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KING'S STUDENT LAW REVIEW

THE CONSTITUTIONAL
RIGHT TO EXPRESS
HATRED:
A COMPARATIVE
ANALYSIS

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ABSTRACT

The freedom of expression, often considered as a paragon of civil liberties, occupies a central position in numerous domestic constitutional and international human rights treaty documents. An often neglected dimension of the freedom of speech is that it is not an unqualified right; the level of protection accorded depends both upon the nature of the speech as well as its potential impact. There is a perceptible, but ill-defined, boundary beyond which restrictions to purported speech will either not be considered as speech, or if it is, will be justifiably limited. While other forms of expression at the frontiers of free speech include pornography, in contradistinction to obscenity, and blasphemy, this article focuses exclusively on the margin associated with hate speech. In order to refine the appropriate balance between the freedom of expression and hate speech, this Article will employ a comparative analysis of the constitutional protection accorded by the United States, Canada and Germany. The high level of free speech guarantees in the United States will be shown to differ from the greater willingness to balance competing rights in other liberal democracies that recognise the potential for unfettered speech to curtail the dignity and equality of others.

1. INTRODUCTION

Hate speech, considered here as degrading speech intended to intimidate or incite violence against certain persons or groups on a range of distinguishing characteristics, presents a unique and problematic challenge to constitutional provisions protecting the freedom of speech. The position adopted in the United States is markedly different than those taken by other liberal democracies such as Canada and Germany and this paper will address the reasons for this paradigmatic divergence. It will begin with an examination of the historical, political, and social context against which these constitutional provisions were drafted and the particular threats to speech which they were to counter as well as the vision of the enshrined right. The focus will then shift to the underlying theoretical bases supporting privileged status speech protection and the reasons for excluding or limiting certain categories of speech in specific circumstances. The application of these principles and limitations will be scrutinised through the domestic case law from the jurisdictions above, with especial attention to relevant international law informing national jurisprudence. This latter point will require detailed consideration of the View of Human Rights Committee of the ICCPR (HRC) but space precludes an analysis of European Court of Human Rights jurisprudence. The goal of this paper is therefore to elucidate

a coherent and justifiable approach to the clash between laws proscribing hate speech and constitutional provisions safeguarding a right to free speech, but again space precludes a detailed analysis of the role played by equality rights in this context.

2. CONTEXTUAL CONSIDERATIONS

In 1791, the adoption of the First Amendment in the US enshrined unfettered free speech in the context of a successful revolution founded upon the dissemination of doctrines and ideas- a foundation which continues to influence these rights.¹ Textually, the freedom of speech is a negative absolute right against the government and speech found within its ambit is extended high levels of protection by the courts. This high premium placed upon speech has resulted in the exclusion of certain categories of speech from the constitutional ambit resulting in a two-tiered system of protection. It also requires reservations to be entered for treaties potentially requiring a limitation upon speech rights as the Supremacy Clause of Article 6 of the Constitution dictates that treaties must be compliant to that document.

Relevant international instruments, on the other hand, were agreed in the post-war era with emphasis upon the maintenance of democratic stability in racially and ethnically diverse populations.² Furthermore, the severe atrocities which had occurred then were seared into the collective memory the potentially devastating effects of unfettered free speech upon other essential rights proved that curtailment of speech is not the supreme threat to functional democratic orders as the US system suggests and granted a greater leeway for incursion into the realm of free speech by laws prohibiting hate speech. Treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD) mandate prohibitive laws in Article 4 in face of domestic constitutional free speech guarantees,³ and Article 20(2) of the ICCPR provides an explicit prohibition of the advocacy of hatred inciting discrimination, violence or hostility. Additionally, the limitation provisions allowed under Article 10(2) of the ECHR and Article 19(3) of the ICCPR support this shift towards balancing expression with other rights, resulting in a single-tier system with an expansive concept of expression, but allows for its limitation as the right

1. Lorraine Eisenstat Weinrib, 'Hate Promotion in a Free and Democratic Society: *R v Keegstra*' (1990-1991) 36 McGill LJ 1416, 1422.

2. *ibid* 1423.

3. Dominic McGoldrick and Therese O'Donnell, 'Hate-Speech Laws: Consistency with National and International Human Rights Law' (1998) 18(4) Legal Studies 453, 469-470.

'carries special duties and responsibilities.' This shift can also be considered as a reaction to redress the difficulties of the anachronistic US position.

As will be seen, the international paradigm informs the approach in many liberal democracies and is considered better suited to contemporary challenges so an analysis of the View of the HRC is required to appropriately contextualise national jurisprudence.

In *Faurisson v France*,⁴ the 'Gayssot Act' criminalising the contestation of crimes against humanity was alleged to curtail the freedom of expression.⁵ The HRC accepted the possible abstract incompatibility of the Act and limited its consideration upon the facts.⁶ It found the restriction of expression was permissible since the statements were 'of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism',⁷ and the necessity limb was satisfied upon the acceptance of Holocaust denial as 'the principle vehicle of anti-semitism'.⁸ The concurring opinion of Nisuke Ando draws attention to the possible chilling effect upon expression this opinion may cause, preferring 'specific legislation prohibiting well-defined acts of anti-semitism'.⁹ Elizabeth Evatt and David Kretzmer's concurring opinion emphasised the 'right to be free from incitement to racism or anti-semitism' concluding that these means were proportional for its protection.¹⁰ These views elucidate the strong balancing of rights involved with the restriction of expression by the HRC in the context of hate speech.

3. UNITED STATES

'Freedom of speech is not only the most cherished American constitutional right, but also one of America's foremost cultural symbols'.¹¹ Thus, the US ratified the ICCPR but entered a reservation to Article 20 to preclude its restriction to the constitutionally protected rights of free speech

4. Communication No. 550/1993.

5. *ibid* paras 2.3 and 3.1.

6. *ibid* para 9.3.

7. *ibid* para 9.6.

8. *ibid* para 9.7.

9. Communication No. 550/1993., B.

10. *ibid* C.10.

11. Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 *Cardozo L Rev* 1523, 1529.

and assembly,¹² and similarly with ICERD, the US ratification reserved the application of Article 4.¹³ Schauer suggests the US position illuminates important ideological differences; the international instruments impose ‘viewpoint discrimination’, against ‘the American understanding ... that principles of freedom of speech do not permit government to distinguish protected from unprotected speech on the basis of the view espoused’.¹⁴

This intolerance of ‘viewpoint discrimination’ has spawned a markedly different approach to hate speech regulation in the US, where the First Amendment is able to protect speech that falls foul of criminal provisions in other jurisdictions. That hate speech can be properly categorised as part of political speech and such ‘public discourse be open to the opinions of all’¹⁵ provides further support for constitutional protection.

Despite this, however, the very nature of hate speech may push the category outside constitutional protection. In *Chaplinsky v New Hampshire*,¹⁶ Murphy J, for a unanimous Supreme Court, said that:

There are certain well-defined and narrowly-limited classes of speech, the prevention and punishment of which have never been thought to raise a constitutional problem. These include ... the insulting or ‘fighting words’ those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.¹⁷

The case interestingly permits a ‘heckler’s veto’ of speech since the reaction of the recipients may be taken into account in its restriction, and is pertinent for hate speech.

In the English case of *Beatty v Gillbanks*¹⁸ which is still good law, Field J held that since the Salvation Army had not committed unlawful acts and as the disturbances caused by the Skeleton Army as a result of their procession was neither intended nor a necessary or natural consequence of their actions,

12. Henry J Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law Politics and Morals* (3rd ed. Oxford University Press, New York 2008). 651.

13. *ibid* 652.

14. *ibid*.

15. Robert C Post, ‘Racist Speech, Democracy, and the First Amendment’ (1991) 32 *William and Mary L Rev* 267, 314.

16. [1942] 315 US 568.

17. *ibid* 572-573.

18. (1881-82) LR 9 QBD 308.

a conviction could not stand, negating the heckler's veto. In *Terminiello v Chicago*,¹⁹ Douglas J for the Supreme Court reversed the conviction for a speech which resulted in a riot; the First Amendment was designed to 'invite dispute ... [and] best serve[s] its high purpose when it induces a condition of unrest ... or even stirs people to anger.'²⁰ Jackson J famously dissenting said that '[t]here is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.'²¹

The position was finalised in the leading case *Brandenburg v Ohio*,²² which specifically concerned racist hate speech. The Court, *per curiam*, held that:

[T]he constitutional guarantees of free speech ... do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.²³

This definitive 'imminent lawless action' test departed from earlier rulings. Holmes J set the 'clear and present danger' standard in *Schenck v US*,²⁴ which *Whitney v California*²⁵ subsequently broadened to require only a 'bad tendency' to produce the prohibited result which *Brandenburg* overruled. Meiklejohn, resting First Amendment protection upon the theoretical justification of effective participation in a democracy, criticised this possibility as restricting speech to protect citizens violates the very rights of those claimed to be protected by the restriction.²⁶

The *Brandenburg* decision affirmed that free speech occupies the hierarchical apex of constitutional values and consistently prevails over competing societal interests. Subsequent hate speech cases illuminate the zealous protection of speech by the Supreme Court. For instance, in *National Socialist Party of America v Skokie*,²⁷ the Supreme Court found no grounds

19. [1949] 337 US 1.

20. [1949] 337 US 1, 4.

21. *ibid* 36.

22. [1969] 395 US 444.

23. *ibid* 447-448.

24. [1919] 249 US 47.

25. [1927] 274 US 357.

26. Thomas Michael Scanlon, 'Freedom of Expression and Categories of Expression' (1978-1979) 40 U Pitt L Rev 519, 529-530.

27. [1978] 432 US 43.

to prohibit a Nazi march through a town with a disproportionately large population of Holocaust survivors under the First Amendment.

The high-water mark for First Amendment protection of hate speech is found in Scalia J's majority judgment in *RAV v St Paul*²⁸ where the Bias-Motivated Crime Ordinance, which required the arousal of 'anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender', was held unconstitutional due to its proscription of speech based purely upon content. Even if cross burning met the incitement standard by constituting 'fighting words', distinction between such incitements amount to a viewpoint discrimination,²⁹ which is extremely noteworthy since *Chaplinsky* has provided consistent authority for the exclusion of such speech from the First Amendment.

White J, concurring on narrow grounds, notes that the categorical exclusion of certain classes of speech is legitimate under the First Amendment, despite being content-based and defends this position as the 'approach has provided a principled and narrowly focused means for distinguishing between expression that the government may freely regulate and that which it may regulate on the basis of content only upon a showing of compelling need.'³⁰ He criticises the novel 'under-inclusiveness' interpretation of the since 'it permits, indeed invites, the continuation of expressive conduct that in this case is evil and worthless in First Amendment terms' in contrast with '[t]he overbreadth doctrine [which] has the redeeming virtue of attempting to avoid the chilling of protected expression.'³¹

Subsequently, the Court retreated from *RAV* in *Virginia v Black*³² on essentially identical facts, allowing statutes focussing on harm or threat of harm to withstand the First Amendment, provided that they do not require specific grounds for that intimidation. O'Connor J held that intimidation is a type of 'true threat', where a speaker directs a threat to a person or group of persons with the intent of placing the victim in the fear of bodily harm or death.³³ The ruling is consistent with *RAV* since content discrimination is not at issue as it 'does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion.'³⁴

28. [1992] 505 US 377.

29. Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 *Cardozo L Rev* 1523, 1539.

30. [1992] 505 US 377, 399-400.

31. [1992] 505 US 377, 402.

32. [2003] 538 US 343.

33. *ibid* 344.

34. *ibid* 345.

Laws proscribing hate speech are generally struck down as unconstitutional, falling down under First Amendment scrutiny. This is because of the classification that such speech is political, and so aligns closely with the constitutional commitment to democracy, as well as a strong intolerance towards content-based discriminations, since the government is not trusted to draw distinctions between types of speech. This is particularly pertinent in hate speech as its proscription of certain categories of speech may result in a bias towards some groups over others, resulting in favouritism and stigmatisation flowing from such discrimination. Such hostility to laws against hate speech is not found in the jurisprudence of other liberal democracies which prefer to balance free expression with other important social values.

4. CANADA

Everybody has the right to freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms, but the reasonable limits clause in section 1 which guarantees these rights, simultaneously subjects them to 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The definitive test of this provision is in *R v Oakes*,³⁵ comprising of two limbs: there must be a 'pressing and substantial objective'; and the means must be 'proportional', requiring that these means to be 'rationally connected to the objective', that there must be a 'minimal impairment of the rights', and that there must be proportionality between the infringement and the objective. There is a striking similarity between restrictions allowed in the Canadian Charter and those under the Article 10(2) of the ECHR, and may be indicative of the influence that international has had on its domestic constitutional jurisprudence.

In the context of hate speech, the leading case of *R v Keegstra*³⁶ concerned section 319(2) of the Criminal Code which created an offence for communicating statements wilfully promoting hatred against any identifiable group, subject to four defences. Dickson CJ reaffirmed that s2(b) encompassed all forms of communicative expression, hate speech was held outside of the narrow exception of communication conducted through direct physical harm per *Dolphin Delivery*³⁷ as '[i]t is criminalised for the repugnancy of its *meaning*, not because any physical harm is consequent on

35. [1986] 1 SCR 103.

36. [1990] 3 SCR 697.

37. [1986] 2 SCR 573.

its utterance. With meaning, therefore, comes constitutional protection.³⁸ This expansive interpretation of s 2(b) problematically conflicts with the equality guarantee of Charter section 15 proscribing state discrimination on grounds including those enumerated in s 319(2), as well as denying the requirement of Charter section 27 to interpret those rights to favour Canada's multicultural heritage³⁹. Nevertheless, hate speech is found to be protected by s 2(b) and the Court moves onto justified limitations in s 1.

In the first limb *Oakes* test, ss 15 and 27 are understood to inform the interpretation of s 1, partially alleviating this inconsistency.⁴⁰ In finding that this limb is satisfied, the Chief Justice notes that a 'person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he ... belongs.'⁴¹ Raz contends that expression should be protected as it serves to validate ways of life, and conversely, that official censorship insults and marginalises those lifestyles.⁴² Thus, this theoretical self-identification justification for the protection of speech arguably supports the proscription of hate speech. Coupled with this is the threat of subtle attitudinal changes caused as '[e]ven if the message of hate propaganda is outwardly rejected, there is evidence that its premise ... may persist in a recipient's mind as an idea that holds some truth.'⁴³

This is reminiscent of MacKinnon's⁴⁴ contention of pornography as hate speech, founded upon recent (in 1985) experimental research linking pornography to empirically measurable harm through attitudinal changes⁴⁵. The US Seventh Circuit Court of Appeals in *Hudnut*⁴⁶ considered a challenge upon an Indianapolis ordinance proscribing pornography based upon this view. Judge Easterbrook accepts MacKinnon's argument: 'Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at

38. Lorraine Eisenstat Weinrib, 'Hate Promotion in a Free and Democratic Society: *R v Keegstra*' (1990-1991) 36 McGill LJ 1416, 1419.

39. *ibid* 1420.

40. *ibid* 1430.

41. [1990] 3 SCR 697, para 65.

42. Joseph Raz, 'Free Expression and Personal Identification' (1991) 11 Oxford J Legal Stud 303, 312-316

43. [1990] 3 SCR 697, para 66.

44. Catharine A MacKinnon, 'Pornography, Civil Rights, and Speech' (1985) 20 Harv CR-C-LL Rev 1.

45. *ibid* 52-56.

46. [1985] 771 F.2d 323.

home, battery and rape on the streets',⁴⁷ but ultimately held the ordinance unconstitutional as its definition was overbroad in not proscribing only obscene materials per the *Miller*⁴⁸ test, illustrating again the high levels of speech protection available under the First Amendment and the Canadian Courts may be more willing to grant a limitation upon such speech in light of *Keegstra*.

The Court, accepting the importance of s 319(2)'s objective, then moved on to proportionality. The Chief Justice rejects both the contradiction of criminalisation with the objective by legitimating the message of hate speech and providing its disseminator with a platform as well as the descent totalitarian descent of Weimar Germany despite its proscription of hate speech by emphasising the strong normative condemnation that criminalisation entails.⁴⁹ The four available defences in s 319(3) and the difficulty of prosecution requiring subjective proof of desire or recklessness to the result reveals the tight tailoring of the provision satisfy the 'minimum impairment' requirement, and moreover, the availability of alternatives does not preclude the use of criminal prohibition.⁵⁰ The conclusion is that the incursion into expression by s 319(2) is not beyond its objective as '[t]he limitation ... is more faithful to Charter values that is the crystallized right expressed in the document itself'.⁵¹

Thus, tightly drafted laws proscribing hate speech are allowed under the Canadian Charter which adopts a vastly differing perspective from the US. The dissent in *Keegstra* authored by McLaughlin J offers an interesting insight into the differences between the two jurisdictions. Her view is that the Charter is more closely aligned to the American approach rather than the international approach of the majority, since Holmes J's 'clear and present danger test' is reflected by the initial inclusion of speech under s 2(b) with justifiable limitations under s 1.⁵² It is submitted that this contention is flawed seeing that the initial inclusion of speech within constitutional guarantees with subsequent justifiable limitations upon narrowly enumerated grounds is the hallmark of international instruments. Article 10 of the ECHR allows for limitations in subsection 2, and Article 19 of the ICCPR similarly provides for limitations in subsection 3 based upon the idea that the freedom

47. *ibid* 329.

48. [1973] 413 US 15.

49. Lorraine Eisenstat Weinrib, 'Hate Promotion in a Free and Democratic Society: *R v Keegstra*' (1990-1991) 36 McGill LJ 1416, 1431.

50. *ibid* 1431-1432.

51. *ibid* 1432.

52. *ibid* 1436.

of expression ‘carries duties and responsibilities’, identical to the wording of the justifiable limitations clause found in Charter s 1. Further support is found in the text of the First Amendment, which provides for an absolute negative right with no exclusion clause available.

Keegstra thus elucidates the priority that the Charter affords to the principles of human dignity and equality in allowing justifiable incursions into free expression which contradict these values. The following landmark case of *Zundel*,⁵³ in striking down section 181 of the Criminal Code criminalising the spread of false news, illuminates the high threshold requirements for s 2(b) despite *Keegstra*. Section 181 conflicted with s 2(b) and could not be saved by s 1 as it was ‘overbroad, particularly invasive and not proportional to its putative objective’ and the chilling effect upon protected speech could not be justified, especially given that s 319 provided for an alternative basis for a prosecution.⁵⁴

These cases deeply divided the Court, so its unanimous judgment in *Attis*⁵⁵ potentially illustrates its direction. An anti-semitic teacher was removed from the classroom by an administrative decision finding that it constituted discrimination against Jewish students since it ‘poisoned the educational environment’⁵⁶ and a ‘gagging order’ was imposed threatening complete dismissal if further anti-semitic material was produced. *La Forest J* upheld the removal from the classroom, but found that the ‘gagging order’ failed the ‘minimal impairment’ justification in s 1, despite the potential for a ‘residual poisoned effect’, as this would infringe too greatly upon his freedom of speech.⁵⁷

The Supreme Court thus conducts a very delicate balancing exercise between the rights enshrined under the Charter. Its jurisprudence indicates that, in line with international instruments and other liberal democracies, the basic principles of human dignity and equality provide for the foundation of guarantees and so allow limitations to be placed upon expression where there is conflict. Despite this emphasis, however, expression is not easily limiting and only proscriptive laws which are tightly drafted and carefully

53. [1992] 2 SCR 731.

54. Dominic McGoldrick and Therese O’Donnell, ‘Hate-Speech Laws: Consistency with National and International Human Rights Law’ (1998) 18(4) *Legal Studies* 453, 463.

55. 1 SCR 825.

56. *ibid* paras 34-37.

57. *ibid* paras 103-107.

implemented will pass through *Oakes* test scrutiny.

5. GERMANY

German Basic Law (*Grundgesetz*) guarantees freedom of expression under Article 5, with a limitations clause in subsection 2 limiting it to 'provisions of general laws ... and in the right to personal honour'. In adopting the general approach of other liberal democracies, the Constitutional Court allows far greater incursions into the realm of free expression. In the Criminal Code, Articles 130 and 131 penalise on public order grounds, Incitement to Hate and Race-Hatred Writings respectively premised on human dignity which is understood in terms of equality.⁵⁸ The latter Article is extremely broad and nebulous, allowing punishment for communicative material 'which incite to racial hatred'.⁵⁹ When considering German jurisprudence, it must be emphasised that their Constitutional Court is not an appellate court, considering only whether the court below had considered the Basic Law and applied the required balancing. It is therefore less intrusive than the Supreme Courts of the US and Canada and cannot be directly compared.

The German approach to hate speech is particularly interesting due to a combination of its Kantian understanding requiring the balancing of constitutional rights and duties, and of the historical atrocities committed under the Third Reich which resulted in especial protection for the Jewish community.⁶⁰

Whilst the former point is reflective of Germany's adherence to the international position, its position on anti-semitic expression is most illuminating. The Constitutional Court in the *Luth*⁶¹ case upheld advocacy of a boycott against the director of an anti-semitic film, focussing upon the damage to Germany's reputation resulting from the persecution of the Jews. In balancing competing rights, the Court held that economic interests must yield to public opinion on important issues.⁶²

In terms of Holocaust Denial, the German position is aligned with the international position elucidated in the *Faurisson* case above. In the *Holocaust*

58. Eric Stein, 'History Against Free Speech: The New German Law Against the "Auschwitz" - and other- "Lies"'. (1986-1987) 85 Mich L Rev 277, 282-286.

59. *ibid* 285.

60. Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 Cardozo L Rev 1523, 1548-1550.

61. [1958] BverfGE 7, 198.

62. Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 Cardozo L Rev 1523, 1551.

Denial Case,⁶³ the Constitutional Court rejected a freedom of expression complaint based upon a content limitation of a public speech by a revisionist historian.⁶⁴ The reasons given by the Court echo Raz's emphasis upon the role of expression in the 'self-perception', or validation, of both individuals and their identifiable group; protecting the Jewish people from continuing harm outweighs the expression rights of 'demonstrably false facts [which] have no genuine role in opinion formation.'⁶⁵

Stein concludes his analysis with a dilemma: the dangers of new atrocities and excesses could flow from diminishing the sense of responsibility and guilt from the collective conscience, but that sense of guilt could provoke a counter-productive backlash against democratic principles and institutions, delegitimising the entire system of rights protection.⁶⁶ Germany is arguably over-protective of equality and dignity rights at the expense of expression, by allowing for the criminalisation of expression upon overbroad criteria, and in doing so, goes beyond the position mandated by international instruments, and Criminal Code ss 130 and 131 are likely to be struck by the US and Canadian Courts if enacted in their jurisdictions. This intrusive incursion into free expression in Germany may, however, be justified by the peculiar historical and social context to affirm its departure from previous positions.

6. THEORETICAL PERSPECTIVES

Finally, it is necessary to place hate speech within general free speech theory to justify, and challenge, the limitations upon this category. Alongside the three positive arguments for speech is the negative suspicion of governmental restrictions where the party seeking to limit speech must show good grounds to justify such incursions.

The Millian argument from truth, as applied by US jurisprudence is 'the power of the thought to get itself accepted in the competition of the market' according to the dissenting opinion of Holmes J in *Abrams*,⁶⁷ which

63. [1994] 90 BVerfGE 241.

64. Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 *Cardozo L Rev* 1523, 1552.

65. *ibid.*

66. Eric Stein, 'History Against Free Speech: The New German Law Against the "Auschwitz" - and other- "Lies"'. (1986-1987) 85 *Mich L Rev* 277, 321-322.

67. [1919] 250 US 616, 630

subsequently became the dominant justification in the US.⁶⁸ Rosenfeld critiques these viewpoints by saying that 'Mill overestimates the potential of rational discussion while Holmes underestimates the potential for serious harm of certain types of speech that fall short of the "clear and present danger" test',⁶⁹ suggesting perhaps that the polar nature of the truth argument precludes the delicate balancing of speech rights with other socially important interests. Laws proscribing hate speech, by excluding inquiry and the adoption of alternative perspectives, assume the infallibility which Mill sought to avoid in his defence of speech. It is unlikely that such proscription furthers truth by dogmatically ascribing one set of official facts as impregnable, but the abstract defence of speech must be tempered with practical considerations such as the resultant impact upon victims as well as implicit and incidental effects which flow subtly from them. The US, in subscribing to the abstract truth defence of speech, may fail to adequately account for competing interests which other liberal democracies are more sympathetic towards.

The democratic basis for the defence of speech is premised upon the requirement of a well-informed citizenry to discharge their duty within a functional self-governing democracy. According to this justification, political speech occupies a privileged position within the parameters of protected speech, but this does not necessarily protect all forms of such speech; anti-democratic and hate speech may not fall within its ambit since these forms of speech are not logically required for the functioning of a healthy democracy.⁷⁰ A wider conception of the democratic argument, however, disputes the exclusion of expression protection. Constitutional guarantees are designed to prevent the tyranny of the majority and protect the minority from harm, which justify their existence. This foundation has apparently shifted to the tyranny of history, exemplified in the US and Germany, where the crystallisation of past has formed the interpretative core of rights provisions. The resultant shift has led to a bias in conducting the balancing exercise to favouring one set of rights over another, causing perhaps an illegitimate skew in favour of speech and equality and dignity respectively. Whilst it may be beneficial that culturally and historically determined positions be retained, the theoretical justifications for this retention are weaker than a rights-based constitutional theory protecting against majoritarian oppression.

The argument from autonomy is premised upon the need to protect

68. Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 *Cardozo L Rev* 1523, 1533.

69. *ibid* 1534.

70. Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 *Cardozo L Rev* 1523, 1532-1533.

self-expression and thus provides the most expansive scope for the protection of expression, which is further widened if the focus of the rights shifts from that of the disseminator to those of the recipient. Censorial activity by the authorities could amount to a form of Orwellian thought-control where the inability to communicate ideas leads to the loss of the ideas themselves. In the context of hate speech, such control may not be perceived as a negative consequence, but the very existence of such regulation threatens other forms of expression and weakens constitutional protection against their erosion through the slippery slope argument.

Traditionally balanced against free speech arguments are ones in favour of human dignity, which is the foundation upon which the international post-war human rights movement was built. Its fundamental importance is reflected generally in national constitutional orders which require the restrictions upon other rights in its favour. Whilst these are essential factors to be taken into account in limiting hate speech, the need to protect dignity does not necessarily entail its curtailment. The prime illustration is the *Skokie* case, above, where:

Because of their very marginality, and because they had no sway over the larger non-target audience in the United States, the actual march by the Neo-Nazis did much more to showcase their isolation and impotence than to advance their cause. Under the circumstances, allowing them to express their hate message probably contributed more to discrediting them than a judicial prohibition against their march.⁷¹

It is submitted that, despite a lack of detailed supporting empirical evidence, a vast majority of prohibited hate speech falls within this category and unfettered speech is preferable to attempts at legitimately excluding certain categories of speech as beyond the pale. Contrary to Raz's contention that censorship is condemnation of a way of life, it is further submitted that censoring an extreme fringe opinion from expression would grant it more publicity and grant its proponents a feeling of martyrdom which would further their cause; his contention is most applicable to minority groups seeking equality within society rather than minority groups seeking to ostracise other groups.

A final theoretical consideration is the requirement of harm for the proscription of hate speech. If this is the threshold criterion, its definition must be coherent, consistent, and easily discernible since a lowering of the

71. Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2002-2003) 24 *Cardozo L Rev* 1523, 1538.

threshold would considerably widen the ambit of proscribable hate speech. The *Hudnut* case provides an example of the slippery slope in this context, where MacKinnon's feminist theory that pornography is harmful hate speech towards women manages to raise justifications for its proscription only to dilute and weaken the harm test in the process. The requirement of explicit harm for limiting speech is defensible and would bring cohesion to the field of excluded expression as, for instance, obscenity is outside constitutional protection in the US (*Miller v California*) and Canada (*R v Butler*)⁷² upon this basis.

7. CONCLUSION

The arguably antiquated approach taken by the US placing primacy on the protection of speech is inconsistent to the post-war international model which balances constitutional rights according to complex criteria. The addition of an explicit exclusion clause into the free speech provisions of international instruments and which were adopted in many liberal constitutions is reflective of the global shift away from the US model and as a measure to address its shortfalls. The anachronistic position of the US does not, however, make it *per se* illegitimate or illegal as it is free to derogate or reserve, as appropriate, from provisions in international instruments which contradict against its heavy presumptive protection of free speech. Whilst the US has been criticised for reservations which render ratification essentially pointless, such as in ICERD, it is difficult to see how such a constitutional system could fully comply with its provisions without severe foundational upheavals. Arguably, the normative force of having the US as a party obviates this problem, but may weaken the structural force of any treaty if its reservations counter its spirit.

The international system allowing proscription of hate speech is a reaction to the atrocities conducted during the war which were precipitated by such speech, as well as a focus to harmonise increasingly pluralistic populations found in liberal democracies. Proscribing speech fosters equality and respect for this diversity, but its suppression may accumulate latent hostility and result in hate expression which is more harmful than speech. The curtailment of speech is violative of the theoretical grounds which mandate its especial protection, potentially weakening the protection for speech generally. Given the importance of protecting speech, only compelling counterarguments should be provided for its curtailment. The Canadian approach providing presumptive protection of expression

72. [1992] 1 SCR 452.

to be limited in narrow categories on strict criteria when it infringes upon conflicting constitutional rights is arguably the best approach; it allows for high levels of speech protection, but allows limitations when the freedom interferes substantially with other rights or constitutional values. The German approach is mired in the past and perhaps overcompensates in its protection of dignity and equality at the expense of expression in order to indicate its abandonment of that history and so goes too far.

Whilst the US position differs markedly from the approach taken by other liberal democracies and the international order, it does provide an alternative model for coping with such a problem and serves as a constructive contrast to evaluate and critique the methods employed by other jurisdictions. The existence of an alternative does not challenge the legitimacy of its rivals, but rather represents the difference of priority placed upon the protection of rights with no position being more theoretically or pragmatically justifiable. The rights system reflects and enshrines societal values such that differences in approaches and solutions are both valuable and inevitable.



KING'S STUDENT LAW REVIEW

OF WHAT VALUE IS
GRAMSCI'S CONCEPT
OF HEGEMONY TO OUR
UNDERSTANDING OF LAW
TODAY?

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1. INTRODUCTION

The character of Gramsci's main work, the *Prison Notebooks* (1929-35)¹, has been described as a 'crustacean'², due to its multi-layered nature. Whilst this is to some extent disorientating for the reader, who finds himself confronted with a fragmentary ensemble of ideas, it however allows him to interpret the text in an interestingly versatile way. The diverse and non-systematic employment of terms such as 'hegemony' expands the spectrum of Gramsci's work beyond a merely Marxist account of philosophy. Joll suggested that Gramsci 'seems to provide a possible bridge between Marxist and non-Marxist thought',³ in that his work is relevant to Marxists for the ideas on political action and organisation, but at the same time non-Marxists can appreciate his views which stretch from the dynamics of ideology to the role of intellectuals and education.

During the course of this essay, Gramsci's concept of 'hegemony' will be explored in its evolution from leadership to domination. I will firstly provide an outline of his 'philosophy of praxis', of the nature of the relation of Gramsci's thought with that of the two philosophers who mostly influenced his work – Hegel and Marx – and of Gramsci's depiction of the State structure, where he adopts and re-interprets the Marxist division between base and superstructure within a framework influenced by Hegel's 'ethical State'. I will then emphasise the importance of Gramsci's 'civil society',⁴ and how the tension between the strata of the State develops into the concept of 'hegemony' or ideological control. Hegemony 'entails the permeation through civil society (e.g. schools, trade unions, and churches) of a system of values, beliefs, attitudes, and morality that are, in one way or another, supportive of the established order and of the class interests that dominate it'.⁵ The main body of the essay will explore the application of the latter concept to the role of law. Does law exercise a hegemonic role? If so, is this a positive or negative role? Is the law an instrument of the political society or of the civil society? These questions will be addressed by looking at three crucial examples: the feminist view of law, the American experience of black

1. Gramsci, A., *Selections from Prison Notebooks*, edited and translated by Q. Hoare and G. N. Smith (Lawrence and Wishart; London: 1971).

2. Ransome, P. Antonio, *Gramsci: A New Introduction* (Harvester Wheatsheaf, London, 1992), p. 132.

3. Joll, J., *Gramsci* (Fontana/Collins; Glasgow: 1977), p. 11.

4. Bobbio, N., 'Gramsci and the Conception of Civil Society' in Mouffe, C. (ed) *Gramsci and Marxist Theory* (Routledge & Kegan Paul; London, Boston and Henley: 1979), pp. 21 – 47.

5. Vogel, M. E., *Coercion to Compromise: Plea Bargaining, the Courts and the Making of Political Authority* (Oxford University Press; Oxford: 2006).

slavery, and the emerging reality of a global or cosmopolitan state.

2. THE PHILOSOPHY OF PRAXIS

Gramsci adhered to and developed a 'philosophy of praxis'.⁶ This aims to prove that theory and practice are not disjointed: an active approach to life (by means of work and technique) corresponds to the degree of understanding, consciousness and awareness that a man has of himself. Therefore, Gramsci expounded a philosophy that attributes responsibility to human conduct and enhances the role of human will.

Every man, in as much as he is active, i.e. living, contributes to modifying the social environment in which he develops ... ; in other words, he tends to establish 'norms', rules of living and of behaviour.⁷

The philosophy of praxis intends to bridge the gap between the intellectuals and the 'simple' people by leading the latter to a higher conception of life.⁸ In a way, this approach aims to develop a form of 'conscious human progress', whereby the individuals are not passive elements of society, but actors in the process of change.

Starting from the premise that all men are political beings, Gramsci suggests that, in a broad sense, all men are legislators, in that they establish norms by which they modify their environment both on a micro- and on a macro-level⁹. Therefore, a critical understanding of the self is necessary to achieve social consciousness of the necessity of the political struggle.¹⁰ With regard to the latter aspect, Gramsci drew inspiration from the new studies of the psyche, which pointed to the relation of mutual influence between the individuals, the collectivity and their surroundings.¹¹ As a result, Ransome concluded that 'radical social change can be achieved only with the prior formation of an alternative world-view'.¹²

6. Hoare, Q. and Smith, G. N., 'Introduction' in Gramsci, *ibid* at 1, pp. xxi - xxv

7. Gramsci, *ibid* (n1), p. 265

8. Gramsci, *ibid* (n1), p. 332

9. Gramsci, *ibid* (n1), p. 265

10. Gramsci, *ibid* (n1), p. 333

11. Joll, *ibid* (n3), p. 84-85

12. Ransome, *ibid* (n2), p. 128 (original emphasis)

3. THE INDETERMINACY OF HISTORY

The broad outline of the theoretical evolution from Hegel to Marx focuses on three core points: firstly, the conception of history and philosophy; secondly, the notion of state; and finally, the role of ideas. In line with his 'philosophy of praxis', Gramsci elaborated an indeterminate view of history, where humans play a major role in shaping their social, political and economic reality. The lack of a pre-existing order leads to the conclusion that history is an 'all-embracing subject', and men are capable of influencing historical events.¹³ Gramsci's 'philosophy of praxis' (theory is combined with practice) can be contrasted to Hegel's view of philosophy as an investigation that follows the historical process (theory follows practice), where the role of man is confined to his rational understanding of his position within a perspective of progress determined by necessity. As a result, the Hegelian 'ethical State' is the product of the dialectical progress of reason, and civil society is degraded 'to the status of a pre-political society',¹⁴ where ideas are merely another product of rationality.

Marx's critique started from the argument that the dialectic process of history is dominated by 'economic determinism': 'since human life cannot exist without the production of material goods, the way that these goods are produced and the forms of co-operation which pertain to them must necessarily provide the foundation upon which all other activities are based'.¹⁵ From this, he derived that ideas are illusory, because ultimately they are mere abstractions which are functional to the instrumental domination of the bourgeoisie. Gramsci objected to the interpretation of the role of ideas as suggested both by Hegel and by Marx: instead, he believed that ideas originate within society, but at the same time are autonomous realities that have the power to influence the historical process.

Distancing his theory from Hegel's, Marx advanced the necessity of social consciousness in order to prompt the upheaval of the proletariat. However, the scope of the individual's initiative within the perspective of economic determinism is far more limited than the role given by Gramsci to human will and choice. Gramsci refined the Marxist 'reductionist' approach, which limited, on the one hand, the importance of non-economic institutions, and, on the other, the influence of human action.¹⁶

13. Joll, *ibid* (n3), p. 78-79.

14. Bellamy, R. and Schecter D., *Gramsci and the Italian State* (University Press; Manchester: 1989), p. 113.

15. Ransome, *ibid* (n2), p. 19.

16. *ibid* p. 21-22.

In relation to the notion of 'state', Gramsci adopted Hegel's moral and educative role of the 'ethical State' and expanded this by drawing from Marx's lesson on the importance of the masses'.¹⁷

In synthesis, Gramsci's work is more sophisticated in propounding a theory for social change based on three premises: firstly, history is not pre-determined and there is scope for human intervention; secondly, civil society has a paramount role in the shaping of the state; thirdly, ideas are a key element to the development of society. Being law a human and ideological instrument, Gramsci's historical indeterminacy implies that law plays a major role in the shaping of society, beyond its evident enforcement of the rules and norms of society.

4. THE STATE

Gramsci employed the word 'state' in two different ways: firstly, with a broad and general meaning, where 'state' was intended as the complex structure of base and superstructure of a particular nation; secondly, with a narrower one, where 'state' was synonym of 'political society'. However, for the purpose of this discussion, I will use the word 'state' only in the broader sense, in order to distinguish it from the notion of 'political society'.

4.1 THE STRUCTURE OF THE STATE

Gramsci's general notion of the super structural level of the State is summarised in the formula: 'State = political society + civil society, in other words hegemony protected by the armour of coercion'.¹⁸ The base of the State is constituted by the economic realm of relations of production. It must be noted that this distinction of society is for purely "methodological" rather than "organic" purposes.¹⁹ The 'political society' comprises those 'organisational' bodies and institutions – the public institutions – that exist with the purpose to maintain order within the state.²⁰ Essentially, it exercises 'direct domination', and it is identified with the bourgeoisie. In contrast, the 'civil society' includes those institutions such as the schools and the churches, that perform a 'connective' function.²¹ Bobbio²² argued

17. Gramsci, *ibid* (n1), p. 258 and p. 262.

18. Gramsci, *ibid* (n1), p. 263.

19. Gramsci, *ibid* (n1), p. 159-160 – Bellamy and Schecter, *ibid* (n15), p. 119.

20. Gramsci, *ibid* (n1), p.12.

21. Gramsci, *ibid* (n1), p. 12.

22. Bobbio, *ibid* (n5), p.23.

that Marx had inverted Hegel's conception of State: firstly, the 'ethical State' was substituted by a coercive State; secondly, the claim of universalism was replaced by a state enforcing a particular structure of class domination; thirdly, Hegel's rational State regulated civil society, whilst Marx envisaged the State as a second moment influenced by civil society. Gramsci reinforced the centrality of civil society by considering it 'the mediator between the State and the economy'.²³ Adamson criticised Bobbio's assessment of Gramsci's civil society for losing sight of the author's express intention to distinguish the strata of the state for a purely 'methodological' purpose.²⁴ Gramsci wrote that the State realises the unity of the ruling classes, not only judicially and politically but also historically as a result of the organic relations between political and civil society.²⁵ Thus, whilst Adamson correctly highlighted the methodological character of the distinction between civil and political society, Bobbio was not wrong in focusing on the importance of civil society. Gramsci envisaged its paramount contribution to the formation of the state and Bobbio's view should be interpreted in the light of the comparison with Hegel and Marx.

4.2 THE EVOLUTION OF THE STATE AND LAW

Gramsci's depiction of the state was not a purely static description. Deeply influenced by Hegel's dialectic, he represented the evolution of the state in three moments.²⁶ The description of the evolution of the state is strictly interrelated with the hegemonic role assumed by law, because the economic evolution of the State can only take place in concomitance with legal development.

The first moment is the economic-corporate level. Each member of the economic process of production feels solidarity merely towards individuals which perform a similar task, and not towards his entire class.²⁷ Secondly, 'consciousness is reached of the solidarity of interests among all the members of a social class – but still in the purely economic field'.²⁸ During this phase there is the first advent of a class-consciousness: this is when hegemony develops at the level of civil society, whilst at the level of political society

23. Bellamy and Schecter, *ibid* (n15), p. 120.

24. Adamson, W. L., *Hegemony and Revolution: a Study of Antonio Gramsci's Political and Cultural Theory* (University of California Press; Berkley, Los Angeles, London: 1980), p. 169.

25. Gramsci, *ibid* (n1), p. 52-53.

26. Gramsci, *ibid* (n1), p. 181.

27. Adamson, *ibid* (n24), p.160.

28. Gramsci, *ibid* (n1), p. 181.

the domination is purely in economic terms. Finally, the passage from the structure (the economic realm) to the superstructure (the organisational and connective institutions of society) entails the establishment of the political moment of the 'ethical State'. What previously were mere ideologies rooted in society, at this stage they assume a political nature, as they 'come into confrontation and conflict'.²⁹ This is also the advancement from the particular to the universal: the ideas that belonged to a particular group gain a universal character, when they become part of the political nature of the State providing 'intellectual and moral unity'.³⁰

4.3 HEGEMONY: CREATION, MAINTENANCE, AND CRISIS

Hegemony is the form of ideological control introduced by Gramsci 'to help explain the paradox that material inequality persists in societies that are governed by self-rule'.³¹ As anticipated, the concept of hegemony has two meanings: 'the supremacy of a social group manifests itself in two ways, as "domination" and as "intellectual and moral leadership"'.³² The key distinction is that the former is a descending hegemony (political society over civil society); whereas the latter is ascending (civil society reaches political society).

The meaning of 'domination' can be explained as 'hegemony-maintenance'³³: the vertical movement of ideological control exercised by the ruling class in the political society over the masses of the civil society. In contrast, the 'intellectual and moral leadership' or 'hegemony-creation'³⁴ is the movement deriving from the civil society, and, through the leadership of a ruling class, winning over the other subaltern classes (horizontal component of hegemony), and ultimately ascending to the level of political society in order to establish a new domination. Gramsci identified the 'historical bloc' as the deriving complex, contradictory and discordant unity of structures and superstructures.³⁵ 'Hegemonies always grow out of historical blocs, but not all historical blocs are hegemonic',³⁶ because a historical bloc is hegemonic only when it is recognised as a ruling class already at the level

29. Gramsci, *ibid* (n1), p. 181.

30. Gramsci, *ibid* (n1), p. 57.

31. Vogel, *ibid* (n6), p. 322.

32. Gramsci, *ibid* (n1), p.57.

33. Adamson, *ibid* (n24), p.174.

34. Adamson, *ibid* (n24), p.174.

35. Gramsci, *ibid* (n1), p. 366.

36. Adamson, *ibid* (n24), p. 177.

of civil society. The historical bloc results by the mediation of the leading group with all other parties, thereby evolving towards the representation of the entire group. Through law, oppositional groups can establish a new hegemonic historical bloc, or 'counter-hegemony'.³⁷

What happens when there is a crisis of authority of the ruling class? The disorientation of the masses when the leadership is absent or weak determines a chaotic movement in civil society; at the same time, the antagonistic forces are incapable of organising the situation of chaos.³⁸ Therefore, the ruling class recurs to the use of force, as the only solution to restore order. Gramsci's dynamic of hegemony as it degrades to violence provides an illuminating explanation for totalitarianism: the failure to maintain hegemony causes the disintegration of the state that, in turn, can determine the dangerous overturn of the state.³⁹

5. THE HEGEMONIC FUNCTION OF LAW

5.1 CONSENT AND COERCION

The aim of hegemony, according to Gramsci, is not only to create a collective will, but an entire new conception of the world⁴⁰ or *Weltanschauung*⁴¹. Therefore, it can be considered an all-embracing concept taking over all institutions of society, and not merely the political realm: 'power, then, extends beyond the apparatus of the state to the micro-conditions for and processes of communication whereby meaning is produced'.⁴² The importance of the communicative aspect emerges in the analysis of the consensual as opposed to coercive relation between political and civil society.

Gramsci saw the sphere of hegemony as operating through the power of 'consent'. The elaboration of the 'dual perspective' in political action, inspired by Machiavelli's Centaur – half-animal and half-human – explores the relation between force and consent⁴³. Whilst 'force' is associated with authority, violence and agitation, 'consent' is linked to hegemony,

37. Vogel, *ibid* (n6), p. 89.

38. Gramsci, *ibid* (n1), p.228.

39. Gramsci, *ibid* (n1), p.210.

40. Bobbio, *ibid* (n5), p. 40.

41. Ransome, *ibid* (n2), p. 126.

42. Vogel, *ibid* (n6), p. 87.

43. Gramsci, *ibid* (n1), pp. 169-170.

civilisation and propaganda. In other words, 'consent' exerts a greater power than 'coercion', because the spontaneous consent of the individual is an ideological consent, which is stable and enduring, whereas force has merely a temporary effect. Gramsci believed that 'coercion' was necessary for the dominant group only when a crisis occurs, that is, when the regime loses the consensual adherence of society.⁴⁴ Through the power of 'consent', hegemony finds its way towards obtaining the spontaneous collaboration of the individuals, in order to uphold the political status quo in the long-term.

Through this influence, exerted via a series of ideological mechanisms, the class antagonisms between rulers and ruled were overcome, with the result that the latter manifested a degree of conscious and willed attachment to the values and interests of the former.⁴⁵

This implies that the power of ideology is not only in the political society, but also in the civil society, namely, there is a relation of mutual hegemonic influence in the maintenance of the existing state framework.

5.2 THE ROLE OF LAW

The duality of consent and coercion is reflected in Gramsci's understanding of the role of law. Although he did not elaborate a specific philosophy of law, from his work it emerges that law is seen as a hegemonic instrument of the state with the purpose "to create and maintain a certain type of civilisation and of citizen ... , and to eliminate certain customs and attitudes and to disseminate others."⁴⁶ Hence, according to Gramsci, law appears to carry two meanings in relation to hegemony. On the one hand, law has a positive function, for it is a means of education. On the other hand, law assumes a negative task as an instrument of conformity. On the level of civil society, law influences the general set of mind, while, in relation to political society, law coincides with the normative aspect of the state.

Furthermore, law provides 'juridical continuity', by linking the conduct of each individual to the ends which society sets itself as necessary.⁴⁷ This continuity is both positive, because it gives rise to a customary tradition, and negative, because it inhibits the process of change. According to Gramsci⁴⁸,

44. Gramsci, *ibid* (n1), p.12.

45. Bellamy and Schecter, *ibid* (n15), p. 119.

46. Gramsci, *ibid* (n1), p. 246.

47. Gramsci, *ibid* (n1), p.195-196.

48. Gramsci, *ibid* (n1), p. 34.

the importance of the legal system lies in its role of mediation between the laws of nature and men's lives. The legal system provides the order necessary to facilitate human work, and for that reason, men must respect and understand its function. If they do not, they hinder the possibility of change and movement within society.

5.2.1 THE POSITIVE ROLE OF THE LAW

Gramsci's view of the educative and formative role of the state clearly bears the influence of Hegel's notion of 'ethical State', where the morality takes the form of cultural practises and institutions. Gramsci envisioned law as the instrument that allows the state to realise the creation of new and higher types of civilisation, because it 'exerts a collective pressure and obtains objective results in the form of an evolution of customs, ways of thinking and acting, morality, etc.'⁴⁹ It should be noted that, whilst in Hegel the 'ethical State' represented the resolution to the 'system of needs' of civil society, Gramsci inverted the relationship between civil society and political society. In fact, the former gained importance for being the soil where the ideological foundations of the state were rooted and developed. As a consequence, 'law' is for Gramsci a wider notion than the 'purely State and governmental activity', and it is taken to include 'the activity involved in directing civil society, in those zones which the technicians of law call legally neutral – i.e. in morality and in custom generally'.⁵⁰

The role of law is innovative, because it creates new systems of values and beliefs necessary for 'each single individual [to] succeed in incorporating himself into the collective man'. This incorporation does not operate through sanctions or obligations, but through the exertion of hegemony, i.e. collective pressure.⁵¹ According to Gramsci, the creation of a set of mind through law is positive in that it gives rise to a 'tradition'. He refers to the Roman Empire and to the Anglo-Saxons as positive examples of 'juridical continuity', because the continuity was not of a perpetual but of an 'organic' character. In other words, continuity must always 'keep close to concrete life in perpetual development'.⁵² In conclusion, 'one fundamental role of law is an educative one: of establishing a normative order that supports prevailing ruling class hegemony'.⁵³

49. Gramsci, *ibid* (n1), p. 242.

50. Gramsci, *ibid* (n1), p.195.

51. Gramsci, *ibid* (n1), p. 242.

52. Gramsci, *ibid* (n1), p. 196.

53. Vogel, *ibid* (n6), p. 88.

5.2.2 THE NEGATIVE ROLE OF THE LAW

If on one side the hegemonic role of law has an educative function, on the other it is the tool for the inhibition of change and for repression. This is problematic because the dominant class, i.e. the bourgeoisie, 'identifies itself as an organism in continuous movement capable of absorbing the entire society'.⁵⁴ This capacity of absorption is precisely the hegemony in its negative connotation, and law is the means of its enforcement. In other words, the new dominant class aims to obtain economic, cultural and ideological conformity whilst paradoxically claiming its dynamicity, for the purpose of gaining consensus and power.

Gramsci hypothesizes that, by assimilating the entire society in order to reach the model of absolute perfection of the state, the bourgeoisie may become 'saturated'.⁵⁵ Saturation would occur due to the exhaustion of elements to assimilate, because everything has already been 'included' in the system. However, this state structure is based on the process of expansion. It is clear how in this prospect, law is rendered useless, because it has been itself incorporated by the system.

The negative role of law can be also analysed in a different way. Whilst the positive character of 'juridical continuity' was previously examined, Gramsci epitomised its downside in the Byzantine/Napoleonic type. Here the organisation was 'conceived as perpetual', inflexible and immutable. Law was in the tool to hinder evolution and change, by means of supporting and preserving the establishment.

5.2.3 EXAMPLES

5.2.3.1 FEMINISM

Holub's post-modern reading of Gramsci fosters a linkage of his theory with feminism.⁵⁶ The concept of hegemony is the starting point, because it 'has the potential of lending itself to probing relations of domination in the most intimate practises of everyday life, in sexual practises'.⁵⁷ Gramsci's

54. Gramsci, *ibid* at 1, p.260

55. Gramsci, *ibid* (n1), p. 260.

56. Holub, R. 'In lieu of a conclusion: Gramsci, feminism, Foucault' in *Antonio Gramsci: Beyond Marxism and Post-Modernism* (Routledge; London and New York: 1992) pp. 191 – 203.

57. Holub, *ibid* (n56), p. 197.

belief that all humans are political implies that the autonomy, the self-determination and the dignity of women is enshrined within their right to be active members of society, capable of choice and of influence on the historical process. Here law is one of the strategies for changing women's condition, but not the only one: its negative hegemonic function upholds the status quo of women, but at the same time it enforces protection of women. 'From Gramsci's complex analysis we can adopt the notion that we are indeed part of many different "structures of feeling", a partiality which carries a positive and negative potential'.⁵⁸ In this framework, feminism can be the counter-hegemonic force that overturns the patriarchal structure through the establishment of a new order (including the legal system) in the same way as Gramsci envisaged the overthrow of the bourgeoisie.

5.2.3.2 SLAVERY

'One of the primary functions of the law concerns the means by which command of the gun becomes ethically sanctioned'.⁵⁹ The law exercises an almost autonomous function, because its hegemonic role allows the ruling class to legitimise the containment of the antagonism of a particular class. Genovese explained how the American system of black slavery was possible due to 'a system of institutionalised jurisprudence',⁶⁰ which 'became an instrument by which the advanced section of the ruling class impose[d] its viewpoint upon the class as a whole and the wider society'.⁶¹ The law proclaimed that the slave was mere property, thereby creating a legal loophole: the rights of property did not exist in themselves, but as an extension of the proprietor's rights, so slaves had no rights. However, this gave rise to a problem: if the slave was not a human, he could not be tried before a court. The slaves realised that the law was shaped on the basis of 'the deception on which the slave society rested – the notion that ... some human beings could become mere extensions of the will of another'.⁶² At this stage, slaves started to rely on local customs (such as the right to own a private garden plot) with the idea of forcing themselves upon the law: 'the courts repeatedly sustained such ostensibly extra-legal arrangements

58. Holub, *ibid* (n56), pp.202-203.

59. Genovese, E. 'The Hegemonic Function of Law' in Roll, Jordan, *Roll: The World the Slaves Made* (Vintage; New York: 1976), p. 25.

60. Genovese, *ibid* (n59), p. 26.

61. Genovese, *ibid* (n59), p.27.

62. Genovese, *ibid* (n59), p.30.

as having the force of law because sanctioned by time-honoured practise.⁶³ Genovese's study of slavery reveals an interesting application of Gramsci's concept of the hegemonic role of law.

5.2.3.3 *THE IMPERIAL GLOBAL STATE*

Chimni⁶⁴ implicitly advanced a provocative parallelism between Gramsci's theory and the nascent global state. Whilst the State structure depicted by Gramsci is to some extent outdated, Chimni transferred his analysis of the dynamics of hegemony to the international scale. Chimni replaced the traditional bourgeoisie with the new 'transnational capitalist class (TCC) which is in the process of congealing and establishing a global state composed of diverse [international institutions] that help actualise and legitimise its world-view'.⁶⁵ This 'global bourgeoisie' is producing a cultural and ideological hegemony which is upheld by international law and institutions. Recalling the dynamics of imperialism, the domination of the new global ruling class is exercised by the more powerful Northern/Western States (i.e. European and North American) over the weaker States (e.g. African). Chimni echoes Gramsci in stressing the centrality of 'the consensus on the form and composition of the emerging global state',⁶⁶ as a necessary element for the maintenance of hegemony.

Finally, he argues that the ruling elite in the Third World upholds through hegemony the idea of multilateralism to their people, because this elite gains certain advantages from the existence of the international system.⁶⁷

6. CONCLUSION

Gramsci's analysis of law is still valuable today, because it provides a critical insight on capitalism. The idea of overthrowing the status quo by creating 'counter-hegemonic values and spaces' can be inter alia applied to the condition of women,⁶⁸ to the condition of slavery,⁶⁹ and to the emerging

63. Genovese, *ibid* (n59), p. 31.

64. Chimni, B. S. 'International Institutions Today: An Imperial Global State in the Making' (2004) *EJIL* Vol. 15 No.1, 1 – 37.

65. Chimni, *ibid* (n64), p.4 (original emphasis).

66. Chimni, *ibid* (n64), p. 5.

67. Chimni, *ibid* (n64), p. 6.

68. Holub, *ibid* (n56).

69. Genovese, *ibid* (n59).

reality of a global state.⁷⁰ Chimni suggested, in relation to the latter, the need to establish a global counter-hegemonic social movement.⁷¹ Finally, we will continue to read Gramsci, because he is 'one of the greatest examples of the independence of the human spirit from its material limitation.'⁷²

70. Chimni, *ibid* (n64).

71. Chimni, *ibid* (n64).

72. Joll, *ibid* (n3), p.11.



KING'S STUDENT LAW REVIEW

THE ARMENIAN
GENOCIDE:
INTERNATIONAL LAW
AND THE ROAD TO
RECOVERY

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ABSTRACT

The law of genocide is governed today by the Convention on the Prevention and Punishment of the Crime of Genocide 1948. However, the aim of this dissertation is to attempt to identify customary International Law which viewed genocide as a crime even prior to the enactment of the 1948 Convention which the Armenian Genocide of 1915-1922 saw the Ottoman state breach. If there is enough evidence to suggest that is the case, the author will examine the possibility for claiming compensation and restitution for the victims and descendants of this historic tragedy, which still carries a great deal of resonance today. All of this will be done with a backdrop of an analysis on the political and historical issues which are associated with the Armenian Genocide and its lack of recognition by Turkey. In turn, this dissertation will highlight the disparity between what actually is possible in terms of international law in providing justice to those who seek it and what is realistic given the issue's heavily politicised nature; an issue which continues to haunt Turkey and Armenians after ninety three years.

1. INTRODUCTION

'In all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international cooperation is required'

**General Assembly of the United Nations in December 9,
1948**

The crime of genocide, or the '*ultimate crime*'¹ as it has been described, involves the 'planned and systematic attempted destruction in whole or in part of a particular racial, religious, national or ethnic group'² and is certainly one of the most, if not the most, abhorrent acts which humanity is capable of committing. The 20th Century saw several instances of genocide with the most notable examples being those of the Jews of Europe, the Tutsis of Rwanda and Bosnian Muslims of Yugoslavia. However, these were all

1. Payam Akhavan, 'Enforcement of the Genocide Convention: A Challenge to Civilization' (1995) 8 Harvard Human Rights Journal 229, 229.

2. See Raphael Lemkin, *Axis Rule in Occupied Europe* (Carnegie Endowment for International Peace 1944) 79; Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948) 78 UNTS 277.

preceded by the Ottoman Turkish extermination of the Armenians, the first instance in the 20th century of what now has come to be known as genocide.³ It remains to this day an extremely complicated issue with many layers and the subject of great historic contention between those who consider it genocide and those who deny it such status. Legally speaking, if it is factually accepted that the Armenian massacres were a pre-meditated State sponsored genocide, then it leads to the question of whether there is any way in which it can be considered to be genocide *de jure* considering its perpetration prior to the enactment of the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*. Therefore, this dissertation intends to examine the possibility of alternative legal approaches to the contemporary 'Armenian Question' to the extent of assessing whether customary international law which criminalised genocide and crimes against humanity existed at the time of the Armenian Genocide and was subsequently breached by Ottoman Turkey.

Despite the subject's multifaceted nature, the author does not intend to discuss or dispute various political or historical aspects associated with the Genocide. The author shall not indulge in a historical debate on whether or not a million and a half Armenians were killed as a result of a bureaucratically organised genocide but instead shall adopt the view that there was a State sponsored and pre-meditated genocide as this is supported by an almost insurmountable amount of evidence. That is not to say however that discussion on politics and history will be neglected all together as any analysis on the development of international law needs to take these factors into account; owing to the inextricable link between them. Therefore, any politic and historic analysis will be relegated to a predominately supplementary position.

With this in mind, the dissertation will fundamentally focus upon the issues from a legal perspective and the author will discuss only briefly the possible reasons for genocide in order to demonstrate some degree of 'motive', which if supported by evidence could strengthen a proposition that the State was responsible for the infliction of what today is understood as genocide. This dissertation aims to examine the issue's eligibility for being approached from the angle of International Law, if it is universally recognised that in fact the Ottoman Armenians were victims of genocide. The author will analyse the development of International Law in the early part of the 20th Century relating to the establishing of legal principles regarding crimes against humanity and consequently, the author shall normatively assess the possibility of Armenian claims for compensation and restitution against

3. See generally Taner Akcam, *The Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (Metropolitan Books/Henry Holt 2006).

Turkey today. Such considerations shall comprise of whether current International Law can facilitate such a claim, and if not whether this issue is only capable of being addressed in the Turkish domestic courts if at all from a legal perspective. If it cannot be successfully demonstrated that some sort of International Criminal Law had been breached by Turkey's perpetration of the Genocide, the author will invite the suggestion that the resolution of the matter for Armenians will come in the form of diplomatic and political expediency as opposed to application of law.

2. THE ARMENIAN GENOCIDE: A CONTEMPORARY OVERVIEW

*'In 1915 the Turkish Government began and ruthlessly carried out the infamous general massacre and deportation of Armenians in Asia Minor... There is no reasonable doubt that this crime was planned and executed for political reasons'*⁴

Winston Churchill

It is widely accepted that the premeditated and systemic extermination of the Armenian populace in the Ottoman Empire between 1915 and 1922 constitutes by definition genocide.⁵ Mustafa Kemal, the father of modern Turkey would come to refer to it as a 'shameful act'⁶ and President Theodore Roosevelt of the United States described it as 'the greatest crime' of the First World War. For the last ninety-three years it has been subject to great debate, especially with regards to being granted formal recognition as genocide. For millions of Armenians, it is and remains the darkest facet of their people's history and one which has not been adequately addressed and for many modern Turks it represents an attempt to demonise and interfere in the sovereignty of their nation. Some, including President George W. Bush, suggest that revisiting history and opening up old wounds through State and legal recognition is not conducive to progress and represents a backward step, however in rebuttal to this, this author proposes that addressing this dark chapter in history could constitute an important step towards reconciliation between the Armenians and Turkey in the long term. Currently reconciliation seems but a distant goal largely due to Turkey's steadfast dispute of certain

4. Winston Churchill, *The World Crisis* (Charles Scribner's Sons 1929) vol 5 'The Aftermath'.

5. See generally Taner Akcam, *The Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (Metropolitan Books/Henry Holt 2006).

6. *ibid.*

historic facts supporting the assertion that the Armenians of the Empire were subjected to a bureaucratically orchestrated extermination. To suggest that the issue of the Armenian Genocide touches a nerve in contemporary Turkey would constitute somewhat of an understatement. For example, when the French Parliament decreed in 2007 that denial of the Armenian Genocide was punishable by criminal prosecution; Turkey proceeded to cut off military contact with France and severed some lucrative contracts. Similarly, when Resolution 106 was to put before Congress in the United States, which if passed would lead to US recognition of genocide, Ankara responded by threatening to make incursion into Northern Iraq to solve its problem of the Kurdish PKK. The problem, perhaps, for Turkey therein lays that recognising genocide may legitimise claims for restitution and compensation for victims and their descendents.

The Armenian Genocide remains a source of great political interest. Twenty-two countries and organisations such have officially recognised the massacres of the Ottoman Armenians as genocide, however many others remain to do so officially. Many commentators have attributed this reluctance to accept the events as genocide to several reasons, the one which stands out most is that Turkey is a key NATO ally for both the United States and the United Kingdom in the Middle East, and any steps made towards recognition may serve to antagonise Turkey, which could possibly be detrimental to US military interests in the region, particularly the current campaign in Iraq. Most recently, President Bush refused to accept the massacres as genocide (despite the House of Representatives voting in favour of recognition by a majority of 27) stating instead that:

We all deeply regret the tragic suffering (sic) of the Armenian people ... But this resolution is not the right response to these historic mass killings. Its passage would do great harm to our relations with a key ally in NATO and in the global war on terror.⁷

This can be interpreted as favouring material interests over those of justice and indeed morality. Donald Bloxham in his book *The Great Game of Genocide* echoes this view by attributing the external acceptance of genocide denial to the fact that 'Turkey simply mattered more in a material sense than Armenia or the Armenians'.⁸

7. See Suzanne Goldenberg, 'Congress Rejects Bush's plea on Armenian Killings' *The Guardian* (London, 11 October 2007).

8. Donald Bloxham, *The Great Game of Genocide: Imperialism, Nationalism and the Destruction of the Ottoman Armenians* (OUP 2005) 9.

2.1 THE CONTEMPORARY IMPORTANCE OF THE ARMENIAN GENOCIDE

The question is perhaps, is the Armenian Genocide as significant from a contemporary legal perspective as it is from a political and historic one? Does its recognition's importance stem further than romantic notions of morality and justice and would it benefit the international community to revisit history with legal driven intentions? The phenomenon of the Armenian Genocide's denial has been described as 'a litmus test of morality in Western foreign policy'⁹ and Donald Bloxham asserts:

if a crime that had considerable resonance in Europe and the USA at the time of its commission could be forcibly submerged, the prospects for recognition of and response to other crimes past and present with less geographical or cultural association are obviously dim¹⁰

The contested genocide in Darfur being a prime example of this. It is suggestible that recognising the Armenian Genocide potentially has great legal implications. It can set a precedent for the addressing of similar tragedies in the future, for example through the creation of new mechanisms in International Law for claiming compensation in a third party State, when claiming domestically is not possible. It could mark the source of origin for future routes to reparation, which is arguably the first step towards reconciliation.

From an anthropological and sociological perspective, the period from the genocide until now can be studied as a model which demonstrates the consequences of genocide denial by States guilty of its perpetration. Despite the passing of years, the majority of Armenians to this day feel aggrieved at the lack of universal recognition of the event which resulted in the death of approximately one and a half million people over a period of seven years. The Turkish perspective of history which underplays the number of casualties, involvement of the State and other significant issues exacerbates the situation and creates an obstacle to progress as far as the majority of Armenians are concerned. Addressing the Armenian Genocide from a legal as well as political perspective would send a clear message that States should not and will not escape liability if they were to perpetrate acts similar to those of the Ottoman Empire by distorting facts and employing methods of deception. The passing of time should not be permitted to act as a means of erasing certain events from the scripts of history.

9. ibid.

10. ibid.

From an economic perspective, the Armenian Genocide can perhaps be traced as the source of why now Armenia has sealed borders with Turkey and oil and gas rich Azerbaijan. Having these borders sealed equates to the potential loss of millions of dollars worth of trade. Relations between Armenia and Turkic countries are, for want of a better word, tense not only due to the Genocide but also due to Armenia's long standing dispute with Azerbaijan over the ethnically Armenian populated Nagorno Karabakh. The possibility of having the border with Turkey opened has been a perennial topic of debate in Armenian national politics. In fact, in the recent 2008 national elections it was a key point of discussion and it was generally accepted that opening the border should not come at the expense of Turkey not formally recognising the Genocide. The impact of having its border with Turkey sealed is that Armenia has only one practical route into Europe via Georgia, thus stifling its trade and economic growth.

Another interesting dimension to this issue is that of Turkey's European Union aspirations. Along with its long running concerns over Northern Cyprus and poor human rights record, issues relating to the Armenian Genocide such as Article 301 of the Turkish Penal Code's ostracising free speech serve to act as buffers against Turkish accession into the EU. Although this will not be discussed in excessive detail on this instance, it is interesting to note this as it perhaps forms another basis for regarding the Armenian Genocide as an important current issue of legal as well as political significance.

Therefore, addressing this problem does have contemporary significance. Its commission ninety-three years ago still constitutes living memory and can still be subjected to legal scrutiny. Although few, there are still survivors and the memory of the Genocide is still at the forefront of the Armenian Diaspora's psyche who feel that it is a wound which has not been allowed to heal properly due to the lack of recognition by Turkey and refusal of compensation. In terms of what action can be taken now; realistically the only option is monetary compensation. Criminal action cannot be taken as virtually all if not actually all of the perpetrating members of the *Committee of Union and Progress* are dead as a result of assassination, natural death or execution following conviction by the Special Military Tribunal established in Istanbul at the end of World War I.¹¹ Moreover, despite the returning of land appearing to be an option which is unfeasible and unimaginable in a contemporary Turkey, it is not an option which should be completely overlooked. In either case, it is important to note that reparation cannot

11. See generally Vahakn N Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications' (1989) 14 *Yale Journal of Int'l Law* 221.

be used as some sort of moral deterrent which washes away the tragedies of history. What it can do is act as an appropriate pre-cursor to some sort of future relationship whether it be economic or diplomatic between the Armenians and Turkey.

3. GENOCIDE IN INTERNATIONAL LAW

*'One of the most complete and glaring illustrations of the violation of international law and the laws of humanity'*¹²

Raphael Lemkin

In this chapter, this author will make a series of observations creating a clear understanding on how the law relating to the crime of genocide developed, thus attempting to highlight any distinction between genocide and other closely related crimes which fall under the mantle of 'crimes against humanity'. The author shall carefully detail the crime of genocide with particular emphasis on its origins which will be analysed in the subsequent chapter and may or may not indicate whether there was any customary international law in existence at the time of the Armenian Genocide which was breached by Ottoman Turkey.

3.1 THE ORIGIN OF 'GENOCIDE' AS A 'CRIME AGAINST HUMANITY'

Principles of crimes against humanity find their origin in the post World War I¹³ period following the spirit of the concept of *The Martens Clause* of the Preamble to the Hague Convention of 1907 which can be considered as being one of the first points of reference when exploring the origins of 'crimes against humanity' and 'genocide'.¹⁴ It provides that:

[u]ntil a more complete code ... had been issued ... the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilised peoples, form the laws of humanity, and the dictates of public conscience.¹⁵

12. Lemkin (n2) 94.

13. See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd revised edn, Kluwer Law 1999) 522.

14. *ibid* 523.

15. Hague Convention Respecting the Laws and Customs of War on Land (signed 18 October 1907) 3 Martens 461.

The language used in this clause appears to reflect 'the international community's recognition that there were evolving and transcendent principles of humanity which safeguarded individuals against the abuse of states'¹⁶ and mitigated the interfering of States in affairs of others based on these principles.

3.2 THE ORIGIN OF THE TERM 'GENOCIDE'

Raphael Lemkin, the Polish lawyer and scholar, was responsible for the coining of the term 'genocide'.¹⁷ He promoted the notion that International Law contains unarticulated laws of humanity in arguing for 'recognition of the new trans-national penal offence of genocide'.¹⁸ In his 1944 study 'Axis Rule in Occupied Europe' Lemkin proposed that the term genocide should be employed to describe 'the destruction of a nation or of an ethnic group'.¹⁹ The origin of the term 'genocide' can be traced to the Greek words *genos* (race) and the Latin *cide* (killing). Lemkin noted that international jurisprudence had increasingly recognised the importance of preserving national groups²⁰, a sentiment which is supported by Shavarsh Toriguian who asserts that:

[although] ... international law is primarily a body of rules regulating conduct between States, as the years have progressed the international community has demonstrated an increasing interest in protecting individuals against the arbitrary actions of their State.²¹

The groups that Lemkin referred to were ones which contributed to the cultural and intellectual enrichment of global society, but often lacked the powers to defend themselves. The prevention of genocide therefore held great practical as well as humanitarian value as these large disastrous events often lead to large-scale emigrations and internal disturbances requiring remedial international action.²² In the present context, this would explain the large-scale emigrations which have led to the creation of the

16. Matthew Lippman, 'Genocide' in M. Cherif Bassiouni, *International Criminal Law* (2nd edn, Transnational Publishing 1999) vol 1 'Crimes', 589.

17. *ibid* citing Lemkin (n2) 74.

18. *ibid*.

19. *ibid*.

20. Lemkin (n2) 74.

21. See Shavarsh Toriguian, *The Armenian Question and International Law* (Hamaskaine 1973) 49.

22. Lemkin (n2) 91-93.

Armenian Diaspora, which sees approximately 7 million of Armenian's global population of 10 million living outside of what today is Armenia.

Following World War II which saw the Nazi extermination of six million of Europe's Jews, there was no specific reference to the recently established term 'genocide' in the Nuremberg Charter of the Judgment of the Nuremberg Tribunal. However it did appear in the indictment and was occasionally referred to by the Prosecution.²³ What is contemporarily known as genocide was in fact prosecuted under the guise of crimes against humanity at the Nuremberg Tribunal. This constitutes the only international prosecution of a crime of this type until the establishment of the ICTY (International Criminal Tribunal for the Yugoslavian atrocities) and ICTR (International Criminal Tribunal for the Rwandan genocide) almost fifty years later. Now, the prescription of the crime of genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948²⁴ has become part of customary international law and a norm of *jus cogens*²⁵ and although it is true to say that genocide as a crime can be subsumed under the broader title of 'crimes against humanity', Ilias Bantekas notes that:

... there was a compelling reason, not necessarily related to any imperative legal justification, for the two offences to be differentiated. The drafters of the crime of genocide wanted to emphasise the particular gravity of targeting members of a specified group with a view to their intentional physical or biological extermination. Emphasis is therefore on the destruction of the group, whereas the victimisation of group members in their individual capacities takes second place.²⁶

This is the crucial difference between genocide and a crime against humanity and one which is fundamental to remember when assessing the Armenian Genocide, as classifying it as a crime against humanity as opposed to a genocide would remove the emphasis on the intention of having this group destroyed.

23. Lemkin (n2) 74.

24. (signed 9 December 1948) 78 UNTS 277.

25. *Prosecutor v Goran Jelusic* (Judgment) ICTY-95-10 (14 December 1999) para 60.

26. See Ilias Bantekas and Susan Nash, *International Criminal Law* (3rd edn, Cavendish 2007) 139.

3.3 THE 1948 CONVENTION

The *Convention on the Prevention and Punishment of the Crime of Genocide* was adopted by the United Nations by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948. Its adoption almost thirty-three years after the perpetration of planned and organised extermination of the Ottoman Armenians means *prima facie* it would constitute a legal misfeasance if it were to be applied as it would breach a fundamental principle of law which prohibits the retroactive application of law. Despite this, had the convention existed at the time of these acts, then it would be applicable to the Armenian Genocide *par excellence*.²⁷ The Convention defines genocide as the following:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to the members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (e) Forcibly transferring children of the group to another group.

The question, however, is there evidence which would suggest that prior to the enactment of the 1948 Convention on Genocide; the act of genocide was recognised as a crime in international law and some sort of law existed to force its punishment?

27. Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) 240.

4. CUSTOM AS A SOURCE OF INTERNATIONAL CRIMINAL LAW

*'We might wish the law were otherwise but we must administer it as we find it'*²⁸

US Military Tribunal Sitting in Nuremberg 1948

Like Common Law, International Law develops gradually on the basis of States' practices, conventions and other manifestations of customary law.²⁹ Having described the development of the crime of genocide in the previous chapter, in this chapter the author shall scrutinise the way in which a rule gains status as customary law. This is the necessary first step when attempting to ascertain whether there is enough evidence to suggest that customary law existed prior to 1948 which intended to punish acts such as the genocide of the Armenians of the Ottoman Empire. Once the various tests for the identification of customary international law have been identified it will create a platform on which to subject any findings gained through researching a number of sources. If the author can show that there is enough evidence to suggest the existence of customary law, it will provide the basis and impetus for exploring the possibility of Armenian civil action against the Turkey for restitution and compensation. However, traversing '*les tenebres du droit coutumier*'³⁰ and identifying customary rules in International Criminal Law is in no way an easy task as many instances of State practice and *opinio juris* will have occurred 'in juridical outer space'.³¹ However despite this difficulty, it is important to remember that identifying customary international law is not an 'exact science'³² and the finding that a norm does form customary law 'must merely be the most reasonable conclusion based on the best available evidence of the existence or non-existence of that rule'.³³

28. *US v von Leeb and Thirteen Others* (Judgment of the US Military Tribunal sitting at Nuremberg) (1949) 1 ILR 376, cited in Bantekas and Nash (n26) 57.

29. See generally, Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) cited in Bassiouni (n13).

30. Vespasien Pella, *La Guerre-Crime et les criminels de guerre: Reflexions sur la justice penale internationale* (Editions de la Bacconniere 1949) 82.

31. David Luban, *Legal Modernism* (University of Michigan Press 1997) 355.

32. Mettraux (n27) 14.

33. *ibid.*

4.1 TESTS FOR CUSTOMARY INTERNATIONAL LAW

Article 38.1(b) of the Statute of the ICJ lists 'international custom, as evidence of a general practice accepted as law', making it one of the sources of law upon which a Court can draw.³⁴ For a rule to be regarded as a piece of customary international law and not merely something that is derived out of friendship, tradition or political expediency it needs to fulfil certain criteria that is a material element and a psychological element.³⁵ The material element refers to certain 'behaviours' or 'actions' which the state must carry out, and the psychological element consists of the state's rationale and belief in a sense of a legal obligation. What one needs to do in order to ascertain whether or not a certain rule is in fact obligatory (in this case genocide being an act punishable under international law) is cross reference the information that exists about the rule, with the criteria that has been set out. If the event of State practice satisfies the criteria of the test, then the rule can be attributed the status of customary international law.

4.2 THE MATERIAL ELEMENT, DIUTURNITAS

The material or objective element refers to the actual State practises themselves which imply that the rule is that of law. *The North Sea Continental Shelf*³⁶ cases act as the modern authority which state that for a rule to be regarded as customary law, its practice does not have to have taken place for a specified period of time before it is regarded as being customary international law. The length of time that a practise has taken place is of relatively little importance, however,

... an indispensable requirement would be that during the period in question, short as it may be, State practice including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.³⁷

34. See Antonio Cassese, *International Law* (OUP 2001) 119.

35. *North Sea Continental Shelf Case (Germany v Denmark/Netherlands)* (Merits) [1969] ICJ Rep 3, para 77.

36. *ibid.*

37. *ibid* para 74.

Therefore when assessing the act of genocide, if it is not required to show that there was state practice long before the Armenian Genocide which suggested that such acts should be punishable under International Law.

The State practice itself needs to demonstrate consistency and it has to be in accordance with a '*constant and uniform usage*'³⁸ not universal usage, the key here is to understand what is meant by '*constant and uniform usage*'. This author understands it to mean that all the States partaking in the action must display similar ways of application, and they cannot apply the rule with unfettered discretion, it has to be constant. What needs to be assessed when looking at the rule in question is the attitudes of the States who are affected by the rule, and not the number of states involved in the practise itself, so much so that it appears that '*the party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party*'.³⁹ Therefore, the Armenians would have to be able to show that Turkey felt bound by the rule. Another essential prerequisite is that the contended rule has a favourable response from leading States, as these States and their attitudes carry more weight and for this reason the actual identity of the States involved is of importance.⁴⁰

The International Law Commission in 1950 compiled a list which included forms of evidence which could be scrutinised when trying to assess if a rule could be deemed as being customary international law.⁴¹ These included:

- i) Treaties
- ii) Decisions of national and international courts
- iii) National legislation
- iv) Opinions of national legal advisors
- v) Diplomatic correspondence

Looking through these various sources is imperative, as it is here that evidence of State practice should be present, and if it is not, then it can be deemed that the rule itself is not customary international law.

38. *Asylum case (Columbia v Peru)* (Merits) [1950] ICJ Rep 266, para 277.

39. *ibid* 276.

40. *North Sea Continental Shelf Case* (n35) para 77.

41. Cassese (n34) 119.

4.3 THE PSYCHOLOGICAL ELEMENT, *OPINIO JURIS SIVE NECESSITATIS*

The *opinio juris sive necessitatis* is the 'psychological' element which makes a state believe that it is obliged to carry out the action; however it is difficult to prove evidence of such an element. But without this element present, the rule would not be customary international law. As the ICJ stated in the *North Sea Continental Shelf Cases*, '*Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of such a belief that is practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinion juris sive necessitatis*'.⁴² In essence, what must be demonstrated is that condemnation and any attempted action against Turkey and those implicated in the commission of the Armenian Genocide at the time was motivated by a sense of legal duty and not '*by considerations of courtesy, convenience or tradition*'.⁴³

Therefore what this author shall do is look at various national and international sources referring to the Armenian Genocide as an international crime and if there appears to be evidence satisfying the necessary requirement for something to be considered as customary international law in the sense that there is some form of consistent practice in bringing to justice those who perpetrated acts similar to those committed by the Turkish authorities in accordance with *opinio juris*, i.e. the conviction of States that the genocide of the Armenians was an international crime with universal jurisdiction then it would be fair to say that the 'rule' has acquired the status of customary international law.

5. CUSTOMARY INTERNATIONAL LAW AND THE ARMENIAN GENOCIDE

Having considered the aforementioned criteria for the establishing of customary international law, this author will examine the possibility of demonstrating the existence of customary international law relating to the punishment of genocide and crimes against humanity at the time of the Armenian Genocide and even if not completely successful in so doing, will make an attempt to interpret evidence in such a way that it could support such an assertion. Perhaps the various Hague Conventions and the humanitarian intervention on the part of the European Powers during the period could

42. *North Sea Continental Shelf Case* (n35) para 77.

43. *ibid.*

serve as an indication of a developing customary rule arising from state Practice to the effect that certain wrongs committed by a State against its own nationals were so odious in nature that the international community looked upon them as crimes against humanity.

As early 1904, there were certain articulations by Heads of State to the effect that certain crimes were so odious in nature that they could create a right to intervene in the affairs of another sovereign state. President Theodore Roosevelt State of Union address in 1904 is a persuasive example of such sentiment existing at the time. Roosevelt believed that:

...there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it...in extreme cases action may be justifiable and proper. What form the action shall take must depend upon the circumstances of that case; that is, upon the degree of the atrocity and upon our power to remedy it. The cases in which we could intervene by force of arms as we interfered to put a stop to intolerable conditions in Cuba are necessarily very few. Yet...it is inevitable that such a nation should desire eagerly to give expression its horror on an occasion like that of the massacre of the Jews in Kishenev, or when it witnesses such systematic and long-extended cruelty and oppression of which the Armenians have been victims, and which have won for the indignant pity of the civilised world...⁴⁴

This clearly demonstrates the feeling of some sort of obligation to intervene beyond some moral determinant but does not necessarily go all the way in demonstrating some sort of legal obligation to intervene with such acts.

5.1 DEVELOPMENTS DURING WORLD WAR I

During the course of and immediately following World War I, statements made by the Allies appeared to indicate an intention to pursue

44. Theodore Roosevelt, 'On Human Rights in Foreign Policy, State of the Union Message 1904' republished in Walter Laquer and Barry Rubin (eds), *The Human Rights Reader* (Penguin Books 1978) cited in Geoffrey Robertson, *Crimes Against Humanity* (Penguin Books 2002) 15.

'systematic reckoning for international crimes.'⁴⁵ The first of these statements were in relation to the Armenian Genocide, where on the 24th May 1915 Russia, France and the United Kingdom declared that 'the connivance and often assistance of Ottoman Authorities... [in the killing were]... crimes of Turkey against humanity and civilisation',⁴⁶ holding those implicated in the commission of such acts responsible. Such rhetoric was even more prominent in relation to German defendants. By 1918 and the end of the war, Allied rhetoric transformed into expectations for international criminal accountability.⁴⁷ This led to the creation of the *Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties* in January 1919 whose mandate it was to investigate the Central Powers' and her allies' 'barbarous or illegitimate methods in violation of the established laws and customs of war and elementary laws of humanity'.⁴⁸ The Commission suggested the creation of a tribunal which would apply 'the principles of the law of nations as they result from the usages of established among civilised people, from the laws of humanity and from the dictates of public conscience'.⁴⁹ The Commission therefore clearly affirmed liability under international law, rather than incorporation of such offences under domestic law.⁵⁰ However, the Commission's proposals were never implemented and the first Allied peace Treaty with Turkey, the Treaty of Sevres,⁵¹ which contained a provision obligating Turkey to hand over those who had committed atrocities, was never ratified. The Treaty of Lausanne⁵² replaced it inadequately by providing no equivalent provision and indeed giving amnesty to the architects of the Genocide.

Although the Treaty of Versailles and the *Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties* did not actually lead to the materialisation of much relating to the Armenian Genocide, it can be suggested that it manifests the consensus and intention of the international community to bring those responsible for armed

45. Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005) 31.

46. FO/371/2488/51010; cited in Cryer (n45) 31.

47. See n36.

48. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference' (1920) 14 AJIL 95, 115.

49. *ibid* 122.

50. See n36.

51. Treaty of Peace Between the Allied Powers and Turkey (signed 10 August 1920) 15 AJIL 179 (reprint).

52. Treaty of Peace between the Allied Powers and Turkey (signed 24 July 1923) 28 LNTS 12.

aggressions, war crimes and violations of the laws of humanity before the bar of justice,⁵³ thereby contributing to the development of customary international law. Also, The 1920 Peace Treaty of Sevres⁵⁴ which made provisions for the trials of those Turkish officials responsible for violating the laws and customs of war and engagement in the Armenian Genocide during the war, but excluding reference to the laws of humanity,⁵⁵ was never ratified and was superseded by the 1923 Treaty of Lausanne which contained a declaration of amnesty for all offences committed between 1914 and 1922⁵⁶ by Turks irrespective of their status as State actors or non State actors.⁵⁷ However, as M. Cherif Bassiouni points out, ‘the political motivations behind this compromise could not disguise the facts that amnesties are only granted for crimes, which even if not prosecuted does not negate their legal existence’.⁵⁸ Therefore, although the Treaty of Lausanne gave amnesty to Turks from any subsequent criminal prosecution, it did not negate the original crimes themselves and indeed can be interpreted as an affirmation that the international community recognised that crimes had been committed in the first place. It is therefore submitted that the Treaty of Lausanne cannot be invoked as a defence or obstacle to claims of compensation or restitution for the crimes committed during the period in question. This proposition is strengthened by the fact that in Germany, a similar trial was being carried out in Leipzig for Germans who had also perpetrated atrocities during the war; thereby supporting the suggestion that there was some sort of customary international law developing at the time which prohibited ‘crimes against humanity’ such as those committed against the Armenians, which can possibly be extended to include genocide, the ultimate crime against humanity.

5.2 THE ISTANBUL TRIALS

The Istanbul Trials of Turkish nationals for their involvement in the massacre of the Armenians have received much less attention and analysis

53. See Treaty of Peace Between the Allied and Associated Powers and Germany (signed 28 June 1919) 11 Martens (ser. 3) 323 (“Treaty of Versailles”).

54. Treaty of Peace Between the Allied Powers and Turkey (signed 10 August 1920) 15 AJIL 179 (reprint) (“Treaty of Sevres”).

55. *ibid.*

56. Treaty of Peace between the Allied Powers and Turkey (signed 24 July 1923) 28 LNTS 12 (“Treaty of Lausanne”).

57. James F Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood 1982).

58. M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Martinus Nijhoff 1992) 175-176.

then similar trials during the same period such as the Leipzig Trials of German that committed atrocities during World War I who were tried before the *Reichsgericht* (German Supreme Court).⁵⁹ This author suggests that the Trials themselves can demonstrate some form of acknowledgment on the part of the then Turkish authorities for crimes committed by the members of the preceding administration. Historically and legally the trials carry significant importance as they formed the first instance in Turkey's history that Ottoman Turkish leaders were held accountable before a Special Military Tribunal for atrocities committed against a non-Muslim and a traditionally discriminated against minority.⁶⁰ The Istanbul Trials consequently set an important historical precedent for the use of domestic courts and domestic law to try nationals of the State for their involvement in international crimes.⁶¹

In Istanbul many suspects who were accused of involvement in the massacres were tried but in actuality this number fell well short of the total number of suspects which had been identified in the report of the *Mazhar Inquiry Commission*⁶² which included the *Valis* (governor-general of the provinces), *Mutasarrifs* (governors of the provinces), and *Kaymakams* (governors of the districts); those responsible for the carrying out of the massacres. Notwithstanding this, many of those convicted were awarded severe penalties including the death sentence. It has been suggested that the reason why penalties of such severity were issued was because of the exercise of political expediency by the Turks in an attempt to placate the Allied Powers.⁶³ Following the end of World War I, Turkey was a State in transition and many in the Sultan's Government viewed these trials as a golden opportunity to hold the *Ittihadist* (Committee of Union and Progress) Party Leadership responsible for the atrocities committed against the Ottoman Empire's Armenian subjects, thereby exculpating the Turkish people as a whole.⁶⁴ However, despite its political motivation, it is important to note that it was as a result of the Special Military Tribunal finding sufficient evidence of pre-meditated mass murder to convict many of the defendants

59. See Timothy McCormack, 'Their Atrocities and Our Misdemeanours' in Mark Lattimer and Phillippe Sands (eds) *Justices for Crimes Against Humanity* (Hart Publishing 2003) 123.

60. See Dadrian (n11) 221.

61. *ibid.*

62. See Vahakn N Dadrian, 'The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series' (1997) 11(1) *Holocaust and Genocide Studies* 28, 32.

63. *ibid.*

64. Dadrian (n62) 31.

that stood before it, thereby demonstrating a feeling of some degree of legal obligation on the part of the Turkish authorities to take action. On July 6, 1919, the Military Tribunal pronounced a guilty verdict, sentencing to death the leading perpetrators of the genocide Talaat Pasha, Enver Pasha, Jemal Pasha and Dr Nazim.

Prima facie the trials in Istanbul demonstrate historic evidence of Turkish willingness to hold those responsible for the massacres to account. Despite this, the trials themselves have received a great degree of criticism. Vahakn Dadrian provides a particularly vitreous analysis of the trials, describing them as being ‘dismally abortive as far as justice is concerned’.⁶⁵ His assessment is that:

... the most salient feature of the present case is the remarkable chasm between the determination of guilt and the indulgence through which so many of the guilty escaped retribution ... a nation was murdered in its ancestral territories and the Tribunal could convict and condemn to death only fifteen men, of whom only three – indeed only the most insignificant of the pack – were actually executed; the rest escaped, or were allowed to escape, and become ‘fugitives from justice’. As British Acting High Commissioner at Istanbul, Rear Admiral Webb, reported to London, ‘it is interesting to see ... the manner in which the sentences have been apportioned among the absent and present so as to affect a minimum of real bloodshed.’⁶⁶

This indicates a lack of a real and effective legal addressing of the Armenian Genocide at the time, which could mean that the case can still be regarded as very much open today to assessment and action today.

This period saw The Sultan’s Government in Istanbul being replaced by that of Mustafa Kemal, the father of modern day Turkey, who brought about a change in regime on a nationalist foundation. Subsequently, the trials were precluded before proceedings were initiated in relation to alleged atrocities committed in the provinces of *Adana*, *Aleppo*, *Bitlis*, *Diarbekir*, *Erzerum*, *Marash* and *Van*⁶⁷ and indeed under Kemal, many of those who were already sentenced to imprisonment did not actually serve their full

65. ibid 50.

66. ibid.

67. See generally Annette Hoss, ‘The Trial of Perpetrators by the Turkish Military Tribunals: The Case of Yozgat’ in Richard G Hovannisian (ed), *The Armenian Genocide: History, Politics, Ethics* (St Martins Press 1992).

sentences.⁶⁸

From a legal perspective, can these Special Military Tribunals serve as some sort of evidence of acknowledgment and admission of the State's involvement in committing a pre-meditated mass murder of a specific group of people? If accepted as such, it would strengthen the proposition that a route for restitution and compensation should be made available on the basis the Genocide was as a result of state organised policy and not as a result of civil unrest or war, an assertion supported by the trying of members of the government. It can be argued that the then Turkish authorities trying of members of the *Ittihadist* Party for pre-meditated murder can rebuke the integrity of Turkey's current position on the genocide, as the evidence appears to be slightly inconsistent with the Turkish interpretation of the facts. An example of such evidence includes the description by a Turkish Court Martial on the 7 August 1919 of the massacres which took place in the *Yozgad* province, which saw many Armenians slaughtered.⁶⁹

5.3 DEVELOPMENTS POST WORLD WAR II; THE NUREMBERG TRIBUNALS

Shavarsh Toriguian offers that perhaps the best source of evidence that customary international law contains a rule defining genocide as a 'crime against humanity' consequently making such crimes punishable under international law, is the judgment of the Nuremberg Tribunal in 1946, where Nazi war criminals were tried by the Allied powers for their involvement in the extermination of six million of Europe's Jews.⁷⁰ Article 6(3) of the Charter of August 8, 1945, signed by the Allied Powers, as modified by the protocol of the October 6, 1945 and Control Council Law No 10 defined 'crimes against humanity' as 'Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, on racial or religious grounds'.⁷¹ However, in response to this, a view also exists that Article 6(3) was not an expression of existing customary international law relating to crimes against humanity, but was instead drafted to cover acts which had taken place during the War that were so atrocious and on such a large scale that they simply could not be ignored.⁷²

68. Dadrian (n62) 50.

69. *Yozgad Tehcir v Taktili Muhahemesi (Karar Sureti)* (Judgment of 8 April 1919) *Takvim-I Vekayi*, no. 3617, 1-2; cited in Mettraux (n27) 239-240.

70. See Toriguian (n21) 54.

71. The London Charter of the International Military Tribunal (issued 8 August 1945) 5 UNTS 251 ("Nuremberg Charter") cited in Bantekas and Nash (n26) 502.

72. See Bantekas and Nash (n26) 502.

The Defence at Nuremberg invoked the suggestion that the application of the Charter constituted legal misfeasance through retroactive application and punishment without law, *nullum crimen sine lege, nulla poena sine lege*, the tribunal at Nuremberg stated that ‘the charter is not an arbitrary exercise of power on the part of the victorious nations ... but in the view of the tribunal it is the expression of the international law existing at the time of its creation.’⁷³ Justice Robert H Jackson, the Chief Council for the US in the Nuremberg prosecution relied on these principles and wrote in his Report to the President of the United States on June 6, 1945: ‘These principles [crimes against humanity] have been assimilated as part of International Law at least since 1907.’⁷⁴ Thus, as Bassiouni observes,

... the Charter’s recognition of ‘Crimes Against Humanity’ as constituting violations of already existing conventional and customary international law, as well as general principles of law, is evidenced by previous efforts of the international community to prohibit conduct proscribed by Article 6(c) of the Charter.⁷⁵

Although this view was certainly true with regards to war crimes, which was acknowledged to be well ‘established’,⁷⁶ it was not as applicable when it came to crimes against humanity as it is argued that prior to the trials at Nuremberg, the term ‘crimes against humanity’ had no fixed legal meaning.⁷⁷ This is frustrating for the Armenian case because as early as 1916 Great Britain, France and Russia had made declarations denouncing what had happened to the Armenians as ‘crimes against humanity’⁷⁸ but as this at the time appeared not to have status as an offence in international law, it resulted in a fundamental lack of practical action to go in hand with the rhetoric which the massacres produced.

Another possible example of evidence pertaining to the existence of customary law comes in the form of the General Assembly of the UN

73. *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 172, 217.

74. Report of Robert H Jackson, United States Representative to the International Conference On Military Trials (US Government Printing Office 1949) x-xi, 50; cited in Bassiouni (n13) 542.

75. See generally Bassiouni (n13).

76. See Bantekas and Nash (n26) 502.

77. *ibid* 126.

78. Roger S Clark, ‘Crimes Against Humanity at Nuremberg’ in George Ginsburg and Vladimir N Kudriavtsev (eds), *The Nuremberg Trial in International Law* (Martinus Nijhoff 1990) 170.

in its resolution 95(1) dated December 11 1946 declaring that 'Genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilised world... and punishable by international law'.⁷⁹ If sustained, the genocide committed by the Ottoman Turkish authorities constituted a crime under international law since it has been shown that the definition of genocide as a crime against humanity, punishable under International Law, is a long established rule firmly incorporated into the body of International Law.

5.4 GENOCIDE DE FACTO & DE JURE

Despite the existence of serious doubt as to whether it is possible to talk of 'genocide' in relation to crimes committed before the adoption of the 1948 Convention,⁸⁰ this author wishes to draw a distinction between genocide in fact and genocide in law. The Armenian Genocide is not necessarily genocide in law due to the 1948 Convention on Genocide being *ex post facto*; however this does not mean that the massacres can not be recognised as genocide in a factual sense.⁸¹ Shavarsh Toriguian suggests that the Armenian Genocide can constitute genocide at law as well as doing so in fact. He asserts that the Preamble of the Genocide Convention and the Nuremberg Trials suggest that genocide is a crime under customary international law and therefore the Genocide Convention of 1948 is simply a declaration of existing law as opposed to the creation of new law.⁸²

If this proposition can be sustained it circumvents the 1948 Convention's incapacity at being applied to the Armenian Genocide. Although this proposition is very much susceptible to criticism, there are certain expressions used in the Convention which would support it. For example, the Convention states that,

The Contracting Parties, having considered the declaration made by the General Assembly of the United Nations in its Resolution 95 (1) dated December 11, 1946, that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilised world; **recognising that in all periods of history genocide has inflicted great losses on humanity**; Being convinced that, in order to liberate mankind from such an odious

79. See Toriguian (n21) 50.

80. Mettraux (27) 239-240.

81. *ibid.*

82. Toriguian (n21) 49.

scourge, international cooperation is required.

The part highlighted in bold appears to acknowledge that the crime of genocide has been perpetrated throughout history and consequently can be interpreted as perhaps not barring acts which have constituted genocide from being recognised as so just because they occurred prior to the enactment of the Convention. Although this does not mitigate the retroactive application of the 1948 Convention to the Armenian Genocide in a legal sense, it can be used as a source of rebuttal against suggestions that the Armenian Genocide cannot be called genocide due to its timing.

Having considered the nature of customary international law, there does seem to be some evidence of its existence to create an argument that the act of genocide committed against the Armenians by Ottoman Turks was a violation of international law. Along with this, the suggestion that the Genocide Convention of 1948 is still relevant from a legal perspective to the Armenian Genocide is also persuasive, despite being open to interpretation and criticism, especially because thirty years later at the trials of Nazi war criminals in Nuremberg, genocide was not actually recognised as being a crime *sui generis*. To further support the suggestion that the Genocide was recognised as a crime, the trials in Istanbul of suspects accountable for the commission of atrocities against Armenians by the Turkish authorities (which is capable of being interpreted as some sort of recognition or acknowledgment by the Turkish Authorities at the time of the crime committed by the state against one of its minorities) creates a strong basis for claiming compensation today for a violation of law back then. All these factors combined make for the issue of the Armenian Genocide seem very much alive legally speaking. However, what cannot be ignored is the amount of evidence which suggests that crimes against humanity were not legally established until many years after the Armenian Genocide and that genocide as a legal concept itself was only established later still. In this author's view, the issue is very much contestable.

6. COMPENSATION AND RESTITUTION

Perhaps the most significant outcome to recognition of the Armenian massacres as genocide by Turkey for the victims and their descendants is the possible entitlement to compensation and restitution of land. This issue however cannot be conceptualised or over simplified. It is simple to perhaps assert that if a wrong has been done then there is a moral obligation for those who have been wronged against to be compensated. However careful assessment of the logistics and practicalities of awarding compensation is crucial. These considerations include the manner in which compensation should be determined; should it for example be determined

by an international court or by domestic courts in the country in question, so in this case Turkey? Also, who exactly should be entitled to claim? In this chapter the author will examine the mechanisms available in granting compensation to the victims of the genocides in Yugoslavia and Rwanda by the *ad hoc tribunals* in order to gain ideas and assess whether any can be suitably replicated to deal with Armenian claims if it is agreed there is a legal basis for doing so.

6.1 THE ICTY AND ICTR

The ICTY⁸³ and the ICTR⁸⁴ do not themselves award reparations to victims of crimes within their jurisdictions. Article 24(3) of the ICTY Statute and Article 23(3) of the ICTR Statute permit the Trial Chambers to order restitution of property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners after convicting the perpetrator of that criminal conduct.⁸⁵

Rule 106 of the ICTY/ICTR *Rules of Procedure and Evidence* sets out compensation to victims. Under this Rule, 'the Registrar is to transmit to the competent authorities of the states concerned the judgment finding the accused guilty of a crime which has caused injury to a victim'.⁸⁶ The victim or persons claiming through that victim may then bring an action in a domestic court or other body to obtain compensation in line with relevant national legislation.⁸⁷ If this approach was applied to the case of the Armenian Genocide, claimants would be required to seek compensation in the Turkish Courts, only if armed with some sort of judgment, but realistically the possibility of this even being an option seems unlikely due to several reasons including the rise in Turkish nationalism and current features of Turkish legislation, such as Article 301 of the Turkish Penal Code which criminalises the insulting of 'Turkishness' (which has led to the prosecution of writers and journalists who have discussed the Armenian Genocide).

83. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

84. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994.

85. Kriangsak Kittichaisaree, *International Criminal Law* (OUP 2001) 323.

86. *ibid.*

87. *ibid* 324.

6.2 *THE INTERNATIONAL CRIMINAL COURT*

The mechanism to provide remedies for victims under the Statute of the International Criminal Court⁸⁸ (ICC) is more direct in the sense that it does not require enforcement through a national court or other competitive body.⁸⁹ Under Article 79 of the ICC Statute,

... the ICC may order money and other property collected through fines paid by a convicted person or forfeiture of that person's proceeds, property, and assets derived directly or indirectly from his crime, to be transferred to a Trust Fund established for the benefits of victims of crimes within the ICC's jurisdiction and their families.⁹⁰

According to Rule 98, entitled 'Trust Fund', as adopted finally by the PCNICC (Preparatory Commission for the International Criminal Court, 1999), individual awards for reparations are made directly against a convicted individual. However, the ICC may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of the order it is impossible or impracticable to make individual awards directly to each victim.⁹¹ Such an award deposited in the 'Trust Fund' is separated from other resources of the 'Trust Fund' and is forwarded to each victim as soon as possible. Furthermore,

... where the number of victims and the scope, forms and modalities of reparations make a collective award more appropriate, the ICC may order that an award for reparations be made through the Trust Fund to intergovernmental, international, or national organisations approved by the Trust Fund.⁹²

The idea of a Trust Fund sounds appropriate for the Armenian case as it is difficult to identify individual victims due to numbers and passing of time.

Moreover, it is provided by Article 75 of the Statute that 'the ICC may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation

88. Rome Statute of the International Criminal Court (1998) 2187 UNTS 90.

89. Kittichaisaree (n85) 324.

90. *ibid.*

91. *ibid.*

92. *ibid.*

and rehabilitation.⁹³ Where appropriate, the ICC may order that the award for reparations be made through the Trust Fund. The PNICC has adopted Rule 97, entitled 'Assessment of Reparations', under Chapter 4 (Provisions Relating To Various Stages of the Proceedings), Section III (Victims and Witnesses), or the Rules of Procedure and Evidence of the ICC.⁹⁴ Sub rule 1 provides:

Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both

In general, it is asserted that damages should be awarded on an individualised basis. However, in certain cases the number of victims may be so large that it is impractical or indeed impossible for the individual who is convicted to provide all with adequate compensation.⁹⁵ This seems to certainly be the situation that an Armenian claim would find itself in due to the potentially large number of people who may be entitled to claim as victims.

6.3 ARMENIAN CLAIMS FOR COMPENSATION

In terms of the case of the Armenian Genocide, due to the time which has elapsed since it was committed, the criminal prosecution of individuals would be futile. It would also be inequitable as well as legally impossible to prosecute current individuals of the Turkey and its administration liable in a criminal sense for the acts committed ninety three years ago. Further more, the Treaty of Lausanne 1923 gave amnesty for all crimes committed during the World War I and it is due to this that criminal prosecution in a tribunal such as the ICTY, ICTR and ICC cannot perhaps be used to prosecute individuals. However the lack of an appropriate forum should not be a source of denying the existence of certain substantive rights. The creation of some form of international machinery for claiming reparations is ideally the best solution given the unlikelihood of domestic channels for compensation in Turkey.

Another issue which should be critically examined surrounds the criteria for claim, who is and who is not entitled to claiming. There is a potential 'flood gates' argument here whereby if claiming compensation

93. Rome Statute of the International Criminal Court (n88).

94. *ibid.*

95. *ibid.*

is made possible then the number of claimants is potentially so high as to make the whole process impracticable. This is one of the consequences of this issue not having been addressed earlier. After ninety three years since the Genocide there have been several generations of Armenians who can claim that they have been directly affected. This is especially true of the Armenian Diaspora who can attribute their widely dispersed nature to the Genocide and having been forcibly deported from their ancestral territories. This approach would entitle all Armenians who can trace their ancestry back to the genocide and Ottoman Turkey to making a claim. Alternatively, claims can be restricted to survivors of the Genocide exclusively resulting in a very low number of potential claimants due to the long period of time which has passed since the act itself. In either case the foreseeable problem is an evidential one. How would an individual prove their entitlement or that they had been subjected to atrocities or that their property has been illegally misappropriated? These are questions which need to be practically approached in order to make the possibility of reparations a reality.

One suggestion is that the current Republic of Armenia could be the embodiment and act to represent the Armenian nation as a whole as it possesses a legal personality and therefore full legal capacity under international law.⁹⁶ But again, this would be oversimplification of the issue as there are great political considerations which need to be made before a state would be willing to file an action against another in international law thereby highlighting the disparity between what is possible and what is likely due to political nature of such an issue.

7. CONCLUSION

'Quand le devoir ordonne de parler, le silence est une lâcheté et le mensonge une trahison . '

Henry Beraud

Despite the political and historical conflicts which resonate on this issue, an attempt was made in this dissertation to investigate the existence of customary law preventing and punishing acts of genocide and crimes against humanity which could be directly applied to the Armenian Genocide. The author attempted to support the proposition that despite the Conventions on the Prevention and Punishment of the Crime of Genocide 1948 being *ex post facto*, there is evidence of customary international law which shows that genocide was still recognised as a crime before the conventions enactment.

96. Toriguian (n21) 59.

That is to suggest, that the Convention of 1948 can be interpreted as being the codification of existing customary international law, as opposed to the source of creation of new law. However, the author also considered evidence which suggested contrary in that genocide was not a crime *sui generis* at the time of the Jewish Holocaust let alone the Armenian genocide which preceded it by thirty years.

To strengthen the proposition above, evidence was included which attempted to demonstrate the existence of such customary law including the signing of the Treaties of Sevres, the Military Tribunals in Istanbul and Nuremberg, declarations made by Heads of State and the Genocide Convention of 1948 itself. On this basis, it was suggested that the victims of genocide, the Armenian people, were entitled to some sort of compensation and restitution from the present day Turkish government.

Notwithstanding this, the majority of the evidence suggests that current international law as it stands cannot be applied to the Armenian Genocide. Despite the existence of sources eluding to the contrary, at the time of the Armenian Genocide, there did not appear to be any concrete established legal principles governing crimes against humanity and genocide in particular, in relation to a state exercising brutality against its own nationals. Customary international law did however exist at the time in relation to war crimes, but the Armenian Genocide was not perpetrated by an occupying force, but the State itself. It was not until the end of World War II and the Tribunal at Nuremberg that a legal significance was attached to the term crime against humanity. But as one author has noted uncovering custom is not necessarily a logical or neutral process, and what judges find to be customary may be what they are willing to find in the practice of states and their *opinio juris* so that customary law has been a matter of opinion and *coup de pousse*, rather than one of existing State practice.⁹⁷

The Armenian Genocide therefore finds itself in somewhat of a legal lacuna, a victim of its timing, as it would seem that if it was perpetrated today, or indeed even sixty years ago international law would be equipped and developed enough to be applied to it *par excellence*. It does however seem extremely inequitable that the first genocide of the 20th Century is circumvented by International Law due to the inadequacies in its development a century ago which in effect appear to negate the substantive rights of the victims and their descendants.

Without the benefit of International Law as it currently stands, the reality is that any legal outcome to this issue would stem from within Turkey and is reliant upon the application of Turkish domestic law. However,

97. Mettraux (n27) 15.

as things stand a modern Turkey accepting the genocide and therefore acknowledging some sort of obligation to provide compensation seems to be somewhat of an unfeasible expectation. Cases which have applied Article 301 of the Turkish Penal Code which criminalises the denigration of ‘Turkishness’ to the context of the publicising of the Armenian Genocide serves to act as just one of many indications of the State’s negative view on the subject. Currently, it would not appear as though Turkey would make some sort of drastic turn around on the Armenian Genocide and facilitate the claims of Armenians.

Despite the complexity of these issues, what can be seen as clear is the notion that if the Republic of Turkey is recognised to having committed an act equating to genocide then in principle here should be compensation of some description made available to victims. Once this is agreed in principle, then it could lead to careful formulations of new mechanisms which would be conducive to equity. It does appear however that the solution to this issue lies in diplomatic and political movements as opposed to current International Law. Just as it has always been, the issue of the Armenian Genocide appears to be dictated by *realpolitik* but, as has already been emphasised on a number of occasions, this author views international law as being the crystallisation of the intentions of the ‘Great powers’, marking an overlap between law and politics. In the view of this author, the recognising of the Armenian Genocide would act as a reaffirmation of the international community’s unequivocal condemnation of such acts.

With all these considerations, it is arguable that lacunae in international law should not stand in the way of justice for those who have been subjected to such atrocities as that of the Armenians of Ottoman Turkey. One cannot help but refer to the poignancy of Noam Chomsky’s words when he said ‘By entering the arena of argument and counter-argument, of technical feasibility and tactics, of footnotes and citations, by accepting the legitimacy of debate on certain issues, one has already lost one’s humanity’;⁹⁸ a sentiment reflecting the current practical realities impeding the resolution of the this issue in legal terms. At the same time, the axioms of justice of legality and observance of the rule of law should never be played down as it is the transgression by offenders from these rules that ultimately lead to crimes against humanity such as the Armenian Genocide.⁹⁹

98. Noam Chomsky, *American Power and the New Mandarins* (Penguin Books 1969) 11.

99. See Bassiouni (n13) 562.



KING'S STUDENT LAW REVIEW

ASSESSING THE
CONTRIBUTIONS OF THE
EC AT THE WTO IN
FACILITATING ACCESS TO
AFFORDABLE MEDICINES
IN AFRICA

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1. INTRODUCTION

The Acquired Immune Deficiency Syndrome (AIDS) is one of the most compelling public health crises of modern times and the long-term evolution of the epidemic remains uncertain. This is because there is no cure for the malady. Many people are living with HIV/AIDS. At the end of 2007, they were estimated at 33.2 million.¹ The number of people with HIV has continued to rise with Africa remaining the global epicentre.² Vulnerable groups have been hardest hit by the epidemic. 75 per cent of young women aged between 15-24 years live with HIV/AIDS in sub-Saharan Africa and this trend is on the rise in other regions where females represent an increasing proportion of people with HIV/AIDS.³ HIV/AIDS related diseases account for 500 million or more illnesses and 6 million deaths every year.⁴

Although it is evident that HIV/AIDS has reached endemic proportions, there is no binding international legal framework on HIV/AIDS specifically. The right to health has however been dealt with extensively in International jurisprudence.⁵ In order to achieve the highest attainable standard of health countries must ensure the prevention, treatment and control of epidemic, endemic occupational and other diseases.⁶ In April 2001, the African Union met to discuss the challenges of the AIDS scourge on the African continent. This led to HIV/AIDS being categorised as a “State of Emergency” in Africa. The efforts led to the Abuja Declaration on HIV/AIDS, Tuberculosis and other infectious diseases.⁷ In addition, in 2001, the World Health Organisation (WHO) adopted Resolution WHA 10, urging

1. UNAIDS ‘AIDS Epidemic Update’ (2007) UN Doc UNAIDS/07.27E/JC1322E <http://data.unaids.org/pub/epislides/2007/2007_epiupdate_en.pdf> accessed 5 February 2011, 6.

2. *ibid.*

3. Global Fund ‘HIV/AIDS, Tuberculosis and Malaria: The Status and Impact of the Three Diseases’ (2005) <<http://www.aidsportal.org/store/584.pdf>> accessed 5 February 2011.

4. Mindy J Roseman and Sofia Gruskin, ‘HIV/AIDS and Human Rights in a Nutshell’ (Program on International Health and Human Rights, Francois Xavier Bagnoud Centre for Health and Human Rights: Harvard School of Public Health and International Council for AIDS Service Organizations, 2004) <<http://www.hsph.harvard.edu/pihhr/files/ENGLISH.pdf>> accessed 5 February 2011.

5. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) art 25; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 [ICESCR], art 12; CESCR ‘General Comment No 14’ (2000) UN Doc E/C.12/2000/4.

6. ICESCR (n 5), art 12.

7. WHO ‘The Abuja Declaration and the Plan of Action’ (2000) Ref No WHO/CDS/RBM/2003.46 <http://www.rbm.who.int/docs/abuja_declaration.pdf> accessed 5 February 2011.

member states to make every effort to provide the highest standard of treatment for HIV/AIDS in a progressive and sustainable manner.⁸

On its part, the United Nations (UN) General Assembly has issued two declarations on HIV/AIDS. The first in 2001 gave rise to the Global Fund to Fight AIDS, Tuberculosis and Malaria in 2002. The second declaration issued in 2006 reaffirmed the commitments made in the first declaration and encouraged the approach of prevention, treatment, care and support which included the removal of barriers on access to essential medicines.⁹ Although declarations of the United Nations are not legally binding documents they represent clear statements by governments on what they have agreed should be done to address HIV/AIDS.

The major specific guidelines on UN Resolutions have dealt extensively with access to medicines for people afflicted by the HIV/AIDS scourge. This is because people living with HIV/AIDS need access to essential medicines¹⁰ in order to survive. The medicines are commonly known as Anti Retroviral medicines (ARVs). There are a variety of ARVs and each serves a specific purpose. For instance, some of the drugs prevent or defer the replication of the virus in the host's body. Antiretroviral treatment is the difference between life and death for the millions of people who are HIV positive.¹¹ Although millions of people who live with HIV/AIDS in developing countries need immediate access to affordable antiretroviral medicines, the majority of them especially those in Africa are living and dying without medicines that have dramatically extended lives in the USA and Europe.¹² The HIV/AIDS pandemic has garnered a lot of attention as a result of the fact that many developing countries cannot afford expensive ARVs. In addition their frustration is further compounded by the fact that

8. 54th World Health Assembly Resolution WHA54.10 'Scaling Up the Response to HIV/AIDS' (21 May 2001) <http://apps.who.int/gb/archive/pdf_files/WHA54/ea54r10.pdf> accessed 5 February 2011.

9. UNGAResolution60/262 'Political Declaration on HIV/AIDS' (15 June 2006) <http://data.unaids.org/pub/Report/2006/20060615_hlm_politicaldeclaration_ares60262_en.pdf> accessed 5 February 2011.

10. Essential Medicines are those that satisfy the priority needs of the population: TRIPS Council 'Technical Cooperation Activities: Information from Other Intergovernmental Organizations' (25 September 2001) RefNo IP/C/W/305/Add.3.

11. Since April 2002, the WHO has recognized ARV drugs as essential medicines: WHO '12th Model List of Essential Medicines' (2002) <<http://apps.who.int/medicinedocs/en/d/Jh3003e/3.html>> accessed 5 February 2011.

12. WHO 'A Commitment to Expanded Access to HIV/AIDS Treatment' (2002) RefNo WHO/HIV/2002.24 <http://www.who.int/hiv/pub/arv/who_hiv_2002_24.pdf> accessed 5 February 2011, 1.

they cannot produce cheaper generic versions.¹³

The problems that poor countries face in terms of access to medicines are often blamed on the World Trade Organization rules on intellectual property rights or TRIPS. The TRIPS Agreement that was endorsed in 1995 covers basic principles, standards on the use of patent enforcement and the dispute settlement mechanism in an event of irreconcilable differences.¹⁴ It has always been fraught with implementation problems due to the inherent tensions between the holders of Intellectual Property rights (IPRs) and the majority of member states that seek to use patented medicines¹⁵ to combat on-going epidemics such as HIV/AIDS. This apparent décalage of interests has always created an enormous North-South chasm because the major holders of patent rights come from the industrialised North while on the other hand the greatest numbers of victims come from the less developed South.¹⁶ The two sides have differing interests. While the South needs access to affordable life saving medicines, the North's interests are more focused on the profitable proprietary pharmaceutical companies¹⁷ that research, develop and produce patented medicines.¹⁸ The patent system is built on the premise that patents provide an incentive for innovation by offering the patent holder an exclusive right to exclude others from using the patented product without the consent of the patent owner. With the absence of competition, the patentee is able to set higher prices during the period of protection usually pegged at 20 years. Although these tensions existed at the signing of the TRIPS Agreement, they were brought to the forefront by the HIV/AIDS epidemic in the 2000/2001.

This paper discusses some of the major contributions that have been made by the European Community in promoting access to affordable

13. A generic drug is a pharmaceutical product intended to be biologically equivalent with an originally patented product. It is often manufactured without a license from the originator company: Merriam-Webster's Medical Dictionary (Merriam-Webster Incorporated 2005).

14. WTO 'TRIPS: A More Detailed Overview of the TRIPS Agreement' <http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> accessed 5 February 2011.

15. A patent is an exclusive right granted for an invention which is a product or process that provides a new way of doing things.

16. Philip McCalman, '*The Doha Agenda and Intellectual Property Rights*' (October 2002) <<http://www.adb.org/Economics/pdf/doha/McCalman.pdf>> accessed 5 February 2011, 2-4.

17. Pharmaceuticals have been consistently ranked as the most profitable sector in the Fortune 500 rankings for the past three decades: See Scott Gottlieb, 'Drug Companies Maintain Astounding Profits' (2002) 324 BMJ 1054.

18. Brook Baker, 'Arthritic Flexibilities for Accessing Medicines, Analysis of WTO Action Regarding Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health' (2004) 14 Indiana International & Comparative Law Review 613.

medicines, *a fortiori*, HIV/AIDS medicines in Africa. It examines some of the contributions that have had a positive impact for access for African countries. In addition it treats some of the positions that have been adopted over the years by the EC that could have been detrimental for poor countries in accessing cheap medicines.

2. POSITIVE ASPECTS OF EC ACTIONS AT THE WTO LEVEL

The EC has been engaged in a number of positive actions related to intellectual property (IP) that have an impact on the public health concerns of developing countries and LDCs. Its backing of the Doha Declaration statement on public health and its support for the changes that culminated in the amendment of the TRIPs Agreement in 2005 are some of the contributions worth mentioning. Other important actions of the EC have involved efforts to fight counterfeit products including pharmaceutical products. In addition, its backing for a differential pricing system for pharmaceutical products for poorer countries has been an innovative approach. It also supported the use of compulsory licensing for those countries that find it necessary to use the same for their public health exigencies. What is more, its technical cooperation contributions for developing states and LDCs in the field of intellectual property rights (IPRs) have been commendable. Finally, the Community's stances on trade diversion as well as its backing for regional integration on patent related issues are some of the steps that have positive fallouts for poorer countries. These various elements are now addressed one apiece.

2.1 EC SUPPORT FOR THE ADOPTION OF THE DOHA DECLARATION

The Doha Declaration was the outcome of the WTO Ministerial Meeting that was held in the United Arab Emirates (UAE) in November 2001.¹⁹ The Declaration contained specific statements on various issues. One of such issues with a separate declaration was the Declaration on the TRIPs Agreement and Public Health ('the declaration').²⁰ The declaration was the culmination of discussions that had been started within the TRIPs Council by the African Group that proposed that 'Members issue a special declaration on the TRIPs Agreement and access to medicines at

19. WTO 'Doha Ministerial Conference: Ministerial Declaration' (adopted 14 November 2001) RefNo WT/MIN(01)/Dec/1.

20. WTO 'Doha Ministerial Conference: Declaration on the TRIPs Agreement and Public Health' (adopted 14 November 2001) Ref No WT/Min(01)/DEC/2 [DTAPH].

the Ministerial Conference in Qatar, affirming that nothing in the TRIPs Agreement should prevent Members from taking measures to protect public health.²¹ The EC was supportive of the move and referred to its efforts made to address the problem of public health concerns in third world countries. These mainly included actions within the framework of the G7, the Round Table and Action Plan of 2000 and its partnership with the World Health Organization ('WHO'). In addition, it reiterated the significance of a European Council Resolution of 14 May 2001 that stressed the elements of affordability, research and development.²²

The discussions all led to the adoption of the special declaration on public health. The declaration contained 7 paragraphs. Paragraph 1 restated the broad awareness of the issue by the Members: 'We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.'²³ The Ministers were quite keen to stress the fact that the TRIPs Agreement should be regarded as being part of the solution to the issue. Members were equally cognizant of the importance of maintaining the famous balance that goes to the very heart of the IP system: 'We recognize,' they affirmed, 'that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.'²⁴

The core of the declaration was in paragraph 4 which stated categorically that the 'TRIPs Agreement does not and should not prevent Members from taking measures to protect public health ... [It] can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.'

A clear commitment was also made in terms of allowing countries in need to use compulsory licenses as deemed appropriate.²⁵ In a significant way, the Members also noted that states will reserve the right to determine what constitutes a national emergency or case of extreme urgency with the understanding that diseases such as HIV/AIDS, tuberculosis, malaria and other epidemics may come under such a narrow category.²⁶ They also

21. TRIPs Council 'Special Discussion on Intellectual Property and Access to Medicines' (10 July 2001) RefNo IP/C/M/31, 4.

22. DTAPH (n 20) para 7.

23. *ibid* para 1.

24. *ibid* para 3.

25. *ibid* para 5(b).

26. *ibid* para 5(c).

reiterated the spirit of Article 6 of the TRIPs Agreement the purport of which is to allow states the right to determine the nature of the exhaustion of IPRs which they judge convenient for their systems.²⁷

In one of the statements, the Members also emphasized the need for technical cooperation to be fostered and that developed countries should assist LDCs with regard to technology transfer. They also extended the transitional period during which LDCs are expected to adhere to the TRIPs Agreement in terms of patent protection for pharmaceutical products.²⁸

Paragraph 6 contained specific terms aimed at addressing a crucial issue that has come to be known as the paragraph 6 problem. The problem emanated from the wording of Article 31(f) of the TRIPs Agreement that allows for the authorization of other use of IP products (without the consent of the patent holder) for the predominant supply of the domestic market. This basically meant that countries that have the capacity to use compulsory licensing for instance in the mass provision of vital drugs such as ARVs could only do so to (mainly) meet the demand of the domestic market. Export of such consignments to foreign countries that are in need ought to be minimal or very limited.²⁹ In addressing this issue Contracting Parties 'recognized that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPs Agreement'.³⁰ They also mandated the Council for TRIPs with the task of finding a speedy solution to the problem and report to the General Council before the end of 2002.

This was an important milestone in dealing with the problem posed in paragraph 6 of the Doha Declaration and such a solution was only reached because most of the states, notably the African states and also the EC made it possible to bring the issue to the limelight. The declaration was such a vital document that it has actually been regarded as a legal text with important forensic implications.³¹

27. *ibid* para 5(d).

28. *ibid* para 7.

29. FM Scherer and Jayashree Watal, 'Post-TRIPS Options for Access to Patented Medicines in Developing Countries' in Keith Maskus (ed), *The WTO, Intellectual Property Rights and the Knowledge Economy* (Edward Elgar Publishing 2004), 367.

30. DTAPH (n 20) para 6.

31. Katharina Gamharter, *Access to Affordable Medicines: Developing Responses Under the TRIPS Agreement and EC Laws* (Springer 2004), 153 & 157.

2.2 EC'S CONTRIBUTIONS IN REACHING THE DECISION OF 30 AUGUST 2003

To address the paragraph 6 problem, Members started negotiations within the TRIPs Council that were geared at reaching a solution that was acceptable to both the rich and poorer countries. Initially, the EC expressed a preference for a TRIPs Article 30 solution. However the Community later retracted from this approach and went along with the majority who wanted a TRIPs Article 31 solution. The essence of the Article 31 solution was modification of Article 31(f) in a manner that will reflect the needs of countries that had a public health problem yet lacked sufficient capacity to deal with the issue. The modification would allow those with sufficient capacity to go beyond the TRIPs requirement of manufacture aimed 'predominantly' for the domestic market. The US and other Western countries were equally concerned that if introduced such a waiver system for Article 31(f) would lead to abuse as some Members may actually seek to use the initiative for commercial purposes. After much debate and clear assurances that were later included in the statement of the Chairman of the General Council, the US succumbed. The EC was very instrumental in helping to allay the fears of the US and thus securing the eventual agreement on the decision on the paragraph 6 problem.³²

The provisions of the 30 August 2003 Decision were important as they waived the obligation of Article 31(f) and also put in place a dispute settlement moratorium on those countries that sought to depart from the strict wording of Article 31(f) to meet public health concerns. The paragraphs of the Decision, which remain in force, are worth examining.

Firstly, the preamble recalls the nature of the paragraph 6 problem and noted that exceptional circumstances existed that warranted deviations by means of waivers from the obligations encoded in Articles 31(f) and 31(h) of the TRIPs Agreement with regard to pharmaceutical products.

Paragraph one presents the scope of eligible products; importing Members and exporting Members. In terms of the scope of the products these mainly relate to any patented product; product manufactured via a patented process and importantly, diagnostic kits necessary for using

32. WTO 'Decision of the General Council: Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health' (1 September 2003) Ref No WT/L/540 [the Decision]. For an upbeat albeit cautious assessment of the potential positive fallout of the Decision in terms of access to medicines for a broad array of diseases in developing countries see, Frederick Abbott, 'The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health' (2005) 99 AJIL 317, 322-3 & 358.

the product in question which was eligible for all LDCs.³³ The second paragraph provides an elaborate description of the *modus operandi* of the mechanism understood as the 'system' contained in the Decision. The provision is to the effect that exporting Members can issue compulsory licenses for the manufacture of pharmaceutical products for use in eligible importing Members, under very strict conditions to be adhered to by both the importing and exporting Members. Paragraph three makes provision for the award of 'adequate remuneration' in the event of the use of a compulsory license in the exporting country. The 'adequate remuneration' condition is in line with the requisites of Article 31(h) of the TRIPs. While paragraph five sets out a generic safeguard provision for all Members to avoid diversion and re-exportation of the products imported under the system, paragraph 6 is a crucial statement that is very relevant for regional trade agreements (RTAs) such as the Southern African Development Community (SADC).³⁴ One of the crucial aspects of paragraph six as mentioned above is that if half of the Members of an RTA is made up of LDCs then the requirements of Article 31(f) shall be waived. The Decision also stipulates that Members will need to make more effort to foster transfer of technology in the pharmaceutical sector.³⁵ A specific review mechanism is provided for under the Decision.³⁶ Finally it makes it clear that the solution provided for by the system is only a temporary solution and that the waivers of the Article 31(f) and 31(h) obligations shall become permanent once the permanent amendment of the TRIPs Agreement takes effect in Member States.

One element that marked the Decision was that it was accompanied by a Statement from the Chairperson of the General Council,³⁷ Ambassador Carlos Pérez del Castillo. The Statement was regarded as representing 'several key shared understandings of Members regarding the Decision.'

In the Statement he sought to allay the fears of those who believed that the Decision could be abused thereby undermining patent protection. This however, clawed back some of the gains of the Declaration by making the conditions for the use of the system stricter. For instance, importing Members are required under the Decision to only show a confirmation of need and a justification of the same. In addition the Decision, limited any

33. The Decision (n 32) para 1(a).

34. *ibid* para 6.

35. *ibid* para 7.

36. *ibid* para 8.

37. TRIPs Council 'Note from the Chairman: Implementation of Paragraph 6 of the DOHA Declaration on the TRIPs Agreement and Public Health' (16 December 2002) Ref No JOB(02)/217 <http://www.atrip.org/Content/Activities/s02-Genovesi_cv.pdf> accessed 5 February 2011.

oversight on the developments regarding the use of the system to annual reviews. The Statement goes further and actually makes provision for a frequent scrutiny of developments of the system during all TRIPs Council meetings. It also calls for an 'expeditious review' that can be conducted by the TRIPs Council at any time. Moreover, it made reference to the option that a Member who has reservations as to the operation of the system can make use of the good offices of the Director General of the WTO. Finally the Statement included an attachment that contained examples of distinctive labelling.³⁸

In spite of these claw back requirements that were included in the Chairperson's Statement, the Decision was hailed in many quarters as a watershed in WTO's history. The WTO Director declared that the Decision 'proves once and for all that the organization can handle humanitarian as well as trade concerns.'³⁹ Some analysts welcomed the so-called balanced nature of the Decision.⁴⁰ But this position was not universal. Indeed one commentator has submitted that, '... the involvement of the WTO in granting compulsory licences, not only results in the surrender of sovereignty but it also establishes a set of obligations beyond the TRIPs Agreement, that is, a TRIPs-plus obligation ...'⁴¹ It has also been contended that the system and strict conditions provided for in the Decision are burdensome for non-producing developing countries.⁴²

Although the EC spasmodically adopted a cautious approach during the negotiations leading to the adoption of the Decision, it nevertheless joined hands with most of the developing world in securing a solution. The EC was moreover quite instrumental in defusing the deadlock that had earlier curtailed efforts to meet the 2002 deadline due to the fact that the US was keen on maintaining a narrow scope of diseases as well as the beneficiaries to be eligible for purposes of the system.⁴³

38. *ibid.*

39. WTO 'Press Release: Decision Removes Final Patent Obstacle to Cheap Drug Imports' (30 August 2003) Ref No Press/350/Rev.1 <http://www.wto.org/english/news_e/pres03_e/pr350_e.htm> accessed 5 February 2011.

40. Paul Vandoren and Jean Charles Van Eeckhoutte, 'The WTO Decision on Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health' (2003) 6 *JWIP* 779, 782.

41. KM Gopakumar, 'The WTO Deal on Cheap Drugs: A Critique' (2004) 7 *JWIP* 99, 108.

42. Duncan Matthews, 'TRIPs Flexibilities and Access to Medicines in Developing Countries: The Problem with Technical Assistance and Free Trade Agreements' (2005) 11 *EIPR* 420, 422.

43. Paul Vandoren, 'Médicaments sans Frontiers? Clarification of the Relationship Between TRIPs and Public Health Resulting from the WTO Doha Ministerial Declaration' (2002) 5 *JWIP* 5, 12.

2.3 EC BACKING FOR THE 2005 TRIPS AMENDMENT

The Decision states that the system of the waiver which it provides is temporary and that the TRIPs Council has to initiate work on the preparation of an amendment to the TRIPs Agreement that will serve as a permanent solution. The amendment has to be based 'where appropriate' on the Decision and on the understanding that it is not part of the broader Doha negotiations.⁴⁴ This was the first modification ever of a WTO covered agreement. A majority of the developed countries preferred the option of using a footnote as a means of amending the TRIPs Agreement – the idea being that most if not all the provisions of the Decision together with the entirety of the Chairman's Statement would become binding as part of the TRIPs Agreement. Argentina dismissed the option of using the footnote.⁴⁵ It also resisted the notion that the Statement of the Chairman had to be integrated as part of the permanent solution in the proposed amendment.⁴⁶ The July meeting ended in a deadlock. When the Council resumed discussions in September, the African Group, through the representative of Nigeria came up with a proposal for an Article 31bis to specifically address the problem of public health which was supported by most developing countries.⁴⁷ The EC was initially abrasive and dismissive of the African Group proposal noting as it were that Members ought to avert opening any negotiations on substantive issues.

At the TRIPs Council meeting held on 1-2 December 2004 Nigeria unveiled the full version of its draft proposal on the revision of Article 31. Article 31 would change to Article 31(1) and the Decision of 2003 would become Article 31(2). Other third world countries⁴⁸ backed the African Group's proposal creating conflict yet again between the developed and developing world.⁴⁹

During the TRIPs Council meetings,⁵⁰ the African group reiterated that the earlier proposed solution of adding a sub-paragraph to Article 31 remained the best approach since '... it left no doubts about the legality of

44. The Decision (n 32) para 11.

45. TRIPS Council 'Minutes of Meeting' (16 June 2004) RefNo IP/C/M/44, para 80.

46. *ibid* para 82.

47. TRIPS Council 'Minutes of Meeting' (21 September 2004) Ref No IP/C/M/45, para 66.

48. *ibid* paras 112, 122, 134, 111, 113, 119, 125 & 115.

49. *ibid* paras 114 & 117.

50. These were held on 8-9 and 31 March 2005.

the amendment.⁵¹ The sections that had to be removed included redundant and self-eliminating provisions such as paragraphs 1(b), 6(ii), 8, 9 and 11.⁵² The other category of provisions that had to be eliminated, were those the purpose of which was served by other provisions of the TRIPs Agreement such as those on enforcement and the extant provisions of Article 31. This entailed that paragraphs 2(a)(i-iii), 2(b)(i-iii) and 2(c) had to be removed.⁵³ Further it was proposed that the paragraph on re-exportation be eliminated. This action was based on the fact that the patent holder would have adequate alternatives to prevent re-exportation of products manufactured under the system.⁵⁴

The EC adopted a cautious approach regarding the African proposal and maintained that any amendment had to be a purely technical exercise rather than a window of opportunity to reopen discussions on substantive parts of the Decision. The EC disagreed with the fact that the African proposal included the words ‘amongst others’ in terms of describing the product range. This, the EC argued, broadened the scope of products in paragraph 1 of the Decision in ‘an unacceptable manner’ to the extent that ‘products’ could cover not only medicines but vaccines as well.⁵⁵ In addition, the EC was concerned that paragraph two had been substantially changed and that the standard or threshold for justification of need that had to be furnished by an importing Member had been diluted and weakened.

The EC also raised issues respecting the African Group Proposal regarding paragraph 3 which basically limited the payment of compensation by the importing rather than exporting Member. The EC equally believed that the African Group proposal had weakened the obligation to restrict diversion and re-exportation under paragraphs 4 and 5.⁵⁶ For the EC, the changes which the African Group was proposing regarding paragraph 6 were simply not acceptable because the proposal ejected two vital aspects, namely, reference to the principle of territoriality of patent rights and establishment of regional patent systems. In terms of paragraph 7 changes, the EC noted that rather than addressing the real issue that pertained to public health the African Group had used their proposal as a means of securing technical cooperation which did not, at the time, constitute the real issue on the table.

51. TRIPS Council ‘Minutes of Meeting’ (8-9 & 31 March 2005) Ref No IP/C/M/47, para 106.

52. *ibid* para 107.

53. *ibid* para 108.

54. *ibid* para 109.

55. *ibid*.

56. *ibid* para 127.

Finally the EC took issue with the fact that the African Group simply cut off the provision in the Decision regarding annual reviews of the operation of the system.⁵⁷

In the face of the challenge to the African Group proposal Argentina mounted a strong defence of the position of the African Group. On the issue of the scope of change open to the negotiators, it argued that '[n]othing in paragraph 11 of the Decision required a transposition without changes. It merely asked for the amendment to be based on the appropriate parts of the Decision.'⁵⁸ The Kenyan representative also derided the approach of the EC which was that of a complete rejection of the African proposal – something which, as Kenya noted, no other delegation had done.⁵⁹

The representative of Rwanda reiterated the fact that the matter was very serious for Africa and that Members should delay no further with futile bickering over useless technicalities of form or content of the amendment. The key issue had to be about saving lives, period.⁶⁰ For her African countries wanted a 'permanent, sustainable, secure and predictable solution' to the paragraph 6 problem.⁶¹ Representatives of Zambia, Argentina and Lesotho also expressed similar views.

Speaking on behalf of the ACP Group, the representative of Benin also backed the African Group proposal.⁶² However, these pleas fell on deaf ears. The EC, Switzerland and the US dismissed the African Group proposal.⁶³ The discussions which were slated to end by March 2005 went on through the year and a solution was only reached and incorporated as the final amendment in December 2005. The amendment was adopted by means of a decision of the General Council which in turn alluded to the use of a protocol that contained the main parts of the amendment. It is expected that the protocol will be open for Members to accept by December 2007.⁶⁴

On the issue of the form of the amendments Members adopted a two track approach: the insertion of Article 31bis after Article 31 and the integration of the Annex to the TRIPs Agreement at the end of the same,

57. *ibid* para 128.

58. *ibid* para 140.

59. *ibid* para 160.

60. *ibid* para 191.

61. *ibid*.

62. *ibid* para 196.

63. *ibid* paras 216, 214 & 210.

64. WTO 'Amendment of the TRIPs Agreement: Decision of 6 December 2005' (2005) RefNo WT/L/641, para 2.

that is, after Article 73.⁶⁵ The insertion of Article 31bis was by means of an annex to the Protocol Amending the TRIPs Agreement.⁶⁶ The annex (and adjoined appendix), mainly imported *mutatis mutandis*, the provisions of the Decision.

This amendment like the Decision of 2003 was also accompanied by a Chairperson's statement⁶⁷ which noted that States were proscribed from using the system for commercial purposes. Her Statement included a list of countries that have made clear they will opt out of the system provided for by the amendment.⁶⁸ Other states noted their intention of using the system only in situations of national emergency or extreme urgency.

Although the amendment has been praised by the WTO Director General, Pascal Lamy,⁶⁹ it is noteworthy that the discussions that took place in the TRIPs Council in the run-up to the amendment revealed certain fundamental deficiencies. The example and strategies of the EC were revealing because outside the WTO setting, the Community had been thought to be an advocate for the development concerns in poor countries. But its interventions during the TRIPs Council meeting raised more questions than answers.

That said, there could be several explanations as to why the EC had to adopt such a hard line position on the issue of a permanent amendment to Article 31. On the one hand it could have been concerned that giving in so easily to the kind of emendations proposed by developing countries for a substantial amendment would have been setting a precedent that revisions of the TRIPs Agreement could be done with ease. Yet this is exactly the kind of development that Members would have striven to avert so as not to open a Pandora's Box or floodgate of future demands for amendments of covered agreements each time Members had to grapple with given challenges. On the other hand, the EC could also have been concerned for its pharmaceutical sector because of the challenges from strong generic concerns in countries such as Brazil, China, Malaysia and India, all of which ardently and trenchantly defended the proposal of the African Group. So while one may question the approach of the EC in terms of the stances adopted during the

65. *ibid* 2 ('Attachment: Protocol Amending the TRIPS Agreement').

66. *ibid* 3 ('Annex to the Protocol Amending the TRIPS Agreement').

67. WTO General Council, 'Chairperson's Statement' WTO News (6 December 2005) <http://www.wto.org/english/news_e/news05_e/trips_319_e.htm> accessed 5 February 2011.

68. Australia, Canada, the European Communities and its Members, Iceland, Japan, New Zealand, Norway, Switzerland and the United States.

69. WTO 'Press Release: Members OK Amendment to Make Health Flexibility Permanent' (6 December 2005) RefNo Press/426.

TRIPs Council discussions one also has to put the issue into context because in such circumstances critical issues and jobs are often on the line.

Despite the difficult compromises that had to be made, a solution was finally arrived at through the permanent amendment and that was good news for countries in need of the system. The ball is now in their court to use the Decision to provide the needed ARVs and other medicines for their patients.

2.4 EC'S STRONG STANCE ON COUNTERFEIT PRODUCTS

The EC has adopted a very strong position on counterfeit products. Besides the damage that such products cause in terms of distorting trade they also pose the danger of being extremely harmful in the case of pharmaceutical products. This is because most of the products are usually fake medicines with insufficient or no active ingredients. What this usually does is to embolden or fortify viral strains of particular diseases. The issue of counterfeit products hedges a general concern that some developing countries have raised regarding the quality of the drugs that are exported to third world countries under the guise of donations or tiered pricing. The EC was quick to respond to these statements regarding the quality of the medicines that are exported to countries of need.

At a TRIPs Council meeting held on 14-15 March 2006 the EC presented a series of documents on the enforcement of IPRs,⁷⁰ the EC representative proposed more stringent transshipment controls and added that these controls should be made part of the discussions within the TRIPs Council.⁷¹ But like in most issues within the WTO it soon became an altercation between the developed and developing nations.⁷² This issues is so critical that in this cases one would have expected Members to tone down the rhetoric and deal with the substance of the problem.

2.5 EC SUPPORT FOR DIFFERENTIAL PRICING

The use of differential pricing has been one of the landmarks in EC's approach in helping countries in need to access affordable medicines.

70. TRIPs Council 'Enforcing Intellectual Property Rights' Communications from the European Communities: (6 June 2005) Ref No IP/C/W/448, (9 March 2006) Ref No IP/C/W/468, and (14 March 2006) Ref No IP/C/W/471. TRIPs Council 'Minutes of Meeting' (14-15 March 2006) Ref No IP/C/M/50, para 111.

71. TRIPs Council 'Minutes of Meeting' (14-15 March 2006) Ref No IP/C/M/50, paras 116 & 117.

72. *ibid* paras 127 & 128.

The basic ideas behind the differential or tiered pricing system is that pharmaceutical companies are encouraged to provide needed and essential medicines at lower prices to LDCs and countries where the need has been expressed. Although the approach is good because it is based on the volition of the pharmaceutical companies,⁷³ it has been criticized because it can easily be abused by free riders who desire to divert the products for purposes of re-exportation back to the rich markets thus undermining the price mechanism that are necessary to recoup their R and D costs.⁷⁴ However, it must be noted that differential pricing makes sense in situations where trade diversion and run-away tendencies of parallel trading are controlled.

2.6 EC APPROACH TO THE USE OF COMPULSORY LICENSING IN COUNTRIES OF NEED

Voluntary licensing is a vital tool for the reproduction of patented products with the consent of the patent holder. In the absence of such consent and where the need so dictates, compulsory licensing can be reverted to, to the extent that the right holder is accorded equitable and fair remuneration. However, the use of compulsory licensing has been limited in countries where one would have thought are in need of the system set in the 2003 Decision. As at the time of writing, only the Rwandan Government has made a notification under the system.⁷⁵

The example of Rwanda shows that contrary to the interventions of Kenya and Pakistan in TRIPs Council meeting of 16 June 2004, the system could be used by developing countries and that the conditions set are not as burdensome as they averred.⁷⁶

However, the use of compulsory licensing is not universally appreciated. In a caustic criticism of mandatory licenses, Rozek and Rainey argue that the use of such licenses ‘... demonstrates a lack of respect for IPRs and destroys the incentives for pharmaceutical firms to invest resources to conduct research and development ... It imposes costs on the national governments faced with having to improve and monitor the

73. See EC intervention in the TRIPs Council meeting: TRIPs Council ‘Minutes of Meeting’ (22 August 2003) RefNo IP/C/M/40, para 32.

74. A Subramanian, ‘The Aids Crisis, Differential Pricing of Drugs, and the TRIPs Agreement: Two Proposals’ (2001) 4JWIP 323, 325.

75. See TRIPs Council ‘Notification Under Paragraph 2(a) of the Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health’ (19 July 2007) RefNo IP/N/9/RWA1. TRIPs Council ‘Minutes of Meeting’ (16 June 2004) RefNo IP/C/M/44, paras 91 & 115.

76. *ibid.*

products produced by the licenses'.⁷⁷ They further note that: 'Compulsory licensing shifts the balance in favour of free-riders (copiers) seeking instant access to technologies, and it destroys the incentives of the innovator ...'⁷⁸ Unfortunately, these interests have turned the debate away from AIDS drugs for poor countries.⁷⁹

2.7 EC POLICIES ON TECHNICAL COOPERATION IN THE AREA OF IPRs

Article 67 of the TRIPs Agreement provides that developed countries should accord assistance to developing and least developed countries in the form of IPRs. It is noteworthy that in all the important events that have taken place in the TRIPs Council ranging from the 2003 Decision to the 2005 amendment, the Members have, on each occasion, made provision for the extension of assistance to LDCs and developing countries in terms of fostering their capacity in this area. At the TRIPs Council meeting of August 2003 the representative of the EC was quick to note that technical cooperation was 'key to an effective implementation' of the Doha Declaration.⁸⁰ He also proposed that the TRIPs Council should direct the WTO Secretariat to make sure that the WTO-World Intellectual Property Organization (WIPO) Joint Initiative on Technical Assistance in the field of IPRs for LDCs should effectively address the public health dimension and that the WHO should equally be closely involved in this process.⁸¹

Although the provision of technical assistance has been met with cynicism as to the motives of the countries providing it,⁸² developing countries and LDCs need more money and human resources assistance to overcome their access problems.⁸³

77. RP Rozek and RL Rainey, 'Broad-Based Compulsory Licensing of Pharmaceutical Technologies: Unsound Public Policy' (2001) 4 JWIP 463, 464.

78. *ibid* 469.

79. E Noehrenberg, 'TRIPS, the Doha Declaration and Public Health' (2003) 6 JWIP 379, 380.

80. TRIPS Council 'Minutes of Meeting' (22 August 2003) Ref No IP/C/M/40, para 28.

81. TRIPS Council 'Minutes of Meeting' (18 November 2003) Ref No IP/C/M/42.

82. Abbott (n 32) 340.

83. Noehrenberg (n 79) 381.

2.8 EC EFFORTS IN CURBING THE INCIDENCE OF TRADE DIVERSION

When medical products that are direly needed in a given importing country are diverted to other countries where consumers have a better purchasing power trade diversion is at play. When it happens efforts geared at price diminution are thereby compromised. This leads to a reduction of the availability of the medicines in the markets where they are badly needed and in turn leads to increased prices. The EC has been vocal on this issue. Kenya however dissented noting that the issue of trade diversion need not be overburdened and overstretched because ‘ ... most of the diseases that were under discussion were not prevalent in the countries that had the capacity and technology to produce the medicines.’⁸⁴ The EU rebutted by citing an instance in 2002 and further stated that this was not an isolated example placing the onus on the recipient countries to ensure that the medicines stayed within their borders.⁸⁵

2.9 EC’S BACKING FOR REGIONAL INTEGRATION IN THE IP FIELD

The Decision of 2003 and the amendment of 2005 all make it explicit that there will be an advantage for countries that are part of an RTA for purposes of Article XXIV of the GATT or for purposes of the Enabling Clause.

The EC has been forthright in its support for the use of patents and also compulsory licences within regional frameworks. During the TRIPS Council meeting of 22 August 2003, the representative of the EC stressed the importance of regional cooperation in view of implementing the TRIPS Agreement and the Doha Declaration. Abbott has also argued that regional patent systems are likely to be beneficial for the development prospects of developing counties.⁸⁶

Although some of the positions adopted by the various WTO States have generated heated discussions and in certain cases led to the exchange of very obtrusive language between delegations in Geneva, reason has always triumphed with the adoption of the 2003 Decision and the 2005 Amendment of TRIPS. However, some of the approaches of the Community on a number

84. TRIPS Council ‘Minutes of Meeting’ (4-5 June 2003) Ref No IP/C/M/40, para 6. See also EC intervention in TRIPS Council meeting of November 2003: TRIPS Council ‘Minutes of Meeting’ (18 November 2003) Ref No IP/C/M/42, para 136.

85. TRIPS Council ‘Minutes of Meeting’ (4-5 June 2003) Ref No IP/C/M/40, para 58.

86. Abbott (n 32) 339. See also Vandoren and Van Eeckhoutte (n 39) 790; T Kongolo and F Shyllon, ‘Panorama of the Most Controversial Intellectual Property Issues in Developing Countries’ (2004) 6 EIPR 258, 262; Matthews (n 41) 426; Gamharter (n 31) 24.

of issues have been patently controversial.

3. CONTROVERSIAL POSITIONS OF THE EC IN TERMS OF ACCESS DEBATES AT THE GLOBAL LEVEL

A number of EC strategies on the question of access to affordable HIV/AIDS medicines in developing countries have given life to many controversies.

3.1 *EC POSITION REGARDING THE CONTROVERSY SURROUNDING PHARMACEUTICAL COMPANIES IN SOUTH AFRICA*

In 1997 the South African Government adopted a Medicines and Related Substances Amendment Act (the Medicines Act) which mandated compulsory licenses to import cheaper drugs and parallel importation in cases of public health emergencies. Many multinational pharmaceutical companies that were based in South Africa (amongst which were EC based firms) brought a case against the Government of President Nelson Mandela in the High Court in 1998 relying mainly on the South African Patent Act of 1978 and the South African Constitution as the bases of their claims.⁸⁷ Many non-governmental organizations took a strong stance on behalf of the South African government and successfully mobilised against this profiteering in the face of acute shortage of ARV's which invariably led to the dropping of the suit by the pharmaceutical companies. The EC like the USA did not come out with a clear position in favour of the plight of the Government of South Africa which was a contradiction of its position.

3.2 *EC'S POSITION ON THE FULL INTEGRATION OF THE CHAIRPERSON'S STATEMENT INTO THE AMENDMENT*

The discussion that marked the debates within the TRIPs Council for the greater part of 2004 and 2005 related to the form that the amendment would take. Incidental to this issue was the legal validity of the Statement of the Chairperson of the General Council. Most developed countries led by the EC, Switzerland and the US (with minor variations of positions) supported the fact that the Chair person's Statement reflected a shared understanding by the WTO Members and that it should be fully integrated into the amendment with full legal effect. Most developing countries and

87. T Kongolo, 'Public Interest Versus the Pharmaceutical Industry's Monopoly in South Africa' (2001) 4 JWIP 609, 609.

LDCs took issue with this approach.

The Statement was simply an expression of intent by the Members to behave in a specific way. It was not a result of a negotiation as the Decision had been.⁸⁸ As Argentina argued: 'At no stage had the Chairman or the Members construed the Statement as being part of the Decision, but rather as an instrument which would facilitate a consensual decision on the Decision.'⁸⁹ It was a unilateral verbalization of the determination of the States not to abuse the system. Furthermore, paragraphs two and three of the Decision had provided for very strict guidelines to control the types of products that could be eligible for purposes of the Decision. Without bickering over the issue a permanent solution to the paragraph 6 problem in the form of an amendment could have been secured earlier. Although the EC finally decided against the elevation of the legal status of the Statement,⁹⁰ its initial position on the issue was ambiguous, at best.

3.3 EC STANCE ON THE PROTECTION OF TEST DATA

Protection for undisclosed information is generally provided for in Article 39 of the TRIPs Agreement. This should not pose any problem to the extent that it curtails unfair commercial use of such data. However, the protection of test data often allows research based pharmaceutical corporations to conceal vital information from generic companies even when the term of protection expires. In this way research-based companies can be able to limit competition when the product comes into the public domain. Developed countries have broadly backed this form of protection that fosters the interests of their companies. This approach has not served consumers (mainly in LDCs and developing countries) well. One of the overall negative impacts of the use of test data exclusivity has been that of dampening the zeal of innovation because pharmaceutical companies find it more interesting and profitable to use such an approach to technically extend their patents on blockbuster drugs rather than engage in innovative research for the production of new medicines.⁹¹

88. SK Sell, 'TRIPS-Plus Free Trade Agreements and Access to Medicines' (2007) 28 LLR 41, 49.

89. TRIPS Council 'Minutes of Meeting' (16 June 2004) Ref No IP/C/M/44, para 82.

90. TRIPS Council 'Minutes of Meeting' (8-9 & 31 March 2005) Ref No IP/C/M/47, para 129.

91. K Timmermans, 'Intertwining Regimes: Trade, Intellectual Property and Regulatory Requirements for Pharmaceuticals' (2005) 8 JWIP 67, 69-70.

3.4 *THE USE OF SUPPLEMENTARY PROTECTION CERTIFICATES (SPCs)*

SPCs are used by patent owners in the EC to prolong the period during which they can exercise exclusive rights over the patented product before it falls into the public domain. In most cases the SPC extends the period of patent protection by five years. Like the issue of test data exclusivity SPCs have the effect of extending the patent protection time. In this manner they limit the time range within which competitors may come into the market leading to an inordinate increase of prices. This is because SPCs may actually foster the power of a pharmaceutical monopoly to determine market prices due to limited competition.

4. CONCLUSION

HIV/AIDS is a serious problem for developing and least developed countries especially for African states that are afflicted by the malady. There are various facets in the possible response to the disease. Prevention, testing and education against stigma are vital components of the riposte which, by necessity, has to be holistic. But more importantly, focusing on the access component is also vital from a prevention perspective. This is because when effective vaccines are discovered to stem the virus, access will also be a key issue.

This paper has focused on the treatment component of access to medicines. In doing so it has dwelt more on the trade related aspects of medicines that are dealt with at the WTO. The WHO, UNAIDS, the UN amongst others are international organizations that play an important role in terms of access to medicines. Attention was placed on the WTO mindful that it is the international body that has the mandate to decide on the modalities of the use of patent rights. Emphasis on the WTO is not an indication that the other international bodies are playing a lesser role on the issue of access.

The positive role of the EC at the WTO was examined. It was noted that the EC backed forward looking initiatives such as the Doha Declaration, tiered pricing, the use of compulsory licensing, amongst others, to deal with a health emergency. It was also asserted that although the Community has been constructive on the access debate at the WTO, it also took certain stances that could have diluted the positive contributions made. Some of the stances such as its approach on extended patent protection and interpretation of WTO rules on test data protection could be ameliorated in a manner that is more coherent with its ambition to assist poor countries provide affordable HIV/AIDS treatment to their populations.



KING'S STUDENT LAW REVIEW

VICARIOUS PUNISHMENT:
AN EMPLOYER'S
VICARIOUS LIABILITY
FOR EXEMPLARY
DAMAGES

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1. INTRODUCTION

In *Rookes v Barnard*, Lord Devlin stated that 'the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour'.¹ The logical corollary to this restriction on the availability of exemplary damages might appear to be the further restriction that a defendant cannot be liable for exemplary damages unless he *himself* committed the punishable behaviour, as Lord Scott asserted (*obiter dictum*) in *Kuddus v Chief Constable of Leicestershire Constabulary*.² This approach was not adopted, however, by the Court of Appeal in *Rowlands v Chief Constable of Merseyside Police*, where exemplary damages were awarded against a defendant whose liability was purely vicarious (vicarious punishment).³

In light of *Rowlands*, this dissertation considers whether vicarious punishment can be justified.⁴ In other words, is it justifiable to hold an innocent employer vicariously liable for a punitive award of damages? To answer this question, it is first necessary to determine the availability of, and independent justifications for, both exemplary damages (Part 2) and vicarious liability (Part 3). This analysis is utilised in Part 4 to delineate the scope for vicarious punishment under the current law, focusing on the impact of the expanded 'course of employment' test in *Lister and others v Hesley Hall Ltd*, and answer the aforementioned question of whether vicarious punishment can in fact be justified.⁵

2. EXEMPLARY DAMAGES

2.1 EXEMPLARY DAMAGES: JUSTIFICATIONS

In the civil law, a claimant is awarded basic damages, in contrast to exemplary damages, to compensate him for the harm caused by a tortious act; 'the principle of the law is that compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong'.⁶

1. [1964] AC 1129 (HL) 1227.

2. [2001] UKHL 29 (HL) 131.

3. [2006] 1 W.L.R 1065 (CA).

4. *ibid.*

5. [2001] UKHL 22 (HL).

6. *Lim v Camden & Islington Area Health Authority* [1980] AC 174 (HL) 187.

In limited circumstances, however, the court will also award aggravated and/or exemplary damages. These supplementary awards share ‘a considerable overlap’ in so far as both are available in situations where basic damages do not fully account for the reprehensible and outrageous nature of the tortfeasor’s conduct.⁷ Nevertheless, these awards have, since *Rookes*, been conceptually distinct, with exemplary damages occupying a particularly controversial position within the civil law.⁸

Aggravated damages are awarded to provide further *compensation* to the claimant, ‘notwithstanding the fact that it may have a punitive effect by increasing the overall amount the defendant is ordered to pay.’⁹ Such awards are available in a wide range of circumstances, including where the claimant has suffered ‘loss of reputation, injured feelings, outraged morality, or requires protection against further calumny or outrage’,¹⁰ and help to reflect the ‘natural indignation of the court’ for the defendant’s conduct.¹¹

In contrast, exemplary damages have no compensatory function, but are awarded to ‘punish and deter’ the tortfeasor for their outrageous conduct. Following the ‘very considerable pruning operation’¹² in *Rookes v Barnard*, the discretionary power of the courts to award exemplary damages has been limited to three narrow categories:¹³

- i) ‘oppressive, arbitrary or unconstitutional action by the servants of the government’;
- ii) ‘where the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff’; and
- iii) ‘where exemplary damages are expressly authorised by statute.’¹⁴

7. H. Street, *Principles of the Law of Damages* (London, Sweet & Maxwell, 1962) p.34.

8. *Rookes* (n1).

9. *Rowlands* (n3) 26.

10. *Cassell & Co. Ltd. Appellants v Broome* [1972] AC 1027 (HL) 1076-1077.

11. *ibid.*

12. *ibid* [1098].

13. *ibid* [1221] (Lord Devlin) exemplary damages had greater availability pre-*Rookes*; H. McGregor, *McGregor on Damages* (Sweet & Maxwell, 2003) 11-002.

14. *Rookes* (n1) [1226-1227] (Lord Devlin).

Exemplary damages have been criticised for 'confusing the function of the civil law, which is to compensate, with the function of the criminal law, which is to inflict deterrent and punitive penalties'.¹⁵ The opposing view notes, however, that 'it cannot be taken for granted ... that there is something inappropriate or illogical or anomalous (a question begging word) in including a punitive element in civil damages'.¹⁶ Indeed, the Law Commission has found that 'the *principled* case for retaining exemplary damages is to be preferred to the principled case for abolition'.¹⁷

Nevertheless, the case for retaining exemplary damages relies largely on arguments of *public policy*. The starting premise for a public policy led defence of exemplary damages is that the law must respond effectively to outrageous behaviour. Such a response is not forthcoming, however, in certain situations where 'defects' in the criminal law prevent the tortfeasor's outrageous behaviour from being reliably punished;¹⁸ a failing exacerbated where civil law remedies such as basic damages, aggravated damages and restitutionary damages 'are perceived as inadequate to achieve a just result between the parties'.¹⁹ Exemplary damages operate to fill these lacunas; the punishment meted out 'vindicates the strength of law'.²⁰

This 'vindication' is achieved through two interlinked punitive aims: (1) punishing the tortfeasor; and, via this punishment, (2) deterring the tortfeasor and others from committing such acts in the future by promoting respect for the law.²¹ Aim (1) is clearly achieved when the tortfeasor is held *personally* liable for the punitive award (cf. when the employer is held *vicariously* liable: Part 4.4 below), as it hurts him in his pocket. Unfortunately, the success or failure of aim (2) is an issue of 'practical usefulness' to which 'no amount of theorising can provide an answer'.²² The courts have nevertheless adopted the reasonable view that potential tortfeasors are deterred from outrageous conduct by the possibility of personal liability for a punitive award.²³ Indeed, Edelman has mounted a convincing defence of

15. *Broome* (n10) [1086B-G] (Lord Reid).

16. *Broome* (n10) [114C-D] (Lord Wilberforce).

17. Law Commission 'Aggravated, Exemplary and Restitutionary Damages' (Law Com No. 247, 1997).

18. McGregor (n13) 11-001, LawCom (n17) p.100.

19. *Kuddus* (n2) [63] (Lord Nicholls).

20. *Rookes* (n1) [1226] (Lord Devlin).

21. *Rookes* (n1), *Broome* (n10).

22. H. Street (n7) p.36.

23. *Kuddus* (n2).

exemplary damages based purely on its perceived deterrent effect.²⁴

As a brief aside, it is interesting to note the Law Commission's claim that the limitations imposed on the availability of exemplary damages by the *Rookes* categories prevents the aforementioned punitive policy aims from being fully achieved.²⁵ Category 1 has been criticised for excluding the outrageous tortious acts of private companies and individuals.²⁶ The limitations on category 2 awards have also been criticised on the grounds that it is often difficult to see why 'the profit motive should suffice but a malicious motive should not.'²⁷ Thus, the Law Commission recommended a 'principled, statutory expansion of the availability of exemplary damages.'²⁸

This dissertation supports the continuing availability of exemplary damages as a 'remedy of last resort.'²⁹ It is submitted that they have served a 'valuable purpose in restraining the arbitrary and outrageous use of executive power',³⁰ and 'played a significant role in buttressing civil liberties.'³¹ As Lord Nicholls notes, 'the extent to which the principle of exemplary damages continues to have vitality is striking'.³² These policy aims are sufficiently powerful, even if only partially achieved under the limitations imposed by *Rookes*, to negate concerns of legal principle. Although the Law Commission's arguments in favour of expanding the availability of exemplary damages are powerful, they must be balanced against the fact that 'English law already contains a heavy, indeed exorbitant, punitive element in its costs system.'³³ It is to be hoped that exemplary damages continue to be developed and refined at common law.

24. J Edelman, 'In Defence of Exemplary Damages' p.225-248 in Rickett (eds), *Justifying Private Law Remedies* (Hart, 2008).

25. Law Com (n17) p.105.

26. *Kuddus* (n2) [66] (Lord Nicholls).

27. *ibid* [67] (Lord Nicholls).

28. LawCom (n17): exemplary damages should be available 'for deliberate and outrageous disregard of the plaintiff's rights' p.107; cf H. McGregor (n13) 11-066 'it is somewhat disturbing to find moves afoot to bring them back'; Hansard, HC Vol 337 col. 502 9 November 1999 WA (government declined to take forward Law Com exemplary damage proposals); conf'd DCA 'The Law on Damages' (2007, CP 9/07) 196-199.

29. Edelman (n24) ; cf. A. Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 OJLS; Anderson 'An exemplary case for reform' (1992) CJQ 233.

30. *Rookes* (n1) [1223].

31. *Kuddus* (n2) [63].

32. *ibid*.

33. cf *Broome* (n10) [1114] (Lord Wilberforce).

2.2 EXEMPLARY DAMAGES: AVAILABILITY

This section examines the availability of exemplary damages under the *Rookes* categories. Following *Kuddus*,³⁴ the 'cause of action' introduced in *A B v South West Water Services Ltd* has been overruled.³⁵ Thus, if tortious conduct falls under any of the three categories, the courts have the discretion to award exemplary damages.³⁶ For the purposes of this dissertation, it is only necessary to consider categories 1 and 2, as category 3 is of limited scope.³⁷

2.2.1 CATEGORY 1

Exemplary damages can be awarded where there has been 'oppressive, arbitrary or unconstitutional action by the servants of the government', as seen in cases such as *Wilkes v Wood*.³⁸ In *Broome*, it was made clear that 'servants' would include 'all persons purporting to exercise powers of government, central or local, conferred upon them by statute or at common law by virtue of the official status or employment which they held'.³⁹ Thus, it has been held to include the police,⁴⁰ local government,⁴¹ local authorities,⁴² and prison guards.⁴³

Although this category does not generally extend to 'private corporations or individuals',⁴⁴ it is interesting to consider whether a private company, 'exercising powers of a public nature' could ever qualify as a servant. The Court of Appeal has found that a privatised company, exercising statutory powers as a protected monopoly supplier,⁴⁵ was not a servant. Nevertheless, this decision leaves open the possibility of a private

34. *Kuddus* (n2).

35. [1993] QB 507.

36. D. Wilby and d. Bannett, *The Law of Damages* (Butterworths, 2003) 42-44 (analysis of discretionary factors).

37. A rare example: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 S.13(2).

38. 98 Eng. Rep. 489 (C.B. 1763).

39. *Broome* (n10) [1130] (Lord Diplock).

40. *Thompson v Comr of Police of the Metropolis* [1998] QB 498 (CA).

41. *Broome* (n10) [1088].

42. *Bradford City Council v Arora* [1991] 2 Q.B. 507 (CA).

43. *Racz v Home Office* [1994] 2 AC 45 (HL).

44. *Rookes* (n1) [1226]; *Broome* (n10) [1088].

45. *AB* (n35) [1993] (CA) 525-526, 531-532 (not overruled on this point).

company qualifying as a servant of the government if it were exercising delegated public powers of a sufficient magnitude.⁴⁶ It is submitted that staff working in privately managed prisons and juvenile detention centres would likely qualify due to the government's delegation of significant powers to detain prisoners.

There is no authoritative definition of an 'oppressive, arbitrary or unconstitutional' tortious act; the case law only serves to show that exceptional conduct is required.⁴⁷ Successful cases have generally involved trespass, false imprisonment, assault and malicious prosecution by the police. For example, in *Makanjuola v Commissioner of Police of the Metropolis*, Henry J awarded exemplary damages for a policeman's sexual assault on a young woman, committed 'in the shadow of his warrant card'.⁴⁸ Similarly, in *Rowlands*, the Court of Appeal awarded exemplary damages where a police officer arrested the claimant unnecessarily, assaulted her and falsified evidence against her.⁴⁹

2.2.2 CATEGORY 2

The second category concerns situations where the 'defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff',⁵⁰ as seen in cases such as *Bell v Midland Railway Co.*⁵¹ Cynical wrongdoers must be shown that 'tort does not pay'.⁵²

To qualify, a defendant must have: (i) 'been aware of, or reckless as to, the illegality of what is proposed' and (ii) decided to carry on with it anyway 'because the prospects of material advantage outweigh the prospects of material loss'.⁵³ It is to be noted that no 'balance sheet' calculations are required.⁵⁴

The courts have interpreted this category relatively broadly. It has

46. *The Law of Damages* (n36) 2.40.

47. NB. bad faith is not a necessary requirement *Holden v Chief Constable of Lancashire* [1987] QB 380 (CA).

48. (1989) Times, 8 August.

49. *Rowlands* (n3).

50. *Rookes* (n3).

51. (1861) 10 C.B.N.S. 287.

52. *Rookes* (n1) [1227].

53. *Broome* (n10) [1079] (Lord Hailsham).

54. *ibid.*

been most readily utilised in the libel context,⁵⁵ but has also been applied in situations where landlords have attempted to unlawfully force tenants to leave rented premises.⁵⁶ It appears likely that exemplary damages could also be awarded where a Doctor or Dentist carried out unnecessary treatment for profit.⁵⁷

2.2.3 CONCLUSION

To conclude, the preceding analysis has shown that both categories of exemplary damages are typically only engaged where there has been outrageous behaviour emanating from 'bad-faith intentional torts' such as assault, libel and trespass.⁵⁸ This restriction is significant when the availability of vicarious punishment is considered in Part 4.

3. VICARIOUS LIABILITY

An employer will be vicariously liable for a tortfeasor's actions if three criteria are met: (1) the tortfeasor committed a tort; (2) the tortfeasor is his employee;⁵⁹ and (3) the tort was committed during the 'course of employment'.⁶⁰ If satisfied, the claimant can hold the employer liable for the measures of basic and aggravated damages awarded against the tortfeasor. For reasons that will become clear, this section focuses on the recent judicial expansion of the course of employment test, before looking at the justifications for vicarious liability.

3.1 THE COURSE OF EMPLOYMENT

An employer is not vicariously liable for every tortious act that an employee commits; such an approach would not 'correspond with common sense notions of fairness'.⁶¹ Instead, liability is limited to situations where there is a *sufficient nexus* between the tortious act of the employee and the duties for which the employee was employed to carry out. This nexus is

55. *Broome* (n10); *John v MGN Ltd* [1998] QB 598 (CA).

56. *Ramdath v Daley* (1993) 25 HLR 273.

57. Law Com (n17) p.8; *Appleton v Garrett* [1997] 8 Med LR 75.

58. J. Neyers, 'A Theory of Vicarious Liability' (2005) 43 Alta. L. Rev. 287

59. *Market Investigations v Minister of Social Security* [1969] 2 QB 173.

60. *Lister* (n5).

61. *Bazley v. Curry* [1999] 2 SCR 534 [36].

known as the ‘course of employment’, and justifies holding the employer liable.

The *Salmond* test has traditionally governed the course of employment; an employer would only be vicariously liable where the tortious act was ‘a wrongful and unauthorised mode of doing something authorised by the master [employer]’.⁶² For example, in *Rose v Plenty*, a milkman negligently injured a child who had been helping him to complete his milk round. The child was able to hold the milkman’s employer vicariously liable as the child’s assistance was a mode of delivering the milk; it did not matter that the employer’s prohibition on the use of children made the mode ‘wrongful and unauthorised’.⁶³ The *Salmond* test restricted liability to situations where the employer had provided ‘implied authority’ for the employees act;⁶⁴ these situations will be referred to as the ‘*Salmond* scenarios’.

The *Salmond* test usually prevented vicarious liability where employees had committed bad-faith intentional torts; these acts could rarely be seen as ‘doing something authorised by the master’.⁶⁵ For example, the operators of a children’s home would not be vicariously liable where an employee sexually assaulted a resident;⁶⁶ this kind of conduct ‘is the very opposite of what the warden has been authorized to do’.⁶⁷ Thus, employers were not liable where the employee was ‘off on a frolic of his own’.⁶⁸ This narrow approach to vicarious liability left claimants without a reliable source of compensation in situations where the employee’s act fell outside the *Salmond* test, such as child abuse in a children’s home, and the employee lacked the resources necessary to pay the award of compensatory damages.⁶⁹

To ensure victim compensation, the courts gradually expanded the course of employment to cover bad-faith intentional torts.⁷⁰ This expansion culminated with the House of Lords decision in *Lister*,⁷¹ where the *Salmond* test was replaced with the close-connection test developed in the Canadian

62. Heuston, R. F. V., and Buckley, R. A., *Salmond & Heuston on the Law of Torts* (21st ed, 1996) p.443.

63. *Rose v Plenty* [1976] 1 WLR 141 (CA).

64. Lunney & Oliphant, *Tort Law: Text and Materials* (Oxford, 2008) p.823.

65. Neyers (n58); *Makanjuola* (n48).

66. Facts of *Lister* (n5).

67. Stevens, R., *Torts and Rights* (Oxford, 2007) p.270.

68. *Navarro v Moregrand Ltd and Anr* [1951] 2 T.L.R. 674 (CA) p.681 (Denning LJ).

69. NB: potential compensation from Criminal Compensation Authority Fund.

70. *Racz* (n43); Neyers (n58).

71. *Lister* (n5).

case of *Bazley v Curry*.⁷² The close-connection test focuses on 'whether the employer's torts were so closely connected with his employment that it would be fair and just to hold the employer vicariously liable.'⁷³ Thus, the close-connection test for course of employment does not expressly prohibit vicarious liability for bad-faith intentional torts of employees.⁷⁴ Indeed, in *Lister*, the owners of a boarding house were found liable for the sexual abuse committed by the schools warden.⁷⁵

In the aftermath of *Lister*, it was suggested that the close-connection test would 'probably lead to a different decision [from the *Salmond* test] in only a handful of cases.'⁷⁶ The decision has nevertheless clearly expanded vicarious liability into the realm of bad-faith intentional torts.⁷⁷ For example, in *Mattis v Pollock*, the Court of Appeal held a nightclub owner vicariously liable for a stabbing committed by the club's bouncer, despite the fact that the assault had taken place outside the nightclub and the bouncer had first returned home to get the knife.⁷⁸

Similarly, in *Gravil v Carrol*, the Court of Appeal found an amateur rugby club vicariously liable for a physical assault committed by their player,⁷⁹ despite the fact that the assault occurred after the final whistle and the player's contract of employment expressly prohibited such violent conduct. This type of situation, where vicarious liability would not previously have been available under the *Salmond* test, will be referred to as the '*Lister* Scenarios'.

3.2 JUSTIFICATIONS

The doctrine of vicarious liability breaches the 'fault' principle, which has traditionally played a central justificatory role in tort law, as the employer is liable in the absence of fault. Moreover, both the judiciary and academic commentators have been unable to provide 'a comprehensive theory of vicarious liability ... that actually explains the central features and

72. *Bazley* (n61) cf *Jacobi v Griffiths* (1999) 174 DLR (4th) 71.

73. *Lister* (n5) p11.

74. Neyers (n58).

75. *Lister* (n5).

76. *Hopkins* [2001] CLJ 458; cited in Lunney p.823.

77. Alex Glassbrook, 'You're only supposed to blow the bloody doors off- employers' vicarious liability for the torts of violent employees' (2005) JPI Law 240; Neyers (n58).

78. [2003] EWCA Civ 887.

79. [2008] EWCA Civ 689.

limits of the doctrine.⁸⁰ It is therefore surprising to note that, in contrast to exemplary damages, there have not been widespread calls for its abolition. Indeed, vicarious liability has been described as an ‘essential’⁸¹ and ‘firmly entrenched’⁸² part of the tort system.

Perhaps the most convincing theoretical justification for the doctrine of vicarious liability is that an employer who stands to profit from an activity must compensate victims for any resulting harm.⁸³ The English courts have alluded to such theories, but have been relatively content to ‘parade vicarious liability as a deduction from legalistic premises.’⁸⁴ Such an approach fails to recognise the undoubted influence of policy considerations,⁸⁵ as affirmed in Canada by the Supreme Court case *Bazley v Curry*.⁸⁶ The imposition of vicarious liability on an employer serves two main policy aims: (i) ‘victim compensation’; and (ii) deterrence of future harm.⁸⁷

3.2.1 VICTIM COMPENSATION

A claimant should be able to obtain compensation for harm caused by employees. The courts recognise that the employer is ‘a more promising source of recompense than his servant who is apt to be a man of straw’;⁸⁸ the employer is more likely to have the resources, or more pertinently the insurance cover, necessary to meet a compensatory award than the employee. As Glanville Williams notes, the doctrine appears to ‘owe its explanation, if not its justification, to the search for a solvent defendant.’⁸⁹ The pursuit of victim compensation resulted in the expansion of the course of employment

80. Neyers (n58).

81. Lewis N. Klar, *Tort Law* (Toronto, 3rd ed) 582 cited by Neyers (n58) p.288.

82. Gary T Schwartz ‘The Hidden and Fundamental Issue of Employer Vicarious Liability’ (1996) 69S Cal.L.Rev cited by Neyers (n58) p.288.

83. *Bazley* (n61).

84. J. G. Fleming, *The Law of Torts* (LBC Information Services, 1998) p.410; Approach seen in *Lister* (n5) 27, 48.

85. Fleming (n82) p.410.

86. *Bazley* (n61); NB: in *Lister* (n5) only the close connection test was adopted, not the policy reasoning used in *Bazley*.

87. Feldthusen, Bruce ‘Vicarious Liability for Sexual Torts’ in Mullany and Allen M. Linden *Torts Tomorrow: A Tribute to John Fleming* (Sydney, LBC Information Services, 1998); cited in *Bazley* (n61).

88. Fleming (n82) p.41.

89. Glanville Williams ‘Vicarious Liability and the Master’s Indemnity’ (1957) 20 MLR 220.

test in *Lister*.⁹⁰ The fault principle is effectively sacrificed to ensure the 'provision of a just and practical remedy' for the claimant's harm.⁹¹

3.2.2 DETERRENCE

As a subsidiary aim, the doctrine of vicarious liability is also intended to deter future harm,⁹² by motivating employers to actively monitor their employees and introduce safeguards to prevent their tortious conduct.⁹³ It is submitted that the deterrent function serves a useful purpose in the Salmond scenarios; the employer is in the best position to recognise the potential for tortious acts, and attempt to prevent employees from committing them when they are doing something 'authorised by the master'.

In the *Lister* scenarios, however, the deterrent justification is not as persuasive; it is unrealistic to expect employers to be able to prevent intentional acts, far removed from the reasons for employment, such as sexual assault. As Neyers notes, 'deterrence theory does not work particularly well where the act to be deterred is already a crime.'⁹⁴ Similarly, per Hayne LJ: 'if the criminal law will not deter the wrongdoer there seems little deterrent value in holding the employer of the offender liable in damages for the assault committed.'⁹⁵ Thus, it is submitted that deterrent theory cannot justify vicarious liability in the *Lister* scenarios.

3.2.3 CONCLUSION

Despite the lack of deterrence, this dissertation accepts that the extension of vicarious liability principles to the *Lister* scenarios, flowing from the expanded course of employment test, can be justified in the context of compensatory damages. This acceptance flows from the proliferation of insurance cover for employers, which ensures that the burden of the claimant's compensation does not fall solely on the employer, but is spread across the whole community; this is a matter of 'sound resource allocation.'⁹⁶

90. *Lister* (n5).

91. Fleming (n82).

92. *Bazley* (n61) 24, citing Fleming (n82).

93. At a higher standard than that imposed by negligence principles.

94. Neyers (n58) p.295.

95. Gummow & Hayne JJ *Lepore*; cited by Neyers (n58).

96. Fleming (n84) p.411.

Indeed, it has been stated that liability insurers cover 94% of the total amount paid out in personal injury cases.⁹⁷ The flipside to achieving victim compensation, however, is that employers have been effectively reduced to ‘involuntary insurers’ in the *Lister* Scenarios, with little hope of deterring such acts.

4. VICARIOUS PUNISHMENT

4.1 VICARIOUS PUNISHMENT: ROWLANDS V CHIEF CONSTABLE OF MERSEYSIDE POLICE

In *Rowlands*, the Court of Appeal authoritatively addressed the issue of ‘vicarious punishment’.⁹⁸ This area of law had previously attracted little judicial or academic discussion, and had not been subject to an authoritative decision.⁹⁹ As will be seen, a number of earlier cases had, however, *assumed* the availability of vicarious punishment. Moore-Bick LJ, delivering the sole judgment of the court, held the Chief Constable vicariously liable for basic, aggravated and category 1 exemplary damages.¹⁰⁰

Unfortunately, *Rowlands* did not clearly delineate the availability of vicarious punishment. Moore-Bick LJ’s judgment is ambiguous as to whether vicarious punishment should be of general application or limited to the particular facts of the case. The judgment only cites case law where the availability of vicarious punishment has been assumed against the Police for category 1 exemplary damages awards,¹⁰¹ but it is clear that an assumption of vicarious punishment has also been made in non-Police cases¹⁰² and cases concerning category 2 awards.¹⁰³ A further complication is that the vicarious liability of the police is governed by the statutory provisions of the Police Act 1996 s 88, replacing Police Act 1964 s 48, rather than the common law

97. Pearson Report, Vol 2, para 509, Cited by Atiyah, *Atiyah’s Accidents, Compensation and the Law* (1996, 6th Ed) p.190.

98. *Rowlands* (n3) 48.

99. *Kuddus* (n2) 126.

100. *Rowlands* (n3).

101. *Rowlands* (n3) [36]; Assumption seen in *Kuddus* (n2), *Thompson* (n40).

102. *Racz* (n43).

103. *Maxwell v Pressdram Ltd* [1987] 1 W.L.R. 298; cf *Broome* (n10) 1088 (Lord Reid): category 2 ‘punitive damages could not be given unless it was proved that they [the publishers] knew that passages in the book were libellous and could not be justified or at least deliberately shut their eyes to the truth’.

principles discussed above.¹⁰⁴

On the basis of these difficulties, *Rowlands* could be said to support three possible interpretations: (1) vicarious punishment is limited to award of category 1 exemplary damages concerning the police; (2) vicarious punishment is limited to awards of category 1 exemplary damages;¹⁰⁵ or (3) vicarious punishment is available for category 1 & 2 awards.¹⁰⁶ In *Mosley v News Group Newspapers Ltd*, Eady J (*obiter dictum*) settled on the third interpretation,¹⁰⁷ feeling unable to deny the possibility of a category 2 exemplary damages claim purely on the basis that it was vicarious.¹⁰⁸ Such a refusal 'could probably at this stage only be made by the House of Lords'.¹⁰⁹

Thus, employers appear to be vicariously liable for awards of both compensatory and exemplary damages. Moreover, the courts seem willing to calculate the size of the exemplary damage award on the basis of the employer's resources, rather than the employees. Moore-Bick LJ attempted to justify such an approach on the basis that the courts should be 'able to make punitive awards against those who are vicariously liable for the conduct of their subordinates without being constrained by the financial means of those who committed the wrongful acts in question'.¹¹⁰

4.2 VICARIOUS PUNISHMENT: THE IMPORTANCE OF THE EXPANDED COURSE OF EMPLOYMENT TEST

Following *Rowlands*¹¹¹ and *Mosley*,¹¹² an employer appears to be vicariously liable for awards of both category 1 and 2 exemplary damages whenever the employee's tortious act falls within his course of employment. This section considers how the development of the 'course of employment', discussed at Part 3.1, has affected the availability of vicarious punishment.

The *Salmond* course of employment test prevented employers from being vicariously liable for bad-faith intentional torts committed

104. A statutory regime is required because police men do not qualify as employee for common law vicarious liability, due to their 'exercise of original and not delegated powers' (*Makanjuola* (n48) p.17).

105. *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) 201.

106. *Mosley* (n105) 201-202.

107. *Mosley* (n105) 201-203.

108. *Mosley* (n105) 203.

109. *Mosley* (n105) 203.

110. *Rowlands* (n3) 47.

111. *Rowlands* (n3).

112. *Mosley* (n105).

by employees.¹¹³ This had the unintentional effect of strictly limiting the potential for vicarious punishment, as exemplary damages were commonly only awarded for bad-faith intentional torts.¹¹⁴ The few situations where the doctrines did converge to allow vicarious punishment predominantly concerned the police.¹¹⁵

Since the *Lister* close-connection test and the decision in *Rowlands*, the potential for vicarious punishment has increased dramatically due to the fact that an employer can now be vicariously liable for bad-faith intentional torts¹¹⁶ committed by employees: the *Lister* Scenarios. To appreciate the magnitude of this development, it is helpful to consider some examples. In the pre-*Lister* case of *Makanjuola*, a police officer threatened to report a young woman for immigration offences if she did not submit to acts of sexual assault.¹¹⁷ The court awarded compensatory damages and category 1 exemplary damages. On considering the applicability of vicarious liability, Henry J accepted that the claimant was ‘only placed in the predicament that she was because of the respect she gave to the warrant card’. Nevertheless, on applying the *Salmond* test, Henry J found that the acts ‘could not be properly regarded as the fraudulent performance of that which the police officer had the authority to do honestly’. Rather, they were ‘an independent action by a rogue police officer’.¹¹⁸ Thus, vicarious liability was not available for the awards of compensatory or exemplary damages.¹¹⁹ This result was unfortunate for the claimant, as the police officers heavy debts might well have prevented, or delayed, the payment of damages.

In contrast, the facts of *Makanjuola* would likely meet the requirements of the close-connection test; the policeman’s position of power and authority makes it ‘more materially likely that an abuse of that power relationship can be fairly ascribed to the employer’.¹²⁰ As the police officer’s abuse of power was substantial, with the acts being largely facilitated by his warrant card, the Chief Constable would be vicariously liable for the awards of compensatory and exemplary damages in this *Lister* scenario.

Similarly, it is possible to imagine an expansion of vicarious punishment

113. Neyers (n58).

114. As seen in Part 2; Neyers (n58).

115. Example *Thompson* (n40); this limited availability goes some way to explaining the sparsity of judicial and academic discussion of vicarious punishment pre-*Lister*.

116. Neyers (n58).

117. *Makanjuola* (n48).

118. *Makanjuola* (n48) p. 20.

119. *Makanjuola* (n48) p. 20.

120. *Bazley* (n60) 44; Glassbrook (n77).

for category 2 awards. For example, if a Doctor conducted an unnecessary breast examination on a female patient in order to obtain information for a database, without her informed consent.¹²¹ Under the *Salmond* test, the NHS would not be vicariously liable for the compensatory or category 2 exemplary damages; the breast examinations were not an authorised act. In contrast, this scenario would likely fall within the *Lister* Scenarios under the close-connection test, as the Doctor's position of authority had allowed him to conduct such treatment. The NHS or private healthcare provider would therefore be liable for the awards of compensatory and exemplary damages. As an aside, the arbitrary nature of the availability of exemplary damages under the *Rookes* categories is apparent in this situation, as an exemplary damage award could not be made if the Doctor had touched the patients for sexual reasons.

To conclude, the expansion of the course of employment test in *Lister*, undertaken to ensure victim compensation, has had the seemingly unforeseen additional effect of increasing the scope for vicarious punishment.

4.3 VICARIOUS PUNISHMENT: JOINT-TORTFEASORS AND THE HIGHEST COMMON FACTOR

In *Broome*, the House of Lords considered whether exemplary damages could be awarded against joint-tortfeasors with different levels of guilt;¹²² a situation with several parallels to the vicarious punishment of innocent employers. Thus, it is useful to consider how the House of Lords resolved this issue, and whether the decision has any direct impact on vicarious punishment.

It is established law that an award of exemplary damages must take into account 'everything which aggravates or mitigates the defendant's conduct', including the 'means of the parties'.¹²³ This approach creates problems where defendants are jointly liable for torts, as 'only one may have been guilty of the outrageous conduct or, if two or more are so guilty they may be guilty in different degrees or, owing to one being rich and another poor, punishment proper for the former may be too heavy for the latter'.¹²⁴ The concern is that an award of exemplary damages could unduly punish the innocent joint tortfeasor, which is similar to concerns regarding vicarious punishment of an innocent employer.

121. Scenario similar to *R v Tabassum* [2000] 2 Cr App R 328 (CA).

122. *Broome* (n10).

123. *ibid* [1228].

124. *ibid* [1090].

In *Broome*, the House of Lords mitigated the potential for unfairness by holding that ‘awards of punitive damages in respect of joint torts should reflect only the lowest figure for which any of them can be held liable’;¹²⁵ Lord Hailsham’s ‘highest common factor’ rule.¹²⁶ Thus, ‘if any one of the defendants does not deserve punishment or if the compensatory damages are in themselves sufficient punishment for any of the defendants, then they [the jury] must not make any addition to the compensatory damages.’¹²⁷ To allow otherwise would be to ‘abandon all pretence of justice’.¹²⁸

In the context of vicarious liability, the highest common factor rule appears to be directly applicable where the tortfeasor employee and employer are joined together as defendants. It would seem to follow that ‘if the conduct of any of them, including the employer, does not merit punishment, an exemplary damages award ought, in principle not to be made.’¹²⁹ The Law Commission has argued, however, that joint-tortfeasors and employers can be fairly distinguished, as employers have powers to discipline and deter employees that joint tortfeasors will often lack amongst themselves.¹³⁰ This view was taken prior to the expansion in *Lister*, and whether this distinction can be justified in the *Lister* Scenarios is open to doubt.

Regardless, in *Rowlands*, Moore-Bick LJ noted that a claimant could bring an action directly against the employer, without joining the employee, on the basis of his vicarious liability for the tortfeasor employee. This ‘selective’ approach ensures that the highest common factor rule is not engaged,¹³¹ paving the way for vicarious punishment.¹³² Interestingly, Robert Stevens has used the availability of vicarious punishment to argue that an employee’s actions, rather than the employee’s liability, are attributed to the employer in vicarious liability cases.¹³³

To conclude, innocent joint-tortfeasors are protected from exemplary damages by the highest common factor rule, whilst innocent employers are

125. *ibid* [1064].

126. *ibid* [1063].

127. *ibid* [1090].

128. *ibid* [1089].

129. *Kuddus* (n2) [161] (Lord Scott).

130. Law Com (n17).

131. *Thompson* (n40) (Lord Woolf): Where exemplary damages against Chief of Police under s 88 Police Act 1996 it ‘appears to us wholly inappropriate to take into account the means of the individual officers except where the action is brought against the individual tortfeasor’.

132. *Rowlands* (n3).

133. Robert Stevens, ‘Vicarious liability or vicarious action?’ (2007) 123 LQR 30 [33].

not. The validity of this distinction effectively rests on the issue of whether vicarious punishment furthers the punitive aims of exemplary damages, which is considered in Part 4.4. If these aims are not furthered, it follows that vicarious punishment should be abolished to preserve a 'pretence of justice'.¹³⁴

4.4 VICARIOUS PUNISHMENT: FURTHERING THE PUNITIVE AIMS?

In *Kuddus*, Lord Scott argued 'that, silently and without any proper or principled justification for it, a system of vicarious punishment of employers for the misfeasance of their employees has crept into our civil law'.¹³⁵ This section considers whether a legitimate justification has been made out for vicarious punishment.

Vicarious punishment is not justified by legal principle; it 'seems wrong in principle to punish someone other than the wrongdoer'.¹³⁶ Vicarious punishment is also not required to ensure victim compensation, as the employer is already vicariously liable to the claimant for compensatory awards in situations where vicarious punishment is available.

Nevertheless, in *Rowlands*, Moore-Bick LJ felt that vicarious punishment was justified on policy grounds;¹³⁷ a view shared by the Law Commission, who recommended the availability of vicarious punishment in 1997, prior to the decision in *Lister*.¹³⁸ These policy reasons are centred on the claim that vicarious punishment can 'offer a wider, if indirect, method for pursuing the aims of punitive damages'¹³⁹. As seen in Part 2, the two punitive aims of exemplary damages are: (i) punishing the tortfeasor; and (ii) deterring the tortfeasor and others from committing such acts in the future by promoting respect for the law. This section considers whether these, and other possible justifications, are achieved by vicarious punishment.

4.4.1 PUNISHING THE TORTFEASOR

Vicarious punishment does not punish the tortfeasor; indeed, the employer's vicarious liability allows the tortfeasor to escape direct

134. *Broome* (n10) [1089].

135. *Kuddus* (n2) [136].

136. PS Atiyah, *The Damages Lottery* (Hart, 1997) 175.

137. *Rowlands* (n3).

138. *Lister* (n5).

139. Law Com (n17).

punishment. Whilst acknowledging this criticism,¹⁴⁰ the Law Commission argued that ‘vicarious punishment’ results in the indirect punishment of employees by encouraging employer’s to take disciplinary action, which ‘may be a more severe form of sanction for wrongdoing by employees than a punitive damages award could directly provide.’¹⁴¹

Disciplinary measures are undoubtedly powerful, but it seems unrealistic to suggest that employers would only be motivated to use them by the threat of vicarious punishment. It is submitted that in vicarious punishment situations the outrageous behaviour of the employee is often sufficient to motivate employers to carry out disciplinary action. For example, in *Makanjuola*, the offending Police Officer had been dismissed long before the case reached court.¹⁴² Employer’s can also already be said to have a strong source of motivation for taking disciplinary action: their vicarious liability for awards of basic and aggravated damages.

To conclude, vicarious punishment does not directly or indirectly punish the tortfeasor. Rather, the innocent employer is punished, whilst the tortfeasor employee is effectively let ‘off the hook’.

4.4.2 DETERRING THE TORTFEASOR AND OTHERS

The Law Commission has argued that vicarious punishment would help to deter future conduct by providing employers with an ‘incentive to control and educate their workforces’, through the use of wrong-preventing educative processes. In the seminal work *Vicarious Liability in the Law of Torts*, Atiyah posited a similar view: ‘it may well be that the deterrence would be more effective if aimed against the employer rather the servant.’¹⁴³

In contrast, Lord Scott declared as ‘fanciful’ the idea that vicarious punishment could operate as a deterrent,¹⁴⁴ arguing that it is difficult to see how an ‘award of exemplary damages adds anything at all to the deterrent effect of the trial judge’s findings of fact in favour of the injured person and his condemnation of the conduct in question.’ This is particularly so in

140. Law Com (n17) p.159 & 161.

141. Law Com (n17).

142. *Makanjuola* (n48).

143. P.S. Atiyah, *Vicarious Liability in the Law of Torts* (1967, Butterworths).

144. (n2) [108] cf Lord Hutton: deterrent effect ‘not fanciful’ in *Kuddus* (n2) [79].

situations where the award is 'going to be met out of public funds'.¹⁴⁵ Indeed, in *The Damages Lottery*, Atiyah reverses his view on deterrence, noting that vicarious punishment 'serves no useful purpose'.¹⁴⁶

In the *Salmond* Scenarios, the arguments are finely weighted. As Edelman notes, the key 'is to strike a balance between a concern for sufficient deterrence and a concern for the liberty of the individual'.¹⁴⁷ On balance, this dissertation accepts the Law Commissions view of deterrence in the *Salmond* Scenarios. For the reasons expounded in Part 3.2.2, the relatively close nexus between the tortious act of the employee and the duties for which the employee was employed to carry out makes it reasonable to suggest that employers could introduce safeguards to limit tortious conduct. Thus an award of exemplary damages where a police officer had used unnecessary force whilst undertaking a routine act would, as Lord Hutton has suggested in *Kuddus*, 'serve to deter such actions in future as such awards will bring home to officers in command of individual units that discipline must be maintained at all times'.¹⁴⁸ This view cannot be conclusive, however, as it is not possible to measure the deterrent effect without an empirical study, as suggested by Professor Street.¹⁴⁹ Nevertheless, in contrast with Lord Scott's view, it is submitted that an award of exemplary damages in the *Salmond* Scenarios is likely to have a stronger deterrent effect than judicial condemnation and aggravated damages.

In the *Lister* Scenarios, however, the existence of a deterrent effect does indeed seem 'fanciful',¹⁵⁰ both to the employer and others, for the reasons noted in Part 3.2.2. For example, in *Makanjuola*, it is unrealistic to expect the Chief Constable to be able to introduce any kind of sensible measures to deter an off-duty police officer from undertaking a pre-mediated illegal act, which is far outside what he has been authorised to do. Nor would such an act have an effective deterrent effect on others in a similar position of responsibility.

To conclude, it is submitted that vicarious punishment is likely to

145. *Kuddus* (n2) [108]; cf USA: punitive awards cannot be made against the government, as the effect is to 'burden the very tax payers and citizens for whose benefit the wrongdoer was being chastised'. *Newport City v Facts Concerts* (1981); cited in *Law of Damages* (n36) 2.72.

146. P.S. Atiyah, *Damages Lottery* (n136) p.175: 'Punitive damages should be abolished in the cases of vicarious liability – it is contrary to all principle to punish one person for the misdeeds of another, and it serves no useful purpose to do so.'

147. Edelman (n24) p.247.

148. *Kuddus* (n2) (Lord Hutton).

149. *Street* (n7).

150. *Kuddus* (n2) [108].

serve an effective deterrent function in the *Salmond* Scenarios, but not in the *Lister* Scenarios.

4.4.3 OTHER JUSTIFICATIONS?

In *Rowlands*, Moore-Bick LJ suggested that ‘an award of exemplary damages is simply a means of expressing the jury’s “vigorous disapproval” of the conduct of the police force as an institution, as well as of the individual police officers, on the occasion in question.’¹⁵¹ This mirrors Lord Denning’s view that ‘the ultimate justification of any punishment is not that it is a deterrent but that it is the *emphatic denunciation* by the community of a crime.’¹⁵² It might well be argued that vicarious punishment can be justified on this basis.

In *Law, Liberty and Morality*, Hart questions whether emphatic denunciation actually requires punishment: ‘The normal way in which moral condemnation is expressed is by words, and it is not clear, if denunciation is really what is required, why a solemn public statement of disapproval would not be the most “appropriate” or “emphatic” means of expressing this.’¹⁵³ This dissertation takes the view that the judgment itself can achieve the requisite ‘vigorous disapproval’, without the need for vicariously punishing an innocent employer.

4.4.4. CONCLUSION

To conclude, this section has argued that vicarious punishment does not further the punitive aim of punishing the tortfeasor, and cannot be justified by the need to show ‘vigorous disapproval’ as this is achieved by the judgment. It has been accepted, however, that vicarious punishment is justified in the *Salmond* Scenarios, as the judgment itself may not achieve the optimum deterrent effect.

4.5 VICARIOUS PUNISHMENT: COMPARISONS WITH THE CRIMINAL LAW

In this section, a brief comparison will be drawn between the civil and criminal law with respect to two interesting issues: (1) the level of complicity

151. *Rowlands* (n3) [42].

152. Report of the Royal Commission on Capital Punishment s 53, cited in *Hart Law, Liberty and Morality* (Stanford, 1963) p.65.

153. Hart (n152) p.66.

required for secondary liability and; (2) the availability of insurance cover for liability.

4.5.1 COMPLICITY

In *Broome*, Lord Reid stated that the availability of exemplary damages in the civil law “contravenes almost every principle which has been evolved for the protection of offenders”¹⁵⁴. In the context of vicarious punishment, it is interesting to explore the validity of this statement by contrasting the level of complicity required for vicarious punishment with the level required under the Criminal law under s 8 Accessories & Abettors Act 1861.

Under s 8, an employer is effectively only criminally liable for assisting or encouraging an employee where he has *deliberately* refused to exercise his powers to prevent the employee’s crime.¹⁵⁵ In the civil law, an employer would also be liable in situations where he had encouraged¹⁵⁶ or deliberately refrained from exercising his power to prevent the employee’s tortious act.¹⁵⁷ This liability is appropriate, as the employer’s conduct merits punishment.

Following *Lister* and *Rowlands*, however, civil law liability is not limited to this extent. An employer can also be vicariously punished where an employee undertakes acts which are the complete opposite of what he has been employed to do, in the total absence of the employer’s knowledge: the *Lister* scenarios.

Thus, the level of complicity required at the civil law is far lower than the comparable level in the criminal law. It therefore seems unjust to impose vicarious punishment in the *Lister* scenarios.

4.5.2 INSURANCE

In *Hardy v. Motor Insurers’ Bureau*, the Court of Appeal confirmed that that public policy reasons prevent insurance to cover liability for a criminal act;¹⁵⁸ the intended effects of punishment are largely negated if insurance is available. The same policy reasons would also seemingly exist in the context of exemplary damages.

In *Lancashire CC v Municipal Mutual Insurance Ltd*, however, the Court

154. *Broome* (n10) [1087C-F].

155. *R v Alfred Transport Ltd* [1997] 2 Cr App 326.

156. *Mattis* (n78).

157. *Brooke v Bool* [1928] 2 KB 578.

158. [1964] 2 Q.B. 745; *Gray v Barr* [1971] 2 Q.B. 554.

of Appeal found that exemplary damages were covered by an insurance policy for ‘compensatory’ awards; cover for exemplary damages had to be expressly excluded in the contract.¹⁵⁹ The court recognised that although such insurance ‘must undoubtedly reduce the deterrent and punitive effect of the [exemplary damages] order upon him, it will greatly improve the plaintiff’s prospects of recovering the sum awarded’. Moreover, the Court of Appeal felt that some punitive effect would be felt by the employer, as there ‘may well be limits of liability and deductibles under the policy’ and ‘the insured is likely to have to pay higher premiums in future and [the employer] may well, indeed, have difficulty in obtaining renewal insurance.’¹⁶⁰

In Part 2.2 it was seen that insurance cover played an important role in justifying the imposition of vicarious liability on an employer for compensatory damages. It might thus be argued that the availability of insurance for exemplary damages provides a panacea to the problems of vicarious punishment. The two situations can be clearly distinguished however; victim compensation is a worthy aim which should be supported by the availability of insurance cover, whilst punishing an innocent employer has been shown to have no useful effect. Put simply, the availability of insurance does not change the fact that vicarious punishment serves no desirable purpose, with the exception of deterrence in the *Salmond* scenarios.

4.6 VICARIOUS PUNISHMENT: THE FUTURE? A RETURN TO THE SALMOND TEST

This dissertation has argued that vicarious punishment is unprincipled, and cannot be justified by policy considerations in the *Lister* scenarios. It has been accepted, however, that vicarious punishment would be likely to serve a useful deterrent function in the *Salmond* scenarios. Against this backdrop, it is necessary to consider two possible options for reforming vicarious punishment.

The first option would be to accept Lord Scott’s view that ‘the objection to exemplary damages in vicarious cases seems to me to be fundamental’, and abolish vicarious punishment in its entirety.¹⁶¹ It is essential to note, however, that employers would remain liable where they

159. [1997] Q.B. 897; Loucas ‘Exemplary damages: policy terms’ Int. I.L.R. G131 [1996].

160. *Lancashire* (n159) 909.

161. *Kuddus* (n2) 131.

were exercising direct control over events in *Brooke v Bool* type scenarios,¹⁶² as the employer deserves punishment for his direct involvement in the outrageous act. Indeed, as a strict matter of law, an employer would likely be primarily, rather than vicariously, liable in these scenarios. This approach is not preferred, however, as it ignores the potential deterrent effect in the *Salmond* Scenarios. It would nevertheless be preferable to the current law.

The second preferred option would be to limit the availability of vicarious punishment to the *Salmond* scenario. The simplest method of achieving this would be to re-introduce the *Salmond* test in the limited context of vicarious punishment; an employer would only be vicariously liable for exemplary damages where the act was 'a wrongful and unauthorised mode of doing something authorised by the master [employer]'.¹⁶³

Thus, the employer would be vicariously liable for compensatory damages in both the *Salmond* and *Lister* scenarios under the normal close-connection test, but only vicariously liable for exemplary damages in the *Salmond* scenarios using the *Salmond* test. In the *Lister* scenarios, the employer's liability would be limited to the compensatory award, whilst the tortfeasor would be liable for the exemplary damages. This would appear to achieve the underlying policy aims of both vicarious liability and exemplary damages: victim compensation and direct punishment of the tortfeasor, whilst striking a fair balance between the burden placed on the employer and the rights of the claimant.¹⁶³

Unfortunately, *Heydon's* case only allows a single award to be made out in favour of the claimant.¹⁶⁴ This problem could potentially be circumvented, however, if a capping method similar to that developed in the libel case of *Veliu v Masrekaj* was utilised.¹⁶⁵ This method would 'cap' the employer's liability to the size of the compensatory award, whilst holding the tortfeasor liable for the total sum of compensatory and exemplary damages. The resources of the employee would be relevant for calculating the size of the exemplary damages award, rather than the employer. Such an approach should be accompanied by the imposition of strict guidelines for the quantification of exemplary damages; the approach seen in *Thompson*

162. *Brooke* (n157).

163. The employer could obtain exemplary damages insurance if he wished (See Part 3.5.2).

164. *Heydon's Case* (1612) 11 Co.Rep. 5a; cf *Broome* (n10) [1090]: support for separate punitive award against tortfeasors, but fears impractical.

165. [2006] EWHC 1710 (QB); For overview of tortious contribution and Proportionate Liabilities, see Mitchell *The Law of Contribution and Reimbursement* (2003, OUP) p.160-164, 170-173.

regarding the quantification of police awards should be expanded.¹⁶⁶

5. CONCLUSION

The cumulative effect of *Lister* and *Rowlands* has dramatically expanded the scope for vicarious punishment.¹⁶⁷ This expansion has placed an unfair burden on innocent employers in the *Lister* scenarios, which cannot be justified by principle or policy. This dissertation has argued that vicarious punishment 'should be rejected' in the *Lister* scenarios.¹⁶⁸ It has been accepted, however, that vicarious punishment is likely to have a legitimate deterrent effect in the *Salmond* scenarios. The legal reform envisaged in the second option of Part 4.6 would strike an appropriate compromise between employers and claimants.

166. *Thompson* (n40) [514-518]; '£50,000 is to be the absolute maximum'.

167. *Lister* (n5); *Rowlands* (n3).

168. *Kuddus* (n2) [137] (Lord Scott).