the CPT argues that it is not sufficient to tell a patient that they are to have a "sleeping treatment" to ascertain their valid consent to ECT);

– remain free from undue pressure or coercion from others when making the decision, especially when those urging compliance is also those who provide everyday care and/or control.

This area requires co-ordination of legislation on behalf of those who lack "capacity" to act on their behalf either in seeking provision or challenging decisions with the allocation of benefits, health care, or other services; or when complaining about active forms of abuse including physical or sexual violence, financial abuse or negligence. Often these decisions are taken informally and very close to the person by those who know them best and this model is usually, for most decisions, in their best interests but when faced with abuse or violence close to home it may exacerbate problems in intervention and protection.

Many countries are enacting or revising mental incapacity legislation to address these issues and the Council has set down formal principles to be adhered to in this legislation (Recommendation No. R (99) 4, Appendix 1). The key principle is that there should be flexibility to appoint a representative with very specific, time-limited powers to act on behalf of a vulnerable person based on a functional assessment of

their capacity to make specific decisions and act on their behalf, but that appointing someone to act on their behalf in one area of their life would not necessarily result in them losing the capacity to act to other decisions, which they remain able to manage.

4. CONCLUSION: SHARED AGENDAS FOR RESEARCH AND DEVELOPMENT

Research also acts as a lever for change because it makes visible the reality and the impact of violence in the lives of all citizens but particularly of vulnerable citizens. It highlights their differential exposure to risk, the failure of authorities to note and act on indicators of violence, and the discriminatory response that they meet in the criminal justice systems of our countries. Research puts the violence, including cozy "domestic" violence, onto a public agenda and makes it clear that it is not a private matter. It is a matter of enormous and shared public concern.

The Council is well aware of the interdependence of policies that are designed to bring about social cohesion and a reduction of violence. In its work on vulnerable people, the relevant working groups have addressed a wide range of issues that are concerned with improving the environment, service provision, equality of opportunity, and the economic position of groups and individuals. Specific attention to issues of protection from violence cannot be detached from these more proactive approaches to securing a good life for those concerned. With children and young people, for example alongside objectives around protection are others that aim to promote healthy lives, access to education, and measures to combat HIV/Aids. But authorities mustn't be allowed to hide behind such aspirations and in doing so to turn away from abuse and violence in the lives of children and vulnerable adults: this colludes with those who wish to see violence as an individual aberration rather than a shared failure to uphold human rights.

Working to promote positives and participation is a necessary but not sufficient condition for the reduction of violence against vulnerable groups. Empowerment and inclusion are both forms of protection but the presence of positives in a person's life does not cancel out the negatives; a woman beaten in a house with hot and cold running water is still a person whose fundamental rights have been abused, as is a person

with disabilities living in an ordinary apartment in their community but being sexually abused by a carer paid for with direct payments.

Moreover, although provision must support individuals, prevention must also address the structural inequalities that allow abuse to fester and violence to go unchallenged. This broader agenda requires collaboration within and between governments as well as across the many working groups and activities of the Council of Europe.

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SOCIAL EXCLUSION

Hilary Silver
Professor of Sociology, International Affairs, and Public Policy and Public Administration, Columbian College of Arts and Sciences.

Social exclusion is a rupturing of the social bond. It is a process of declining participation, access, and solidarity. At the societal level, it reflects inadequate social cohesion or integration. At the individual level, it refers to the incapacity to participate in normatively expected social activities and to build meaning full social relations.

The idea of social exclusion originated in France. It has many affinities with French Republican thought, especially the concepts of solidarity and the social bond. Its sociological pedigree is Durkheimian, as Levitas (2000) has noted. However, the concept is also adumbrated in Georg Simmel's The Stranger, Norbert Elias's The Established and the Outsiders, Stigma, and Howard Becker's Outsiders. Social exclusion may also be conceived in terms of Max Weber's concepts of status groups and social closure.

Despite the concept's novelty and ambiguity, definitions of social exclusion abound. They vary by national context and sociological paradigm. Some scholars refer to an inability to exercise the social rights of citizenship, including the right to a decent standard of living. These approaches see social exclusion as synonymous with poverty and deprivation, and thus as an aspect of social stratification. Other approaches, especially in Britain, emphasize the importance of individual choice, for a person cannot be excluded if inclusion is accessible but undesired. These perspectives emphasize exclusion from opportunities and thus conceive of the concept as one similar to discrimination. However, the original meaning of social exclusion stresses social distance, marginalization, and inadequate integration.

Social exclusion is most frequently defined in contrast to poverty. It is a relational rather than a redistributive idea. Although poverty can lead to social exclusion, as well as the reverse, one can easily imagine rich members of excluded groups. Thus, it is not strictly a question of insufficient material resources. As Touraine (1991) put it, the exclusion is

an issue of being in or out, rather than up or down. Because exclusion is about broken relationships, there are always two parties to consider: the excluders as well as the excluded.

Exclusion is also multi-dimensional, combining economic and social deprivation. However, analysts differ on whether exclusion is always a cumulative process of multiple, interrelated disadvantages. The UK's Social Exclusion Unit defines exclusion as "a shorthand label for what can happen when individuals or areas suffer from a combination of linked problems." Emphasizing joined-up social problems, especially when spatially concentrated, resonates with the idea of an "underclass." This is, even more, the case when, as Vleminckx and Berghman (2001) claim, exclusion implies entrapment or intergenerational transmission.

Certainly, research confirms that exclusion along one dimension may increase the risks of exclusion along other dimensions, but very few people are excluded from all social relations at once. There are many more people who are socially excluded in some respects than there are people excluded in all respects. Indeed, human beings can't exist totally outside societal influences.

Social exclusion may be considered as both a condition and a process, although it is most frequently treated in dynamic terms. Castel (1991), for example, eschews the term exclusion, preferring the notion of *disaffiliation*. Paugam (1991), another French sociologist, refers to a process of social disqualification. These authors consider exclusion along a continuum, with intermediate steps of vulnerability or precariousness.

There are many mechanisms of social exclusion: extermination, exile, abandonment, ostracism, shaming, marginalization, segregation, discrimination. Sometimes, even social assistance can produce exclusion. In general, groups deliberately use exclusion as a means of social control and boundary maintenance. It reinforces internal solidarity and may allow insiders to monopolize resources.

Although most scholars agree that social exclusion is multi-dimensional and has different forms in different social contexts, there is little consensus over what are the most important dimensions of social exclusion. Studies have so far examined the dimensions that are easiest to measure with available data. This has first and foremost meant extending

poverty and unemployment indicators to take account of time and place. A. B. Atkinson, a British economist, proposed the initial exclusion measures for the European Union, most of which consisted of income and joblessness indicators (Atkinson et al. 2002). In the second EU Joint Inclusion Report, these indicators were accompanied by education and health measures.

However, several sociological studies, especially in the UK, have tackled other social and political dimensions of exclusion. For example, Gordon et al. (2000) conducted a new Poverty and Social Exclusion in Britain survey for the Joseph Rowntree Foundation specifically for this purpose. In addition to income poverty and material deprivation, exclusion from the labor market, and public services, they examined four aspects of exclusion from social relations: socializing, social isolation, social support, and civic engagement. The researchers identified these aspects directly by asking Britons themselves what they considered "normal" social activities, whether they experienced constraints upon participating in them, and, if so, the nature of those obstacles. This and other studies (see Hills et al. 2002) reveal that income distribution and unemployment are weakly associated with sociability and community participation. Gallie and Paugam's (2000) research suggests material deprivation may even be positively related to social relations in Southern Europe.

The dimensions of social exclusion receiving the most recent attention concern the recognition and rights of racial and ethnic groups, especially immigrants. This emphasis is largely due to the adoption of the 2000 EU "Racial Directive" on equal treatment irrespective of racial and ethnic origin, and the EQUAL program to fight labor market discrimination. In 2005 the British Council of Brussels and other agencies released a European Civic Citizenship and Inclusion Index that uses uniform indicators to gauge the extent to which immigrants to a country have rights and obligations comparable to EU citizens. While these attempts to measure social dimensions of exclusion are important advances, many cultural, political, and social aspects of life lack good indicators. The Joint Report on Social Inclusion called for more attention to neglected types of disadvantage, such as access to the Internet, housing, transportation, continuing education, and language

acquisition. Further methodological advances are expected in the future.

Social exclusion has expanded its meaning over time to encompass more social problems and disadvantaged groups. In France, when the term originated in the 1960s, a group of "Social Catholics," especially the ATD Fourth World movement headed by Father Joseph Wresinski, used the term to refer to the extremely poor of affluent and less developed countries living in the slums. In the 1970s, when René Lenoir (1974) used the term, the socially excluded referred to the handicapped, substance abusers, juvenile delinquents, and deviant groups. In the 1980s, as unemployment rose after the Oil Shocks, the term applied to youth and older unskilled workers whom deindustrialization displaced. As long-term joblessness, homelessness, and racism all became issues in the next two decades, they added yet more complexity to the meaning of the social exclusion. A coalition of social movements concerned with these many issues demanded action, leading to France's anti exclusion laws enacted in 1988, 1998, and 2005.

In the 1990s the European Union adopted the term. Leaders passed resolutions to fight social exclusion as part of the European Social Model, one that weds economic growth with job creation and social cohesion. Since 2001, member states of the EU have produced National Action Plans for social inclusion submitted to Brussels for coordination in a Joint Inclusion Report. The European Union will shortly consider the fight for social inclusion in the larger context of social protection. Already in 2005, the Joint Report on Social Protection and Social Inclusion coupled national progress reports on inclusion with benchmarks on pensions. The next Joint Report will further streamline the monitoring process, adding medical and other dimensions. As the EU expands from 15 to 25 members, new issues of social exclusion are likely to arise, such as discrimination against the Roma (gypsies) in Central and Eastern Europe. In sum, Brussels will probably determine the direction of the study of social exclusion for the near future.

Interest in social exclusion has expanded beyond Europe, although so far, the concept has not caught on in the US. International agencies working in less developed countries have found the concept useful for studying the challenges of integration in plural ethnic societies, caste

structures, religious cleavages, and indigenous peoples' rights. UN agencies and international development banks have funded programs to promote social inclusion in the global South.

Thus, political and policy considerations have been as important as sociological interests to the development of social exclusion as a subject of study. For example, Giddens (2000) discussed "social exclusion" in his book on The Third Way just as Tony Blair was adopting the idea. Esping Andersen referred to the challenges of social exclusion in his 2002 book, Why We Need a New Welfare State. And France's full-fledged National Observatory for the Study of Social Exclusion produces annual research reports for the government.

Programs to fight social exclusion ideally take a comprehensive approach, progressively tackling multiple problems and tailoring solutions to a person's particular combination of needs. Solutions usually entail the participation of the excluded in their inclusion. The European Social Funds have co-funded local projects that help rebuild social relations and "reinsert" excluded people in socially useful activities. These projects might include working in a subsidized job, taking a training course, or renovating housing for the homeless. They may not lift someone out of poverty, but they do reknit the social bond. Inclusion does not rely only on having a paid job in a for-profit business.

Finally, there are many critiques of the idea of social exclusion. Central among them is the argument that it distracts attention from social inequality and class conflict. The excluded have a wide range of problems and do not share interests that might cement them into a political force. Besides, inclusion is usually a euphemism for rejoining the labor force. Other critics point out the lack of a theory that identifies the causes and consequences of exclusion. There is not a zero-sum relationship in which greater exclusion means less inclusion. Rather, both processes are interrelated and can occur simultaneously. These and many other controversies will ensure the further development of the concept of social exclusion in the years to come.

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CATEGORICAL RIGHTS AND VULNERABLE GROUPS: MOVING AWAY FROM THE UNIVERSAL HUMAN BEING

Marc Bossuyt
Fellow of the Stellenbosch Institute for Advanced Study (STIAS); Member of the U.N. Committee on the Elimination of Racial Discrimination; Emeritus Professor of International Law of the University of Antwerp; Honorary Commissioner General for Refugees and Stateless Persons; Emeritus President of the Constitutional Court of Belgium.

I. INTRODUCTION

The traditional concept of human rights, as conceived in the French Declaration of the Rights of Man and the Citizen in 1789, and the American Bill of Rights in 1791, refers to rights that every individual is entitled to as a human being. These are rights that everyone — whoever, wherever, and whenever — is entitled to. These rights concern important and legitimate aspirations, legally protected by international conventions and national constitutions, which can be legally enforced by a judge and that every State, regardless of the available resources, is capable of respecting.[1]

To some extent, the traditional concept of human rights has been abandoned at the universal and regional levels. Starting with the Universal Declaration (1948), social rights also are included in the same or different human rights instruments adopted since on both levels. Moreover, in the last thirty-five years, some international human rights treaties dealing with categorical rights have been adopted, such as the specific rights of women, children, migrant workers, and persons with disabilities. In Europe, the European Court of Human Rights (the Court) identified in 2010 and 2011 particularly vulnerable groups: the Roma population, mentally disabled persons, asylum seekers, and people living with HIV. The question may be raised whether those new developments are strengthening or weakening the universality of human rights.

2. DIFFERENT CATEGORIES OF RIGHTS

The Universal Declaration of Human Rights of 1948 contains not only civil rights and fundamental freedoms, which correspond to

1. *See* MARC BOSSUYT, *INTERNATIONAL HUMAN RIGHTS PROTECTION: BALANCED, CRITICAL, REALISTIC*: 7–8 (2016).

the traditional concept of human rights but also social rights, which do not have the same legal characteristics.[2] For that reason, States are not burdened with the same obligations concerning social rights as for civil and political rights.[3] As clarified in Article 2.1 of the International Covenant on Economic, Social, and Cultural Rights, the States Parties to the Covenant have not undertaken "to respect and to ensure"[4] those rights, but instead to take steps*, to the maximum of their available resources*, to achieve *progressively* the full realization of those rights.[5] The distinct characteristics of the two categories of rights explain why two different covenants were adopted in 1966.

Indeed, not only the obligations of the States Parties but also the supervisory mechanisms in the International Covenant on Civil and Political Rights, differ considerably from those in the International Covenant on Economic, Social and Cultural Rights.[6] During the drafting process of the Covenants by the Commission on Human Rights, opinions on these issues were summarized, stating that "[a]lthough it was generally agreed that economic, social and cultural rights on the one hand, and civil and political rights on the other, were equally important, the opinion was expressed that the former were not justiciable rights and the method of their implementation was therefore different."[7] Similarly, the Annotations on the text of the draft International Covenants on Human Rights, prepared by the Secretary-General, stated, as follows:

> 9. Those in favor of drafting two separate covenants argued that civil and political rights were enforceable, or justiciable, or of an 'absolute' character, while economic, social, and cultural rights were not or might not be; that the former

2. *See* Marc Bossuyt, *La distinction juridique entre les droits civils et politiques et les droits ´economiques, sociaux et culturels*, 8 HUM. RTS. J. 783, 789–95 (1975).

3. *Id*. at 788.

4. International Covenant on Economic, Social and Cultural Rights art. 2, § 1, Dec. 16, 1966, 993 U.N.T.S. 3.

5. *Id*.

6. The supervision of the International Covenant on Civil and Political Rights is entrusted to a Human Rights Committee, composed of eighteen independent experts, competent to adopt general comments based on reports submitted by the States Parties, which may also recognize the competence of the Committee to receive inter-state and individual communications. Originally, the supervision of the International Covenant on Economic, Social and Cultural Rights was entrusted to a political body, the Economic and Social Council. See generally International Covenant on Civil and Political Rights, art. 2, §1, Dec. 16, 1966, 999 U.N.T.S. 171.

7. U.N. Secretary-General, *Annotations on the Text of the Draft International Covenants on Human Rights*, ch. 1, § 9, U.N. Doc. A/2929 (July 1, 1955) ; *see also* Marc Bossuyt, *Les Travaux Préparatoires*, *in* LE PACTE INTERNATIONAL RELATIF AUX DROITS CIVILS ET POLITIQUES. COMMENTAIRE ARTICLE PAR ARTICLE 7 (Emmanuel Decaux ed., 2011).

> was immediately applicable, while the latter were to be progressively implemented; and that, generally speaking, the former were rights of the individual 'against' the State, that is, against unlawful and unjust action of the State, while the latter were rights which the State would have to take positive action to promote. Since the nature of civil and political rights and that of economic, social, and cultural rights, and the obligations of the State in respect thereof, were different, two separate instruments should be prepared.
>
> 10. The question of drafting one or two covenants was intimately related to the question of implementation. If no measures of implementation were to be formulated, it would make little difference whether one or two covenants were to be drafted. Generally speaking, civil and political rights were thought to be 'legal' rights and could best be implemented by the creation of a good offices committee, while economic, social, and cultural rights were thought to be 'program' rights and could best be implemented by the establishment of a system of periodic reports. Since the rights could be divided into two broad categories, which should be subject to different procedures of implementation, it would be both logical and convenient to formulate two separate covenants.[8]

Debate on the decision of whether to draft a single or instead two separate conventions continued; in 1951, the Economic and Social Council invited the General Assembly to reconsider its decision, asking it "to include in one covenant articles on economic, social and cultural rights, together with articles on civil and political rights."[9] Finally, after a long debate lasting from November 1951 to February 1952, the General Assembly requested that the Economic and Social Council ask the Commission on Human Rights, as follows:

> To draft two covenants on human rights..., one to contain civil and political rights and the other to contain economic,

8. U.N. Secretary-General, *supra* note 7, ch. 2, §§ 9–10.
9. *Id*. ch. 2, § 6.

> social and cultural rights, so that the General Assembly may approve the two covenants simultaneously and open them at the same time for signature, the two covenants to contain, to emphasize the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible.[10]

The preparatory work of the International Covenants does not confirm that the Cold War is the reason why the two categories of rights are contained in two different treaties.[11] Instead, they show that the differences like the rights and in the obligations of the States led the drafters to opt for two covenants. The Council of Europe, whose Member States were exclusively Western and did not wage a cold war among each other, also opted for two separate treaties—one for civil rights and fundamental freedoms (the European Convention on Human Rights), and one for social rights (the European Social Charter).[12] The existence of different conventions for civil and social rights is not the result of old-fashioned liberalism blind to social needs.[13] It does not result from regretful negligence or ignorance of the real world.[14] It is also not as much the result of a pre-determined choice of lawyers, politicians, and diplomats, but instead due to the intrinsic differences between the two categories of rights.[15]

Contrary to social rights (which, in the absence of sufficient resources, all States are not capable of realizing all at once for all persons), civil rights and fundamental freedoms must be respected immediately and for everybody.[16] The human person envisaged by those civil rights and fundamental freedoms is the universal human being. That somewhat abstract conception of a universal human being is defined by what he or

10. *Id*. ch. 1, §§ 31–32.

11. It has often been asserted that the differences between civil and social rights date back to the Cold War when each side claimed a set of rights built on their political ideology. See, e.g., Sofia Guerrero & Lucy Coronel, Civil and Political Rights vs. Economic-Social-Cultural Rights, (Oct. 10, 2012) humanrightsfight.blogpost.be; see also Marc Bossuyt, Social Rights: A Specific Category of Human Rights?, in MEXICAN SUPREME COURT OF JUSTICE, A DIALOGUE BETWEEN JUDGES: WRITINGS OF THE SUMMIT OF PRESIDENTS OF CONSTITUTIONAL, REGIONAL AND SUPREME COURTS 359, 364 (2014).

12. *Id*.

13. MARC BOSSUYT, L'INTERDICTION DE LA DISCRIMINATION DANS LE DROIT INTERNATIONAL DES DROITS DE L'HOMME 184 (1976) [hereinafter BOSSUYT, EQUALITY & DISCRIMINATION].

14. *Id*.

15. *Id*.

16. *Id*. at 187–88.

she has in common with all human beings, in opposition to the more concrete notion of human beings having characteristics that distinguish each of them from other people.[17] While human beings, taken *in concreto*, are all different, they are—abstraction made of those differences—all equal, as far as their (human) rights are concerned.

In a 1971 Report of the Parliamentary Conference on Human Rights of the Council of Europe, the question was raised: "[w]hich human being should be taken into consideration in protecting his rights?"[18] The Rapporteur, Pierre Mertens, wondered whether, beyond the "abstract human being" protected by the European Convention on Human Rights, particular categories of human beings should be protected, taking into account the particular situations that qualify and characterize them.[19] The Rapporteur envisaged the following categories: women, children, aliens, vagrants, nomads, detainees, mentally handicapped persons, men in uniform, and foreign press correspondents.[20] More recently, a 2006 book on human rights by Elisabeth Reichert denoted vulnerable groups as including the following: women, children, victims of racism, persons with disabilities, persons with HIV-AIDS, older persons, and gays and lesbians.[21] In 2013, Alexandra Timmer identified through the case-law of the European Court of Human Rights the following categories of vulnerable persons: children and persons with mental disabilities, persons in detention, women in domestic violence or precarious reproductive health situations, persons who are accused, and persons who lack legal capacity, demonstrators and journalists, detention and expulsion of asylum seekers, Roma, people with impaired health, and (to some extent) asylum seekers.[22] Beyond women and children, these newer categories correspond to modern trends in present-day society.

17. *Id*. at 211–12.

18. Pierre Mertens, *Quel homme doit être pris en considération quant `a la protection de ses droits, in* CONSEIL DE L'EUROPE, ASSEMBL´ EE CONSULTATIVE, CONF´ERENCE PARLEMENTAIRE SUR LES DROITS DE L'HOMME, VIENNA, 18-20 OCTOBER 1971, 36 (1972).

19. *Id*. ("Au-delà de 'l'homme abstrait' que protègent déjà une série de textes, telle la Convention européenne des Droits de l'Homme, la réalité sociale nous met en présence de catégories particulières d''hommes situés, datés, spécifiés, fongibles' que qualifie et caractérise une situation particulière et qu'il convient précisément de protéger à travers cette situation.") [Beyond the abstract human being already protected by a number of texts, such as the European Convention on Human Rights, social reality confronts us with particular categories of human beings "situated, marked, specified, fungible" qualifying and characterizing a particular situation that precisely should be protected through that situation (author's translation)].

20. *Id*. at 36–58.

21. ELIZABETH REICHERT, UNDERSTANDING HUMAN RIGHTS: AN EXERCISE BOOK 78–89 (2006).

22. Alexandra Timmer, *A Quiet Revolution: Vulnerability in the European Court of Human Rights, in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 152–61 (Martha Fineman & Anna Grear eds., 2013).

3. UNITED NATIONS TREATIES PROTECTING CATEGORICAL RIGHTS

The more categorical approach to human rights led to the United Nation's adoption of conventions specifically protecting particular categories of persons. The first of such treaties (among the core international human rights treaties)[23] was the Convention on the Elimination of All Forms of Discrimination against Women,[24] adopted on 18 December 1979, and the Convention on the Rights of the Child,[25] adopted on 20 November 1989. These treaties were followed by the International Convention on the Protection of the Rights of All Migrant Workers,[26] adopted on 18 December 1990, and the Convention on the Rights of Persons with Disabilities,[27] adopted on 13 December 2006. It is interesting to give some attention to the position these conventions take for economic and social rights.

A. Discrimination Against Women

In the Convention on the Elimination of All Forms of Discrimination against Women, economic and social rights are not specifically mentioned. The Convention defines "discrimination against women" as follows:

> [A]ny distinction, exclusion or restriction made based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[28]

23. *See* United Nations Human Rights Office of the High Commissioner, The Core International Human Rights Treaties, 93, 119, U.N. Doc. ST/HR/3/Rev.1 (2014).
24. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.
25. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.
26. *See* International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter Convention on the Protection of the Rights of All Migrant Workers].
27. *See* Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.
28. Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 24, art. 1.

The last words of that definition are deliberately confusing by enumerating the different categories of rights in random order: "political, economic, social, cultural, civil or any other field." The clear intention[29] is to reject any idea of possible differences between economic, social, and cultural rights, on the one hand, and civil and political rights, on the other hand. This sharply contrasts with the International Covenants on Human Rights. It may be explained, to some extent, by the method used in the Convention on discrimination against women: protecting a category of persons through the spectrum of the prohibition of discrimination, a principle that applies as well to economic, social, and cultural rights, as to civil and political rights.

B. Rights of the Child

Regarding economic, social, and cultural rights, Article 4 of the Convention on the Rights of the Child states that "States Parties shall undertake such measures *to the maximum extent of their available resources* and, when needed, within the framework of international cooperation."[30] The phrase "to the maximum extent of their available resources," is inspired by Article 2.1 of the International Covenant on Economic, Social and Cultural Rights, which states, as follows:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, *to the maximum of its available resources*, to achieve progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[31]

29. As aimed at by the Court in its Chamber judgment of 9 October 1979 in the case Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) 1, 12 § 26 (1979), "[T]here is no water-tight division separating that sphere [of social and economic rights] from the field covered by the Convention" and by the Vienna World Conference on Human Rights in point 5 of its Declaration and Programme of Action, adopted on 25 June 1993: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." World Conference on Human Rights, *Vienna Declaration and Programme of Action* 3, § 5 (1993).

30. Convention of the Rights of the Child, *supra note* 25, at art. 4 (emphasis added).

31. See International Covenant on Economic, Social and Cultural Rights, *supra note* 4, art. 2.1 (emphasis added).

C. Rights of Migrant Workers

The International Convention on the Protection of the Rights of All Migrant Workers enumerates a long list of civil rights but does not specifically mention socio-economic rights. Among the rights it enumerates is the freedom "to leave any State,"[32] "the right to life,"[33] the prohibition "to be subjected to torture or cruel, inhuman or degrading treatment or punishment"[34] or "to be held in slavery or servitude,"[35] "the right to freedom of thought, conscience and religion,"[36] "the right to hold opinions without interference" and "the right to freedom of expression,"[37] the right to "privacy, family, home, correspondence or other communications,"[38] the right to "property,"[39] "the right to liberty and security of person,"[40] the right of persons "deprived of their liberty [to] be treated with humanity,"[41] the right to a fair trial,[42] and the non-retroactivity of criminal law.[43] All those rights and freedoms belong to the category of civil rights.

D. Rights of Persons with Disabilities

Article 4.2 of the Convention on the Rights of Persons with Disabilities shares many similarities with the wording of Article 2.1 of the International Covenant on Economic, Social and Cultural Rights. Article 4.2 states, as follows:

> Concerning economic, social, and cultural rights, each State Party undertakes to take measures *to the maximum of its available resources* and, where needed, within the framework of international cooperation, *to achieve progressively the*

32. International Convention on the Protection of the Rights of All Migrant Workers, *supra note* 26, art. 8.
33. *Id*. art. 9.
34. *Id*. art. 10.
35. *Id*. art. 11.
36. *Id*. art. 12.
37. *Id*. art. 13.
38. *Id*. art. 14.
39. *Id*. art. 15.
40. *Id*. art. 16.
41. *Id*. art. 17.
42. *See id*. art. 18.
43. *See id*. art. 19.

> *full realization of these rights*, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.[44]

The Convention on the Rights of Persons with Disabilities contains several provisions dealing with civil and political rights, such as the "right to life,"[45] "equal recognition before the law,"[46] "access to justice,"[47] "freedom from torture or cruel, inhuman or degrading treatment or punishment,"[48] "freedom from exploitation, violence, and abuse,"[49] "protecting the integrity of the person,"[50] "liberty of movement and nationality,"[51] "freedom of expression and opinion, and access to information,"[52] "respect for privacy,"[53] "respect for home and the family,"[54] and "participation in political and public life."[55] The Convention also mentions economic, social, and cultural rights such as "education,"[56] "health,"[57] "habilitation and rehabilitation,"[58] "work and employment,"[59] "adequate living and social protection, [including adequate food, clothing, and housing],"[60] and "participation in cultural life, recreation, leisure, and sport."[61]

The Conventions on discrimination against women and on migrant workers are silent on the issue of social rights. Two other conventions, one on the rights of children and one on the rights of persons with disabilities, state explicitly that, about economic, social, and cultural rights, the States Parties undertake measures *to the maximum of their available resources.*[62] By adding that such measures are taken "to achieve *progressively* the full

44. Convention on the Rights of Persons with Disabilities, *supra note* 27, art. 4.2 (emphasis added).
45. *Id*. art. 10.
46. *Id*. art. 12.
47. *Id*. art. 13.
48. *Id*. art. 15.
49. *Id*. art. 16.
50. *Id*. art. 17.
51. *Id*. art. 18.
52. *Id*. art. 21.
53. *Id*. art. 22.
54. *Id*. art. 23.
55. *Id*. art. 29.
56. *Id*. art. 24.
57. *Id*. art. 25.
58. *Id*. art. 26.
59. *Id*. art. 27.
60. *Id*. art. 28.
61. *Id*. art. 30.
62. Convention of the Rights of the Child, supra note 25, art. 4; Convention on the Rights of Persons with Disabilities, supra note 27, art. 4.2.

realization of these rights," the most recent convention (on persons with disabilities) is closest to that of the International Covenant on Economic, Social, and Cultural Rights.[63] This demonstrates that States are still aware, as they were when drafting the two International Covenants on Human Rights, that the obligations they have undertaken concerning the implementation of social rights are different from those undertaken about civil rights (comparatively, in the International Covenant on Civil and Political Rights, the States Parties do not undertake "to take steps"; instead, they undertake the more stringent obligation "*to respect and to ensure*" the rights recognized in the Covenant).[64]

4. VULNERABLE GROUPS IN THE CASE LAW OF THE STRASBOURG COURT

In contrast with the European Convention on Human Rights, the European Court of Human Rights (the Court) in Strasbourg is moving away from protecting the universal human being and towards the protection of some specific categories of, particularly vulnerable persons.

1. The Roma Population

In a 2001 Grand Chamber[65] judgment, *Chapman v. the United Kingdom*, the applicant urged the Court to take into account recent international developments in reducing the margin of appreciation accorded to the States Parties, in light of the recognition of the problems of vulnerable groups, such as Gypsies.[66] The Court responded, as follows:

> [T]here may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity, and lifestyle...,

63. Convention on the Rights of Persons with Disabilities, *supra note* 27, art. 4.2 (emphasis added).

64. *Compare* International Covenant on Economic, Social and Cultural Rights *supra note* 4, art. 2.1 (*adopted* Dec. 19, 1966) (emphasis added) *with* International Covenant on Civil and Political Rights, *supra note* 6, art. 2.1 (*adopted* Dec. 19, 1966) (emphasis added).

65. *See generally* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, arts. 26, 30 [hereinafter European Convention on Human Rights] (establishing that a Chamber of the Court, composed of seven judges, may relinquish jurisdiction in favor of the Grand Chamber of seventeen judges when a case pending before that Chamber raises a serious question or when the resolution of a question might have a result inconsistent with a judgment previously delivered by the Court).

66. *See* Chapman v. United Kingdom, 2001-I Eur. Ct. H.R. 41, § 93.

> not only to safeguard the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.[67]

However, the Court was not yet persuaded that there was a "sufficiently concrete" consensus "for it to derive any guidance as to the conduct or standards which the Contracting States consider desirable in any particular situation."[68] Nevertheless, in a 2010 Grand Chamber case, *Oršuš and Others v. Croatia*, the Court, noting that the applicants were members of the Roma minority, did take into account the "specific position" of the Roma population.[69] The Court observed that, "as a result of their history, the Roma [had] become a specific type of disadvantaged and vulnerable minority" and that they, therefore, required "special protection."[70]

2. Mentally Disabled Persons

In a 2010 Chamber judgment, *Alajos Kiss v. Hungary*, the Court did not accept that "an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation."[71] The Court stated, as follows:

> [I]f a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. [. . .] The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such

67. *Id.*
68. *Id.* § 94.
69. *See* Oršuš & Others v. Croatia, 2010-II Eur. Ct. H.R. 247 § 147.
70. *Id.; see also* Horvath & Kiss v. Hungary, App. No. 11146/11, Eur. Ct. H.R. §§ 102, 110 (2013), http://hudoc.echr.coe.int/eng?i=001-116124.
71. Alajos Kiss v. Hungary, App. No. 38832/06, Eur. Ct. H.R. § 42 (2010), http://hudoc.echr.coe.int/eng?i=001-98800.

prejudice may entail legislative stereotyping which prohibits the individualized evaluation of their capacities and needs.[72]

3. Asylum Seekers

In a 2011 Grand Chamber judgment, M.S.S. v. *Belgium and Greece*, the Court identified a new category of vulnerable persons: "asylum seekers."[73] Regarding his detention, the Court took into account that "the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously."[74] Also, concerning the lack of accommodation of the applicant, the Court attached considerable importance to the applicant's "status as an asylum-seeker and, as such, as a member of a particularly underprivileged and vulnerable population group in need of special protection."[75] Referring to the European Union Council Directive 2003/9/EC (the Reception Conditions Directive) of January 27, 2003[76] "laying down minimum standards for the reception of asylum-seekers," the Court stated that "the obligation to provide accommodation and decent material conditions to impoverished asylum-seekers has now entered into positive law."[77]

In his dissent, Judge András Sajó of Hungary argued that asylum seekers cannot "be unconditionally considered as a particularly vulnerable group," because they do not constitute a group that has been "historically subjected to prejudice with lasting consequences,

72. *Id.; see also* Mifobova v. Russia, App. No. 5525/11, Eur. Ct. H.R. § 54 (2015), http://hudoc.echr.coe.int/eng?i=001-150792; Zagidulina v. Russia, App. No. 11737/06, Eur. Ct. H.R. § 52 (2013), http://hudoc.echr.coe.int/eng?i=001-119043 (asserting that "individuals suffering from a mental illness constitute a particularly vulnerable group"). Cf. Mircea Dumitrescu v. Romania, App. No. 14609/10, Eur. Ct. H.R. §§ 6, 59 (2013), http://hudoc.echr.coe.int/eng?i=001-122975 (observing that the applicant, who suffered from flaccid paralysis of both of his lower limbs since he was a child, "undoubtedly belongs to a particularly vulnerable group given his severe disability"); Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, App. No. 47848/08, Eur. Ct. H.R. § 135 (2014), http://hudoc.echr.coe.int/eng?i=001-145577 (featuring an NGO acting on behalf of a "vulnerable patient" who had been left without any legal assistance or protection when admitted to a psychiatric institution).

73. *See* M.S.S. v. Belgium & Greece, 2011–I Eur. Ct. H.R. 255 § 251; Marc Bossuyt, Belgium Condemned for Inhuman or Degrading Treatment Due to Violations by Greece of EU Asylum Law: M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, January 21, 2011, 5 EUR. HUM. RTS. L. REV. 582, 583 (2011) [hereinafter Bossuyt, M.S.S.].

74. M.S.S., 2011-I Eur. Ct. H.R. § 232.

75. *Id*. § 251.

76. 2003 OJ (L 31) 18–25. From July 21, 2015 on, that Directive has been replaced by Directive 2013/33/EU of the European Parliament and Council of June 26, 2013, "laying down standards for the reception of applicants for international protection." 2013 OJ (L 180) 96–116.

77. M.S.S., 2011-1 Eur. Ct. H.R. § 250.

resulting in their social exclusion."[78] He states that the position of the Court on an applicant's living conditions are "perfectly compatible with the concept of the Social Welfare State and social rights, at least for a constitutional court adjudicating based on a national constitution that has [constitutionalized] the Social Welfare State."[79] In Judge Sajó's opinion, "[t]here seems to be only a small step between the Court's present position and that of a general and unconditional positive obligation of the State to provide shelter and other material services to satisfy the basic needs of the 'vulnerable.'"[80]

4. PEOPLE LIVING WITH HIV

In its 2011 Chamber judgment, *Kiyutin v. Russia*, referring to its above-mentioned statement in *Alajos Kiss*, the Court stated that "people living with HIV are a vulnerable group with a history of prejudice and [stigmatization] and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment based on their HIV status."[81] The Court took "into account that the applicant belonged to a particularly vulnerable group, that his exclusion has not been shown to have reasonable and objective justification, and that the contested legislative provisions did not make room for an [individualized] evaluation." Based on its findings, the Court found that "the Government overstepped the narrow margin of appreciation afforded to them in the instant case" and that the applicant had been "a victim of discrimination on account of his health status, in violation of Article 14 of the Convention taken in conjunction with Article 8."[82]

78. *Id*. at 101–02 (Sajó, J., dissenting). In his opinion, M.S.S. was not particularly vulnerable, *id*., "the applicant was in possession of considerable means," *id*. at 106 (he had paid his smuggler $12,000, id. § 15), and "as a former interpreter he was capable of communicating in a foreign environment," id. at 106. The applicant himself alleged that he "spent months living in a state of the most extreme poverty . . . and the ever-present fear of being attacked and robbed." *Id*. § 254. The contradiction between those two elements apparently escaped the attention of the Court.

79. *Id*. at 103.

80. *Id*.

81. Kiyutin v. Russia, 439 Eur. Ct. H.R. §§ 63–64 (2011).

82. *Id*. § 74; *see also* I.B. v. Greece, App. No. 552/10 Eur. Ct. H.R §§ 79–81 (2013) (summarizing outcome of Kiyutin decision).

B. Evaluation

From March 2010 to March 2011, the Court identified four categories of persons constituting "particularly vulnerable groups," but the approach adopted in doing so was not always the same.

1. The Approach in the Chamber Judgments

In *Kiyutin*, the last of those four judgments, the Court noted that it had previously identified some vulnerable groups that suffered different treatment on account of their sex,[83] sexual orientation,[84] race or ethnicity,[85] mental faculties,[86] or disability.[87] By referring to "different treatment," the Court put the concept of vulnerability in a context of discrimination.[88] These cases concern persons who were the subjects of a difference in treatment, considered discriminatory because the treatment was based on the grounds rendering them vulnerable. Such persons were treated less favorably than others not having those distinctive characteristics. The Chamber judgments in *Alajos Kiss* and *Kiyutin* proceeded from that approach: Alajos Kiss was prohibited from voting because he was mentally ill, and Kiyutin was refused a residence permit because he was living with HIV.

2. The Approach in the Grand Chamber Judgments

In the two Grand Chamber judgments, the approach taken was different. In *Orˇsuˇs and Others*, the Court required "special protection" because the applicants, as members of the Roma population, belonged to "a specific type of disadvantaged and vulnerable minority."[89] In M.S.S., the Court considered the applicant "in need of special

83. *See* Abdulaziz, Cabales & Balkandali v. United Kingdom, App. No. 9214/80, Eur. Ct. H.R (Ct. Plen) § 78 (1965); Burghartz v. Switzerland, App. No. 16213/90, Eur. Ct. H.R (Ct. Plen App. No.) § 27 (1994).

84. *See* Schalk & Kopf v. Austria, App. No. 30141/04, Eur. Ct. H.R § 97 (2010); Smith & Grady v. United Kingdom, App. No. 33985/96 Eur. Ct. H.R § 90 (2000); Alajos Kiss, App. No. 38832/06, Eur. Ct. H.R. § 42; E.B. v. France, App. No. 43536/02, Eur. Ct. H.R § 94 (2008).

85. *See* D.H. & Others v. Czech Republic, App. No. 57325/00, Eur. Ct. H.R § 182 (2007); Timishev v. Russia, App. No. 55974/00, Eur. Ct. H.R. § 56 (2005).

86. Alajos Kiss, App. No. 38832/06, Eur. Ct. H.R. § 42; Shtukaturov v. Russia, Eur. Ct. H.R § 95 (2008).

87. Glor v. Switzerland, 2009-III Eur. Ct. H.R. § 84.

88. Kiyutin, 439 Eur. Ct. H.R. § 63.

89. Orˇsuˇs, 2010-II Eur. Ct. H.R § 147.

protection" because, as an asylum seeker, the applicant was "a member of a particularly underprivileged and vulnerable population group."[90] In those cases, the applicants were entitled to more favorable treatment than others because they were persons belonging to a particularly vulnerable group. Therefore, acceptable Government treatment of individuals not belonging to such vulnerable groups becomes unacceptable when it concerns individuals belonging to a "particularly vulnerable" group.

Asylum seekers are the best example of this approach: the brief detention of M.S.S., which once lasted four days and another time seven days, was considered degrading, because "the applicant, being an asylum-seeker, was particularly vulnerable."[91] Moreover, the scope of application of Article 3 was also enlarged: while the Court stated that "Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home," nor to "entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living," the Court considered that Article 3 does require decent living conditions for asylum seekers as prescribed by the E.U. Reception Directive.[92]

The Court does not clearly distinguish between refugees and asylum seekers. A refugee is a person who may not be expelled or returned to his country, owing to a well-founded fear of being persecuted for reasons mentioned in the Geneva Convention Relating to the Status of Refugees.[93] Refugee status is obtained only when one is recognized as such by the competent authorities have determined that the conditions set out in the Geneva Convention are fulfilled. It is obvious that someone who dared to take risks for his liberty, his physical integrity, or even his life for reason of his opinion, deserves special protection. On the contrary, to obtain the "status" of an asylum seeker, no conditions have to be fulfilled and no procedure followed: any person who applies for asylum to the authorities of a country other than his own is an asylum seeker.

Asylum seekers are a self-selected category. It is by deciding to seek asylum that they become members of the category of asylum seekers.[94]

90. M.S.S, 2011-1 Eur. Ct. H.R. § 251.
91. *Id*. § 232.
92. *Id*. § 249.
93. Convention Relating to the Status of Refugees art. 1A (2), July 28, 1951, 189 U.N.T.S. 137.
94. Marc Bossuyt, *Judicial Activism in Strasbourg*, in INTERNATIONAL LAW IN SILVER PERSPECTIVE: CHALLENGES AHEAD 31, 40 (Karel Wellens ed., 2015) (hereinafter Bossuyt, *Judicial Activism*).

There are no reasons why an asylum seeker would automatically need special protection, regardless of his condition, his country of origin, or his motives for applying.[95] In *M.S.S.*, the Court stated that Article 3 of the Convention does not "entail any general obligation to give *refugees* financial assistance to enable them to maintain a certain standard of living,"[96] but that the same Article 3 entails "the obligation to provide accommodation and decent material conditions to impoverished *asylum-seekers*."[97]

In his dissent in *M.S.S.*, Judge Sajó criticized the reliance of the Court on E.U. law: "[h]uman rights as defined by the Convention differ from humanitarian concerns" and "[t]here is a difference [...] between European Union law and conventional obligations which originate from the prohibition of inhuman and degrading treatment."[98] The Court imposed considerably larger obligations for the twenty-eight Member States of the European Union than for the nineteen other States Parties to the Convention who are not E.U. Members. Interpretations by the Court, relying on E.U. regulations and directives, cannot affect the obligations under the Convention of the nineteen non-E.U. States Parties, nor can those obligations differ between E.U. and non-E.U. States Parties.[99] The rights that must be respected by the States Parties to the Convention are human rights, meaning that they are universal rights and not rights that can only be respected by a small number of affluent States. The obligations accepted by the States Parties to the Convention are minimum obligations. According to the preamble of the Convention, the Parties were resolved to take the "first steps" for the collective enforcement of "certain" rights stated in the Universal Declaration.[100] E.U. obligations additional to the European Convention should be supervised by the E.U. Court of Justice of Luxembourg, which is set up to uphold E.U. law by the twenty-eight Member States of the European Union, and not by the European Court of Human Rights of Strasbourg,

95. Marc Bossuyt, *The European Union Confronted with an Asylum Crisis in the Mediterranean: Reflections on Refugees and Human Rights Issues*, 5 EUR. J. HUM. RTS. 581, 594 (2015).
96. M.S.S., 2011-1 Eur. Ct. H.R. § 249 (emphasis added).
97. *Id.* § 250 (emphasis added).
98. *Id.* at 104 (Sajó, J., concurring in part, dissenting in part).
99. *See* Bossuyt, Judicial Activism, supra note 94, at 53.
100. Marc Bossuyt, *Should the Strasbourg Court Exercise More Self-Restraint*, 28 H.R.L.J. 321, 328 (2007).

which is set up to uphold the respect of the European Convention by the forty-seven States parties to that Convention.[101]

3. The Approach in Judgments of the First Section

Yet another approach is adopted by the First Section[102] of the Strasbourg Court in qualifying persons to be expelled or extradited by Russia to Kyrgyzstan or Uzbekistan as belonging to "a particularly vulnerable group" or to "a vulnerable group." In *Gayratbek Saliyev*,[103] *Kadirzhanov and Mamashev*,[104] and *Khamrakulov*,[105] ethnic Uzbeks from Kyrgyzstan are qualified as "particularly vulnerable." Persons charged with religiously or politically-motivated crimes in Uzbekistan, in *Eshonkulov*,[106] *Khalikov*,[107] and *Mukhitdinov*,[108] are termed "vulnerable." No different meaning appeared to correspond to the Court's slightly different qualification of the vulnerability of those applicants.

In any case, based on the *M.S.S.*, they were already—as asylum seekers—entitled to special protection, concerning their conditions of detention and their living conditions in the country where they have applied for asylum. Their present identification as persons belonging to

101. Bossuyt, *Judicial Activism, supra* note 94, at 53; Bossuyt, M.S.S., *supra note* 73, at 592.

102. The Court has five Sections. A Section of the Court is an administrative entity composed of nine or ten judges. European Court of Human Rights, *Composition of the Court* (2016), http://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#NewComponent-134615204144. A Chamber, composed of seven judges, is a judicial formation of the Court within a given Section. Cases against the Russian Federation are dealt with by the First Section. European Convention on Human Rights, *supra note* 65, art. 27.1.

103. Gayratbek Saliyev v. Russia, App. No. 39093/13, Eur. Ct. H.R. § 62 (2014).

104. Kadirzhanov & Mamashev v. Russia, Eur. Ct. H.R. § 92 (2014).

105. Khamrakulov v. Russia, App. No. 68894/13, Eur. Ct. H.R. § 66 (2015). The standard formula in those judgments reads, as follows: Given the widespread use by the Kyrgyz authorities of torture and ill-treatment in order to obtain confessions from ethnic Uzbeks charged with involvement in the inter-ethnic riots in the Jalal-Abad Region, which has been reported by both U.N. bodies [the Committee on the Elimination of Racial Discrimination and the Committee against Torture] and reputable NGOs [Amnesty International and Human Rights Watch], the Court is satisfied that the applicant belongs to a particularly vulnerable group, the members of which are routinely subjected to treatment proscribed by Article 3 of the Convention in the requesting country. *Id*. (emphasis added).
In its judgment Mamadaliyev v. Russia, also, the Court noted that the *applicant*, an ethnic Uzbek in Kyrgyzstan, was as such "a member of *a particularly vulnerable group* that faced a serious risk of ill-treatment if handed over to the Kyrgyz authorities. Mamadaliyev v. Russia, App. No. 27239/13, Eur. Ct. H.R. § 51 (2014) (emphasis added).

106. Eshonkulov v. Russia, App. No. 68900/13, Eur. Ct. H.R. §§ 34–35 (2015).

107. Khalikov v. Russia, App. No. 66373/13, Eur. Ct. H.R. §§ 42–43 (2015).

108. Mukhitdinov v. Russia, App. No. 20999/14, Eur. Ct. H.R. at §§ 45–46 (2015). The standard formula in those judgments reads, as follows:
It has been the Court's constant position that individuals whose extradition was sought by the Uzbek authorities on charges of religiously or politically motivated crimes constituted *a vulnerable group*, running a real risk of treatment contrary to Article 3 of the Convention in the event of their transfer to Uzbekistan. Id. § 45 (emphasis added).
Similarly, in the Court's judgment in Mamazhonov v. Russia, it concluded that the Russian authorities had substantial grounds for believing that the individuals, whose extradition was sought by the Uzbek authorities on charges of religiously or politically motivated crimes, constituted "a vulnerable group." Mamazhonov v. Russia, App. No. 17239/13, Eur. Ct. H.R. § 141 (2014).

"a (particularly) vulnerable group" (because they are ethnic Uzbeks from Kyrgyzstan or persons charged with religiously or politically-motivated crimes in Uzbekistan) provides them with substantial grounds for believing that they would be exposed to a real risk of being subjected to inhuman or degrading treatment upon return to their country of origin. That identification is not relevant for the "status" of asylum seeker but does constitute substantial grounds for obtaining the "status of refugee," because Uzbeks having those specific characteristics may not be returned "to the frontiers of territories where their life or freedom would be threatened."[109]

In a judgment against Turkey,[110] the Court found a violation in the conditions of detention of a forty-five-year-old British woman held in Istanbul Atatürk Airport for three days in an overcrowded room. Although she had not applied for asylum, the Court did not require a higher threshold.[111] It shows that the quality of being an asylum seeker has been used as a pretext for lowering the threshold of Article 3, rather than being the real ground for doing so. In all this, the Court also contributed to the widespread confusion between refugees, asylum seekers,[112] and irregular migrants or other aliens not authorized to stay on the territory of the States parties.

5. THE ANALYSIS OF PERONI AND TIMMER

A 2013 study by Lourdes Peroni and Alexandra Timmer, entitled "Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law," continues this analysis of "vulnerable groups."[113]

109. Geneva Convention Relating to the Status of Refugees, *supra note* 93, art. 33.1.

110. T. & A. v. Turkey, App. No. 47146/11, Eur. Ct. H.R. (2014). Her detention in the Istanbul airport detention facility lasted from 9 till 12 November 2010. *Id*. §§ 9-22.

111. In the absence of any element indicating that the treatment of the applicant in that case was harsher than in any case concerning asylum seekers in which the Court has found a violation of Article 3 of the Convention, a detention of three days constitutes a threshold which is even lower than in nearly all asylum cases. *See* Marc Bossuyt, *Is the European Court of Human Rights on a Slippery Slope?*, in THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS: TURNING CRITICISM INTO STRENGTH 27, 36 (Spyridon Flogaitis, Tom Zwart, & Julie Fraser eds., 2013).

112. *See supra* Part III.B.2.

113. Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law,* 11 INT. J. CONST. L. 1056, 1056–1085 (2013).

A. A Mainly Sociological Analysis

The authors of the study noted that "the appearance of the vulnerable-group concept in the Court's legal reasoning has so far escaped scholarly attention."[114] As a result, their analysis is confined "to the case law in which the Court speaks of vulnerable *groups*."[115] They do not deal with the "considerable amount of case-law in which the Court recognizes that the applicant is in a vulnerable position individually, notably in cases concerning prisoners or children," because these cases "lack a group-centered analysis . . . ."[116] The authors recognize that the meaning of vulnerability is "imprecise and contested."[117] They further describe these new concepts as "[c]onfusing, complex, vague, [and] ambiguous," and that ultimately, "what exactly ties all these [vulnerable] groups together is still not entirely clear."[118] As they understand it, the concept of "group vulnerability" used by the Court, has three characteristics: relational,[119] particular,[120] and harm-based.[121] In the authors' view, the Court's case-law reveals "some blanks or inconsistencies," because "there are more groups that could have fallen within the notion of vulnerable groups" such as "national minorities, religious minorities, and LGBT people."[122]

Among the drawbacks of the Court's account of group vulnerability, Peroni and Timmer particularly fear the risks of reinforcing

114. *Id*. at 1056.
115. *Id*. at 1057 n.7 (emphasis added).
116. *Id*. For that other area of the Court's case law, *see* Timmer, *supra note* 22.
117. Peroni & Timmer, *supra note* 113, at 1058; *see also* Solbakk Jan Helge, *Vulnerability: A Futile or Useful Principle in Healthcare Ethics?*, in THE SAGE HANDBOOK OF HEALTH CARE ETHICS: CORE AND EMERGING ISSUES 228, 229 (Ruth Chadwick et al., eds., 2011) (stating that the principle of vulnerability is complex and confusing); Mary C. Rouf, *Vulnerability, Vulnerable Populations, and Policy*, 14 KENNEDY INST. ETHICS J. 411, 411 (2004); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 9 (2008–2009).
118. Peroni & Timmer, *supra note* 113, at 1058, 1064.
119. *Id*. at 1064. The vulnerability is located "not in the individual alone but rather in her wider social circumstances," "as shaped by social, historical, and institutional forces" and linked "to the social or institutional environment" of the applicant. *Id*.
120. *Id*. "[T]he Court tends to talk of 'particularly vulnerable groups' rather than just of 'vulnerable groups'[;]" "people belonging to these groups are simply 'more' vulnerable than others[;]" and "the Court's vulnerable subject is a group member whose vulnerability is shaped by specific group-based experiences." *Id*.
121. *Id*. at 1064–69. The indicators "prejudice and stigmatization" point to "the harm of *misrecognition*," because they are "less than full partners in social interaction," and to "*maldistribution*," because they "lack the necessary resources to interact with others as peers." *Id*. (citing Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REV. 107, 113 (2000)). Examples given for misrecognition are—besides the already mentioned judgments of Or˘su˘s, 2010-II Eur. Ct. H.R; Alajos Kiss, App. No. 38832/06, Eur. Ct. H.R.; Kiyutin, 439 Eur. Ct. H.R.; Horvath & Kiss, App. No. 11146/11, Eur. Ct. H.R.—D.H. & Others v. Czech Republic, App. No. 57325/00, Eur. Ct. H.R; Sampanis & Others v. Greece, App. No. 32526/05, Eur. Ct. H.R. (2008); V.C. v. Slovakia, 2011-IV Eur. Ct. H.R. (2011). Examples given for maldistribution are Yordanova & Others v. Bulgaria, App. No. 25446/06, Eur. Ct. H.R. (2012); M.S.S., 2011-I Eur. Ct. H.R. ("has significantly broadened the Court's notion of group vulnerability"). According to the authors, "it is not quite clear whether *all* asylum seekers are to be considered vulnerable, or just the ones who arrive in Greece." Peroni & Timmer, supra note 113, at 1069. Subsequent judgments of the Strasbourg Court tend towards the former preposition.
122. Peroni & Timmer, *supra note* 113, at 1070.

the vulnerability of certain groups by essentializing,[123] stigmatizing,[124] victimizing, and paternalizing[125] them. In their opinion, the Court should ensure that, as follows:

> i) it is specifically *why* it considers that *group* particularly vulnerable and ii) it demonstrates *why* that makes the *particular applicant* more prone to certain types of harm or why the applicant should be considered and treated as a vulnerable member of that group in the instant case. The test should therefore entail two interrelated levels of inquiry: collective and individual.[126]

Peroni and Timmer nevertheless believe that the emergence of this concept has had "positive implications" in the Court's case-law, that it is "a welcome development," and that it "represents a crucial step towards an enhanced anti-discrimination case law and a more robust idea of equality."[127]

Referring to the writing of Sandra Fredman,[128] Peroni and Timmer argue that the Court's insertion of the notion of vulnerable groups has addressed the four chief aims of substantive equality: a) participation, by compensating for the absence of political voice; b) transformation, by removing the detriment which is attached to difference rather than difference itself; c) redistribution, by breaking the cycle of disadvantage; and d) recognition, by promoting "respect for the dignity and worth, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an identity group."[129]

123. *See id.* at 1071 ("reifying one experience as paradigmatic, at the expense of other experiences").
124. *See id.* at 1072 (vulnerability takes on a "master status" when it overshadows all other aspects of an applicant's identity, his talents and abilities).
125. *See id.* In D.H. & Others, for example, the Court was "not satisfied that the parents of the Roma children . . . were capable of weighing up all the aspects of the situation and the consequences of giving their consent." D.H. & Others, App. No. 57325/00, Eur. Ct. H.R §203.
126. Peroni & Timmer, *supra* note 113, at 1073 (emphasis added).
127. *Id.* at 1074.
128. SANDRA FREDMAN, DISCRIMINATION LAW 25–33 (2d ed., 2011).
129. Peroni & Timmer, *supra* note 113, at 1074–75 (quoting FREDMAN, *supra* note 128, at 25).

B. Different Manifestations of the Vulnerable Group Approach

According to Peroni and Timmer, the vulnerable group approach of the Court is manifested as follows:

1. More Pronounced or Special Positive Obligations Under the European Convention on Human Rights[130]

In *Chapman*, the Court recognized "a positive obligation imposed on the Contracting States under Article 8 to facilitate the Gypsy way of life."[131] In *Orˇsuˇs*, the Court required "safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State had sufficient regard to [the] special needs of [Roma children] as members of a disadvantaged group."[132] In *M.S.S.*, the Court stated that "the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs."[133] Peroni and Timmer described the Court as deriving "positive obligations in the social and economic sphere from the civil and political right encapsulated in Article 3 of the European Convention on Human Rights."[134] In V.C., the Court required "effective legal safeguards to protect the reproductive health of women of Roma origin in particular," by ensuring that their "full and informed consent" in procedures concerning that matter was obtained.[135] In *Yordanova and Others*, the Court considered that "the principle of proportionality required that due consideration be given to the consequences of their removal and the risk of their becoming homeless," meaning that "an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of

130. *See* [First] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, *enacted* Mar. 20, 1952 (Right to Education) [hereinafter Protocol for European Convention on Human Rights]: European Convention on Human Rights, *supra* note 65, art. 14 (Prohibition of Discrimination) art. 3 (Prohibition of torture), art. 8 (Right to respect for private and family life).
131. Chapman, 2001-I Eur. Ct. H.R. § 96.
132. Orˇsuˇs v. Croatia, App. No. 15766/03, Eur. Ct. H.R. § 182 (2010), http://hudoc.echr.coe.int/eng?i=001-97689.
133. M.S.S., 2011-I Eur. Ct. H.R. § 263.
134. Peroni & Timmer, *supra* note 113, at 1078.
135. V.C, 2011-IV Eur. Ct. H.R. §§ 145, 151.

the Convention in exceptional cases."[136] In *Horvath and Kiss*, the Court required "guarantees stemming from the positive obligations of the State to undo a history of racial segregation in special schools,"[137] because otherwise, these children are "unlikely to break out of this system of inferior education, resulting in their lower educational achievement and poorer prospects of employment."[138]

2. Increased Weight of Harm in the Scope and Proportionality Analyses[139]

In M.S.S., as stated by Peroni and Timmer, "the effects of his detention take a dimension that they would not have taken if the case had concerned a less vulnerable applicant," meaning "the ill-treatment caused to the applicant looks bigger through the vulnerability lens."[140] In *Yordanova and Others*, the Court held that "the applicants' specificity as a social group and their needs must be one of the relevant factors in the proportionality assessment that the national authorities are under a duty to undertake."[141] Peroni and Timmer further illustrated the need for proportionality: "they are likely to experience harm *more acutely*."[142]

3. A Narrower Margin of Appreciation[143]

In *Alajos Kiss*, the Court held that "the treatment of a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to *strict scrutiny*."[144] Similarly, in *Kiyutin*, the Court observed, as follows:

> If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State's margin of

136. Yordanova, App. No. 25446/06, Eur. Ct. H.R. §§ 126, 130.
137. Horvath & Kiss App. No. 11146/11, Eur. Ct. H.R. § 127.
138. *Id.* § 115.
139. European Convention on Human Rights, *supra* note 65, arts. 3, 8.
140. Peroni & Timmer, *supra* note 113, at 1079.
141. Yordanova, App. No. 25446/06, Eur. Ct. H.R. § 129.
142. Peroni & Timmer, *supra* note 113, at 1080 (emphasis added).
143. European Convention on Human Rights, *supra* note 65, art. 14.
144. Alajos Kiss, App. No. 38832/06, Eur. Ct. H.R. § 44 (emphasis added).

> appreciation is substantially narrower and it must have *very weighty reasons* for the restrictions in question. The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the [individualized] evaluation of their capacities and needs.[145]

Peroni and Timmer further clarified the emerging legal standard, writing "certain classifications are deemed suspect 'per se' . . . when they concern groups of people that have been historically discriminated against."[146]

Addressing concerns that the Court is overstepping its proper role by transforming political rights into social rights, the authors reply that vulnerability might be a useful guiding principle that could be viewed as "a *limiting* rather than a *limitless* principle"—"in the prioritization of scarce resources, states give preference to those whose needs they consider most pressing."[147] Concerning the margin of appreciation, the authors stress "that the Court never uses group vulnerability as an *automatic* trigger," and that the Court's cue should be the confirmation by activities of international organizations and human rights reports that "there is a structural failure to protect the human rights of a particular group."[148] In conclusion, Peroni and Timmer "perceive the Court's increasing use of group vulnerability reasoning as a welcome development" and "as a step towards a more inclusive universal human rights subject," provided that it avoids the pitfalls of "essentialism, stigmatization, and paternalism."[149]

C. Evaluation

The most useful contribution of Peroni and Timmer involves their analysis of the Court's different manifestations of an approach toward "vulnerable groups": a) the Court imposes even more positive

145. Kiyutin, 439 Eur. Ct. H.R. § 63 (emphasis added).
146. Peroni & Timmer, *supra* note 113, at 1081.
147. *Id*. at 1083–84.
148. *Id*. at 1084.
149. *Id*. at 1085.

obligations on States; b) an increased weight of harm in the scope and proportionality analysis; and c) a narrower margin of appreciation.[150] The last two manifestations are closely linked: a narrower margin of appreciation (of the government concerned) results in reducing the chances for a State to pass the proportionality test. Not passing that test results in a finding of discrimination. Notions such as "strict scrutiny"[151] and "very weighty reasons,"[152] however, are not necessarily confined to vulnerable groups. It is questionable whether the Court needs a concept, such as "vulnerable groups," to find a violation of the Convention when it wants to do so. However, even more, questionable is the imposition on States of additional positive obligations.

The present author has already criticized the Court for "attribut[ing] positive obligations to virtually all Convention rights," despite the negative formulation in the Convention of almost all these rights.[153] Among the dangers of the creation of positive obligations, he mentioned the non-respect of the principle of Separation of Powers,[154] the abandonment of the restraint required in interpreting international treaties,[155] the deprivation of human rights of their universality,[156] and the relinquishing of "a considerable degree of sovereignty from the national legislator to the international judge, much more than is the case concerning civil rights and fundamental freedoms."[157] Not every imposition of a positive obligation transforms a civil right into a social right, but "when positive obligations are attributed to it which entail expenditures that many states cannot afford and that require choices and priorities at the expense of other rights or other categories of persons . . . a civil right loses its very nature."[158] To the extent that the recognition

150. Peroni & Timmer, *supra* note 113, at 1076–82.

151. Since January 1, 2010, thirty hits (occurrences of the Court using the term "strict scrutiny") are found in judgments in the HUDOC database, http://hudoc.echr.coe.int/, which provides access to the case law of the European Court of Human Rights, the European Commission of Human Rights, and the Committee of Ministers of the Council of Europe.

152. Since January 1, 2010, there has been forty-eight hits (occurrences of the Court using the term "very weighty reasons") in judgments found in the HUDOC database.

153. Bossuyt, *Judicial Activism*, *supra* note 94, at 33–37.

154. "The Court is entitled to interpret the rules, not to extend its own competences by creating new rules" and "it is up to the political authorities of the state to set up priorities as far as the rights, their beneficiaries and the timetable of their realization is concerned." Id. at 50.

155. "The knowledge that the jurisdiction of the Court is based on an agreement given by the states parties in the form of an international treaty, should induce the Court to exercise its jurisdiction with great restraint…" *Id.* at 51.

156. "The extension of the Court's jurisdiction to economic and social rights leads to the development of a purely regional human rights standard, unattainable by many countries and depriving human rights of their universality, which is one of the strengths of the traditional concept of human rights." *Id.* at 51–52.

157. *Id.* at 52.

158. *Id.* at 48.

of "particularly vulnerable groups" leads to such a result, it is not a development that should be welcomed.

Even more unwelcome is the search for "a more robust idea of equality," which must be understood as "substantive equality."[159] Article 14 of the European Convention does not prescribe the attainment of substantive equality.[160] First, Article 14 does not contain a general prohibition of discrimination, but it prohibits discrimination in the "enjoyment of the rights and freedoms outlined in this Convention."[161] Second, even the general prohibition contained in Protocol 12 to the European Convention, adopted in November 2000, does not aim to achieve substantive equality. Its sole difference is that its application is not limited to "the rights and freedoms set forth" in the Convention, but is extended to the "enjoyment of any right set forth by law."[162] It applies to every right recognized in the domestic legal order, even when it is not outlined in the Convention. Because the term "any right" is not qualified, it extends as well to economic, social, and cultural rights as it does to civil and political rights. However, it can only apply to "rights." The prohibition of discrimination does not apply to interests not protected by law.[163] If the need is felt to prohibit discrimination to such an interest, it should be subjected to legal regulations that would entail, *ipso facto*, the application of the prohibition of discrimination to that legally regulated interest, as it will have become a right.[164]

Both the discrimination clause of Article 14 of the European Convention and the general prohibition of discrimination in Protocol 12 guarantee "equality before the law," concerning the application of the law, and "equality in the law," concerning the creation of the law.[165] But neither "equality before the law" nor "equality before the law" guarantees "substantive equality."[166] All persons are equal in rights, despite the

159. Peroni & Timmer, *supra* note 113, at 1074–75.

160. European Convention on Human Rights, *supra* note 65, art. 14.

161. *Id*.

162. Compare European Convention on Human Rights, *supra* note 65, art. 14, with Protocol for European Convention on Human Rights 12, *supra* note 65, art. 1.1.

163. *See* BOSSUYT, EQUALITY & DISCRIMINATION, *supra* note 13, at 262; Marc Bossuyt *Prohibition of Discrimination and the Concept of Affirmative Action*, in BRINGING INTERNATIONAL HUMAN RIGHTS LAW HOME, 93–106 (2000).

164. *Id*.

165. Marc Bossuyt, *The Principle of Equality in Article 26 of the International Covenant on Civil and Political Rights*, *in* THE LIMITATION OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 269, 279–80 (Armand de Mestral et al., eds., 1986).

166. To the extent that the second sentence of Article 26 of the International Covenant on Civil and Political Rights ("In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination...") could be understood as containing such a guarantee, it may not be applied by the judiciary without previous intervention of the legislature, since its wording is not self-sufficient. See International Convention on Civil and Political Rights, *supra* note 6, art. 26.

possible inequalities in everyone's material position. Of course, it is laudable when governments pursue policies aimed specifically at decreasing those inequalities and take special measures to that effect, but this is the task of the legislature and the executive—not of courts, and certainly not of an international court. Either there is a misunderstanding about what is meant by "substantive equality" or the Court is acting beyond its jurisdiction.

6. CONCLUSION

Not everyone is equally enthusiastic in welcoming international treaties aimed at protecting categorical rights. Governments frequently complain about the heavy burdens that the reporting systems of treaties lay on their administrative services. Nevertheless, the continuous expansion of human rights treaties and the status of ratification of those treaties reveal how difficult it is for them to resist initiatives to draft such treaties and to withstand appeals to become parties to newly adopted human rights conventions or protocols. In any event, the legitimacy of those instruments cannot be questioned. The only states that, out of their free will, accept to become parties to such treaties are bound by them. Two such human rights treaties are among the most frequently ratified.[167]

The legitimacy of imposing upon States Parties to the European Convention more positive obligations by identifying "particularly vulnerable groups" is more questionable. It is doubtful that the States Parties to the European Convention have agreed that the Court is entitled to act in such away. The Court has jurisdiction to interpret the Convention but not to amend it by imposing obligations on the States Parties "when it is not possible—in good faith—to take it for granted that they are inherent or implied in the civil rights and fundamental freedoms guaranteed by the Convention."[168]

167. As of January 1, 2016, 196 States are parties to the *Convention on the Rights of the Child*, Convention on the Rights of the Child, UNITED NATIONS TREATY COLLECTION (2016), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en, and 189 to the Convention on Elimination of All Forms of Discrimination against Women, *Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS TREATY COLLECTION (2016), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en. Furthermore, in less than ten years, 161 States have ratified the Convention on the Rights of Persons with Disabilities. Convention on the Rights of Persons with Disabilities, UNITED NATIONS TREATY COLLECTION (2016), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&lang=en. The International Convention on the Protection of the Rights of All Migrant Workers is only ratified by forty-eight States. *International Convention on the Protection of the Rights of All Migrant Workers*, UNITED NATIONS TREATY COLLECTION (2016), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&lang=en.

168. *See* Bossuyt, *Judicial Activism*, *supra* note 94, at 48.

And lastly, what will further developments in identifying "particularly vulnerable groups" accomplish? If women, children, the elderly, aliens, people with disabilities or suffering from illnesses, people living in poverty, and people belonging to racial, ethnic, religious, or sexual minorities are all classified as "particularly vulnerable" persons, the overwhelming majority of any country's population will then be recognized as "particularly vulnerable." If they all deserve particular attention from the Government and special efforts must be undertaken to meet their specific needs, one may wonder whether the small minority of persons not belonging to any of those groups do not also become vulnerable since they are not entitled to any special effort.

SOCIAL INCLUSION AND EXCLUSION: A REVIEW[1]

Nabin Rawal
Central Department of Sociology and Anthropology, Tribhuvan University.

I. INTRODUCTION

René Lenoir, writing about a quarter of a century ago, is given the credit for authorship of the expression. As Secrétaire d'Etat a l'Action Sociale of the French Government, René Lenoir, spoke of the following as constituting the "excluded" – a tenth – of the French population:

> mentally and physically handicapped, suicidal people, aged invalids, abused children, substance abusers, delinquents, single parents, multi-problem households, marginal, asocial persons, and other social "misfits'.

The literature that has followed Lenoir's original initiative has vastly added to this already bulging list of the "socially excluded" and is seen as covering a remarkably wide range of social and economic problems (Sen, 2000:1). The concept of social exclusion as it appeared in France and Europe in general, was tied to the effect of the failure of the integrative institutions. As Room (1995, cited in O'Brien and Penna, 2007:3) points out, the concept has its roots in the functionalist social theory of Emile Durkheim. Writing at the turn of the 20th century Durkheim was concerned with how social order and stability could be maintained in a society where social dislocations accompanied the transitions from an agrarian to the industrial society. O'Brien and Penna (2007) argue that the concept of social exclusion and the contemporary European research agenda on it has been informed by the problems associated with maintaining social order and stability. Durkheim's moral sociology echoes down the centuries, and much greater significance has been a re-rendering of Durkheim – in the resurgence of neo-Parsonian *systems analysis and* 'neo-functionalism'– in sociology and social policy analysis from the late 1970s onwards. (O'Brien and Penna, 2007:3)

1. A review of social inclusion and exclusion is limited to the literature available to the reviewer.

This concept, which first emerged in the policy discourse in France and its adoption later by other European countries, has had an increasing impact on the analyses of social disadvantages in Europe over the last couple of decades. (Aasland and Flotten, 2000:1026; Gore and Figueiredo, 1997, cited in Francis, 2002:74).

The concept gained widespread applicability after the World Summit as a result of which, increasing attention has been paid to the possible relevance of the concept to social policy analysis in developing countries (IILS, 1997, IDS, 1998, cited in Kabeer, n.d.:1), and it was widely adopted by development agencies and in development studies as another way of understanding and reducing poverty in the south (Jackson, 1999:125). It has also been argued that the application of the social exclusion to southern societies is indicative of a convergence of social policy between North and South as a result of globalization and international migration (Maxwell, 1998, cited in Francis, 2000:75). Thus, the danger is that given the roots of the concept in northern policy discourse, it will simply serve to re-label longstanding and locally developed approaches to social problems or that it will promote a tendency to assess southern realities in terms of the extent to which they converge or diverge from some 'standard' northern model (Kabeer, 2000:2). Likewise, in a similar vein, Silver (1995) has argued that the meaning of social exclusion depends on the nature of the society, or the dominant model of the society from which exclusion occurs and it varies in meanings according to national and ideological contexts (Silver, 1994:539).

2. CONCEPTUALIZING SOCIAL EXCLUSION

Social exclusion has been defined as 'the process through which individuals or groups are wholly or partially excluded from full participation in the society within which they live' (European foundation, 1195, p.4, quoted in de Haan, 1998, cited in Francis, 2002).

Aasland and Flotten (2000) state that the concept of social inclusion gained prominence in the policy discourse in Europe since it replaced the concept of poverty, taking into its fold more dimensions of people's lives than the poverty concept.

> An important reason for this is the fact that the concept of poverty has been difficult to define, and that it has been heavily contested whether or not this concept can fully depict the social disadvantages in today's society. One of the most popular arguments in favor of the social exclusion concept is that it takes into account more dimensions of people's lives that the poverty concept (Aasland and Flotten, 2000:1027).

However, Aasland and Flotten (2000) argue that the concept of social exclusion is no more unambiguous than the concept of poverty. They contend that when the concept was first employed in France in the 1970s, it took into account people unable to adjust to mainstream society and the following years the concept was frequently redefined, and more groups were included, such as school dropouts, unemployed youths, and immigrants (Aasland and Flotten, 2000:1027). Thus, Aasland and Flotten, attribute the problems attached to the concept of social exclusion as arising out of the increasingly varied meaning attached to it in France and its spreading to other countries with their interpretations of the concept. Furthermore, they argue that the concept is vague and is employed to describe a multitude of situations and processes, which is often loaded with economic, social, cultural, and political connotations. To operationalize the concept of social exclusion adequately for empirical analysis, they have made an effort to present an analysis of the relationship between ethnicity and several variables that they consider to be proxies for social exclusion.

They consider social exclusion as multidimensional phenomena and have considered several important living condition variables as proxies for social exclusion. They are: 1) Exclusion from formal citizenship rights: 2) Exclusion from labor market; 3) Exclusion from participation in civil society and 4) Exclusion from social arenas. Participation in all these areas would suggest that people are not socially excluded, but indicators of participation, degree of participation, and how the degree of participation in different areas should be considered concerning each other still need to be specified. (Aasland and Flotten, 2000:1028).

Francis (2000) locates the strength of social exclusion as a concept in its attempt to capture the multifaceted character of social deprivation, especially its institutional and cultural aspects. This conception of social exclusion has been labeled as a multidimensional concept of exclusion (Geddes and Benington, 2001, cited in O'Reilly, 2005: 81). The strength of the concept according to Francis lies in the fact that in distinction to poverty, which has been primarily thought about in economic terms, the social exclusion also takes into consideration deprivation in several spheres, of which low income is but one. However, he states that three questions are of vital importance to assess the concept of social exclusion. First, how does it differ from that of poverty? Second, what does it add to our understanding of deprivation? Third, does it increase our capacity to address such social ills? (Francis, 2000:75)

According to Geddes and Benington, (2001), the multidimensional concept of exclusion broadens out the notion of material poverty and identifies social problems and then labels them as aspects of social exclusion. Geddes and Benington (2001) argue that this approach to exclusion is naïvely heuristic and tautological in that it identifies social problems and then labels them as aspects of exclusion. It is not guided by any particular social science paradigm or theorization of what either exclusion or inclusion is. Its lack of theoretical rigor, however, means that the absence of a strong ideological orientation allows a relatively open approach to identify exclusion, even if its symptoms and conditions are not systematically understood (Geddes and Benington, 2001, cited in O'Reilly, 2005:81)

Sen (2000) argues that the idea of social exclusion needs to be examined about its utility in providing new insights in understanding the nature of poverty, identifying causes of poverty, contribution to thinking on policy and social action in alleviating poverty. Sen (2000) associates the idea of social exclusion to a capability perspective on poverty (Sen, 2000:4).

> The capability perspective on poverty is inescapably multidimensional since there are distinct capabilities and functionings that we have reason to value. I would suggest that it is useful to investigate the literature on "social exclusion" using this broadly Aristotelian approach. The connections are immediate. First, we have good reason to value not being excluded from social relations, and in this sense, social exclusion may be directly a part of capability poverty. Second, being excluded from social relations can lead to other deprivations as well, thereby further limiting our living opportunities. For example, being excluded from the opportunity to be employed or to receive credit may lead to economic impoverishment that may, in turn, lead to other deprivations (such as undernourishment or homelessness). Social exclusion can, thus, be constitutively a part of capability deprivation as well as instrumentally a cause of diverse capability failures. The case for seeing social exclusion as an approach to poverty is easy enough to establish within the general perspective of poverty as capability failure (Sen, 2000:4-5).

Even though the concept of social inclusion has its roots in France, Hillary (1994) states that in contrast to distinctive French Republican conceptions, challenges to Republican ideology and the adoption of exclusion discourse in other national contexts imparted meanings to the term more properly considered within other paradigms of social disadvantage (Hillary, 1994:539). Thus, in Social exclusion: Three paradigms (1995), she puts forth her threefold typology of the multiple meanings of exclusion distinguished by different theoretical perspectives, political ideologies, and national discourse. The three paradigms of social exclusion viz: solidarity, specialization, and monopoly, based on different notions of social integration, attribute exclusion to a different cause and are grounded in a different political philosophy and explains multiple forms of social disadvantage.

The 'solidarity' paradigm derived from the French Republican thought attributes exclusion to the breakdown of social solidarity i.e. the social bond between the individual and society. The solidarity paradigm, with strong antecedents in Durkheimian sociology, views society as something external, moral, and normative rather than grounded in individual, group, or class interests and solidarity arising out of shared values and rights. This approach lays heavy emphasis on how cultural or moral boundaries between groups socially construct dualistic categories for ordering the world. Like deviance, exclusion both threatens and reinforces social cohesion and the inverse of exclusion is 'integration', and the process of attaining it is an insertion, which implies assimilation into the dominant culture.

As Paul Spicker (cited in Atkinson and Davoudi, 2000) points out, however, there are two variants of the social integrationist discourse: the one Levitas identifies as a 'new Durkheimian hegemony' that justifies differences between groups, and a more republican version that identifies solidarity as transcending individual, class, ethnic and regional interests (O'Reilly, 2005:82).

The specialization paradigm, indicative of the Anglo-Saxon world, in contrast, is one of social differentiation. The Anglo-Saxon liberalism assumes that individuals differ; giving rise to specialization in the market and social groups and thus views the social order as networks of voluntary exchanges. The liberal tradition emphasizes the contractual exchange of rights and obligations and the separation of spheres in social life. Thus, according to this paradigm, the exclusion is a form of discrimination, which occurs when individuals are denied free movement and exchange between spheres, when rules inappropriate to a given sphere are enforced, or when group boundaries impede individual freedom to participate in social exchanges.

The third paradigm, influential on the European Left, views exclusion as a consequence of the formation of group monopolies, with resources being controlled by hierarchical and exclusive networks. Drawing heavily on Weber, and to some extent Marx, it views the social order as coercive, imposed through a set of hierarchical power relations. According to this paradigm, exclusion arises from the interplay of class,

status, and political power and serves the interest of the included and the excluded are simultaneously outsiders and dominated. Exclusion can be combated through citizenship and the extension of equal membership and full participation in the community.

According to Levitas (1998), the redistributionist moral discourse that accompanies the monopoly paradigm prefigures inclusion in terms of citizenship rights which would promote equality (Levitas, 1998, cited in O'Reilly, 2005:82). The utilization of a discourse of rights as a tool for social change has been challenged by the responsibilities discourse of neo-conservative parties and commentators, while the monopoly paradigm implies that a restructuring of the economy is necessary to change the unequal distributions within society to which current social rights are only a palliative (O'Reilly, 2005:82).

Even though Hillary Silver has tried to locate her paradigm of exclusion based on the nature of society, nevertheless, such differentiated conceptions of the nature of society would entail different notions of what exclusion and inclusion would mean. This paradigm based on the nature of society calls for different conceptions of what constitutes inclusion and exclusion, thus, making it even more difficult to devise a suitable means for promoting inclusion. In the same light Jackson (1999) also argues that dualistic opposition between inclusion and exclusion tends to emphasize exclusion as the opposite of integration, which limits exploration of the contradictions in the multiplicity of exclusion or the paradoxes of simultaneous inclusion and exclusion.

Even at the level of a single society, the concept, by presenting forms of social differentiation in terms of a single descriptor, implies that the various groups that make up the 'excluded' may have more in common than is the case (Francis, 2000:76). Francis (2000:76) further adds that the mechanisms that create and perpetuate disadvantage among, for example, the disabled, women, scheduled castes, pastoralist, the landless, the Roma, and the industrial employees are very different and whatever the superficial attraction of a common schema, placing these groups in a single category may do little to aid the understanding of the specific difficulties that any of them face or to help resolve these. A case in point has been illustrated by Jackson (1999) where she argues that early liberal

western feminisms produced a universalizing theory of marginality, which tended to view the marginality of women as 'parallel in its form to the marginalized of the colonized, the non-white, or the poor' (Tsing, 1993:18, cited in Jackson, 1999:130) which failed to take into account the divisions between women, and the fact that gender marks social relations across and within groups. This position shifts the focus on the gendered construction of identities rather on a bounded category of exclusion based on gender.

She further argues that a binary and polarized formulation of inclusion and exclusion is problematic for at least two reasons. First, it suggests a unitary notion of power in which the included are powerful and excluded are powerless, rather than one in which power is dispersed, contingent, and unstable. Second, dualist discourses can themselves be structures of control, which deserve to be questioned and decentered (Jackson, 1999:132.).

Cursory reviews of the concept of social exclusion indicate different conceptions of what constitutes social inclusion and exclusion. The concepts and definitions vary both in academia and in development policies. For instance, some analysts see social exclusion as a cause of poverty, others suggest that it is both an expression and a determinant, of poverty and most would probably agree that poverty is a form of social exclusion (de Haan, 1998, cited in Jackson, 1999:126). Although originally defined in terms of the rupture of social bonds, and applied to social disintegration rather than poverty *per se*, social exclusion has developed in a range of paradigmatic styles in different political and intellectual contexts (Silver, 1995, cited in *Jackson*, 1999:126). In development discourse, social exclusion is discussed predominantly in terms of its relationship to poverty. Is it a cause or consequence of poverty or cause of poverty? Is it a better way of conceptualizing poverty? How does it differ from other ways of conceptualizing poverty? (de Hann, 1998, Gore and Figueiredo, 1997, cited in Jackson, 1999:126) Furthermore, inclusion and exclusion are inseparable sides of the same coin: the strength of intragroup ties and of the identity that forges them is inseparable from a community's definition of itself as distinctive. And if inclusion implies, as it may, incorporation into exploitative or violent relationships, exclusion may not always be a bad thing (Francis, 2000:76).

Given this variation on the conception of exclusion, Francis (2000) contends that the notion of social exclusion, while carrying several pointers for a broader and less income-focused conception of generation is not a very precise or a nuanced one (Francis, 2000:76). Indeed, one may suspect with Atkinson (1998:13) that it has gained such wide currency partly because it means all things to all people.

3. SOCIAL INCLUSION

A review of the limited literature accessible to the author has shown that social inclusion has not been defined in its own right. In literature conceptualizing exclusion, conceptions of inclusions are implicit and unproblematized. Social inclusion is seen to be defined concerning social exclusion. Some analysts have argued that both inclusion and exclusion are an inseparable side of the same coin. However, some comment that academic debate on social exclusion has been relatively silent on its assumed corollary.

There have been some notable contributions to a debate on inclusion (cf. in particular the essays in Askonas and Stewart, 2000), but this has not been closely integrated into the wider debate on exclusion. It, therefore, remains the case that in the majority of the exclusion literature the nature and meaning of social inclusion are merely implied or asserted (Cameron, 2006:396). Only if the question of what constitutes inclusion is addressed can the question of what constitutes exclusion be posed. Each question is mutually dependent on the other. (O'Reilly, 2005:84)

Cameron (2006) further argues that due to an inadequate understanding of what is meant by inclusion, the attention has been focused on the problems and deficits of 'excluded" (Cameron, 2006:397). He deplores the way by which the issue of inclusion has been taken up about the debate of exclusion, but fails to provide his conceptualization on the issue. He alluded this shortcoming to a result of a general failure to develop a critical understanding of the real and discursive *geographies* of social inclusion. For instance, he remarks,

> Where a conceptualization of inclusion does appear in the social exclusion literature, it is often only indirect. Frequently, for example, it appears in invocations of 'normal' social expectation/participation or, more commonly,' mainstream' applied to various things that people are understood to be excluded from the labor market, economy, society, culture, citizenship, etc. The meaning and location of the mainstream are routinely taken to be self-evident. As this implies, social inclusion is most commonly defined only *negatively* – as whatever is *not socially excluded*. For this reason, much of the discussion of social inclusion is conceptually dominated by exclusion – social exclusion is the datum point against which social inclusion is both empirically measured and conceptually defined (Cameron, 2006:397)

Although social inclusion has been defined with regards to social exclusion in many of the works of literature, Jackson (1999) argues that there can be simultaneous exclusion and inclusion, that is individuals and groups can be excluded in one domain and included in another, for instance, "social relations of kinship and marriage include whilst they exclude and affirm, as they deny membership rights' (Jackson, 1999:129). One can thus talk about inclusion in the domain of language but exclusion in political and economic domains, e.g. in the case of parbate Dalits; or exclusion from the dominant language and culture but inclusion in political and economic domains, as in the case of Newars (Pradhan, 2006).

Likewise, Jackson (1999:130) drawing on the works of marginality by Anna Tsing (1998:18) argues that marginality is both a source of constraint and creativity. Marginality offers both limitations and opportunities, for instance, women can use the idioms of motherhood and the domestic as the basis for voice. Jackson (1999) quoting the work of Tsing (1998) on the Meratus women of Indonesia reveals that gendered experience of marginality in which, 'as one moves closer to power centers, one gains both luxury and servitude; as one moves away, one gains autonomy with hardships.

Feminist inquiries have also shown that marginality need not only be a social disadvantage but can be both the ground of resistant discourses and resource claims. For example, in a piece on women irrigators in Nepal Margareet Swarteveen and Nita Neupane (1996, cited in Jackson, 1998) have shown that identities of exclusion and vulnerability were utilized to argue successfully for priority in water supply, to justify 'stealing' of water, to avoid night irrigation, to win exemption (on grounds of lesser strength and the undesirability of women working alongside strange men) from contributing to system construction and maintenance and reduction in cash contributions (Jackson, 1998:131). Thus, if inclusion implies, incorporation into exploitative or violent relationships, exclusion may not always be undesirable. More important is the ability of individuals and groups to control the terms under which they are included. For instance, debates about marginality have deep roots in Latin America where poverty is seen as resulting not from lack of integration the world capitalist system, but rather from the terms of incorporation of individuals and communities within it (Gore, 1995:5, cited in Jackson, 1999:128)

Jackson (1999:135) also reminds us that inclusion can also produce exclusion, and this occurs, when excluded groups successfully achieve inclusion based on excluding groups even weaker than themselves. For example, women may deny their gender interest in a bid for inclusion through adopting male postures or the socially mobile poor may position themselves nearer the center through dissociation from the seriously poor. Pradhan (2006) claims that social inclusion has been frequently made by constructing an excluded other in Nepal. However, many ethnic groups discriminate against the Dalits, and upper-caste women discriminate against low caste women. He also argues that the hill ethnic groups and Dalits may achieve inclusion into the state structures by excluding the Madhesis, especially those who are neither Dalits nor *adivasis/janjatis*.

Thus, the included/excluded dualism apparent in the writings of social inclusion and exclusion cannot be taken at face value. The politics of dualistic inclusion/exclusion deserve questioning in other ways. One of these is to consider in what sense there is a single center of social integration, who is excluded from what, and whose representation

of the center is privileged (Jackson, 1999:133). She further notes that representation of both the included and the excluded need to be critiqued. Jackson (1999:133) drawing on Fraser (1997:75) argues that, in 19th century America, 'the view that women and blacks were excluded from "the public sphere" turned out to be ideological; it rests on a class and gender-based notion of publicity, one that accepts at face value the bourgeois public's claim to be the public. Pradhan (2006) also cautions against taking the arguments at face value, where he writes, 'to say that the janjatis, Dalits, women, and Madhesis are excluded and thus have to be included, without adding further qualifications, may be politically correct and useful for research and project grants, but it does not help us to understand the complexities of the relationships between exclusion and inclusion".

4. INCLUSION/EXCLUSION DEBATE IN NEPAL

The inclusion/exclusion debate has now pervaded both the official and development policy discourse in Nepal. Inclusion as an official policy made inroads into the government policy after inclusion was incorporated as one of the four pillars of Nepal's Poverty Reduction Strategy Paper (PRSP) in 2003, which is also Nepal's Tenth Plan. Contemporarily, inclusion, state restructuring, proportionate representations, federalism are the recurring themes in today's public discourse in Nepal.

The resurgence of ethnic identity was fortified after the reinstatement of multiparty democracy in 1990. Along with ethnic revivalism, issues and grievances of the Madhes were also spearheaded by political parties, mainly the party which had its electoral base in the Madhes. However, with the current change in regime after the popular uprising in April, which has been dubbed as Janandolan-II, cultural, ethnic, linguistic and even territorial claims have boiled over with intensity, hitherto unknown.

The ethnic groups, the Madhes and Dalits have now challenged what they call the hegemony of the parbatiya hill 'high' castes. Ethnic groups in particular have rejected and come down heavily on what they call the process of Hinduization[2], which according to them have relegated them to the margins. They have called for proportionate representation and ethnic autonomy with the right to self-determination. Likewise, the

2. is a process of social ordering according to the Hindu framework which is typically based on a hierarchy of caste.

grievances of the Madhes that have now surfaced after the success of the Janandolan-II are not new either. Long back, Gaige (1975) had argued concerning the Tarai region that Nepal had been geographically united; however, the State had not been able to accommodate the aspirations and culture of the Tarai in the national framework. Gaige (1975:195) had then stated that integration of the Tarai in the national framework by force is not a viable option, but a more realistic approach would be to draw the plains people into the national structure through participation in the nation's political life, through the encouragement of the voluntary acceptance of national political and cultural values. Likewise, Dalits in both the hill and Tarai face the brunt of the discriminatory practices prevailing in Nepal, since, it is a common practice whereby non-Dalits, including both caste and ethnic communities in both the hill and Tarai regions as well as in rural and urban settings, exclude Dalits.

There is no doubt that the cultural and linguistic rights of the ethnic communities have been denied by the State. Nevertheless, what I would like to argue is that it would be wrong to treat the issue of exclusion in a simplistic manner or understand it through the binary opposition of exclusion/inclusion. Thus, the issue must be discussed and debated by identifying the variations amongst the social sub-categories within the caste and ethnic population as well as between members belonging to them. Available literature in Nepal on social discrimination/ exclusion/ inequality has paid little attention to this. Rather, it puts forward an argument that the Brahmans and Chhetris are the most privileged among all caste and ethnic communities and they have remained in positions of power and have used this privilege to shape the system of values in society as well as to divert its opportunities and resources in favor of their communities (Pandey et.al., 2006:76). This type of perception has been expressed in the metaphor of what has been commonly termed as 'Bahunbad' (Bista, 1992).

At a broader level of generality, these arguments are not unfounded. Nevertheless, Nepal's caste and ethnic population constitute several diversities, and internal variations among different ethnic communities also exist. Data available for the case of Newars and Thakalis indicate that unlike what has been said about the ethnic population and indicative

of the discourse on exclusion/inclusion, the share of these two ethnic groups in the opportunities and facilities available in the country is higher than any caste group or any other ethnic community. This is true to their share in the graduate population, urban population, business transactions, technical, legislative, administrative, and clerical jobs in governmental institutions, income levels, and access to other facilities (See Pandey et al:77). Such a context also enables us to be aware of the limitations associated with perceiving caste and ethnic population as homogenous categories.

Thus, the debates of inclusion/exclusion in Nepal have not taken into account the differences in terms of the proportion of privileged population contained within each group, which indicates that 'other' analytical categories of comparison should be formulated while indicating the extent of inclusion or exclusion in Nepal.

5. CONCLUSION

The concept of social inclusion/exclusion emerged in response to the crisis of the welfare state in Europe, which had an increasing impact on the analysis of social disadvantages in Europe over the last couple of decades. When the concept was first employed in France in the 1970s, it took into account people unable to adjust to mainstream society, and later other European countries adopted it with their interpretation. The concept gained widespread applicability after the First World Summit on Social Development in Copenhagen in 1995 as a result of which, it was embraced into the development discourse and development agencies. Likewise, inclusion was also incorporated in the official policy discourse of Nepal in 2003, after which, the issue has gained considerable currency. However, Nepal's tryst with the concept should also be understood in the broader context of policy discourse that surrounds official development agencies, and its considerable leverage in the development policy of Nepal.

As is seen social exclusion/inclusion is a contestable term, and thus its relevance to Nepal in its European avatar is open to a lot of questions. Furthermore, given the diversities in Nepal, with its own social, cultural, historical realities, the concept needs more deliberation and needs to reflect the realities of Nepal going beyond popular discourse and emotive appeal for a segment of the population.

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MARGINALIZATION OF YOUNG PEOPLE IN SOCIETY

Oksana Duchak
Ph.D. candidate at the Faculty of Social Sciences in general Pedagogy at The John Paul II Catholic University of Lublin in Poland.

1. INTRODUCTION

Modern society has a lot of issues that require immediate interference from the side of state policy and government. A special place among these problems takes the process of marginalization of young people which is caused by the deformation of state and public institutions, destruction of social, cultural, ideological, and political bases of life, loss of value orientations. Stereotypical presumptions about people, coupled with prejudiced views concerning specific religions and their followers, are dangerous concerning the influence that these stereotypes can have on progress towards social integration and community cohesion[1]. Social exclusion produces negative consequences and long-term damage to the living conditions, social and economic participation, health status, and emotional life of young people. It also leads to the intergenerational transmission of poverty[2]. Social status and social feeling of the population, including the young people, are constitutive features of changes that appear in the society and define the level of social condition, which depends on the possibility of youth realization and meeting their needs.

Political philosopher Iris Marion Young supposes marginalization is a growing problem in the developed nations:

> Marginalization is perhaps the most dangerous form of oppression. A whole category of people is expelled from useful participation in social life[3].

Research conducted on youth shows that experiences of poverty, homelessness, racism, unemployment, abuse, addiction, gender

1. Experience of discrimination, social marginalization and violence: a comparative study of Muslim and non-Muslim youth in three EU Member States. European Union Agency for Fundamental Rights, 2010, p. 3.
2. G. Paolini. *Youth Social Exclusion and Lessons from Youth Work*. Produced by the Education, Audiovisual and Culture Executive Agency, p. 4.
3. I. M Young. *Justice and the politics of difference*. Princeton, NJ: Princeton University Press, 1990, p. 53.

preference, and so on generally determine marginalization but not necessarily[4]. Almost one out of three young people between the ages of 18 and 24 is at risk of social exclusion and poverty in the European Union[5].

The notion of social exclusion and social marginalization are enlightened in the paper and propositions for the development of effective policy strategies to prevent marginalization are presented. This article deals with analyzing the determinants of social exclusion, the ideology of marginalization, educational marginalization.

2. THE NOTION OF SOCIAL EXCLUSION AND SOCIAL MARGINALIZATION

The notion of social exclusion can appear at different levels of human life, affecting not only the individual person but also the whole group and is a major problem in the world.

> "Social exclusion" is a concept that can be characterized and developed in two ways. In a narrow sense, it is used as a synonym for income poverty and refers to people who are not connected with the paid labor market or to people in low-wage work[6]. It can be understood broadly – it means much more than poverty, deprivation, income inequity, or lack of employment. The matter is that social exclusion is multidimensional[7]. In contrast to poverty and unemployment which concentrate on households or individuals, social exclusion is mainly concerned with the relationship between the individual and society, and the dynamics of that connection[8].

Social exclusion may be a part of capability poverty. A Scottish moral philosopher and a pioneer of political economy Adam Smith focus on the deprivation involved in not "being able to appear in public without

4. R. Omidvar & T. Richmond. *Immigrant settlement and social inclusion in Canada*. Working Paper Series: Perspectives on Social Inclusion. Laidlaw Foundation, 2003.
5. According to the latest data published by Eurostat, an estimate of 29,8% of young people in the 18-24 age group were at risk of poverty or social exclusion in the EU in 2011. Data can be accessed at http://epp.eurostat.ec.europa.eu/portal/page/portal/employment_social_policy_equality/youth/indicators (access: 25. 10. 2013).
6. R. Peace. *Social exclusion: a concept in need of definition? "Social Policy Journal of New Zealand"*, 2001: Issue 16, p. 26.
7. The same.
8. S. Klasen. *Social exclusion, children, and education: conceptual and measurement issues*, p. 2.

shame" is a good example of a capability deprivation, taking the form of social exclusion. It reflects the importance of participating in community life and according to Aristotelian understanding that the individual lives inevitable "social" life[9]. The point of Smith is that inability to interact freely with others is a significant deprivation in itself and some types of social exclusion must perceive as constitutive components of the idea of poverty[10].

Social exclusion is a process whereby individuals, groups, or communities are pushed to the edge of society, cut off from community networks and activities, and kept from taking part fully on account of their poverty, lack of education, poor health, or other disadvantages. This may be the result of discrimination or an unintended outcome of policies[11]. The reason for the social exclusion of young people is external and internal – their independence doesn't make any possibility to change the situation.

Marginalization combines social exclusion and discrimination. It insults human dignity and it objects human rights, especially the right to live effectively as equal citizens[12]. Families, ethnic groups may be marginalized within localities. Marginalization is a shifting phenomenon. For example, individuals may be satisfied with their social status at some period, but when the social change takes place, they lose this status and become marginalized[13]. Social marginalization represents the influence on the health condition. The impact goes in many directions which intertwinement is evident[14]. (see Figure 1)

9. A. Sen. *Social exclusion: concept, application, and scrutiny. "Social Development Papers"*, Asian Development Bank, 2000. No.1, p. 4.

10. The same, p. 5.

11. Volunteerism and Social Inclusion. An extract from the 2011 State of the World's Volunteerism Report, 2011, p. 3.

12. S. Cornish. *Globalization and Marginalization: Discussion guide to the Jesuit Task Force Report.* Loyola Institute, Australian Jesuits, 2007.

13. M Burton, C. Kagan, Marginalization, In I. Prilleltensky and G. Nelson. *Community Psychology: In pursuit of wellness and liberation.* London: MacMillan/Palgrave, 2003.

14. C. Kagan, D. Burns, M. Burton, I. Crespo, R. Evans, K. Knowles, et al. *Working with People who are marginalized by the social system: challenges for community psychological work.* Available at: http://www.homepages.poptel.org.uk/mark.burton/margibarc.pdf (access: 18. 03. 2014).

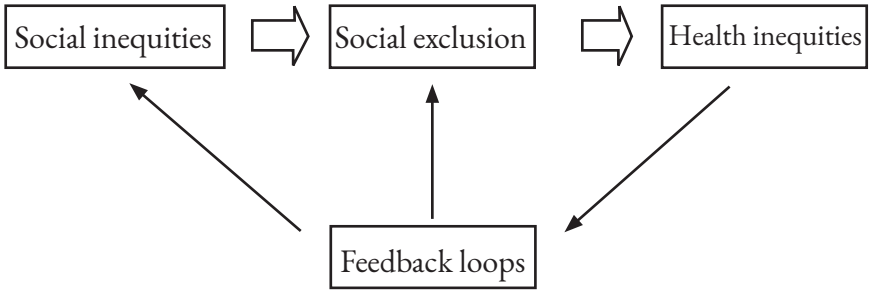

Figure 1

Peter Leonard in his book "*Personality and Ideology*" defines social marginality as "*being outside the mainstream of productive activity and/or social reproductive activity*"[15]. This includes two groups, a relatively small group of people who are voluntarily marginal to the social order (artists, commune members, religious sects) and groups who are involuntarily socially marginal. Leonard characterizes these people as "*involuntary social marginality*"[16]. It is difficult to give a precise definition of marginalization. But many previous studies have shown that it has a background of statistically measurable risk factors such as unemployment, lack of vocational skills and education, lack of family and social support, living in rental houses, or living in the unemployment area[17].

3. DETERMINANTS OF SOCIAL EXCLUSION

The main determinants of social exclusion are poor levels of education, living in remote geographical areas, discrimination because of monetary poverty, personal characteristics, unemployment, the experience of juvenile delinquency. The ground on socio-economic position, individuals and groups experience differences in exposure and vulnerability to marginalization[18].

By discrimination, we usually mean the treatment of a person based on the group to which a person belongs, not taking into consideration

15. P. Leonard. *Personality and ideology: Towards a materialist understanding of the individual*, London: Macmillan 1984, p. 180.
16. The same, p. 181.
17. A. Antilla and A. Uusitalo (ed). *Contemporary marginalization and exclusion of young people – whose reality counts?* NUORA Publications, 1998, No. 10, p. 30.
18. G. Paolini. *Youth Social Exclusion and Lessons from Youth Work*. Produced by the Education, Audiovisual and Culture Executive Agency, p. 6.

personal achievements. Repetitive experiences of discrimination (based on various individual characteristics such as ethnic background, gender, sexual orientation, religion, language) increase the probability of experiencing social exclusion[19]. Data indicate that feeling discriminated because of gender and sexual orientation lead to poorer levels of emotional wellbeing and bad health condition. Amongst the determinants of social exclusion, inequalities based on sexual identity and gender seems to be the strongest factors inducing physical and emotional suffering amongst young people[20].

In the life circle of socially excluded young people, early school leaving and barriers to accessing quality education and training are common occasions, impacting their ability to secure comfortable living conditions, enjoy political and cultural participation, defend their health, and obtain assistance when necessary. Combating these problems has been the EU's aim in establishing the target of reducing the rates of early school leaving to below 10 % as part of its EU2020 strategy[21]. Several studies on the consequences of school failure point out that dropping out of school can result in lower employment rates, lower lifetime earnings, worse health status, less risk aversion, and lower satisfaction of life[22].

Unemployment is a powerful threat for young people which leads to psychological discomfort and low self-esteem. The absence of education and work for a long period results in the social and political marginalization of young people, strengthening the feeling of powerlessness and dependence. Being not in employment, education, and training is also linked to risk behavior, having consequences of worse health conditions and further social exclusion[23].

There are three types of social practices and attitudes which result in exclusion:

19. The same, p. 7.
20. The same, p. 9.
21. Council conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training ('ET 2020'). OJ C 119, 28.05.2009, pp. 2-10.
22. G. Psacharopoulos. *The Costs of School Failure*. Analytical Report for the European Commission prepared by the European Expert Network on Economics of Education (EENEE), 2007, p. 7.
23. G. Paolini. *Youth Social Exclusion and Lessons from Youth Work*. Produced by the Education, Audiovisual and Culture Executive Agency, p. 14.

a) Mobilization of institutional prejudice: This refers to the existence of "a predominant set of values, rituals and institutional procedures that operate systematically and consistently to the benefit of certain persons and groups at the expense of others";
b) unruly practices: this refers to the gaps between rules and their implementation;
c) social closure: this is how "social collectiveness seeks to maximize rewards by restricting access to resources and opportunities to a limited circle of eligible"[24].

One can think of three main categories of the social aspect s of exclusion:
a) access to social services (such as health and education);
b) access to the labor market (precariousness of employment as distinct from low pay);
c) the opportunity for social participation and its effects on the social fabric (greater crime, juvenile delinquency, homelessness, and so on)[25].

4. IDEOLOGY OF MARGINALIZATION

Poverty is one of the main reasons and one of the main consequences of marginalization. It is an almost unavoidable characteristic of all types of marginalized population groups: the ones suffering from AIDS, persons with difficulties in individual development, convicts, persons with mental disorders, refugees, homosexuals, juvenile delinquents, homeless[26].

The two dimensions of marginalization, such as disempowerment/ social dislocation and poverty/economic dislocation, can be considered as primary material insults. Being a part of a marginalized group also brings the risk of some more psychosocial-ideological threats. The first is the definition of one's identity by others: the ideological definition of one's marginalized identity in the interest of the dominant groups in society. Besides, we can notice that the situation of the marginalized persons is portrayed as a result of their characteristic features[27].

24. S. Kham. *Topic guide on Social Exclusion*. International Development Department. University of Birmingham, 2012, p. 9.
25. A. Bhalla and F. Lapeyre. *Social exclusion: Towards an Analytical and Operational Framework*, p. 419.
26. C. Sagric, O. Radulovic and M. Bogdanonovic and R. Markovic. *Social marginalization and health*, p. 50.
27. M. Burton and C. Kagan. Marginalization. In I. Prilleltensky and G. Nelson (Eds.). *Community Psychology: In pursuit of wellness and liberation*. London: MacMillan/Palgrave, 2003.

The problems that people face are then seen as of their own making, or at least as inseparable from their particular nature. The phenomenon is naturalized; it can be understood not only as a social aspect but as something which can be expected in the person. This phenomenon has been called 'blaming the victim'[28] and it is part of a more general 'culture of blame'[29]. For example, it has been suggested that personality characteristics develop in a specific cultural context, for example, a 'culture of poverty' in which destitution result in cultural patterns that are passed on and are no longer adaptive[30].

5. EDUCATIONAL MARGINALIZATION

Educational marginalization is understood as the status of an individual that has an educational level sufficiently lower than average to feel like marginalized in the society in general and in the labor market in particular because of her/his educational gap[31].

Before identifying the educationally marginalized, it is important to look at levels of educational attainment by country, age, and gender. There are some facts worth noticing:

a) In some countries, education attainment is low by international standards, at all educational levels;

b) The share of individuals with primary education or below is in some countries still very high by international standards. In particular, those with primary education or below are 42 % of men and 39 % of women in Syria; about 15 % for women and 9 % for men in Iran; about 25 % of women and 14 % circa of men in Egypt; 18 % for both men and women in Kosovo; 18.5 % for men and about 12 % for women in Nepal;

c) In some countries, the share of university graduates is similar to that of more advanced economies (Egypt, Iran), whereas it is dramatically lagging in other countries (Kosovo, Syria). Azerbaijan, China, Mongolia, and Nepal are in an intermediate position.

28. W. Ryan. *Blaming the victim*. New York: Vintage Books, 1976.

29. B.A. Farber & S. T. Azar. *Blaming the helpers: The marginalization of teachers and parents of the urban poor.* "American Journal of Orthopsychiatry", 1999, 69, pp. 515-528.

30. C. Kagan, D. Burns, M. Burton, I. Crespo, R. Evans, K. Knowles, J. L Lalueza and J. Sixsmith. *Working with People who are marginalized by the social system: challenges for community psychological work*. p. 7. Much of this paper is adapted from an expanded version of this paper, to appear as M. Burton and C. Kagan (in press). Marginalization. In: I. Prilleltensky and G. Nelson. Community Psychology: In pursuit of wellness and liberation. London: Macmillan/Palgrave.

31. F. Pastore. Marginalization of young people in education and work: Findings from the School-to-Work Transition Surveys. Background paper prepared for the Education for All Global Monitoring Report, 2012, p. 3.

d) In some countries, women, experience a disadvantage concerning men. This is, in particular, the case of Egypt and Iran, whereas in other countries, the share of women that attain primary education or below is greater than that of men;
e) With few exceptions (Azerbaijan, Egypt, Iran), women reach higher educational levels than men, in terms of high secondary and tertiary education[32].

Education can be a source of exclusion and marginalization for young people and children, besides can involve problems. This is particularly the case if, for some children, it fails to meet the standard called for in the Convention of the Rights of Children of 'development of the child's personality, talents, and mental and physical abilities to their fullest potential'. Also, educational policies can encourage social exclusion as being adults[33].

6. THE ROLE OF COMMUNITY PSYCHOLOGY FOR PREVENTING MARGINALIZATION

Community psychology can be a rather helpful and productive way to respond to the challenge of youth marginalization. Its work concentrates on critically using notions from the psychology of individuals to comprehend the processes that penetrate marginalized people. Besides, community psychology has to avoid two subsidiary mistakes: the neglect of the subjective experience of social actors and the individualization of social problems[34].

It's worth mentioning the definition of community psychology, which reflects its significance:

> Community Psychology concerns the relationships of the individual to communities and society. Through collaborative research and action, community psychologists seek to understand and to enhance the quality of life for individuals, communities, and society[35].

32. The same, p. 4.
33. S. Klasen. *Social exclusion, children, and education: conceptual and measurement issues*, p. 9.
34. M. Burton, C. Kagan, *Marginalization*. In I. Prilleltensky and G. Nelson (Eds.). *Community Psychology: In pursuit of wellness and liberation*. London: MacMillan/Palgrave, 2003.
35. J. H. Dalton, M. J. Elias, & A. Wandersman. *Community psychology: Linking individuals and communities*, Stamford, CT: Wadsworth, 2001, p. 5.

The practice of community psychology is based on a philosophy of change and community psychologists being actively involved in community processes that try to understand them. Community psychology interventions are competently placed in the community in non-clinical settings. With prevention as a key point, the community psychologist indents to effect social change in a broad context, participating in the community itself and cooperating with other community members. Community psychologists' concentrates on the rights of people use the privilege afforded them to effect change towards a more neutral distribution of resources, especially for those who may be marginalized. Also, many psychologists believe that loneliness is the main problem that takes place among many people in Western society. That's why community psychologies try to encourage to build a community, participating in various communities as it increases the quality of life and emotional stability[36].

7. CONCLUSION

Young people may be socially excluded suffering from material deprivation, social, and emotional marginalization. "Social exclusion" is a concept that can be defined in two ways. In a narrow sense, it is used as a synonym for income poverty and refers to people who are not connected with the paid labor market or to people in low-wage work[37]. In the second sense, it means much more than poverty, deprivation, income inequity, or lack of employment. Social exclusion is a process where individuals, groups, or communities are pushed to the edge of society, cut off from community networks and activities, and kept from taking part fully on account of their poverty, lack of education, or other disadvantages. Marginalization combines social exclusion and discrimination.

The main determinants of social exclusion are poor levels of education, living in remote geographical areas, discrimination because of monetary poverty, personal characteristics, unemployment, the experience of juvenile delinquency. Educational marginalization is understood as the status of an individual that has an educational level sufficiently lower than average to feel like marginalized in the society in general and in the

36. May be available at: http://www.uml.edu/docs/Community%20Psychology%20%20Guiding%20Principles_tcm18-116910.pdf (access: 13. 03. 2014).

37. R. Peace. *Social exclusion: a concept in need of definition?* "Social Policy Journal of New Zealand", 2001, Issue 16, p. 26.

labor market in particular because of her/his educational gap. The work of community psychologists concentrates on critically using notions from the psychology of individuals to comprehend the processes that penetrate marginalized people.

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4 Cornish S., *Globalization, and Marginalization: Discussion guide to the Jesuit Task Force Report*, Loyola Institute: Australian Jesuits, 2007.

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16 Peace R., *Social Policy Journal of New Zealand 16* (2001), 26.
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SOCIAL EXCLUSION AND CHILDREN IN OECD COUNTRIES: SOME CONCEPTUAL ISSUES

Stephan Klasen
Department of Economics University of Munich, Germany.

1. DEFINING SOCIAL EXCLUSION

1. Ever since the term first gained usage in France in the 1970s (Evans, Paugham, and Prelis, 1995), social exclusion has, alongside poverty and inequality, become one of the most important concepts in social policy debates in Europe. At the same time, there is considerable lack of clarity about the meaning of this concept, so that a first important task in setting out conceptual issues surrounding social exclusion and children is to define the term. While many writers have used the term interchangeably with poverty and/or unemployment (Regional Studies Conference, 1997), such usage adds little new to the focus of the commonly discussed issues of poverty and unemployment. To add conceptual meaning to social exclusion, it is important to make the distinction between social exclusion and poverty or unemployment.

2. K Duffy defined social exclusion as: 'low material means and inability to participate effectively in economic, social, and cultural life, and, in some characteristics, alienation and distance from the mainstream society.' (Duffy 1995). While this definition adds important new dimensions to the term and distinguishes it from income poverty, it is a bit ambiguous as it assumes that 'low material means' (i.e. income poverty) is an integral part of it. As argued below, this does not necessarily have to be the case, although it is likely that poverty is a contributing factor to the inability to participate and the alienation from mainstream society.

3. Room (1995) adds a new dimension to the discussion by couching the issue of social exclusion in a rights-based language when he talks about social exclusion as the 'denial or non-realisation of civil, political, and social rights of citizenship.' Such a rights-based approach to the problem

of social exclusion has much to recommend it. It has a great affinity with the capability approach developed by Amartya Sen which calls for efforts to ensure that people have equal access to basic capabilities such as the ability to be healthy, well-fed, housed, integrated into the community, participate in community and public life, and enjoy social bases of self-respect (Sen, 1992).[1] 1 The term social exclusion would then be seen as the denial of the last three important capabilities. The advantages of the capability and rights-based approach to this issue are the following:

4. First, it emphasises that the inability to participate in and be respected by, mainstream society is a violation of a basic right that should be open to all citizens (or residents).[2] 2 It thereby places a burden on *society* to ensure that it enables participation and integration of all its members (Walker, 1997). As a result, there is less temptation to blame the excluded for their fate as is often the temptation in a discussion about poverty and welfare.[3] 3 Instead, it highlights the role of political, economic and social arrangements in generating exclusion and the role of solidarity among members in overcoming it (Townsend, 1997).

5. Second, it does not demand uniformity of outcomes but instead calls for equal freedoms for all to enjoy all aspects of citizenship. Thus, an important distinction may be made between, for example, economic and social discrimination of ethnic minorities as a denial of some fundamental rights of participation, and diversity of cultural and social arrangements, where portions of some ethnic or cultural minorities may choose to not participate in mainstream society despite the option to do so. The former could be an incidence of social exclusion, while the latter would not.

6. Third, it recognises the diversity of people in their ability to make use of opportunities. For example, participation in mainstream society may be seriously constrained for people with physical and mental disabilities, as it could for people who are otherwise disadvantaged by birth or background. Thus, calling for equal capabilities (or the ability to exercise

1. Adam Smith referred to this last issue as the ability to 'walk in public without shame', the failure of which he considered to be an important criterion of poverty.
2. Citizenship itself can be a contested term and can become an exclusionary tool within a society. The refusal and or hurdles associated with granting citizenship to long-term residents of foreign origins (such as first, second and third generation foreign residents in Germany) can lead to forms of social exclusion of long-term residents who only enjoy partial citizenship rights (Mitchell and Russell, 1994). See discussion below.
3. This does not, of course, mean that efforts to reduce social exclusion will not importantly depend on the efforts of excluded individuals to be 're-inserted'.

civil and social citizenship rights) may necessitate extra efforts by society to provide equal capabilities to such people. An equal starting point (or 'equal opportunities') may not be enough to ensure equal capabilities.[4]

7. It is important to clarify that rights in such a rights-based approach to social exclusion should not necessarily be seen as legally enforceable claims. Instead, these rights should be seen as part of our endowment as human beings and that efforts should be made to enable us to realise these rights. Whether societies will be able to extend these rights fully to all of their citizens (and possibly make some of them legally enforceable claims) depends on public consideration of the priority these rights should enjoy over other rights (such as the right of limits to undue interference by others, including the state), as well as the policies and means available and the incentives that such policies may create (e.g. in a poor country, it may not be possible to extend all the support that is necessary to ensure a disadvantages person does not suffer from social exclusion)

8. Applying 'social exclusion' to children necessitates further considerations. Since children are citizens who are entitled to rights and capabilities, 'social exclusion' is an issue violating their rights and capabilities directly. At the same time, since children are growing to be adults and decisions, choices, and opportunities in childhood will crucially affect their position as adults, the impact of issues such as education and socialisation on their likely social exclusion as adults will have to be examined as well.

9. Before concluding the discussion of the terminology, it may be important to make clear distinctions between the capability-based definition of social exclusion used above and two related issues, namely poverty and disability.

10. Discussions of poverty in OECD countries tend to be very income-focused (mainly due to the extensive use of poverty lines as the primary measure of poverty).[5]

11. Social exclusion is, on the other hand, not primarily concerned with income at all, but with the capabilities, people enjoy or fail to enjoy.

4. This distinction was at the heart of a recent debate between Sen and Rawls about the focus on 'equal capabilities' or the focus on equal access to 'primary goods. Sen argued that equal access to primary goods may not be enough for those who are disadvantaged by birth or background and may therefore need more to achieve the same capabilities (Sen, 1990).

5. One could, of course, develop much broader measures of deprivation measuring many more capabilities directly. See for example the various multivariate indices proposed by the London Research Group in their attempts to map poverty and social exclusion in London (LRG, 1996).

Income, of course, maybe extremely important in generating some of the capabilities that would ensure social inclusion (see below). Particularly in a market economy, the ability to participate in community and public life, as well as the social bases for self-respect, are in important ways related to one's incomes. At the same time, income is only an imperfect proxy for inclusion or exclusion as even many non-poor may suffer from social exclusion as the same income may generate very different capabilities for people due to their inherent diversity of people and a result of inherent disadvantages by birth, background, or environment. Moreover, many elements of social 'inclusion' cannot be purchased with incomes as they are public goods that are underprovided by markets and therefore depend on the public provision (or public support for private provision) or are directly dependent on public policy.[6]

12. There are cases where a well-intentioned and successful anti-poverty strategy, such as a means-tested cash transfer system which succeeds in lifting incomes above a defined poverty line, could further social exclusion if there is a considerable social stigma attached to receiving these benefits and if it traps people in welfare dependency. For example, some have argued that the increasing reliance on means-tested transfers in the UK over the past 15 years has generated such stigmatisation and exclusion, while greater reliance on contributory and insurance-based mechanisms of social support has less stigma attached and keeps recipients more firmly integrated into the mainstream society (Evans et al. 1995; Piachaud, 1997).

13. There is also an important distinction between issues of social exclusion and issues of physical and mental disability. While disability can lead to social exclusion if the disabled do not have access to the additional support and resources, they need to have the ability to participate fully in community and public life, physical and mental disability is just one of many factors that can lead to such social exclusion. More importantly, it appears that problems of special needs and support for the disadvantaged groups are commonly recognised and fully accepted in the case of physical or mental disability so that in practice it appears that considerable efforts have been made in most OECD countries to include the disabled to the

6. For example, community social structures have elements of public goods and would therefore be underprovided by the market. Similarly, inclusionary or exclusionary policies relating to ethnic minorities and/or foreign residents are unrelated to the incomes of those individuals.

extent possible in the community and public life.[7] In contrast, recognition of the need for additional efforts and greater resources for non-disabled disadvantaged groups is much more controversial and, as a result, such support is much less forthcoming. Thus, in many OECD countries, social exclusion appears to be a growing and more serious problem among non-disabled disadvantaged groups than among the disabled.[8]

2. SOCIAL EXCLUSION: INSTRUMENTAL AND INTRINSIC CONSIDERATIONS

14. The rights or capabilities-based approach used above in defining social exclusion carries with it a focus on the *intrinsic* problems associated with social exclusion. If the social exclusion is a violation of rights or capabilities, it immediately implies that a society that tolerates social exclusion is intrinsically deficient as it fails to grant basic rights or capabilities to its citizens. Thus, this approach ensures that social exclusion is not seen primarily as a problem for those who suffer from it, but a larger societal shortcoming.

15. At the same time, there are many *instrumental* reasons why social exclusion may be a serious societal problem that merits the attention of policy-makers. First, socially excluded groups may, as a result of their exclusion, suffer from deficiencies in other important capabilities, such as the ability to be healthy, well-educated, well-housed, or well-nourished. Many studies have pointed to the close empirical linkages between socially excluded groups and such short-comings (e.g. Walker, 1985; LRG, 1996; Klasen 1997; Room, 1995). This reduces the well-being of those suffering from it, but may also have larger societal implications (e.g. due to the positive externalities of health and education).

16. Besides, social exclusion may have close empirical relations to other social problems that threaten the stability and prosperity of society at large, such as crime, violence, social pathologies, societal divisions, racism, xenophobia, etc.

17. In the case of social exclusion of children, there is the additional worry

7. There is, of course, great variation among OECD countries in these efforts and their success in preventing social exclusion of the disabled.

8. There are many reasons why this may be the case. In the case of disability, the physical nature of the defect and its certifiability and measurement by the medical profession has given a strong scientific base for the disadvantage suffered. The randomness associated with disability (by birth or accident) has given it much wider sympathy than that suffered by socially excluded individuals who tend to be predominantly drawn from narrow socio-economic groups. Finally, the predominant absence of a link between disability and social pathologies (crime, violence, alcoholism, etc.) ensures that disabled do constitute the threat that socially excluded people often pose.

that socially excluded children will pose a threat to the future well-being of society as they may grow up with a little stake in the existing order. Also, to the extent that social exclusion is transmitted intergenerationally, social exclusion of children may create ever deeper divisions within society that amplify across generations.

18. It is important to point out that the intrinsic and instrumental reasons to be concerned about the social exclusion of children have very different moral standings. While the intrinsic arguments against social exclusion rise and fall with the acceptance of their philosophical basis (such as a capability-based or other rights-based approach), the instrumental considerations rise and fall with the veracity of the linkages postulated, which largely is an empirical question. This has important implications for a research agenda on social exclusion. A research agenda focused on testing the linkages between exclusion and other desirable welfare criteria implicitly accepts the instrumental approach; one that accepts the intrinsic arguments can immediately move to policy questions related to social exclusion.[9]

3. SOURCES OF SOCIAL EXCLUSION

19. One way to examine sources of social exclusion is to place them in a two-way classification system (see Figure 1). The first type of classification relates to the source of the disadvantage of households or individuals which may in itself lead to social exclusion as a consequence. Four kinds of sources come to mind: economic, birth or background, social, and societal/political. At the same time, within each of these categories, it is possible to distinguish two distinct mechanisms of social exclusion. In the first, the exclusion associated with the disadvantage stems directly from the disadvantage, while in the second, the exclusion stems primarily from public policy that turns an existing disadvantage into a form of social exclusion. Such public policy that fosters social exclusion may be doing so with that intent in mind (such as restrictive citizenship policies) or in may end up creating social exclusion despite attempting to achieve the opposite (such as stigmatising and entrapping anti-poverty policies).

9. At the same time, establishing the empirical linkages may be very important to generate societal consensus around policies combating social exclusion, particularly if it can be shown that social exclusion hurts everyone and not just those suffering from it. The complete reliance on this approach is quite tricky as it may get bogged down in empirical issues rather than focus on important policy-questions.

Let me deal with the issues in turn.

20. Before describing the four bases of social exclusion as they may relate to children, it is important to point out that they should not be seen as mutually exclusive. Social exclusion has been shown to become most intractable when several of these factors appear in combination or one factor promotes the development of others (e.g. there appear to be causal empirical linkages in both directions between unemployment and income poverty on one hand, and family breakdown on the other, Paugam, 1995; Walker, 1995)

a) Economic Bases of Social Exclusion

21. Two economic disadvantages seem to be particularly important in generating social exclusion. One relates to unemployment which denies those who suffer from it access from one of the most important income, value, status, and meaning-creating activities secular liberal capitalist societies have to offer. The exclusion felt by that denied access to work, esp. for the long-term unemployed has been documented many times; it includes the social exclusion associated with the economic vulnerability that is associated with unemployment or insecure employment, as well as the impact it has on such diverse items such as family formation and dissolution and social contacts (e.g. Paugam, 1995; Walker 1995, Bruegel and Hegewish, 1994).

22. The other relates to the low incomes, which, in market economies of the types prevailing in OECD countries, can lead to a variety of social exclusions.[10] Some forms of exclusion are very directly related to economic means such as the exclusion associated with homelessness, the inability to properly feed and clothe one's children, and the inability to afford to live in neighbourhoods that are safe, clean, and have the amenities that form the social bases of self-respect. Slightly less obvious is exclusion associated with the inability to afford transport (personal or public) which, in many rural and urban environments in OECD countries, precludes participation in many community and public activities. As found in studies about the changes in retailing in the past 30 years in most OECD

10. The source of this lack of economic means can, of course, be unemployment, but it may also be low earnings, or inability to work, the lack of a formal or informal income support system, etc.

countries, lack of affordable transport also precludes people from getting access to higher quality, greater variety, and lower cost commodities which reinforces the economic bases of social exclusion (Lang, 1997).

23. Similarly, lack of economic means precludes participation in many social and public activities that cost money, including visits to sports events, cinema, theatres, and, with the growth of cable television and pay-per-view, even watching television.

24. For children, considerable stigmatisation and social exclusion can be associated with the inability of their parents to afford many of the increasingly costly items that are in fashion among children, including brand-name clothes, expensive hobbies, the latest toys, annual vacation abroad, and the like.[11] Also, to the extent that a costly private education system affords much higher quality education as is available in the public sector (particularly in some areas), as it does in many OECD countries, ability to pay can generate considerable inequality of opportunity for children.

25. Apart from these forms of social exclusion generated directly by economic disadvantage, social exclusion can be a result of economic policy. A classic case of such exclusion can be the policy of local funding of education which, if carried to the extreme (i.e. without cross-subsidisation across school districts) would ensure that economic disadvantage translates into an educational disadvantage as the tax base in poor areas is too small to afford high-quality education. To a varying degree, this is the case in several OECD countries and thereby helps to create close linkages between economic and educational disadvantage and exclusion across generations. Moreover, policies to combat poverty such as means-tested cash transfers can help foster social exclusion in two ways. One is related to the stigma attached to receiving a means-tested grant which is unrelated to prior contributions and is often seen as a form of charity to the 'undeserving'. The other is that the rules governing such grants often discourage a return to work through the high loss of benefits associated with a return to work (and additional costs associated with work, including child-care, transport, and the like). As a result, they may

11. The growth in parental interest in school uniforms in the United States is one indication how parents are trying to lessen the costly competition and exclusion associated with children's clothing. One should point out that not all of the sometimes intense positional competition for status among children should be considered as part of the discussion on social exclusion, as such positional competition is a wider phenomenon than social exclusion and exists at all levels of society to some degree (Schor, 1997; Hirsch, 1976); failure to outdo the Joneses does not necessarily mean social exclusion.

entrap people in a cycle of poverty and unemployment which reinforces social exclusion (Walker, 1997).

b) Social Bases of Exclusion

26. The most important social disadvantages that may foster social exclusion for children relate to family and neighbourhood. Relating to family, separation, divorce and death of parents, and the difficult economic, social, and psychological adjustments that follow such events, tend to be among the important factors that can promote social exclusion among children, who may find it difficult to adjust to the new circumstances at home. Similarly, the economic and social circumstances under which many lone parents are dealing with can be another force of social exclusion, particularly if it is accompanied with poverty (of money or parental time) and/or the possible stigmatisation of children coming from non-traditional households. The prevalence of family break-up as an important trigger of poverty and exclusion as well as the over-representation of lone parents among the poor and socially excluded in many OECD countries is testimony to the impact of these social bases of exclusion (Walker, 1995; Walker, 1997).

27. The importance of the neighbourhood is an important and often neglected, factor in influencing social exclusion. As it defies typical measurement instruments such as household surveys, the powerful influence of the neighbourhood in fostering social exclusion is often not picked up; instead, different types of information is needed to monitor the influence of this factor such as Local Deprivation Indices (Kristensen, 1995; Robson, et al. 1995; LRG, 1996). The neighbourhood can have a direct impact on social exclusion through the services provided in the neighbourhood (commercial and leisure facilities), the amenities and safety provided (physical attractiveness, crime, state of housing stock, etc.) or the access from the neighbourhood to other localities are lacking in important aspects (state of public transport). Slightly less direct, but equally powerful influences can operate via the quality of the educational facilities in a neighbourhood which, apart from the level of support they receive from the state (discussed above), depend importantly on the

quality of other students and teachers willing to work in the area. The recent experience with school league tables in the UK has shown that there is an extremely strong correlation between socio-economics of a catchment area and the quality of the school, which appears to operate despite the absence of specific financial discrimination against poorer school districts.[12]

28. As with the case of the economic bases of social exclusion, public policy may be contributing to the problem. In the case of support for non-traditional household structures, there is a long literature on the various incentive and disincentive effects provided by finely targeted welfare provisions to lone parents or other specific household types. State support for such households with large implicit taxes for those who begin working (and inadequate support for childcare) may trap families and children in poverty and offer little incentive and opportunity to escape (Walker, 1997).

29. Relating to public policy that affects neighbourhood effects on social exclusion, several, generally well-intentioned and in some aspects, commendable policies, appear to have promoted the social exclusion of those unable to benefit from the opportunities offered. For example, Kristensen (1995) argues that generous incentive policies that successfully promoted homeownership in Denmark have contributed to the deterioration of many rental-accommodation neighbourhoods where an increasingly poorer and socially weaker community was left behind. Similar processes have been held to be responsible for the significant deterioration of inner-city African-American neighbourhoods in the United States where, in the wake of anti-discrimination policies of the 1960s, affluent and upwardly mobile blacks left the inner cities leaving a poorer and less diverse community behind.

30. Educational policies can also promote such polarization and social exclusion. This is most directly the case if schools draw from socially homogeneous catchment areas and therefore carry the disadvantages of living in poor and socially unstable neighbourhoods into the educational system. But even where policies promote school choice beyond the catchment area, there may be problems. For example, the focus on expanding school choice for parents and fostering competition among

12. Similar neighbourhood effects have been found to operate in many other OECD countries as well.

schools through league tables and other performance indicators in the UK is held by Smith et al. (1997) appears to work best in more affluent areas where such choice and competition has become a reality, while in many poorer areas, choice and competition has remained very restricted. Moreover, they argue that it benefits those best placed to work the system and make use of these opportunities thereby contributing to the greater polarisation of education performance. Similarly, the focus on measurable indicators of quality without consideration for the environments some schools operate under is alleged to have increased the already rising numbers of permanently excluded students. In the UK, this number has reached a record of 13500 in 1996 (Smith, et al. 1997).

31. Other educational policies that can promote further social exclusion relate to the effective end of bussing in most parts of the United States and the migration of more affluent parents to well-to-do to better endowed and higher-quality school districts.

c) Social Exclusion based on Birth or Background

32. In many ways, the bases of social exclusion relating to physical or mental disability have been well understood and recognised for the longest time in most OECD countries. The last 30 years have seen increasing efforts in most countries to provide special support and, importantly, support for the integration of disabled people in mainstream society and its institutions (including mainstream education and social and public facilities). This increasing preference for providing special support for the disabled to gain access and participate, on increasingly equal terms, in mainstream society (rather than creating separate structures and institutions solely focused on dealing with them) can be seen as a model for combating social exclusion that arises from reasons other than physical or mental disability.

33. At the same time, there are other disadvantages of birth and background where there has been less and much more uneven progress in extending similar integrative support. For example, the recognition of various forms of learning disabilities that have little physical bases but may be related to birth or social background is more uneven in many OECD countries.

Similarly, various forms of socially dysfunctional behaviour that is often related to the family background (and sometimes to birth) including alcoholism, proneness to violent behaviour, disruptive children, etc., can be an important source of social exclusion. Finally, increasing numbers of residents in OECD countries are recent immigrants and suffer from linguistic and cultural barriers that may create additional difficulties and social exclusion for them and their children.

34. It is in these less recognised causes of the disadvantage of birth and background where policy may have fostered social exclusion, esp. relating to children. For example, to the extent that 'disruptive' or 'difficult' children are excluded from mainstream education and placed in special education streams, the social exclusion associated with these disadvantages may be strengthened.[13] Similarly, to the extent that special efforts are made to integrate residents of different ethnic or cultural origins (or to promote separation from mainstream society through the formation of specific institutions catering for them), social exclusion relating to this disadvantage may be lessened or intensified.

d) Societal, Political

35. Finally, there may be societal and political bases of social exclusion. By societal bases, I refer mainly to prejudice and discrimination certain groups of the population may suffer at the hands of mainstream society. The groups suffering from such societal prejudice vary greatly among OECD countries, as does the intensity of such prejudice. Issues can range from racial or ethnic bias in some countries relating to housing, labour markets, and civil society institutions (clubs, leisure activities, etc.) to outright hostility and violence against certain groups.

36. Also here, public policy and public institutions can play an important positive and negative role. To the extent that public institutions (churches, political system, media) try to counter such bias through either moral

13. In order to generate special support for such disadvantages, there have been attempts in many countries to variously extend the definition of disability to include some of these disadvantaged groups. While this strategy holds out the promise of the greater support that is available to disabled people, another strategy may be to have greater recognition that disadvantage may be a distinct problem that requires similar, but not necessarily the same, attention and interventions as policies vis-à-vis the disabled have.

suasion or enforceable anti-discrimination provisions, they can reduce the social exclusion associated with existing prejudice.

37. At the same time, public policy may also foster social exclusion which I refer to as the political bases of social exclusion. Measures that may be seen in this regard include, among others, restrictive citizenship policies for long-term foreign residents of a country (as in the case of Germany, Mark and Russell, 1995), restrictions on movements or economic activities of foreign residents (or asylum-seekers), or one-language policies that are becoming increasingly common in parts of the United States.

Table 1: Examples of Sources of Social Exclusion

Sources of Exclusion	Direct	Policy-Related
a) Economic	Unemployment, poverty	Education funding, stigmatising or and entrapping of Welfare Systems
b) Social	Family, neighbourhood	Housing, welfare, discrimination, education policies
c) Birth or Background	Disability, other forms of disadvantage (ethnicity, social background, etc.)	Excluding educational policies
d) Societal/Political	Prejudice and Discrimination	Citizenship and residency policies

4. MEASURING AND MONITORING SOCIAL EXCLUSION

38. It is difficult to establish definitive measures of social exclusion. As social exclusion, in the sense of denial of important civil and social rights or capabilities, contains diverse elements and components, there is no single measure that can capture its extent or intensity. Moreover, since social exclusion carries objective as well as subjective connotations,

it will be hard to examine its extent based on objective data; instead, some reliance must be placed on subjective assessments of the matter. Similarly, since not all incidences of 'separateness' necessarily indicate exclusion (they may be voluntary by both the included and the excluded; for example, even if all children could afford to spend money on pop music CDs, not all would want to), measuring separateness by itself may not always be the right indicator.

39. Social exclusion can be approached from two levels. One attempts to measure its extent directly, and the other focuses on measuring the extent of the bases of social exclusion. Focus on the latter has the advantage that there may more data readily available and that the links to policy issues may be more direct. Focus on the former has the advantage of measuring outcomes directly without having to rely on presumed (and often untested) linkages between certain bases of social exclusion and the actual resulting exclusion.

40. It seems that it is important to try to measure both. Attempts to measure social exclusion directly could take as a starting point expert assessment (combined with attitude survey data) on critical components of social inclusion. In the case of children, it may include, for example, the ability to participate in mainstream education, the ability to participate equally in social, leisure, and cultural activities, and the ability to enjoy the respect of one's peers.

41. Based on such assessments, one can then develop indicators that show to what extent some children appear to be socially excluded in any one of these ways. Possible indicators may then include objective and subjective items such as

— number/share of children excluded from the normal educational system

— number/share of children in special education systems

— indicators of racial/ethnic/socioeconomic mix in educational and social institutions (schools; sports clubs; youth clubs; boy and girl scouts, etc.)

— number/share of children not participating in leisure activities (sports,

youth club, annual vacation with family) and indicators of segregation in such activities.
— number/share of children unable to afford costly youth culture activities (music, clothes, toys, etc.)
— factors influencing school choice and educational streaming within schools (esp. importance of family background and economic means).
— number/share of children involved in criminal activities or social pathologies (drugs, alcohol abuse, etc.)
— number/share of children who feel excluded from certain aspects of youth culture (by causes, e.g. no money, no activity offered in neighbourhood, not allowed to join, etc.)

42. At the same, it is important to keep monitoring the various bases of exclusion such as poverty, unemployment, family break-up and neighbourhood effects, disability rates and rates of other disadvantages, and discrimination and bias.
43. In both cases, monitoring individual indicators is helpful. At the same time, there is a good case for creating component indicators of social exclusion or the various bases of social exclusion due to the close relation of many of the components and their compound effect on individuals and families. Thus, combined indices such as the local deprivation index for neighbourhood effects (LRG, 1996; Robson et al. 1996), or deprivation measures for the economic bases of social exclusion (Paugham 1995; Klasen 1997, etc.) may be useful.

5. A RESEARCH AGENDA

44. Following from the above, several important research issues emerge. First, more must be known about the nature of social exclusion and its extent in OECD countries. Establishing the most important components of such exclusion and gathering data on these components is therefore a first important task. A second, and related task is to carefully assess the bases of social exclusion and determine the linkages between them and the 'outcome measures' of social exclusion. In this context, the importance of policies in turning a disadvantage into exclusion is of particular importance. Third, and in line with an instrumental concern about

social exclusion, it may be important to assess linkages of social exclusion to other societal problems (economic development and prosperity, criminal activity, social pathology, etc.). And finally, it is critical to assess policy options that can address the problems of social exclusion feasibly and sustainably. In all four areas, the diversity of experiences in OECD countries should help generate a lot of positive and negative experiences that can guide the policy formulation process.

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ATTACHMENTS

BRASILIA REGULATIONS REGARDING ACCESS TO JUSTICE FOR VULNERABLE PEOPLE

STATEMENT OF REASONS

Within the framework of the works carried out on occasion of its 14th edition, the Ibero-American Judicial Summit has considered it necessary to draft some Basic Regulations regarding access to justice for vulnerable people. These expand on the principles included in the "Charter of Rights of the People before the Judiciary in the Ibero-American Judicial Space" (Cancun 2002), specifically those included in the part entitled "*A justice system that protects the weakest*" (sections 23 to 34).

All the main Ibero-American networks of civil servants and workers of the judicial system also took part in the preparatory work for these Regulations: the Ibero-American Association of Public Ministries, the Inter-American Association of Public Defence Ministries, the Ibero-American Federation of Ombudsmen and the Ibero-American Union of Lawyers' Societies and Associations. Their contributions have greatly enriched the contents of this document.

The judicial system must be designed, and indeed is being designed, as an instrument for the effective defence of the rights of vulnerable people. It is of little use if the State formally recognises a right when its owner is unable to access the justice system effectively in order to exercise said right.

Though the difficulty of guaranteeing the efficacy of rights generally affects all scopes of public policy, this difficulty becomes even greater when dealing with vulnerable people, given that they encounter greater obstacles to exercising their rights. This is why it is important to carry out more focused, intense activities aimed at conquering, eliminating or mitigating such limitations. Thus, the justice system itself can contribute significantly to the reduction of social inequalities, favouring social cohesion.

The present Regulations are not limited to establishing the bases for reflection on the problems that vulnerable people face when accessing justice: they also include recommendations for public bodies and for

those who provide their services within the judicial system. They not only refer to the promotion of public policies that guarantee access to justice for these people, but also to the everyday work of all workers and operators of the judicial system and those who contribute to the operation of the system in one way or another.

The initial Chapter of this document defines its aim and then moves on to defining its beneficiaries and addressees. The following Chapter has a series of rules applicable to all vulnerable people who must access or have accessed justice, as part of the process, for the defence of their rights. Subsequently it contains regulations that are applicable to any vulnerable person taking part in a judicial proceeding, be it as the party taking action or the party defending their right before an action, be it as a witness, a victim or in any other condition. The last Chapter includes a series of measures aimed at increasing and promoting the effectiveness of these Regulations, in order that they may contribute effectively to the improvement of the conditions of access to justice for vulnerable people.

The members of Ibero-American Judicial Summit are aware that the promotion of an effective improvement of access to justice demands a series of measures within the competency of the judicial power. Given the importance of this document for guaranteeing access to justice for vulnerable people, all public powers are hereby urged, within their respective scope of competency, to promote legislative reforms and to adopt measures that make effective the contents of these Regulations. Likewise, International Organisations and Cooperation Agencies are hereby actively urged to take into account these Regulations in the course of their activities, incorporating them in the different programmes and projects to modernise the judicial system in which they take part.

CHAPTER I: PRELIMINARY

Section 1. Aim

(1) These Regulations aim to guarantee the conditions of effective access to justice for vulnerable people, without discrimination, encompassing the group of policies, measures, assistance and support that allow these people to fully enjoy the services of the judicial system.

(2) It is recommended that public policies that guarantee access to justice for vulnerable people be drafted, approved, implemented and strengthened.

The workers and operators of the justice system shall treat vulnerable people according to their specific circumstances.

It is also recommended that priority be given to actions aimed at facilitating access to justice for people who are exceptionally vulnerable, be it due to several concurrent causes or due to severity of one cause.

Section 2. Beneficiaries of the Regulations

1. Definition of vulnerable people

(3) Vulnerable people are defined here as those who, due to reasons of age, gender, physical or mental state, or due to social, economic, ethnic and/or cultural circumstances, find it especially difficult to fully exercise their rights before the justice system as recognised to them by law.

(4) The following may constitute causes of vulnerability: age, disability, belonging to indigenous communities or minorities, victimisation, migration and internal displacement, poverty, gender and deprivation of liberty.

The specific definition of vulnerable people in each country will depend on their specific characteristics, and even on their level of social or economic development.

2. Age

(5) Persons under eighteen years of age are considered *children and adolescents*, except if they have reached legal age before by virtue of the applicable national legislation.

Any child or adolescent must be subject to a special guardianship by the justice system bodies in line with their development.

(6) Aging can also constitute a cause of vulnerability if an *elderly adult person* finds it especially difficult to exercise their rights before the justice system, on the basis of their functional abilities.

3. Disability

(7) *Disability* is understood here as a physical, mental or sensorial deficiency, be it permanent or temporary, which limits the ability of carrying out one or more essential activities of daily life, which may be caused or aggravated by the economic or social environment.

(8) Every attempt will be made to establish the necessary conditions to guarantee the accessibility of disabled persons to the justice system, including measures aimed at using all required judicial systems and having all resources that guarantee for them safety, mobility, comfort, understanding, privacy and communication.

4. Belonging to indigenous communities

(9) People belonging to *indigenous communities* may be in a condition of vulnerability when they exercise their rights before the state justice system. Conditions aimed at enabling indigenous people and communities to fully exercise said rights before the justice system, without any discrimination with regard to their indigenous origins or identity, shall be promoted. The judicial powers will ensure that the treatment they receive by the state justice administration bodies is respectful towards their dignity, language and cultural traditions.

This is without prejudice of Regulation 48 regarding the indigenous peoples' own ways of solving conflicts, encouraging their harmonisation with the state justice administration system.

5. Victimisation

(10) To the effects of these Regulations, a *victim* is any physical person that has suffered damages caused by a criminal offence, including physical or psychological injury, such as moral suffering and economic damages. The term "victim" may also include, if applicable, the immediate family or the people in charge of the direct victim.

(11) Any victim of a crime with relevant limitations in avoiding or mitigating the damages derived from criminal offences or in their contact with the justice system or in facing the risks of suffering a new victimisation is considered to be in a vulnerable situation. Vulnerability may be derived from their own personal characteristics or from other circumstances of the criminal offence. Some of these victims may be minors, victims of domestic or family violence, sex crime victims, aged adults, as well as relatives of victims who died violently.

(12) The adoption of measures aimed at mitigating the negative effects of the crime (primary victimisation) shall be encouraged.

In addition, efforts shall be made to ensure that the damage suffered by the victim of the crime is not worsened as a result of their contact with the justice system (secondary victimisation).

Efforts shall be made to guarantee, throughout all the phases of the criminal proceedings, the protection of the physical and psychological integrity of the victims, especially in favour of those who are at the highest risk of intimidation, reprisal or reiterated or repeated victimisation (the same person being a victim of more than one crime over a certain period of time), It may also be necessary to grant specific protection to victims who are going to give evidence in the trial. Special attention shall be paid to cases of family violence, as well as to cases where the person accused of having committed the crime is set free.

6. Migration and internal displacement

(13) The displacement of a person outside the state of their nationality can be a cause of vulnerability, especially in the case of *migrating workers* and their families. A migrating worker is defined here as a worker who is going to carry out, is carrying out or has carried out a paid activity in a state of which he is not a national. In addition, special protection shall be given to the beneficiaries of the *refugee* status in accordance with the 1951 Refugee Convention, as well as to *asylum seekers*.

(14) *Internal migrants* may also be in a situation of vulnerability. These are people or groups of people who have been forced or obliged to escape or flee from their home or place of habitual residence, specifically as a result of or to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural catastrophes or catastrophes caused by humankind, and which have not crossed an internationally recognised state border.

7. Poverty

(15) *Poverty* is a cause of social exclusion, in economic terms, and also in social and cultural terms. It is also a serious obstacle for the access to justice, especially for those people who are in a vulnerable situation due to other additional reasons.

(16) Legal culture or literacy shall be promoted among people in a situation of poverty, as well as the conditions to improve their effective access to the justice system.

8. Gender

(17) The discrimination suffered by women in several spheres is an obstacle for their access to justice, which is worsened in cases where other vulnerability factors are also present.

(18) *Discrimination against women* is understood as any distinction, exclusion or restriction based on gender, aimed at or resulting in undermining or cancelling the recognition, enjoyment or exercise by women, regardless of their marriage status, on the basis of the equality of man and woman, of the human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field.

(19) *Violence against women* is understood as any action or conduct, on the basis of their gender, causing death, physical, sexual or psychological damage or suffering to the woman, both in the public and private spheres, by means of the use of physical or psychological violence.

(20) The necessary measures required to eradicate discrimination against women in the access of justice for the custody of their legitimate rights and interests shall be promoted, in order to achieve effective equality of conditions.

Special attention shall be paid to cases of violence against women, establishing efficient mechanisms aimed at protecting women (and their property, home and family), their access to trials and speedy and timely proceedings.

9. Belonging to a minority

(21) Belonging to a national, ethnic, religious or linguistic minority can be a cause for vulnerability. The dignity of people belonging to minorities should be respected when they come into contact with the justice system.

10. Confinement

(22) *Confinement*, ordered by a competent public authority, can generate difficulties to exercise fully before the justice system the rest of rights pertaining to the person in confinement, especially if any of the other causes of vulnerability listed in the previous sections concur.

(23) To the effects of these Regulations, confinement is understood as that which has been ordered by a public authority, whether for reasons of crime investigation, a criminal sentence, mental illness or any other reason.

Section 3ª. Addressees: agents of the justice system

(24) The addressees of the content of these Regulations are:
a) Those responsible for designing, implementing and assessing public policy within the judicial system;
b) Judges, Prosecutors, Public Defenders, Attorneys and other civil servants who work in the Justice Administration system in accordance with the internal legislation of each country;

c) Lawyers and other Law professionals, as well as Societies and Associations of Lawyers;
d) People who work at Ombudsmen bodies.
e) Prison police officers and services.
f) And, generally, all operators of the judicial system and those who take part in any way in its operation.

CHAPTER II: EFFECTIVE ACCESS TO JUSTICE FOR THE DEFENCE OF RIGHTS

This Chapter is applicable to those vulnerable people who must access or have accessed justice, as part of the process for the defence of their rights.

(25) The necessary conditions should be promoted so that the judicial custody of the rights recognised by law is effective, adopting the measures that best adapt to each condition of vulnerability.

Section 1. Legal culture

(26) Actions aimed at providing basic information on the rights of vulnerable people shall be promoted, as well as about the procedures and requirements to guarantee an effective access to justice for vulnerable people.

(27) The participation of civil servants and operators of the justice system will be encouraged in the design, dissemination and training of a legal civil culture, and especially that of people who collaborate with the administration of justice in rural areas and in underprivileged areas of large cities.

Section 2. Legal assistance and public defence

1. Promotion of technical legal assistance to vulnerable people

(28) The relevance of technical legal advice for the effectiveness of the rights of vulnerable people is confirmed:

• As regards legal assistance, that is, legal consultation regarding any issue that may affect the legitimate rights or interests of the vulnerable person, even if a trial has not been initiated;
• As regards defence, to defend their rights in the proceedings before all jurisdictions and in all legal courts;
• And as regards the provision of legal assistance to the arrested.

(29) It is advisable to promote public policy aimed at guaranteeing technical legal assistance to the vulnerable person for the defence of their rights in all jurisdictions; whether through extending the responsibilities of the Public Defence office, not only in the criminal jurisdiction but also in other jurisdictions; or by creating mechanisms of legal assistance: legal consultancy with the participation of universities, *casas de justicia* (justice centres), intervention of bar associations or societies...
This is without prejudice to the review of the procedural requirements and procedures as a means of facilitating access to justice as referred to in Section 4 of this Chapter.

2. Quality, specialised and free assistance

(30) Emphasis on the need to guarantee *quality* and specialised technical legal assistance. To this aim, instruments aimed at controlling the quality of the assistance provided shall be promoted.

(31) Actions aimed at guaranteeing the *gratuity* of quality technical legal assistance to people who are in a position where they are unable to pay the expenses with their own resources and conditions shall be promoted.

Section 3. Right to an interpreter

(32) The use of an interpreter shall be guaranteed when the foreigner does not know the official language or languages or, if applicable, the official language of the community, and when it is necessary to interrogate them or for them to make a statement, or if it were necessary communicate a resolution to them personally.

Section 4. Review of procedural requirements and procedures as a means of facilitating access to justice

(33) The procedural regulations shall be reviewed to facilitate the access of vulnerable people, adopting any organisation and legal management measures that are conducive to this aim.

1. Procedural measures

This category includes actions that affect the regulation of the procedure, both with regards to its processing and with regards to the requirements demanded for the practice of the procedural acts.

(34) Requirements for accessing the process and legitimation
Measures shall be promoted for the simplification and dissemination of the requirements demanded by law in the practice of certain acts, in order to favour the access to justice of vulnerable people, and without prejudice to other participating bodies which may assist in the exercise of the rights of these people.

(35) Oral hearings
Oral hearings shall be promoted in order to improve the conditions under which legal actions are held, as contemplated in Chapter III of these Regulations, and in order to favour increased swiftness in the processing, reducing the effects of the delays in the legal decision regarding the situation of vulnerable people.

(36) Forms

Promotion of easy-to-handle forms for the exercise of certain actions, establishing conditions so that they are accessible and free for the users, especially in those cases in which legal assistance is not required.

(37) Accepting evidence in advance of the trial

It is recommended that the procedures be adapted to allow advance evidence-taking for vulnerable people in order to avoid having to repeat statements, and to avoid the worsening of a disability or an illness, if applicable. To these effects, it may be necessary to make an audiovisual recording of the court proceedings in which the vulnerable person is taking part, so that it can be replayed in future judicial instances.

2. Organisational measures and judicial management

This category includes policies and measures that affect the organisation and management models of the judicial system bodies, in such a manner that the way in which the justice system is organised facilitates in itself access to justice for vulnerable people. These policies and measures may be applicable both to professional judges and to non-professional judges.

(38) Swiftness and priority

The necessary measures shall be adopted to avoid delays in processing each case, guaranteeing a prompt judicial resolution, as well as the fast execution of the resolution. When the circumstances of the situation of vulnerability so require, priority shall be given to the attention, resolution and execution of the case by the bodies of the system of justice.

(39) Coordination

Intra- and inter-institutional coordination mechanisms, both organic and functional, shall be established with the aim of managing the interdependencies of the acts of the different bodies and institutions, both public and private, that form part of or take part in the system of justice.

(40) Specialisation

Measures shall be adopted aimed at the specialisation of professionals, operators and civil servants of the judicial system for the attention of vulnerable people.

Where necessary, it is advisable to place the matter in the hands of specialised bodies of the judiciary system.

(41) Interdisciplinary action

Importance is given to the action of multidisciplinary teams, made up of professionals of different fields, to improve the response of the judicial system to a vulnerable person's demands for justice.

(42) Proximity

The adoption of measures shall be promoted such that encourage a bridging of distances between the justice system services and those groups of people which, due to circumstances related with their vulnerability, are in remote locations or in very poorly communicated places.

Section 5. Alternative means of conflict-resolution

1. Alternative means and vulnerable people

(43) Alternative means of conflict-resolution shall be promoted in cases where it is appropriate, both before the start of the process and during the process itself. Mediation, reconciliation, arbitration and other means that do not require the resolution of the conflict in a court can contribute to improving the conditions of access to justice for certain groups of vulnerable people, as well as to decongest the operation of the formal services of the justice system.

(44) In any case, before resorting to an alternative means of conflict resolution, the specific circumstances of each of the persons affected shall be taken into account, especially if they are in any of the situations of vulnerability contemplated in these Regulations. The training of mediators, arbitrators and other people who take part in the resolution of conflict will be promoted.

2. Dissemination and information

(45) The existence and features of these means of conflict resolution should be disseminated and communicated among all groups of people that may be potential users in the cases where the law allows their use.

(46) Any vulnerable person who takes part in the resolution of a conflict by any of these means should be previously informed of their content, form and effects. Said information shall be provided in accordance with the provisions contained in Section 1 of Chapter III of these regulations.

3. Participation of vulnerable people in Alternative Conflict Resolution

(47) Promotion should be carried out for the adoption of specific measures that allow the participation of vulnerable people in the mechanism chosen for the Alternative Conflict Resolution, such as the assistance of professionals, the participation of interpreters or the intervention of the parental authority for minors when necessary.
The Alternative Conflict Resolution activity should take place in an environment that is safe and appropriate for the circumstances of the persons taking part.

Section 6. System for the resolution of conflicts within indigenous communities

(48) Based on the international instruments drafted on the subject, it is convenient to stimulate own justice procedures in the resolution of conflicts that have arisen within the context of indigenous communities, as well as to encourage the harmonisation of the state and indigenous justice administration systems based on the principle of mutual respect in accordance with the international human rights regulations.

(49) Also applicable will be the remaining measures included in these Regulations in cases of conflict resolution outside indigenous communities by the state justice administration system, where it is also convenient to tackle the issues related to cultural appraisal and the right to express oneself in one's own language.

CHAPTER III: EXECUTION OF JUDICIAL PROCEEDINGS

The contents of this Chapter are applicable to any vulnerable person who takes part in a judicial proceeding, whether as a party or in any other capacity.

(50) All efforts will be made to ensure that the dignity of the vulnerable person is respected in any intervention as part of a judicial proceeding, granting them a specific treatment according to their specific circumstances.

Section 1. Procedural or jurisdictional information

(51) Conditions aimed at guaranteeing that vulnerable people be duly informed with regard to the relevant aspects of their intervention in the judicial proceedings will be promoted, in a manner adapted to the circumstances that determine their vulnerability.

1. Content of the information

(52) When a vulnerable person takes part in a judicial action, in any condition, they will be informed on the following issues:
• The nature of the judicial action in which they will be participating
• Their role within that action
• The type of support they may receive with reference to the specific action, as well as the information on the body or institution that can provide it

(53) If they take an active part in the proceedings or may take it, they will be entitled to receive any relevant information for the protection of their interests. Said information should include at least:
• The type of support or assistance that they may receive within the framework of the judicial action
• The rights they may exercise during the process
• The manner and conditions under which they can access free technical-legal assistance or judicial advice in the cases in which this possibility is contemplated by law

• The type of services or organisations which they can go to in order to receive support

2. Provision of information

(54) Information must be provided from the start of the process and during the entire process, even from the first contact with the police authorities, in the case of criminal proceedings.

3. Manner or means for the provision of information

(55) The information will be provided in accordance with the circumstances that determine the person's vulnerability and in such a way that guarantees that the addressee will receive the information. It would be especially convenient to create or develop information offices or other bodies created for said purpose. It is also interesting to point out the advantages derived from the use of new technologies in order to adapt to the person's specific vulnerability.

4. Specific provisions regarding the victim

(56) It will be encouraged that victims receive information regarding the following elements of the jurisdictional process:
• Possibilities of obtaining relief for damages suffered
• Place and manner in which they may present a report or a document by which they exercise an action
• Giving effect to their report or document
• Relevant phases in the development of the process
• Resolutions issued by the judicial body

(57) Whenever there is a risk to the victim, their property or their home, every attempt will be made to inform them of any judicial decisions that may affect their security and, in any case, of all those which refer to setting free the accused or condemned person, especially in cases of alleged intra-family violence.

Section 2. Understanding of judicial actions

(58) All necessary measures will be adopted to reduce any difficulties in communication that affect the understanding of the judicial proceeding in which a vulnerable person is taking part, guaranteeing that they can understand its scope and significance.

1. Notices and summons

(59) Simple and easily understandable terms and grammatical structures will be used in notices and summons, in line with the specific needs of the vulnerable persons referred to in these Regulations. Likewise, intimidating expressions or elements will be avoided, without prejudice of the occasions when it is necessary to use admonishing or threatening expressions.

2. Contents of the court resolutions

(60) Simple terms and syntax will be used in court resolutions, without prejudice to their technical accuracy.

3. Understanding of oral hearings

(61) The necessary mechanisms will be promoted for the vulnerable person to understand the judgements, trial, hearings and other oral judicial actions in which they take part, in accordance with the contents of paragraph 3, Section 3 of this Chapter,

Section 3. Appearance at court

(62) Every effort will be made for the appearance of a vulnerable person at court to be made in a manner appropriate for the circumstances of their vulnerability.

1. Information regarding the appearance at court

(63) Prior to the judicial proceeding, the vulnerable person should be provided with information directly related to the way in which the appearance will be held and its contents, whether describing the court and the people who will be taking part, or aiming to familiarise the vulnerable person with the legal terms and concepts, as well as any other relevant details.

2. Assistance

(64) Prior to the appearance
Assistance will be provided by specialised personnel (professionals of Psychology, Social Work, interpreters, translators or any other professionals considered necessary) in order to confront the worries and fears related to the proceedings.

(65) During the appearance
When the specific situation of vulnerability makes it advisable, the statement and other procedural acts will be carried out in the presence of a professional, whose function will be to guarantee the rights of the vulnerable person.
It may also be convenient to have a person present at the act to provide emotional support for the vulnerable person.

3. Conditions of the appearance

Place of appearance

(66) It is convenient for the appearance to take place in a comfortable, accessible, safe and quiet setting.

(67) In order to mitigate or avoid emotional tension or anxiety, every effort will be made to avoid the victim coinciding with the person accused of the crime in the court premises, as well as their confrontation during judicial proceedings, ensuring the victim is protected visually.

Duration of appearance

(68) Every effort will be made to limit the amount of time that the vulnerable person has to wait before the celebration of the judicial proceeding.
Judicial proceedings must be held in a timely manner.
When justified by the appropriate concurrent reasons, preference may be given to holding a judicial proceeding in which a vulnerable person is taking part.

(69) It is advisable to avoid unnecessary appearances, in such a way that vulnerable people should only have to appear when it is strictly necessary in accordance with judicial regulations. Efforts will be made to try to concentrate in the same day the different actions in which the same person must take part.

(70) It is recommended that the possibility of presenting evidence in advance be examined, whenever possible in accordance with applicable Law.

(71) On certain occasions, it may be possible to proceed to the audiovisual recording of the act, in cases where this may avoid it being repeated in successive judicial instances.

Manner of appearance

(72) Efforts will be made to adapt the language used to the conditions of the vulnerable person, such as their age, degree of maturity, educational level, intellectual abilities, degree of disability and socio-cultural conditions. The questions formulated should be clear and should have a simple structure.

(73) All those taking part in the appearance should avoid issuing judgement or criticism regarding the behaviour of the vulnerable person, especially in the case of crime victims.

(74) Whenever necessary, the vulnerable person will be protected from the consequences of having to declare before a public audience; it may be possible to consider them participating in the judicial proceeding under conditions that make it possible to reach said objective, even excluding their physical presence at the place of the trial or hearing, provided this is compatible with the Law in force.
To said effect, it may be useful to use the videoconference system or a CCTV system.

4. Safety of victims in a vulnerable condition

(75) It is recommended to adopt the necessary measures to guarantee an effective protection of the safety of the vulnerable people who are taking part in the judicial proceedings as victims or witnesses, as well as that of their belongings, home and family; in addition to guaranteeing that the victim be heard in those criminal proceedings in which their interests are at stake.

(76) Special attention will be paid in those cases in which the person is subjected to the danger of reiterated or repeated victimisation, such as victims threatened in cases of organised crime, minors who are victims of sexual or physical abuse, and women who are victims of violence within their families or couples.

5. Accessibility of disabled people

(77) Accessibility will be provided for disabled people when celebrating proceedings in which they have to intervene; in particular, every effort will be made to overcome architectural barriers, making it easier to access and to be present in the judicial premises.

6. Participation of children and adolescents in judicial proceedings

(78) In judicial proceedings where minors must take part, it is important to take into account their age and general development, as well as observing the following:
• The acts shall be celebrated in an appropriate court or room.
• The language used must be simple, making it easier to understand.
• Any unnecessary formalities must be avoided, such as the use of robes, the physical distance with the tribunal and other similar formalities.

7. Persons belonging to indigenous communities

(79) When holding judicial proceedings, the dignity, customs and cultural traditions of people belonging to indigenous communities shall be respected, in accordance with the internal legislation of each country.

Section 4. Protection of privacy

1. Restriction of judicial proceedings

(80) There may be occasions when, out of respect towards the rights of the vulnerable person, it may be advisable to consider making the acts of the oral and written proceedings unavailable to the public, in such a way that only the people involved may access their contents.

2. Image

(81) In cases where the dignity, emotional situation or safety of the vulnerable person may be affected, it may be convenient to forbid taking and disseminating images, be they in a photographic or video format.

(82) In any case, it is forbidden to take and disseminate images related to children and adolescents, given that this affects their personal development in a decisive manner.

3. Personal data protection

(83) In cases of special vulnerability, all efforts will be made to avoid any unwanted publicity of personal data related to vulnerable people.

(84) Special attention will be paid in cases where the data is held digitally or any other way that allows its automated treatment.

CHAPTER IV: EFFECTIVENESS OF THE REGULATIONS

This Chapter expressly focuses on a series of measures destined to increase the effectiveness of the Regulations, in such a way that they contribute effectively to the improvement of the conditions of access to justice for vulnerable people.

1. General principle of collaboration

(85) The efficacy of these Regulations is directly linked to the degree of collaboration between its addressees, as defined in Section 3 of Chapter I. The assignment of the bodies and entities called upon to collaborate depends of the specific circumstances of each country, and therefore the main promoters of public policies must be especially careful both in identifying them and obtaining their participation, and in maintaining their collaboration throughout the process.

(86) The implementation of a permanent instance where the different agents referred to in the previous section will be promoted, which may be established by sectors.

(87) It is important for the Judicial Power to collaborate with other State Powers in the improvement of access to justice for vulnerable people.

(88) The participation of federal and central authorities, autonomic and regional government and state bodies in federal states will be promoted, given that, in the scope of their competencies, they are frequently closer to directly managing social protection for the most disadvantaged sectors of society.

(89) Every country will consider the convenience of promoting the participation of civil society bodies given their relevant role in social cohesion and their close relationship and involvement with the most disadvantaged sectors of society.

2. International cooperation

(90) The creation of spaces that enable the exchange of experiences among different countries will be promoted, analysing the causes of the success or failure in each of them and establishing good practices. These spaces for participation may be sectorial.

These spaces may also welcome the participation of representatives of any permanent instances that may be created in each of the States.

(91) International Organisations and Cooperation Agencies are called upon to:

• Continue providing their technical and financial assistance for strengthening and improving access to justice.

• Take into account the contents of these Regulations in their activities, and to incorporate them across the different programmes and projects to modernise the judicial system in which they participate.

• Promote and collaborate in the development of the aforementioned spaces for participation.

3. Research and studies

(92) Studies and research on this subject will be promoted, in collaboration with academic and university institutions.

4. Awareness-raising and training of professionals

(93) Activities will be carried out to promote an organisational culture geared to providing the appropriate assistance to vulnerable people on the basis of the contents of these Regulations.

(94) Initiatives will be adopted with the aim of supplying an adequate training to all those people within the judicial system who, due to their

intervention in the process, are in contact with vulnerable people.
It would be necessary to integrate the contents of these Regulations into the different training and updating programmes aimed at those working in the judicial system.

5. New technologies

(95) Every effort will be made to make the most of the possibilities offered by technical progress in order to improve the conditions of access to justice for vulnerable people.

6. Sectorial good practices handbooks

(96) Handbooks will be drafted, containing the best practices for each of the vulnerability sectors, which can expand on the contents of these Regulations, adapting them to the specific circumstances of each group.

(97) In addition, a catalogue of international instruments will be drafted, referred to each of the sectors or groups mentioned earlier.

7. Dissemination

(98) The dissemination of these Regulations will be promoted among their different addressees as defined in Section 3 of Chapter I.

(99) Activities with the media will be promoted in order to contribute to encouraging the right approach and attitudes with regard to the contents of these Regulations.

8. Monitoring committee

(100) A Monitoring Committee will be formed, which will have the following aims:

• Drafting a report after each Summit Meeting regarding the application of these Regulations.

• Proposing an Activities Framework Plan, in order to guarantee the monitoring of the implementation of these regulations in each country.
• Via the corresponding bodies of the Summit, proposing to the international, hemispherical and regional bodies, as well as to the Summits of Heads of State and Government of Ibero-America, the definition, adoption and strengthening of public policies that promote the improvement of the conditions of access to justice for vulnerable people.
• Proposing modifications and updates to the content of these Regulations.

The Committee will be made up of five members appointed by the Ibero-American Judicial Summit. Other representatives of the other Ibero-American Networks of the judicial system that assume these Regulations may form part of this Committee. In any case, the Committee will have a maximum of nine members.

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY ON 13 DECEMBER 2006

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The General Assembly,

Recalling its resolution 56/168 of 19 December 2001, by which it decided to establish an Ad Hoc Committee, open to the participation of all Member States and observers to the United Nations, to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on a holistic approach in the work done in the fields of social development, human rights and non-discrimination and taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development,

Recalling also its previous relevant resolutions, the most recent of which was resolution 60/232 of 23 December 2005, as well as relevant resolutions of the Commission for Social Development and the Commission on Human Rights,

Welcoming the valuable contributions made by intergovernmental and non-governmental organizations and national human rights institutions to the work of the Ad Hoc Committee,

Expresses its appreciation to the Ad Hoc Committee for having concluded the elaboration of the draft Convention on the Rights of Persons with Disabilities and the draft Optional Protocol to the Convention;

Adopts the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention annexed to the present resolution, which shall be open for signature at United Nations Headquarters in New York as of 30 March 2007;

Calls upon States to consider signing and ratifying the Convention and the Optional Protocol as a matter of priority, and expresses the hope that they will enter into force at an early date;

Requests the Secretary-General to provide the staff and facilities necessary for the effective performance of the functions of the Conference of States Parties and the Committee under the Convention

and the Optional Protocol after the entry into force of the Convention, as well as for the dissemination of information on the Convention and the Optional Protocol;

Also requests the Secretary-General to implement progressively standards and guidelines for the accessibility of facilities and services of the United Nations system, taking into account relevant provisions of the Convention, in particular when undertaking renovations;

Requests United Nations agencies and organizations, and invites intergovernmental and non-governmental organizations, to undertake efforts to disseminate information on the Convention and the Optional Protocol and to promote their understanding;

Requests the Secretary-General to submit to the General Assembly at its sixty-second session a report on the status of the Convention and the Optional Protocol and the implementation of the present resolution, under a sub-item entitled "Convention on the Rights of Persons with Disabilities".

76th plenary meeting 13 December 2006

Annex I

Convention on the Rights of Persons with Disabilities Preamble

The States Parties to the present Convention,

Recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world,

Recognizing that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,

Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination,

Recalling the International Covenant on Economic, Social and

Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,

Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,

Recognizing the importance of the principles and policy guidelines contained in the World Programmed of Action concerning Disabled Persons and in the Standard Rules on the Equalization of Opportunities for Persons with

Disabilities in influencing the promotion, formulation and evaluation of the policies, plans, programmers and actions at the national, regional and international levels to further equalize opportunities for persons with disabilities,

Emphasizing the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development,

Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,

Recognizing further the diversity of persons with disabilities,

Recognizing the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,

Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

Recognizing the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries,

Recognizing the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty,

Recognizing the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,

Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmers, including those directly concerning them,

Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, color, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,

Recognizing that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,

Recognizing that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child,

Emphasizing the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities,

Highlighting the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities,

Bearing in mind that conditions of peace and security based on full respect for the purposes and principles contained in the Charter of the United Nations and observance of applicable human rights instruments are indispensable for the full protection of persons with disabilities, in particular during armed conflicts and foreign occupation,

Recognizing the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights,

Convinced that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities,

Convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries,

Have agreed as follows:

Article 1 Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 2 Definitions

For the purposes of the present Convention:

"Communication" includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain- language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology;

"Language" includes spoken and signed languages and other forms of non-spoken languages;

"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

"Universal design" means the design of products, environments, programmers and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. "Universal design" shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

Article 3

General principles

The principles of the present Convention shall be:

Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

Non-discrimination;

Full and effective participation and inclusion in society;

Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

Equality of opportunity;

Accessibility;

Equality between men and women;

Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4

General obligations

States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

To promote the training of professionals and staff working with persons with disabilities in the rights recognized in the present Convention so as to better provide the assistance and services guaranteed by those rights.

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent.

The provisions of the present Convention shall extend to all parts of federal States without any limitations or exceptions.

Article 5

Equality and non-discrimination

States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 6

Women with disabilities

States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

Article 7

Children with disabilities

States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

Article 8

Awareness-raising

States Parties undertake to adopt immediate, effective and appropriate measures:

To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

To promote awareness of the capabilities and contributions of persons with disabilities.

Measures to this end include:

Initiating and maintaining effective public awareness campaigns designed:

To nurture receptiveness to the rights of persons with disabilities;

To promote positive perceptions and greater social awareness towards persons with disabilities;

To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;

Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;

Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;

Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

Article 9

Accessibility

To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

Information, communications and other services, including electronic services and emergency services.

States Parties shall also take appropriate measures:

To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;

To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;

To provide training for stakeholders on accessibility issues facing persons with disabilities;

To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;

To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;

To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;

To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 10

Right to life

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

Article 11

Situations of risk and humanitarian emergencies

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Article 12

Equal recognition before the law

States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to

prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13

Access to justice

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 14

Liberty and security of person

States Parties shall ensure that persons with disabilities, on an equal basis with others:

Enjoy the right to liberty and security of person;

Are not deprived of their liberty unlawfully or arbitrarily, and that

any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Article 15

Freedom from torture or cruel, inhuman or degrading treatment or punishment

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 16

Freedom from exploitation, violence and abuse

States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Article 17

Protecting the integrity of the person

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Article 18

Liberty of movement and nationality

States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;

Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;

Are free to leave any country, including their own;

Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

Article 19

Living independently and being included in the community

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Article 20

Personal mobility

States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost;

Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;

Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities;

Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.

Article 21

Freedom of expression and opinion, and access to information

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;

Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;

Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;

Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;

Recognizing and promoting the use of sign languages.

Article 22

Respect for privacy

No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference

with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honor and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

Article 23

Respect for home and the family

States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

Persons with disabilities, including children, retain their fertility on an equal basis with others.

States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, ward ship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child- rearing responsibilities.

States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

Article 24

Education

States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

The full development of human potential and sense of dignity and self- worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;

Enabling persons with disabilities to participate effectively in a free society.

In realizing this right, States Parties shall ensure that:

Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;

Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

Reasonable accommodation of the individual's requirements is provided;

Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;

Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

Article 25

Health

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population- based public health programmes;

Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;

Provide these health services as close as possible to people's own communities, including in rural areas;

Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;

Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;

Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

Article 26

Habilitation and rehabilitation

States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:

Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;

Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.

States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

Article 27

Work and employment

States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labor market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

Prohibit discrimination on the basis of disability with regard to

all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

Protect the rights of persons with disabilities, on an equal basis with others, to just and favorable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

Ensure that persons with disabilities are able to exercise their labor and trade union rights on an equal basis with others;

Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

Promote employment opportunities and career advancement for persons with disabilities in the labor market, as well as assistance in finding, obtaining, maintaining and returning to employment;

Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

Employ persons with disabilities in the public sector;

Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

Promote the acquisition by persons with disabilities of work experience in the open labor market;

Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labor.

Article 28

Adequate standard of living and social protection

States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;

To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;

To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;

To ensure access by persons with disabilities to public housing programmes;

To ensure equal access by persons with disabilities to retirement benefits and programmes.

Article 29

Participation in political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others,

directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;

Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

Article 30

Participation in cultural life, recreation, leisure and sport

States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

Enjoy access to cultural materials in accessible formats;

Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;

Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as

far as possible, enjoy access to monuments and sites of national cultural importance.

States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.

States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.

With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;

To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;

To ensure that persons with disabilities have access to sporting, recreational and tourism venues;

To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;

To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.

Article 31

Statistics and data collection

States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:

Comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities;

Comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.

The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.

States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.

Article 32

International cooperation

States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia:

Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;

Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;

Facilitating cooperation in research and access to scientific and technical knowledge;

Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.

Article 33

National implementation and monitoring

States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

Article 34

Committee on the Rights of Persons with Disabilities

There shall be established a Committee on the Rights of Persons with Disabilities (hereafter referred to as "the Committee"), which shall carry out the functions hereinafter provided.

The Committee shall consist, at the time of entry into force of the present Convention, of twelve experts. After an additional sixty ratifications or accessions to the Convention, the membership of the Committee shall increase by six members, attaining a maximum number of eighteen members.

The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the present Convention. When nominating their candidates, States Parties are invited to give due consideration to the provision set out in article 4, paragraph 3, of the present Convention.

The members of the Committee shall be elected by States Parties, consideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities.

The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals at meetings of the Conference of States Parties. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

The initial election shall be held no later than six months after the date of entry into force of the present Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit the nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating the State Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of six of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these six members shall be chosen by lot by the chairperson of the meeting referred to in paragraph 5 of this article.

The election of the six additional members of the Committee shall be held on the occasion of regular elections, in accordance with the relevant provisions of this article.

If a member of the Committee dies or resigns or declares that for any other cause she or he can no longer perform her or his duties, the State Party which nominated the member shall appoint another expert possessing the qualifications and meeting the requirements set out in the relevant provisions of this article, to serve for the remainder of the term.

The Committee shall establish its own rules of procedure.

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention, and shall convene its initial meeting.

With the approval of the General Assembly of the United Nations, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 35

Reports by States Parties

Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned.

Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests.

The Committee shall decide any guidelines applicable to the content of the reports.

A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports, repeat information previously provided. When preparing reports to the Committee, States Parties are invited to consider doing so in an open and transparent process and to give due consideration to the provision set out in article 4, paragraph 3, of the present Convention.

Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 36

Consideration of reports

Each report shall be considered by the Committee, which shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned. The State Party may respond with any information it chooses to the Committee. The Committee may request further information from States Parties relevant to the implementation of the present Convention.

If a State Party is significantly overdue in the submission of a report, the Committee may notify the State Party concerned of the need to examine the implementation of the present Convention in that State Party, on the basis of reliable information available to the Committee, if the relevant report is not submitted within three months following the notification. The Committee shall invite the State Party concerned to participate in such examination. Should the State Party respond by submitting the relevant report, the provisions of paragraph 1 of this article will apply.

The Secretary-General of the United Nations shall make available the reports to all States Parties.

States Parties shall make their reports widely available to the public in their own countries and facilitate access to the suggestions and general recommendations relating to these reports.

The Committee shall transmit, as it may consider appropriate, to the specialized agencies, funds and programmes of the United Nations, and other competent bodies, reports from States Parties in order to address a request or indication of a need for technical advice or assistance

contained therein, along with the Committee's observations and recommendations, if any, on these requests or indications.

Article 37

Cooperation between States Parties and the Committee

Each State Party shall cooperate with the Committee and assist its members in the fulfilment of their mandate.

In its relationship with States Parties, the Committee shall give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention, including through international cooperation.

Article 38

Relationship of the Committee with other bodies

In order to foster the effective implementation of the present Convention and to encourage international cooperation in the field covered by the present Convention:

The specialized agencies and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite specialized agencies and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

The Committee, as it discharges its mandate, shall consult, as appropriate, other relevant bodies instituted by international human rights treaties, with a view to ensuring the consistency of their respective reporting guidelines, suggestions and general recommendations, and avoiding duplication and overlap in the performance of their functions.

Article 39

Report of the Committee

The Committee shall report every two years to the General Assembly and to the Economic and Social Council on its activities, and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

Article 40

Conference of States Parties

The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the present Convention.

No later than six months after the entry into force of the present Convention, the Conference of States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary- General biennially or upon the decision of the Conference of States Parties.

Article 41 Depositary

The Secretary-General of the United Nations shall be the depositary of the present Convention.

Article 42 Signature

The present Convention shall be open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of 30 March 2007.

Article 43

Consent to be bound

The present Convention shall be subject to ratification by signatory States and to formal confirmation by signatory regional integration organizations. It shall be open for accession by any State or regional integration organization which has not signed the Convention.

Article 44

Regional integration organizations

"Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

References to "States Parties" in the present Convention shall apply to such organizations within the limits of their competence.

For the purposes of article 45, paragraph 1, and article 47, paragraphs 2 and 3, of the present Convention, any instrument deposited by a regional integration organization shall not be counted.

Regional integration organizations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 45 Entry into force

The present Convention shall enter into force on the thirtieth day after the deposit of the twentieth instrument of ratification or accession.

For each State or regional integration organization ratifying, formally

confirming or acceding to the present Convention after the deposit of the twentieth such instrument, the Convention shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 46 Reservations

Reservations incompatible with the object and purpose of the present Convention shall not be permitted.

Reservations may be withdrawn at any time.

Article 47 Amendments

Any State Party may propose an amendment to the present Convention and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favor a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favor such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.

An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with paragraph 1 of this article which relates exclusively to articles 34, 38, 39 and 40 shall enter into force for all States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment.

Article 48 Denunciation

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary- General.

Article 49 Accessible format

The text of the present Convention shall be made available in accessible formats.

Article 50 Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention shall be equally authentic.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

Annex II

Optional Protocol to the Convention on the Rights of Persons with Disabilities

The States Parties to the present Protocol have agreed as follows:

Article 1

A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Rights of Persons with Disabilities ("the Committee") to receive and consider communications from or on behalf of individuals or groups of individual's subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.

No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

Article 2

The Committee shall consider a communication inadmissible when:

The communication is anonymous;

The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention;

The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;

All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;

It is manifestly ill-founded or not sufficiently substantiated; or when

The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 3

Subject to the provisions of article 2 of the present Protocol, the Committee shall bring any communications submitted to it confidentially to the attention of the State Party. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 4

At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

Where the Committee exercises its discretion under paragraph 1 of this article, this does not imply a determination on admissibility or on the merits of the communication.

Article 5

The Committee shall hold closed meetings when examining communications under the present Protocol. After examining a communication, the Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

Article 6

If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end submit observations with regard to the information concerned.

Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.

The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

Article 7

The Committee may invite the State Party concerned to include in its report under article 35 of the Convention details of any measures taken in response to an inquiry conducted under article 6 of the present Protocol.

The Committee may, if necessary, after the end of the period of six months referred to in article 6, paragraph 4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 8

Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 6 and 7.

Article 9

The Secretary-General of the United Nations shall be the depositary of the present Protocol.

Article 10

The present Protocol shall be open for signature by signatory States and regional integration organizations of the Convention at United Nations Headquarters in New York as of 30 March 2007.

Article 11

The present Protocol shall be subject to ratification by signatory States of the present Protocol which have ratified or acceded to the Convention. It shall be subject to formal confirmation by signatory regional integration organizations of the present Protocol which have formally confirmed or acceded to the Convention. It shall be open for accession by any State or regional integration organization which has ratified, formally confirmed or acceded to the Convention and which has not signed the Protocol.

Article 12

"Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the Convention and the present Protocol. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the Convention and the present Protocol. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

References to "States Parties" in the present Protocol shall apply to such organizations within the limits of their competence.

For the purposes of article 13, paragraph 1, and article 15, paragraph 2, of the present Protocol, any instrument deposited by a regional integration organization shall not be counted.

Regional integration organizations, in matters within their competence, may exercise their right to vote in the meeting of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Protocol. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 13

Subject to the entry into force of the Convention, the present Protocol shall enter into force on the thirtieth day after the deposit of the tenth instrument of ratification or accession.

For each State or regional integration organization ratifying, formally confirming or acceding to the present Protocol after the deposit of the tenth such instrument, the Protocol shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 14

Reservations incompatible with the object and purpose of the present Protocol shall not be permitted.

Reservations may be withdrawn at any time.

Article 15

Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favor a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favor such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.

An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

Article 16

A State Party may denounce the present Protocol by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 17

The text of the present Protocol shall be made available in accessible formats.

Article 18

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Protocol shall be equally authentic.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Protocol.

Thus, for example, at the U.N. level, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides, *inter alia*, in its Article 17(1), that "[m]igrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and their cultural identity". Likewise, the 1989 U.N. Convention on the Rights of the Child stipulates that "States Parties shall ensure that [e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age (…)" (Article 37(b)). Provisions of the kind can also be found in human rights treaties at the regional level".

Antônio Augusto Cançado Trindade

Centro Universitário Farias Brito

IIDH
INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS
INSTITUT INTERAMÉRICAIN DES DROITS DE L'HOMME
INSTITUTO INTERAMERICANO DE DIREITOS HUMANOS
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