

Globalisation and the Human Rights of Women



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Abbreviations

CCPR	Covenant on Civil and Political Rights
CEACR	Committee of Expert on the Application of Conventions and Recommendations
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
CESCR	Covenant on Economic, Social and Cultural Rights
CoE	Council of Europe
EPZ	Export processing zones
IMF	International Monetary Fund
ILO	International Labour Organisation
NGO	Non-governmental organisations
OAS	Organisation of African Unity
OAU	Organisation of the American States
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
WB	World Bank
WTO	World Trade Organisations

1. Introduction

1.1. Context of the study

The international protection of human rights has after the end of the cold war attained an increasingly prominent position in the work of international organisations such as the United Nations and regional organisations especially in Europe, Africa and America.¹ In the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993 it is stated:

“The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community. The organs and specialised agencies related to human rights should therefore further enhance the coordination of their activities based on the consistent and objective application of international human rights instruments”.²

Subsequently an increasing number of UN specialised agencies, funds and programmes have put more and more emphasis on human rights in their activities, including mainstreaming human rights into their operations.³ For example, the United Nations Children’s Fund (UNICEF) belongs to one of the first agencies which clearly spelt out a human rights approach to its work in 1996.⁴ UNDP has during the 1990s clearly moved away from a narrow focus on economic development towards the notion of sustainable human development, a notion which in the end of the 1990s has come nearer to human

¹ Council of Europe (CoE), Organization of African Unity (OAU), and the Organization of the American States (OAS).

² The Vienna Declaration and Programme of Action, Adopted at the World Conference on Human Rights in June 1993, para 4.

³ Anne Gallagher, “Human Rights in the Wider United Nations System”, in: Raija Hanski & Markku Suksi (eds), *An Introduction to the International Protection of Human Rights. A Textbook*, 1999, pp. 153-167.

⁴ *Ibid*, p. 157.

rights.⁵ Thus, the special theme of the 2000 edition of the UNDP's Human Development Report was human rights. The report clearly outlines the close relationship between human rights and human development. It is held that "until the last decade human development and human rights followed parallel paths in both concept and action ... economic and social progress on the one hand, political pressure, legal reform and ethical questioning on the other. But today, as the two converge in both concept and action, the divide between the human development agenda and the human rights agenda is narrowing".⁶

Not only has the general human rights discussion within the UN and other organizations been intensified during the 1990s, but also the discussion on the human rights of women has gone through similar developments. For many years women's rights were viewed as distinct from human rights.⁷ This was reflected, for example, in the fact that the UN Commission on the Status of Women, which was established as a sister body to the UN Commission on Human Rights, operated for a long time detached from the work of human rights organs of the United Nations.⁸ Moreover, the human rights machinery, particularly the treaty monitoring bodies, paid only limited attention to gender-specific issues in the interpretation and application of human rights.⁹ During the 1990s a dramatic change took place. Already the World Conference on Human Rights endorsed strongly that "the human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights" and that "the human rights of women should form an integral part of the United Nations human rights activities".¹⁰ This so-called mainstream approach was further advanced in the Beijing World Conference on Women in 1995 by the inclusion of

⁵ In 1998, UNDP adopted a policy document called "Integrating Human Rights with Sustainable Human Development".

⁶ *Human Development Report 2000*, United Nations Development Programme, 2000, p. 2. It has been argued that the Human Development Report should not necessarily be seen as a reflection of the UNDP's official policy since the report is produced by a team of consultants, advisers and UNDP staff. See Koen De Feyter, *World Development Law. Sharing Responsibility for Development*, 2001, p. 3f.

⁷ See, e.g., Riane Eisler, "Human Rights: Toward an Integrated Theory of Action", *Human Rights Quarterly*, 1987, pp. 287-308 and Charlotte Bunch, "Women's Rights as Human Rights: Towards a Re-Vision of Human Rights", *Human Rights Quarterly*, 1992, pp. 486-498.

⁸ This was particularly the case during late 1960s and 1970s, see Laura Reanda, "The Commission on the Status of Women", in: Philip Alston (ed.), *The United Nations and Human Rights. A Critical Appraisal*, 1992, p. 281.

⁹ Andrew Byrnes, "Women, Feminism and International Human Rights Law – Methodological Myopia, Fundamental Flaws or Meaningful Marginalization? Some Current Issues", *Australian Yearbook of International Law*, 1992, pp. 205-240 and Anne Gallagher, "Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System", *Human Rights Quarterly*, 1997, pp. 283-333.

a separate chapter in the final report focusing on the human rights of women.¹¹ Subsequently the Human Rights Committee established pursuant to the Covenant on Civil and Political Rights has adopted a ground breaking general comment on equality of rights between men and women (No. 28 of 2000), which includes a gender-sensitive reading of most of the rights in the CCPR.¹² The Committee on the Elimination of Racial Discrimination has in turn adopted a general recommendation concerning gender-related dimensions of racial discrimination.¹³ The legal significance of women's human rights can further be expected to increase through the individual complaint procedure under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women which entered into force on 22 December 2000.

This strengthened recognition of human rights in general and women's human rights in particular has however with the on-going globalisation development become increasingly threatened. Economic integration, free trade, deregulation and privatisation have been seen by many as a challenge to the international protection of human rights and particularly to the realisation of economic, social and cultural rights.¹⁴ In addition, it has been argued that the state, which is the traditional bearer of human rights obligations, has lost control over the globalisation process and that in fact other players such as financial institutions and transnational corporations are the ones shaping the development.¹⁵

1.2. Impact of globalisation on women

There is no clear-cut definition of the concept of globalisation. Instead the concept has been approached in different ways by different authors. A common understanding is that globalisation refers to the intensification of social and economic relations beyond state

¹⁰ Vienna Declaration and Programme of Action, para. 18.

¹¹ Platform for Action and the Beijing Declaration, Adopted at the Fourth World Conference on Women, 4-15 September 1995, paras. 210-233.

¹² UN doc. HRI/GEN/1/Rev.5 (26 April 2001), pp. 168-174.

¹³ General Recommendation XXV (2000) concerning gender-related dimensions of racial discrimination, see UN doc. HRI/GEN/1/Rev. 5 (26 April 2001), pp. 194-195.

¹⁴ Andrew Clapham, "Globalization and the Rule of Law", Paper presented at the Triennial Meeting of the International Commission of Jurists, 1998, p. 2.

¹⁵ Peter Leuprecht, "The World Trade Organisation – Another Playground of Pan-Economic Ideology", in Malini Mehra (ed.), *Human Rights and Economic Globalisation: Directions for the WTO*, 1999, p. 17.

borders, with the consequence that local and global events are increasingly linked to and influenced by each other.¹⁶ The markets and the technology, particularly the information technology, have been identified as the main arenas of globalisation. In this report the focus will be first and foremost on the economic aspects of globalisation thereby referring to the economic integration presently taking place both globally and regionally. This integration involves among other things a removal of barriers to trade and investment and an increasing movement of capital across national boundaries. The dominant policy trend today when it comes to economic integration includes trade liberalisation, privatisation of state functions, deregulation of various activities and the emergence of new powerful actors in the economic field. It should be kept in mind that globalisation as such does not presuppose a focus on neo-liberal economic policies, but rather that this is an ideological choice currently made by international actors (governments, international organisations). When analysing the impact of globalisation on various groups in society it is often the effect of these trends and policies which are addressed. This will be the approach in this study as well.

There is no unambiguous answer to the question how economic globalisation affects the lives of women worldwide. In order to be able to analyse the impact of globalisation on women one should be able to isolate the factors which are linked to the globalisation process and which causes changes in the position of women, thereby excluding possible other factors which also affect women's position but which are not directly linked to the globalisation process. It is not possible within the framework of this study to make a comprehensive analysis of this question. Instead reference will be made to studies and research done by other researchers and experts.

Generally it has been submitted that globalisation affects women differently in different parts of the world and within different social groupings. Moreover, a common understanding is that the impact may include both positive and negative aspects.¹⁷ For example in areas with export-driven industries the establishment of new industries may provide new opportunities of employment and thereby regular income for women and

¹⁶ See e.g. Raimo Väyrynen, *Globalisaatio; uhka vai mahdollisuus?*, 1998, p. 65-67.

¹⁷ Christine Chinkin, "A Century in Retrospect. Gender and Globalization", *United Nations Chronicle Online Edition*, Vol. XXXVII, No 2 (2000).

men. In fact empirical evidence shows a significant increase in women's share of industrial employment in developing countries such as Bangladesh, Malaysia, Indonesia, Thailand and the Philippines.¹⁸ However, at the same time these new employment opportunities might be coupled with inferior working conditions and low remuneration. For women living in countries at the margin of the globalisation process (e.g. Sub-Saharan Africa) the employment opportunities are much more scarce forcing the majority of women into the informal sector often with poverty as the result.¹⁹

Also in the developed world globalisation is often characterised as a two-edged sword.²⁰ Dominant policies linked to globalisation have been fairly successful in facilitating economic growth and combating inflation in many rich countries. However, simultaneously this has caused "increasing income polarisation, persistently high levels of unemployment, and widespread social exclusion".²¹ The downsizing of the welfare system has in many instances led to the displacement of public welfare functions to the market or the home, and thereby increased the burden on women who in any way tend to do the major bulk of the labour in the invisible economy.²²

In some studies the impact of globalisation on women has been linked to an increase in sexual exploitation of women in the form of trafficking for prostitution particularly in countries undergoing rapid economic transformation.²³

¹⁸ Süle Özler, "Globalization, employment and gender", in: *Globalization with a Human Face, Background Papers*, Vol. 1, 1999, p. 223. Özler submits that recent research shows that the association of increased intensity of female employment with export-oriented industrialisation might be reversed as a consequence of the introduction of e.g. new technologies and skill upgrading of export producers.

¹⁹ On the participation of Sub-Saharan African states in the global economy, see Nguyuru H.I. Lipumba, "Opportunities and Challenges of Globalisation: Can Sub-Saharan Africa Avoid Marginalisation?", in: *Globalization with a Human Face, Background Papers* Vol. II, 1999, pp. 157-221.

²⁰ Isabella Bakker, "Globalization and Human Development in the Rich Countries: Lessons from Labour Markets and Welfare States", in: *Globalization with a Human Face, Background Papers*, Vol. II, 1999, p. 32.

²¹ *Ibid.*, p. 38.

²² Anne Orford, "Contesting Globalization: A Feminist Perspective on the Future of Human Rights, in: Burns H. Weston & Stephen P. Marks (eds), *The Future of International Human Rights*, 1999, p. 157f.

²³ Report of the Special Rapporteur on violence against women, its causes and consequences (Radhika Coomaraswamy), UN doc. E/CN.4/2000/68, paras. 59 and 60. See also Katharina Knaus, Angelika Kartusch & Gabriele Reiter, *Combat of Trafficking in Women for the Purpose of Forced Prostitution. International Standards*, 2000.

In sum, present globalisation trends and policies influence a number of human rights both civil and political as well as economic, social and cultural rights. However, it seems reasonable to conclude that particularly economic, social and cultural rights are threatened when addressing the position of women in a global economy.

1.3. Focus of the study

This study aims at exploring the ramifications of economic globalisation on the international protection of women's human rights.²⁴ This will be done by focusing on how the international human rights machinery has responded to the new challenges that are posed by the globalisation process. More precisely the study aims at analysing the content and scope of state parties' obligations to realise selected human rights which have been identified as particularly important to women in a time of globalisation.

The selection of rights has been determined by an interest to look into several areas of human rights protection rather than only one. Areas which have been identified as particularly relevant to women are employment, poverty and trafficking. All these areas are broad encapsulating a number of different rights. It will not be possible to analyse all rights comprehensively. Instead the focus will be on identifying the most pressing questions under each theme.

The international human rights machinery subject to investigation includes particularly the human rights treaty bodies established to monitor the implementation of various human rights treaties. Of particular interest are the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of All Forms of Discrimination against Women. In addition, the treaty monitoring work done within some of the specialised agencies, particularly the International Labour Organisation (ILO), will be considered. Only brief references will be made to the work of the political branch of the United Nations, that is, the General Assembly, the Commission on Human Rights,

²⁴ The study is limited to an analysis of the human rights problems faced by adult women. However, it should be kept in mind that in many instances the human rights violations faced by women and (girl) children may be deeply intertwined and a sharp distinction may be difficult to maintain.

the Commission on the Status of Women, and the Sub-Commission on the Promotion and Protection of Human Rights.

The study will be done within the scientific discipline of international human rights law.

1.4. Different actors

As has been indicated earlier, the globalisation development poses a number of challenges to the international protection of human rights. Not only are individual rights threatened, but also more profound questions linked to the role of the state in protecting human rights may be raised.

Traditionally the state is viewed as the main bearer of obligations when it comes to safeguarding internationally protected human rights. It has been argued that in the global economy other actors become more central to the protection or rather the violation of human rights. These actors include international financial institutions, international organisations and transnational corporations. An increasing amount of research has been done in trying to establish to what extent, if at all, these kinds of actors are bound by international human rights law.²⁵ Here only few remarks with respect to non-state actors will be made.

When it comes to international financial institutions, such as the World Bank (WB) and the International Monetary Fund (IMF), they have themselves been highly reluctant to accept that they would be bound by international human rights norms. This standpoint has recently been contested in an academic study that holds that the WB and the IMF are obliged to respect human rights in their own operations. This conclusion is drawn from “their status as specialised agencies of the United Nations based on the relationship agreements that the two institutions have entered into with the UN”.²⁶ This status implies

²⁵ See, e.g., Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund*, 2001.

²⁶ *Ibid.*, p. 192.

that the two institutions are bound by the principles of the United Nations, one of which is the respect for “human rights and fundamental freedoms”.²⁷

When it comes to the question concerning to what extent international organisations are legally bound by human rights norms, of particular interest to us is the position of the World Trade Organisation (WTO). Since WTO lacks a formal link to the UN, the possible relationship between WTO and human rights has to be determined on the basis of the Agreement establishing WTO and general rules governing international law. Academic scholars have argued that human rights law should supersede trade law, particularly in situations where the rights violated forms part of *jus cogens* or customary international law.²⁸ It goes without saying that a lot of research and analysis still needs to be done in order to specify the scope of WTO’s obligations to adhere to human rights. A change of policy is further required in order to make such obligations applicable in reality.

With respect to transnational corporations a legal responsibility under international human rights law has not so far been established. Transnational corporations are only indirectly affected by international human rights law through legislative and other measures which State Parties adopt in order to comply with their legal obligations under human rights treaties and other instruments.²⁹ For example, according to the Convention on the Elimination of All Forms of Discrimination against Women, State Parties are obliged “to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise” (Art. 2 e). Instead of establishing direct legally binding rules on transnational corporations the approach internationally has so far been to advance voluntary actions. For example, the Global Compact, which was initiated by the UN’s Secretary General in 1999, encourages corporate leaders “to demonstrate good global citizenship by embracing, supporting and enacting common values in the human rights, labour standards, and environmental areas”.³⁰

²⁷ Article 1 (3) of the United Nations Charter.

²⁸ Robert Howse and Makau Mutua, “Protecting Human Rights in a Global Economy. Challenges for the World Trade Organization”, in: Hugo Stokke & Arne Tostensen (eds.), *Human Rights in Development Yearbook 1999/2000. The Millennium Edition*, 2001, pp. 53-82.

²⁹ For recent developments in this field, see Craig Scott, “Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights”, in: Asbjørn Eide, Catarina Krause & Allan Rosas (eds), *Economic, Social and Cultural Rights. A Textbook*, 2001, pp. 563-595.

³⁰ Viljam Engström, *Realizing the Global Compact*, 2001, p. 18.

With the increasing emphasis on new actors it is easy to neglect the role of the state which despite changes in the environment still is significant in the international legal arena. The state continues to bear the main responsibility for implementing human rights within their own jurisdiction. This concerns most directly the policies and practices of different branches of government as well as public authorities. As indicated earlier in this section the state is also responsible for adopting measures aimed at safeguarding that third parties, such as enterprises, do not violate human rights.

The central role of the state in handling social consequences caused by neo-liberal economic policies has been recognised also by other actors on the global arena. In the World Development Report of 1997, the World Bank stresses that “the state is central to economic and social development, not as a direct provider of growth but as a partner, catalyst, and facilitator”.³¹ In the words of *Andrew Clapham*:

“It is not the fact of the expanding global market, deregulation or privatization which is destroying rights but rather the ways in which States are responding to the new developments. Rather than abandoning the State as a focus for human rights activism we may need to refocus on the existing obligations of the State”.³²

1.5. State obligations

A lot has been said on the nature and scope of state obligations under international human rights law. Especially in the past the categorisation of obligations has often been determined on the basis of the perceived character of a specific right. For example, state obligations linked to civil and political rights have often been defined as negative and immediate, whereas obligations linked to economic, social and cultural rights have been described as positive and progressive. This distinction between obligations depending on the characterisation of rights has been highly criticised in scholarly writings as well as in the work of international human rights treaty bodies. The argument being that there is no

³¹ *World Development Report 1997*, 1997, p. 1.

fundamental difference between the different sets of rights and that the same obligations, albeit to varying extent, are applicable with respect to all human rights.

The most quoted categorisation of state obligations in current research and practice is the one developed by *Asbjørn Eide* in his UN study on the Right to Adequate Food as a Human Right, that is, the obligations to respect, to protect and to fulfil.³³ The Committee on Economic, Social and Cultural Rights has directly applied this categorisation in its general comments on the right to adequate food and on the right to the highest attainable standard of health.³⁴ The CEDAW Committee refers to it in its General Recommendation No. 24 on women and health.³⁵ The categorisation finds support also in the context of civil and political rights, which in Article 2 explicitly states that “Each State party to the present Covenant undertakes to respect and to ensure to all individuals ... the rights recognised in the present Covenant”. The concept “ensure” can be construed as including both the obligation to protect and to fulfil.³⁶

The content of these obligations has been defined by Eide in the following manner:

“The *obligation to respect* requires the State to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in the way she or he finds best to satisfy basic needs.

The *obligation to protect* requires from the State the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual – including the prevention of infringements of his or her material resources.

³² Andrew Clapham, *Globalization and the Rule of Law*, *supra* note 14, p. 2.

³³ Asbjørn Eide, *Right to adequate food as a human right*, Study Series 1, 1989.

³⁴ General Comment No. 12 (1999) on the right to adequate food, UN doc. HRI/GEN/1/Rev.5, p.69, para. 15 and General Comment No. 14 (2000) on the right to the highest attainable standard of health, UN doc. HRI/GEN/1/Rev.5, p. 98, para. 33. See also The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, *Human Rights Quarterly*, 1998, pp. 691-705.

³⁵ General Recommendation No. 24 (1999) on women and health, UN doc. HRI/GEN/1/Rev.5, pp. 244-251.

The *obligation to fulfil* requires the State to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognised in the human rights instruments, which cannot be secured by personal efforts”.³⁷

It is clear that the obligation to respect is of particular relevance to many civil and political rights such as the freedom of association, assembly and expression and that the obligations to protect and to fulfil are pivotal in connection with the realisation of many economic, social and cultural rights. However, this does not mean that the first obligation would not be relevant in conjunction with economic, social and cultural rights and the two last ones in conjunction with civil and political rights. For example, the right to food may in some circumstances best be guaranteed by the state refraining from interfering in the use of resources possessed by the individuals. The right to fair trial, a typical civil and political right, on the other hand, may require active measures by the state both in the form of establishing and maintaining a functional court system as well as providing legal assistance to individuals who lack own means.³⁸

In addition to the obligations to respect, protect and fulfil, there are scholars who suggest that an obligation to promote should be added to the list. *Martin Scheinin* observes that even if the obligation to promote can be subsumed under the obligation to protect and to fulfil, a “fourth category of promotion would help in recognizing the multitude of issues to be examined at when an overall assessment is made on an individual State’s compliance with its human rights obligations”.³⁹

³⁶ Asbjørn Eide, “Economic, Social and Cultural Rights as Human Rights, in: Asbjørn Eide, Catarina Krause & Allan Rosas (eds.), *Economic, Social and Cultural Rights. A Textbook*, 2001, p. 24f.

³⁷ Asbjørn Eide, “Realisation of social and economic rights and the minimum threshold approach”, *Human Rights Law Journal*, 1989, p. 37

³⁸ Martin Scheinin, “Women’s Economic and Social Rights as Human Rights. Conceptual Problems and Issues of Practical Implementation”, in: Lauri Hannikainen & Eeva Nykänen (eds.), *New Trends in Discrimination Law – International Perspectives*, 1999, p. 15f.

³⁹ *Ibid.*, p. 16f.

2. Employment

2.1. Introduction

2.1.1. Export processing zones

As has been observed in the introductory chapter, female participation in paid employment has increased as a consequence of the new policies and trends linked to globalisation in most parts of the world.⁴⁰ This concerns especially work in the manufacturing, service and agricultural sectors. The number of female employees has been particularly high in export-oriented manufacturing industries set up in so-called export processing zones (EPZ). For example, in Malaysia, Philippines, Korea and Sri Lanka, the share of women in EPZ employment varied between 53.5 % and 84.8 % in the beginning of the 1990s, whereas the figures in non-EPZ manufacturing was between 42.1 and 47.2 %.⁴¹

Export processing zones have been defined as “industrial zones with special incentives set up to attract foreign investment, in which imported materials undergo some degree of processing before being exported again”.⁴² The establishment of free trade areas is by no means a new phenomenon. However, the increase in EPZ during the 1980’s and 1990’s has commonly been attributed to the globalisation process. Whereas 24 developing countries had export processing zones in 1976, the figure in 1999 was 93 developing countries.⁴³ The incentives usually offered to the investors include: financial benefits such as tax reductions and duty free imports and exports, infrastructure, favourable labour costs and strategic location or market access. The big increase in the number of EPZ has intensified the competition of foreign investment and put even higher pressure on governments to provide the most attractive business conditions for investors. Since the labour costs constitute an important factor when increasing the competitiveness there is a pressure to adopt labour standards, which are specifically designed for the zones, and

⁴⁰ *1999 World Survey on the Role of Women in Development*, United Nations, 1999, p. 8. Other factors, which have contributed to the development, are, according to the survey, improvements in women’s level of education, falling fertility rates, better access to health care, and changing lifestyles and attitudes.

⁴¹ *Ibid*, p. 10.

⁴² *Labour and social issues relating to export processing zones*, International Labour Organisation, 1998, p. 3.

which very often provide lower labour standards than formally applied on other labour relations in the country.

Despite some common features, the design of export processing zones may differ considerably between countries. For example with respect to wages, it has been shown in some countries that manufacturing industries within EPZ have offered better wages than industries outside the zones.⁴⁴ In other instances, however, the high number of female workers in EPZ has clearly resulted in upholding a continuous low wage level, which in turn has safeguarded the competitiveness of the export sector.⁴⁵ This having been said, it is evident that female workers in export processing zones regularly face human rights related problems linked to short-term labour contracts, long working hours, inadequate benefits, difficulties to combine child care and work etc.⁴⁶

Even if the focus of this study is limited to export processing zones, similar issues can be observed also in other fields of employment, for example in the service and agricultural sectors. Thus, the subsequent discussion on the international legal regulation of work-related rights is applicable also on other types of work. Since the focus of this chapter is on paid employment, work in the informal sector will not explicitly be addressed. However, it should be kept in mind that the distinction between formal and informal employment is far from clear-cut. It has been argued that the global increase in atypical work (i.e. part-time, casual, temporary, own account or self-employed, homework and contract work), which is not necessarily covered by regular labour legislation, has contributed to blurring the picture of distinct forms of work.⁴⁷

⁴³ 1999 *World Survey on the Role of Women in Development*, supra note 40, p. 10.

⁴⁴ Rajendra Paratian and Raymond Torres, *Studies on the Social Dimensions of Globalization - Bangladesh*, 2001, p. 50.

⁴⁵ Richard Anker, Rajendra Paratian and Raymond Torres, *Studies on the Social Dimensions of Globalization - Mauritius*, 2001, p. 65.

⁴⁶ See *From the Household to the Factory. Sex Discrimination in the Guatemala Labour Force*, Human Rights Watch, 2002.

⁴⁷ Kerry Rittich, "Feminization and Contingency: Regulating the Stakes of Work for Women", in: Joanne Conaghan et al. (eds), *Labour Law in an Era of Globalization*, 2002, p. 117f.

2.1.2. Human rights in the field of employment

There are a number of human rights that are relevant in the field of employment. In an effort to present an overview of these rights *Krzysztof Drzewicki* has introduced a division into four categories of rights: Employment-related rights; employment-derivative rights; equality of treatment and non-discrimination rights; and instrumental rights.⁴⁸ I will start by defining these categories and by identifying the rights under the four categories which may be considered as particularly relevant for women in a globalised economy.

Firstly, employment-related rights refer to the most fundamental labour rights and include: the freedom from slavery and similar practices; the freedom from forced and compulsory labour; the freedom to work; the right to free employment services; the right to employment; the right to protection of employment; and the right to protection against unemployment. In this category the most pressing right for women, in a free-trade environment, is the right to protection of employment, which here means the right to stay in employment, for example, as a consequence of pregnancy.

Secondly, employment-derivative rights refer to rights that become operational when a person has an employment, that is, rights which first and foremost deal with different aspects of the employment relationship. These include especially the right to just conditions of work, the right to safe and healthy working conditions, the right to fair remuneration, the rights to vocational guidance and training, maternity protection, and the right to social security. These rights seem to be the most crucial when addressing the rights of women in export industries.

Thirdly, the rights of equality of treatment and non-discrimination are relevant both as independent rights⁴⁹ and in conjunction with the application of other rights.⁵⁰ It goes

⁴⁸ Krzysztof Drzewicki, "The Right to Work and Rights in Work", in: Asbjørn Eide, Catarina Krause & Allan Rosas (eds), *Economic, Social and Cultural Rights. A Textbook*, 2001, pp. 223-244.

⁴⁹ E.g. Article 26 of the CCPR includes an autonomous right of non-discrimination, see further General Comment No. 18 on non-discrimination, UN doc. HRI/GEN/1/Rev.5, p. 136, para. 12.

⁵⁰ See common Article 3 of the CCPR and CESCR which include a provision stating that "The State Parties to the present Covenant undertakes to ensure the equal right of men and women to the enjoyment of all... rights set forth in the present Covenant", thereby indicating that the right of equal treatment is linked to the application of the individual rights contained in the respective treaty.

without saying that the rights of equal treatment and non-discrimination are of utmost importance when discussing women's human rights in employment.

Fourthly, instrumental rights refer to rights that are required in order to safeguard that other work-related rights can be fully exercised. The most pivotal rights in this category are the right to organise, the right to collective bargaining, the right to strike and the right to effective remedies. Other important rights are the freedom of expression and assembly, property rights, and freedom and security of persons. In this category the right to effective remedy is particularly important and will together with the trade union rights be singled out as the most relevant for women in the globalised economy.

In sum, the main work-related rights to be considered in this study are rights listed under the headings employment-derivative rights, equality and non-discrimination rights and instrumental rights. The first category, employment-related rights, will be subsumed under the second category. This concerns particularly the right to protection of employment.

2.1.3. Relevant human rights instruments

It goes without saying that the most comprehensive international regulation in the employment field can be found among the 184 conventions and 192 recommendations adopted by the International Labour Organisation since its inception in 1919.⁵¹ Out of these conventions ILO has defined eight as so-called fundamental human rights conventions⁵² and four as so-called basic human rights standards.⁵³ The former

⁵¹ As of 14 May 2002.

⁵² ILO Conventions No. 29 concerning Forced or Compulsory Labour (1930), No. 87 concerning Freedom of Association and Protection of the Right to Organise (1948), No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1949), No. 105 concerning the Abolition of Forced Labour (1957), No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951), No. 111 concerning Discrimination Respect of Employment and Occupation (1958), No. 138 concerning Minimum Age for Admission to Employment (1973), No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999).

⁵³ ILO Conventions No. 135 concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking (1971), No. 141 concerning Organisations of Rural Workers and Their Role in Economic and Social Development (1975), No. 151 concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (1978), No. 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers with Family Responsibilities (1981).

conventions concern freedom of association, abolition of forced labour, equality, and elimination of child labour. For the purposes of this study especially the conventions relating to the freedom of association and equality will be considered.⁵⁴ With respect to the basic human rights conventions reference could in this context be made to the ILO Convention No. 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities. Moreover, there are a number of other conventions which address the question of female workers from different perspectives, particularly women in underground work⁵⁵ and night work⁵⁶ as well as the issue of maternity protection⁵⁷.

Whereas the fundamental human rights conventions adopted by the ILO have received a considerable number of ratifications, many of the conventions, which are of particular importance to women, have been ratified by only few states.⁵⁸ Since conventions providing general human rights protection, such as the CCPR, the CESCRC and the CEDAW, tend to be ratified by a bigger number of states⁵⁹ than the ILO conventions in general, these conventions become important also in the field of labour rights. Thus, with respect to the CCPR the main provisions to be considered are Article 26 on the right to non-discrimination and Article 22 on the freedom of association, including the right to join trade unions. Article 8 on the prohibition of slavery, forced and compulsory labour falls outside the scope of this study. The CESCRC deals more comprehensively with work-related rights, that is, the right to work (Article 6), rights in work (Article 7), trade union rights (Article 8), social security rights (Article 9) and maternity protection (Article 10). Moreover, the CEDAW contains a provision on the elimination of gender-based discrimination in the field of employment (Article 11).

⁵⁴ ILO Convention No. 87, 98, 100, 111, *supra* note 52.

⁵⁵ ILO Convention No. 45 concerning the Employment of Women on Underground Work in Mines of All Kinds (1935).

⁵⁶ ILO Convention No. 89 concerning Night Work of Women Employed in Industry (1948), No. 171 concerning Night Work (1990).

⁵⁷ ILO Convention No. 3 concerning the Employment of Women before and after Childbirth (1919), No. 103 concerning Maternity Protection (1952), No. 183 concerning the revision of the Maternity Protection Convention (2000).

⁵⁸ No. 183 (3 countries), No. 171 (7 countries), No. 156 (33 countries).

2.1.4. Treaty-monitoring bodies

In the subsequent effort to elucidate state obligations with respect to selected work-related rights, the focus will be on the international practice produced by the UN and ILO treaty monitoring bodies. It is evident that the most comprehensive material is to be found within the ILO system.⁶⁰ The monitoring system under the ILO differs from the corresponding systems under the UN treaties⁶¹ and needs therefore some more elaboration at this stage.⁶² There are basically two supervisory procedures attached to the ILO conventions, one is based on the consideration of state reports and the other on the investigation of alleged violations of treaty provisions. For our purposes the reporting procedure is of particular relevance and thereby the material produced by the Committee of Experts on the Application of Conventions and Recommendations, which considers the reports and makes observations with respect to their content.⁶³ Of special interpretative value are the general surveys, which the Committee of Experts compiles annually on different topics on the basis of the reports received from the states.⁶⁴ The investigation procedures include an inter-state complaint procedure,⁶⁵ a so-called representations procedure, which may be initiated by workers' or employers' organisations,⁶⁶ and a complaint procedure in the field of freedom of association which may be initiated by one of the tripartite partners.⁶⁷

Already a preliminary study of the UN treaty practice indicates that the question of work-related rights has not yet been at the top of the agenda. For example, the Committee on Economic, Social and Cultural Rights has not addressed work-related rights in its general

⁵⁹ As of 14 May 2002, the CCPR has 148 ratifications, the CESCR 145 ratifications, and the CEDAW 169 ratifications.

⁶⁰ See the database ILOLEX available through ILO's homepage at <http://www.ilo.org>. This database has constituted the basis for the ILO material utilised in this study.

⁶¹ The UN human rights treaties are generally monitored by an independent expert body which has the mandate to consider state reports and in some instances individual communications or complaints (CCPR, CERD, CEDAW, CAT). Under two treaties the expert body may in addition initiate an inquiry procedure into grave and systematic patterns of violations (CAT and CEDAW).

⁶² Klaus Samson and Kenneth Schindler, "The Standard-Setting and Supervisory System of the International Labour Organization", in: Raija Hanski & Markku Suksi (eds), *An Introduction to the International Protection of Human Rights. A Textbook*, 1999, pp. 185-218.

⁶³ The Committee of Experts on the Application of Conventions and Recommendations (CEACR), which was set up in 1927, is presently composed of 20 independent members.

⁶⁴ For a presentation of the system for the examination of periodical reports, see N. Valticos, *International Labour Law*, 1979, pp. 240-245.

⁶⁵ Articles 26-34 of the ILO Constitution.

⁶⁶ Articles 24-25 of the ILO Constitution.

comments.⁶⁸ The CEDAW Committee has adopted only one general recommendation in this field, that is, one focusing on equal remuneration in 1989.⁶⁹ In addition, the general recommendation on violence against women addresses employment-related sexual exploitation.⁷⁰ The Human Rights Committee has adopted general comments on equality and non-discrimination, but has so far not addressed comprehensively the question of freedom of association and thereby the right to join trade unions.⁷¹

The limited availability of general comments and recommendations within the UN treaty system, requires a focus on the concluding observations adopted at the end of the consideration of state reports. Rather than going through all available state reports the focus will be on reports put forward by developing countries that have established export processing zones. One criterion used when singling out the states has been that they have ratified the UN human rights conventions and the main part of the ILO conventions. There are states which have established export processing zones but which have not ratified for example the two Covenants. This is the case with states like Indonesia and Malaysia.

2.2. Employment-derivative rights

As indicated above the main problems linked to women's work-related rights in the globalised economy seem to be found among the so-called employment-derivative rights. This concerns particularly the question of minimum wages and working conditions, including maternity protection.

⁶⁷ See Klaus Samson and Kenneth Schindler, *supra* note 61, pp. 209-211.

⁶⁸ See, however, the Statement on Globalisation adopted by the Committee on Economic, Social and Cultural Rights on 11 May 1998, para 3.

⁶⁹ General Recommendation No. 13 (1989) on equal remuneration for work of equal value, UN doc. HRI/GEN/1/Rev.5, p. 210.

⁷⁰ General Recommendation No. 19 (1992) on violence against women, UN doc. HRI/GEN/1/Rev.5, pp. 216-222, paras. 17 and 18.

⁷¹ In the case law of the Human Rights Committee, there are only few individual cases dealing with the right to freedom of association, see, Communication No. 118/1982, *J.B. et al. V. Canada*, Inadmissibility decision of 18 July 1986, UN doc. CCPR/C/28/D/118/1982.

Minimum wages

Concerning the level of remuneration there are basically two sets of standards of relevance. In accordance with Article 7 of the CESC, the right of everyone to the enjoyment of just and favourable conditions of work includes a right to fair wages guaranteeing a decent living for all workers and their families in accordance with the provisions of the Covenant. In addition, the ILO Convention No. 131 concerning Minimum Wage Fixing, with Special Reference to Developing Countries provides that when determining the level of minimum wages attention shall be paid both to the needs of the workers and their families as well as to economic factors (Article 3).⁷²

The question of minimum wages in international human rights law has basically two dimensions, one deals with the material content of the concept of minimum wages and the other with the procedure whereby the minimum wage is established and controlled. Here only the first dimension will be dealt with. It is evident that the minimum wage cannot be established *in abstracto* but will be dependent on the social and economic context of a particular country. Whereas the ILO Convention No. 131 refers to the needs of the employee as the determining criterion, the CESC more explicitly links the level of the minimum wage to the possibility of the worker to exercise through the salary his/her other human rights under the Covenant.

The Committee on Economic, Social and Cultural Rights has in connection with the consideration of state reports addressed the question of the level of the minimum wage, for example, in the case of Panama. The Committee expressed its concern “that the minimum wage was not sufficient to provide for the basic needs of the worker’s family”.⁷³ Further, in relation to Mexico’s report the Committee noted that no adjustment to the minimum wage had been made despite a positive growth of macroeconomic indicators and a sharp decrease in the level of inflation. Moreover, the fact that “about five minimum wages are needed to obtain the officially set basic food basket” was not in compliance with Article 7

⁷² See also ILO Convention No. 26 concerning the Creation of Minimum Wage-Fixing Machinery (1928).

⁷³ UN doc. E/CN.12/Add.64 (24 September 2001), paras. 13 and 32.

(a) of the CESCR.⁷⁴ It is of interest to note that the Committee in this case clearly adopted a normative stand indicating non-compliance with the Covenant.

Closely linked to the material content of minimum wages is the question of the inclusiveness of the right, that is, what categories of workers should be entitled to a minimum wage. Article 7 of the CESCR stipulates that fair wages should be provided for “all workers”. The concept of workers has not been explicitly defined in the Covenant. It is unclear to what extent it covers other groups than wage earners, such as employers and self-employed.⁷⁵ In the ILO Convention No. 131 it is regulated that the system of minimum wages shall cover “all groups of wage earners whose terms of employment are such that coverage would be appropriate” (Article 1(1)). In the previous ILO Convention No. 26 concerning the Creation of Minimum Wage-Fixing Machinery the corresponding wording includes a particular reference to trades “in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low” (Article 1(1)). The Committee of Experts has in its general survey on minimum wages observed that Convention No. 131 “complements and strengthens the objective and obligation arising from the previous Conventions”, thereby emphasising the need to protect wage earners who are not organised.⁷⁶ In accordance with paragraphs 2 and 3 of Article 1 of the ILO Convention No. 131, a state party may exclude some groups from the minimum wage system. In its general survey, the Committee of Experts regrets that only a limited number of Governments has listed in its first report the excluded groups.⁷⁷

No direct reference to the question of minimum wages in export processing zones has been found in the treaty practice of the CESCR or the ILO conventions. However, the application of labour legislation in EPZ in general has been dealt with. Thus, the Committee on Economic, Social and Cultural Rights has expressed its concern with respect to practices whereby labour standards have been withdrawn or modified with respect to free trade areas.⁷⁸ The ILO Committee of Experts has considered this issue in

⁷⁴ UN doc. E/C.12/1/Add.41 (8 December 1999), paras. 20 and 36.

⁷⁵ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development*, 1995, pp. 228-229 and 235.

⁷⁶ General survey on minimum wages, Report III, Part 4 B, 1992, para. 66.

⁷⁷ *Ibid*, para 84.

⁷⁸ UN doc. E.C.12/1/Add.64 (24 September 2001), para. 14 (Panama), UN doc. E/C.12/1994/8 (31 May 1994), para. 9 (Mauritius).

connection with Bangladesh's state report on ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise. Bangladesh argued that the restrictions on the right to form trade unions in EPZ "are temporary measures necessitated by the national situation, the level of development and the specific circumstances within Bangladesh".⁷⁹ Of course, the right to form trade unions belongs to the fundamental rights and has therefore a stronger position in the ILO system than the issue of minimum wages. Consequently the Committee of Experts held in the case of Bangladesh that no restrictions are acceptable, not even temporarily.⁸⁰

The partial exclusion of EPZ from the national labour laws is further problematic from an equality perspective, since women tend to be in the majority among workers in free trade areas, in many instances up to 80 %. By leaving out the EPZ clearly more women than men are affected. This in turn raises the question of possible indirect discrimination on the basis of sex (see below).

Working conditions

The concept of working conditions is here used as an umbrella concept for working hours, employment contracts and benefits. The problems often raised in connection with export processing zones include both long working hours, short term labour contracts and, as a consequence thereof, insecure labour contracts and reduced benefits. Article 7 of the CESCR provides that everyone has the right to the enjoyment of just and favourable conditions of work. This includes among other things "safe and healthy working conditions" and "rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays" (Article 7 (b) and (d)).

Within the ILO system there are over 20 general conventions which deal with safe and healthy working conditions and around the same number of conventions in the field of working hours and holidays. It has not been possible within the scope of this study to examine these conventions comprehensively. On the basis of a brief review it appears that the Committee of Experts has not addressed the topic of working conditions in export

⁷⁹ CEACR: Individual Observation concerning Convention No. 87, ILOLEX, 1999 (Bangladesh).

processing zones to any larger extent during the consideration of state reports. This could be partly due to the fact that many of the developing countries with extensive EPZ have not ratified the relevant conventions.

In connection with the consideration of state reports, the Committee on Economic, Social and Cultural Rights has with respect to working hours expressed concern about “excessive overtime work in the Export Processing Zones”.⁸¹ Furthermore, the Committee has addressed at a general level the “apparent flagrant disregard of labour laws, ... the lack of respect for minimum wages, for conditions of work and unionisation”, thereby indicating that even if the legislation is adequate the implementation thereof may be ineffective.⁸² It is of particular interest to note that the Committee has in this context raised the topic of the position of women, by noting that it is seriously concerned about “the situation of those persons working in the “maquillas” (export sector industries), many of whom are women”.⁸³

Also the Committee on the Elimination of Discrimination against Women has expressed concern about the situation of women in export processing zones. The Committee notes that “while the percentage of women employed in free-trade zones is laudable, because it gives them a financial footing, women workers suffer considerable discrimination in income and benefits”.⁸⁴ In another instance, the Committee recommends that the state party pay attention to improving the wage levels and the terms and conditions of women workers in the export processing zones.⁸⁵

⁸⁰ *Ibid.*

⁸¹ UN doc. E/C.12/1994/8 (31 May 1994), para. 9 (Mauritius).

⁸² UN doc. E/C.12/1/Add.3 (28 May 1996), para. 18 (Guatemala).

⁸³ *Ibid.*

⁸⁴ UN doc. A/53/38 (14 May 1998), para. 336 (Dominican Republic).

⁸⁵ UN doc. A/52/38/Rev.1 (12 August 1997), para. 456 (Bangladesh).

Maternity / family protection

The combination of family life and participation in employment outside the home is an equation which many women worldwide struggle with daily. The problems faced in this regard by women working in export processing zones are often particularly severe. International human rights law provides a fairly broad protection of women's reproductive rights. The rights protected include the right to paid maternity leave or leave with adequate social benefits,⁸⁶ the prohibition against terminating the working contract due to pregnancy,⁸⁷ protection against harmful working conditions,⁸⁸ the right to breastfeed⁸⁹ and the right to child-care facilities.⁹⁰

The application of these rights in the context of EPZ has been addressed in connection with several state reports. The Committee on Economic, Social and Cultural Rights expresses deep concern, in conjunction with the consideration of the Mexican report, regarding women's situation in so-called *maquiladoras*. In these industries located on the border between Mexico and the United States women are allegedly subjected to pregnancy tests upon recruitment and at intervals during work, and are dismissed if found to be pregnant.⁹¹ The Committee does not provide insights into what human rights are at stake when such practices are carried out. It seems that at least Article 7 on just and favourable conditions of work is threatened.

However, these practices may also be addressed under other human rights, such as the right to privacy. Thus, the Human Rights Committee has in its General Comment No. 28 on equality of rights between men and women stated with respect to Article 17 of the CCPR that "women's privacy may also be interfered with by private actors, such as employers who request a pregnancy test before hiring a woman".⁹²

⁸⁶ CESCR Article 10(2), CEDAW Article 11(2), ILO Convention No. 183 Article 6.

⁸⁷ CEDAW Article 11(2), ILO Convention No. 183 Article 8.

⁸⁸ CESCR Article 10(2), CEDAW Article 11(2).

⁸⁹ ILO Convention No 183 Article 10.

⁹⁰ CEDAW Article 11(2).

⁹¹ UN doc. E/C.12/1/Add.41 (8 December 1999), para. 21 (Mexico). See also UN doc. E/C.12/1/Add.16 (12 December 1997), para. 15 (Dominican Republic).

The ILO Committee of Experts has addressed these kinds of practices under the right to non-discrimination provided for in ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation. The Committee exemplifies discriminatory practices against female workers in export processing zones by referring to the practice whereby “women are required to provide urine samples and, during the probationary period, provide proof to the enterprise of the continuation of their menstrual cycles”.⁹³ Moreover, the Committee addresses practices whereby employers request certificates attesting to the sterilisation of women before recruiting them.⁹⁴ In both these cases the Committee confirms that these practices constitute discrimination on the basis of sex.

The non-discrimination approach is also dominant in the CEDAW. Without necessarily referring to free-trade areas the CEDAW Committee has addressed questions of maternity protection in conjunction with a number of state reports. For example in the case of Panama the lack of “effective protection with respect to maternity leave and breastfeeding breaks” is pointed out.⁹⁵ The lack of social benefits, including paid maternity leave and adequate child-care facilities in the manufacturing sector are addressed in the case of Bangladesh.⁹⁶ During the consideration of the Mexican report, the CEDAW Committee addressed the infringements on women’s reproductive rights when mandatory pregnancy tests are required for employment.⁹⁷ In the case of Mauritius, the Committee raised questions concerning the rule enshrined in the labour law and the export-processing zone act, whereby women are entitled to maternity leave for only three pregnancies.⁹⁸

All these incidences of violations of women’s reproductive rights are characterised by the fact that the perpetrator of the violation is a private employer, often a foreign employer operating in the country. This means that the first level of state obligations, that is, the obligation to respect is not at stake, but instead the obligation to protect is relevant. In an effort to exemplify what these obligations may entail reference can be made to the

⁹² UN doc. HRI/GEN/1/Rev.5, p. 171, para. 20. See also UN doc. CCPR/C/79/Add.109 (27 July 1999), para. 17 (Mexico) and CCPR/C/79/Add.66 (24 July 1996), para. 335 (Brazil).

⁹³ CEACR: Individual Observation concerning Convention No. 111, ILOLEX, 2000, para. 3 (Mexico).

⁹⁴ CEACR: Individual Observation concerning Convention No. 111, ILOLEX, 1994, para. 2 (Brazil).

⁹⁵ UN doc. A/53/38/Rev.1 (2 July 1998), para. 197 (Panama).

⁹⁶ UN doc. A/52/38/Rev.1 (12 August 1997), para.441 (Bangladesh).

⁹⁷ UN doc. A/53/38 (15 May 1998), para. 391 (Mexico).

⁹⁸ UN doc. A/50/38 (31 May 1995), para. 189 (Mauritius).

observations made by the ILO Committee of Experts in considering Mexico's report under Convention No. 111. Here the Committee observes that the measures to be adopted by the government could include:

“Sending a clear message to employers and workers to the effect that all action taken with the view to requiring women to undergo pregnancy tests constitutes discrimination based on sex; taking measures to penalise employers who persist in imposing such discriminatory practices; establishing of effective mechanisms of prevention, complaint, investigation and compensation where appropriate and, to this end, strengthening the labour inspection services and involving the bodies specialised in promotion and prevention, application and monitoring of the principle of the Convention”.⁹⁹

As shown above, the application, or rather lack of application, of employment-derivative rights in export processing zones has been addressed by all treaty monitoring bodies dealt with in this study. With the exception of the ILO system, the content of work-related rights is still to a large extent undefined. However, the monitoring bodies have adopted a strong gender specific approach particularly in conjunction with the realisation of reproductive rights in export processing zones.

2.3. Equality of treatment and non-discrimination rights

The equality of treatment and the non-discrimination rights are, as noted earlier, central to the protection of women's human rights. In the context of economic, social and cultural rights it is generally argued that the right not to be discriminated against belongs to one of the immediate state obligations as opposed to obligations which may be progressively realised on the basis of available resources.¹⁰⁰ In this sense the non-discrimination rights under the CDESCR resembles the corresponding provisions of the CCPR (Articles 2 and 26) and the ILO Convention No. 111. With respect to the CEDAW the operative article of

⁹⁹ CEACR: Individual Observation concerning Convention No. 111, ILOLEX, 2000, para. 5 (Mexico)

the Convention provides that “State parties ...agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women” (Article 2). Even if the CEDAW allows a certain time span before the policy of eliminating discrimination against women is fully realised, it has been argued that this delay first and foremost should be linked to the time required in order to develop appropriate means.¹⁰¹ In other words, the state party has an immediate obligation to initiate the work to identify the appropriate means.

Furthermore, the right to non-discrimination, particularly in the interpretation of treaty-monitoring bodies, contains discriminatory practices committed by both public and private actors. With respect to CEDAW, this is clearly spelt out in the text of the Convention. Article 1 of the Convention stipulates that the term “discrimination against women” shall mean any infringements on women’s enjoyment of “human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”. The reference to the economic field includes work-related rights both within the public and private sector. This is further confirmed in Article 2 (e) by the statement that the state party undertakes “to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise”.

The Human Rights Committee has with respect to Article 26 of the CCPR submitted that the provision “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”.¹⁰² Furthermore, the Committee has requested state parties to provide information on discriminatory practices carried out “by public authorities, by the community, or by private persons or bodies”.¹⁰³ The CESCR Committee has adopted a similar approach in their consideration of state reports.¹⁰⁴ The same goes for the ILO

¹⁰⁰ See General Comment No. 3 (1990), UN doc. HRI/GEN/1/Rev.5 (26 April 2001), p. 19, para 5 and UN doc. E/CN.4/1987/17, Annex, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, paras. 22 and 35.

¹⁰¹ Rebecca Cook, “State Responsibility for Violations of Women’s Human Rights”, *Harvard Human Rights Journal*, 1994, p. 163.

¹⁰² UN doc. HRI/GEN/1/Rev.5 (26 April 2001), General Comment No. 18 (1989) on non-discrimination, p. 136, para 12.

¹⁰³ *Ibid*, para. 9.

¹⁰⁴ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Developments*, *supra* note 75, p. 190-192. See also UN doc. E/CN.4/1987/17, *supra* note 100, para. 40.

Convention No. 111 concerning Discrimination in Respect of Employment and Occupation.¹⁰⁵

Even if the right to non-discrimination in general terms provides a broad protection against discrimination, the application of the right on gender relations is often afflicted with difficulties. The reason for this is to be found in the traditional way of understanding discriminatory practices. Thus, the application of the right to non-discrimination on the basis of sex often requires a comparison between two similarly situated individuals, a woman and a man. If it is found that the woman and the man are similarly situated they are to be treated alike, if not, they should be treated different from each other.¹⁰⁶ Discrimination occurs when similarly situated individuals are treated differently or vice versa. From women's point of view the problem is that the male easily becomes the norm against whom the situation of women is compared. In areas where no male comparator exists the right to non-discrimination easily becomes obsolete. This is for example the case in the context of discriminatory practices linked to maternity. There are several examples from particularly national case law which show that the application of the non-discrimination rule on reproduction-related issues have in some instances led to the most bizarre interpretations, including artificial comparisons between pregnant women and sick men.¹⁰⁷

As indicated earlier in this chapter, the interpretation of international human rights treaty monitoring bodies, particularly those operating under the ILO and CEDAW, have clearly defined distinctions made on the basis of maternity or pregnancy as discrimination on the basis of sex, or in the case of CEDAW, discrimination against women. The CEDAW Committee has further defined gender-based violence, including sexual harassment in the work place, as discrimination against women.¹⁰⁸

¹⁰⁵ General survey on equality in employment and occupation, Report III, Part 4 B, 1988, p. 23f.

¹⁰⁶ Vierdag, E.W., *The Concept of Discrimination in International Law with Special Reference to Human Rights*, 1973, pp. 7-8 and 16-17.

¹⁰⁷ Mahoney, Kathleen E., "Canadian Approaches to Equality Rights and Gender Equality in Courts", in Rebecca J. Cook (ed), *Human Rights of Women. National and International Perspectives*, 1994, pp. 437-461.

¹⁰⁸ General Recommendation No. 19 on violence against women, *supra* note 70, para. 1.

Another aspect of discrimination, which is of particular relevance in the field of employment, is the situation where gender neutral distinctions are made which have gender specific effects. Such distinctions are only indirectly discriminating against women (or men). This question is particularly pertinent in conjunction with the application of the principle of equal pay for equal work or work of equal value.¹⁰⁹ The term pay or remuneration should here be interpreted as including both the salary and other benefits paid directly or indirectly by the employer. With respect to the ILO practice, the general survey on equal remuneration confirms this interpretation.¹¹⁰ It is stated that the reference to “any additional emoluments whatsoever ... arising out of the worker’s employment” in Article 1 of the ILO Convention No. 100 concerning Equal Remuneration covers increments based on seniority, housing and family allowances, allowances paid through a fund managed by employers or workers, and social security benefits financed by the employer or industry.¹¹¹ This means that when an employer pays better work-related benefits for example to full time employees or employees with permanent labour contracts women might be victims of indirect discrimination in case they are in the majority, as often is the case, among the part-time workers or workers with temporary working contracts. The Committee on Economic, Social and Cultural Rights has partly addressed this question in the case of Korea, where the Committee questions the Korean distinction between “regular” and “irregular workers” and the provision of lower wages, pension benefits, unemployment and health benefits to the so-called irregular workers. In this context the Committee notes that “the proportion of irregular workers in the general labour force has grown to half, the great majority of them women”.¹¹² However, the Committee does not refer to the right to non-discrimination in this situation. In the context of free trade areas, indirect sex discrimination could be used when discussing the exclusion of free-trade areas from the application of standard labour laws.

Even if the treaty-monitoring bodies still need to clarify the content of the human right to non-discrimination, it is clear on the basis of available treaty practice that the monitoring

¹⁰⁹ Article 7(a) (I) of the CESC, Article 11 (1) (d) of the CEDAW, ILO Convention No. 100 on Equal Remuneration for Men and Women Workers for Work of Equal Value (1951).

¹¹⁰ General survey on equal remuneration, Report III, Part 4B, 1986, paras. 14-17.

¹¹¹ See also Article 11 (1) (d) of the CEDAW which reads “The right to equal remuneration, including benefits...”.

¹¹² UN doc. E/C.12/1/Add.59 (21 May 2001), para. 17 (Republic of Korea).

bodies have tried to go beyond a formal approach to discrimination. As an example, increasing references to indirect discrimination has been made in connection with the consideration of state reports.¹¹³ Furthermore, the approach by the CEDAW Committee to consider gender-based violence, which lacks a comparable male, as discrimination against women indicate that the Committee is in favour of an approach which emphasises the structural dimensions of inequality and discrimination.

It appears that the implementation of women's rights to non-discrimination and equality in export processing zones has not yet been broadly addressed in treaty practice. The main exception in this regard is the practice of the CEDAW Committee which is based on the non-discriminatory approach embedded in the Convention.

2.4. Instrumental rights

Instrumental rights refer to rights which are required in order to fully exercise other work-related rights. There are basically two rights which become highly important in the context of export processing zones. The first concerns the establishment and operation of trade unions advancing the rights of the workers in the free trade areas, and the second, the availability of mechanisms for protecting the rights, including effective remedies.

The right to establish and join trade unions is perhaps the most fundamental right within the ILO system. In fact it is today considered that every member of the ILO has an obligation to respect trade union rights irrespective of whether they have ratified the conventions which deal with the rights or not.¹¹⁴ Even if trade union rights are protected also under the CCPR (Article 22) and the CESCR (Article 8), it is clear that the ILO system provides the paramount protection in this field.

¹¹³ UN doc. A/54/38 (1 July 1999), para. 129 (Nepal), UN doc. A/56/38 (21 July 2001), para. 84 (Singapore), UN doc. CCPR/C/79/Add.21 (1993), para. 6 (Ireland).

¹¹⁴ ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise and No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. See Virginia A. Leary, "Lessons from the Experience of the International Labour Organisation", in: Philip Alston (ed), *The United Nations and Human Rights. A Critical Appraisal*, 1992, p. 591.

It has already been noted in an earlier section that the restriction on trade union rights in export processing zones has been scrutinised by the ILO Committee of Experts. This was done repeatedly in the case of Bangladesh which, ever since 1980, has denied the right to organise of workers in EPZ with the motivation that these temporary measures are “necessitated by the national situation, the level of development and the specific circumstances within Bangladesh”.¹¹⁵ The Committee observed that “such a fundamental right as the right to organise should not be denied to workers, even temporarily, and that this would constitute a violation of Article 2 of the Convention” (No. 87). Moreover, the Committee observes that the national legislation which provides for the exemption of the zones from the enjoyment of the trade union rights “cannot be considered a ‘temporary measure’, in view of the fact that it was adopted in 1980”.¹¹⁶ Also under the other human rights conventions restrictions on trade union rights in EPZ have been addressed. The Committee on Economic, Social and Cultural Rights has discussed this in connection with the state report of Panama.¹¹⁷

Even in cases where trade union rights are not formally restricted with respect to EPZ, the factual exercise of these rights might be limited due to informal restrictions put up by employers and ignorance among the workers of their rights. It has been shown in a number of studies that this often is the case in female dominated work places in EPZ where the majority of the workers are young and lack previous work experience. The question to be raised is to what extent does the state have an obligation through active measures to protect, fulfil and promote the trade union rights.

The Human Rights Committee has raised this question in conjunction with the consideration of the state report of Mauritius. The Committee recommends that the Government will consider “whether workers in export processing zones (who include a majority of women) need additional legal protection to ensure their full enjoyment of their rights guaranteed by Article 22 of the Covenant”.¹¹⁸ With respect to the report of the Dominican Republic, the Committee on Economic, Social and Cultural Rights has expressed concern that “workers in the free trade zones are allegedly discouraged from

¹¹⁵ CEACR: Individual Observations concerning Convention No. 87 in, e.g., 1997, 1999 and 2001.

¹¹⁶ All quotations from CEACR: Individual Observation concerning Convention No. 87, 1999 (Bangladesh).

¹¹⁷ UN doc. E/C.12/1/Add.64 (24 September 2001), paras. 114 and 29 (Panama).

joining or forming trade unions and that the regulations concerning the right to strike in the Labour Code are not complied with by the employers”.¹¹⁹ It is, in other words, clear that the Government has an obligation to protect the trade union rights also in EPZ through legal and other measures. However, the treaty monitoring bodies do not seem to have addressed a possible obligation to promote trade unionisation, which could be important in order to reach the workers in EPZ.

This brings us to the second aspect of the instrumental rights, that is, the question of the existence of legal and other remedies in order to protect the rights. The CCPR explicitly stipulates that anyone whose rights are violated under the Covenant shall have access to an effective remedy (Article 2 (3)). The CEDAW, on the other hand, provides that states parties undertake “to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination” (Article 2 (c)).

Even if the CESCR lacks an explicit reference to effective remedies, the Committee on Economic, Social and Cultural Rights has, in its General Comment No. 9 on domestic application of the Covenant, addressed the issue. The Committee states “the Covenant norms must be recognised within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place”.¹²⁰ The CESCR leaves to the discretion of the state parties to specify what type of remedies are available. Apart from judicial remedies, also administrative remedies may be utilised. However, the Committee observes that “there are some obligations, such as (but by no means limited to) those concerning non-discrimination, in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirement of the Covenant”.¹²¹

¹¹⁸ UN doc. CCPR/C/79/Add.60 (4 April 1996), paras. 21 and 29 (Mauritius).

¹¹⁹ UN doc. E/C.12/1/Add.16 (12 December 1997), paras. 20 and 37 (Dominican Republic).

¹²⁰ General Comment No. 9 (1998) on domestic application of the Covenant, UN doc. HRI/GEN/1/Rev.5 (26 April 2001), p. 58, para. 2.

¹²¹ *Ibid*, para. 9.

In the case of work-related rights, where the alleged human rights violator is a private enterprise, the question of a functioning system of control and supervision of the application of labour standards becomes imperative. The Committee on Economic, Social and Cultural Rights has addressed this issue in the context of export processing zones. The Committee submits in connection with Guatemala's state report that "despite the Government's stated policy of undertaking further commitments to strengthen the labour inspectorate and introduce changes in the monitoring and enforcement of labour standards, including through the proposals on economic policy and labour legislation contained in recently signed agreements, the possibilities for ensuring effective implementation of the new proposals continue to give grounds for concern to the Committee".¹²²

With respect to the ILO system, the Convention No. 81 concerning Labour Inspection in Industry and Commerce has been singled out by the Governing Body of the ILO as one of the four so-called priority international labour standards. The Convention, which has been ratified by 128 states, regulates in considerable detail the function, organisation and operation of the labour inspectorate. One of the key functions of the inspectorate is "to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare ..." (Article 3 (1a)). The Committee of Experts has regularly addressed the problems linked to the insufficient number of inspectors and their inadequate means to carry out the tasks under the Convention effectively.¹²³ In the case of Sri Lanka, the Committee has explicitly addressed the topic of labour inspection in export processing zones, by requesting information on the activities of the labour inspectorate in EPZ.¹²⁴ In subsequent observations the Committee has continued to request for statistical information on the number of inspections carried out.¹²⁵

¹²² UN doc. E/C.12/1/Add.3 (28 May 1996), para. 18 (Guatemala).

¹²³ N. Valticos, *International Labour Law*, 1979, p. 218.

¹²⁴ CEACR: Individual Observation concerning Convention No. 81, 1999 (Sri Lanka)

¹²⁵ CEACR: Individual Observation concerning Convention No. 81, 2000, para 2 (Sri Lanka)

3. Trafficking in women

3.1. Introduction

3.1.1. General remarks

There is no unambiguous definition of the concept ‘trafficking in women’.¹²⁶ Suffice it to note at this stage that trafficking in women usually refers to the recruitment and transportation of women for work or services by means of some form of coercion.¹²⁷ Trafficking in women usually involves the transportation of women from developing countries or countries in transition to developed countries as well as between developing countries or even within national borders.

Trafficking in women is an old phenomenon, which was regulated at the international level for the first time in 1904. The limited scope of the International Agreement for the Suppression of the White Slave Trade has been considerably broadened in subsequent treaties and today international bodies are increasingly addressing the question of trafficking.¹²⁸

Before going into the international standards in the area, it is necessary to look into the connection between trafficking and globalisation. Of particular interest to us is the question of how the globalisation process has shaped the trafficking in women. In the literature it is commonly submitted that the globalisation process has contributed to an increase in trafficking worldwide.¹²⁹ It is often stated that particularly unemployment among women and lack of viable economic prospects, which often are the consequence of market oriented reforms and structural adjustment programmes, contribute to driving

¹²⁶ In this study the focus will be on trafficking in women, thereby leaving aside trafficking in men and children.

¹²⁷ Lois Chiang, “Trafficking in Women”, in: Kelly D. Askin & Dorean M. Koenig (eds), *Women and International Human Right Law*, 1999, p. 323.

¹²⁸ For an up-date on trafficking-related activities of United Nations and other international organisations, see UN.doc.E/CN.4/2002/80 (25 January 2002), Report of the Secretary-General, Integration of the Human Rights of Women and the Gender Perspective. Trafficking in women and girls.

¹²⁹ Nora V. Demleitner, “The Law at a Crossroads: The Construction of Migrant Women Trafficked into Prostitution”, in: David Kyle & Rey Koslowski (eds), *Global Human Smuggling*, 2001, p. 257. With respect

women into trafficking.¹³⁰ It has also been argued that the expansion of the tourism industry has led to an increase in the demand for sex services and thereby trafficking.¹³¹ The lucrative illegal business profiting from trafficking in women is increasingly operating on the basis of international networks, which through e.g. Internet effectively may respond to the needs of the markets.¹³²

Even if trafficking traditionally has been linked to prostitution, as the main purpose of trafficking, it has been argued in more recent studies and policy documents that trafficking should be viewed more broadly as a question involving a number of purposes apart from prostitution, such as, slavery-like labour, forced marriages, and domestic services. In most situations women are exploited in one way or the other through various degrees of coercion, exploitative working conditions, debt-bondage, violence etc.

3.1.2. International standard-setting and procedures

The question of trafficking in women can be studied within the framework of a number of international legal regulations. These are at least anti-trafficking law, anti-slavery law, international humanitarian law, international criminal law, labour law and human rights law. These fields of law are not always sharply distinguishable, but since they have different origins it is meaningful for descriptive reasons to treat them as distinctive normative standards.

The 1904 Convention on trafficking referred to above was subsequently followed by other Conventions in 1910,¹³³ 1921,¹³⁴ 1933¹³⁵ and 1949. The latter Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

to Southeast Asia, see Lin Lean Lim (ed.), *The Sex Sector: The economic and social bases of prostitution in Southeast Asia*, 1998, p. 6. See also *Migrant Trafficking and Human Smuggling in Europe*, 2000, pp. 25-27.

¹³⁰ UN doc. E/CN.4/2000/68 (29 February 2000), Radhika Coomaraswamy, Special Rapporteur on Violence against Women, paras. 29 and 59.

¹³¹ See Jyoti Sangera, "In the Belly of the Beast: Sex Trade, Prostitution and Globalization", Discussion paper for the South Asia Regional Consultation on Prostitution, 17-18 February 1999.

¹³² Janie Chuang, "Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts", *Harvard Human Rights Journal*, 1998, p. 68.

¹³³ International Convention for the Suppression of the White Slave Traffic.

¹³⁴ International Convention for the Suppression of the Traffic in Women and Children.

consolidated the earlier conventions and has up till recently been the main international agreement in the field. The Convention aims at prohibiting the exploitation of prostitution by third party through punishing anyone who is involved in the trafficking business either by procuring or leading away another person for the purposes of prostitution, keeping or managing brothels, or knowingly renting buildings for the purpose of prostitution (Articles 1 and 2).

Closely linked to the international anti-trafficking regulation is the international anti-slavery regulation, which dates back to the early 19th century.¹³⁶ Today there are two international instruments which exclusively deal with the prohibition of slavery, that is, the 1926 Convention on Slavery, Servitude, Forced Labour and Similar Institutions and Practices and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. The 1926 Convention defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised” (Article 1). The 1956 Convention expands the definition by including also other closely related practices such as debt bondage and forced marriages (Article 1). It is clear that the anti-slavery conventions encompass trafficking in women.¹³⁷

A common feature of both the anti-trafficking and the anti-slavery instruments is their weak enforcement mechanisms and consequently limited effect at the international arena. There are no independent treaty bodies, which would, in the same way as the treaty bodies under for example the CCPR and CESCR, supervise the implementation of the conventions. However, in 1974 the Economic and Social Council of the United Nations decided that the States Parties to the above mentioned conventions are to submit reports on trafficking and slavery to the Sub-Commission on the Promotion and Protection of Human Rights. The Working Group on Contemporary Forms of Slavery established by the Sub-Commission reviews the reports, but has limited possibilities in terms of mandate and

¹³⁵ International Convention for the Suppression of the Traffic in Women of Full Age.

¹³⁶ The 1815 Declaration Relative to the Universal Abolition of the Slave Trade was the first international instrument to condemn slavery. See Michael Dottridge & David Weissbrodt, “Review of the Implementation of and Follow-up to the Conventions on Slavery”, *German Yearbook of International Law*, 1999, p. 243.

¹³⁷ Stephanie Farrior, “The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential”, *Harvard Human Rights Journal*, 1997, p. 221.

resources to act on the reports.¹³⁸ In addition, special procedures in the form of special rapporteurs have been utilised in this area.¹³⁹

The question of trafficking in women may further be raised under ILO conventions and particularly Convention No. 29 concerning Forced Labour (1930) and No. 105 concerning the Abolition of Forced Labour (1957). With respect to children, Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour was adopted in 1999. As noted in the chapter on employment the most relevant monitoring mechanism under the ILO Convention is the reporting procedure and the work carried out by the Committee of Experts on the Application of Conventions and Recommendations.

Through the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda as well as the more recent International Criminal Court,¹⁴⁰ increasing emphasis has been put on gender-specific aspects of international crimes within international humanitarian law and international criminal law. The question of trafficking in women may meet the crime descriptions particularly under the headings “crimes against humanity” and “war crimes”.¹⁴¹ In the Rome Statute of the International Criminal Court, crimes against humanity are defined as “enslavement” and “rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilisation” (Article 7 1 (a) and (g)) and are applicable “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” (Article 7.1). The same crimes except “enslavement” are listed under the heading “war crimes” and are applicable during armed conflict “when committed as part of a plan or policy or as part of a large-scale commission of such crimes” (Article 8.1).

Within international cooperation aiming at combating organised crimes, the question of trafficking in women is addressed in the newly adopted Protocol to Prevent, Suppress and

¹³⁸ *Ibid*, p. 220f and 242-244.

¹³⁹ See particular the Special Rapporteur on Violence Against Women, whose mandate was created in 1994, and Special Rapporteur on human rights of migrants, whose mandate was created in 1999.

¹⁴⁰ The Statute of the International Criminal Court will enter into force on 1 July 2002.

¹⁴¹ Judith G. Gardam and Michelle J. Jarvis, *Women, Armed Conflict and International Law*, 2001, pp. 72-81.

Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime.¹⁴² The purpose of the Protocol is “to prevent and combat trafficking in persons” and “to protect and assist the victims of such trafficking, with full respect for their human rights” (Article 2). There is no supervisory mechanism attached to the Protocol. The State Party Conference established under the Convention against Transnational Organised Crime is not applicable on the Protocols.¹⁴³

When talking about human rights law in the present context reference is made to the international conventions drafted under the auspices of the UN Human Rights Commission and the UN Commission on the Status of Women. The key instruments are the CCPR, CESC, CEDAW and the Migrant Workers Convention. Also the Racial Discrimination Convention, the Convention against Torture and the Convention on the Rights of the Child are relevant but will here be left outside the scope of the study.¹⁴⁴ The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which covers the rights of both legal and illegal immigrants, has not yet entered into force and consequently the interpretation of the Convention is still limited.¹⁴⁵ Thus, the main focus in this study will be on the practice within the CCPR, CESC and the CEDAW.

Human rights law constitutes the main basis of this study. The focus will be on how the question of trafficking in women has been addressed within the theory and practice of international human rights treaties. The reason for this approach is twofold. Firstly, the question of trafficking in women raises fundamental human rights problems that call for a human rights response. Secondly, the international enforcement system is more developed when it comes to human rights treaties than for example anti-trafficking or anti-slavery law. Notwithstanding this, it should be kept in mind that the development of human rights

¹⁴² The UN General Assembly adopted the Protocol on 15 November 2000. It will enter into force after 40 ratifications.

¹⁴³ Anne Gallagher, “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis”, *Human Rights Quarterly*, 2001, p. 981.

¹⁴⁴ See Optional Protocol to the Convention on the Sale of Children and Child Prostitution and Child Pornography, which entered into force on 18 January 2002.

¹⁴⁵ As of 10 April 2002, 19 states have ratified the Convention, which enters into force upon the ratification of 20 states.

law often is influenced by other fields of law and that therefore a holistic approach is in many ways warranted.

3.1.3. Controversies regarding trafficking in women and prostitution

Before analysing how trafficking in women has been dealt with in the international treaty practice it is necessary to briefly depict the controversies surrounding the phenomenon. Trafficking for the purpose of prostitution belongs to one of the most debated questions in the field of women's human rights. The controversies concern fundamental questions such as who and what should be covered by the concept and what measures should be required.

Firstly, there are those who argue that trafficking in women for the purposes of prostitution always is an expression of patriarchal dominance and sexual exploitation of women thereby advocating for the elimination of all forms of prostitution irrespective of whether the woman concerned has seemingly voluntarily entered into the prostitution. The basic notion here is that trafficking for the purpose of prostitution never is a free choice but always to some extent coerced.¹⁴⁶

Secondly, there are those who emphasise the right of self-determination of the prostitutes, thereby advocating for the recognition of the legal status of prostitutes, including those who migrate for that purpose. In accordance with this view, the emphasis in international treaty regulation should be on combating trafficking and exploitative forms of prostitution, which involves clear coercion and profiting by third party. One of the motivations behind this stand is that an approach which would ban prostitution would not be realistic bearing in mind the economic interests involved in the prostitution industry of today.¹⁴⁷

Thirdly, there are those who reject the distinction between forced and voluntary prostitution on the ground that the distinction tend to highlight only the human rights

¹⁴⁶ Kathleen Barry, *The Prostitution of Sexuality*, 1995, pp. 304-309.

¹⁴⁷ Jyoti Sangera, "In the Belly of the Beast: Sex Trade, Prostitution and Globalization", *supra* note 131.

problems of prostitutes who are forced into prostitution and neglect the work-related problems faced by prostitutes who have chosen prostitution as their profession.¹⁴⁸

It goes without saying that the choice between criminalising, regulating or decriminalising prostitution depends largely on the basic view adopted. In the following sections some of the questions raised in this debate will further be discussed in the light of international human rights provisions and practice.

3.2. The concept of trafficking in women

In international human rights law there is only one explicit definition of the concept of trafficking in persons, that is, in the 2000 Protocol to the Convention on Combating Organised Crime. Even if the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others does not explicitly define the concept, the Convention enumerates acts which are prohibited under the Convention, thereby indirectly defining the concept. According to Article 1, state parties agree to punish any person who, “to gratify the passion of another:

- 1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
- 2) Exploits the prostitution of another person, even with the consent of that person”.

In accordance with the much more elaborated definition of the 2000 Protocol, the concept of “trafficking in persons” means:

“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person

¹⁴⁸ Jo Doezema, “Forced to Choose. Beyond the Voluntary v. Forced Prostitution Dichotomy”, in: Kamala

having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”. (Article 3).

In an effort to clarify the complex concept of trafficking in persons, it seems meaningful to approach it from the perspective of the definition adopted in the 2000 Protocol. It is possible to identify three separate elements of the definition: 1) the action of trafficking, 2) the means whereby trafficking is realised and 3) the purpose of trafficking. In order for trafficking to take place all these elements have to be fulfilled.¹⁴⁹

The first element defining the action contains an enumeration of different stages of the trafficking process (recruitment, transportation, transfer, harbouring or receipt of person), thereby covering the activities of a range of persons profiting from the trafficking. The second element refers to the requirement of coercion in the trafficking process. This requirement is fairly broad not only covering the use of force, but also other milder forms of coercion like “threat of force”, “deception” and “abuse of power or position of vulnerability”. In real life situations it is very often the case that the trafficker gives false or misleading information about the type of work or working conditions at the place of destination. The final element of the definition is crucial for the whole concept of trafficking. An action amounts to trafficking only if it is carried out for an exploitative purpose. This element of exploitation distinguishes trafficking from smuggling.

Smuggling is mainly concerned with profiting from transporting persons across national borders. There is no specific end purpose of smuggling apart from the transportation. Another difference between trafficking and smuggling is that smuggling always involves border crossings, whereas trafficking does not necessarily require this, but may also apply on situations where women are moved within a country, e.g. from rural areas to urban centres or tourist resorts. Despite this seemingly unambiguous distinction between trafficking and smuggling, it is clear that the application of this distinction on real life situations might be problematic. A state might be tempted to define an individual as a

Kempadoo & Jo Doezema (eds), *Global Sex Workers. Rights, Resistance, and Redefinition*, 1998, p. 35.

smuggled migrant rather than as a trafficked person, because the state obligations of protection are broader in the latter case.¹⁵⁰

If compared with the 1949 Convention the definition of the 2000 Protocol is both broader and narrower. It is narrower in the sense that it only focuses on exploitative purposes of trafficking, including prostitution, whereas the purpose of the trafficking in the 1949 Convention includes any form of prostitution. This is a reflection of the abolitionist approach to prostitution contained in the 1949 Convention. In accordance with the preamble of the Convention, “prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person”. In other words, the 1949 Convention can be interpreted as defining all forms of prostitution as exploitative irrespective of whether it takes place voluntarily or not.

However, the definition of the 2000 Protocol is clearly broader than the earlier Convention by its focus on also other purposes of trafficking than prostitution. The inclusion of an open-ended list of several exploitative purposes was the result of active lobbying by NGOs and various UN agencies.¹⁵¹ For example, the UN Special Rapporteur on Violence against Women has strongly advocated for the expansion of the concept of trafficking.¹⁵² It is clear that this broader approach to trafficking is highly warranted taking into account the real life experiences of many trafficked women who end up in forced marriages or manufacturing industries where the working conditions are slavery-like.

Before going into the question how the various human rights bodies have approached trafficking it is necessary to briefly look at the highly debated question of consent. The approach in the 1949 Convention clearly emphasises in the text of the treaty that the consent of the person who is trafficked is irrelevant for determining whether trafficking has taken place or not. This is interesting taking into account the fact that the 1949

¹⁴⁹ Anne Gallagher, *supra* note 143, p. 986f.

¹⁵⁰ See UN doc. E/CN.4/Sub.2/2001/26 (5 July 2001), para. 7.

¹⁵¹ Anne Gallagher, *supra* note 143, p. 1003.

¹⁵² UN doc. E/CN.4/2000/68 (29 February 2000), paras 10-17. See also Informal Note by the United Nations High Commissioner for Human Rights, UN doc. A/AC.254/16 (1 June 1999), para. 12.

Convention lacks the exploitative requirement thereby encompassing all persons who are lead away, perhaps with their own consent, into any form of prostitution.

The 2000 Protocol is also concerned with the question of consent. Article 3.b stipulates that:

“The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used”

Subparagraph (a) refers to the provision concerning the definition of trafficking in persons. The obvious aim of this provision is to guarantee that a trafficker cannot use the consent of the trafficked woman as a defence against conviction.¹⁵³ Nevertheless, critical views have been put forward against the inclusion of the reference to consent. Some argue that trafficking always include an element of coercion and can never take place with the full consent of the woman.¹⁵⁴ From a completely different point of view, others argue that by stipulating that the consent is irrelevant women are portrayed “as perennial victims of false consciousness, incapable of making autonomous choices regarding their means of migration and employment”.¹⁵⁵

3.3. Different human rights approaches to trafficking

The aim of this section is to study what approaches to trafficking in women or in persons have been adopted by the human rights treaty-monitoring bodies when analysing and responding to state reports. The point of departure will be the Convention on the Elimination of All Forms of Discrimination against Women, which without defining the concept of trafficking, refers to the practice in Article 6.

¹⁵³ Anne Gallagher, *supra* note 143, p. 985.

¹⁵⁴ *Ibid.*

¹⁵⁵ Janie Chuang, *supra* note 132, p. 85. See also Kamala Kempadoo & Jo Doezema (eds.), *Global Sex Workers. Rights, Resistance, and Redefinition*, 1998.

According to the provision, “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”. In principle it could be argued on the basis of the text of the provision that it aims at abolishing prostitution. However, the *travaux préparatoires* of the Convention clearly show that this was not the intent of the drafters. Morocco wanted to amend the draft article by way of including a reference to the suppression of prostitution in addition to the exploitation of prostitution. This broadening of the scope of the provision was considered unacceptable and therefore rejected.¹⁵⁶ This is also reflected in the treaty practice. During the consideration of state reports, the CEDAW Committee has welcomed the decriminalisation of prostitution in the case of Greece.¹⁵⁷ However, at the same time the Committee has considered the Swedish legislation which prohibits the purchase of sexual services from prostitutes to be in conformity with the Convention.¹⁵⁸

Article 6 distinguishes between “traffic in women” and “exploitation of prostitution” as two separate phenomena. This means that on the basis of the text it is possible to conclude that the concept of “traffic in women” also contains other end purposes than the exploitation of prostitution of women. The CEDAW Committee has in its General Recommendation No. 19 on Violence against Women addressed this question in more detail. It is submitted that:

“In addition to established forms of trafficking, there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries, and organised marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse”.¹⁵⁹

Consequently, in the interpretation by the CEDAW Committee, trafficking in women is first and foremost viewed as an expression of gender-based violence. In the General Recommendation No. 19, gender-based violence is defined as “a form of discrimination

¹⁵⁶ Jo Doezema, *supra* note 148, p. 39.

¹⁵⁷ UN doc. A/54/38 (1 February 1999), para. 197.

¹⁵⁸ UN doc. CEDAW/C/2001/II/Add.6 (31 July 2001), para. 36.

that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men".¹⁶⁰ Without going into the discussion here on the concept of discrimination in the practice of the CEDAW, suffice it to note that this interpretation reinforces the extensive approach to the concept "discrimination against women" adopted by the Committee. No comparable man is required for establishing discrimination. Instead emphasis is put on practices which contribute to the subjugation of women in society.¹⁶¹

The Human Rights Committee established pursuant to the Covenant on Civil and Political Rights has addressed trafficking in women mainly under Article 3 on equality and Article 8 on the prohibition of slavery, servitude and forced labour.¹⁶² In addition, the Committee has during the consideration of state reports raised questions under Article 7 on torture or cruel, inhuman or degrading treatment.¹⁶³ No definition on trafficking is provided. However, in accordance with the General Comment No. 28,

"States parties should inform the Committee of measures taken to eliminate trafficking of women and children, within the country or across borders, and forced prostitution. They must also provide information on measures taken to protect women and children, including foreign women and children, from slavery, disguised inter alia as domestic or other kinds of personal services".

The Committee does not specify for what purpose trafficking should take place under the Covenant. In fact the reference to the protection of women, including foreign women, "from slavery, disguised inter alia as domestic or other kinds of personal services" seems to indicate that trafficking in principle could take place for a number of reasons. In

¹⁵⁹ General Recommendation No. 19 on violence against women, *supra* note 70, p. 218, para 14.

¹⁶⁰ *Ibid*, para 1.

¹⁶¹ Rebecca Cook, "State Responsibility for Violations of Women's Human Rights", *supra* note 101, 1994, p. 155f.

¹⁶² With respect to Article 8, see General Comment No. 28 on equality of rights between men and women, *supra* note 12, p. 170, para. 12.

¹⁶³ See UN doc. CCPR/CO/71/VEN (26 April 2001), para 16 (Venezuela), UN doc. CCPR/CO/69/KGZ (24 July 2000, para. 17 (The Kyrgyz Republic).

connection with the consideration of state reports the Committee has mainly been concerned with trafficking for the purpose of prostitution.¹⁶⁴

The Committee on Economic, Social and Cultural Rights has addressed prostitution as the main purpose of trafficking. However, in conjunction with Germany's report the Committee refers to women who fall "victim to marriage trafficking, trafficking for prostitution and exploitation".¹⁶⁵ Moreover, the Committee has in the case of Togo addressed the situation of "non-consensual labour as domestic servants" in the context of trafficking.¹⁶⁶ In comparison with the Human Rights Committee there are fewer references to trafficking in the practice of the Committee on Economic, Social and Cultural Rights. One reason for this might be the difficulty to identify relevant human rights under the CESCR. The Committee has addressed trafficking in women basically under three different rights, that is, Articles 3 (equality), 10 (protection of the family) and 12 (right to health). Article 3 safeguards "the equal right of men and women to the enjoyment of all economic, social and cultural rights". As indicated in the text of the provision, Article 3 should be applied in conjunction with a substantive economic, social and cultural right.

With respect to the right to health, the Committee has been particularly concerned with the spread of the HIV/AIDS epidemic "due to commercial sex and trafficking of women, and sex tourism".¹⁶⁷ Less obvious is the connection between trafficking and the protection of the family. Of interest is to note that the Committee on Economic, Social and Cultural Rights has not addressed trafficking in women under Article 7 on the right of just and favourable conditions of work.¹⁶⁸

¹⁶⁴ UN doc. CCPR/C/79/Add.94 (18 August 1998), para. 5 (Italy), CCPR/C/79/Add.93 (18 August 1998), para. 16 (Israel), CCPR/C.79/Add.115 (4 November 1999), para. 11 (Portugal, Macau), CCPR/CO/72/CZE (24 July 2001), para. 13 (Czech Republic).

¹⁶⁵ UN doc. E/C.12/1/Add.29 (4 December 1998), para. 20 (Germany).

¹⁶⁶ UN doc. A/C.12/1/Add.61 (21 May 2001), para 14 (Togo).

¹⁶⁷ UN doc. E/C.12/1/Add.66 (24 September 2001), para. 35 (Nepal).

¹⁶⁸ The Committee on Economic, Social and Cultural Rights is presently preparing a general comment on Article 3 and this could clarify the Committee's stand on trafficking.

3.4. State obligations in connection with trafficking

3.4.1. Legal responses to trafficking

When talking of legal measures to be adopted in conjunction with trafficking one may refer to measures whereby trafficking is legally regulated, for example through criminalisation, or to measures whereby the law enforcement system in a country is made responsive to the problems of trafficking, or to measures whereby the victims of human rights violations are provided with effective legal remedies. The state obligations attached to these legal measures are mainly found among the obligations to protect and to fulfil. In instances where state officials (police, border guards etc.) are sexually exploiting the trafficked women also the state obligation to respect the rights of the trafficked women are at stake.

The dominant state obligation attached to trafficking is the obligation to criminalise trafficking in women. Thus the 1949 Convention provides that the state parties agree “to punish any person” who profits from trafficking (Article 1). Moreover, the 2000 Protocol stipulates that the state parties “shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article 3” (Article 5).¹⁶⁹ Further, the reference in Article 6 of the CEDAW to the obligation to “suppress all forms of traffic in women” has in the treaty practice been interpreted as containing the obligation to criminalise acts committed by traffickers.¹⁷⁰ In this regard the CEDAW Committee has explicitly observed that “criminal penalties imposed only on prostitutes entrench sexual exploitation of women” and thereby violate Article 6.¹⁷¹ Also the Human Rights Committee has strongly stressed the duty to adopt penal provisions against trafficking.¹⁷² In addition, the CEDAW Committee has raised the question of adopting criminal legislation applicable also on offences committed outside the country, by highlighting, in conjunction with the consideration of Belgium’s state report, the “landmark law against

¹⁶⁹ Article 3 contains the definition on trafficking.

¹⁷⁰ UN doc. A/54/38 (1 July 1999), para 150 (Nepal), UN doc. A/55/38 (23 June 2000), para 309 (Romania).

¹⁷¹ UN doc. A/55/38 (16 June 2000), para 152 (Lithuania).

¹⁷² UN doc. CCPR/CO/69/KGZ (24 July 2000), para. 14 (The Kyrgyz Republic), CCPR/CO/73/AZE (5 November 2001), para 15 (Azerbaijan).

trafficking in persons ... with extraterritorial applications”.¹⁷³ Of course, this statement cannot be interpreted as including a general obligation for all countries to adopt such legislation.

In order for the criminalisation of trafficking to be effective, the law enforcement system has to be designed so that the victims of trafficking have realistic means of obtaining justice. In this context the question of how to guarantee that the victims of trafficking have access to effective legal remedies is highly pertinent. In many instances the trafficked woman is considered an illegal migrant and therefore expelled before given a chance to raise criminal charges against the trafficker. In connection with the drafting of the 2000 Protocol one of the controversial questions concerned to what extent the trafficked woman should be treated as a criminal or as a victim of human rights violations. The High Commissioner for Human Rights strongly advocated for the inclusion of provisions guaranteeing that the human rights of the trafficked women are safeguarded.¹⁷⁴ As a consequence hereof the 2000 Protocol contains an explicit statement that the purpose of the Protocol is “to protect and assist the victims of ... trafficking, with full respect for their human rights”.¹⁷⁵ Also in the General Recommendation No. 19 the question of the effectiveness of penal provisions is addressed through the statement “effective complaints procedures and remedies, including compensation, should be provided”.¹⁷⁶ In connection with the consideration of state reports, the treaty monitoring bodies have raised a number of important aspects of the criminal procedure in trafficking-related cases.

The Human Rights Committee has with respect to Israel’s state report regretted that women brought into the country for purpose of prostitution “are not protected as victims of trafficking but are likely to be penalised for their illegal presence in Israel by deportation”. The Committee continues by stating that “such an approach to this problem effectively prevents these women from pursuing a remedy for the violation of their rights under Article 8 of the Covenant”.¹⁷⁷ In connection with reviewing Portugal’s report on

¹⁷³ UN doc. A/51/38 (9 May 1996), para 178 (Belgium).

¹⁷⁴ UN doc. A/AC.254/16 (1 June 1999), Informal note by the United Nations High Commissioner for Human Rights.

¹⁷⁵ See also chapter two of the Protocol entitled “protection of victims of trafficking in persons”.

¹⁷⁶ UN doc. HRI/GEN/1/Rev.5 (26 April 2001), p. 220, para 24 (i).

¹⁷⁷ UN doc. CCPR/C/79/Add.93 (18 August 1998), para. 16 (Israel).

Macau and the report of the Czech Republic the Committee has noted that protection should be provided to trafficked women “so that they may have a place of refuge and an opportunity to give evidence against the person responsible in criminal or civil proceedings”.¹⁷⁸ The same observation has been made by the CEDAW Committee in the case of Germany. The Committee “calls on the Government to ensure that trafficked women have the support that they need so that they can provide testimony against their traffickers”.¹⁷⁹ The Committee on Economic, Social and Cultural Rights has also addressed the question in connection with the consideration of Italy’s state report. The Committee welcomes the legal developments in Italy, whereby “women who have been the victims of trafficking and who denounce their exploiters” are granted one-year residence/work permits.¹⁸⁰

In fact the question of the status of trafficked women in the receiving country is highly controversial taken into account that they often have entered the country as irregular or illegal immigrants or have obtained an illegal status after the expiry of a temporary residence permit or tourist visa. In the 2000 Protocol only a fairly weak formulation could be agreed upon that is “each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in person to remain in its territory, temporarily or permanently, in appropriate cases” (Article 7 (1)). The CEDAW Committee has used stronger language by urging the government of the Netherlands “to ensure that trafficked women are provided with full protection in their countries of origin or grant them asylum/refugee status”.¹⁸¹

As shown in this section, international conventions consider trafficking an illegal offence. This means among other things that effective legal remedies should be available. Of particular importance in this regard is the adoption of protective measures which enable trafficked women to raise charges or testify against the trafficker. This in turn requires that trafficked women are genuinely viewed as victims of human rights violations and not as illegal immigrants. On the other hand, the support and assistance to trafficked women

¹⁷⁸ UN doc. CCPR/C/79/Add.77 (5 May 1997), para. 19 (Portugal (Macau)), CCPR/CO/72/CZE (24 July 2001), para. 13 (Czech Republic).

¹⁷⁹ UN doc. A/55/38 (2 February 2000), para. 322 (Germany).

¹⁸⁰ UN doc. E/C.12/1/Add.43 (23 May 2000), para 3 (Italy).

¹⁸¹ UN doc. CEDAW/C/2001/II/Add.7 (31 July 2001), para. 28 (The Netherlands).

should not be linked to their willingness to witness in trials against criminal organisations.¹⁸²

3.4.2. Non-legal responses to trafficking

It goes without saying that legal responses to the problem of trafficking only constitute one side of the coin. Also other responses are necessary in order to address fully the problems involved. From a human rights point of view the key non-legal measures are those which are directed towards ensuring the rights of the victim, that is, the trafficked woman. Within the framework of international regulation concerning organised crime the main focus is on quashing down the international criminal organisations behind the trafficking activities. Therefore the 2000 Protocol emphasises cooperation between countries in the form of exchange of information between law enforcement, immigration and other relevant authorities (Article 10). Also in the practice of the general human rights treaties, in particular the practice of the CEDAW Committee, this question has been addressed.¹⁸³

In the following the emphasis will be on the non-legal measures directed towards the trafficked woman. At the outset the treaty-monitoring bodies have raised the question of the need to adopt a policy or strategy whereby the problem of trafficking is addressed. As part of this, the CEDAW Committee has emphasised the need of collecting statistical information on the number of women trafficked from, through and/or into the country as well as research on the conditions of prostitutes in the country.¹⁸⁴

¹⁸² Nora V. Demleitner, “The Law at A Crossroads: The Construction of Migrant Women Trafficked into Prostitution”, *supra* note 129, p. 277.

¹⁸³ UN doc. A/53/38 (14 May 1998), para 256 (Bulgaria), A/54/38 (2 February 1999), para 238 (Thailand), A/54/38 (1 July 1999), para 150 (Nepal),

¹⁸⁴ UN doc. A/52/38/Rev. 1 (22 January 1997), para (Saint Vincent and the Grenadines), where the CEDAW Committee notes “with concern that no research had been undertaken on the real situation concerning prostitution and trafficking in women”. See also UN doc. CEDAW/C/2001/II/Add.8 (31 July 2001), para. 30 (Viet Nam).

Furthermore, particularly the CEDAW Committee has in its comments addressed the obligation to adopt measures aimed at preventing trafficking.¹⁸⁵ Special emphasis should be put on the root causes of trafficking, which have been defined by the Committee as being linked to “women’s economic vulnerability”.¹⁸⁶ Preventive measures to be adopted, according to the Committee, include “poverty alleviation and women’s economic empowerment”.¹⁸⁷

All treaty-monitoring bodies have stressed the obligation to adopt measures whereby trafficked women are assisted, rehabilitated and/or reintegrated into the society. In the General Recommendation No. 19 of the CEDAW Committee it is emphasised that the state parties should take protective measures, “including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence”.¹⁸⁸ In the case of Indonesia the Committee has stated that it “recommends that the Government address the issue of trafficking in women and prostitution, in accordance with Article 6 of the Convention, and establish, *inter alia*, socio-economic and health programmes to assist women in this context”. Assistance to trafficked women is also emphasised by the other treaty-monitoring bodies. The Human Rights Committee has stated in the case of the Czech Republic that “the state party should ... strengthen programmes aimed at providing assistance to women in difficult circumstances, particularly those coming from other countries who are brought into its territory for the purpose of prostitution”.¹⁸⁹ The Committee on Economic, Social and Cultural Rights has addressed protective measures at least in the context of the state reports of Ukraine¹⁹⁰ and Nepal.¹⁹¹

¹⁸⁵ See also similar comments by the Human Rights Committee, UN doc. CCPR/CO/72/CZE (24 July 2001), para. 13 (Czech Republic).

¹⁸⁶ UN doc. A/53/38 (14 May 1998), para. 256 (Bulgaria).

¹⁸⁷ UN doc. A/55/38 (23 June 2000), para. 309 (Romania). See also UN doc. A/53/38 (14 May 1998), para. 204 (Czech Republic) and UN doc. CEDAW/C/2001/II/Add.8 (31 July 2001), para. 30 (Viet Nam).

¹⁸⁸ General Recommendation No. 19, UN doc. HRI/GEN/1/Rev.5 (26 April 2001), p. 221, para. 24(t) (iii).

¹⁸⁹ UN doc. CCPR/CO/72/CZE (24 July 2001), para. 13 (Czech Republic). See also UN doc. CCPR/C/79/Add.77 (5 May 1997), para. 19 (Portugal (Macau)), CCPR/C/79/Add.93 (18 August 1998), para. 16 (Israel), CCPR/CO/71/VEN (26 April 2001), para. 16 (Venezuela).

¹⁹⁰ UN doc. E/C.12/1/Add.65 (24 September 2001), para. 29 (Ukraine).

¹⁹¹ UN doc. E/C.12/1/Add.66 (24 September 2001), para. 45 (Nepal).

It is evident that in order to combat trafficking in women in the globalised world cooperation between states and other actors is necessary. This cooperation should, in accordance with treaty law, include the adoption of preventive measures aimed at eliminating the reasons behind trafficking. Furthermore, states are required to work together in order to fight the international criminal organisations profiting from trafficking. Finally, cooperation might be needed in order to realise the obligation to assist and support trafficked women in their home or host country.

4. Poverty

4.1. Introduction

Statistical surveys have shown that the present globalisation trends have contributed to widening the gap between rich and poor both in comparisons between developed and developing countries as well as between different population groups within a single country. Thus, the 1999 Human Development Report submits that the income gap between the fifth of the world's people living in the richest countries and the fifth in the poorest was 30 to 1 in 1960, 60 to 1 in 1990 and 74 to 1 in 1997.¹⁹²

Furthermore, whereas the richest 20 % of all countries count for 68-86 % of the world's gross domestic product, exports of goods and services, and foreign direct investment, the poorest 20 % count for only 1 %.¹⁹³ Not only has the gap between rich and poor countries grown, but the Human Development Index, which is applied in the Human Development Report, has for the first time since 1990 dropped for as many as 30 countries by the end of the decade.¹⁹⁴ This indicates a growth in absolute poverty.

It is not possible in this study to comprehensively analyse how this development has influenced the lives of men and women living in poor countries. Only a few examples will be given. Firstly, many poor countries, which have opened up their markets for the global economy, have faced an increase in production costs, a growing competition on the local market and an over-emphasis on export production at the expense of the production for the local market by local producers. This in turn has led to bankruptcies, unemployment and income losses, often with poverty as the result. Secondly, poor countries, which are dependent on borrowing money from international lending institutions, are usually required to implement structural adjustments programmes aimed at improving the country's overall economic performance. However, as has been shown in several surveys, these programmes coupled with drastic cut backs in public expenditures have often lead to

¹⁹² *Human Development Report 1999*, 1999, p. 3.

¹⁹³ *Ibid.*, 2.

¹⁹⁴ *Human Development Report 1997*, 1997, p. 65.

an increasing marginalisation among groups who are dependent on public support for their livelihood.¹⁹⁵

Thirdly, it has been argued that the globalisation trends have contributed to the “feminisation of poverty”. In some instances this concept has been used to describe the increase in the share of poverty among women.¹⁹⁶ In other instances it has been argued that it is not always possible to show that there is a difference between female- and male-headed households when it comes to household consumption and expenditure.¹⁹⁷ However, a commonly held view is that women and men experience poverty in different ways. The feminisation of poverty could from this perspective be used to highlight the greater hardships that women living in poverty usually face compared to men. In accordance with the Beijing Platform for Action, “Women’s poverty is directly related to the absence of economic opportunities and autonomy, lack of access to economic resources, including credit, land ownership and inheritance, lack of access to education and support services and their minimal participation in the decision-making process”.¹⁹⁸

This brings us to the definition of poverty. In earlier approaches, poverty was often seen as the lack of material commodities or of resources to acquire them. Today poverty is generally viewed in a broader perspective also referring to the capabilities required for achieving well-being (e.g. participation).

4.2 Poverty and human rights

The concept of poverty is not included in the international conventions on human rights. In the preamble of the Universal Declaration of Human Rights, reference is made to the “freedom from want” and in Article 28 to the entitlement of everyone “to a social and international order in which the rights and freedoms set forth in this Declaration can be

¹⁹⁵ See, e.g., *The Policy Roots of Economic Crisis and Poverty. A Multi-Country Participatory Assessment of Structural Adjustment*, Prepared by the Structural Adjustment Participatory Review International Network (SAPRIN), 2002, pp. 173-188.

¹⁹⁶ See, e.g., Platform for Action and the Beijing Declaration, Fourth World Conference on Women, 1995, Chapter A. Women and poverty.

¹⁹⁷ *Human Development Report 1997*, 1997, p. 64.

¹⁹⁸ Platform for Action and the Beijing Declaration, *supra* note 194, p. 39, para.51.

fully realised”. Needless to say that poverty or extreme poverty severely inhibit the enjoyment of human rights.

During the 1990s an increasing recognition of the link between poverty and human rights can be observed in the work of the United Nations. The Commission on Human Rights and the Sub-Commission have both increasingly emphasised a human rights-based approach to poverty.¹⁹⁹ A number of special rapporteurs and independent experts have studied poverty-related issues, *inter alia*, structural adjustment,²⁰⁰ extreme poverty,²⁰¹ income distribution,²⁰² globalisation.²⁰³ In 2001, a United Nations expert seminar on extreme poverty and human rights was held with the aim of reviewing the need of the General Assembly to adopt a special declaration on poverty and human rights.²⁰⁴ The discussion both within academic circles and the United Nations is still very much in the beginning and there is no common understanding of poverty as a human rights issue.

The Committee on Economic, Social and Cultural Rights has in a statement on poverty outlined the normative dimensions of poverty eradication.²⁰⁵ It seems meaningful for our purpose to briefly depict the outcome of the Committee’s deliberations. The starting-point for the Committee’s statement is that “poverty constitutes a denial of human rights” (para 1). Furthermore, the Committee regrets that “human rights dimensions of poverty eradication policies rarely receive the attention they deserve”, because, according to the Committee, “a human rights approach to poverty can reinforce anti-poverty strategies and make them more effective” (para 2).

¹⁹⁹ See Commission on Human Rights resolution 2001/31 (Human rights and extreme poverty) and Sub-Commission on Human Rights resolution 2001/8 (Implementation of existing human rights norms and standards in the context of the fight against extreme poverty).

²⁰⁰ Independent Expert on the effects of structural adjustment policies on the full enjoyment of human rights (Fantu Cheru).

²⁰¹ Special Rapporteur on human rights and extreme poverty (Leandro Despouy) and Independent Expert on human rights and extreme poverty (A.-M. Lizin).

²⁰² Special Rapporteur on the relationship between the enjoyment of human rights, in particular economic, social and cultural rights, and income distribution (José Bengoa).

²⁰³ Special Rapporteurs on globalisation and its impact on the full enjoyment of human rights (J. Oloka-Onyango and Deepika Udagama).

²⁰⁴ UN doc. E/CN.4/2001/54/Add.1, Report of the Expert Seminar on Human Rights and Extreme Poverty, 7-10 February 2001.

²⁰⁵ Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: poverty and the International Covenant on Economic, Social and Cultural Rights, Statement adopted by the Committee on Economic, Social and Cultural Rights, UN doc. E/C.12/2001/10 (10 May 2001).

In defining poverty, the Committee adopts a broad understanding of the concept. It submits that:

“Poverty may be defined as a human condition characterised by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights” (para 8).

Of interest is to note that the Committee advocates for a definition which strongly emphasises the indivisibility and interdependent nature of human rights. In other words, poverty reduction cannot successfully be implemented only by fulfilling basic needs through the provision of material resources, but requires that the poor are equipped with political and civil capabilities as well.²⁰⁶

In the context of the Covenant on Economic, Social and Cultural Rights, the Committee identifies rights which are directly linked to the eradication of poverty. These are the right to work, adequate standard of living, housing, food, health and education (para 1). In addition, the Committee identifies non-discrimination, equality, participation and accountability as essential elements of a successful anti-poverty strategy (para 9). All these elements constitute central dimensions of a normative human rights framework. The rights to non-discrimination and equality address above all the rights of individuals and groups who are vulnerable, marginal, disadvantaged or socially excluded and are consequently of outmost relevance from a gender perspective. Participation refers to the right to take part in the conduct of public affairs at various societal levels. Most directly this concerns the right to take part in the formulation, implementation and monitoring of development undertakings aimed at improving the position of those affected. Accountability refers to the obligations of states and other duty-holders under international human rights law to provide legal and other remedies to rectify violations of human rights. These remedies may be judicial, quasi-judicial, administrative or political.

²⁰⁶ See also J. Oloka-Onyango, “Poverty, Human Rights and the Quest for Sustainable Human Development in Structurally-Adjusted Uganda”, *Netherlands Human Rights Quarterly*, 2000, p. 24f.

The Committee on Economic, Social and Cultural Rights has not in detail elaborated the civil and political rights which are of direct relevance to the discussion on poverty and human rights. It has been argued in a recent discussion paper submitted by academic human rights experts to the High Commissioner for Human Rights that the rights to information, association, fair trial, liberty and security of persons as well as the prohibition against cruel, inhuman and degrading treatment should be included in a human rights based poverty reduction strategy.²⁰⁷

It will not be possible in this study to conduct a comprehensive analysis of all the human rights dimensions involved in a discussion on poverty reduction. Instead focus will be on some of the key elements identified by the Committee on Economic, Social and Cultural Rights, that is, non-discrimination, equality and participation as well as selected economic, social and cultural rights.

4.3. Economic, social and cultural rights

The poverty-related rights identified by the Committee on Economic, Social and Cultural Rights are the right to work,²⁰⁸ an adequate standard of living, housing, food,²⁰⁹ health²¹⁰ and education.²¹¹ In order to guide the states parties in their implementation of these rights, the Committee has adopted general comments with respect to the right to adequate

²⁰⁷ Paul Hunt, Manfred Nowak & Siddiq Osmani, Human Rights and Poverty Reduction Strategies, Discussion Paper submitted to the UN Office of the High Commissioner for Human Rights, 28 February 2002, paras 57-60.

²⁰⁸ Article 6 (1) of the CESC - “The State Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”.

²⁰⁹ Article 11 (1) of the CESC - “The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions...”.

²¹⁰ Article 12 (1) of the CESC - “The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

²¹¹ Article 13 (1) of the CESC - “The States Parties to the present Covenant recognise the right of everyone to education...”. Article 14 of the CESC - “Each State Party ... undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all”.

housing,²¹² plans of action for primary education,²¹³ the right to adequate food,²¹⁴ the right to education,²¹⁵ and the right to the highest attainable standard of health.²¹⁶

It is not possible within the ramifications of this study to analyse in depth the material content of these rights. Instead the main focus will be on some general features linked to the identification of state obligations of economic, social and cultural rights.

In accordance with Article 2 of the CESCR, “Each State Party ... undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant”. This provision reflects the principle of progressive realisation which imbues the whole CESCR and which consequently influences the determination of the scope of a state's obligations under the Covenant.

In other words, the CESCR pays attention to the financial and other resources available and therefore accepts that the level to be attained and the timetable to be pursued may vary depending on each country's economic situation. Of importance is to note that the reference in Article 2 to international assistance and cooperation clearly emphasises that available resources should be interpreted as also including possible development assistance.

Even though a certain period of time is acceptable under the CESCR, it has been repeatedly stressed by the Committee on Economic, Social and Cultural Rights that there are elements of the various rights which require immediate realisation. This concerns especially the obligation not to discriminate on any ground when realising the various

²¹² General Comment No. 4 (1991) on the right to adequate housing (article 11 (1)) and No. 7 (1997) on the right to adequate housing (Article 11 (1)): forced evictions, UN doc. HRI/GEN/1/Rev.5 (26 April 2001), pp. 22-27 and 49-54.

²¹³ General Comment No. 11 (1999) on plans of action for primary education (Article 14), UN doc. HRI/GEN/1/Rev.5 (26 April 2001), pp. 63-66.

²¹⁴ General Comment No. 12 (1999) on the right to adequate food (Article 11), UN doc. HRI/GEN/1/Rev.5 (26 April 2001), pp. 66-74.

²¹⁵ General Comment No. 13 (1999) on the right to education (Article 13), UN doc. HRI/GEN/1/Rev. 5 (26 April 2001), pp. 74-89.

rights (Article 2(2)). Moreover, states parties are obliged immediately to "take steps" to implement the rights. As an example, in connection with the right to adequate housing, the Committee has established that the adoption of a national housing strategy and the implementation of an effective monitoring system require immediate action.²¹⁷ With respect to the obligation under Article 14 to adopt a plan of action for the primary education, the Committee submits that "a state party cannot escape the unequivocal obligation to adopt a plan of action on the grounds that the necessary resources are not available".²¹⁸

In its general comment on the nature of state parties' obligations, the Committee on Economic, Social and Cultural Rights has introduced the concept minimum core obligation, which covers a minimum level of obligations which have to be realised immediately. The Committee argues that without such a minimum core obligation the Covenant would be largely deprived of its *raison d'être*.²¹⁹ In 1990 the Committee held that "in order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations".²²⁰ Ten years later the Committee has adopted a more restrictive stand on deviations from core obligations. In the general comment on the right to the highest attainable standard of health it is stated that "a state party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations ... which are non-derogable".²²¹

Furthermore, the Committee has in its practice developed a restrictive stand on so-called retrogressive measures, that is, measures which lower an already attained level of human rights protection. The Committee submits that "there is a strong presumption of impermissibility of any retrogressive measures taken in relation to ... rights enunciated in

²¹⁶ General Comment No. 14 (2000) on the right to the highest attainable standard of health (article 12), UN doc. HRI/GEN/1/Rev.5 (26 April 2001), pp. 90-109.

²¹⁷ General Comment No. 4 on the right to adequate housing, *supra* note 212, paras. 12-13.

²¹⁸ General Comment No. 11, *supra* note 213, para 9.

²¹⁹ General Comment No. 3 on the nature of states parties obligations, *supra* note 100, para. 10.

²²⁰ *Ibid.*

²²¹ General Comment No. 14, *supra* note 216, para. 47.

the Covenant".²²² A state party which adopts such measures deliberately has the burden of proving that "they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the state party's maximum available resources".²²³ In connection with the general comment on the right to the highest attainable standard of health, the Committee further observes that "the adoption of any retrogressive measures incompatible with the core obligations under the right to health ... constitutes a violation of the right to health".²²⁴

In order to exemplify what has been understood by minimum core obligations, it might be useful to briefly list some of them:

Right to adequate food

- The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;
- The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.²²⁵

Right to education

- To ensure the right of access to public educational institutions and programmes on a non-discriminatory basis;
- To ensure that education conforms to the objectives set out in article 13, paragraph 1;
- To provide primary education for all in accordance with article 13, paragraph 2(a);
- To adopt and implement a national educational strategy which includes provisions for secondary, higher and fundamental education;
- To ensure free choice of education without interference from the state or third parties, subject to "conformity with minimum educational standards" (article 13, paras. 3 and 4).²²⁶

²²² With respect to the right to education, see General Comment No. 13, *supra* note 215, para. 45.

²²³ *Ibid.*

²²⁴ General Comment No. 14, *supra* note 216, para. 48.

²²⁵ General Comment No. 12, *supra* note 214, para. 8.

²²⁶ General Comment No. 13, *supra* note 215, para 57.

Right to the highest attainable standard of health²²⁷

- To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable and marginalised groups;
- To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- To ensure equitable distribution of all health facilities, goods and services;
- To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable and marginalised groups.²²⁸

These minimum core obligations have in the poverty statement by the Committee on Economic, Social and Cultural Rights been defined as “an international minimum threshold that all development policies should be designed to respect”. The Committee further observes that “if a national or international anti-poverty strategy does not reflect this minimum threshold, it is inconsistent with the legally binding obligations of the state party”.²²⁹

²²⁷ See also General Recommendation No. 24 on women and health adopted by the CEDAW Committee in 1999, UN doc. HRI/GEN/1/Rev.5 (26 April 2001), pp. 244-251.

²²⁸ General Comment No. 14, *supra* note 216, para 43.

4.4. Non-discrimination and equality

As indicated in the list of the minimum core obligation of the various economic, social and cultural rights, special attention is put on the right to non-discrimination and the realisation of the rights of vulnerable and marginalised groups. The strong emphasis on the realisation of the rights of disadvantaged groups clearly indicates that the implementation of the rights to non-discrimination and equal treatment require positive action on the part of the state. In fact the Committee on Economic, Social and Cultural Rights submits that "states parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration".²³⁰ It is obvious on the basis of the treaty practice that women are considered in many instances as a disadvantaged group.²³¹ When it comes to improving the position of women living in poverty it is evident that a formal right to equality with men to land, financial resources, services etc. will not guarantee that their position really improves. Instead also special measures are required.

With the exception of few provisions, the CESCR is gender neutral,²³² thereby guaranteeing the same rights to both women and men.²³³ This is the case despite the fact that in some instances the text of the treaty reflects a stereotyped view on gender roles, which dominated at the time of the drafting of the treaty. In this context, special reference could be made to Article 11, which contains "the right of everyone to an adequate standard of living for himself and his family". The Committee on Economic, Social and Cultural Rights has observed that "the phrase cannot be read today as implying any limitations upon the applicability of the rights to individuals or to female-headed households or other such groups".²³⁴

It is clear that many of the human rights problems faced by women living in poverty are not new problems, which can solely be attributed to globalisation trends. Instead

²²⁹ UN doc. E/C.12/2001/10 (10 May 2001), para. 17.

²³⁰ General Comment No. 4 on the right to adequate housing, *supra* note 212, para 11.

²³¹ See, e.g., General Comment No.7 on the right to adequate housing, *supra* note 212, para 11.

²³² Article 7 (fair wages), Article 10 (protection of mothers during childbirth).

²³³ See in particular Article 3 which provides "The States Parties ... undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant"

²³⁴ General Comment No. 4 on the right to adequate housing, *supra* note 212, para. 6.

discrimination and inequality, as an example, are often deeply rooted in the culture and in the customs of many developing (and developed) countries. In some instances these customs are reflected in the law either the statutory or customary law or both. Particularly customary law is, as a rule, based on disparate gender roles within the family and society rather than on the idea of equality between men and women. Whereas customary norms at least to some extent provided protection to women in the traditional societies, they do not adequately address the current problems and needs of women in developing countries. For example, female-headed households living in urban areas do not necessarily have access to the family support, which in earlier days could provide protection to women who did not have a husband for one reason or the other.²³⁵

This means that today discriminatory norms and practices, embedded either in statutory or customary law, can be detrimental to a woman's possibility to provide effective means of subsistence for herself, her children and family. This is particularly the case with regard to discriminatory practices in connection with property and ownership rights, which are essential for women's access to economic resources.²³⁶ The Committee on the Elimination of Discrimination against Women has in its General Recommendation No. 21 on equality in marriage and family relations elaborated on the various dimensions of the property-related rights of women under Articles 15 and 16 of the CEDAW.²³⁷

Even if women in international human rights law are viewed as a disadvantaged group, it should be kept in mind that there are huge differences between different groups of women. In this regard, special attention should be paid to the provision on rural women, which is included in the CEDAW. Article 14 (2) stipulates that:

“States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and

²³⁵ For a discussion on gender and customary law in African societies, see Alice Armstrong et al., “Uncovering Reality: Excavating Women's Rights in African Family Law”, *International Journal of Law and the Family*, 1993, pp. 314-369.

²³⁶ Katarina Frostell and Martin Scheinin, "Women", in Asbjørn Eide, Catarina Krause & Allan Rosas (eds), *Economic, Social and Cultural Rights. A Textbook*. 2001, pp. 338-341.

²³⁷ UN doc. HRI/GEN/1/Rev.5 (26 April 2001), pp. 222-231.

women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- (a) To participate in the elaboration and implementation of development planning at all levels;
- (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
- (c) To benefit directly from social security programmes;
- (d) To obtain all types of training and education, formal and informal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency;
- (e) To organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;
- (f) To participate in all community activities;
- (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
- (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication".

This provision is highly interesting from a legal perspective. Not only are all appropriate measures required to eliminate discrimination against rural women, but these women shall, additionally, be ensured rights enumerated in (a)-(h). Whereas states parties under CEDAW generally are obliged to ensure rights "on equal terms with men", the equality phrase is less prominent in Article 14. Paragraph 2 consists of one sentence which is divided by the conjunction "and" into two distinct parts which both begin with the word "shall". The term "on a basis of equality of men and women" belongs to the first part of the sentence and is not repeated in the second part. The wording of the provision seems to indicate that a comparison with the corresponding rights of men is not necessary, but that the rural women are entitled to these rights *per se*.

The CEDAW Committee has not so far provided clear guidance on this point. Furthermore, at the time of drafting, it appears that the implication of the formulation of Article 14 (2) was not analysed in depth.²³⁸ Hence, the phrase "that they participate in and benefit from rural development and, in particular, shall ensure to such women the right", which divides paragraph 2 into two parts, was inserted in the end of the preparatory work by a working group which made final corrections in the draft before it was submitted for consideration by the Third Committee.²³⁹ Irrespective of the unclear formulation of paragraph 2 of Article 14, it is obvious that the CEDAW puts a strong emphasis on the position of rural women and on the need to adopt special measures in this regard.

4.5. Participation

The concept of (popular) participation forms an integral part of any current discussion on development.²⁴⁰ It is generally held that a successful development undertaking requires the effective participation by those affected during every stage of the development process. In the past the concept of participation was often equated with the "mobilisation of people to undertake social and economic development projects", whereas today the emphasis, at least in theory, is on "the process of empowerment of the deprived and the excluded".²⁴¹ Of interest to us is to try to unveil to what extent participation is a human right with corresponding legal obligations. Despite the fact that the Commission on Human Rights already in 1983 endorsed the right to popular participation the exact parameters of the right has remained diffuse.²⁴²

²³⁸ See Noreen Burrows, "The 1979 Convention on the Elimination of All Forms of Discrimination Against Women", *Netherlands International Law Review*, 1985, p. 450f. The Commission on the Status of Women prepared a draft proposal between 1974 and 1976. Thereafter, the draft was submitted to the Third Committee which established a Working Group to discuss amendments and to clarify certain articles. The whole Third Committee discussed the draft Convention only for two days in December 1979, see UN doc. A/C.3/34/SR.70-73 (1979).

²³⁹ UN doc. A/C.3/34/14 (1979), p. 27.

²⁴⁰ See e.g. Article 8 of the Declaration on the Right to Development.

²⁴¹ Dharam Ghai, "Participatory Development: Some Perspectives from Grass-roots Experiences", *Journal of Development Planning*, 1989, p. 217f.

²⁴² Commission on Human Rights resolution 1983/14. For a critical discussion on the unsystematic way whereby the Human Rights Commission particularly in the past introduced new human rights, see Philip Alston, "Conjuring up New Human Rights: A Proposal for Quality Control", *American Journal of International Law*, 1984, pp. 607-621.

A cursory glance at the key human rights provisions shows that the main form of participation regulated in human rights law is the right to take part in the election of representatives to national decision-making bodies, that is, parliaments.²⁴³ Even if this form of participation is important also to women, it may be argued that in an effort to eradicate poverty other forms of participation become even more central. The question to be asked is therefore what other forms of participation beside electoral participation can be found in international human rights law.²⁴⁴

At the outset it may be observed that there are fairly few provisions in legally binding instruments which regulate other participatory rights than electoral rights. Article 25 of the CCPR provides that "Every citizen shall have the right and opportunity ... (a) To take part in the conduct of public affairs, directly or through freely chosen representatives". The Human Rights Committee observes in its general comment that the phrase "conduct of public affairs" should be interpreted broadly, thereby including "the exercise of legislative, executive and administrative powers" as well as "all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels".²⁴⁵ The CESCR contains an indirect reference to participatory rights by the stipulation that "education shall enable all persons to participate effectively in a free society" (Article 13 (1)). In other words, in order for this to take place some form of mechanisms for effective participation are required. Furthermore, indigenous peoples are entitled to effective participation under the ILO Convention No. 169 and to some extent under Article 27 of the CCPR.²⁴⁶ The latter provision covers also minorities.

The participation of women is more comprehensively regulated in the CEDAW, that is, in Article 7 and, with respect to rural women, in Article 14. The CEDAW Committee observes in its General Recommendation No. 23 on women in public life that Article 7 extends to all areas of public and political life and should be interpreted broadly. In addition to the same areas listed by the Human Rights Committee, the CEDAW

²⁴³ See Article 21 of the UDHR, Article 25 of the CCPR, Article 7 of the CEDAW.

²⁴⁴ For a discussion on the right to participate in elections, see Veronika U. Hinz & Markku Suksi, *Election Elements: On the International Standards of Electoral Participation*, 2002.

²⁴⁵ General Comment No. 25 (1996), UN doc. HRI/GEN/1/Rev. 5 (26 April 2001), pp. 157-162.

²⁴⁶ Kristian Myntti, *Minoriteter och urfolks politiska rättigheter. En studie av rätten för små minoriteter och urfolk till politiskt deltagande och självbestämmande*, 1998, pp. 133-140 and 152-166.

Committee continues by stating that Article 7 also covers "many aspects of civil society, including public boards and local councils and the activities of organisations such as political parties, trade unions, professional or industry associations, women's organisations, community-based organisations and other organisations concerned with public and political life".²⁴⁷

Characteristic of both Articles 25 of the CCPR and 7 of the CEDAW is that they do not require that the state parties establish certain forms of participation, but leaves this to the discretion of the respective state. Thus, the Human Rights Committee submits that "the allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by Article 25 should be established by the constitution and other laws".²⁴⁸ From a strictly legal perspective it seems that the only mode of participation which is explicitly required by Articles 7 and 25 is the participation in national decision-making through freely chosen representatives (i.e. parliaments). However, it has been argued that a state obligation to promote additional forms of participation can be deduced from the above mentioned provisions.²⁴⁹

This interpretation would be in line with Article 14 of the CEDAW which, as has been observed earlier, seems to contain a broader obligation on the part of the state to provide opportunities for rural women "to participate in the elaboration and implementation of development planning at all levels" and "to participate in all community activities". No further elaboration on how to organise rural women's participation in development is provided. It seems evident that the mode of participation will vary not only depending on the political and administrative system of each state party but also on the societal level of application. At the local or village level, direct forms of participation, such as general meetings (perhaps only for women) and interviews with members of the village can be appropriate means of participation. However, at the national level where general policies are laid down, other modes of participation will obviously be necessary. In this context

²⁴⁷ General Recommendation No. 23 (1997) on political and public life, UN doc. HRI/GEN/1/Rev.5 (26 April 2001), p. 234, para. 5.

²⁴⁸ General Comment No. 25, *supra* note 245, para. 5.

²⁴⁹ Henry Steiner, "Political Participation as a Human Right", *Harvard Human Rights Yearbook*, Vol. 1, 1988, p. 129-134, Allan Rosas, "Democracy and Human Rights", in: Allan Rosas & Jan Helgesen (eds), *Human Rights in a Changing East/West Perspective*, 1990, p. 50.

representative decision-making and/or an administrative machinery might be more suitable.

Concerning the question of institutional mechanisms for integrating a gender perspective into policy- and decision-making, the CEDAW Committee has already in 1988 adopted a General Recommendation entitled effective national machinery and publicity. The Committee recommends that states parties "establish and/or strengthen effective national machinery, institutions and procedures, at a high level of Government, and with adequate resources, commitment and authority".²⁵⁰ Even if the General Recommendation does not contain any reference to corresponding provisions in the Convention, it appears logical to assume that the recommendation covers, in particular, the implementation of Articles 2, 7 and 14.²⁵¹

4.6. International cooperation

This chapter has shown that there are a number of state obligations which can be drawn from the human rights conventions and which are of high relevance in an effort to eradicate poverty. So far the discussion on state obligations has focused first and foremost on a state's obligations in relation to its own activities within the country. However, particularly when talking of poverty eradication the question of other partners and arenas become pertinent. I will briefly focus here on the role of donor states, on the one hand, and on state activities in relation to international actors, on the other hand. As already mentioned in the first chapter, I will not focus on the possible human rights obligations which other international (non-state) actors might have, that is, international financial institutions, transnational corporations, international organisations, international non-governmental organisations etc.

What legal obligations do donor countries have when it comes to respecting, protecting, fulfilling and promoting economic, social and cultural rights in recipient countries? This

²⁵⁰ General Recommendation No. 6 (1988) on effective national machinery and publicity, UN doc. HRI/GEN/1/Rev.5 (26 April 2001), pp. 204-205.

question includes two dimensions. Firstly, to what extent are developed countries obliged in the first place to support developing countries, and secondly, when doing so, what human rights obligations can be identified. The only international human rights convention which directly obliges states to take action also with regard to the situation in another country is the African Charter on Human and Peoples' Rights, which provides in Article 22(2) that "States shall have the duty, individually or collectively, to ensure the exercise of the right to development". This provision on the right to development obviously includes the realisation of economic, social and cultural rights. Also in the context of the Covenant on Economic, Social and Cultural Rights reference is made to "international assistance and co-operation" as a means of realising the rights (Article 2 (1)).²⁵² However, despite this and other fragments in international instruments, which appear to include a duty to support other countries,²⁵³ it is difficult to deduce from this normative framework a clear-cut legal obligation to do so.²⁵⁴

When it comes to the question of a donor's obligation to adhere to economic, social and cultural rights in its activities in a third country, it is far more clear that the donor country, which has ratified the CESC, is obliged to adhere to the rights in their undertakings abroad.²⁵⁵ Of interest is to note that this question has not so far to any larger extent been discussed in the practice of treaty-monitoring bodies.

In other words, a state party is obliged to adhere to its human rights obligations also when the state acts internationally. In concrete situations it may be difficult to grasp the consequences of policy decisions which states take collectively as members of for example international organisations. In the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights a group of experts suggests that "a violation of economic, social and cultural rights occurs when a state pursues, by action or omission, a

²⁵¹ See also Platform for Action and the Beijing Declaration, Fourth World Conference on Women, Section H "Institutional mechanisms for the advancement of women".

²⁵² See also Article 11.

²⁵³ See, e.g., Article 55 and 56 of the United Nations Charter, Article 28 of the Universal Declaration of Human Rights, Article 3 of the Declaration on the Right to Development.

²⁵⁴ For a discussion on this topic, see Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", *Human Rights Quarterly*, 1987, pp. 186-192, Allan Rosas, "The Right to Development", in: Asbjørn Eide, Catarina Krause & Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook*, 2001, p. 129.

²⁵⁵ See Article 2 (1).

policy or practice which deliberately contravenes or ignores obligations of the Covenant or fails to achieve the required standard of conduct or result".²⁵⁶ Even if this has been formulated first and foremost with regard to a state's policy-making nationally, it could be implemented also internationally. On the other hand, concerning negative consequences, which are unpredictable, it might be argued that a state's obligation to protect economic, social and cultural rights includes an obligation to adopt measures which alleviate these consequences.²⁵⁷

Of particular relevance for the discussion in this study is the situation where a state negotiates with an international actor, including an international financial institution, concerning the requirements for financial and technical support. Particularly the Committee on Economic, Social and Cultural Rights has in various ways addressed the question of structural adjustment programmes and their impact on human rights. In the General Comment No. 2 on international technical assistance measures, the Committee notes that "adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity". With respect to the need to protect the most basic economic, social and cultural rights in these situations, the Committee urges states to ensure that "such protection is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment".²⁵⁸ This has further been stressed in the Committee's considerations of state reports.

Thus, the Committee recommends in the case of Cameroon that the state party reviews "its macroeconomic reform programmes with respect to their impact on the standard of living of vulnerable groups, particularly in rural areas, and make efforts to adjust these reforms in a way that better responds to the current needs of such groups". Moreover, the Committee recommends that "in negotiations with international financial institutions, the

²⁵⁶ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, *Human Rights Quarterly*, 1998, pp. 691-705, para. 11.

²⁵⁷ See, e.g., UN doc. E/C.12/1993/16 (5 January 1994), para 11 (Mexico), where the Committee on Economic, Social and Cultural Rights recommends that the "State party should take energetic steps to mitigate any negative impact that the North American Free Trade Agreement (NAFTA) might have on the enjoyment of the rights set out in the Covenant.

²⁵⁸ General Comment No. 2 (1990) on international technical assistance measures, UN doc. HRI/GEN/1/Rev.5 (26 April 2001), p. 17, para. 9.

State party take into account its international legal obligations to protect, promote and fulfil economic, social and cultural rights".²⁵⁹

²⁵⁹ UN doc. E/C.12/1/Add.40 (8 December 1999), para 38 (Cameroon). See also UN doc. E/C.12/1/Add.44 (23 May 2000), para 28 (Egypt)

5. Summary and conclusions

The focus of this study has been on analysing, from a human rights perspective, selected areas of concern to women in a globalised economy. The areas selected were employment, trafficking and poverty. All these areas are broad in scope, addressing a number of human rights. Apart from women, also many men face human rights problems linked to the selected areas of study. However, it has been argued in this study that the problems faced by women are often more severe or more frequent.

The key international human rights instruments dealt with in the study are the International Covenant on Economic, Social and Cultural Rights (CESCR), the International Covenant on Civil and Political Rights (CCPR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In addition, selected ILO conventions have been studied. Special focus has been on the treaty practice produced by the respective treaty monitoring body in connection with the consideration of periodic state reports. Emphasis has been on selecting state reports presented by developing countries since the beginning of the 1990s.

The protection of human rights in times of globalisation involves a multitude of actors. Apart from states also other actors such as international organisations (e.g. WTO), financial institution (WB and IMF) and transnational corporations play a central role in this regard. However, it has been submitted in this study that the role played by the state continues to be paramount through the fact that under international law only states are unambiguously bound by international human rights treaties. The direct legal obligations of other actors are only in the process of development.

The approach adopted in this study has been to identify the legal obligations of states with respect to the various human rights addressed under each thematic heading. In so doing the distinction into four categories of obligations has been utilised, that is, the obligations to respect, protect, fulfil and promote. The obligation to respect requires states to adhere to human rights standards in their own activities, the obligation to protect requires states to protect victims of human rights violations by third parties, the obligation to fulfil requires

states to take measures towards the full realisation of rights and the obligation to promote requires states to adopt positive measures to further strengthen the realisation of human rights.

The first theme discussed in the study was the question of employment in export processing zones. Women tend to comprise the majority of the workers in the manufacturing industries in these zones. It has been shown in the practice of the treaty monitoring bodies and other studies that women face considerable human rights problems in these industries. The standard-setting within the International Labour Organisation regulates most comprehensively the different rights of relevance in this regard. However, since the number of ratifications of the more specialised instruments, which, among other things, provide for maternity protection, often is fairly low, the need to apply also the more general human rights instruments becomes apparent. It has been noted in this study that even if the monitoring bodies under for example the CESC and the CEDAW have addressed work-related rights in connection with the consideration of state reports, a systematic development of the interpretation of these rights through general comments and recommendations is still missing.

Rights discussed in the study involve particularly rights linked to just and favourable conditions of work, non-discrimination, trade unions rights and the right to effective remedies. The most broadly addressed problem is the limitations put on women's reproductive freedom, for example, by the adoption of obligatory pregnancy tests. Different treaty monitoring bodies have addressed these problems from different perspectives, both as a violation of the right to privacy and the right to non-discrimination.

Characteristic of the human rights violations in connection with export processing zones is the fact that the perpetrator is a private actor rather than public authorities. This means that the state obligations to be identified involve particularly obligations to protect. Of particular importance are the obligations to provide effective remedies, including the instalment of effective mechanisms to investigate and monitor the compliance with labour legislation in processing zones. In some instances also the national legislation is clearly supporting discriminatory practices against female workers. When it comes to trade union

rights it has been shown that the problem is not necessarily that trade union activity is prohibited in national legislation, but the practical realisation of the rights is often curtailed through informal restrictions. In order to overcome this problem active state measures are required. The obligation to protect trade union activities has been clearly endorsed by the monitoring bodies, whereas an obligation to promote trade unionisation has not explicitly been spelt out.

Trafficking in women was the second theme to be considered in the study. Trafficking in women, which involves the transport of women from one country or region to another for some form of exploitative purpose, may be considered under a number of legal regimes (e.g. anti-trafficking and anti-slavery law, labour law, humanitarian law and human rights law). The starting point of this study has been the human rights approach, combined with comparisons with some of the more specialised instruments dealing with trafficking, particularly the recent Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Crime adopted in 2000. In the past trafficking was usually linked to prostitution. However, as reflected in the 2000 Protocol, increasing emphasis is put on the need to also include trafficking for other purposes than prostitution such as slavery-like labour, forced marriages and domestic services.

The strong link between trafficking and prostitution and the disagreement on how to deal with prostitution in a human rights context has hampered the development of coherent standards. In the older trafficking instruments, an abolitionist approach to prostitution is adopted, which outlaws the leading away of a person, with or without her consent, for the purpose of any form of prostitution. The approach has, however, in later instruments somewhat changed and today the main emphasis is put on protecting the rights of women who face exploitative forms of prostitution, thereby distinguishing more clearly than before between trafficked women for the purpose of forced prostitution and migrant women who work in the sex industry.

The key state obligations in this field involve the criminalisation of all the stages of the trafficking process. In the 2000 Trafficking Protocol increasing emphasis is put on

developing the cooperation between states in order to crack down the trafficking organisations. Obligations directed towards the trafficked women involve the availability of effective legal remedies, including protective measures required in order for them to be able to testify in criminal or civil proceedings against the trafficker.

Only during the 1990s, with a stronger international emphasis on economic, social and cultural rights, has the connection between human rights and poverty been more deeply addressed. In the practice of international treaty monitoring bodies, particularly the Committee on Economic, Social and Cultural Rights has through statements on globalisation and poverty contributed to the discussion on a human rights-based approach to poverty. Within the United Nations a discussion is presently taking place concerning the need to develop a declaration on poverty and human rights.

The key ingredients in this discussion have been the realisation of economic, social and cultural rights, the right to non-discrimination and equality, participation and accountability. It has been shown that all these are important to women and that the present human rights instruments include a number of rights with corresponding obligations which address these issues. Of particular interest is Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women which addresses the rights of rural women to “participate in and benefit from rural development”, for example, by participating in the elaboration and implementation of development planning.

This study has shown that there is a broad range of human rights which are relevant when studying globalisation and women’s human rights in the context of employment, trafficking and poverty. Many of the states which are actively taking part in the global economy are parties to the universal human rights treaties. The treaty monitoring bodies have since the beginning of the 1990s paid increasing attention to women’s human rights problems in times of globalisation by addressing inadequacies in treaty implementation. It appears that in order to improve state performance in these areas a better integration of human rights considerations into the operations of the state, also internationally, is required. This has been clearly demonstrated in connection with poverty eradication, it is

imperative that also donor countries, international financial institutions and international organisations pay due regard to a state's human rights obligations. At a practical level, the problem is often that those who participate in financial negotiations at international level are not always aware of the human rights obligations of their own country.

In this study the focus has been on three areas (employment, trafficking, poverty). It goes without saying that also other areas are relevant when addressing women's human rights in a globalised economy. One such area is the right to take part in the conduct of public affairs, particularly against the background that an increasing part of policy- and decision-making is taking place outside the traditional decision-making bodies. Even if the right to participation does not strictly belong to the category of economic, social and cultural rights, participation is of outmost importance for their realisation. The fact that the study has comprised three distinct and fairly broad areas has not enabled a comprehensive analysis. Thus, separate studies on each theme could provide valuable additional information. It is suggested that such studies should focus from a gender perspective particularly on further defining legal human rights obligations, on analysing the role of other actors apart from the state and on discussing development assistance in the context of a human rights-based approach to poverty eradication.

Tiivistelmä

Tutkimusraportti globalisaatiosta ja naisten ihmisoikeuksista käsittelee eräitä erityisesti naisia koskevia ihmisoikeusongelmia. Valitut aihealueet ovat työelämä, naiskauppa ja köyhyys. Kukin niistä muodostaa varsin laajan asiakokonaisuuden, johon liittyy useita ihmisoikeuksia.

Tutkimuksessa käsitellyt keskeisimmät kansainväliset ihmisoikeusinstrumentit ovat YK:n taloudellisia, sosiaalisia ja sivistyksellisiä oikeuksia koskeva kansainvälinen yleissopimus (TSS-sopimus), YK:n kansalaisoikeuksia ja poliittisia oikeuksia koskeva kansainvälinen yleissopimus (KP-sopimus) ja YK:n kaikkinaisen naisten syrjinnän poistamista koskeva yleissopimus (naisten oikeuksien sopimus). Näiden lisäksi tutkimuksen piiriin on otettu eräitä Kansainvälisen työjärjestö ILO:n puitteissa laadittuja sopimuksia. Erityishuomion kohteena on ollut yllämainittuja sopimuksia valvovien asiantuntijaelinten valtioiden määräaikauskertomusten käsittelyn yhteydessä tuottama materiaali.

Ihmisoikeuksien suojeleminen globalisaation aikakautena lankeaa monille eri toimijoille. Valtioiden lisäksi kansainvälisillä järjestöillä, kansainvälisillä rahoituslaitoksilla ja monikansallisilla yhtiöillä on merkittävä rooli ihmisoikeuksien turvaamisessa. Tässä tutkimuksessa korostetaan kuitenkin valtioiden ensisijaista roolia, koska kansainvälisen oikeuden mukaan kansainväliset ihmisoikeussopimukset sitovat yksiselitteisesti ainoastaan valtioita. Muihin toimijoihin kohdistuvat suorat juridiset velvoitteet ovat vasta kehittymässä.

Tutkimuksen lähestymistapana on ollut identifioida valtioiden juridiset velvoitteet, jotka liittyvät jokaisen temaattisen otsikon (työelämä, naiskauppa ja köyhyys) alla käsiteltyihin ihmisoikeuksiin. Tässä yhteydessä valtioiden velvoitteet on jaettu neljään ryhmään: velvollisuus kunnioittaa, velvollisuus suojella, velvollisuus toteuttaa ja velvollisuus edistää. Velvollisuus kunnioittaa tarkoittaa, että valtioiden tulee noudattaa ihmisoikeusstandardeja omassa toiminnassaan; velvollisuus suojella taas edellyttää, että valtiot suojelevat kolmansien tahojen suorittamien ihmisoikeusloukkausten uhreja. Velvollisuus toteuttaa vaatii valtioita ryhtymään toimenpiteisiin ihmisoikeuksien täydelliseksi toteuttamiseksi, ja velvollisuus edistää taas tarkoittaa, että valtioiden tulee

ryhtyä nk. positiivisiin toimenpiteisiin vahvistaakseen entisestään ihmisoikeuksien toteutumista.

Tutkimuksen ensimmäisenä teimana ovat työelämään liittyvät ihmisoikeuskysymykset viennin edistämiseen tähtäävillä erityisalueilla (*export processing zones*). Naiset näyttävät muodostavan enemmistön kyseisillä alueilla toimivien tuotantolaitosten työntekijöistä. Sopimusten valvontaelinten käytäntö ja erilaiset tutkimukset osoittavat, että nämä naistyöntekijät kärsivät huomattavista ihmisoikeusongelmista. ILO:n piirissä laaditut normit sääntelevät kattavimmin niitä oikeuksia, jotka ovat heidän kannaltaan relevantteja. Esimerkkinä voidaan mainita äitiyttä suojaavat ILO-sopimukset. Koska nämä erikoistuneemmat sopimukset ratifioineiden valtioiden määrä on suhteellisen alhainen, on olemassa selkeä tarve soveltaa työelämää koskeviin ihmisoikeuskysymyksiin sisällöltään yleisempiä ihmisoikeusinstrumentteja, jotka ratifioineiden valtioiden määrä on selvästi suurempi. Vaikka ihmisoikeussopimusten valvontaelimet (esim. TSS-sopimusta ja naisten oikeuksien sopimusta valvovat komiteat) ovat määrääkäsraportteja tutkiessaan käsitelleet työelämään liittyviä oikeuksia, on näiden oikeuksien järjestelmällinen kehittäminen nk. yleisten kannanottojen ja suositusten avulla yhä puutteellista.

Tutkimuksessa on tarkasteltu erityisesti oikeuksia, jotka koskevat oikeudenmukaisia ja suotuisia työoloja, syrjinnän kieltoa, ammatillista järjestäytymistä sekä tehokkaita oikeussuojakeinoja. Kaikkein suurimman huomion saavat naisten lisääntymisvapaudelle asetetut rajoitukset, joista yhtenä esimerkkinä voidaan mainita pakolliset raskaustestit. Sopimusten valvontaelimet ovat pohtineet tätä ongelmaa eri näkökulmista, sekä yksityisyyden suojan että syrjintäkiellon loukkauksina.

Viennin edistämiseen tähtäävillä erityisalueilla tapahtuville ihmisoikeusloukkauksille on ominaista, että niihin syllistyvät yksityiset toimijat julkisen vallan sijasta. Tästä johtuen valtion eri velvoitteista kyseeseen tulee ensisijaisesti velvollisuus suojella ihmisoikeuksien toteutumista. Erityisen tärkeinä voidaan pitää valtion velvollisuutta tarjota ihmisoikeusloukkausten uhreille tehokkaita oikeussuojakeinoja ja sen velvollisuutta luoda mekanismit, joiden avulla voidaan tutkia ja valvoa työlainsäädännön noudattamista vientivyojhykkeillä. Mitä tulee ammatilliseen

järjestäytymiseen liittyviin oikeuksiin, ongelmana ei välttämättä ole ammattiliittojen toiminnan kieltäminen kansallisessa lainsäädännössä, vaan ko. oikeuksien nauttimisen rajoittaminen epävirallisoin keinoin. Tämän ongelman poistaminen vaatii aktiivisia toimenpiteitä valtion taholta. Ihmisoikeussopimusten valvontaelimet ovat selkeästi hyväksyneet, että valtioilla on velvollisuus suojella ammattiliittojen toimintaa, kun taas valtioiden velvollisuutta edistää ammatillista järjestäytymistä ei ole vielä selkeästi ilmaistu.

Toinen tutkimuksen kolmesta teemasta on naiskauppa. Siinä on kyse naisten kuljettamisesta maasta tai alueelta toiseen hyväksikäyttötarkoituksessa. Naiskauppa on kysymys, jota voidaan tarkastella useasta kansainvälisoikeudellisesta näkökulmasta: ihmiskaupan ja orjuuden kieltäminen, työelämää säätelevät normit, humanitäärinen oikeus tai ihmisoikeudet. Tutkimuksen lähtökohtana on yleinen ihmisoikeusnäkökulma, johon on yhdistetty vertailu muutaman erikoistuneemman ihmiskauppaa koskevan instrumentin kanssa. Tässä yhteydessä on syytä mainita etenkin vuonna 2000 hyväksytty ihmiskauppaa koskeva protokolla (Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children). Aikaisemmin naiskauppa yhdistettiin tavallisesti prostituutioon, mutta nykyisin yhä suurempaa huomiota saa tarve sisällyttää naiskaupan käsitteeseen myös muuta kuin prostituutio, esim. orjuuden kaltainen työ ja pakkoavioliitot, mikä käy ilmi myös edellämainitusta protokollasta.

Naiskaupan ja prostituution välinen vahva yhteys sekä erimielisyydet koskien sitä millä tavalla prostituutiota tulisi käsitellä ihmisoikeuskontekstissa ovat haitanneet yhtenäisten standardien kehittymistä. Vanhemmissa ihmiskauppaa koskevissa instrumenteissa on omaksuttu prostituution kieltämiseen pyrkivä lähestymistapa. Niissä kielletään henkilön houkuttelu mihin tahansa prostituution muotoon riippumatta siitä tapahtuuko se tämän suostumuksella tai ilman. Tämä lähestymistapa on kuitenkin myöhemmissä instrumenteissa muuttunut. Suurin paino asetetaan nykyään niiden naisten oikeuksien suojelulle, jotka kohtaavat prostituution selvästi riistäviä muotoja. Näin tehdään aikaisempaa selvempi ero prostitutioiduiksi myytyjen naisten ja seksiteollisuudessa työskentelevien maahanmuuttajanaisten välillä.

Valtioiden keskeinen velvollisuus on naiskaupan kaikkien vaiheiden kriminalisointi. Vuonna 2000 hyväksytyssä ihmiskauppaa koskevassa protokollassa on painotettu aikaisempaa enemmän valtioiden välistä yhteistyötä, jonka tarkoituksena on murskata ihmis- ja naiskauppaa harjoittavat järjestöt. Mitä tulee naiskaupan uhreiksi joutuneisiin naisiin, tulee valtioiden taata heille tehokkaat oikeussuojakeinot. Yhtenä esimerkkinä voidaan mainita sellaisten suojatoimenpiteiden tarjoaminen, jotka mahdollistavat uhrien esiintymisen todistajina naiskaupan harjoittajia vastaan käytävissä rikos- tai siviilioikeudenkäynneissä.

Ihmisoikeuksien ja köyhyyden välillä oleva yhteys alkoi saada osakseen syvempää huomiota vasta 1990-luvulla, samaan aikaan kun taloudelliset, sosiaaliset ja sivistykselliset oikeudet saivat lisää kansainvälistä painoarvoa. Ihmisoikeussopimuksia valvovista elimistä erityisesti TSS-komitea on globalisaatiosta ja köyhyydestä antamallaan lausunnoilla vaikuttanut keskusteluun, jota käydään köyhyyteen sovellettavasta ihmisoikeuksiin perustuvasta näkökulmasta. Tässä keskustelussa ovat olennaisena osana olleet taloudellisten, sosiaalisten ja sivistyksellisten oikeuksien toteuttaminen, syrjinnän kieltäminen, osallistumisoikeudet sekä vastuukysymykset. Ne kaikki ovat luonnollisesti naisten kannalta tärkeitä kysymyksiä, ja nykyiset ihmisoikeusinstrumentit sisältävätkin joukon niitä koskevia oikeuksia ja vastaavia velvollisuuksia. Erityisen huomionarvoinen on naisten oikeuksien sopimuksen 14. artikla, joka koskee maaseudun naisten oikeutta osallistua ja hyötyä maaseudun kehityksestä esimerkiksi osallistumalla kehityssuunnitelmien laadintaan ja toteuttamiseen.

Tämä tutkimus osoittaa, että on olemassa laaja kirjo ihmisoikeuksia, jotka ovat relevantteja tutkittaessa globalisaatiota ja naisten ihmisoikeuksia työelämän, naiskaupan ja köyhyyden alueella. Monet globaalissa taloudessa aktiivisesti mukana olevat valtiot ovat ratifioineet universaaleja ihmisoikeussopimuksia. Niitä valvovat asiantuntijakomiteat ovat 1990-luvun alusta lähtien kiinnittäneet kasvavaa huomiota globalisaation aikakaudella esiintyviin naisten ihmisoikeusongelmiin käsittelemällä sopimusten toteuttamisessa olevia puutteita. Näyttää siltä, että jotta valtioiden ihmisoikeuskäytäntöä voitaisiin näillä alueilla parantaa, on ihmisoikeusnäkökulma integroitava entistä voimakkaammin osaksi valtioiden toimintaa sekä kansallisella että kansainvälisellä tasolla. Tämä on selkeästi havaittu

taistelussa köyhyyttä vastaan: on välttämätöntä, että myös kehitysapua antavat maa, kansainväliset rahoituslaitokset ja kansainväliset järjestöt ottavat asiaankuuluvalla tavalla huomioon valtioiden ihmisoikeusveloitteet. Käytännön tasolla ongelmana on usein se, että ne jotka osallistuvat taloudellisia kysymyksiä koskeviin kansainvälisiin neuvotteluihin, eivät aina ole tietoisia edustamaansa maata sitovista ihmisoikeusveloitteista.

Bibliography

- Alston, Philip. 1984. "Conjuring up New Human Rights: A Proposal for Quality Control", *American Journal of International Law*, Vol. 78, No. 3, pp. 607-621.
- Alston, Philip and Gerard Quinn. 1987. "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", *Human Rights Quarterly*, Vol. 9, pp. 156-229.
- Anker, Richard and Rajendra Paratian and Raymond Torres. 2001. *Studies on the Social Dimensions of Globalization – Mauritius*. Geneva: International Labour Office.
- Armstrong, Alice et al. 1993. "Uncovering Reality: Excavating Women's Rights in African family Law", *International Journal of Law and the Family*, Vol. 7, pp. 314-369.
- Bakker, Isabella. 1999. "Globalization and Human Development in the Rich Countries: Lessons from Labour Markets and Welfare States", in: *Globalization with a Human Face*, Background Papers, Vol. II, Human Development Report 1999, pp. 29-80.
- Barry, Kathleen. 1995. *The Prostitution of Sexuality*. New York: New York University Press.
- Bunch, Charlotte. 1992. "Women's Rights as Human Rights: Towards a Re-Vision of Human Rights", *Human Rights Quarterly*, Vol. 12, No. 4, pp. 486-498.
- Burrows, Noreen. 1985. "The 1979 Convention on the Elimination of All Forms of Discrimination Against Women", *Netherlands International Law Review*, Vol. 32, No. 3, pp. 419-460.
- Byrnes, Andrew. 1992. "Women, Feminism and International Human Rights Law – Methodological Myopia, Fundamental Flaws or Meaningful Marginalization? Some Current Issues", *Australian Yearbook of International Law*, Vol. 12, pp. 205-240.
- Chiang, Lois. 1999. "Trafficking in Women", in: Kelly D. Askin & Dorean M. Koenig (eds), *Women and International Human Rights Law*, Vol. 1. Ardsley: Transnational Publishers Inc., pp. 321-364.
- Chinkin, Christine. 2000. "A Century in Retrospect. Gender and Globalization", *United Nations Chronicle Online Edition*, Vol. XXXVII, No. 2.
- Chuang, Janie. 1998. "Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts", *Harvard Human Rights Journal*, Vol. 11, pp. 65-107.
- Clapham, Andrew. 1998. "Globalization and the Rule of Law". Paper presented at the Triennial Meeting of the International Commission of Jurists in Cape Town 1998. Available at <http://business-humanrights.org/Globalization-and-the-Rule-of-Law.htm>.

- Cook, Rebecca. 1994. "State Responsibility for Violations of Women's Human Rights", *Harvard Human Rights Journal*, Vol. 7, pp. 125-175.
- Craven, Matthew. 1995. *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development*. Oxford: Clarendon Press.
- De Feyter, Koen. 2001. *World Development Law. Sharing Responsibilities for Development*. Intersentia.
- Demleitner, Nora V. 2001. "The Law at a Crossroads: The Construction of Migrant Women Trafficked into Prostitution", in: David Kyle & Rey Koslowski (eds), *Global Human Smuggling: Comparative Perspectives*. Baltimore: The Johns Hopkins University Press, pp. 257-293.
- Doezema, Jo. 1998. "Forced to Chose: Beyond the Voluntary v. Forced Prostitution Dichotomy", in: Kamala Kempadoo & Jo Doezema (eds), *Global Sex Workers. Rights, Resistance and Redefinition*. New York: Routledge, pp. 34-50.
- Dottridge, Michael and David Weissbrodt. 1999. "Review of the Implementation of and Follow-up to the Conventions on Slavery", *German Yearbook of International Law*, Vol. 42, pp. 242-292.
- Drzewicki, Krzysztof. 2001. "The Right to Work and Rights in Work", in: Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights. A Textbook*. Dordrecht: Martinus Nijhoff Publishers, pp. 223-244.
- Eide, Asbjørn. 1989. *Right to adequate food as a human right*, Study Series 1. United Nations: Centre for Human Rights.
- Eide, Asbjørn. 1989. "Realisation of Social and Economic Rights and the Minimum Threshold Approach", *Human Rights Law Journal*, Vol. 10, No. 1-2, pp. 35-51.
- Eide, Asbjørn. 2001. "Economic, Social and Cultural Rights as Human Rights", in: Asbjørn Eide, Catarina Krause & Allan Rosas (eds), *Economic, Social and Cultural Rights. A Textbook*. Dordrecht: Martinus Nijhoff Publishers, pp. 9-28.
- Eisler, Riene. 1987. "Human Rights: Toward an Integrated Theory of Action", *Human Rights Quarterly*, Vol. 9, No. 3, pp. 287-308.
- Engström, Viljam. 2002. *Realizing the Global Compact*. Forum Iuris. Publications of the Faculty of Law of University of Helsinki. Helsinki: Hakapaino.
- Farrior, Stephanie. 1997. "The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential", *Harvard Human Rights Journal*, Vol. 10, pp. 213-255.
- From the Household to the Factory. Sex Discrimination in the Guatemala Labour Force*. 2002. New York: Human Rights Watch.

- Frostell, Katarina and Martin Scheinin. 2001. "Women", in: Asbjørn Eide, Catarina Krause & Allan Rosas (eds), *Economic, Social and Cultural Rights. A Textbook*. Dordrecht: Martinus Nijhoff Publishers, pp. 331-352.
- Gallagher, Anne. 1997. "Ending the Marginalisation: Strategies for Incorporating Women into the United Nations Human Rights System", *Human Rights Quarterly*, Vol. 19, No. 2, pp. 283-333.
- Gallagher, Anne. 1999. "Human Rights in the Wider United Nations System", in: Raija Hanski & Markku Suksi (eds), *An Introduction to the International Protection of Human Rights. A Textbook*. Åbo: Institute for Human Rights, pp. 153-168.
- Gallagher, Anne. 2001. "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis", *Human Rights Quarterly*, Vol. 23, pp. 975-1004.
- Gardam, Judith G. and Michelle J. Jarvis. 2001. *Women, Armed Conflict and International Law*. The Hague: Kluwer Law International.
- Ghai, Dharam. 1989. "Participatory Development: Some Perspectives from grass-roots Experiences", *Journal of Development Planning*, No. 19, pp. 215-246.
- Hinz, Veronika U. and Markku Suksi. 2002. *Election Elements: On the International Standards of Electoral Participation*. Turku: Åbo Akademis tryckeri.
- Howse, Robert and Mutua, Makau. 2001. "Protecting Human Rights in a Global Economy. Challenges for the World Trade Organization", in: Hugo Stokke & Arne Tostensen (eds), *Human Rights in Development Yearbook 1999/2000. The Millennium Edition*. The Hague: Kluwer Law International, pp. 51-82.
- Human Development Report 1997*. Published for the United Nations Development Programme. New York: Oxford University Press.
- Human Development Report 1999*. Published for the United Nations Development Programme. New York: Oxford University Press.
- Human Development Report 2000*. Published for the United Nations Development Programme. New York: Oxford University Press.
- Hunt, Paul and Manfred Nowak and Siddiq Osmani. 2002. *Human Rights and Poverty Reduction Strategies*, Discussion Paper submitted to the UN Office of the High Commissioner for Human Rights on 28 February 2002.
- Knaus, Katharina and Angelika Kartusch and Gabriele Reiter. 2000. *Combat of Trafficking in Women for the Purpose of Forced Prostitution. International Standards*. Vienna: Ludwig Boltzman Institute of Human Rights.
- Labour and social issues relating to export processing zones*. 1998. Geneva: International Labour Office.

- Leary, Virginia A. 1992. "Lessons from the Experience of the International Labour Organisation", in: Philip Alston (ed), *The United Nations and Human Rights. A Critical Appraisal*. Oxford: Clarendon Press, pp. 580-619.
- Leuprecht, Peter. 1999. "The World Trade Organisation – Another Playground of Pan-Economic Ideology", in: Malini Mehra (ed), *Human Rights and Economic Globalisation: Directions for the WTO*. Uppsala:Fyris-Tryck Ab, pp. 15-22.
- Lim, Lin Lean (ed). 1998. *The Sex Sector. The economic and social bases of prostitution in Southeast Asia*. Geneva: International Labour Office.
- Lipumba, Nguyuru H.I. 1999. "Opportunities and Challenges of Globalisation: Can Sub-Saharan Africa Avoid Marginalisation?", in: *Globalization with a Human Face*, Background Papers, Vol. II, Human Development Report 1999, pp. 157-221.
- Mahoney, Kathleen E. 1994. "Canadian Approaches to Equality Rights and Gender Equality in Courts", in: Rebecca J. Cook (ed), *Human Rights of Women. National and International Perspectives*. Philadelphia: University of Pennsylvania Press, pp. 437-461.
- Migrant Trafficking and Human Smuggling in Europe. A review of the evidence with case studies from Hungary, Poland and Ukraine*. 2000. Geneva: International Organization for Migration (IOM).
- Myntti, Kristian. 1998. *Minoriteters och urfolks politiska rättigheter. En studie av rätten för små minoriteter och urfolk till politiskt deltagande och självbestämmande*. Rovaniemi: Lapplands Universitets tryckeri.
- Oloka-Onyango, J. 2000. "Poverty, Human Rights and the Quest for Sustainable Human Development in Structurally-Adjusted Uganda", *Netherlands Human Rights Quarterly*, Vol. 18, No. 1, pp. 23-44.
- Orford, Anne. 1999. "Contesting Globalization: A Feminist Perspective on the Future of Human Rights", in: Burnes H. Weston & Stephen P. Marks (eds), *The Future of International Human Rights*. Ardsley: Transnational Publishers Inc., pp. 157-186.
- Paratian, Rajendra and Raymond Torres. 2001. *Studies on the Social Dimensions of Globalization – Bangladesh*. Geneva: International Labour Office.
- Platform for Action and the Beijing Declaration*. 1996. Fourth World Conference on Women, Beijing, China 4-15 September 1995. New York: United Nations.
- The Policy Roots of Economic Crisis and Poverty. A Multi-Country Participatory Assessment of Structural Adjustment*. 2002. Report prepared by the Structural Adjustment Participatory Review International Network (SAPRIN). Available at <http://www.saprin.org/news-updates.htm>.
- Reanda, Laura. 1992. "The Commission on the Status of Women", in: Philip Alston (ed), *The United Nations and Human Rights. A Critical Appraisal*. Oxford: Clarendon Press, pp. 265-303.

- Rittich, Kerry. 2002. "Feminization and Contingency: Regulating the Stakes of Work for Women", in Joanne Conaghan et al. (eds), *Labour Law in an Era of Globalization. Transformative Practices & Possibilities*. Oxford University Press, pp. 117-136.
- Rosas, Allan. 1990. "Democracy and Human Rights", in: Allan Rosas & Jan Helgesen (eds), *Human Rights in a Changing East/West Perspective*. London: Printer Publishers, pp. 17-57.
- Rosas, Allan. 2001. "The Right to Development", in: Asbjørn Eide, Catarina Krause & Allan Rosas (eds), *Economic, Social and Cultural Rights. A Textbook*. Dordrecht: Martinus Nijhoff Publishers, pp. 119-132.
- Samson, Klaus and Kenneth Schindler. 1999. "The Standard-Setting and Supervisory System of the International Labour Organisation", in: Raija Hanski & Markku Suksi (eds), *An Introduction to the International Protection of Human Rights. A Textbook*. Turku: Åbo Akademis tryckeri, pp. 185-218.
- Sangera, Jyoti. 1999. "In the Belly of the Beast: Sex Trade, Prostitution and Globalization". Discussion paper for South Asia Regional Consultation on Prostitution, 17-18 February 1999, Bangkok. Available at <http://www.hsph.harvard.edu/Organizations/healthnet/Sasia/repro2/jyoti-sangera.htm>.
- Scheinin, Martin. 1999. "Women's Economic and Social Rights as Human Rights. Conceptual Problems and Issues of Practical Implementation", in: Lauri Hannikainen & Eeva Nykänen (eds), *New Trends in Discrimination Law – International Perspectives*. Publications of Turku Law School Vol. 3, No. 1, pp. 1-28.
- Scott, Craig. 2001. "Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights", in: Asbjørn Eide, Catarina Krause & Allan Rosas (eds), *Economic, Social and Cultural Rights A Textbook*. Dordrecht: Martinus Nijhoff Publishers.
- Skogly, Sigrun. 2001. *The Human Rights Obligations of the World Bank and the International Monetary Fund*. London: Cavendish Publishing Limited.
- Steiner, Henry. 1988. "Political Participation as a Human Right", *Harvard Human Rights Yearbook*, Vol. 1, pp. 77-134.
- Valticos, N. 1979. *International Labour Law*. Deventer: Kluwer.
- Vienna Declaration and Programme of Action*. 1993. World Conference on Human Rights, June 1993, Vienna. New York: United Nations.
- Vierdag, E.W. 1973. *The Concept of Discrimination in International Law with Special Reference to Human Rights*. The Hague: Martinus Nijhoff.
- World Development Report 1997: The State in a Changing World*. 1997. Published for the World Bank. New York: Oxford University Press.

World Survey on the Role of Women in Development. Globalization, Gender and Work. 1999. New York: United Nations.

Väyrynen, Raimo. 1998. *Globalisaatio; uhka vai mahdollisuus?*. Atena kustannus/WSOY.

Özler, Süle. 1999. "Globalization, employment and gender", in: *Globalization with a Human Face*, Background Papers, Vol. I. Human Development Report 1999, pp. 223-234.