

# זכויות האדם ביחסים הבינלאומיים

מקרה

עורכת  
אללה קרן



### **תנאי שימוש בקבץ הדיגיטלי:**

1. הקבץ הוא לשימוש **האישי בלבד**. פרטיים מזהים של מוטבעים בקבץ נלווים ובצורה סמייה.
2. השימוש בקבץ הוא אך ורק למטרות לימוד, עיון ומחקר אישי.
3. העתקה או שימוש בתכנים נבחרים מותרת בהיקף העומד בכלל השימוש ההוגן, המפורטים בסעיף 19 לחוק זכויות יוצרים 2007. במקרה של שימוש כאמור חלה חובה לציין את מקור הפרסום.
4. הנר רשאי להדפיס דפים מחומר הלימוד לצורכי לימוד, מחקר ועיון אישיים. אין להפיץ או למכור תדיםים כלשהם מתוך חומר הלימוד.

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מקרה

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10535

מהדורה פנימית מעודכנת  
לא להפצה ולא למכירה  
מק"ט 10535-5069

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## **פרק 2**

# **התפתחות רעיון זכויות האדם**

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# The Attack on Human Rights\*

*Michael Ignatieff*

## FROM WITHIN AND WITHOUT

SINCE 1945, human rights language has become a source of power and authority. Inevitably, power invites challenge. Human rights doctrine is now so powerful, but also so unthinkingly imperialist in its claim to universality, that it has exposed itself to serious intellectual attack. These challenges have raised important questions about whether human rights norms deserve the authority they have acquired: whether their claims to universality are justified, or whether they are just another cunning exercise in Western moral imperialism.

The cultural challenge to the universality of human rights arises from three distinct sources—from resurgent Islam, from within the West itself, and from East Asia. Each of these challenges is independent of the others, but taken together, they have raised substantial questions about the cross-cultural validity—and hence the legitimacy—of human rights norms.

The challenge from Islam has been there from the beginning. When the Universal Declaration of Human Rights was being drafted in 1947, the Saudi Arabian delegation raised particular objection to Article 16, relating to free marriage choice, and Article 18, relating to freedom of religion. On the question of marriage, the Saudi delegate to the committee examining the draft of the declaration made

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MICHAEL IGNATIEFF is Director of the Carr Center for Human Rights at the Kennedy School of Government at Harvard University. This essay is adapted from his latest book, *Human Rights as Politics and Idolatry*. Copyright © 2001 by Princeton University Press.

[102]

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\* Ignatieff, Michael, "The Attack on Human Rights", *Foreign Affairs*, Vol. 80, No. 6, November/ December 2001, pp. 102-116.

*The Attack on Human Rights*

an argument that has resonated ever since in Islamic encounters with Western human rights, saying that

the authors of the draft declaration had, for the most part, taken into consideration only the standards recognized by Western civilization and had ignored more ancient civilizations which were past the experimental stage, and the institutions of which, for example, marriage, had proved their wisdom through the centuries. It was not for the Committee to proclaim the superiority of one civilization over all others or to establish uniform standards for all the countries of the world.

This was a defense of both the Islamic faith and patriarchal authority. The Saudi delegate in effect argued that the exchange and control of women is the very *raison d'être* of traditional cultures, and that the restriction of female choice in marriage is central to the maintenance of patriarchal property relations. On the basis of these objections to Articles 16 and 18, the Saudi delegation refused to ratify the declaration.

There have been recurrent attempts, including Islamic declarations of human rights, to reconcile Islamic and Western traditions by putting more emphasis on family duty and religious devotion and by drawing on distinctively Islamic traditions of religious and ethnic tolerance. But these attempts at fusion between the Islamic world and the West have never been entirely successful: agreement by the parties actually trades away what is vital to each side. The resulting consensus is bland and unconvincing.

Since the 1970s the relation of Islam to human rights has grown more hostile. When the Islamic Revolution in Iran rose up against the tyrannical modernization imposed by the shah, Islamic figures began to question the universal writ of Western human rights norms. They have pointed out that the Western separation of church and state, of secular and religious authority, is alien to the jurisprudence and political thought of the Islamic tradition. And they are correct. The freedoms articulated in the Universal Declaration of Human Rights make no sense within the theocratic bias of Islamic political thought. The right to marry and establish a family, to freely choose one's partner, is a direct challenge to the authorities in Islamic society that enforce the family choice of spouse, polygamy, and other restrictions on women's freedom. In Islamic eyes, universalizing rights discourse

*Michael Ignatieff*

implies a sovereign and discrete individual, which is blasphemous from the perspective of the Koran.

In responding to this challenge, the West has made the mistake of assuming that fundamentalism and Islam are synonymous. But in fact Islam speaks in many voices, some more anti-Western or theocratic than others. National contexts may be more important in defining local Islamic reactions to Western values than are broad theological principles in the religion as a whole. Where Islamic societies have managed to modernize, create a middle class, and enter the global economy—Egypt and Tunisia being examples—a constituency in favor of basic human rights can emerge. Egypt, for instance, is now in the process of passing legislation to give women the right to divorce, and although dialogue with Egypt's religious authorities has been difficult, women's rights will be substantially enhanced by the new legislation. In Algeria, a secular human rights culture is more embattled. The governing elite, which rode to power after a bloody anticolonial revolution failed to modernize the country, faces an opposition, led by Islamic militants, that has taken an anti-Western, anti-human rights stance. And in Afghanistan, where the state itself has collapsed and foreign arms transfers have aggravated the nation's decline, the Taliban explicitly rejects all Western human rights standards. In these instances, the critical variant is not Islam itself but the fateful course of Western policy and economic globalization.

A second challenge to the universality of human rights comes from within the West itself. For the last 20 years, an influential current in Western political opinion has been maintaining, in the words of the radical scholars Adamantia Pollis and Peter Schwab, that human rights are a "Western construct of limited applicability," a twentieth-century fiction dependent on the rights traditions of the United States, the United Kingdom, and France and therefore inapplicable in cultures that do not share this historical matrix of liberal individualism.

This current of thought has complicated intellectual origins: the Marxist critique of the rights of man, the anthropological critique of the arrogance of late-nineteenth-century bourgeois imperialism, and the postmodernist critique of the universalizing pretensions of Enlightenment thought. All of these tendencies have come together in a critique of Western intellectual hegemony as expressed in the

### *The Attack on Human Rights*

language of human rights. Human rights are seen as an exercise in the cunning of Western reason: no longer able to dominate the world through direct imperial rule, the West now masks its own will to power in the impartial, universalizing language of human rights and seeks to impose its own narrow agenda on a plethora of world cultures that do not actually share the West's conception of individuality, self-hood, agency, or freedom. This postmodernist relativism began as an intellectual fashion on Western university campuses, but it has seeped slowly into Western human rights practice, causing all activists to pause and consider the intellectual warrant for the universality they once took for granted.

This challenge within has been amplified by a challenge from without: the critique of Western human rights standards by some political leaders in the rising economies of East Asia. Whereas the Islamic challenge to human rights can be explained in part by the failure of Islamic societies to benefit from the global economy, the Asian challenge is a consequence of the region's staggering economic success. Because of Malaysia's robust economic growth, for example, its leaders feel confident enough to reject Western ideas of democracy and individual rights in favor of an Asian route to development and prosperity—a route that depends on authoritarian government and authoritarian family structures.

The same can be said about Singapore, which successfully synthesized political authoritarianism with market capitalism. Singapore's Senior Minister Lee Kuan Yew has been quoted as saying that Asians have "little doubt that a society with communitarian values where the interests of society take precedence over that of the individual suits them better than the individualism of America." Singaporeans often cite rising divorce and crime rates in the West to illustrate that Western individualism is detrimental to the order necessary for the enjoyment of rights themselves.

An "Asian model" supposedly puts community and family ahead of individual rights and order ahead of democracy and individual freedom. In reality, of course, there is no single Asian model: each of these societies has modernized in different ways, within different political traditions, and with differing degrees of political and market freedom. Yet it has proven useful for Asian authoritarians to argue that they represent a civilizational challenge to the hegemony of Western models.

*Michael Ignatieff*

#### TRADES AND COMPROMISES

LET IT BE CONCEDED at once that these three separate challenges to the universality of human rights discourse—two from without and one from within the Western tradition—have had a productive impact. They have forced human rights activists to question their assumptions, to rethink the history of their commitments, and to realize just how complicated intercultural dialogue on rights questions becomes when all cultures participate as equals.

But at the same time, Western defenders of human rights have traded too much away. In the desire to find common ground with Islamic and Asian positions and to purge their own discourse of the imperial legacies uncovered by the postmodernist critique, Western defenders of human rights norms risk compromising the very universality they ought to be defending. They also risk rewriting their own history.

Many traditions, not just Western ones, were represented at the drafting of the Universal Declaration of Human Rights—for example, the Chinese, Middle Eastern Christian, Marxist, Hindu, Latin American, and Islamic. The members of the drafting committee saw their task not as a simple ratification of Western convictions but as an attempt to delimit a range of moral universals from within their very different religious, political, ethnic, and philosophical backgrounds. This fact helps to explain why the document makes no reference to God in its preamble. The communist delegations would have vetoed any such reference, and the competing religious traditions could not have agreed on words that would make human rights derive from human beings' common existence as God's creatures. Hence the secular ground of the document is not a sign of European cultural domination so much as a pragmatic common denominator designed to make agreement possible across the range of divergent cultural and political viewpoints.

It remains true, of course, that Western inspirations—and Western drafters—played the predominant role in the drafting of the document. Even so, the drafters' mood in 1947 was anything but triumphalist. They were aware, first of all, that the age of colonial emancipation was at hand: Indian independence was proclaimed while the language of the declaration was being finalized. Although the declaration does not specifically endorse self-determination,

*The Attack on Human Rights*

its drafters clearly foresaw the coming tide of struggles for national independence. Because it does proclaim the right of people to self-government and freedom of speech and religion, it also concedes the right of colonial peoples to construe moral universals in a language rooted in their own traditions. Whatever failings the drafters of the declaration may be accused of, unexamined Western triumphalism is not one of them. Key drafters such as René Cassin of France and John Humphrey of Canada knew the knell had sounded on two centuries of Western colonialism.

They also knew that the declaration was not so much a proclamation of the superiority of European civilization as an attempt to salvage the remains of its Enlightenment heritage from the barbarism of a world war just concluded. The declaration was written in full awareness of Auschwitz and dawning awareness of Kolyma. A consciousness of European savagery is built into the very language of the declaration's preamble: "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind ..."

The declaration may still be a child of the Enlightenment, but it was written when faith in the Enlightenment faced its deepest crisis. In this sense, human rights norms are not so much a declaration of the superiority of European civilization as a warning by Europeans that the rest of the world should not reproduce their mistakes. The chief of these was the idolatry of the nation-state, causing individuals to forget the higher law commanding them to disobey unjust orders. The abandonment of this moral heritage of natural law and the surrender of individualism to collectivism, the drafters believed, led to the catastrophes of Nazi and Stalinist oppression. Unless the disastrous heritage of European collectivism is kept in mind as the framing experience in the drafting of the declaration, its individualism will appear to be nothing more than the ratification of Western bourgeois capitalist prejudice. In fact, it was much more: a studied attempt to reinvent the European natural law tradition in order to safeguard individual agency against the totalitarian state.

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*Michael Ignatieff*

#### THE POWER OF ONE

IT REMAINS TRUE, therefore, that the core of the declaration is the moral individualism for which it is so reproached by non-Western societies. It is this individualism for which Western activists have become most apologetic, believing that it should be tempered by greater emphasis on social duties and responsibilities to the community. Human rights, it is argued, can recover universal appeal only if they soften their individualistic bias and put greater emphasis on the communitarian parts of the declaration, especially Article 29, which says that “everyone has duties to the community in which alone the free and full development of his personality is possible.” This desire to water down the individualism of rights discourse is driven by a desire both to make human rights more palatable to less individualistic cultures in the non-Western world and also to respond to disquiet among Western communitarians at the supposedly corrosive impact of individualistic values on Western social cohesion.

But this tack mistakes what rights actually are and misunderstands why they have proven attractive to millions of people raised in non-Western traditions. Rights are meaningful only if they confer entitlements and immunities on individuals; they are worth having only if they can be enforced against institutions such as the family, the state, and the church. This remains true even when the rights in question are collective or group rights. Some of these group rights—such as the right to speak your own language or practice your own religion—are essential preconditions for the exercise of individual rights. The right to speak a language of your choice will not mean very much if the language has died out. For this reason, group rights are needed to protect individual rights. But the ultimate purpose and justification of group rights is not the protection of the group as such but the protection of the individuals who compose it. Group rights to language, for example, must not be used to prevent an individual from learning a second language. Group rights to practice religion should not cancel the right of individuals to leave a religious community if they choose.

Rights are inescapably political because they tacitly imply a conflict between a rights holder and a rights “withholder,” some authority against

### *The Attack on Human Rights*

which the rights holder can make justified claims. To confuse rights with aspirations, and rights conventions with syncretic syntheses of world values, is to wish away the conflicts that define the very content of rights. Individuals and groups will always be in conflict, and rights exist to protect individuals. Rights language cannot be parsed or translated into a nonindividualistic, communitarian framework; it presumes moral individualism and is nonsensical outside that assumption.

Moreover, it is precisely this individualism that renders human rights attractive to non-Western peoples and explains why the fight for those rights has become a global movement. The language of human rights is the only universally available moral vernacular that validates the claims of women and children against the oppression they experience in patriarchal and tribal societies; it is the only vernacular that enables dependent persons to perceive themselves as moral agents and to act against practices—arranged marriages, purdah, civic disenfranchisement, genital mutilation, domestic slavery, and so on—that are ratified by the weight and authority of their cultures. These agents seek out human rights protection precisely because it legitimizes their protests against oppression.

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Rights doctrines challenge powerful religions, tribes, and authoritarian states.

If this is so, then it is necessary to rethink what it means when one says that rights are universal. Rights doctrines arouse powerful opposition because they challenge powerful religions, family structures, authoritarian states, and tribes. It would be a hopeless task to attempt to persuade these holders of power of the universal validity of rights doctrines, since if these doctrines prevailed, their exercise of authority would necessarily be abridged and constrained. Thus universality cannot imply universal assent, since in a world of unequal power, the only propositions that the powerful and powerless would agree on would be entirely toothless and anodyne. Rights are universal because they define the universal interests of the powerless—namely, that power be exercised over them in ways that respect their autonomy as agents. In this sense, human rights represent a revolutionary creed, since they make a radical demand of all human groups that they serve the interests of the individuals who compose them. This, then, implies

*Michael Ignatieff*

that human groups should be, insofar as possible, consensual, or at least that they should respect an individual's right to exit when the constraints of the group become unbearable.

The idea that groups should respect an individual's right of exit is not easy to reconcile with what groups actually are. Most human groups—the family, for example—are blood groups, based on inherited kinship or ethnic ties. People do not choose to be born into them and do not leave them easily, since these collectivities provide the frame of meaning within which individual life makes sense. This is as true in modern secular societies as it is in religious or traditional ones. Group rights doctrines exist to safeguard the collective rights—for example, to language—that make individual agency meaningful and valuable. But individual and group interests inevitably conflict. Human rights exist to adjudicate these conflicts, to define the irreducible minimum beyond which group and collective claims must not go in constraining the lives of individuals.

#### CULTURE SHOCK

ADOPTING THE VALUES of individual agency does not necessarily entail adopting Western ways of life. Believing in your right not to be tortured or abused need not mean adopting Western dress, speaking Western languages, or approving of the Western lifestyle. To seek human rights protection is not to change your civilization; it is merely to avail yourself of the protections of what the philosopher Isaiah Berlin called “negative liberty”: to be free from oppression, bondage, and gross physical harm.

Human rights do not, and should not, delegitimize traditional culture as a whole. The women in Kabul who come to human rights agencies seeking protection from the Taliban do not want to cease being Muslim wives and mothers; they want to combine their traditions with education and professional health care provided by a woman. And they hope the agencies will defend them against being beaten and persecuted for claiming such rights.

The legitimacy of such claims is reinforced by the fact that the people who make them are not foreign human rights activists or employees of international organizations but the victims themselves.

*The Attack on Human Rights*

In Pakistan, for example, it is poor rural women who are criticizing the grotesque distortion of Islamic teaching that claims to justify “honor killings”—in which women are burned alive when they disobey their husbands. Human rights have gone global by going local, empowering the powerless, giving voice to the voiceless.

It is simply not the case, as Islamic and Asian critics contend, that human rights force the Western way of life on their societies. For all its individualism, human rights rhetoric does not require adherents to jettison their other cultural attachments.

As the philosopher Jack Donnelly argues, human rights assume “that people probably are best suited, and in any case are entitled, to choose the good life for themselves.” What the declaration does mandate is the right to choose, and specifically the right to exit a group when choice is denied. The global diffusion of rights language would never have occurred had these not been authentically attractive propositions to millions of people, especially women, in theocratic, traditional, or patriarchal societies.

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Human rights should not delegitimize traditional culture.

Critics of this view would argue that it is too “voluntaristic”; it implies that individuals in traditional societies are free to choose the manner of their insertion into the global economy and free to choose which Western values to adopt and which to reject. In reality, these critics argue, people are not free to choose. Economic globalization steamrolls local economies, and moral globalization—human rights—follows behind as the legitimizing ideology of global capitalism. “Given the class interest of the internationalist class carrying out this agenda,” law professor Kenneth Anderson writes, “the claim to universalism is a sham. Universalism is mere globalism and a globalism, moreover, whose key terms are established by capital.”

This idea that human rights represent the moral arm of global capitalism falsifies the insurgent nature of the relationship between human rights activism and the global corporation. The activists of nongovernmental organizations (NGOs) who devote their lives to challenging the labor practices of global giants such as Nike and Royal Dutch/Shell would be astonished to discover that their human rights agenda has been serving the interests of global capital all along.

*Michael Ignatieff*

Anderson conflates globalism and internationalism and mixes up two classes, the free market globalists and the human rights internationalists, whose interests and values are in conflict.

Although free markets do encourage the emergence of assertively self-interested individuals, these individuals seek human rights in order to protect themselves from the indignities and indecencies of the market. Moreover, the dignity such individuals seek to protect is not necessarily derived from Western models. Anderson writes as if human rights were always imposed from the top down by an international elite bent on “saving the world.” He ignores the extent to which the demand for human rights comes from the bottom up.

Indeed, what makes human rights demands legitimate is that they emanate from the bottom, from the powerless. Instead of apologizing for the individualism of Western human rights standards, activists need to attend to another problem, which is how to create conditions in which individuals on the bottom are free to avail themselves of such rights. Increasing the freedom of people to exercise their rights depends on close cultural understanding of the frameworks that often constrain choice.

The much debated issue of female circumcision illustrates this point. What may appear as mutilation in Western eyes is, in some cultures, simply the price of tribal and family belonging for women. Accordingly, if they fail to submit to the ritual, they lose their place in that world. Choosing to exercise their rights, therefore, may result in social ostracism, leaving them no option but to leave their tribe and make for the city. Human rights advocates should be aware of what it really means for a woman to abandon traditional practices under such circumstances. And activists have an equal duty to inform women of the medical costs and consequences of these practices and to seek, as a first step, to make them less dangerous for those who choose to undergo them.

As for the final decision, it is for women themselves to decide how to adjudicate between tribal and Western wisdom. The criteria of informed consent that regulate medical patients’ choices in Western societies are equally applicable in non-Western settings, and human rights activists must respect the autonomy and dignity of agents. An activist’s proper role is not to make the choices for the women in question but to enlarge those women’s knowledge of

### *The Attack on Human Rights*

what the choices entail. In traditional societies, harmful practices can be abandoned only when the whole community decides to do so. Otherwise, individuals who decide on their own face ostracism and worse. Consent in these cases means collective or group consent. Yet even group consent must be built on consultation with the individuals involved.

Sensitivity to the real constraints that limit individual freedom in different cultures is not the same thing as deferring to these cultures. It does not mean abandoning universality. It simply means facing up to a demanding intercultural dialogue in which all parties come to the table under common expectations of being treated as moral equals. Traditional society is oppressive for individuals within it, not because it fails to afford them a Western way of life, but because it does not accord them a right to speak and be heard. Western activists have no right to overturn traditional cultural practice, provided that such practice continues to receive the assent of its members. Human rights are universal not as a vernacular of cultural prescription but as a language of moral empowerment. Their role is not in defining the content of culture but in trying to enfranchise all agents so that they can freely shape that content.

The best way to face the cultural challenges to human rights coming from Asia, Islam, and Western postmodernism is to admit their truth: rights discourse is individualistic. But that is precisely why it has proven an effective remedy against tyranny, and why it has proven attractive to people from very different cultures. The other advantage of liberal individualism is that it is a distinctly “thin” theory of the human good: it defines and proscribes the “negative”—that is, those restraints and injustices that make any human life, however conceived, impossible; at the same time, it does not prescribe the “positive” range of good lives that human beings can lead. The doctrine of human rights is morally universal because it says that all human beings need certain specific freedoms “from”; it does not go on to define what their freedom “to” should comprise.<sup>1</sup> In

<sup>1</sup> These distinctions—negative liberty, positive liberty, freedom from, freedom to—are suggested by Isaiah Berlin, “Two Concepts of Liberty,” in *The Proper Study of Mankind*, ed. Henry Hardy (London: Chatto and Windus, 1997), pp. 191–243; on “thin” theories of the good, see John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1970).

*Michael Ignatieff*

this sense, it is a less prescriptive universalism than the world's religions: it articulates standards of human decency without violating rights of cultural autonomy.

#### THE WEST AGAINST ITSELF

IN THE MORAL DISPUTE between the “West” and the “rest,” both sides make the mistake of assuming that the other speaks with one voice. When the non-Western world looks at human rights, it assumes—rightly—that the discourse originates in a matrix of historical traditions shared by all the major Western countries. But these Western nations interpret the core principles of their own rights tradition very differently. A common tradition does not necessarily result in common points of view on rights. All of the formative rights cultures of the West—the English, the French, and the American—give a different account of such issues as privacy, free speech, incitement, the right to bear arms, and the right to life.

In the 50 years since the promulgation of the Universal Declaration of Human Rights, these disagreements have become more salient. Indeed, the moral unanimity of the West—always a myth more persuasive from the outside than from the inside—is breaking up and revealing its unalterable heterogeneity. American rights discourse once belonged to the common European natural law tradition and to British common law. But this awareness of a common anchorage now competes with a growing sense of American moral and legal exceptionalism.

American human rights policy in the last 20 years has been increasingly distinctive and paradoxical: it is the product of a nation with a great national rights tradition that leads the world in denouncing the human rights violations of others but refuses to ratify key international rights conventions itself. The most important resistance to the domestic application of international rights norms comes not from rogue states outside the Western tradition or from Islamic and Asian societies. It comes, in fact, from within the heart of the Western rights tradition itself, from a nation that, in linking rights to popular sovereignty, opposes international human rights oversight as an infringement on its democracy. Of all the ironies in the history of human rights since the signing of the Universal Declaration of Human

### *The Attack on Human Rights*

Rights, the one that would most astonish Eleanor Roosevelt is the degree to which her own country is now the odd one out.

In the next 50 years, the moral consensus that sustained the declaration in 1948 will continue to splinter. For all the rhetoric about common values, the distance between the United States and Europe on issues such as abortion and capital punishment may grow, just as the distance between the West and the rest may also increase. There is no reason to believe that economic globalization entails moral globalization. Indeed, there is some reason to think that as economies have unified their business practices, ownership, languages, and networks of communication, a countermovement has developed to safeguard the integrity of national communities, national cultures, religions, and indigenous and religious ways of life.

This is a prophecy not of the end of the human rights movement but of its belated coming of age, its recognition that we live in a world of plural cultures that have a right to equal consideration in the argument about what we can and cannot, should and should not, do to human beings. Indeed, this may be the central historical importance of human rights in the history of human progress: it has abolished the hierarchy of civilizations and cultures. As late as 1945, it was common to think of European civilization as inherently superior to the civilizations it ruled. Today many Europeans continue to believe this, but they know that they have no right to do so. More to the point, many non-Western peoples also took the civilizational superiority of their rulers for granted. They no longer have any reason to continue believing this. One reason for that is the global diffusion of human rights talk—the language that most consistently articulates the moral equality of all the individuals on the face of the earth. But to the degree that it does this, it simultaneously increases the level of conflict over the meaning, application, and legitimacy of rights claims.

Rights language states that all human beings belong at the table in the essential conversation about how we should treat each other. But once this universal right to speak and be heard is granted, there is bound to be tumult. There is bound to be discord. Why? Because the

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Disagreements within the competing Western rights traditions have become more salient over the last 50 years.

*Michael Ignatieff*

European voices that once took it upon themselves to silence the babble with a peremptory ruling no longer take it as their privilege to do so, and those who sit with them at the table no longer grant them the right to do so. All this counts as progress, as a step toward a world imagined for millennia in different cultures and religions: a world of genuine moral equality among human beings. But a world of moral equality is a world of conflict, deliberation, argument, and contention.

We need to stop thinking of human rights as trumps and begin thinking of them as part of a language that creates the basis for deliberation. In this argument, the ground we share may actually be quite limited—not much more than the basic intuition that what is pain and humiliation for you is bound to be pain and humiliation for me. But this is already something. In such a future, shared among equals, rights are not the universal credo of a global society, not a secular religion, but something much more limited and yet just as valuable: the shared vocabulary from which our arguments can begin, and the bare human minimum from which differing ideas of human flourishing can take root. ♦

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## **פרק 3**

# **התפתחות ההגנה על זכויות האדם ביחסים הבינ-לאומיים**

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*Stanley Hoffmann*

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## Reaching for the Most Difficult: Human Rights as a Foreign Policy Goal\*

**A**S A PROBLEM OF POLICY, the promotion of human rights can be envisaged at two different levels. One, with which several essays in this issue are concerned, is that of the domestic political system. The defense of these rights remains above all a matter of internal arrangements. It was through domestic battles between, on one side, individuals and groups determined to obtain legal recognition and effective protection of their claims, and, on the other, a hostile state and other groups resisting such demands, that progress was achieved in Western democracies. This was the case of the civil and political rights that have their roots in eighteenth century liberalism, and of the economic and social rights defined in the nineteenth and twentieth centuries by a variety of intellectual currents, socialist and Christian in particular. But the protection of human rights also became a matter of international relations after the Second World War, when various codes were drafted and the components of an international regime, and of various regional regimes as well, for safeguarding these rights were set up.

In his essay, John Ruggie asks whether the acceptance by most states of the principle that human rights are a legitimate international issue has amounted to a shift in the principles of legitimacy, mechanisms of governance, and social framework of the international community or society. His answer is negative, and I agree with his analysis. My concern here differs from his in three ways. His approach is essentially empirical; mine is primarily normative. He tells us how things are (or what they are not); I present a plea for change toward

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\* Hoffmann, Stanley, "Reaching for the Most Difficult: Human Rights as a Foreign Policy Goal", *Daedalus*, vol. 112, no. 4, Fall 1983, pp. 19-49.

20 *Stanley Hoffmann*

the goals we have not reached, and I make a case for trying to reach them against enormous odds. He focuses on the international milieu; I look at the actors in this milieu and at human rights as a morally and politically necessary subject for the foreign policy of states. He shows the elements of continuity in world affairs—before and after the “reemergence of the individual in international relations”; I try to argue that there is a great deal of discontinuity—not between a world of competing sovereign states and a (still distant) world in which the rights of individuals are recognized by, and protected from, their states, but between the international systems of the past, in which those rights did not enjoy international recognition, and the current international system, in which their official “legitimacy” coexists and conflicts with colossal violations.

## THE PREDICAMENT

The distinction between the traditional Machiavellian ethics of statecraft and a more cosmopolitan ethic is an important one for our discussion.<sup>1</sup> The former is a codification of sacred egoism: the statesman should concern himself only with the common good of his community. The latter asserts that his moral duties do not stop at the borders of his polity. The former, insofar as it sees the wisdom of introducing some order into the jungle of states, nevertheless recognizes only the mutual rights of states: it is an ethics of reciprocity among sovereign entities. The latter includes obligations toward individuals in foreign countries; humanity, not the (partial) society of states, is its constituency.

The promotion of human rights to the agenda of international politics is part of an effort at moving beyond Machiavellian statecraft. The United Nations Declaration on Human Rights, the two UN Covenants, and the various regional instruments reflect a sense of moral obligation after the crimes and horrors of the Second World War. In this area, the creation of a legal network was particularly important. The relations between moral and legal rights and duties are complex. In international affairs, there can be moral obligations despite the silence of the law. The various imperatives recently proclaimed by the American Bishops' pastoral letter<sup>2</sup> concerning the use of nuclear weapons go far beyond the prescriptions and proscriptions of either the UN Charter or the conventions that regulate the

## Human Rights as a Foreign Policy Goal 21

*jus in bello*. The latter do not deal explicitly with nuclear weapons; the former certainly does not rule out a resort to these weapons in retaliation against nuclear or conventional aggression. It often happens that the human conscience, including that of statesmen, is ahead of laws or treaties and customs, and expresses itself, not through legislation, but through unilateral policy decisions or diplomatic understandings.

In the field of human rights, however, legalization is indispensable. It is the prerequisite to the empirical efficacy of moral obligations; it makes it possible for this sense of moral duty to have political effects. If I, as a statesman, sign a treaty in which I accept the legal obligation to respect certain human rights, it means that I acknowledge not only a domestic responsibility, but a “cosmopolitan” one as well: I recognize that you, too, have a right to see to it that I respect these rights. This is a major breakthrough in a world in which previously you were entitled only to ensure that I treated fairly your nationals settled in or visiting my country. If *you* sign such a treaty and don’t carry out your legal obligations to your people, I can, as a cosignatory, raise the issue of your neglect or violation. Thus the significance of a legal code here is double. First, the treatment of individuals (including nationals) is now a legitimate concern of the members of the international society; the notion of sovereignty, the very cornerstone of the “Westphalian order”—which essentially reduced international affairs to arrangements and conflicts about and among states, and left almost everything happening *within* a sovereign state to its jurisdiction—has been breached. Second, international law now grants not merely states, but individuals as well, a set of rights: they are recognized as being both the citizens of their states and entitled to certain rights, whatever their states’ practices.

Without such a legal code, the so-called conscience of mankind, often aroused in the past by mass atrocities in distant lands, would lack a handle. This does not mean that there is necessarily perfect correspondence between moral and legal obligations. A statesman, or indeed a citizen, of a country that has signed any of the legal codes may well believe that the legal provisions exceed what can be morally required of his state (*a fortiori*, of a foreign state). For instance, can one morally require the government of a poor country to provide for the “periodic holidays with pay, as well as remuneration for public holidays” prescribed by Article 7d of the Covenant on Economic,

## 22 Stanley Hoffmann

Social and Cultural Rights? Conversely, one may believe that one's moral duty exceeds the limits of a somewhat niggardly code. Tom Farer points out in his essay that the American Convention on Human Rights has only one, very broad and vague, article on "progressive development" of economic, social, and cultural rights. But whereas, in the realm of distributive justice, a rich state can carry out a moral duty to the poor abroad by embarking on a policy of economic assistance, or by opening its borders to the products of poor nations, and can even try to see to it, by various strictures, that the aid it grants does indeed reach the destitute in that country, in the realm of human rights, the barrier can only be crossed if the state that wants to help foreign victims of violations can use an international legal document as a crutch or a club or a ladder.

Nevertheless, the revolutionary significance of the international legal network has failed to transform either the basic realities of international politics or the conditions in most countries. This is so because of a triple predicament: the legal framework is shaky; the distance between the normative order and the political one is huge; and the opportunities for internal improvement of the latter are limited.

The network *is* a very weak one, and it suffers from many characteristic flaws of contemporary international law. Several of the rights that are to be protected are defined so vaguely as to make violations easy. We are all familiar with the difficulties of self-determination: *What* is the "self" that is entitled to it? *Who* determines either what it is or under what conditions self-determination will occur? Does it necessarily mean statehood?—and so on. And yet, both UN Covenants merely recognize a "people's right to self-determination." Similarly, the Covenant on Civil and Political Rights guarantees "equal protection of the law" and outlaws discrimination: these are anything but self-evident notions.

Also, and more important, many of the rights are granted in a way that makes excessive restriction or even elimination legally possible. Some rights are only provided within the limits set by national legislation; others are saddled with exceptions through which whole police forces may pass (there is a right to freedom of expression, but propaganda for war, or advocacy of national, racial, or religious hatred that "constitutes incitement to discrimination, hostility or war"

## Human Rights as a Foreign Policy Goal 23

shall be prohibited by law). Various rights can be restricted for reasons of national security, public safety, or public order. The Helsinki agreements acknowledge the principle of noninterference in internal or external affairs of the signatories.

Above all, there are all the weaknesses of the mechanisms of enforcement that John Ruggie reviews: the economic and social Covenant, given the nature of the rights it recognizes, is largely left to the signatories for implementation; the procedure of complaints remains predominantly in the hands of states, not individuals; the various international bodies lack powers of enforcement, and so on.

The fact that only fourteen states have adhered to the interstate complaints procedure set up by Article 41 of the Covenant on Civil and Political Rights points to a second predicament: the abyss between the legal network and the states' political practices. "At least there is now an international law to be violated."<sup>3</sup> But the scope of the violations tells us much more than the obvious fact that we still live—in terms of power—in a world of states that defend their sovereignty, use human rights primarily as a tool of warfare against each other, and severely restrict the capacity of individuals to escape from their national cage or to call in relief from outside.

Tension between the international normative and political orders is neither surprising nor new. There is always tension between the legal codes and the moral rules that prescribe how people *ought* to behave and the way they *actually* do. This gap usually reflects the subjects' fallibility. Sometimes it results from their desire to change the norms if these have become obsolete or harmful, or if they no longer correspond to the prevailing new sense of what is right. The tension also serves as a goad to orderly progress, when the rules embody new ways of arranging social affairs or recognize new claims and responsibilities that meet the resistance of entrenched interests. But when the gap between moral and legal norms and practice is so great that it can be described as an abyss, it has then become pathological. It happens in two typical cases: when power is lawless, and when there is anomie. In the first instance, state power recognizes no limits; it installs the rule of arbitrariness, either in disregard of existing law or behind the cloak of a pseudo-law that provides it with all the authorizations it needs, and removes from its victims all the protections they need—something like the famous, interminable Article

24 *Stanley Hoffmann*

58 of the Soviet criminal code under Stalin. It can also be the case of a hegemonic power mighty enough to disregard moral and legal restraints in its conduct of foreign affairs, and to deal with weaker states the way Athens treated Mytilene and Melos during the Peloponnesian War. The second instance—*anomie*—is that of a civil war in which, as Thucydides remarked, “words change their ordinary meaning,” and moderation becomes “the cloak of unmanliness . . . [and] frantic violence the attribute of manliness.”<sup>4</sup> It is also that of the present international system.

How, the reader might ask, does it differ from systems of the past? After all, we have had no general war for almost forty years; the actors—five of whom have nuclear weapons, many of whom are new, poor, inexperienced, and unsteady—have managed, on the whole, to keep their conflicts limited, and to find in the fear of physical destruction and the intimacies of economic interdependence both a basis of cooperation (however grudging or competitive) and a reason for developing various kinds of international law. Is the gap between the latter and the behavior of states any wider today? My answer is “yes,” partly because international law itself, in reaction to the excesses of their behavior—as a magical reassurance against the evils of practice (or the practice of evil)—has become so much more demanding and so much less accommodating of national sovereignty than it had been in the nineteenth century. This is particularly true in the two areas that are at the core of sovereignty. One is the right to wage war, intact in nineteenth century law, restricted after the bloodbath of the First World War, and severely curbed in the UN Charter, which recognizes its legitimacy only in self-defense or in collective resistance to aggression.<sup>5</sup> The other is the state’s right to treat its subjects as it sees fit.

In both these domains, the gap between the new international law and the practice of states is enormous. In the realm of force, at least, the abusive resort to the excuse of self-defense, the imaginative ways of disguising or diluting outright aggression, or of using the ambiguities that surround such concepts as “territorial integrity” and “political independence” when applied to states with unsettled borders and with shaky or puppet regimes—in other words, all the attempts to get around the ban on the use or threat of force—have not yet led to a global war or even to an unlimited war in the Middle East. The leaky dam of the Charter is buttressed by the fear of a nuclear hol-

## Human Rights as a Foreign Policy Goal 25

caust. But in the realm of human rights, there is no comparable, if bitter, consolation. Here, the differences with the past certainly do not lie in the novelty of human rights violations. In the nineteenth century, the massacres of Armenians in the Ottoman Empire may have provoked high emotions, but the behavior of colonial powers (or colonial sovereigns like Belgium's King Leopold) in Africa or Asia was often brutal and racist (indeed, the protection of the Indians of America colonized by the Spaniards had already been Vitoria's concern in the sixteenth century). Many of the "civilized" countries of the nineteenth century had repressive governments. The differences lie elsewhere, not merely in the absence of an international network of recognized human rights before 1945, but also in the end of the colonial era (which means that standards of humanity—i.e., of public morality—that even Liberals often tended to reserve to the governments of "civilized" peoples are now assumed to be valid for the regimes of all mankind); and in the sad fact that, unlike the trend of *aspirations*, which went up, the trend of *expectations* is going down. In the nineteenth century, the way in which the Turkish sovereign treated his subjects and the pogroms that occurred in Tsarist Russia were seen not only as deplorable, but as a mark of decadence as well. In the present international system, comparable behavior is often considered morally and legally reprehensible, but empirically normal (we all know the phrase: moderately repressive). In the nineteenth century, slavery was being abolished, and revolutionary movements demanding national self-determination and the rights associated with self-government were strong, won many victories, and expected to prevail over the forces of prejudice, absolutism, and authoritarianism. Today, it has become clear that self-determination does not necessarily breed either satisfaction or self-government; and the number of countries that can be called democratic, even if one adopts a rather modest or Schumpeterian definition of democracy (one that focuses on the free competition of political candidates for election), is extremely small. The number of countries that respect all the rights defined in the UN Covenants is smaller still, and the prospects for improvements are dim. We may now aspire to a kind of legal and moral perfectionism; but the expectation of progress is gone.

Thus the incorporation of human rights into the international moral and legal order coincides with the dismal reality of human

## 26 Stanley Hoffmann

rights violations, just as, after 1918, the fall of the legitimacy of war from the international normative order, and the advent of collective security principles in it, coincided with the age of aggression and appeasement. When the tension becomes an abyss, what disappears is the pressure that the normative order usually puts on the behavior that this order excommunicates, behavior that may previously have been either not recognized as bad by that order or deemed perfectible only by a different normative order altogether. (In the case of human rights, insofar as they were acknowledged at all, it used to be only in liberal domestic systems.) And the normative order itself, when practice contradicts it blatantly and repeatedly, usually ends up collapsing—which means that the law ceases to be taken seriously. A violation is no longer perceived as such, nor are the provisions of the law any longer seen as conferring genuine rights and duties: we are merely in the realm of rhetoric, not of norms. The commands that the law expresses are recognized no longer as moral imperatives, but as hypocritical disguises or superstitious incantations aimed at keeping the evil eye away. For any normative order to deserve being called by that name, it must partake both of the realm of “oughts” and of the empirical one: it must be *at least in part* a set of rules of actual behavior; it must not only ask for, but actually inspire, some practice. Otherwise, it withers away.

To be sure, as evidence of that “germ of universal consciousness” mentioned some time ago by Raymond Aron, there is a new official sensitivity to the charge of violating human rights. As Patricia Derian, President Carter’s Assistant Secretary of State for Human Rights, put it, “All countries say that they are great defenders of and believers in human rights. . . . No country really admits it is a human rights violator.”<sup>6</sup> This is the usual tribute of vice to virtue, of immoral or amoral practice to moral obligation. On the other hand, there are structural elements in the present society of states that make massive violations inevitable. Once more—as in the realm of force after 1918—the legalization of concern reflects both a moral revulsion against reality and the desire to exorcise it *faute de mieux*, that is, in the absence of any political possibility of removing the fundamental causes of evil (the “international regime” of collective security put in place by the League, and later by the UN, turned out to be no stronger than the human rights regimes discussed by John Ruggie).<sup>7</sup>

## *Human Rights as a Foreign Policy Goal* 27

These structural elements are of two kinds. One could be called the exacerbation of traditional violations. Three categories stand out. First, tribal or ethnic conflicts within countries have multiplied, in a world in which the quite exceptional legitimacy granted by all states, whatever their ideology, to the principle of self-determination only emboldens groups that feel oppressed by their current masters to seek autonomy, and encourages those masters to get rid of irredentist or unassimilable minorities. Thus we have witnessed, recently, massacres of Tamils by Sinhalese in Sri Lanka, Moslems by Hindus in Assam, Hutus by Tutsis in Burundi, a political conflict with tribal overtones between Mugabe and Nkomo in Zimbabwe, the expulsion of ethnic Chinese from Vietnam, the murderous fragmentation of Lebanon. Such violations are always worse when the ethnic tensions are stirred up by psychopathic rulers such as a Bokassa and an Idi Amin.

A second traditional category consists of the traumas of self-determination itself—of the massive violations that accompany the struggle of nations to achieve or preserve independence, or the clash of intensely nationalist groups that claim the same territory. The litany is familiar: the civil war in Biafra, the massacres leading to the independence of Bangladesh, the bloody, interminable contest between Indonesian militant (and military) nationalism and the independence movement in East Timor, the South African raids into neighboring countries in the battle against Namibian nationalism, the fight of the Eritreans against the Ethiopians and of the Afghans against the Soviet Union, above all, the Palestinian issue and its human rights ramifications—terrorism on one side, and on the other, the denial of various human rights in the occupied territories and last summer's massacres in Palestinian camps.

A third traditional category comprises the dismal effects of revolutions (or failed revolutions): the massacres of Communists and alleged Communists in Indonesia in 1965 (a mix of ideological and ethnic barbarism, since many of the victims were Chinese), the violations of human rights that accompanied and followed the fall of the Shah of Iran and those that accompanied the fall of Somoza. Ethnic conflicts, wars of national independence, and revolutionary brutalities are not new; but the global extension of the principle of self-determination and of ideological conflicts—the diffusion of Western ideas (such as Marxism-Leninism) and the reaction of anti-Western

## 28 Stanley Hoffmann

movements (such as Islamic fundamentalism) to the diffusion of Western culture and practices—has widened the battlefield.

The second structural element is more original; it is the institutionalization of cruelty. World moral anomie, which undermines the new international normative order, results not only from the chaos bred by the traditional conflicts I have just described, but also from the existence of regimes that have turned the domestic legal order into tools of power at the expense of human rights. This is the more serious and intractable source of violations and of the ineffectiveness of the various international and regional regimes. One can imagine that many of the battles of tribes and ethnic groups, that most of the conflicts over self-determination, will be resolved, and even that—as has usually happened in history—ideological hatreds will lead to cynicism and the armistice of exhaustion. It is more difficult to imagine the destruction of the domestic fortresses of inequity—or to believe that it will be achievable without further colossal violence.

Three kinds of regimes constitute such fortresses. One can be called institutionalized inequality; it is the apartheid system of South Africa. Not only are more than four fifths of the land reserved for the whites, not only are the resources available for health and education of the black majority pitiful, but the blacks are deprived of both the economic and social and the civil and political rights defined in the UN Covenants. They have no political possibilities of self-expression and participation, no free trade unions, no right to racially mixed marriages; above all, they are submitted to the demeaning system of passes described so well by Athol Fugard in his play *Sizwe Bansi is Dead*. The government can detain indefinitely anyone suspected of terrorism, and impose restrictions on the freedom of expression and movement of political suspects; acts against apartheid are criminal offenses. The number of deaths occurring in prison has been considerable. Here, clearly, the law has no higher function than preserving the separation of the races, reducing the blacks to their manpower role, and covering violations of human rights with the mantle of apartheid “legality.”

The second case is one of institutionalized political oppression. I am referring to regimes based on the Leninist-Stalinist model. This model has been enforced ununiformly; even in the Soviet Union, where the apparatus of terror has been partly dismantled, it is no

## *Human Rights as a Foreign Policy Goal* 29

longer applied fully. But this model entails depriving the people of their civil and political rights in exchange for some economic and social achievements. In particular, there are no rights of political expression and free association; sharp restrictions are imposed on the independence of the judiciary, on the fairness of criminal procedures (cf. the use of psychiatric hospitals against some dissidents in the Soviet Union and the harsh penalties inflicted on others), as well as on freedom of movement. While lip service is sometimes paid to the concept of human rights, the system is usually rationalized as one that puts an end to the “bourgeois” conflict between the individual and the state. (Hence, Soviet abstention on the vote of the UN General Assembly adopting the Universal Declaration of Human Rights in December 1948. The Russian delegate argued that “in a society where there are no rival classes, there cannot be any contradiction between the government and the individual since the government is in fact the collective individual.”<sup>7</sup> In such a conception, it is clear that a dissident or deviant can only be seen as either an enemy of society or insane.) Civil and political rights are treated as purely formalistic—empty, unless a material base of economic and social services is provided. But these are indeed only *services*: they are granted and organized by the state and can therefore be taken away by it. They are not rights that individuals or groups can claim. Those who—correctly—point to the achievements of communist regimes in matters of health, social security, education, or housing sometimes fail to note the difference between a right that can thus be fought for (even if it is a right to a service that only the state can provide) and a mere grant of benefits by an all-powerful state. The two categories of rights recognized by the UN are interdependent: civil and political rights are often meaningless to people living below the subsistence level or in traditional structures of dependence and social oppression, but economic and social rights cannot be made effective unless individuals and groups can express themselves, mobilize and agitate for their realization, act in courts, and seek redress.

The Leninist-Stalinist model has led to the most extensive violations of human rights whenever the national circumstances approximated those of a civil war. In China and in Vietnam, when the communist regimes came to power after a protracted struggle, whole classes of people were submitted to “reeducation,” forced labor, and humiliation; the horrors of the Pol Pot regime in Kampuchea are well

30 *Stanley Hoffmann*

documented. Indeed, such regimes sometimes create a kind of deliberate civil war to carry out their ideological program or to preserve their ideological vigor. This is what Stalin did in the 1930s when he destroyed the Kulaks through repression and famines, and purged the party and army; this is what the Chinese Cultural Revolution of the mid-1960s amounted to.

The third type is institutionalized state terrorism. As in the previous one, ideology is at the root of the disease, but in a different way: here, the militant ideologues are in the opposition (often in clandestine opposition). It is the threat created by insurgents or by (usually) leftist movements that serves as the pretext for a state response which, under the cloak of national security, entails brutal repression, extensive control of social organizations, and the suspension of many civil and political rights. The plea of necessity or supreme emergency is thus moved from its usual domain—foreign affairs—to the domestic scene. In Brazil after the 1964 coup, in Chile after the fall and murder of Allende, in Argentina after 1976, in the Philippines under Marcos's rule, in Turkey during the past few years of military government, in the Shah's Iran, one witnessed neither *exceptional* measures nor *limited* restrictions to rights, but a pattern: arbitrary arrests, disappearances, the widespread resort to torture (admirably described by Jacobo Timerman), the taming of institutions that could have harbored or fostered opposition. In many of these cases, the violations of human rights have been accompanied by an often savage economic policy of *laissez faire*, perpetrated under military rule, with the officers wrapping themselves in the mantle of nationalism and quite naturally practicing their expertise against their enemies.

As in the case of the Leninist-Stalinist regimes, these violations are most brutal when the opposition has been able to organize an insurgency and conditions of quasi-civil war exist, as, for instance, despite a facade of elections, in El Salvador, and also in Guatemala. There, according to Amnesty International, twelve thousand unarmed civilians have been massacred since 1978; under the previous military ruler, whole villages have been destroyed by ground and air raids, and large numbers of people have been removed from their homes.

These political realities point to the third predicament. Not only are the legal nets full of holes and the gap between law and practice enormous, but the possibility of narrowing it through political action

## Human Rights as a Foreign Policy Goal 31

at the international level is extremely small. This is so for two sets of reasons: the nature of the international system and the moral-ideological significance of human rights.

We find a good way of measuring the obstacle constituted by the international system in Kant. In both his *Idea for a Universal History* and the essay *Eternal Peace*, we find that he believed there could be no peace without a league of Republican, that is, constitutional, states—states that provide their citizens precisely with the kind of autonomy and chances for self-fulfillment that the legal provisions on human rights in national constitutions and international documents try to promote. He considered the creation of such regimes to be “the most difficult problem and at the same time the one which mankind solves last.” But their establishment “depends upon the problem of a lawful external relationship of the states and cannot be solved without the latter.” In other words, there can be no peace without constitutional regimes, but no such regimes without peace. In a world of intense interstate conflicts, the fate of regimes respecting human rights cannot be good: the “state of war,” which inflicts on the polity “the very same evils which oppress individual human beings and which compelled them to enter into a lawful civic state,” would soon disturb or destroy the harmonious polity. On the other hand, a league of states for the abolition of war requires a “republican” civil constitution in these states: “Under a constitution where the subject is not a citizen and which is therefore not republican, it is the easiest thing in the world to start a war. The head of state is not a fellow citizen but owner of the state.”<sup>8</sup>

Thus the domestic and the external problems—let us call them a political regime of human rights and peace—must be solved simultaneously. Kant’s intriguing philosophy of history tells us that “the excessive and never-ending preparation for wars, and the want which every state even in the midst of peace must feel,” will force governments to do what reason suggests: enter into a union of states for peace. But he also told us that such a union will last only if the states have the right constitution. We are therefore left in a very uncomfortable position. This (necessary) union will make it *possible* for states to become enlightened (since their resources will no longer be wasted on expansion and defense): what Kant also calls “a pathologically enforced coordination of society” will thus finally *be able* to “transform it into a moral whole.” Both the union and the enlight-

32 *Stanley Hoffmann*

ened commonwealth appear as moral duties *as well as* objectives of “a hidden plan of nature” to produce concord through conflict. But this union will remain fragile *unless* its members have the right regimes, and those regimes can’t get rooted, or survive, unless there is peace. A first reading of Kant suggests that (thanks to nature’s plan) a perfect constitution (“the only state in which nature can develop all faculties of mankind”) and “a perfect civic association of mankind” will both be achieved: all good things coming together. A second reading, alas, suggests a vicious circle.<sup>9</sup>

Let us transpose this conundrum into the present world scene. The absence of peace serves to justify, and in some cases engenders, regimes that violate human rights; they can blame the troubles that “require” repression on external agitators or explain that the conditions of “encirclement” in which they operate allow no relaxation of state power and control. Interstate tensions require soldiers, and soldiers often take over their own countries. The very strength and spread of such regimes, many of which feel profoundly insecure and act accordingly on a world stage marked by a profusion of interventions, make a peaceful international order difficult to establish, and a successful international regime of human rights hard to conceive, as well. As Michael Doyle has pointed out, only liberal states have succeeded in creating a zone of peace: they have not been at war with one another, and have achieved both of Kant’s (and nature’s) goals.<sup>10</sup> Kant was right in this respect; but while he stressed the interdependence of the solutions to the two problems of human rights and peace, he was also right in stressing the decisive character of the *domestic* system. Whether a country observes human rights or not depends, ultimately, not only on whether external peace allows for domestic civility or on favorable internal circumstances, on the whims of passing rulers, but also on the nature of the economic system, of the social structure and values, and of the political regime: the state of human rights is the mirror of the polity. Enforcement of the international normative order requires certain internal changes. Can we really expect these changes to come through the processes and mechanisms of international politics? Indeed, would even a world at peace (either because of the fear of nuclear war—the hidden plan of nature—and/or because of respect for the normative order curtailing the use of force) be capable of transforming its members? The dilemma is obvious: the effectiveness of the international norma-

## Human Rights as a Foreign Policy Goal 33

tive order of human rights requires both a genuine (not just a rhetorical) consensus on the values that inspire this order and a world enforcement system—in other words, an end of international relations as we know them. The transformation of international relations and of domestic regimes that the world recognition of human rights should logically engender presupposes a revolution in the structure of the international milieu. Not even the kind of halfway house between a system of sovereign states and a world federation, suggested by Kant, would suffice (his League had no powers of execution, and its “cosmopolitan law” was reduced to hospitality).

Not only would an effective international order of human rights require, as a precondition, a decline in the role of states and the emergence of powerful collective mechanisms or regimes, but it would also, in the long run, amount to a revolution in the nature of most political regimes. The idea of human rights is dangerously subversive of many existing polities, for two reasons. The first is that it pretends, and appears at first sight, *not* to be so revolutionary. Political regimes are not being asked, by international law, to cease being communist, or socialist, or single party, or economically laissez faire; they are “merely” being asked to observe or to set up rights to which they have themselves, in various treaties or even in their constitutions, subscribed. What could be more reasonable? But the fact is that if these rights were effectively granted, the nature of the regime would be drastically transformed. It is a mistake to look at them as a mere set of guarantees given to individuals and groups, which they should and could enjoy in *any* state. Even when they aim at creating a sphere in which no state can intrude, *they are all political rights*, they concern individuals as citizens, and groups as actors, in the polity. As Claude Lefort has suggested,<sup>11</sup> if they were only “private” rights, a state could always justify a transgression by arguing that the necessities of power or revolution (or, I would add, those of the “state of war”) require a temporary displacement of the private by public needs. But if they are seen as political rights, then they become the basis for a polity that has very little in common with many of the political regimes of today. The notion of the sacred sphere of civil rights, like that of a state which fulfills economic and social needs by erecting them into rights, is a political notion that defines a certain kind of polity and excludes others.

34 *Stanley Hoffmann*

Indeed, human rights are subversive, in the second place, because, under the cloak of a demand for basic guarantees, they constitute a program for a politically liberal, economically social-democratic (or welfare-liberal) commonwealth. This, of course, explains the hostility of all kinds of tyrannies, and the reticence, in the United States, of the more conservative, antiwelfare-state liberals. It is true, as Ruggie indicates, that the international documents are a compromise, not the expression of any one “hegemon’s” values, and also, as he puts it, that “different clusters of rights enjoy differential normative status in the international community.” Nevertheless, as a whole, these documents are a kind of war machine for a slightly left-of-center liberalism. And this brings us back to our predicament: In a decentralized and cacophonic world society, how can one expect antiliberal regimes to yield to such a vision and to allow the entry of Trojan horses?—for the history of human rights shows that granting some of these rights always leads to demands for more, to that very questioning of existing laws and practices, to that very search for new forms and meanings of self-mastery and self-fulfillment, that is both the glory and occasionally the doom of liberal polities.

There is a fundamental ambiguity about the international normative order of human rights. On the one hand, it pretends to represent a consensus, to offer a kind of common floor on which very different regimes can stand—both because conceptual trade-offs and verbal agreements made these documents possible, and because the only chance this order has of becoming more than a display of collective hypocrisy is the establishment of some kind of common denominator, some form of “peaceful coexistence” and minimal convergence of all the ideologies in competition. On the other hand, it is also, however much concealed, the ram of one particular ideological faction against all others. Being both an offer of an armistice and a tool of warfare—the continuation of ideological competition by other, potentially more dangerous means (action at the international level)—the politics of human rights ends up suffering from both the clash of *arrière-pensées* behind the (verbal) armistice, and from the heightened resistance this new form of warfare cannot help but provoke.

## Human Rights as a Foreign Policy Goal 35

### THE IMPERATIVES

Despite all these obstacles, I consider it imperative for the United States and other democracies to take the international dimension of human rights seriously and to make the promotion of these rights a major goal of their foreign policies. This is so for two sets of reasons—the very same kinds of reasons that made up the political predicament.

In the first place, it is a moral imperative. To be sure, this argument will not convince those who believe that the only command a state must heed is its national interest, or that its lodestar should be prudence and expediency. But, as has often been argued, there are different ways of conceiving the national interest, and it is only when international relations are a hell of inexpiable hatreds and life-and-death situations, when physical survival is immediately at stake, that a case can be made for eliminating moral consideration *extra muros*. When the system is less like a jungle, and indeed when there are different ways of ensuring survival, chances for a not purely Machiavellian ethics exist. What is prudent or expedient is itself partly determined by what the statesman considers right.

Why is it right to act for the promotion of human rights abroad? It is not only, or primarily, because the American public requires idealism. The publics of many democracies do not expect their governments to fight for causes other than the purely national ones—that is, they seem to accept the distinction between (to use Kantian terms) moral politics at home and amoral politics abroad. As for American idealism, it has often found itself satisfied with what Kant would have called political moralism, concealing purely selfish objectives behind moral rationalizations. It is because the values of the international normative order of human rights—the moral and political ideology of human rights, if you prefer—are the values and ideology of liberal democracies and have an inherently universal thrust, whatever the philosophical basis for endorsing these values (a philosophy of rights or “rule utilitarianism”) may be. If statesmen believe in these values, and even if they also believe that the diversity of situations, dogmas, and cultural traditions does not allow for their successful promotion everywhere at once, they would be both timid and inconsistent if they did not try to promote this ideal (unless they accept the counterarguments that I shall try to refute later). Deciding to pro-

36 *Stanley Hoffmann*

mote it does not tell us what the best tools are, how far it is wise to prod other regimes into reform, whether discretion or publicity are the best approaches, and so on. Here, we are in the domain of practice and skill, of balancing and trade-offs. But such a decision means rejecting relativism and neutrality; relativism, because if one believes that—to quote from Tom Farer—"the value of liberty defined as control over one's life" is a value worth living and dying for, one should not hesitate to try to make it prevail—peacefully—over inferior values; neutrality, because other moral-ideological codes are most unlikely to show comparable restraint, and also because the form that the international rhetorical consensus of clashing value systems has happened to take is that of the liberal credo. This is an invitation to press those who have chosen to salute it, for whatever reason, to adjust their conduct to their words.

For reasons of necessity, of prudence, and of philosophy, a Liberal (or a liberal polity) must take as a starting point the coexistence and free contest of different value systems; tolerance, respect for diversity, and resignation to dissent are basic liberal values. But the version of liberalism that reduces it to an open flea market, where all merchants come and peddle wares of equivalent worth, is unacceptable. The values I have just described define the nature of the contest; they do not rule out an attempt at propagating one's faith and at consolidating the rights that embody the liberal creed. My plea is against the brand of liberalism (so powerful in the nineteenth century) that was unreservedly anti-interventionist abroad—for instance, for the anti-paternalistic reasons given by John Stuart Mill. Wholesale noninterventionism abandons the victims of illiberal regimes to their masters. Is this, then, a plea for intervention? Yes, within very strict limits: the purpose and *effects* must be to increase the autonomy of such victims (many American interventions abroad, despite fine intentions, have actually deprived those whom we wanted to help of responsibility for their fate), with the means carefully tailored to these ends. Existing legal mechanisms must therefore be used as fully as possible, and in order to guard against the temptation of self-serving action or selfish benevolence, the policy should be carried out by a "front" of several countries.

One powerful moral reason for such a policy is that it would aim not only at spreading the benefits of liberal democracies, but also at overcoming the antinomy between what has been called "the moral-

## Human Rights as a Foreign Policy Goal 37

ity of states" (based on the principle of state autonomy<sup>12</sup> and on the mutual recognition of a range of states' rights) and a cosmopolitan morality that subordinates these rights to the human rights of individuals and groups. Staying strictly within the former means either denying the primacy of human rights or subordinating their protection to the consent of states, even when those states are repressive shells within which there is no "fit" between the government and the people, no recognition either of the principle of self-determination or of the ideal of self-government. The present international order has actually gone beyond this morality, insofar as it grants legitimacy only to states that respect the principle of *self-determination*. But despite the legal network of human rights treaties and declarations, states behave as if the disregard of the ideal of *self-government* were no bar to the legitimacy of regimes, no ground for external action on its behalf. A consistent liberal world order would erect both values as criteria of governmental legitimacy; in this way, the conflict between states' rights and human rights would be resolved, and states (or rather their agents, the governments) would be recognized as entitled to a full panoply of rights only if they were at the service of their citizens' humans rights.

The second imperative for such a policy lies in the realm not of ethics, but of politics. It is in the long-run interest of liberal democracies to transform the nature of the "game" of international politics. In a world armed with nuclear weapons and marked by "complex interdependence," politics-as-usual, the clash of security calculations, and the manipulation of all by everyone guarantee physical destruction and economic chaos.<sup>13</sup> Development, social progress, a modicum of psychological, economic, and physical security, and a reduction of violence all require, not a "reinvention of politics" or the abolition of the sovereign state (for if this were the prerequisite, we might as well resign ourselves to our doom), but a reorientation of politics and a redefinition of the national interest—so that it incorporates more of the international interest as well—a pooling of sovereignties, and the spread and strengthening of international regimes. These provide the member states with benefits unilateral action cannot obtain; they give states a stake in preserving such procedures and institutions even if the momentary balance of gains and losses for a given member shows a deficit; they enforce mutual restraints. Such a transformist, or reformist, strategy clearly aims at narrowing the gap

### 38 *Stanley Hoffmann*

between the international normative order and the practice of world politics.

The promotion of an international human rights policy is an important part of such a strategy of change. On the one hand, at the global level, strengthening the machinery set up for the protection of these rights, while certainly not ensuring individual happiness and stability among states (promoting rights is inherently contentious), would at least help remove some of the most basic causes of violence in world society; it would enlarge the sphere of transparency and increase chances for redress. On the other hand, going back once more to Kantian wisdom, we have good reasons to believe that the global preconditions for individual self-fulfillment—peace and an effective international system of distributive justice—are most likely to exist when the main actors are states that respect human rights; such a strategy would tend precisely to protect the states that already do and to nudge the others in a similar direction. The political objective, distant as it may appear, would be the same as the moral one: a world in which the conditions of legitimacy of regimes would be both self-determination and the observance of the other human rights recognized by the international normative order. It would be a world in which what Ruggie finds still missing badly, a more integrated global society (more consensus) with a collective machinery of enforcement (more centralization), would emerge gradually.

The case that has often been made for international regimes in such realms as the oceans, trade, world finance, communications, nuclear proliferation, and so on, can be argued just as powerfully with respect to human rights, even though most of the former concern transnational flows that no single government can control (or where attempts at national control boomerang), whereas the field of human rights seems to consist mainly of national struggles between individuals or groups and their governments. But the massive violations that occur today are likely to provoke flows, or floods, of refugees seeking asylum abroad; the alternative to collective regulation is generalized misery or the backlash that inevitably results when certain countries, having opened their borders more than others, come to resent the selfishness of the latter and to experience domestic friction. Conversely, national attempts to regulate the flow of migrant workers are likely to result in violations of human rights, and if these rules are too restrictive, in violent explosions in countries whose sur-

## Human Rights as a Foreign Policy Goal 39

plus active population could no longer use “exit” instead of “voice.” Without international norms and regimes, the conflict between “cosmopolitan” moral duties and a national government’s primary responsibility for the welfare of its own citizens would become unmanageable.

Against this moral and political plea are aligned a number of counterarguments that can be divided into two groups: “*You should not try*,” and “*It cannot be done*.” The first group consists of a variety of positions, all of which amount to saying that while as human beings we should all be concerned with the fate of human rights anywhere, a foreign policy of human rights will only make things morally and politically worse. Three types of arguments can be distinguished.

The first one puts the greatest emphasis on the moral harm such a strategy could cause. It deplores it as a form of moral imperialism, as the arrogant attempt by one nation or group of nations to impose their peculiar values and practices on other cultures and on countries with different political experiences and traditions. What right does any one nation have to be righteous and to set itself up as a model? Isn’t such pretension a form of cultural and political expansion? Doesn’t it in fact violate the basic norms of the international milieu, since the principle of noninterference in the domestic affairs of states is designed precisely to protect each national group’s right to have its own practices (however obnoxious they may appear to others) and to stop foreign governments from trying to reshape other states? Replying to critics who had accused him of ruling out as immoral external intervention by force to help victims of a tyrannical regime win their revolutionary attempt at achieving self-government, Michael Walzer wrote of a people’s right to have its rights violated by its own state.<sup>14</sup> This point, often made by Reinhold Niebuhr, is reinforced by George Kennan’s observation about another moral flaw, the arbitrary selectivity with which the concern “for other people’s liberties” is usually expressed.<sup>15</sup>

A second argument presents a mixed case—partly moral, partly political: the strategy I have recommended would aggravate the predicament discussed above, and make both international relations and the condition of human rights abroad even more difficult. Doesn’t, in practice, a diplomacy of human rights amount to political warfare, not on behalf of certain values, but against specific countries? Hasn’t

40 *Stanley Hoffmann*

the cause of human rights been used as a weapon in America's cold war against the Soviet Union (or Cuba or, today, Nicaragua)? What about the anti-Zionist resolution pushed by Arab states and their patrons in the General Assembly and other UN bodies? Violations of human rights abroad can become pretexts for cutting off foreign aid, and thus for hurting the poor in developing countries; that is, they can fuel a hypocritical desire to turn one's back on the outside world and provide a moralistic disguise for sheer selfishness. Thus the universalistic language of human rights, this alleged common discourse or conversation shared by all ideological systems, would actually be abused for particularistic and harmful purposes.

The third argument is the most heavily political. Paradoxically, it derives from a kind of moral Manichaeism. It suggests that not all states that appear to violate human rights (or actually do so) should be put in the same basket: there are, so to speak, good violations (or tolerable ones) and bad ones. Two such cases have been made; they are mutually exclusive in their effects, despite a similar structure of arguments. One is derived from Marxism; it asserts that the array of civil and political rights cannot be provided by a government unless the basic economic and social needs of the population, and the possibility of economic development, are provided first. Since these conditions cannot be met in poor countries under the capitalist system, as the theorists of *dependencia* argue, the only true violator of human rights is capitalism.

The other case is derived from a certain interpretation of liberalism. It proclaims the primacy of the "negative" rights of the individual, that is, of civil and political rights, and focuses on the antagonistic relation between society (whose autonomy is seen as a major value, and which is conceived as a sum of individuals) and the state (whose powers are to be curtailed). In this scheme, there is one categorical villain: totalitarian regimes, which deny these rights, destroy all limits to state power, and throttle society. To be sure, authoritarian regimes restrict political rights also, but they do not remove all restraints on governmental power. They may try to control political institutions and limit the flow of ideas, but they allow for (nonpolitical) independent organizations in society, do not try to absorb all social institutions into the state, and often, as Jeane Kirkpatrick has argued, "leave in place . . . habitual rhythms of work and leisure, . . . habitual patterns of family and personal relations."<sup>16</sup> She recog-

## *Human Rights as a Foreign Policy Goal* 41

nizes that they also leave in place “existing allocations of wealth, power, status [that] maintain masses in poverty.” Remember, however, that economic and social rights other than the right to free enterprise and property are not, in this conception, recognized as “real” rights. A Kissinger variant is that authoritarian regimes are distorted versions of traditional regimes, which observe customary restraints, but totalitarian ones are perversions of absolute populist or nonliberal democracies, in which the people’s will is supposed to be unconstrained by checks and balances, and unfiltered by representative government.<sup>17</sup>

All these arguments strike me as morally defective and politically unconvincing. The last one is doubly embarrassing, and for this reason, I will discuss it first. Morally, the suggestion that there are bad violations, and, if not good, at least tolerable ones, provides no consolation for the victims of the latter, and evaluates the ills they suffer, not according to the harm inflicted on them nor on the basis of the nature or importance of the rights violated, but on the basis of the essence or nature of the regime. Empirically, the case is extraordinarily weak. The Marxist variant assumes that economic development and social progress are best assured by certain restrictions on civil and political rights (“luxuries” that poor societies still riddled with injustice cannot afford) and by revolutionary violence. It postulates that such development and progress are more likely in leftist authoritarian (or totalitarian) regimes than in liberal democratic ones. The record is far more murky, as the essays by Farer and Weinstein indicate. Leftist regimes that limit civil and political rights have a better record in social issues, particularly in the redistribution of income, in Latin America and in Africa. If we define rights as control over one’s life, we must remember that even in the realm of economic and social affairs, this progress consists of services provided, not of rights granted. Moreover, the economic record of progress is far less impressive than that of social change: many of the economies of Marxist countries have stagnated or reached levels of growth below those of comparable capitalist or partly socialized economies, and there is considerable evidence of waste, a lack of incentives or innovation, and a stifling price of bureaucratic regulation. Finally, as Weinstein shows, violations of civil and political rights are damaging for economic development—many resources are spent on repression,

**42     *Stanley Hoffmann***

and many talents squashed by it—and also for social justice, because of corruption and favoritism at the top.

As for the famous distinction between totalitarian and authoritarian governments, it rests, as has often been pointed out, on a confusion between the world of ideal-types—which provide criteria for identifying, “placing,” and comparing existing regimes—and the world of political realities. As a result, it tends to ascribe to actual totalitarian governments attributes of the pure ideal-type, and to credit (or debit) them with a capacity of mass mobilization and an ability to control all sectors of society that far exceed their resources. Such a view distorts a reality that is often marked, not by idealistic zeal, but by cynicism and apathy, not by the politicization of all groups and social institutions, but by intense privatization, the ultimate form of social and individual defense. Also, the distinction beautifies unduly many authoritarian regimes. Today, such regimes are often anything but “traditional”; they are either sophisticated modern versions of fascism, with its emphasis on controlling the corporate groups it pretends to resuscitate or to create; or they are systems of uncontrolled bureaucratic and technocratic rule. They are not satisfied with banning political parties (or creating fake ones) and limiting freedom of political expression, but insist on preventing society from organizing itself in a way that could challenge the arbitrary power of the state—hence the purging of unions and universities.

The distinction neglects the fact that not every authoritarian regime is easily replaceable by a liberal one. Such a change has happened only in places that had a pre-authoritarian democratic experience. Some authoritarian governments have been remarkably self-perpetuating, or, when shaken, succeeded only by another variety of authoritarianism. Conversely, some totalitarian regimes have been quite adept at undermining themselves: in Hungary, Czechoslovakia, and Poland, they have survived, not because of the formidable power of the state (which in Poland in 1982 had largely withered away), but because of the military—the Red Army and the Polish army; in Yugoslavia, “totalitarianism” has evolved into a rather original and complex brand of authoritarianism. From the essence or ideal-type of a system, one cannot derive valid conclusions about the possibilities of democratic conversion of real states.

Above all, the distinction ignores one point of crucial importance: Whatever the two ideal-types may tell us about the relations between

## *Human Rights as a Foreign Policy Goal* 43

the state and society, they (as well as the regimes that correspond to them) share what Montesquieu called a principle, which he defined as the government's spring, "what makes it act," whereas its nature is "what makes it so." Nature is structure; principle is the set of "human passions that makes it move."<sup>18</sup> The principle of all despotic governments is fear; neither honor nor virtue constitute adequate barriers to its power. This matters particularly for the subjects of human rights: individuals and social groups. Montesquieu understood that politics is a matter of psychology (shaping and shaped by laws and institutions): the fundamental differences between regimes are the differences in psychological springs, in the passions that governments manipulate, in the character of the subjects thus molded.<sup>19</sup> Fear can be a complex and subtle tool, one that a despotic government can manipulate and modulate according to circumstances. Mass terror is the most spectacular and scary example, and we have all been darkly fascinated by what we have learned about death camps and Gulags. But fear can operate more quietly without losing its effectiveness: the notion of the economy of force applies also to terror. Several disappearances, some executions, strategic purges, a sudden display of arbitrariness, can have the same cowering effect and succeed just as well in "beating down anyone's courage." If we consider human rights, as I suggested, as political rights, the distinction between the two types of illiberal regimes vanishes.

Both the dichotomy derived from Marxism and that of the neo-conservatives, derived from C.J. Friedrich and Hannah Arendt, tell us: Do not try to pursue a policy that aims at defending human rights everywhere, because the primary moral and political duty of a leader is to win in the struggle of "us" (the forces of good) against "them." The contest between rival powers is, of course, a reality that the "moral politician" described by Kant must take into account. But it cannot be morally determining: it is a constraint, not an ethical imperative; and it should not be disguised as virtuous if it leads, for instance, the champions of the good to ally themselves with perpetrators of evil who happen to be on their side against the common enemy. If our government has to do so (which is questionable), we might as well recognize candidly that we are forced into it by the contest and led to it by the pro-American sympathies of these dubious allies, rather than pretend that they deserve our protection because the failings of the adversary are so much worse.

44 *Stanley Hoffmann*

The second counterargument, about the bad effects of a serious concern for human rights on international relations, is based on some good evidence. In a world of competing interests and self-help, the risk of contributing to the “state of war” without helping the cause of human rights at all is real (the Jackson-Vanik Amendment did nothing for Jewish emigration from the Soviet Union; Carter’s public concern for prominent Soviet dissidents served neither their cause nor that of arms control). Collective sanctions against South Africa’s apartheid policy might well render hopeless the situation of those South African politicians and elites who understand the need for gradual evolution. But this counterargument should be taken only as a warning against a human rights policy that would ignore the criterion of effectiveness, sacrifice it to spectacle, or be motivated by considerations of political warfare. The case of Timerman, that of many other prisoners liberated under American pressure during the Carter years, and that of the elections of 1978 in the Dominican Republic show that a policy can be effective without aggravating international relations. What the counterargument suggests is prudence and skill in means, and vigilance against a slide in ends; it should not lead us to give up trying to reach just ends.

As for the first, the condemnation of moral imperialism, again the risk exists; but abandoning the attempt because nobody is good enough to try, or capable of giving, in Kennan’s words, a “very fair and principled devotion to the cause” consistently, evenly, and universally, is an argument of despair. It would amount to avoiding moral imperialism by moral cowardice. Let us generalize it; there are, some people tell us, “macho” cultures in which rape is tolerated, where women who are raped are presumed to have “asked for it.” Why should I impose my condemnation of rape—a violation of the victim’s right to physical integrity—on such a culture? And since I clearly cannot pursue a Quixotic attempt at getting rapists caught and punished everywhere, why should I get so indignant about a crime that happens to have occurred within my reach? In other words, despite the noble concern that this argument shows for humility, and for the distinctive features of other societies, it can all too easily become an alibi for bad governments and for abandoning the victims. The argument about specific mores and institutions that are incompatible with American or Western liberal expectations is all too often used as a shield behind which harm safely continues to be in-

## *Human Rights as a Foreign Policy Goal* 45

flicted on the innocent and even the most basic human rights are trampled. Once again, we need to be cautioned against both ignoring those particularities of customs and rituals whose character and pervasiveness may prevent the achievement of the full range of human rights recognized in the international normative order, and against imposing our own structures and strictures on polities that they don't fit. But the realities that these legal norms aim at creating happen to meet the aspirations and needs of most individuals and groups—except when they have been repressed so long that they don't even realize that chances for self-fulfillment exist. It is usually governments and their defenders that argue about the obstacles, even though they signed these documents or even acknowledged these aspirations in their constitutions. Whether a human rights policy is morally imperialist or not is a matter of practice; it is not of the essence.

Thus, none of the “thou shall not” exhortations is fully convincing. But Kant also taught that there is no moral duty to pursue the impossible. We must therefore turn to the second set of admonitions: Don’t try, because it can’t be done. Again, we find three principal arguments. The first concerns the information on which a human rights policy must be based: it is impossible, we are told, to know exactly what goes on abroad, because some countries are very good at concealing mischief (we still don’t know what happened, for example, some years ago in Sverdlovsk). Even when we know the facts (such as massacres in a Central American country), we can’t always find out who committed the crime or under what circumstances. Even when this can be figured out, we have to try to make sense of the whole context, which is very difficult to grasp from the outside, and often fiercely controversial.

A second argument deals with the perennial issue of consistency. The inevitable trade-offs will make a coherent policy impossible. We must, after all (or before anything else) protect our strategic interests: the “relation of major tension” cannot be ignored, and we have to avoid weakening our allies, however deplorable some of them may be, in order not to strengthen our adversary or throw our disgruntled clients into his arms. We must also protect other legitimate “world order” concerns—the international normative order does not consist of human rights alone. For instance, in the realm of force, we have a

#### 46 *Stanley Hoffmann*

major political and moral interest in slowing down nuclear proliferation; diverting a country from becoming a nuclear power often involves providing it with guarantees, or tightening links between it and our own: this could be incompatible with an assault on its human rights violations. Last but not least, our own moral sense, our long-term political and economic interests, the pressures from developing countries, and recommendations of groups like the Brandt Commission argue for our helping these nations to meet the basic human needs of their people—even by providing assistance to governments that trample the civil and political rights of their subjects as they try to raise the level of wealth and improve social conditions.

The third argument goes back to the political predicament I dealt with earlier. Improving human rights abroad means persuading and forcing a foreign government to change its ways. This cannot be achieved without massive intervention: armed, perhaps, when we try to stop genocide (cf. the Indian move into Bangladesh, the Tanzanian against Idi Amin), or more peaceful yet highly intrusive—for instance, if we attached to our economic and military assistance to El Salvador strict conditions about the behavior of the army and paramilitary groups there. Now, such intrusions, in addition to being potentially catastrophic for world peace (they could lead to local bloodshed and to counterinterventions), are most unlikely to reach their goal. If they are brief or scattered, their effects will vanish; lasting improvements will require lasting involvement; and this is most unlikely to be acceptable at home, in addition to creating deep resentments abroad. For there is a fundamental contradiction between trying to increase the dose of “control over one’s life” in a foreign country and, so to speak, taking it over.

These points are not fully convincing either. To be sure, information is often spotty or imperfect. But there are, by now, so many ways, public or private, of obtaining a good overall picture and of finding out not only about specifics, but about trends (often a more important consideration), that it is, in fact, more a feat to ignore what crimes and inequities are being committed than to know. As for the second and third arguments, they are perfectionist: they suggest that only total consistency or complete effectiveness would be acceptable, a demand rarely presented in the more usual realms of foreign policy. It is obvious that in the real world, the complex calculation of trade-offs will make perfect consistency impossible. But so long as

## *Human Rights as a Foreign Policy Goal* 47

the concern for human rights does not disappear, so long as the need to protect other interests does not result in the elimination of our effort, a certain degree of unevenness is perfectly acceptable. Indeed, it may even be desirable.<sup>20</sup> For a crucial objective of a human rights policy must be effectiveness, and we cannot either be effective everywhere with the same methods or, whatever methods we use, be equally effective in the results we achieve all over the world. From the viewpoint of effectiveness, a case can be made for concentrating our efforts, not on adversaries who are largely beyond our reach, or on "friendly violators" too difficult to handle because our ties with them are too few (such as China), but on clients who are largely dependent on us, for whose governments, or for whose governments' actions, we cannot escape a big share of responsibility, and whose reform is both our moral duty and in our political interest. For the violations perpetrated by these governments are likely to undermine them, to weaken our own position, and to plunge us into the dreadful, familiar dilemma of either trying to save them by giving them whatever assistance they need (on their own terms, since it is, by then, too late for reform) or else risking a double disaster: the collapse of our own power position, and the coming to power of forces that will be both hostile to us and, from the viewpoint of human rights, not necessarily any better than our suicidal client.

Changing regimes from the outside is obviously difficult. But it is not a matter of all or nothing. It is a matter of using and expanding the leverage one has in order to obtain significant results without becoming trapped in self-defeating intrusions. What this requires, as I have argued elsewhere, is a triple strategy. First, we ought to aim at achieving a common floor (i.e., require of all states the respect of the most basic human rights, those of physical integrity—freedom from torture and arbitrary deprivation of life as well as from famine and disease) and a movable ceiling (since the range of what can be expected will vary from place to place). Second, the policy must entail acts both by governments and by international institutions, including international financial ones. Human rights considerations are perhaps "political," but there are many other political considerations these institutions, sometimes clandestinely, take routinely into account. Moreover, economic or financial measures are only means to goals; the promotion of human rights ought to be one of the goals sought, in accordance with the dictates of various international legal docu-

48 *Stanley Hoffmann*

ments. The policy must also entail acts both by public bodies and by private individuals and organizations. A public policy that tries to use available leverage against a violator can be defeated by bankers, traders, and investors who keep pouring far more money into the country in question than the government that takes human rights seriously ever gave or lent to it. What is needed here is both a greater “cosmopolitan” moral sense among private, especially corporate, groups and the use, on behalf of a human rights policy, of the kind of legislation that curtails business activities with adversaries and that even many champions of free enterprise, or of the notion that profitability should be the only business of business, find quite tolerable on behalf of national security. Third, it must be a multinational policy, to guard against the diversions or temptations of one nation’s moral imperialism and to increase the chances of effectiveness.

Samuel Huntington has suggested that democratic governments have spread abroad when America has been powerful, and receded when its power declined.<sup>21</sup> Quite apart from the fact that he focuses only on civil and political rights, he ignores all the cases in which American power has been used to strengthen or to preserve regimes whose attitudes toward human rights were anything but compatible with democratic values. The promotion of human rights abroad is not synonymous with “the expansion of American power.” Neither the pluralism of our institutions nor our own liberal-democratic values have guaranteed us against the misuse or corruption of American power abroad. These institutions have functioned either badly or too late, and our leaders have either confused the expansion of our power with that of our ideals or tacitly put aside the latter to ensure the former. What the promotion of human rights abroad requires is a coalition of liberal-democratic states willing to heed, in their foreign policy, the dictates of their values, and to recognize the congruence between these values and their long-term interest in a transformed international system composed of states that respect human rights.

## ENDNOTES

<sup>1</sup>I discuss this at length in *Duties Beyond Borders* (Syracuse, N.Y.: Syracuse University Press, 1981).

## Human Rights as a Foreign Policy Goal 49

- <sup>2</sup>"The Challenge of Peace: God's Promise and Our Response," *Origins* 13 (1) NC Documentary Service, May 19, 1983).
- <sup>3</sup>Peter Meyer, in *The International Bill of Human Rights*, edited by Paul Williams (Entwhistle Books, 1981), p. xli.
- <sup>4</sup>*The Peloponnesian War* (New York: Modern Library, 1934), p. 189.
- <sup>5</sup>On this point, see my essay, "International Law and the Control of Force," in *The Relevance of International Law*, edited by K. Deutsch and S. Hoffmann (New York: Anchor, 1971), pp. 34-66.
- <sup>6</sup>*Human Rights and Basic Needs in the Americas*, edited by Margaret E. Graham (Washington, D.C.: Georgetown University Press, 1982), p. 316.
- <sup>7</sup>Quoted in Meyer, *The International Bill of Human Rights*, p. xxxi.
- <sup>8</sup>*The Philosophy of Kant*, edited by C.J. Friedrich (New York: Modern Library, 1949), pp. 122, 123, 124, 438.
- <sup>9</sup>Ibid., pp. 126-27, 120, 127.
- <sup>10</sup>"Kant, Liberal Legacies, and Foreign Affairs," in *Philosophy and Public Affairs*, June 1983 and forthcoming in October 1983.
- <sup>11</sup>*L'invention démocratique* (Paris: Fayard, 1981), pp. 50ff.
- <sup>12</sup>Cf. Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), pp. 63ff.
- <sup>13</sup>See *Primacy of World Order* (New York: McGraw-Hill, 1978).
- <sup>14</sup>"The Moral Standing of States," *Philosophy and Public Affairs*, Spring 1980, p. 226.
- <sup>15</sup>*The Cloud of Danger* (New York: Atlantic, 1982), p. 44.
- <sup>16</sup>"Dictatorship and Double Standards," *Commentary*, November 1979.
- <sup>17</sup>*Years of Upheaval* (Little, Brown, 1982), pp. 312-13.
- <sup>18</sup>*The Spirit of the Laws*, part 1, book 3, chapter 1.
- <sup>19</sup>See Judith Shklar's forthcoming book, *Vices* (Harvard University Press).
- <sup>20</sup>See Alan Tonelson, "Human Rights: The Bias We Need," *Foreign Policy*, no. 4, (Winter 1982-83): 52-74.
- <sup>21</sup>*American Politics: The Promise of Disharmony* (Harvard University Press, 1981), pp. 246-59.

Rein Müllerson

## 1 The *raison d'être* of human rights diplomacy\*

Governments, even in democratic countries, are not, and can hardly be expected to act as, human rights organizations. As Louis Henkin writes, 'state egoism, selfishness, is the hallmark of the international state system.... The occasional reference to mankind is rhetoric; it has no significant normative implications'.<sup>1</sup> Governments have to take care of many other interests and, naturally, they have to take care of their own interest in staying in power. Their concern for human rights in other countries is only one, and certainly not the most important, of the imperatives of their foreign policy. Moreover, all too often human rights diplomacy does not fit comfortably with other foreign policy priorities.

Therefore, before turning to issues of efficiency (or inefficiency) and other problems of human rights diplomacy, it is necessary to ask: why should governments, which are, or at least should be, responsible to and before their own people, be at all concerned with human rights in far away places? Why should, for example, the British or French governments think of human rights in East Timor, Bahrain or Chechnya? Why should states create, finance and pay attention to activities of international bodies such as the UN Human Rights Commission, and the so-called 'treaty-bodies' which monitor the implementation of various human rights instruments; keep in Geneva the UN Centre for Human Rights; or have several regional human rights bodies?

Human rights issues have become part and parcel of everyday diplomatic discourse, and therefore these questions may seem too obvious to be asked. However, it seems that answers to and reflections on these questions may help to provide new approaches to concerns of practical diplomacy.

This chapter attempts to answer these questions. Starting from a historical point of view I will show that it was the rights and interests

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\* Müllerson, Rein, "The Raison d'être of Human Rights Diplomacy", *Human Rights Diplomacy*. London: Routledge, 1997, pp. 15-36.

## 15 Human rights diplomacy

of religious and ethnic minorities, with the threat to international security that their violation often brought, which raised the issue of human rights to the international level.

I shall then go on to argue that undemocratic regimes, hostile to human rights, sometimes tend to choose foreign policy options which may threaten international stability; that most serious post-Cold War human rights violations are committed by weak regimes with insufficient legitimacy, with the attendant risk that such regimes may implode, thereby threatening international stability; that business interests may not always be inimical to human rights; that, on the contrary, under certain circumstances it is in the interests of business to support human rights; and that international concern for human rights is legitimate not only because of these links between human rights and international relations, but also because there are common bonds between different peoples and there is a certain meaning in the word 'humankind' which induces states to take human rights into consideration in their foreign policy.

### FROM CHRISTIANS IN THE OTTOMAN EMPIRE TO MUSLIMS IN EUROPE

An interesting point as to the *raison d'être* of human rights diplomacy can be made by comparing the genesis of domestic human rights norms with that of international ones. England's Magna Carta of 1215, the Habeas Corpus Acts and Bill of Rights of 1689; the French Declaration of the Rights of Man and the Citizen of 1789; and the US Declaration of Rights of 1774, are all texts which, with certain qualifications and exclusions dependent on the historical time period, of course, spoke of the rights of human beings generally. In contradistinction to such an approach, which was concerned with the human rights of all individuals, or at least those of all white male Protestant property owners, international concern for human rights started with attention to the rights of only one category of individuals: persons belonging to religious or ethnic minorities.

Reflection on this difference of genesis of domestic and international concern for human rights helps to shed some light on the questions of why states may be interested at all in human rights in other countries, and why human rights and freedoms, which are in principle an issue between the individual and the state, have become an international issue.

International concern with the rights of religious and ethnic

*The raison d'être of human rights diplomacy* 17

minorities was from the very beginning related to the most important issue of international relations – war.<sup>2</sup>

Armed conflicts are usually divided into international wars and civil wars, though this rather clear-cut normative distinction is becoming now more and more blurred. However, from the point of view of the evolution of international concern for human rights (not only from this point of view of course, but that is what interests us here), wars, or armed conflicts as they are now usually called, can be characterized not only as being of an internal or international nature, but as involving or not involving ethnic or religious issues.

The history of humankind has proven that religion and war, like ethnicity and war, are closely related phenomena. Though there have been various reasons for armed conflicts, many of them could be characterized as religious or ethnic crusades. Religious or ethnic factors may not have always been the real or main cause of some so-called religious or inter-ethnic wars, but they have certainly been an important catalyst in many of them. Therefore it is not surprising that, in order to suppress or limit such armed conflicts, their sources, i.e., religious or ethnic issues, must have been addressed. Similarly, those who wanted to exploit these issues for the sake of their secular or material aims and interests had to fan the flames of religious or ethnic animosity in order to achieve their aims.

Though all international wars may ultimately be considered, at least to a certain extent, as inter-ethnic conflicts, there have been some international wars where ethnic factors have played a prominent role in the genesis of the conflict. For example, the medieval crusades were to a great extent religious wars, and the Thirty Years' War (1618–48) also had important religious causes as well as consequences. It was caused mainly by the political rivalry between the Catholic and Protestant princes of Germany, as well as by the interests of other powers in Germany. The Treaty of Westphalia, which ended the war, established an important principle – *cuius regio, eius religio* (literally, ‘whose the region, his the religion’) – with important religious implications.

In the Second World War the Nazis used ethnic arguments as a pretext to attack their neighbours (for example, the claimed necessity to protect ethnic Germans in other countries). In his Proclamation of 15 March 1939 on the German occupation of Bohemia and Moravia, Hitler referred to ‘assaults on the life and liberty of minorities, and the purpose of disarming Czech troops and terrorist bans threatening the lives of minorities’.<sup>3</sup> In their genocidal policy the Nazis singled out for extermination and tried to dehumanize certain ethnic groups (Jews, Gypsies and Slavs).

## 18 Human rights diplomacy

As for civil wars, some, like the American Civil War (1861–65) or the Russian Civil War (1918–20), may not have had any significant inter-ethnic or inter-religious characteristics, while others did, being caused by religious or ethnic factors, waged for the sake of religion or ethnicity and often resulting in outcomes which had religious or ethnic implications.

While many of the medieval domestic conflicts were based on religious differences, (for example the Wars of Religion in France, which started with the massacre of the Huguenots by the troops of the Duc de Guise, and tore France asunder for many years in the second half of the sixteenth century) most current conflicts (for example, in the former Soviet Union, Yugoslavia and in many places in Africa) have their roots in ethnic rivalries and hatred.

These and other internal conflicts with significant religious or ethnic elements, i.e., conflicts which very often originate from the oppression of religious or ethnic minorities, have always considerably affected international relations.

Therefore, it is not accidental and should not be surprising at all that the first international documents purporting to define and protect the rights of certain categories of human beings were treaties on the protection of religious minorities. For example, the Treaty between the King of Hungary and the Prince of Transylvania of 1606 accorded to the Protestant minority in Transylvania free exercise of its religion.<sup>4</sup> Again, one of the most famous treaties of that time – the Treaty of Westphalia, concluded in 1648 between France and the Holy Roman Empire and their respective allies – granted religious freedom to the Protestants in Germany in terms of equality with Roman Catholics.<sup>5</sup> At approximately the same time, the European powers started to conclude treaties with the Ottoman Empire in order to protect their respective religious minorities. Article 7 of the Austro-Ottoman Treaty of 1615 purported to protect Christians in the Ottoman Empire,<sup>6</sup> where European countries intervened more than once in order to guarantee the rights of its Christian subjects. For example, in 1827 England, France and Russia used armed force in order to assist Greek Christian insurgents;<sup>7</sup> and in 1860–61 French troops occupied parts of Syria to protect Maronite Christians against massacre by the Turks.<sup>8</sup>

After the First World War a system of treaties aimed at the protection of ethnic minorities in some European countries came into being under the aegis of the League of Nations. Here also the *raison d'être* of these efforts was the link between the rights and interests of minorities and the stability of the new international system in Europe after the break-up of the Austro-Hungarian and Ottoman Empires. US

*The raison d'être of human rights diplomacy* 19

President Woodrow Wilson, in his statement of 31 May 1919 at a plenary meeting of the Peace Conference in Paris, stated that 'nothing... is more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities...'<sup>9</sup>

The League of Nations system for the protection of minorities consisted of five treaties with the new states which had emerged or had enlarged their territory in the aftermath of the Second World War (Poland, Serbia, Romania, Greece, Czechoslovakia), four special chapters in the peace treaties with vanquished states (Austria, Bulgaria, Hungary, Turkey), and five unilateral declarations made between 1921 and 1932 by some states which were admitted to the League of Nations (Albania, Lithuania, Latvia, Estonia, Iraq).<sup>10</sup>

Although these first efforts at human rights protection were concerned only with specific categories of individuals in specific countries, and were one-sided and often used as a pretext for intervention in weaker states, they also show that, even at a time when few people spoke of human rights in their own countries, there were good reasons for attempts to try to take care of certain categories of persons in other states. Oppression of a whole population by its ruler of the same religion or, later, of the same ethnicity, could lead, at worst, to a rebellion or mutiny; oppression of groups which professed a different faith or were ethnically different could lead to the break-up of states and could drag other countries into the conflict as well.

There was also a sense of belongingness based on religion or ethnicity between the populations of different countries. And even if there were not any such feelings, they could be artificially created or fanned by religious or nationalistic leaders. These spiritual bonds between religious and ethnic kinsmen who lived in different states could be mobilized for the protection of the interests of those who were religiously or ethnically close to the 'protecting' powers. Therefore, the plight of minorities, especially those who had their religious or ethnic brethren in other countries, could directly affect inter-state relations. For example, the argument over who should protect the rights of the Christian subjects of the Sublime Porte played a role in the genesis of the Crimean War (1853–56) – the war which, in the words of Disraeli, was 'a just but unnecessary war' and which Sir Robert Morier called 'the only perfectly useless modern war that has been waged'.<sup>11</sup>

Chapter Two will deal in some detail with contemporary issues related to the rights of ethnic and religious minorities, and with the influence which their violation may exert on international relations. Here it should be emphasized that it was this relationship between

## 20. Human rights diplomacy

the interests and rights of ethnic or religious minorities and inter-state relations which raised human rights issues to the international level.

Issues of minority rights remain most explosive at the end of the millennium, and international peace and security may often depend on how states resolve issues related to religious or ethnic minorities. How many perfectly useless and unnecessary wars are currently being waged in the name of religion or ethnicity in different parts of the world? Though religious or ethnic motivation, as I shall try to show later, is not always the only or even the principal cause (contrary to what may be claimed by the participants in a conflict) leading to wars and humanitarian disasters, it certainly plays an important role in triggering many human rights violations, some of which may constitute a threat to international stability.

All this shows that problems of ethnic and religious minorities are often as much issues of international security as they are human rights issues. As violation of the rights of minorities may result in refugee flows, wars of secession, irredentist claims and foreign interference, it is natural that other states and the world community as a whole should be concerned with the issue.

Moreover, repressions against religious or ethnic minorities have always involved, and unfortunately continue to involve, some of the most inhumane atrocities which a human being is able to commit against a fellow human being. The genocide by the Turks of the Armenians at the beginning of this century, the Holocaust, massacres of the Hutus by the Tutsis and the Tutsis by the Hutus, and of the Bosnian Muslims by their Serb or Croat neighbours, upstage most human rights violations committed by tyrants against their own ethnic or religious brethren. Even ideological murderers such as Stalin or Pol Pot who, as a rule, did not discriminate as to the ethnic origin or religion of their victims, occasionally singled out certain religious or ethnic groups as special targets (for example, the Jews, Chechens and Crimean Tatars by Stalin, ethnic Vietnamese and Buddhist monks by Pol Pot).

In summary, it is a mixture of idealistic or even emotional motives, practical political considerations, and the possibility for the cynical use of the idea of the rights and interests of minorities as justification for acts having, in reality, very little to do with these ideals, which is at the basis of the emergence of international norms on the protection of minorities. The same mixture of idealism, pragmatism and cynicism can be found in the emergence and development of other international human rights standards.

*The raison d'être of human rights diplomacy* 21

For many people in many countries the international effort to promote human rights everywhere, and especially in places where they are most egregiously trampled upon, is seen as an end in itself. For them, human rights are for the sake of human rights. Human rights NGOs whose number and influence is constantly growing represent this trend, without which there would not be any human rights movement in the world. There are those who believe that at least some human rights violations may negatively affect inter-state relations by creating refugee flows, dragging neighbouring countries into internal disturbances and generally destabilizing international relations. In addition, many governments have used human rights as it suited them, cynically manipulating public opinion at home and exerting pressure on their political and ideological adversaries, while at the same time ignoring violations by friendly dictators.

These three categories of reasons for the existence of human rights discourse at the international level will remain in the foreseeable future. There is reason to believe, however, that as time goes on there will be less ground for the abusive or manipulative use of human rights issues in international relations, and that governments will be able to see that, at least in the long run, it is in their interest to take human rights seriously in their foreign policy-making.

### **ARE OPPRESSORS ALSO POTENTIAL AGGRESSORS?**

The most important reason for the post-Second World War rapid development of international human rights law was the link, real or perceived, between massive human rights violations and threats to international peace and security. The idea was put most eloquently in 1948 by George Marshall, the former US Secretary of State:

Governments which systematically disregard the rights of their own people are not likely to respect the rights of other nations and other people and are likely to seek their objectives by coercion and force.<sup>12</sup>

Article 55 of the UN Charter states that, 'with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations', the United Nations shall promote, *inter alia*, 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. The Universal Declaration of Human Rights of 1948 is equally clear: 'Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of... peace in the world'.

## 22 Human rights diplomacy

Nazi Germany is often given as an irrefutable example of how human rights violations at home lead to or are accompanied by an aggressive foreign policy.

This example rings true in the sense that domestic repression in Germany, before and during the Second World War, really did go hand in hand with its aggressive foreign policy, and the former was, if not a necessary precondition of the latter, then at least a factor which facilitated Germany's adventures abroad. Repressions at home cleared the way for aggression against other states. This example also serves to show how nationalism, violation of human rights at home and aggressive foreign policy may feed on each other. There are other examples, such as Iraq, Iran and Libya, which tend to show that domestic repression and adventurous behaviour abroad have certain, if not always direct then at least indirect, causal links. Oppression of domestic opposition and attempts to export religious fundamentalism or terrorism are caused by the same characteristics of some regimes. Often, a regime's hold of power needs to be justified in terms of foreign threats. This, in turn, can be achieved by demonizing other countries, peoples or faith. Though such policies do not always lead to armed conflicts or even terrorism, there is no doubt that they negatively affect relations between states and peoples.

However, even gross and massive human rights violations are rarely, if ever, the single or direct cause of wars or other threats to international stability. As Bruce Russet writes: 'Not all authoritarian states are necessarily aggressive. In fact, at any particular time, the great majority are not'.<sup>13</sup> The human rights situation in a country is usually only one element in the complex web of causes and conditions which may eventually lead to a breach of the peace, act of aggression, intervention, regional conflict, or to the creation of tension and friction with other states.

Yet, if there are territorial problems, unsatisfied imperial ambitions, simmering passions to remedy historical grievances, offences or perceived injustices, then an undemocratic and human rights-hostile regime may, more easily than a democratic state, choose violent means of resolving the problem. Such states are also more prone to engage in foolhardy external policies in an attempt to distract criticism from domestic problems. This was evidenced by the Argentine military under the Galtieri government which decided to invade the Malvinas-Falklands.<sup>14</sup> The bloody regimes of Idi Amin in Uganda and the Khmer Rouge in Cambodia provoked their respective neighbours, Tanzania and Vietnam, contrary to the self-interest of those governments in survival. External adventures which eventually

*The raison d'être of human rights diplomacy* 23

accelerated the demise of the oppressive cliques of Idi Amin and Pol Pot were undertaken to help consolidate their power and distract the attention of the population from domestic problems. A serious human rights situation may sometimes be a condition facilitating the furtherance of other negative tendencies, all of which in combination may create a threat to international stability. For example, the striving of the Serbian leadership to create a Greater Serbia was generated by Serbian nationalism and Serbia's hostile policy towards its minorities, and was facilitated also by the Croatian policy of discrimination against Serbs in Croatia. There were many other factors which influenced the outcome which we now have in the former Yugoslavia, but serious human rights violations, which were ethnically based, began long before the armed struggle broke out.

Nazi Germany did not attack its neighbours just because it was a fascist dictatorship. So was Franco's Spain. The search for the *Lebensraum*, a desire to unite all Germans, and economic interests, were the principal reasons for Germany's aggressive foreign policy. However, the upsurge of extreme nationalism leading to the suppression of any opposition to the regime and to 'ethnic cleansing' at home certainly made the adoption of such an aggressive attitude towards its neighbours much easier. Suppression of domestic opposition to an oppressive regime usually means at the same time the suppression of opposition to aggressive foreign policy.

Iraq, Libya, North Korea, Sudan and Iran, all have human rights-hostile regimes, and they all constitute in one way or another a potential threat to international peace and security. Fred Halliday writes, for example, that 'the concept of "export of revolution" (*sulur-i-inqilab*) was commonly used by Iranian officials. It included the conventional means of exporting political radicalism – arms, financial support, training, international congresses, propaganda and radio programmes'.<sup>15</sup> The imminent causes of such a threat are not the abominable human rights records of such countries, but the acts of aggression they commit against their neighbours, their export of terrorism and religious fundamentalism, or their nuclear ambitions. However, repression at home constitutes a *conditio sine qua non* for the pursuit of these policies. Without internal oppression many, if not all, of these regimes would quickly lose their power.

This relationship between domestic and foreign policy may be called a 'two-sides-of-the-same-coin' link between the human rights situation in a country and international stability. This link, in order to be realized, depends on other circumstances and does not necessarily mean that oppressive regimes put international stability at risk by

## 24 Human rights diplomacy

initiating wars against their neighbours. There are finer links between domestic oppression and international stability.

Repressive regimes have used real or imagined foreign threats in order to consolidate their hold on power and to justify their lack of human rights. It would have been more difficult to fabricate spy trials in the USSR in the 1930s, when not dissidents but convinced communists were accused of being British, Japanese or German spies, had there been friendly, or simply normal, relations between the Soviet Union and its neighbours. Moscow had a domestic interest in the existence of international tension. Several other totalitarian or authoritarian regimes have used alleged external threats in order to consolidate their power, and have thereby contributed to the increase of international tension.

On the other hand, extreme international tension may be, if not a cause, then at least a contributing factor to human rights limitations even in democratic countries; the Cold War and McCarthyism were not isolated phenomena. The witch-hunt in the United States could hardly have been possible without extreme international tension. Similarly, the threat from the North was a factor which contributed to the continuance of the national security state and encroachments on human rights in South Korea. Even after the reformist President Kim Young Sam came to power in 1993, fear of North Korea, with its supposed spies, saboteurs and propagandists, as *The Economist* reports, has prevented South Korea's Agency for National Security Planning from shedding all its old habits: 'Its news releases are still unreliable, and its respect for human rights remains less than full'.<sup>16</sup>

The atrocities committed by the North Korean authorities against their own population, and the isolation of one of the last communist regimes in the world, are both features which have a direct bearing on North Korea's nuclear ambition, which in its turn has a destabilizing effect on regional and world security. The failed ideology and political and economic system, repression against the population at home to keep the system going, the consequent isolation in the world, and an unpredictable and threatening foreign policy, are all links in the same chain.

The militant Islamic revolution in Iran resulted not only in the further limitation of the rights and freedoms of Iranians (I am not of course suggesting that they had unlimited rights under the Shah), but resulted also in the Teheran hostage crisis, support of terrorism in the Middle East, as well as in the *fatwa* against the writer Salman Rushdie.

I believe that these examples demonstrate the existence of links between domestic and international relations generally and internal

*The raison d'être of human rights diplomacy* 25

repressions and destabilizing foreign policy in particular. This thesis, that non-democratic and human rights-hostile states, through their foreign policy which is a reflection of their domestic policies, are prone under certain circumstances to having a destabilizing effect on international relations, has another aspect to it. It asserts that democratic and human rights-friendly states are more peaceful than states which lack these characteristics.

The end of the Cold War has given new impetus to the discussion on whether democratic states are more peaceful than authoritarian ones. Without going into great detail on this exciting and important dispute, and referring the reader to the works of Michael Doyle,<sup>17</sup> Bruce Russet<sup>18</sup> and others who support the thesis of peacefulness of democratic states, as well as to their critics,<sup>19</sup> I would like to make some observations which tend to confirm, with certain qualifications of course, the thesis that democratic states are usually less aggressive than non-democratic ones.

There are examples from earlier times which show that the character of a regime has direct relevance to its readiness to become engaged in armed conflict. Analysing the causes of the Crimean War of 1853–56, David Welch comes to the conclusion that, had the political system in Russia been a bit less authoritarian and more open, the war – which none of the participants really wanted – could have been avoided.<sup>20</sup> In our time, it is difficult to imagine that, had there been a less repressive and more open regime in Iraq in 1990, it could have committed a surprise attack on Kuwait.

This does not mean that democracies never go to war. For example, colonialism and colonial wars are an especially black spot on the history of Western democracies. Similarly, the US record in Latin America or Vietnam is far from exemplary. However, political stability and a political culture which favours the peaceful resolution of conflicts and compromises, together with certain institutional constraints, are the features of democratic states which limit their likelihood to engage in war in the international system.<sup>21</sup>

There are, of course, different views expressed on the issue. *The Economist*, for example, argues that 'if democracies are really the best bulwark against war, many seemingly hard choices between idealism and *Realpolitik* can be simplified abruptly. All good things can be made together'.<sup>22</sup> It is simply too good to be true, believes *The Economist*, and adds that too great a confidence in a simple correlation between democracy and peace may lull the world into a false sense of security.

However, such a danger hardly exists. Although the recent studies of

## 26 Human rights diplomacy

international crises demonstrate that democracies are significantly less likely to allow these crises to escalate into war, even when facing non-democratic opponents,<sup>23</sup> the problem rests that there are not enough democracies in the world to make this simple correlation safeguard peace in all parts of all continents. It will probably take more time and effort from different societies to achieve democracy in most countries than it will to achieve peace in the whole world. In any foreseeable future, both objectives would be simply utopian. Therefore, in the absence of a significant number of mature democracies, there is also no chance of being lulled into any kind of false sense of security.

It is also necessary to make clear that, even when a state has had its first free elections (usually such elections are semi-free), and has even had its period of *glasnost*, this does not mean that such a state immediately becomes democratic or more peaceful. On the contrary, as I will show in Chapter Two, during the initial stages of the liberalization and democratization of authoritarian regimes, such states may constitute an even greater threat to international stability than their authoritarian predecessors. Therefore, when one speaks of a correlation between democracy and peace, one should have in mind only stable, established, developed and mature democracies. There is usually quite a long road between first elections, which do not yet bring about democracy but are only the first step towards it, and the fruits of a developed democracy such as internal peace and prosperity and the contribution to international stability that this may bring.

Analysis of certain events of the mid-1990s shows rather clearly that there is a difference between the approaches of democratic states and non-democratic states involved, for whatever reason, in wars. While, for example, Western governments are constantly concerned with the lives of their troops on peacekeeping missions in hot-spots all over the world, and sometimes tend to worry more about the safety of their personnel than the achievement of peacekeeping or peace-making objectives, the authorities, for instance, of Russia – a country which has taken only its first steps along the road towards liberalization and democratization and whose society contains elements of democracy, authoritarianism and chaos – feel proud of Russian soldiers who lose their lives in Tadzhikistan or Chechnya. Pavel Grachev, the former Russian Minister of Defence, in his infamous televised speech, described for example how ‘Russian boys are dying in Chechnya with smiles on their faces’.<sup>24</sup> The way the Russian authorities handled the hostage crisis in Chechnya’s neighbour, Dagestan, in January 1996, where the village of Pervomayskoye was destroyed, many hostages were killed and many terrorists escaped,

*The raison d'être of human rights diplomacy* 27

shows gross neglect by the authorities for that most sacred of human rights – the right to life.

This, of course, is not only evidence of the strength of democracy but maybe its weakness, too, in the face of such challenges as General Aideed or Doctor Karadjic. Nevertheless, the comparison shows that there is a positive correlation between the values society ascribes to human life and its behaviour in the international arena: not being involved in armed conflicts and helping to avoid them is one of the ways to save the lives of citizens. I believe that this remains true even if we recognize that, for democratic governments, there is often rather a great difference between the value they ascribe to the lives of their own citizens (i.e., their electorate) and that which they ascribe to the lives of the nationals of other countries.

The existence of a positive link between human rights and international security can also be demonstrated when one compares the current Federal Republic of Germany with its Nazi predecessor. Though there are many factors which influence the current foreign policy of Germany (including, for example, its close integration into European structures), it would probably not be an overestimation to conclude that the strongest guarantee against a revival of Germany's aggressiveness, which has twice in this century led Europe and the whole world to catastrophic results, is the democratic nature of Germany and its attitude towards human rights.

The same can be said about Japan. Although democratic ideas were implanted into the Japanese soil from outside after its defeat in the Second World War, they nevertheless took root rather well. The historic development of both Germany and Japan shows clearly that there is a link between democracy and human rights at home and a state's behaviour in the international arena.

Currently, the best hopes for Russia's foreign policy becoming stable, irreversibly civilized and non-threatening for its neighbours lie, to a great extent, in the success of its domestic political, social and economic reforms. Zhirinovsky's promises to establish a dictatorship at home, and his threats to dump nuclear waste in the Baltic countries, are certainly two sides of the same coin. It seems to me that even the dispute between Russia and the West over NATO's enlargement is not completely detached from human rights problems. Russia has not yet established itself as a stable democracy. The December 1995 elections to the state Duma saw the return of the neo-communists. Moreover, paranoid military and extreme nationalists have an important say in Moscow's policy-making. These forces in Russia see themselves threatened by NATO moving eastwards. At the same time, Russia's

## 28 Human rights diplomacy

neighbours have an interest in putting themselves under the NATO umbrella, not only because of their previous experiences with the Russian and Soviet Empires, but also because they see that Russia is still far from becoming a stable democratic country that would not pose any security threat\* to its neighbours. And, in a vicious circle, the more bellicosely Russia responds to NATO's enlargement, the stronger will be the interest of Eastern Europeans and the Balts to join NATO. The stronger their desire to get under the NATO umbrella and the greater the likelihood that NATO's enlargement may become a reality, the more influential will become the voices of those in Russia who are against NATO moving eastwards.

### **THE CHANGE OF PARADIGM: WEAK STATES VIOLATE HUMAN RIGHTS AND THREATEN INTERNATIONAL STABILITY**

Even if an undemocratic and oppressive regime does not pursue aggressive foreign policy aims and does not directly threaten in any other way its neighbours, struggle against internal oppression may spill over and create at least regional security problems (for example, in Liberia in the 1990s, in Eastern Pakistan in 1971 and in Rwanda in 1994).

One of the widespread forms of spill-over from gross and massive repression and other forms of human rights violations is the flow of refugees. The UNHCR report for 1993 states: 'As the year [1993] began, the number of people forced to leave their countries for fear of persecution and violence had risen to a total of 18.2 million'.<sup>25</sup> This statistic becomes even more significant from the point of view of human rights when one considers that virtually all of the refugee-producing conflicts taking place in the world during 1993 were *within* states rather than between them. The UNHCR report found that 'the lack of representative political institutions, an independent judiciary, impartial law enforcement or free elections may lead people to conclude that armed resistance is the only way to bring about change'.<sup>26</sup> This confirms the existence of a recurrent pattern: human rights violations lead to internal disturbances which, in their turn, adversely affect international relations.

In the post-Cold War world, most armed conflicts are not inter-state clashes but civil wars or inter-ethnic conflicts<sup>27</sup> which very often have their roots in ethnically or religiously based human rights violations. Georgia's problems with its Ossetian and Abkhazian minorities; the Yugoslav pandemonium; the massacres in Rwanda and Burundi; Sri Lanka's and Indonesia's problems, are all conflicts

*The raison d'être of human rights diplomacy* 29

which have at their basis, if not outright violations of the elementary rights of ethnic minorities, then at least the neglect of their legitimate interests.

During the Cold War, most serious human rights abuses were caused mainly by strong centralized regimes. In the post-Cold War era, human rights are more often violated in countries with weak and unresponsive governments.<sup>28</sup> Such governments, in order to stay in power, to quell rebellions or to prevail in civil wars, often resort to gross human rights abuses. Liberia, Nigeria, Zaire and Tajikistan are current prominent examples of countries under unstable governments (or, in the case of Liberia, no government at all). In these countries, human rights abuses have significant effects, not only on the stability of the country itself but also on the stability of international relations. Even when weak governments would like to protect their people against abuses by insurgents or warlords, which is rarely the case, they are unable to do so.

Internal conflicts involving massive human rights violations create refugee flows, strain relations with neighbouring states, and may eventually drag the latter into such conflicts, especially if they are the 'motherlands' of ethnic or religious brethren who are, or are deemed to be, oppressed. In addition, in some countries corrupt and ineffective regimes are the cause of the absolute poverty and the great social inequality of a majority of the population, which in human rights terms is tantamount to the absence of any economic or social rights. In these circumstances a regime can usually stay in power only by suppressing any dissent or discontent. This can lead to the implosion of such countries, thereby causing even greater human rights emergencies which, again, have a tendency to adversely affect relations between states. Haiti and Liberia went through such a scenario.

It may sound paradoxical, but it is a thin line that separates a strong and a weak state. Many of today's weak states, only yesterday, had strong, authoritarian, repressive regimes in power. For example, the Soviet Union was able to suppress with a strong hand any opposition to Communist party rule for seventy years. However, today, the Russian government is unable to deal with a rising crime rate or secessionist tendencies without serious human rights violations. Chechnya is a prime example.<sup>29</sup> And the problem is that such strong and weak regimes have a tendency to replace each other on a regular basis, thereby throwing the society from oppression into chaos and from chaos into oppression. Strong authoritarian regimes are often under the threat of turning disorderly and violent, while social disorder usually calls for a strong hand. Hobbes's 'Leviathan', a centralized

### 30 Human rights diplomacy

state enabled ‘by terror...to form the wills of them all to peace at home and mutual aid against their enemies abroad’,<sup>30</sup> and ‘Behemoth’, a kind of non-state, a chaos, a condition of lawlessness, of rebellion, anarchy and civil war,<sup>31</sup> are both not only equally inimical to human rights. Often they seem to call for each other. Ralf Dahrendorf writes that ‘the absence of a credible state, lawlessness, the resulting mix of chaos and rebellion describe not totalitarianism, but the condition which gives rise to it’.<sup>32</sup> Recently *The Economist* noted that ‘Bad governments help worse ones into power: it was the corruption and authoritarianism of Cambodia in the 1960s that helped to create the Khmer Rouge.’<sup>33</sup> For the sake, not only of human rights, but also of international stability, it is necessary to try to break, where possible, such vicious circles. Once again it can be seen that domestic conflicts, even if they do not directly lead to international security threats, may have a destabilizing effect on international relations.

It is necessary to caution against the view, stated by Max Singer and Aaron Wildavski,<sup>34</sup> that the world can be neatly divided into zones of peace and zones of turmoil. Fred Halliday contends rightly that ‘the greatest mistake would be to maintain the idea that conflicts at the international level can be isolated from that within states’.<sup>35</sup> Internal conflicts within so-called zones of turmoil (basically, those in the Third World) inevitably affect states in so-called zones of peace. As Robert Keohane observes: ‘Threats to the rich democracies from the zones of conflict may include terrorism, unwanted migration, the proliferation of nuclear weapons, and economic damage’.<sup>36</sup>

Stanley Hoffmann shows convincingly that:

we live in a world in which apathy about what happens in ‘far away countries of which we know nothing’ [the phrase coined by Neville Chamberlain and used on the occasion of Hitler’s annexation of Czechoslovakia in 1938] can all too easily lead – through contagion, through the message such moral passivity sends to troublemakers, would-be tyrants, and ethnic cleansers elsewhere – not to the kind of Armageddon we feared during the Cold War but to a creeping escalation of disorder and beastliness that will, sooner or later, reach the shores of the complacent, the rich, and the indifferent.<sup>37</sup>

That is why Western European states are not acting simply out of pure altruism when they try to integrate the former communist countries into European structures. Similarly, when they met at the end of 1995 in Barcelona with representatives of states across the Mediterranean in order to promote economic growth and stability in the Magreb area and the Middle East, they were not thinking only of

*The raison d'être of human rights diplomacy* 31

countries across the Mediterranean. Western Europeans are rightly worried about illegal immigration, the export of drugs, terrorism, religious fundamentalism and instability from their 'near abroad'. Issues of economic cooperation, terrorism, drugs, immigration and also of human rights were discussed in Barcelona, and the EU proposed to double its funds for the Mediterranean region over the next five years.<sup>38</sup> On 28 November 1995, the EU and its twelve Mediterranean neighbours signed a cooperation pact aimed at improving regional stability by lifting trade barriers, pouring cash into struggling economies and strengthening political ties.<sup>39</sup>

The more interconnected and interdependent the world becomes, the greater the interest which states have in affairs which, until quite recently, were considered to be exclusively internal matters. Human rights are often at the centre of such intermestic (international/domestic) affairs.

### **IS BUSINESS PRO OR ANTI HUMAN RIGHTS?**

If public opinion, the mass media and NGOs often push governments towards more active human rights diplomacy, the attitude of business communities to human rights is more controversial. We may recall that in 1972, after Ferdinand Marcos had declared martial law in the Philippines, the American Chamber of Commerce sent him a telegram in which the American business community wished him every success in his 'endeavor to restore peace and order, business confidence, economic growth and the well-being of the Filipino people'.<sup>40</sup> US grain farmers were not supportive of Washington's attempts to link trade with the Soviet Union to the latter's human rights record. Recently, American businesses were against tying Chinese MFN (Most Favoured Nation) status to its human rights record. Similarly, they have been against pushing India too hard on its human rights violations in Kashmir.

Such an attitude is, if not always justifiable, then at least understandable. The purpose of business is to make money, not to promote human rights. It just so happens that while business is making money, consumers usually become better off. Interestingly enough, something similar may happen with the link between business interests and human rights in countries where these interests lie.

Businesses may be against linking trade with human rights, but they are interested in the stability and predictability of their business transactions. This means that they have an interest in the stability of law and order wherever they do business. Safety of investments and of

### 32 Human rights diplomacy

other business transactions cannot be completely separated from issues of civil and political rights. There are at least two problems which a business may have with dictators like Idi Amin or Bokassa: such despots either may easily change their mind, or they may be overthrown.

Moreover, in the post-Cold War world, as we have already mentioned, most human rights violations do not occur in strong, stable states like, for example, the former Soviet Union, its Eastern European allies, Chile, Paraguay or Argentina under military dictatorships, which were able to guarantee the stability and order (though at the expense of justice and human rights) necessary for businesses. Currently, in most states where gross and massive human rights violations occur, there is neither justice nor order. Suppression of human rights is not leading to an unjust order, but is contributing to the increase of unjust chaos. Pinochet's success story (I do not know whether in this context to use quotation marks or not) will hardly be repeated. As *The Economist* aptly points out, 'If dictators made countries rich, Africa would be an economic colossus'.<sup>41</sup>

On the other hand, there does seem to be a positive, though not absolute, and somewhat controversial correlation between economic development and political freedoms. There are studies which confirm that, other things being equal, an improvement of one mark in civil and political freedoms raises annual growth per head of roughly a full percentage point.<sup>42</sup> And, *vice versa*, economic growth has been followed, at least in some important cases, by political liberalization (for example, in South Korea, Malaysia, Taiwan, Chile). Eric Hobsbawm writes that 'the rapid industrial growth tended to generate large and educated professional classes which, though far from subversive, would have welcomed the civic liberalization of authoritarian industrializing regimes'.<sup>43</sup> 'Authoritarianism works only up to a point', argues Soogil Young, President of the Korea Transport Institute in Seoul. 'It becomes a victim of its own success'.<sup>44</sup> Osvaldo Sunkel writes, of Latin American dictatorships: 'With the exception of Chile, military governments were rather unsuccessful and unpopular, particularly as they were unable to deal with the economic and social crisis that is still largely present'.<sup>45</sup>

It seems that, in countries such as Singapore and Malaysia, their newly prosperous people may soon become tired of the *de facto* one-party rule which has brought them stability and wealth at the cost of political freedom.

This means that businesses, being interested in economic freedoms, may become unexpected and unintentional allies for those who are

*The raison d'être of human rights diplomacy* 33

interested in the promotion of human rights. Certainly, their interest in economic stability is not affected by the limitations on freedom of the press, or by the corporal punishment meted out to young vandals who spray cars with graffiti somewhere in Singapore or Malaysia, especially if such limitations or punishments are not actively protested against or are even supported by the majority of the population at home. However, when authorities use excessive violence to suppress popular discontent, resort to torture or arbitrarily kill opponents of their regime, businesses ought to think twice before investing in such countries.

There are examples which show that some businesses have taken action in support of human rights abroad. At the beginning of 1995, US Federated Department Stores, which owns Macy's, New York's largest shop, declared that it would stop buying clothes made in Myanmar, and the City Council of Berkeley, California, decided not to buy goods produced by companies doing business in that country. Levi Strauss, the clothing giant, had already withdrawn earlier.<sup>46</sup>

Of course, there are many other examples of quite a different kind. Arms producers and dealers are especially notorious for selling their products to the worst human rights violators. However, civilized investors need at least some minimum standard of civilized business conditions. Robert Keohane argues that 'stable property rights require constitutional government, although not necessarily democracy. Hence the desire for economic growth provides a set of incentives for constitutionalism, as can be observed in Korea and Taiwan and perhaps in the future will emerge in China'.<sup>47</sup> However, he also warns that 'these incentives are not necessarily decisive; other favourable conditions have to apply before constitutionalism can be effectively instituted'.<sup>48</sup> To the extent that business needs the stability of property rights which cannot be guaranteed without at least some law and order, business may be an ally of those who are interested in the promotion of human rights (see Chapter Five).

## HUMAN RIGHTS DIPLOMACY FOR THE SAKE OF HUMAN RIGHTS

The link between the atrocities committed by the Nazis at home and their aggressive foreign policy was not the only reason for the rapid development of the international – inter-governmental as well as non-governmental – human rights movements after the Second World War. One need not be Jewish to feel deeply shocked by the Holocaust, or Muslim to call for action in order to stop the rape of Muslim women in

### 34 Human rights diplomacy

Bosnia. There are not only pragmatic but also humanitarian reasons why peoples and states have become concerned with human rights in other countries. Not only religious or ethnic bonds, but simply the fact of belonging to humankind, may be for many individuals and peoples a factor which does not allow them to remain indifferent to the plight of fellow human beings in other countries.

The world is composed not only of states. Other entities, such as non-governmental as well as inter-governmental organizations, and individuals play an active part in world affairs. That is why we have a rather specific branch in international law – international human rights law – whose emergence and development is not only due to the fact that some human rights situations may adversely affect inter-state relations but whose genesis also reflects the increasing role of individuals and non-governmental bodies in domestic and international affairs.

Richard Rorty observes that the last two hundred years of moral progress has brought us to a moment in human history in which it is plausible to say that the human rights phenomenon is a ‘fact of the world’.<sup>49</sup> Though Rorty is cautious and writes that this phenomenon may be just a ‘blip’, he nevertheless believes that ‘it may mark the beginning of a time in which gang rape brings forth as strong a response when it happens to women as when it happens to men, or when it happens to foreigners as when it happens to people like us’.<sup>50</sup>

More recently, the so-called ‘CNN factor’ has brought humankind even closer together, with the result that many people in many countries feel strongly that ‘something should be done’ when acts of genocide, torture, gross discrimination based on race, ethnicity, religion or gender, as well as other crimes against human rights, take place in far-away places. Mass media and public pressure are often factors inducing the governments of democratic countries to take human rights into consideration in their foreign policy decision-making. The governments of democratic countries would feel rather embarrassed had they remained silent in the face of the atrocities committed against civilians in Bosnia, had they not reacted at all to the genocide in Rwanda or to the persecution of opponents of the military regime in Nigeria.

Of course, since the emergence of the very first international human rights instruments on the protection of certain minorities, human rights issues, as we saw, have been used as an instrument of state policy with quite a large portion of hypocrisy. Thus, in the Cold War era, human rights were often abused as part of the ideological and political struggle between the East and the West. However, in the development

*The raison d'être of human rights diplomacy* 35

of international law, there is a phenomenon which could be called the 'hypocrisy trap'. For example, in the domain of human rights – where morality plays an important role and governments seldom want to be seen as outrightly immoral – some governments, which pay only lip-service to human rights or which try to use the issue as an instrument against their political adversaries, may find at the end of the day that their behaviour has nonetheless led to the emergence of certain norms and even practices which may really start to affect governments' policy. International human rights standards, like many other principles and norms of international law, are not just pieces of paper. They have the capacity to create expectations on the part of individuals and peoples as well as on the part of other governments – expectations which states may find difficult to resist. Louis Henkin is right when he says that

the development of human rights law may indeed serve as a lesson in the benign consequences of certain kinds of hypocrisy, of the homage that vice pays to virtue. It is important that human rights is the virtue to which vice is impelled to pay homage. Then all states are impelled to accept human rights in principle, making promises to their own people as well as to the world. Repressive states are compelled to deny and conceal, but concealment can be uncovered and lies exposed.<sup>51</sup>

The international human rights movement, whatever its causes and reasons, has acquired its own momentum, and states could stay away from it only by losing further some of their credibility and power to other actors.

## **CONCLUSIONS**

I believe that these examples and arguments show that governments and peoples have a legitimate interest in human rights issues everywhere, at home and abroad. This interest does not depend on whether violations are committed by strong or weak regimes. It is not surprising, therefore, that the planners of the Western European Union are currently drawing up contingency plans for operations on humanitarian relief, peacekeeping and crisis-management. For example, one of the planning exercises in November 1994 concerned a relief mission in an imaginary African country.<sup>52</sup> It is obvious that, if military planners are concerning themselves with the consequences of humanitarian emergencies, the thoughts of politicians should be aimed at how to prevent such emergencies from arising. Human rights situations in many countries may be the indicators of

### 36 Human rights diplomacy

impending instability and an object of serious concern for the world community.

Thus we may conclude that human rights have today become an important part of international diplomacy, because their absence or serious violation can often negatively affect relations between states (an issue which will be discussed in some detail in the following chapters), and also because there is a common bond between most human beings, irrespective of their racial, ethnic, religious or national origin, which allows us to speak of humanity and which sometimes forces governments to act even contrary to the precepts of *Realpolitik*. Luc Ferry is right that ‘tant que la politique continuera de sous-estimer l’importance historique de la naissance de l’amour modern, tant qu’elle ne comprandra pas le potentiel extraordinaire de solidarité, de sympathie qui réside dans la sphère privée, tant qu’elle ne fera pas fond sur lui, rien, en elle, ne suscitera l’enthousiasme’.<sup>53</sup>

- 1 L. Henkin, *International Law: Politics and Values*, p. 106 (Dordrecht: Nijhoff Publishers, 1995).
- 2 The laws of war, which aim at the protection of individuals in international armed conflicts, emerged, of course, much earlier than international norms on the rights of religious or ethnic minorities. In contrast to human rights norms, which protect the individual *vis-à-vis* his or her own state, the rules and customs of war (or international humanitarian law) emerged to protect only enemy or alien nationals. Expected reciprocity was the very reason for such a concern for the rights of enemy nationals. Therefore the laws of war are international by definition.
- 3 I. Brownlie, *International Law and the Use of Force by States*, p. 340 (Oxford: Clarendon Press, 1963).
- 4 See A. de Balogh, *La protection internationale des minorités*, p. 23 (Paris: Les éditions internationales, 1930).
- 5 See F. L. Israel, *Major Peace Treaties of Modern History, 1648–1967*, vol. 1, pp. 7–49 (New York: Chelsea House in association with McGraw-Hill, 1967).
- 6 See P. Thornberry, *International Law and the Rights of Minorities*, p. 27 (Oxford: Clarendon Press, 1991).
- 7 See E. C. Stowell, *Intervention in International Law*, pp. 126, 489 (Washington, DC: Henry Holt & Company, 1921).
- 8 See Stowell 1921.
- 9 F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, p. 17 (New York: United Nations, 1991).
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- 12 Quoted by W. Laqueur in ‘The Issue of Human Rights’, *Commentary*, 64:5, 33 (1977).
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- 16 *The Economist*, 14 May 1994, p. 88.
- 17 M. Doyle, 'Kant, Liberal Legacies, and Foreign Affairs', *Philosophy and Public Affairs*, 12:3 (1983).
- 18 Russet 1993.
- 19 C. Layne, 'Kant or Cant: The Myth of the Democratic Peace', *International Security*, 19:2 (1994); D. Spiro, 'The Insignificance of the Liberal Peace', *International Security*, 19:2 (1994).
- 20 Welch 1993, p. 73.
- 21 See Russet 1993, pp. 11–35.
- 22 *The Economist*, 1 April 1995, p. 21.
- 23 A. Moravcsik, 'Letter to the Economist', *The Economist*, 29 April 1995, p. 8.
- 24 *Sunday Times*, 9 July 1995, p. 15.
- 25 UNHCR, *The State of the World's Refugees. The Challenge of Protection*, p. 1 (New York: Penguin Books, 1993).
- 26 Ibid., p. 3.
- 27 The 1994 Human Development Report prepared by the UNDP counts only three inter-state wars in the period between 1989 and 1992, while there had been seventy-nine cases of intra-state conflicts within the same period (*UNDP, Human Development Report 1994*, p. 47 (New York: Oxford University Press, 1994)).
- 28 See *Country Reports on Human Rights Practices for 1994*, US State Department, February 1995.
- 29 The Parliamentary Assembly of the Council of Europe, in its Resolution of 2 February 1995, declared that although the political conflict between Chechnya and the central authorities of the Russian Federation belonged to the internal affairs of Russia, the methods used by these authorities violate Russia's international obligations (*Human Rights in Russia – International Dimension* (in Russian), Moscow: *Prava Cheloveka* (Human Rights) 1995, p. 179). In January 1996, though the Parliamentary Assembly voted for the admission of Russia to the Council of Europe, its government was severely criticized by many members of the Assembly for its human rights record generally and especially for its handling of the hostage crisis in Dagestan. The main reasoning behind the vote in favour of Russia seems to be that positive changes in the country would become a reality through its inclusion into European structures rather than its exclusion from them.
- 30 T. Hobbes, *Leviathan*, Part 2, Chapter 17.
- 31 T. Hobbes, *Behemoth or the Long Parliament* (ed. F. Tonnies), Second edition (London: Frank Cass & Co., 1969).
- 32 R. Dahrendorf, *Law and Order*, p. 158 (London: Stevens & Sons, 1985).
- 33 *The Economist*, 28 August 1993, p. 15.
- 34 See M. Singer and A. Wildavski, *The Real World Order: Zones of Peace/Zones of Turmoil* (Chatham: Chatham House Publishers, 1993).

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- 37 S. Hoffman, 'In Defence of Mother Teresa: Morality in Foreign Policy', *International Affairs*, 75:2 (March–April 1996), 175.
- 38 *The Times*, 27 November 1995, p. 9.
- 39 *The Times*, 29 November 1995, p. 21.
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- 41 *The Economist*, 27 August 1994, p. 17.
- 42 Ibid., p. 19.
- 43 E. Hobsbawm, *Age of Extremes*, p. 370 (London: Michael Joseph, 1994).
- 44 *Time*, 22 May 1995, p. 57.
- 45 O. Sunkel, 'Uneven Globalization, Economic Reform, and Democracy: A View from Latin America', in H. H. Holm and G. Sorensen (eds), *Whose World Order*, p. 57 (Boulder: Westview Press, 1995).
- 46 *The Economist*, 22 April 1995, p. 77.
- 47 Keohane 1995, p. 224.
- 48 Ibid.
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- 50 Ibid.
- 51 Henkin 1995, p. 183.
- 52 *The Economist*, 25 February 1995, p. 22.
- 53 L. Ferry, *L'homme-Dieu ou le Sens de la vie*, p. 225 Paris: Grasset, 1996).

# The Responsibility to Protect\*

*Gareth Evans and Mohamed Sahnoun*

## REVISITING HUMANITARIAN INTERVENTION

THE INTERNATIONAL COMMUNITY in the last decade repeatedly made a mess of handling the many demands that were made for “humanitarian intervention”: coercive action against a state to protect people within its borders from suffering grave harm. There were no agreed rules for handling cases such as Somalia, Bosnia, Rwanda, and Kosovo at the start of the 1990s, and there remain none today. Disagreement continues about whether there is a right of intervention, how and when it should be exercised, and under whose authority.

Since September 11, 2001, policy attention has been captured by a different set of problems: the response to global terrorism and the case for “hot preemption” against countries believed to be irresponsibly acquiring weapons of mass destruction. These issues, however, are conceptually and practically distinct. There are indeed common questions, especially concerning the precautionary principles that should apply to any military action anywhere. But what is involved in the debates about intervention in Afghanistan, Iraq, and elsewhere is the scope and limits of countries’ rights to

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GARETH EVANS is President and Chief Executive Officer of the International Crisis Group and former Foreign Minister of Australia. MOHAMED SAHNOUN is Special Adviser on Africa to the UN Secretary-General and a former senior Algerian diplomat. They co-chaired the International Commission on Intervention and State Sovereignty (ICISS), whose report, *The Responsibility to Protect*, was published in December 2001 and is now available on [www.iciss-ciise.gc.ca](http://www.iciss-ciise.gc.ca).

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\* Evans, Gareth and Sahnoun, Mohamed, "The Responsibility to Protect", *Foreign Affairs*, 81(6), 2002,

pp. 99-110.

*Gareth Evans and Mohamed Sahnoun*

act in self-defense—not their right, or obligation, to intervene elsewhere to protect peoples other than their own.

Meanwhile, the debate about intervention for human protection purposes has not gone away. And it will not go away so long as human nature remains as fallible as it is and internal conflict and state failures stay as prevalent as they are. The debate was certainly a lively one throughout the 1990s. Controversy may have been muted in the case of the interventions, by varying casts of actors, in Liberia in 1990, northern Iraq in 1991, Haiti in 1994, Sierra Leone in 1997, and (not strictly coercively) East Timor in 1999. But in Somalia in 1993, Rwanda in 1994, and Bosnia in 1995, the UN action taken (if taken at all) was widely perceived as too little too late, misconceived, poorly resourced, poorly executed, or all of the above. During NATO's 1999 intervention in Kosovo, Security Council members were sharply divided; the legal justification for action without UN authority was asserted but largely unargued; and great misgivings surrounded the means by which the allies waged the war.

It is only a matter of time before reports emerge again from somewhere of massacres, mass starvation, rape, and ethnic cleansing. And then the question will arise again in the Security Council, in political capitals, and in the media: What do we do? This time around the international community must have the answers.<sup>1</sup> Few things have done more harm to its shared ideal that people are all equal in worth and dignity than the inability of the community of states to prevent these horrors. In this new century, there must be no more Rwandas.

Secretary-General Kofi Annan, deeply troubled by the inconsistency of the international response, has repeatedly challenged the General Assembly to find a way through these dilemmas. But in the debates that followed his calls, he was rewarded for the most part by cantankerous exchanges in which fervent supporters of intervention

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<sup>1</sup> In September 2000, the government of Canada established the ICISS. Our colleagues were Gisele Cote-Harper, Lee Hamilton, Michael Ignatieff, Vladimir Lukin, Klaus Naumann, Cyril Ramaphosa, Fidel Ramos, Cornelio Sommaruga, Eduardo Stein, and Ramesh Thakur. We met as a commission in Africa, Asia, Europe, and North America and consulted comprehensively in Latin America, the Middle East, Russia, and China. This article is a distillation of the report.

### *The Responsibility to Protect*

on human rights grounds, opposed by anxious defenders of state sovereignty, dug themselves deeper and deeper into opposing trenches.

If the international community is to respond to this challenge, the whole debate must be turned on its head. The issue must be reframed not as an argument about the “right to intervene” but about the “responsibility to protect.” And it has to be accepted that although this responsibility is owed by all sovereign states to their own citizens in the first instance, it must be picked up by the international community if that first-tier responsibility is abdicated, or if it cannot be exercised.

#### SOVEREIGNTY AS RESPONSIBILITY

USING this alternative language will help shake up the policy debate, getting governments in particular to think afresh about what the real issues are. Changing the terminology from “intervention” to “protection” gets away from the language of “humanitarian intervention.” The latter term has always deeply concerned humanitarian relief organizations, which have hated the association of “humanitarian” with military activity. Beyond that, talking about the “responsibility to protect” rather than the “right to intervene” has three other big advantages. First, it implies evaluating the issues from the point of view of those needing support, rather than those who may be considering intervention. The searchlight is back where it should always be: on the duty to protect communities from mass killing, women from systematic rape, and children from starvation. Second, this formulation implies that the primary responsibility rests with the state concerned. Only if that state is unable or unwilling to fulfill its responsibility to protect, or is itself the perpetrator, should the international community take the responsibility to act in its place. Third, the “responsibility to protect” is an umbrella concept, embracing not just the “responsibility to react” but the “responsibility to prevent” and the “responsibility to rebuild” as well. Both of these dimensions have been much neglected in the traditional humanitarian-intervention debate. Bringing them back to center stage should help make the concept of reaction itself more palatable.

At the heart of this conceptual approach is a shift in thinking about the essence of sovereignty, from control to responsibility. In the

*Gareth Evans and Mohamed Sahnoun*

classic Westphalian system of international relations, the defining characteristic of sovereignty has always been the state's capacity to make authoritative decisions regarding the people and resources within its territory. The principle of sovereign equality of states is enshrined in Article 2, Section 1, of the UN Charter, and the corresponding norm of nonintervention is enshrined in Article 2, Section 7: a sovereign state is empowered by international law to exercise exclusive and total jurisdiction within its territorial borders, and other states have the corresponding duty not to intervene in its internal affairs. But working against this standard has been the increasing impact in recent decades of human rights norms, bringing a shift from a culture of sovereign impunity to one of national and international accountability. The increasing influence of the concept of human security has also played a role: what matters is not just state security but the protection of individuals against threats to life, livelihood, or dignity that can come from within or without. In short, a large and growing gap has been developing between international behavior as articulated in the state-centered UN Charter, which was signed in 1946, and evolving state practice since then, which now emphasizes the limits of sovereignty.

Indeed, even the strongest supporters of state sovereignty will admit today that no state holds unlimited power to do what it wants to its own people. It is now commonly acknowledged that sovereignty implies a dual responsibility: externally, to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state. In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum content of good international citizenship. Although this new principle cannot be said to be customary international law yet, it is sufficiently accepted in practice to be regarded as a de facto emerging norm: the responsibility to protect.

#### MILITARY INTERVENTION: SETTING THE BAR

THE RESPONSIBILITY to protect implies a duty to react to situations in which there is compelling need for human protection. If preventive measures fail to resolve or contain such a situation, and when the state

### *The Responsibility to Protect*

in question is unable or unwilling to step in, then intervention by other states may be required. Coercive measures then may include political, economic, or judicial steps. In extreme cases—but only extreme cases—they may also include military action. But what is an extreme case? Where should we draw the line in determining when military intervention is defensible? What other conditions or restraints, if any, should apply in determining whether and how that intervention should proceed? And, most difficult of all, who should have the ultimate authority to determine whether an intrusion into a sovereign state, involving the use of deadly force on a potentially massive scale, should actually go ahead? These questions have generated an enormous literature and much competing terminology, but on the core issues there is a great deal of common ground, most of it derived from “just war” theory. To justify military intervention, six principles have to be satisfied: the “just cause” threshold, four precautionary principles, and the requirement of “right authority.”

#### OPERATION JUST CAUSE

AS FOR THE “JUST CAUSE” THRESHOLD, our starting point is that military intervention for human protection purposes is an extraordinary measure. For it to be warranted, civilians must be faced with the threat of serious and irreparable harm in one of just two exceptional ways. The first is large-scale loss of life, actual or anticipated, with genocidal intent or not, which is the product of deliberate state action, state neglect, inability to act, or state failure. The second is large-scale “ethnic cleansing,” actual or anticipated, whether carried out by killing, forced expulsion, acts of terror, or rape.

Why does the bar for just cause need to be set so high? There is the conceptual reason that military intervention must be very exceptional. There is also a practical political rationale: if intervention is to happen when it is most necessary, it cannot be called on too often. In the two situations identified as legitimate triggers, we do not quantify what is “large scale” but make clear our belief that military action can be legitimate as an anticipatory measure in response to clear evidence of likely large-scale killing or ethnic cleansing. Without this possibility, the international community would be placed in the morally untenable

*Gareth Evans and Mohamed Sahnoun*

position of being required to wait until genocide begins before being able to take action to stop it. The threshold criteria articulated here not only cover the deliberate perpetration of horrors such as in the cases of Bosnia, Rwanda, and Kosovo. They can also apply to situations of state collapse and the resultant exposure of the population to mass starvation or civil war, as in Somalia. Also potentially covered would be overwhelming natural or environmental catastrophes, in which the state concerned is either unwilling or unable to help and significant loss of life is occurring or threatened. What are not covered by our “just cause” threshold criteria are human rights violations falling short of outright killing or ethnic cleansing (such as systematic racial discrimination or political oppression), the overthrow of democratically elected governments, and the rescue by a state of its own nationals on foreign territory. Although deserving of external action—including in appropriate cases political, economic, or military sanctions—these are not instances that would seem to justify military action for human protection purposes.

**PRECAUTIONARY PRINCIPLES**

OF THE PRECAUTIONARY PRINCIPLES needed to justify intervention, the first is “right intention.” The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. There are a number of ways of helping ensure that this criterion is satisfied. One is to have military intervention always take place on a collective or multilateral basis. Another is to look at the extent to which the intervention is actually supported by the people for whose benefit the intervention is intended. Yet another is to look to what extent the opinion of other countries in the region has been taken into account and is supportive. Complete disinterestedness may be an ideal, but it is not likely always to be a reality: mixed motives, in international relations as everywhere else, are a fact of life. Moreover, the budgetary cost and risk to personnel involved in any military action may make it imperative for the intervening state to be able to claim some degree of self-interest in the intervention, however altruistic its primary motive.

### *The Responsibility to Protect*

The second precautionary principle is “last resort”: military intervention can be justified only when every nonmilitary option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded. The responsibility to react with military coercion can be justified only when the responsibility to prevent has been fully discharged. This guideline does not necessarily mean that every such option must literally have been tried and failed; often there is simply not enough time for that process to work itself out. But it does mean that there must be reasonable grounds for believing that, given the circumstances, other measures would not have succeeded.

The third principle is “proportional means”: the scale, duration, and intensity of the planned military intervention should be the minimum necessary to secure the defined objective of protecting people. The scale of action taken must be commensurate with its stated purpose and with the magnitude of the original provocation. The effect on the political system of the country targeted should be limited to what is strictly necessary to accomplish the intervention’s purpose. Although the precise practical implications of these strictures are always open to argument, the principles involved are clear enough.

Finally, there is the principle of “reasonable prospects”: there must be a reasonable chance of success in halting or averting the suffering that has justified the intervention; the consequences of action should not be worse than the consequences of inaction. Military action must not risk triggering a greater conflagration. Applying this precautionary principle would, on purely utilitarian grounds, likely preclude military action against any one of the five permanent members of the Security Council, even with all other conditions for intervention having been met. Otherwise, it is difficult to imagine a major conflict being avoided or success in the original objective being achieved. The same is true for other major powers that are not permanent members of the Security Council. This raises the familiar question of double standards, to which there is only one answer: The reality that interventions may not be plausibly mounted in every justifiable case is no reason for them not to be mounted in any case.

*Gareth Evans and Mohamed Sahnoun*

#### WHOSE AUTHORITY?

THE MOST DIFFICULT and controversial principle to apply is that of “right authority.” When it comes to authorizing military intervention for human protection purposes, the argument is compelling that the United Nations, and in particular its Security Council, should be the first port of call. The difficult question—starkly raised by the Kosovo war—is whether it should be the last.

The issue of principle here is unarguable. The UN is unquestionably the principal institution for building, consolidating, and using the authority of the international community. It was set up to be the linchpin of order and stability, the framework within which members of the international system negotiate agreements on the rules of behavior and the legal norms of proper conduct to preserve the society of states. The authority of the UN is underpinned not by coercive power but by its role as the applicator of legitimacy. The concept of legitimacy acts as the connecting link between the exercise of authority and the recourse to power. Attempts to enforce authority can be made only by the legitimate agents of that authority. Nations regard collective intervention blessed by the UN as legitimate because a representative international body duly authorized it, whereas unilateral intervention is seen as illegitimate because it is self-interested. Those who challenge or evade the authority of the UN run the risk of eroding its authority in general and undermining the principle of a world order based on international law and universal norms.

The task is not to find alternatives to the Security Council as a source of authority, but to make the council work better than it has. Security Council authorization should, in all cases, be sought prior to any military intervention being carried out. Those advocates calling for an intervention should formally request such authorization, ask the council to raise the matter on its own initiative, or demand that the secretary-general raise it under Article 99 of the UN Charter. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large-scale loss of life or ethnic cleansing. It should, in this context, also seek adequate verification of facts or conditions on the ground that might support a military intervention. And the council’s five

*The Responsibility to Protect*

permanent members should agree to not exercise their veto power (in matters where their vital state interests are not involved) to block resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support. We know of at least one that will so agree.

If the Security Council is unable or unwilling to act in a case crying out for intervention, two institutional solutions are available. One is for the General Assembly to consider the matter in an emergency special session under the “Uniting for Peace” procedure, used in the cases of Korea in 1950, Egypt in 1956, and Congo in 1960. Had it been used, that approach could well have delivered a speedy majority recommendation for action in the Rwanda and Kosovo cases. The other is action within an area of jurisdiction by regional or subregional organizations under Chapter VIII of the UN Charter, subject to their seeking subsequent authorization from the Security Council; that is what happened with the West African interventions in Liberia in the early 1990s and in Sierra Leone in 1997. But interventions by ad hoc coalitions (or individual states) acting without the approval of the Security Council, the General Assembly, or a regional or subregional grouping do not find wide international favor. As a matter of political reality, then, it would simply be impossible to build consensus around any set of proposals for military intervention that acknowledged the validity of any intervention not authorized by the Security Council or General Assembly.

There are many reasons to be dissatisfied with the role that the Security Council usually plays: its generally uneven performance, its unrepresentative membership, and its inherent institutional double standards with the permanent-five veto power. But there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes. The political reality—quite apart from the force of the argument in principle—is that if international consensus is ever to be reached about how military intervention should happen, the Security Council will clearly have to be at the heart of that consensus.

The task is to make the Security Council work better than it has.

*Gareth Evans and Mohamed Sahnoun*

But what if the Security Council fails to discharge its own responsibility to protect in a conscience-shocking situation crying out for action, as was the case with Kosovo? A real question arises as to which of two evils is the worse: the damage to international order if the Security Council is bypassed, or the damage to that order if human beings are slaughtered while the Security Council stands by. The answer to this dilemma is twofold, and these messages have to be delivered loud and clear. First, if the Security Council does fail to discharge its responsibility in such a case, then concerned individual states simply may not rule out other means to address the gravity and urgency of the situation. It follows that there will be a risk that such interventions, without the discipline and constraints of UN authorization, will not be conducted for the right reasons or with the right commitment to the necessary precautionary principles. Second, if the council does fail to act and a military intervention by an ad hoc coalition or individual state follows and respects all the necessary threshold and precautionary criteria—and if that intervention succeeds and is seen by the world to have succeeded—this outcome may have enduringly serious consequences for the stature of the UN itself. This is essentially what happened with the NATO intervention in Kosovo. The UN cannot afford to drop the ball too many times on that scale.

**THE PROBLEM OF POLITICAL WILL**

AS IMPORTANT as it is to reach consensus on the principles that should govern intervention for human protection purposes, unless the political will is mustered to act when necessary, the debate will be largely academic. As events during the 1990s too often demonstrated, even a decision by the Security Council to authorize international action in humanitarian cases has been no guarantee that any action would be taken, or taken effectively. The most compelling task now is to work to ensure that when the call for action goes out to the community of states, it will be answered.

Part of the problem is that there are few countries in the global community who have the assets most in demand in implementing intervention mandates. There are real constraints on how much

### *The Responsibility to Protect*

spare capacity exists to take on additional burdens. United Nations peacekeeping peaked in 1993 at 78,000 personnel; today, if NATO and other multinational force operations (e.g., in Afghanistan) are included along with UN missions, the number of soldiers in international peace operations has grown by about 45 percent, to 113,000. Even states willing in principle to look at new foreign military commitments need to make choices about how to use limited and strained military capabilities.

If the right choices are to be made in the right situations, there is no alternative but to generate the necessary political will in the relevant constituencies. Too often more time is spent lamenting the absence of political will than on analyzing its ingredients and how to mobilize them. The key to mobilizing international support for intervention is to mobilize domestic support, or at least to neutralize domestic opposition. It is usually helpful to press three buttons in particular.

Moral appeals inspire and legitimize in almost any political environment: political leaders often underestimate the sheer sense of decency and compassion that prevails among their electorates. Financial arguments also have their place: preventive strategies are likely to be far cheaper than responding after the event through military action, humanitarian relief assistance, postconflict reconstruction, or all three. If coercive action is required, however, earlier is always cheaper than later. National interest appeals are the most comfortable and effective of all and can be made at many different levels. Avoiding the disintegration of a neighbor, given the refugee outflows and general regional security destabilization associated with it, can be a compelling motive in many contexts. National economic interests often can be equally well served by keeping resource supply lines, trade routes, and markets undisrupted. And whatever may have been the case in the past, nowadays peace is generally regarded as much better for business than is war.

For those domestic constituencies who may actually demand that their governments not be moved by altruistic "right intention," the best short answer may be that these days good international citizenship is a matter of national self-interest. With the world as interdependent as it now is, and with crises as capable as they now are of generating major problems elsewhere (such as terrorism, refugee

*Gareth Evans and Mohamed Sahnoun*

outflows, health pandemics, narcotics trafficking, and organized crime), it is in every country's interest to help resolve such problems, quite apart from the humanitarian imperative.

It is the responsibility of the whole international community to ensure that when the next case of threatened mass killing or ethnic cleansing invariably comes along, the mistakes of the 1990s will not be repeated. A good place to start would be agreement by the Security Council, at least informally, to systematically apply the principles set out here to any such case. So too would be a declaratory UN General Assembly resolution giving weight to those principles and to the whole idea of the "responsibility to protect" as an emerging international norm. There is a developing consensus around the idea that sovereignty must be qualified by the responsibility to protect. But until there is general acceptance of the practical commitments this involves, more tragedies such as Rwanda will be all too likely.❸

# Humanitarianism in Crisis\*

*David Rieff*

## A WORLD APART?

THE HUMANITARIAN WORLD emerged from the 1990s both saddened and chastened. Again and again nonprofit and UN personnel had been overwhelmed by the magnitude of particular crises—as when 2 million people crossed from Rwanda into Zaire in 1994, or when 800,000 Kosovar Albanians were forcibly deported from the province by Serb forces in the spring of 1999. Even more unnerving was the sense that, often despite the relief groups' own best efforts, the moral dilemmas attendant on their actions had only grown more acute over the course of the decade. Even so, humanitarians did not give up. Nongovernmental organizations (NGOs) and UN agencies multiplied their efforts to refine their operations in light of the lessons of Somalia, Rwanda, Bosnia, and Kosovo. Still, by the beginning of the twenty-first century, experienced relief workers had come to accept the new conventional wisdom that there are no humanitarian solutions to humanitarian problems.

From this simple truth, however, diametrically opposing conclusions can be drawn about what humanitarian action should involve. Many persistent advocates of humanitarianism, including UN Secretary-General Kofi Annan, see it as one of a number of “pillars” supporting a promising new liberal world order. Such an order, they seem to believe, can be constructed to fill the vacuum created by globalization’s undermining of the idea of state sovereignty. It will also be built on

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DAVID RIEFF is a journalist and a Visiting Professor at Bard College. This article is adapted from his latest book, *A Bed for the Night: Humanitarianism in Crisis*, to be published by Simon & Schuster. Copyright © 2002 by David Rieff.

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\* Rieff, David, "Humanitarianism in Crisis", *Foreign Affairs*, Vol. 81(6), 2002, pp. 111-121.

*David Rieff*

the increasing incorporation of key human rights principles into international laws and treaties. As the authors of the December 2001 report by the International Commission on Intervention and State Sovereignty on “The Responsibility to Protect” put it, “What has gradually been emerging [since 1945] is a parallel transition from a culture of sovereign impunity to a culture of national and international accountability.” In other words, individuals have rights that neither their communities nor their governments can abrogate.

It is unclear, however, whether humanitarianism is the appropriate instrument to further these objectives. Many NGOs, particularly those influenced by the British and American aid traditions, assume that relief groups could play a useful role if they could only increase their human rights-enforcing and peace-building capacities. Dissenting figures, notably in French humanitarian circles, argue that humanitarianism needs to remain a world apart, no matter how worthy the

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**It is unclear whether humanitarianism is the appropriate instrument to further human rights objectives.**

larger goals of advancing human rights, resolving conflict, and fostering development. Thus many of the most influential figures from Médecins Sans Frontières (MSF) and other like-minded agencies insist that such projects take humanitarianism beyond the role for which it is suited.

To people outside the humanitarian world, this latter stance seems both mystifying and utterly counterintuitive. Why not shed relief workers’ traditional impartiality and neutrality if that would address and help overcome the limitations and shortcomings so tragically revealed in the major humanitarian operations of the 1990s?

After all, over the course of that decade, a majority of aid workers came to share a belief in the need for more comprehensive answers to the world’s problems—ones in which humanitarianism would play only a part. Even those who felt that humanitarian action and the promotion of human rights were distinct and in some ways irreconcilable imperatives shared the Western public’s sense that doing things the old way was no longer enough. Most felt that the realities of the field and the new agendas of donor governments had made such a transformation inescapable. States were involved both as actors

### *Humanitarianism in Crisis*

in humanitarian operations and as funders of them. Aid had political consequences and therefore could not be restricted to immediate relief work. And grave human rights abuses, not to mention genocide, could not be remedied by humanitarian action alone.

By 2001, most people within the humanitarian movement were united in the conviction that aid had to become more political and break free of its original neutral principles if it was to become effective and morally coherent. The ideological shift to a humanitarianism grounded in human rights was facilitated by the increasing role of logisticians, many of whom had formerly served in similar capacities in NATO armies. It was not that these ex-soldiers had a special commitment to human rights or refugee protection. But their presence in effect meant that NGOs were being “militarized” from within, as the ex-soldiers played an increasingly essential role in the field. This helped make cooperation with Western armies seem normal for NGOs, whereas such collaboration would have appeared both culturally and politically alien a generation earlier.

#### RIGHTS OR WRONGS FIRST?

THE INSIGHTS AND PRACTICES of the human rights movement, and the placing of humanitarianism within the context of international humanitarian law, seemed to offer the humanitarian movement a moral revalidation. As Jean-Francois Vidal of the Action Contre la Faim put it,

the problem with the traditional idea of humanitarianism is that it demands access for [NGO] workers to reach victims who then become the object of “our” compassion. What I support is the victims’ access to their rights—that is, a construction that makes them subjects, not objects.

This question of not just access but what the demand for humanitarian access implies for both relief workers and the people they were trying to assist was crucial. By the mid-1990s, humanitarian aid workers did not need outside critics to tell them they were unable to effect meaningful change on their own. NGOs were particularly frustrated by the increasing difficulty they had in reaching those zones where the needs were most acute, and even when they succeeded in

*David Rieff*

doing so, in operating independently. When warlords and repressive governments did not want them around, they simply began to target the relief workers.

The language of rights has also proved alluring. For many aid workers, asserting the right of victims to receive assistance (set out in international humanitarian law and the Universal Declaration of Human Rights) restored their human dignity and made them more than passive recipients of the charity of others. This was part of a broader shift in the post-Cold War era toward a rights-based universalism. For humanitarian agencies, many of which had always had other commitments—to development, to a socialist or a Christian social agenda, to international humanitarian law—the notion of a confluence of interest between the humanitarian enterprise and the human rights movement appeared simple and morally impregnable. How could individuals not deserve protection from their rulers, just as they deserved help when overwhelmed by natural disasters? And how could humanitarian aid workers not want to take part in that struggle or feel bound by that duty? To act otherwise would be to condemn everyone who had the misfortune to be born poor, or at least in a poor country, to a life of misery and oppression or a future of intolerable vulnerability.

Annan's acceptance speech upon receiving the 2001 Nobel Peace Prize relied on the assumption that humanitarian assistance and human rights were part of the same struggle for a fairer and more peaceful world. "Today's real borders," he said, "are not between nations, but between powerful and powerless, free and fettered, privileged and humiliated. Today, no walls can separate humanitarian or human rights crises in one part of the world from national security crises in the other." It was certainly clear that for Annan there was no break in the rights continuum between "fundamental freedoms," by which he meant political rights, and economic and social rights, such as the "fundamental right to education, food, and security." A denial of either was an affront to human dignity.

Annan's deepest engagements have been with human rights, not humanitarian action. Still, his vision resonated with that of a mainstream humanitarian movement haunted by its failures and completely unreconciled to the idea that private voluntary agencies could or should resign themselves to the self-limitation insisted on by, for example, the



REUTERS

*On a road to nowhere: Hutu refugees from Rwanda, Goma, Zaire, November 1996*

International Rescue Committee (IRC). This understanding gathered momentum over the latter part of the 1990s, and by the end of the century it had become virtually ascendant. According to the British relief specialist Fiona Fox, the main aspects of the new humanitarianism were human rights and development relief. In the future, humanitarian action would be based at least in part on how far it furthered the cause of human rights. Aid would be withheld if delivering it could prolong conflict and undermine those goals. Undoubtedly, many humanitarian agencies were more comfortable with this changed perspective in theory than in practice, but Fox was correct in pointing out how far NGOs and donors had come in transforming themselves.

Obviously, the proponents of the new humanitarianism drew the line at applying the new human rights-based criteria to the most pressing emergency situations. No one argued, for example, for inaction in the face of the cholera epidemic that ravaged the refugee centers in the eastern Democratic Republic of the Congo in the summer of 1994. NGOs accepted that aid would occasionally have to be given even if it failed to improve the human rights situation or threatened to make it worse. However, the idea that there was now to be, as

*David Rieff*

Nicholas Stockton of Oxfam angrily observed, a new class of “undeserving victims” suggested that the most urgent question about the new humanitarianism should have been whether there was still anything humanitarian about it.

After all, what was being proposed was not simply a right of withdrawal—as the IRC and MSF had done from the eastern Congo in the aftermath of the Rwandan genocide, when they concluded that they were doing more harm than good. Nor was it a case of an NGO deciding that the obduracy of a warlord or government in blocking supplies or preventing them from being fairly distributed made it impossible to help the victims. Instead, the new humanitarianism held that the traditional focus on trying to help could at times be trumped by the moral imperatives of human rights.

## NO UTOPIA

AT THE HEART of the debate over the future of humanitarianism lies the question of its relationship to war. No version of the intermingling of humanitarianism and human rights makes sense except in the context of a world order in which humanitarian military intervention, or at least its credible threat, is one standard response to a so-called humanitarian crisis. The idea that states are accountable to the “international community” for the way they treat their own people has fired the imaginations of many relief workers, and understandably so—since they had observed firsthand what happens when states and warlords are able to abuse their own people with impunity.

In theory, of course, agencies that believed it appropriate to withdraw when the local regimes they had to deal with sank below a certain human rights standard were not necessarily endorsing the doctrine of humanitarian military intervention. But in practice, they were increasingly unable to resist such calls, whether voiced by the powerful governments that funded them, private donors, or field workers.

In an age of intervention, the role of the donors was particularly important. Eric Dachy of MSF might have been correct when he wrote that “the right of intervention, peace-keeping operations invoking the use of force to guarantee the transport of relief aid, and wars fought for so-called humanitarian aims, these all constitute so many variations

### *Humanitarianism in Crisis*

on a misleading theme: to accompany, or mask, a deliberate political choice with gestures of generosity and compassion." Yet by the time the war in Afghanistan began, it was increasingly difficult to distinguish between the rhetoric or even the policies of humanitarian NGOs, the UN system, and Western governments. The difficulty was compounded by the fact that few agencies today either choose to or are in a position to refuse contracts from donors or the UN. And this trend toward seeing themselves as, in effect, subcontractors for major donors has only increased since human rights considerations began to be incorporated more and more systematically into the plans and programs of the mainline NGOs.

That said, a majority of aid groups believe that if they are doing any good at all they should remain in the field, Afghanistan serving as one notable example. Had the agencies withdrawn between 1996 and 2001 because of the cruel oppression of women by the Taliban, nothing would have changed for Afghan women except that they would have lost what help they were getting from the IRC, Oxfam, or MSF. And however insufficient that help was, it was crucial to the survival of hundreds of thousands, if not millions, of Afghans.

Aid workers were drawn to the idea of human rights first and foremost because they were frustrated with the limits on what humanitarianism can accomplish on its own in a political vacuum. It is their grief and outrage over this, rather than some "neocolonialist" hidden agenda, that accounts for why so many of them have been mesmerized by the idea of humanitarian military intervention. Its proponents have become convinced that, at least in the most dire circumstances, either there must be force to ensure a minimal protection of human rights, or else relief programs will accomplish too little to be justifiable. A Slobodan Milošević in Belgrade or a Mullah Omar in Kandahar is not going to permit NGOs to operate as anything but purveyors of charity. And while Serb fascism and the Taliban may seem like extreme examples, in fact NGOs experienced the same constraints in Yugoslavia and Afghanistan as they do in most countries, particularly those with the greatest humanitarian need, from Sudan to Indonesia.

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A despotic ruler is not going to permit NGOs to operate as anything but purveyors of charity.

*David Rieff*

The claim that most humanitarian emergencies originate in human rights abuses is usually correct and demonstrable. But it is questionable whether it is wise or realistic for NGOs to rely on the possibility of a world order that would make intervention possible in situations other than those involving a great power's self-interest. Unlike international humanitarian law, the laws of war are fundamentally modest and grounded in reality. Annan's vision of a world in which it behooves the powerful to undertake endless wars of altruism when states hide behind the doctrine of sovereignty while refusing to uphold their fundamental obligations toward their own citizens is fundamentally utopian.

Reality lies elsewhere. In the case of Afghanistan, for example, for seven of ten years during the 1990s, the country did not receive more than 50 percent of the monies that the UN requested of the major Western donors and the Japanese. Aid agencies pleaded for more help, insisting that Afghanistan was one of the worst humanitarian disasters in the world. All that changed only on September 11, 2001. Only in the aftermath of the terrorist attack on America did the financial commitments to relief and development by the United States and its allies increase dramatically.

#### THE GRAND ILLUSION

TO AN OUTSIDER, it may seem as if humanitarians have adapted to the uncontested centrality of human rights. And yet there is so much to contest. To begin with, the language of rights is much more problematic than relief NGOs have thus far been willing to recognize. What can the "right to food" mean in the context of the real world? It is one thing to talk about rights in societies that have the means to ensure them, but quite another to do so in places that are too poor or too convulsed by ethnic war or political strife to so guarantee. The dictates of the Universal Declaration of Human Rights are unlikely to translate into consequences on the ground. And yet NGOs operate on the notion that the law is or could be made independent of state power.

In the absence of some radical reform of the global order—by which one can only mean the development of a global conscience—such rights cannot be enforced. The U.S. government could not even integrate Southern schools in the 1950s without calling in the military. If similar

### *Humanitarianism in Crisis*

force remains unavailable, what is the point of repeating the mantra that victims of humanitarian emergencies have rights? Aid workers themselves, having repeatedly been willing to put their lives on the line, are the greatest victims of this consoling fiction. It is perfectly understandable, given what relief workers do and the suffering and injustice that they witness, that many of them would want to dispense more than just aid. After all, the people they try to assist need protection at least as much as, if not more than, they need food, shelter, or medical attention. And yet at present protection is the one thing relief workers are rarely, if ever, able to provide. In every country where they operate, aid workers can recount stories of everyday murder, rape, and other brutality. It is therefore no wonder that so many relief workers have taken to fantasizing about an international equivalent of John Wayne and the Seventh Cavalry who will ride in to ensure that they can finally do their jobs.

But it is this notion, and not the reservations of humanitarian absolutists who hew to strict neutrality, that is the real retreat into wishful thinking. Soldiers who are competent enough to fight the Taliban, the Yugoslav federal army, or Somali warlords are not going to do what relief workers want. Rather, they will expect that relief workers listen to them. For all the talk of improved coordination, joint exercises, and declarations of mutual respect, the history of humanitarian military interventions from Kurdistan in 1991 to Afghanistan in 2001–2 has demonstrated just that.

Even assuming, against all odds, that the U.S., British, or French armies would be prepared to fight a war in the name of securing humanitarian access for aid workers, they would still fight that war so as to win it. And in winning it, as in Afghanistan, they would first make the humanitarian situation worse, as all wars do. That is why imagining that just wars can be joined with humanitarian imperatives is a delusion that ignores the lessons of history. World War II made the humanitarian situation of noncombatant civilian “victims”—to use contemporary humanitarian language—far worse; on solely humanitarian grounds that war should have been stopped, not prosecuted to the utmost.

When humanitarian NGOs speak of military intervention, they are evoking so-called police actions or robust UN peacekeeping missions, not actual war. So far, in Bosnia, Kosovo, and Afghanistan, by the

*David Rieff*

standards of past wars, the consequences of humanitarianism and human rights-based interventions have not yet been terrible enough to give many of the activists pause. And without this necessary consciousness of the horror of war—even of just wars that decent people are likely to support—it is as if many humanitarians do not go far beyond contrasting the military's wealth of resources and its logistical reach with their own perennially underfunded, under-resourced condition. As a result, instead of seeing warriors, relief workers too often see little more than armed humanitarian logisticians in the field. They even go as far as to deceive themselves and the public about the relationship between relief agencies and NATO militaries.

#### KEEP IT IN NEUTRAL

FROM A STRICTLY humanitarian point of view, collaboration with the military has not been a success, nor should it have been expected to be. In a postwar situation, where a military force is deployed not to go into combat but to intimidate belligerents who have signed a peace agreement and to perform police duties (as in Bosnia after the Dayton accords), soldiers and relief workers can work together effectively. But to imagine that war and humanitarian action can go together during hostilities is a fantasy. This is not to argue that there should never be military interventions for moral purposes, such as against genocide; western military intervention in a case such as Bosnia is justified. And not only intervention may be warranted, but protectorates as well, whether under the auspices of the UN or under those of some great power. Given the choice between liberal imperialism and barbarism, the former may well be the best that the people of Sierra Leone or perhaps even Bosnia can hope for at the moment.

But to argue for military intervention on political grounds—to believe that it would have been right for the United States to side with a Bosnian state based on citizenship and multiethnicity against a Serb nationalism based on blood, or to finally finish off Milošević in Kosovo—is not the same as to promote military intervention on humanitarian grounds. That will always be a contradiction in terms. It is a perversion of humanitarianism, which must be either neutral or nothing. Today there is an increasing reevaluation, and even repudiation,

### *Humanitarianism in Crisis*

of neutrality by all the mainline organizations, from UN specialized agencies to the principal NGOs. Only MSF still stands partly aloof. Among the ranks of this organization, which invented the terms of contemporary humanitarianism, there are those who side with the trend, but also others who believe that the moral coherence of their views depends on distancing themselves from the humanitarian mainstream. MSF has never claimed to hold monopoly over the right to bring assistance. The group is more than willing to stipulate that, in the contemporary context, it may be right or even unavoidable for nations to undertake humanitarian missions that will in no sense be either neutral or impartial. Nonetheless, MSF remains persuaded that for humanitarianism to do what it is pledged to do responsibly, it must function independently.

It is anything but clear that the world is a more just or peaceful place than it was at the beginning of the so-called human rights revolution. In most cases, humanitarianism is best advised to focus on saving lives, whatever the compromises it has to make along the way. Let it tend to the victims and remind the luckier corner of the world of the incalculable suffering, misery, and grief that literally billions of people feel every day of their lives. That would be accomplishment enough. Must humanitarians, whether out of despair, conformity to intellectual and moral fashion, or groundless hope, insist on trying to be the Archimedean lever for perpetual peace, the universal rule of law, or, in Oxfam's more modest formulation, the creation of a fairer world?

The tragedy of humanitarianism may be that for all its failings and limitations, it represents what is decent in an indecent world. Its core assumptions—solidarity, a fundamental sympathy for victims, and an antipathy for oppressors and exploiters—represent those rare moments of grace when we are at our best. So many people, including relief workers, now speak of “mere” charity, “mere” humanitarianism—as if coping with a dishonorable world justly, and a cruel world with kindness, were not honor enough. Instead, a serious, wonderful, and limited idea has become a catchall for the thwarted aspirations of our age. And few seem to notice, and fewer still to care, about what is being lost. ♦

## *Preventive Potential of the International Criminal Court\*\**

SONG Sang-Hyun\*  
 International Criminal Court  
*sang-hyun.song@icc-cpi.int*

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### **Abstract**

This article discusses the transition of international criminal justice from a predominantly *ex post facto* punitive concept of post World War II efforts—and the *ad hoc* tribunals set up in the 1990s—towards a more comprehensive concept of justice centred around the International Criminal Court established by the Rome Statute, with significant potential for the prevention of future atrocities. Four sources of preventive effect are examined: deterrence, timely intervention, stabilization, and norm setting. Significant challenges remain for the Rome Statute system, notably strengthening the principle of complementarity, enhancing the co-operation of states with the ICC, securing sufficient resources for international justice, and furthering universal acceptance of the Rome Statute, especially in the Asia-Pacific. The author argues that the ultimate value of the Rome Statute system lies in entrenching legal and social norms that will help human compassion prevail over cruelty.

### **I. DEVELOPMENT OF INTERNATIONAL CRIMINAL JUSTICE SINCE WORLD WAR II**

#### *A. From Nuremberg to Rome*

The wake of World War II saw a fundamental overhaul of international structures with the creation of the United Nations and the International Court of Justice (ICJ). The shockwaves of the Nazi atrocities also gave rise to the Universal Declaration of Human Rights (UDHR), which became the basis of the modern concept of human rights.

International military tribunals were set up in Nuremberg and Tokyo to try the architects of the shocking atrocities committed by Nazi Germany and its allies. Shortly afterwards, the Convention on the Prevention and Punishment of the Crime of Genocide and the four Geneva Conventions were adopted. Common to all these

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\* President (since 2009) and Judge (since 2003) of the International Criminal Court. This article is a modified version of “From Punishment to Prevention: Reflections on the Future of International Criminal Justice”, Wallace Wurth Memorial Lecture, delivered by the author, on 14 February 2012 at the University of New South Wales, Sydney, Australia, who also participated in the Conference Justice for All? Ten Years of the International Criminal Court, 14–16 February 2012, organized by the Australian Human Rights Centre and the Faculties of Law and Arts and Social Sciences at the University of New South Wales. The views expressed herein are solely of the author in his personal capacity and do not in any way represent the positions of those offices.

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\*\* Song, Sang-Hyun, "Preventive Potential of the International Criminal Court", *The Asian journal of international law* (3), 2013: 203-213.

post World War II developments was the notion that the protection of peace and basic human dignity is a matter of common concern and that even in a world consisting of sovereign states, certain international rules are necessary to safeguard these values of fundamental importance to humankind as a whole.

We can distinguish several different but mutually related areas of international law in this respect. First, the UN Charter prohibited aggressive warfare and charged the UN Security Council with matters of international peace and security.<sup>1</sup> Along with this, the ICJ was mandated with the settlement of interstate disputes related to international law and treaties. Second, international human rights law emerged as an expression of the new notion that states have a responsibility to respect and to protect the human rights of their own nationals and other individuals on their territory. Third, the law of armed conflict progressed into international humanitarian law with an increased focus on the protection of vulnerable individuals in time of war. Lastly, the seeds of international criminal law were planted in Nuremberg with the recognition that individuals responsible for mass atrocities or the crime of aggression, regardless of their official position, must be held accountable for their acts. Sadly, the ensuing Cold War rivalry drove international criminal justice into the background. The violent use of armed force continued to plague humankind in many parts of the world. The Asia-Pacific was no exception.

It was not until twenty years ago, after the end of the Cold War, that the project of international criminal justice gained a new momentum through the creation of the *ad hoc* international criminal tribunals for the former Yugoslavia in 1993 and Rwanda in 1994, and renewed efforts by lawyers, diplomats, and civil society to create a permanent international criminal court. These aspirations came to a concrete conclusion in Rome in July 1998. Delegates from all regions of the world converged to cast their votes on a court which had been fifty years in the making: 120 states voted in favour of the proposed treaty, which became the Rome Statute of the International Criminal Court.

In a remarkably short time, after the necessary sixty state ratifications, the Rome Statute came into force and the International Criminal Court (ICC) was formally created on 1 July 2002. A new permanent international organization was born, independent from the UN or any other pre-existing body. With good reason it has been said that the birth of the ICC was among the most important developments in international law since the creation of the UN and the adoption of the UN Charter.<sup>2</sup>

The ICC was given jurisdiction over four groups of heinous crimes. First is the crime of genocide, characterized by the specific intent to destroy a national, ethnic, racial, or religious group by killing its members or other means.<sup>3</sup> Second, the ICC can prosecute crimes against humanity, committed as part of a large-scale attack against any civilian population. The various forms of crimes against humanity listed in the

1. *United Nations Charter*, 24 October 1945, 1 U.N.T.S. XVI, art. 24.

2. See e.g. "Statement by Trinidad and Tobago at the UN General Assembly" (15 September 2002), online: United Nations <<http://www.un.org/webcast/ga/57/statements/o20915trinidadE.htm>>.

3. UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, art. 6 [Rome Statute].

Rome Statute include offences such as murder, rape, imprisonment, enforced disappearances, enslavement—particularly of women and children—sexual slavery, torture, apartheid, and deportation.<sup>4</sup> Third, the Rome Statute contains a long list of war crimes, bringing together Geneva law and Hague law (i.e. the protection of persons and property on the one hand and the limitation of methods and means of warfare on the other). The Statute makes a distinction between international and non-international armed conflicts, both categories including, for instance, the use of child soldiers, the killing or torture of persons such as civilians or prisoners of war, intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science, or charitable purposes.<sup>5</sup> Finally, the fourth crime falling within the ICC's jurisdiction is the crime of aggression. At the time of the adoption of the Rome Statute, states could not agree on the definition of aggression or the jurisdictional rules for its prosecution, but this shortcoming was overcome by the adoption of amendments at the first Review Conference of the Statute in Kampala in 2010. Bringing these amendments into force will require ratifications and an additional vote by States Parties, which cannot take place until 2017 at the earliest.<sup>6</sup>

### B. The ICC Today

Since its formal establishment on 1 July 2002, the ICC has turned from a court on paper into a leading actor in the area of the enforcement of international justice. As of March 2013, 122 states, constituting more than sixty percent of the world's sovereign nations, have ratified or acceded to the Rome Statute, and the number keeps growing. Four states have referred their situations to the ICC's Prosecutor, and two situations have been referred by the UN Security Council, the latest one with a unanimous decision.<sup>7</sup> These are all strong indicators of the growing international confidence in the ICC's role.

As of March 2013, eight country situations are under investigation and prosecution at the ICC: the Democratic Republic of the Congo (DRC), Uganda, the Central African Republic, Sudan, Kenya, Libya, the Ivory Coast, and Mali. The Prosecutor is following developments in many more situations across the world. In 2012, the ICC delivered its first two trial judgments, concerning the alleged use of child soldiers and other crimes in the DRC. Five other cases are at trial stage, involving eight accused, and nine cases are at pre-trial stage, involving a total of fourteen suspects, thirteen of whom remain at large.

## II. FROM PUNITIVE TOWARDS PREVENTIVE JUSTICE

As discussed above, over the last seventy years the world has witnessed a remarkable development of international efforts to hold perpetrators of mass atrocities accountable. The nature and context of these efforts have changed significantly over time.

4. *Ibid.*, art. 7.

5. *Ibid.*, art. 8.

6. *Ibid.*, arts. 8bis, 15bis, 15ter.

7. UN Security Council Resolution 1970 (*The Situation in Libya*), S/RES/1970 (2011).

Nuremberg and Tokyo were purely *ex post facto* tribunals set up in reaction to atrocities that had already occurred. Their central purpose was punishment for actions committed during a conflict which had already ended. If these courts had been followed by the establishment of a credible system of enforcing the new principles of international law, a deterrent effect could have ensued. But during the Cold War period, there was incidental justice at best.

In the 1990s, the situation slowly started changing. The UN Security Council set up the International Criminal Tribunal for the Former Yugoslavia (ICTY) while the conflict was continuing, and left the temporal jurisdiction of the tribunal open-ended. This thereby put potential future perpetrators on notice that they could be held to account.<sup>8</sup> The Security Council expressly pronounced that the creation of the Tribunal was expected to contribute to the restoration of peace, and an end to the ongoing atrocities.<sup>9</sup> However, this did not take full effect. Even the states on the Security Council were not fully prepared to provide political backing to the Tribunal,<sup>10</sup> and with the time that was needed to really put it in motion, there was arguably no significant deterrent effect until the short-lived conflict in Macedonia, several years after the Bosnian war.<sup>11</sup>

The International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Panels in East Timor, and the Extraordinary Chambers in the Courts of Cambodia, were all established essentially *ex post facto*. However, viewed together, they seemed to be indicating a trend that was making accountability for atrocity crimes increasingly a real possibility. Moreover, with the parallel conceptual development of transitional justice, there was a growing recognition that international justice should not only be about punishment of crime, but also about helping societies build a stable future by coming to terms with past crimes.

The public perception of the ICC still seems to be influenced by the earlier history of international justice, and the ICC is often seen primarily as a means for the international community to put on trial high-level perpetrators of mass atrocities. While it is true that the ICC is now the leading institution to have arisen from the proliferation of international mechanisms to address crimes that have occurred, the long-term significance of the Rome Statute framework in this author's view does not lie in the punishment of past atrocities. What makes this new system fundamentally different from earlier efforts is its potential for the prevention of future crimes.

### III. PREVENTION

The potential for preventive effect appears in several different forms, which can be categorized under the broad headings of deterrence, timely intervention, stabilization, and norm setting.

8. *UN Security Council Resolution 827 (Tribunal, Former Yugoslavia)*, S/RES/827 (1993).

9. *Ibid.*, at preambular para. 6.

10. Gary BASS, *Stay the Hand of Vengeance: the Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000) at 206–75.

11. “Address by the Prosecutor of the ICTY, Carla DEL PONTE, to the UN Security Council” (November 2001), online: ICTY Press <<http://www.icty.org/sid/7926>>.

### A. Deterrence

Deterrence is one of the main purposes of punishment in traditional criminal theory. This is the most direct preventive effect of international justice, but I do not believe it is necessarily the most significant one.

Deterrence is notoriously difficult to measure, since we essentially need to look at the relationship between justice administered and the absence of crimes. In a national setting, with ordinary crimes, it is easier to produce statistics with meaningful data. For example, if the number of break-ins has dropped from 800 to 500 per year in a given residential area, it may be possible to connect this change to factors that have caused it, such as increased policing or social programmes.

A similar exercise is far more difficult with regard to atrocity crimes. Every situation is unique and each conflict has its specific historical and political setting. The greatest challenge is causality—there are so many factors affecting the occurrence of atrocities that it is close to impossible to determine what the effect of deterrence is. Nevertheless, there is reason to believe that a deterrent effect is slowly emerging. Arrest warrants for sitting Heads of State issued by the ICC as well as other international courts demonstrate that no one is immune from accountability, and the likelihood of punishment has grown.<sup>12</sup>

One of the most concrete appraisals of the ICC's deterrent effect so far was conveyed to me in January 2011 from the then Justice Minister of the DRC during his visit to the ICC. He told me that tensions surrounding the recent DRC elections had been very high, but large-scale violence had fortunately been avoided. People had already seen DRC nationals facing the court in The Hague and the Minister said the ICC had been a constant topic of discussion around the elections, which in his view had had a significant deterrent effect.

### B. The ICC's Capacity to Intervene in Active Situations<sup>13</sup>

Another aspect of the ICC's preventive potential, closely related to deterrence, is the Court's ability to intervene in active situations involving the threat or possible occurrence of atrocity crimes. An important factor in this respect is the fact that the Court is an independent institution that does not require the approval of political organs to investigate situations or to prosecute crimes that are under its jurisdiction.<sup>14</sup> The ICC's intervention may take several forms, escalating from a preliminary examination,<sup>15</sup> through an investigation, to the issuance of arrest warrants, and prosecution. Holding trials before the ICC is the last available tool, not a goal in itself.

Where tensions arise and reports emerge pointing to a threat of imminent atrocities, announcing publicly that the ICC Prosecutor is following the situation can be a powerful tool, putting potential perpetrators on notice that they might be held

<sup>12.</sup> Kathryn SIKKINK, *The Justice Cascade* (New York: W.W. Norton & Company, 2011) at 258.

<sup>13.</sup> Hector OLÁSOLO, *Essays on International Criminal Justice* (Oxford: Hart Publishing, 2012) at 1–19.

<sup>14.</sup> Note, however, that the ICC's jurisdiction is limited to crimes occurring on the territory or committed by a citizen of a State Party to the Rome Statute or a state that has accepted the ICC's jurisdiction by a declaration, unless a situation is referred to the ICC Prosecutor by the United Nations Security Council.

<sup>15.</sup> The preliminary examination is the stage preceding a formal investigation.

liable for their actions and could become subject to arrest warrants enforceable in the 122 States Parties to the Rome Statute. A warning of this sort can boost the ICC's deterrent effect, as demonstrated by the example from the DRC discussed in the previous section. The ICC's intervention can also draw local as well as international attention to the situation and help induce the relevant stakeholders to take necessary action to defuse the tensions and to prevent atrocities.

If atrocity crimes do occur despite the efforts to prevent them, and the national authorities are unable or unwilling to address the situation, the ICC can open an investigation. Even this, however, does not necessarily have to lead to prosecution before the ICC. In the best case scenario, the fact that the ICC opens an investigation will help prompt the national authorities to prosecute the alleged crimes in an expeditious manner, thereby reducing the likelihood of further atrocities. Even after the issuance of arrest warrants by the ICC, the national authorities could still take action to address the crimes, and if they can show that they are genuinely prosecuting the persons in question for the alleged offences, the Rome Statute prescribes that the ICC must defer to the national jurisdiction.

Finally, if trials are held at the ICC, this can be expected to strengthen deterrence in the long term, both in the country where the crimes in question occurred, as well as elsewhere, by demonstrating through public proceedings that perpetrators of international crimes, regardless of their official position, cannot count on impunity. Through its proceedings, the ICC becomes a factor in the broader efforts to outlaw and eradicate grave breaches of international humanitarian law, and to help societies overcome the legacy of such crimes, as discussed in the next section.

### C. Stabilization

By stabilization I refer to the capacity of international justice to contribute to long-term peace, stability, and equitable development in post-conflict societies. These are fundamental guarantees for a future free of violence.

The connection of peace and justice is well recognized. The two are not mutually exclusive—on the contrary, they reinforce each other. Where impunity is allowed to reign, it leaves a desire for vengeance among populations who have been victims of massive crimes and provides fertile ground for the recurrence of conflicts. Indeed, the World Bank's groundbreaking 2011 World Development Report recognized transitional justice as one of the core tools to forestall cycles of violence.<sup>16</sup> Research suggests that countries that have held former leaders accountable for their crimes have in most cases come away stronger.<sup>17</sup>

Accountability for past atrocities and the strengthening of the rule of law are key ingredients in the healing of post-conflict societies; but attributing guilt to individual perpetrators is not sufficient. To enable a more comprehensive process of justice, the founders of the ICC introduced several important provisions in the Rome Statute for the empowerment of victims.

<sup>16</sup>. "World Development Report 2011: Conflict, Security and Development" (2011) at 17–18, online: World Bank <[http://wdr2011.worldbank.org/sites/default/files/WDR2011\\_Overview.pdf](http://wdr2011.worldbank.org/sites/default/files/WDR2011_Overview.pdf)>.

<sup>17</sup>. See generally Sikkink, *supra* note 12.

First, the ICC is the first international judicial body to allow participation of victims in their own right, and not just as witnesses. People who were victimized by powerful criminals have now become actors in international proceedings designed to prosecute those crimes. Along with this, the Rome Statute pays special attention to the needs of women and children, who are often the most vulnerable victims of atrocities. The ICC's legal documents extensively codify specific crimes against women and impose a responsibility on each organ of the ICC to ensure the safety, psychological health, dignity, and confidentiality of female victims and witnesses.<sup>18</sup> The ICC represents a step away from the traditional male-dominated world also by being the first international court with a majority of female judges.<sup>19</sup>

Another innovative feature of the Rome Statute system is the creation of a Trust Fund for Victims, which is without precedent in international criminal justice. The Fund's activities are funded through voluntary contributions by states and donations by private donors. The ICC may also order money and other property collected through fines and forfeitures to be transferred to the Trust Fund.<sup>20</sup> Recognizing both the rights and the needs of victims and their families, the Fund empowers victims to become key stakeholders in the pursuit of transitional justice.

More than five years of victims' assistance in northern Uganda and the DRC have seen the Trust Fund for Victims mature into a solid institution. By recognizing the particular needs of victims of the most serious crimes, for instance for reconstructive surgery and trauma-based counselling, the Trust Fund has been able to articulate a truly human dimension to the process of international criminal justice. As of March 2013, more than 80,000 direct beneficiaries have received assistance provided by the Fund and its local and international partners.<sup>21</sup> In 2013, the Fund will start a new programme, in the Central African Republic, initially focusing on victims of sexual violence.<sup>22</sup>

#### D. Norm Setting

Finally, I come to norm setting. This I see as the ICC's greatest potential—to have a significant preventive effect by entrenching a system of norms that outlaw atrocities.<sup>23</sup> I am not merely referring to a layer of international laws that label certain actions as criminal offences. What we need to achieve is a system of fully internalized legal and social norms that make the Rome Statute crimes not only punishable but also simply unacceptable in societies everywhere.

Naturally, the Rome Statute must be seen as part of the wider international movement aimed at protecting fundamental human rights and dignity. These are long processes. The fact that a state ratifies an international treaty does not mean that all the rights defined therein miraculously take immediate effect. But with proper

18. *Rome Statute*, *supra* note 3, art. 68.

19. As of March 2013, ten of the eighteen ICC judges were women.

20. *Rome Statute*, *supra* note 3, art. 79(2).

21. "The Trust Fund for Victims, Programme Progress Report" (Winter 2012) at 4, online: Trust Fund for Victims <[http://trustfundforvictims.org/sites/default/files/media\\_library/documents/pdf/TFV%20Programme%20Progress%20Report%20Winter%202012Finalcompressed.pdf](http://trustfundforvictims.org/sites/default/files/media_library/documents/pdf/TFV%20Programme%20Progress%20Report%20Winter%202012Finalcompressed.pdf)>.

22. *Ibid.*, at 11.

23. Sikkink, *supra* note 12 at 258.

national implementation, education, and democratic support, adherence to treaties can make a huge difference. In the best-case scenario, the emergence of legal norms and core societal values is a mutually reinforcing process.

But is the distance between an international treaty and the social norms of a local community too large? How can this gap be bridged? Here the *complementarity principle* of the Rome Statute is of crucial importance. Under the concept of complementarity, the national judiciary of each state retains the right, and the primary duty, to investigate and prosecute grave violations of international humanitarian law.

Therefore, each State Party to the Rome Statute is expected to make all ICC crimes punishable under its national laws and ensure that the country's law enforcement system is fully capable of investigating and prosecuting such offences. If this is properly done, the international legal norms of the Rome Statute also become domestic norms within each State Party. This, particularly with proper raising of awareness, will in turn bolster efforts of civil society to promote adherence to these norms, which are of critical value to the protection of human rights and dignity.

#### IV. CHALLENGES FOR THE EFFECTIVENESS OF THE ROME STATUTE SYSTEM

##### A. *Complementarity*

Making the principle of complementarity fully effective remains one of the greatest challenges for creating a truly credible and comprehensive system of deterrence and prevention against atrocity crimes. The domestic justice systems of states should be so well equipped to deal with Rome Statute crimes that they can serve as the primary deterrent worldwide, while the ICC is a safety net that ensures accountability when the national jurisdictions are unable for whatever reason to carry out this task.

A vast amount of work remains to be done for this goal to be achieved. A large number of ICC States Parties are yet to incorporate Rome Statute crimes into their national criminal codes. Where large-scale crimes have occurred, their effective investigation and prosecution frequently presents enormous challenges for the national jurisdictions involved in terms of, *inter alia*, human resources, technical capabilities, and specialized skills. Indeed, the Assembly of States Parties to the Rome Statute recalled at its latest session that:

Appropriate measures need to be adopted at the national level, and international cooperation and judicial assistance need to be strengthened, in order to ensure that national legal systems are capable of genuinely prosecuting [the most serious crimes of international concern].<sup>24</sup>

##### B. *State Co-operation with the ICC*

Another crucial aspect for the credibility and effectiveness of the ICC is the co-operation of states with the Court and the enforcement of the Court's orders. The ICC has no police force of its own; instead it relies entirely on states to execute

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<sup>24.</sup> *Complementarity*, ICC-ASP/11/Res.6 (2012) at preambular para. 3.

its arrest warrants, to provide evidence, to facilitate the appearance of witnesses, and so forth. Without the co-operation of states, the ICC is powerless. Unfortunately, several ICC arrest warrants have remained outstanding for years.

Political will to bring these persons to justice is crucial. Allowing persons suspected of grave international crimes to evade justice seriously risks eroding the deterrent effect of the ICC. Co-operation has been recognized as a key issue in the Assembly of States Parties to the Rome Statute, which has stressed “the importance of effective and comprehensive cooperation and assistance by States Parties, other States, and international and regional organizations, to enable the Court to fulfil its mandate as set out in the Rome Statute”.<sup>25</sup>

### C. Securing Sufficient Resources for International Justice

The cost of justice is a factor that cannot be ignored when discussing the challenges of the Rome Statute system. International trials are expensive and they should always be an exception, never the rule. Especially during difficult times for the world economy, the ICC Member States understandably keep a tight rein on the Court’s budget.

However, states should balance budgetary discipline with respect for the increasing demands that the Court faces. Over the last five years the Court’s case-load has more than doubled, while its budget has increased by just ten percent. While the ICC is fully committed to enhancing the efficiency of its operations, the States Parties need to ensure that the ICC is provided with the essential resources to carry out the mandate it has been entrusted with. To do otherwise would mean letting down all the victims who look to the ICC in hope of justice, and sending out a message that perpetrators may get away with atrocity crimes because of financial considerations.

### D. Universality: The Rome Statute and the Asia-Pacific

Another key challenge that we face in our aspirations to make the Rome Statute truly comprehensive is achieving universality. It is remarkable that 122 states have voluntarily acceded to the Rome Statute, thereby accepting all the obligations as well as benefits that this brings. But with more than seventy countries yet to join, a majority of the human race remains outside the Rome Statute’s legal protection.

The Asia-Pacific is particularly underrepresented in the ICC and, as President of the ICC, I have made it one of my priorities to promote greater involvement of my region in the ICC. After all, international justice should not be regarded as a concept foreign to this part of the world. International criminal law has deep-seated roots in Asia, spanning a legacy of more than two thousand years. The writings of Sun Tzu in China, and the Laws of Manu in India, laid down some of the earliest foundations of humanitarian rules for armed conflict, such as the humane treatment of the sick, wounded, prisoners, and civilians, and respect for religious institutions in occupied territories.<sup>26</sup>

<sup>25.</sup> Cooperation, ICC-ASP/11/Res.5 (2012).

<sup>26.</sup> Cherif BASSIOUNI, *International Criminal Law: Sources, Volume I: Subjects and Contents*, 3rd ed. (Leiden: Martinus Nijhoff Publishers, 2008) at 19–20.

All Asian countries, without exception, are States Parties to the four Geneva Conventions of 1949, and have thereby agreed to criminalize the grave breaches defined in those treaties, and to prosecute the perpetrators of such grave breaches—which form, in fact, a major part of the war crimes contained in the Rome Statute. Indeed, Asian countries participated in the creation of the ICC and the *ad hoc* tribunals for the former Yugoslavia and Rwanda, and judges from Australia, Bangladesh, China, Cyprus, Fiji, Japan, Jordan, Malaysia, Pakistan, Samoa, Singapore, South Korea, Sri Lanka, and Turkey have served on the judicial benches of at least one of these courts.

There is no reason for Asian states to shy away from the ICC: the Rome Statute's potential for strengthening the rule of law and contributing to the prevention of atrocities is just as significant here as elsewhere on the globe. Right now, the Asia-Pacific is the fastest growing regional group of ICC States Parties,<sup>27</sup> and I hope to see more states sailing with the wind that is blowing across the Asia-Pacific in favour of ratification of the Rome Statute.

#### *E. International Justice Cannot Make a Difference in Isolation*

To be truly effective, international criminal justice must work in concert with other mechanisms. Rather than a panacea, international justice should be seen as one of the integral pieces in a large puzzle of elements crucial for the protection of human rights, suppression of conflicts, and the promotion of peace and stability.

Where atrocities have already occurred, a multitude of other transitional justice mechanisms are necessary in addition to criminal justice, such as the public acknowledgement of crimes, finding missing persons, and the sustainable return of refugees. In the case of ongoing or imminent conflicts and atrocities, justice can rarely act alone, and diplomacy is usually the main international tool of rapid reaction to prevent escalation of the violence. Likewise, political solutions are necessary to end conflicts. Where long-term prevention is concerned, education, democracy, and development are at least as important as a credible system of criminal justice.

These are not merely theoretical considerations. A realistic understanding of the possibilities and limitations of international criminal justice is a prerequisite to its success. Societies can only be rebuilt and stability achieved if there is a commitment to holistic development, democracy, and the rule of law, with justice as one among many important components.

#### V. CONCLUSION

The ICC, together with the wider Rome Statute system of international criminal justice around it, holds tremendous potential for the prevention of atrocity crimes. This potential consists of a growing deterrent effect, the ICC's ability to intervene in actual situations of emerging conflicts, the contribution of accountability efforts to long-term stability and, last but not least, the norm setting effect of the Rome Statute system.

27. As of March 2013, three of the latest six states to join the ICC are from the Asia-Pacific (Vanuatu acceded on 2 December 2011, Maldives acceded on 21 September 2011, and the Philippines ratified the Rome Statute on 30 August 2011).

For the ICC's preventive potential to be fully realized, it must be cherished and supported by states. Only if nations act in unified defiance of impunity can the goals of the Rome Statute be achieved. States must provide the ICC with the necessary co-operation to help it conduct effective and expeditious investigations, prosecutions, and trials. When arrest warrants are issued, all efforts must be exerted to ensure that they are executed. The calculus of potential perpetrators must be altered to show them that their acts will not go unpunished.

The ICC is only as strong as the commitment of its States Parties. The more states that join forces under the umbrella of the Rome Statute, the greater effect the evolving system of international criminal justice can have.

By acting wisely, with determination and commitment, humanity can save future generations from atrocities that cause terrible suffering. That is the goal that we must seek to achieve, and the Asia-Pacific should join this global endeavour without hesitation. The region has shown its incredible capacity to develop rapidly. There is no reason why it could not become a leader in international criminal law as well.

The late Justice William J. Brennan of the US Supreme Court said that “[t]he law is not an end in itself, nor does it provide ends. It is pre-eminently a means to serve what society thinks is right”.<sup>28</sup> This applies to the Rome Statute as well—it is a means to serve what is right: to condemn heinous crimes against children, women, and men everywhere, and to contribute to the prevention of such acts. Humans are capable not just of powerful compassion but also of extreme cruelty. The ultimate value of the ICC is in entrenching moral and legal norms that will help the former prevail over the latter.

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28. Justice William J. BRENNAN, “Remarks: What’s Ahead for the New Lawyer?” (1986) 47 University of Pittsburgh Law Review 705 at 708.

# 10

## The International Criminal Court\*

*Sigall Horovitz, Gilad Noam, and Yuval Shany*

### 10.1 Introduction

The establishment of the International Criminal Court (ICC), the world's only permanent international criminal judicial body, has been a crucial step in the development of international criminal law (ICL). Prior to the establishment of the ICC, the international community either failed to address properly and timely situations in which international crimes were committed (as was the case during the cold war era)<sup>1</sup> or responded to such crimes by establishing ad hoc institutions (as was the case with regard to Nazi Germany and Japan in the post World War Two era, and the former Yugoslavia and Rwanda in the civil wars of the 1990s).<sup>2</sup> However, as was noted in Chapter 7, ad hoc responses to international criminality raise legitimacy concerns. Many have regarded the decision to subject some situations to international criminal proceedings and to refrain from acting in other no less serious situations as selective in nature and thus unfair. Among other things, such a selective application of ICL appears to rest on political considerations, reflective of the international balance of power, and not on a strict application of principles of justice.

The concerns about the legitimacy deficit of ad hoc international criminal institutions and their limited impact on the commission of atrocities (attributed, to some extent, to their limited jurisdictional reach and belated response), pushed many states to accept the need for establishing a permanent international criminal court.<sup>3</sup> At the UN Diplomatic Conference of Plenipotentiaries on the

<sup>1</sup> For example, the international community did not address international crimes committed in Cambodia and in Iraq in the 1970s and 1980s until decades later.

<sup>2</sup> In certain cases, "hybrid" ad hoc criminal tribunals were established through agreements between the UN and the state where the crimes occurred. These include, for example, the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia, the War Crimes Chamber in the State Court of Bosnia and Herzegovina, and the Special Tribunal for Lebanon. Such tribunals involve international and national judges, have jurisdiction over national and international crimes, and are usually based in the country of the crimes.

<sup>3</sup> The idea of establishing an international criminal court was considered in various stages along the twentieth century. For example, in 1937, a Statute of an International Criminal Court was drafted but never adopted. An early draft of the Genocide Convention had included a model statute for an international criminal court, based on the 1937 draft treaty (William A Schabas, *An Introduction to the International Criminal Court* (3rd edn, Cambridge University Press, Cambridge 2007) 8). The

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\* Horovitz, Sigall, Noam Gilad and Yuval Shany, "The International Criminal Court", in *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, Ed. Yuval Shany, Oxford University Press, Forthcoming 2014, pp. 223-252.

224 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

Establishment of an International Criminal Court held in Rome during June and July 1998 (“the Rome Conference”), the Rome Statute of the International Criminal Court (“ICC Statute” or “Statute”) was drafted, adopted, and opened for signature and ratification.<sup>4</sup>

The ICC Statute entered into force on July 1, 2002, following its ratification by 60 states,<sup>5</sup> and as of July 2013, 122 states are parties to the Statute. Following the entry into force of the Statute, the Assembly of States Parties (ASP) adopted the Rules of Procedure and Evidence and the “Elements of Crimes”—a document intended to assist the Court in the interpretation and application of the crimes subject to its jurisdiction.<sup>6</sup> In 2003, the ASP elected the eighteen judges of the Court<sup>7</sup> and its first prosecutor (Luis Moreno-Ocampo of Argentina).<sup>8</sup> Its second prosecutor, Fatou Bensouda of the Gambia, was elected in 2011 and assumed her position in 2012.

The ICC has been in existence for just over a decade, with active investigations starting only in mid 2004. Its first trial began in early 2009, and at the time of writing, only two trial judgments have been issued (both are currently under appeal). Still, the ICC has also issued important prosecutorial and interim judicial decisions and arrest warrants, undertaken extensive investigative activities, interacted with national authorities, held on-site visits, established witness protection schemes, conducted outreach programs, and supported education and capacity-building initiatives. Moreover, the mere existence of the ICC seems to have already affected the conduct of international affairs.<sup>9</sup>

Although any attempt to assess the effectiveness of the ICC should be understood in light of the short time that has passed since its establishment and its limited judicial activity thus far, the goal-based approach applied in this book may allow us to make some predictions about the future effectiveness of the Court on the basis of its structure and process, as well as on the basis of its initial outputs and outcomes. The goal-based approach to judicial effectiveness may also enable us to identify potential and existing problems that need attending to.

end of the cold war made the idea feasible, following a lengthy process that was launched by the UN General Assembly in 1989. On the drafting history of the ICC Statute, see Schabas, *An Introduction* 15–21; Antonio Cassese, *Cassese's International Criminal Law* (Revised by Antonio Cassese et al, 3rd edn, Oxford University Press, Oxford 2013) 261–63.

<sup>4</sup> 120 states voted in favor, 7 states voted against the adoption of the ICC Statute, and 21 states abstained.

<sup>5</sup> Rome Statute of the International Criminal Court (adopted July 17, 1998, entered into force July 1, 2002) UN Doc A/CONE.183/9 <<http://untreaty.un.org/cod/icc/statute/romefra.htm>>. The ICC Statute has since been amended. An updated version is available at <[http://www.icc-cpi.int/en\\_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/rome%20statute.aspx](http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/rome%20statute.aspx)> (hereinafter: “ICC Statute”).

<sup>6</sup> ICC Statute, Arts 9, 51.

<sup>7</sup> On the qualification, nomination, and election of judges, see: ICC Statute, Art 36.

<sup>8</sup> According to the ICC Statute, Art 42(4), the prosecutor is elected for a nine years period. See: William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, Oxford 2010) 581–82.

<sup>9</sup> See eg, Alejandro Chehtman, “The Impact of the ICC on Colombia: Positive Complementarity on Trial” (2011) DOMAC/17 <<http://www.domac.is/media/domac-skjol/Domac-17-AC.pdf>>.

Like other chapters in this part of the book, the present chapter discusses the goals of one international court (the ICC), identifies the factors that may influence judicial outcomes, and assesses the goal-attaining implications of these outcomes. A detailed survey of the legal structure of the ICC and its elaborate jurisdictional configuration is beyond the scope of this book. It suffices to mention at this point a few basic facts about the Court, which may facilitate our effectiveness analysis below: the Court is composed of four organs—Presidency, Judicial Divisions, the Office of the Prosecutor (OTP) and the Registry (which also includes an “Office of Public Counsel for Victims” and an “Office of Public Counsel for Defence”). It exercises jurisdiction over three categories of crimes: genocide, crimes against humanity, and war crimes (a recently adopted amendment to the ICC Statute, which is not yet in force, also paves the way for applying the jurisdiction of the ICC over the crime of aggression).<sup>10</sup> The personal jurisdiction of the ICC is limited to “natural persons” over the age of eighteen,<sup>11</sup> who typically bear the greatest responsibility for large-scale atrocities (even if they were not the direct perpetrators of the crimes in a physical sense).<sup>12</sup> The Court acquires jurisdiction on the basis of the consent of the states in whose territories the alleged crimes have occurred or the states of nationality of the alleged perpetrators, or through Security Council referrals under Chapter VII of the UN Charter.<sup>13</sup>

Significantly, the ICC is guided by the principle of complementarity, which provides, in essence, that a case will not be brought before the Court if it has been or is being investigated or prosecuted by a state with jurisdiction over the case, unless the state in question is unwilling or unable to genuinely carry out the proceedings.<sup>14</sup> Additionally, insufficient gravity and the interests of justice constitute grounds for declaring cases inadmissible, even where crimes falling within the jurisdiction of the Court were committed.

The Court is not part of the UN, but maintains a close cooperative relationship with it.<sup>15</sup> Its mandate providers are the state parties, who exercise their powers of control and supervision of the Court through the ASP.<sup>16</sup> Note that the state parties

<sup>10</sup> The crime of aggression is defined by the ICC Statute, Art 8bis, which was adopted through resolution RC/Res.6 of June 11, 2010 <[http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf)>. According to the ICC Statute, Art 15bis, “[t]he Court shall exercise jurisdiction over the crime of aggression ... subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.”

<sup>11</sup> ICC Statute, Art 25(1), 26.

<sup>12</sup> Schabas (n 8) 422, but see *Situation in the Democratic Republic of the Congo* (Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-trial Chamber I’s 31 March Decision Denying Leave to Appeal) ICC-01/04 (July 13, 2006), para 79 (emphasizing that the drafters of the Statute did not mean to confine the scope of prosecutions to the “most responsible” perpetrators).

<sup>13</sup> ICC Statute, Arts 12, 13.

<sup>14</sup> ICC Statute, Art 17.

<sup>15</sup> An Agreement between the ICC and the UN from 2004 provides for institutional relations, cooperation, and judicial assistance between the ICC and the UN, while reaffirming the independence of the Court. See Negotiated Relationship Agreement between the International Criminal Court and the United Nations (adopted October 4, 2004, entered into force 22 July) ICC-ASP/3/Res.1 <[http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf)>.

<sup>16</sup> ICC Statute, Art 112.

226 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

are also the Court's principal duty holders and are under an obligation to assist the ICC in its investigations and prosecutions.<sup>17</sup>

The situation in Uganda was the first situation referred to the Court (in 2003). Since then, and as of June 2013, the Office of the Prosecutor has conducted investigations in eight situations.<sup>18</sup> Additionally, the prosecutor currently conducts eight "preliminary examinations."<sup>19</sup> The ICC issued twenty-three arrest warrants (two of them were withdrawn following the suspects' death), and six arrests have been made.<sup>20</sup> Nine summonses to appear have been issued, and all nine suspects voluntarily appeared before the Court.<sup>21</sup> Five persons are currently held in custody: three accused with relation to the situation in the Democratic Republic of Congo (DRC), one person with relation to the situation in the Central African Republic (CAR), and one person with relation to the situation in Côte d'Ivoire. Twelve suspects remain at large. Eighteen cases have been initiated before the ICC—four of which are currently at the trial stage and two at the appeals stage.<sup>22</sup>

## 10.2 The Goals of the ICC

The ICC Statute does not explicitly refer to the "goals" or "objectives" of the Court. However, such goals can be inferred from various provisions included in the Statute, the Statute's legislative history, documents issued by organs of the Court, declarations of the ASP, and the relevant literature.<sup>23</sup> Our investigation into judicial goals shows that after adjustment to the unique context of ICL, the four "generic" ultimate ends identified in Chapter 2 of this book (norm support, dispute/problem resolution, regime support, and legitimization) are all reflected in the goals of the ICC. Moreover, the ICC has some additional idiosyncratic goals (related, nonetheless, to the ultimate ends), which we discuss below as well.

<sup>17</sup> Cooperation of states is vital in issues such as arrests, providing evidence, relocating witnesses, and enforcing the sentences of convicted persons.

<sup>18</sup> International Criminal Court, "The Court Today" (Updated June 20 2013) ICC-PIDS-TCT-01-029/13\_Eng <[http://www.icc-cpi.int/iccdocs/PIDS/publications/The Court Today Eng.pdf](http://www.icc-cpi.int/iccdocs/PIDS/publications/The%20Court%20Today%20Eng.pdf)>.

<sup>19</sup> ICC, The Court Today (n 18).

<sup>20</sup> ICC, The Court Today (n 18).

<sup>21</sup> ICC, The Court Today (n 18).

<sup>22</sup> ICC, The Court Today (n 18).

<sup>23</sup> There were very few attempts in the academic literature to address directly the issue of goals of international criminal tribunals. The scarce attempts to map the goals of international criminal tribunals include, eg: Mirjan Damaska, "What is the Point of International Criminal Justice?" (2008) 83 Chicago-Kent L Rev 329; Minna Schrag, "Lessons Learned from ICTY Experience" (2004) 2 Journal of International Criminal Justice (JICJ) 427, 428 (listing goals of the ICTY); Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, Princeton NJ 2002) ch 8 (addressing goals of international criminal tribunals through an analysis of the "liberal case for war crimes tribunals"); Cassese (n 3) ch 14.6 (dealing with "the need for international trials," their main traits, their merits and the main problems related to international criminal proceedings). The goals of the ICC sometimes pull in different directions. See Damaska, "What is the Point" 331–35 (illustrating some of the tensions between the various goals of international criminal justice).

## Supporting ICL

ICL aims at preventing and punishing individual conduct that is defined as an international crime. The ICC serves the ultimate end of supporting ICL, including supporting compliance with it, through pursuing the intermediate goals of ending impunity and generating deterrence. These two intermediate goals relate to the need to both prevent international crimes and to address these crimes once they have occurred. In addition, the ICC supports ICL through encouraging the internalization of its norms into domestic jurisdictions. By pursuing this third intermediate goal, the ICC increases the chances that ICL norms will be complied with and legitimized on a global scale. Finally, the ICC contributes, through its work, to the development of ICL and it may be claimed that the mandate providers have embraced this contribution as another intermediate goal comprising part of norm support.

### (i) Ending impunity

In the preamble to the ICC Statute, state parties affirm, *inter alia*, “that the most serious crimes of concern to the international community as a whole must not go unpunished,” and that they are “determined to put an end to impunity for the perpetrators of these crimes.”<sup>24</sup> Ending impunity serves as an intermediate goal not only in relation to the ultimate end of supporting compliance with ICL, but also in relation to other ultimate ends, as discussed below.

Ending impunity is reflected in, *inter alia*, the fact that the official capacity of persons, including head of states or governments, does not exempt them from criminal liability under the Statute.<sup>25</sup> This approach conforms to the relevant precedents set by the ad hoc criminal tribunals.<sup>26</sup> In its decision to confirm the prosecutor’s request for an arrest warrant against Sudanese President Omar al-Bashir, the Pre-Trial Chamber of the ICC reiterated the link between the competence of the Court to prosecute heads of states and the goal of ending impunity.<sup>27</sup>

### (ii) Generating deterrence

Strengthening deterrence against the commission of international crimes was a principal motive for the creation of the ICC.<sup>28</sup> Indeed, the preamble of the Statute

<sup>24</sup> ICC Statute, preamble, paras 4–5.

<sup>25</sup> ICC Statute, Art 27. See also *Situation in Darfur, Sudan: The Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (December 12, 2011).

<sup>26</sup> Schabas (n 8) 447; Geoffrey Robertson, “Ending Impunity: How International Criminal Law Can Put Tyrants on Trial” (2005) 38 Cornell Int’l LJ 649; Hans-Heinrich Jescheck, “The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute” (2004) 2 JICJ 38, 43–44.

<sup>27</sup> *Situation in Darfur, Sudan: In the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar al Bashir”)* (Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (March 4, 2009) paras 41–43. See also Schabas (n 8) 451.

<sup>28</sup> See eg, statements of delegations to the Rome Conference quoted in: Jan Klabbers, “Just Revenge? The Deterrence Argument in International Criminal Law” (2001) 12 Finnish Ybk Int’l L 249, 251.

228 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

states that the states parties are “determined to put an end to impunity … and thus to contribute to the prevention of such crimes.”<sup>29</sup>

The claim that international criminal adjudication can generate deterrence is difficult to prove or measure empirically, however. Scholars have raised doubts in this regard, mainly due to the strong political and social motivations that typically accompany the commission of international crimes, the small number of cases that can actually be brought before international criminal courts, and the difficulties in apprehending offenders.<sup>30</sup> Still, the ICC may have better chances to achieve the goal of deterrence than other international criminal tribunals, given its relatively broad temporal, geographical and subject-matter jurisdiction.<sup>31</sup> Moreover, the ICC, as a permanent institution that may respond to atrocities *while the conflict is still ongoing*, can make more a credible claim to a demonstrable deterrent effect than ad hoc criminal tribunals sometimes created long after the specific conflict-related atrocities have abated.<sup>32</sup>

Interestingly enough, the Statute does not explicitly mention deterrence in the context of the applicable sentencing considerations.<sup>33</sup> Whereas other international criminal tribunals have alluded in their sentencing judgments to deterrence as one of the goals of their sentencing,<sup>34</sup> the only sentencing judgment issued by the ICC until now (in the *Lubanga* case) fails to mention this consideration.<sup>35</sup>

### (iii) Norm internalization

The dominant view is that most of the crimes under the Court’s jurisdiction were customary norms of international law prior to their introduction into the ICC

<sup>29</sup> ICC Statute, preamble, para 5.

<sup>30</sup> See eg, Klabbbers (n 28); David Whippman, “Atrocities, Deterrence, and the Limits of International Justice” (1999) 23 Fordham Int’l LJ 473; Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” (2001) 95 AJIL 7; Julian Ku and Jide Nzelibe, “Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?” (2006) 84 Washington University L Rev 777; James F Alexander, “The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s Impact” (2009) 54 Villanova L Rev 1. For a broad perception of “deterrence” beyond international criminal justice, see: Michael L Smidt, “The International Criminal Court: An Effective Means of Deterrence?” (2001) 167 Military L Rev 156.

<sup>31</sup> For example, both the ICTR and the SCSL could only review events occurring prior to their establishment (unlike the ICTY, which had open-ended temporal jurisdiction). See Schabas (n 8) 44. All ad hoc criminal tribunals were invested with narrowly confined geographical jurisdiction.

<sup>32</sup> Schabas (n 8). For instance, the Extraordinary Chamber in the Court of Cambodia was established in 2001 to try the perpetrators of crimes committed by senior Khmer Rouge officials between 1975 and 1979.

<sup>33</sup> On the lack of direct reference to the objectives of punishment, see Schabas (n 8) 898–900. Article 78 of the ICC Statute merely addresses mitigating and aggravating factors, as well as some technical issues.

<sup>34</sup> *Prosecutor v Dario Kordić and Mario Cerkez* (Judgment) IT-95-14/2-A (December 17, 2004), para 1076–78. The Tribunal noted that: “It is important to note, however, that this sentencing factor must not be given ‘undue prominence’ when determining a sentence” (para 1078). See also *Prosecutor v Zeynil Delalic, Zdravko Mucic (aka “PAVO”), Hazim Delic and Esad Landzo (aka “ZENGA”)* (Judgment) IT-96-21-A (February 20, 2001), para 801.

<sup>35</sup> *Situation in the Democratic Republic of the Congo: in the Case of the Prosecutor v Thomas Lubanga Dyilo* (Decision on Sentence Pursuant to Article 76 of the Statute) ICC-01/04-01/06 (July 10, 2012).

Statute. Still, the inclusion of ICL norms in the Statute most likely promotes their global acceptance. Furthermore, in the course of becoming parties to the Statute, states regularly review their domestic laws with a view to assessing their compatibility with the core crimes contained in the Statute,<sup>36</sup> and in various cases these reviews have resulted in the introduction of implementing national legislation.<sup>37</sup> Note that for some states, the main motivation for adopting implementing legislation may be to provide the legal infrastructure that could be used by domestic authorities to invoke the principle of complementarity and to stave off ICC jurisdiction over crimes allegedly committed by their own nationals.<sup>38</sup>

#### *(iv) Development of international legal norms*

The ICC is also expected to support the development of ICL through its decisions and judgments and to adjust its norms to new battlefield conditions, as well as to new patterns of atrocious conduct. Although norm development in the field of ICL is subject to the principle of *nullum crimen sine lege*—the principle of legality<sup>39</sup>—the experience of other international criminal tribunals shows that their work has been praised by observers much because of its contribution to the development of ICL through their jurisprudence and the creation of a comprehensive “case law.”<sup>40</sup> It stands to reasons that observers of the ICC will also regard its contribution to ICL as one of the most positive outcomes of its operation.<sup>41</sup>

### Dispute resolution and problem solving

In addition to its norm-support mission, the ICC was also intended to respond to a number of serious problems: the persistence of international crimes, the plight

<sup>36</sup> Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, Oxford 2008) 333–34.

<sup>37</sup> Kleffner (n 36) 334–36.

<sup>38</sup> Kleffner (n 36) 337.

<sup>39</sup> ICC Statute, Art 22. See also Hector Olasolo, “A Note on the Evolution of the Principle of Legality in International Criminal Law” (2007) 18 Criminal Law Forum 301. However, the development of ICL through case law in which international tribunals interpret existing norms does not contradict, as such, the principle of legality. On the lack of contradiction between the principle of legality and the development of criminal law by means of legitimate interpretation, see eg, *Streletz, Kessler and Krenz v Germany* App no 34044/96, 35532/97 and 44801/98 (ECtHR, March 22, 2001) (referring to previous decisions that adopted this approach).

<sup>40</sup> See eg, Erik Møse, “Main Achievements of the ICTR” (2005) 3 JICJ 920, 934–36. The following statement appears in the official website of the ICTY: “Since its establishment ... the Tribunal has consistently and systematically developed international humanitarian law ... The legal precedents set by the Tribunal have expanded the boundaries of international humanitarian and international criminal law, both in terms of substance and procedure.” See also <<http://www.icty.org/sid/324>>.

<sup>41</sup> The jurisprudence of the ICC is also expected to promote the development of other fields of international law, especially international humanitarian law (IHL) and international human rights law (IHRL), which form the basic normative framework upon which the war crimes and crimes against humanity that are included in the ICC Statute are based. Christine Bell, “Post-Judgment Accountability and the Reshaping of Human Rights and Humanitarian Law” in Orna Ben Naftali (ed), *International Human Rights Law and International Humanitarian Law* (Oxford University Press, Oxford 2011) 340–41.

230 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

of their victims, and, ultimately, the continuance of violent conflicts exacerbated by the perpetration of international crimes. Thus, some of the specific goals of the ICC—ending impunity, promoting peace and security, and providing satisfaction to victims—can be regarded as intermediate goals serving the ultimate end of dispute resolution or problem solving. Another intermediate goal possibly serving the same ultimate end is the Court’s policy of establishing a historical record of the relevant events it discusses.

*(i) Ending impunity*

The intermediate goal discussed above of ending impunity is also relevant to the ultimate end of promoting dispute resolution or problem solving. Beyond the interdependence between increased compliance with ICL and mitigating violent conflicts, one may also note that the physical removal of a criminal leadership from positions of influence, through the apprehension and prosecution of the relevant individuals at The Hague (or, alternatively, their absconding justice and going underground) may create improved conditions for ending the relevant conflict. The removal of the most extreme elements of the Serb leadership in Belgrade and Pale following their indictments for international crimes and the subsequent end of the Balkan wars serve as a possible illustration of this justice–peace linkage.<sup>42</sup>

*(ii) Promoting peace and security*

The goal of promoting peace and security is reflected, *inter alia*, in the court’s authorization to exercise jurisdiction based on Security Council’s referrals under Chapter VII of the UN Charter.<sup>43</sup> More broadly, in the third paragraph of the preamble, the states parties recognize “that such grave crimes threaten the peace, security and well-being of the world.”<sup>44</sup> Thus, the Statute implies that the Court’s contribution to reducing the commission of grave crimes is designed to advance the cause of international peace and security. Indeed, the first prosecutor noted that “the ICC was created on the premise that justice is an essential component of a stable peace.”<sup>45</sup>

The difficult “peace versus justice dilemma” relates to how the Court should treat peace negotiations in the course of which the parties may seek guarantees that they will not be prosecuted as a condition for cessation of the armed conflict.<sup>46</sup>

<sup>42</sup> See Elizabeth Pond, *Endgame in the Balkans: Regime Change, European Style* (Brookings Institution Press, Washington DC 2006) 255.

<sup>43</sup> ICC Statute, Art 13(b).

<sup>44</sup> Other provisions of the preamble to the ICC Statute enhance the importance of peace and security. In the seventh paragraph, the states parties reaffirm “the purposes and principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State. . . .” In the subsequent paragraph, the state parties emphasize “in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State.”

<sup>45</sup> Office of the ICC Prosecutor, “Policy paper on the interests of justice” (September 2007) <<http://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestsofjustice.pdf>> 8.

<sup>46</sup> See eg, Damaska (n 23) 331–32.

A similar dilemma presents itself when amnesties are granted for alleged perpetrators of international crimes in exchange for their cooperation with “alternative justice” mechanisms that do not entail individual criminal responsibility and punishment (eg, truth and reconciliation commissions). Prosecutor Ocampo opined that “the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.”<sup>47</sup> Accordingly, he stated that while he is authorized to consider the “interests of justice” as a ground for refusing to open investigations or prosecutions, “there is a difference between the concepts of interests of justice and interests of peace.”<sup>48</sup> The claim that the ICC may be viewed as promoting peace and security merely as a result of the fact that it conducts criminal proceedings has been criticized in the literature as oversimplified, as it avoids the challenges associated with the complex relations between peacemaking, reconciliation, and criminal justice.<sup>49</sup>

An acknowledgment that in certain circumstances, proceedings before the Court may be disadvantageous to peace and security in the short term is reflected in the provisions of the Statute itself. According to Article 16 of the Statute:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter ... has requested the Court to that effect ...<sup>50</sup>

When important constituencies view proceedings before the Court as potentially harmful for peace negotiations, Article 16 of the Statute provides them with an institutional solution (at least for the twelve-month period in which the deferral of ICC jurisdiction is in force). The feasibility of this political solution depends, in turn, on the availability of the necessary political conditions allowing for attainment of the required majority on the Security Council.<sup>51</sup>

<sup>47</sup> OPT Policy paper 2007 (n 45) 9.

<sup>48</sup> ICC Statute, Art 53(1)(c) and 53(2)(c); OPT Policy paper 2007 (n 45) 9.

<sup>49</sup> Schabas (n 8) 43. See also: Eric D Blumenson, “The Challenge of a Global Standard of Justice: Peace, Pluralism and Punishment at the International Criminal Court” (2006) 44 Columbia J Transnat'l L 801; Bass (n 23) 285: “The spectacle of foreign-imposed trials may cause a nationalist backlash. Or a moralistic insistence on punishing war crimes may make it impossible to do business with bloodstained leaders who, however repulsive, might end the war. When politics is linked to law, crucial flexibility is lost—potentially with catastrophic results.”

<sup>50</sup> ICC Statute, Art 16.

<sup>51</sup> Schabas (n 8) 333. The Security Council made use of Art 16 soon after the ICC Statute entered into force to exclude from the Court’s jurisdiction members of peace keeping forces who are nationals of non-party states. Security Council Resolution 1422 (2002) provided that “Requests, consistent with the provisions of Art 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.” See UNSC Res 1422 (July 12, 2002) UN Doc S/RES/1422, para 1. The Security Council has not extended the validity of this decision beyond 2004. However, in Resolution 1593 (2005) and Resolution 1970 (2011), in which the Security Council referred the situations in Darfur and in Libya to the ICC, respectively, references to Art 16 were included in the preambles to the resolutions, supposedly to support the exclusion of peace keeping forces from non-party states from the Court’s jurisdiction. See UNSC Res 1593 (March 31, 2005) UN Doc S/RES/1593; UNSC Res 1970 (February 26, 2011) UN Doc S/RES/1970.

232 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

The Court's direct influence on matters of peace and security may be enhanced once the amendment of the Statute defining the crime of aggression will enter into force and the ICC will start exercising jurisdiction over this crime.<sup>52</sup> However, since unlike the other crimes under the Court's jurisdiction, the ICC's jurisdiction over the crime of aggression would be exercised only with respect to state parties to the Statute, and given that the states parties were also granted the possibility of opting out from the Court's jurisdiction with regard to this crime by way of a unilateral declaration, we expect that few (if any at all) aggression cases would be adjudicated by the Court in the foreseeable future.<sup>53</sup>

*(iii) Victim satisfaction*

The status of victims in proceedings before the ICC is often cited as one of the great innovations of the ICC Statute, as victims had no recognized status in previous international criminal tribunal proceedings (besides their role as witnesses to a crime).<sup>54</sup> The Statute contains provisions that endow victims with the right to actively participate in the proceedings and to obtain reparations.<sup>55</sup> The Court may determine "the scope and extent of any damage, loss and injury to, or in respect of, victims"; moreover, it "may make an order directly against a convicted person specifying appropriate reparations," and order the payment of reparation through the "Trust Fund" established under the Statute.<sup>56</sup> This Trust Fund already functions and provides assistance to victims of crimes under the ICC's jurisdiction, including vocational training, counseling, and reconciliation workshops.<sup>57</sup>

The ICC's approach to victims reflects developments in international human rights law recognizing the right to a remedy and reparation for victims of gross human rights violations.<sup>58</sup> This approach demonstrates a commitment to both retributive and restorative justice, which supports the claim that the ICC aims not only to bring criminals to justice but also to help victims to rebuild their lives.<sup>59</sup> While addressing victims' needs has intrinsic value, and can be regarded one of the important

On the legal difficulties that arise as a result of such use of Art 16, see: Mohamed El Zeidy, "The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422" (2002) 35 Vanderbilt Journal of Transnational Law 1503.

<sup>52</sup> See n 10. <sup>53</sup> ICC Statute, Art 15bis, paras 4, 5.

<sup>54</sup> Schabas (n 8) 42 notes also the reference to victims in the second paragraph of the preamble ("during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity").

<sup>55</sup> ICC Statute, Arts 68, 75. <sup>56</sup> ICC Statute, Arts 75, 79.

<sup>57</sup> See Trust Fund website <<http://www.trustfundforvictims.org/>>.

<sup>58</sup> On the importance granted to satisfaction of victims' needs within the ICC and its link to the international developments in this field, see the resolution adopted by the ICC Review Conference "The Impact of the Rome Statute System on Victims and Affected Communities" (June 8, 2010) Resolution RC/Res.2.

<sup>59</sup> International Criminal Court, "Victims before the Court" ICC-PIDS-FS-02-001/09\_Eng, <<http://www.icc-cpi.int/NR/rdonlyres/CD7C61CC-910D-4334-88AF-71E9191291D9/280498/Victims0109ENGweb.pdf>>.

aspects of the problem-solving goal of the ICC and, more generally, one of the goals of international criminal justice,<sup>60</sup> it also serves other goals—primarily, the aforementioned goal of promoting peace and security.

*(iv) Establishing historical records of atrocious events*

Some commentators have regarded the goal of providing an historical record of atrocious events as an unstated goal of the ICC that is shared by all international criminal tribunals since Nuremberg.<sup>61</sup> Damaska explained how this specific goal serves the more general goal of promoting peace:

[m]assive violations of human rights, including politically motivated violence, tend to be denied by the perpetrators and their sympathizers. The resulting desire to set the historical record straight, and to restore the integrity of human remembrance, is greatly strengthened by the belief that truth telling about the past is a necessary precondition for reconciliation and avoidance of future conflicts.<sup>62</sup>

Establishing the historical record is also closely related to the aforementioned goal of providing satisfaction to victims; a public endorsement by the Court of the factual information on the atrocities that were committed provides victims with an official acknowledgment of their suffering. Furthermore, establishing the historical record almost inevitably involves offering victims the opportunity to be heard in court—an empowering experience that constitutes a potentially important element in providing them some degree of satisfaction.

Like its predecessors, the ICC is expected to establish in its judgments a historical record of the relevant events.<sup>63</sup> However, some controversy surrounds the desirability of this goal and, more importantly for our purpose, the capacity of the ICC to realize it. On the one hand, establishing an historical record offers an important contextualization in time and space of crimes that have occurred and helps to identify the organizational background against which individual crimes

<sup>60</sup> See eg, T Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press, Oxford 2010); Conor McCarthy, "Victim Redress and International Criminal Justice: Competing Paradigms or Compatible Forms of Justice?" (2012) 10 JICJ 351–72.

<sup>61</sup> Bass (n 23) 302.

<sup>62</sup> Damaska (n 23) 335. See also Bass (n 23) 304, and "Some of the Achievements of the ICTY" in the official website of the ICTY <<http://www.icty.org/sid/324>> ("The Tribunal's judgments have contributed to creating a historical record, combatting denial and preventing attempts at revisionism and provided the basis for future transitional justice initiatives in the region").

<sup>63</sup> The prosecutor explained that "while the Office's mandate does not include production of comprehensive historical records for a given conflict, incidents are selected to provide a sample that is reflective of the gravest incidents and the main types of victimization." See Office of the ICC Prosecutor, "Prosecutorial Strategy—2009–2012" (February 1, 2010) <<http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>> para 20. Notably, the first two judgments of the Court—*Lubanga* and *Chui*—included only short segments on the factual background of the crimes alleged. *Situation in the Democratic Republic of the Congo: in the Case of the Prosecutor V Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (March 14, 2012) 41–49; *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Mathieu Ngudjolo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (December 18, 2012) 119–26.

234 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

were committed.<sup>64</sup> The visibility of ICC proceedings and their relative “distance” from the events and the rival parties render the ICC a particularly powerful and neutral narrative-establisher, whose findings are likely to enjoy broad acceptance. On the other hand, some claim that the ICC, like other international criminal tribunals, is ill equipped to establish “historical truths.” The Court focuses on the guilt or innocence of specific defendants and applies to that question a set of rules of procedure and evidence designed to produce a “legal truth” that may not reflect the full extent of the events that occurred. As a result, “legal truths” may not promote—and might even impede—the advancement of broader social goals such as reconciliation, which rest on broad acceptance of an “historical truth.”<sup>65</sup>

### **Supporting the ICL regime**

Strictly speaking, the ICC does not operate as a judicial organ within the framework of a standing international organization. Thus, in the narrow, formal-institutional sense, the ICC is not a “regime court.” However, in a broader sense, an ICL regime in which the ICC constitutes a central element does exist, comprised of “implicit or explicit principles, norms, rules, and decision-making procedures in a given area of international relations around which actors’ expectations converge.”<sup>66</sup> The ICL regime is commonly portrayed as comprising an international component and a domestic component (also intended to advance the realization of international standards). While domestic judiciaries are the primary fora for applying ICL, the ICC is the dominant institution within the international part of the regime. As the only permanent international institution with a global reach, the ICC has an important responsibility for supporting the ICL regime and advances this ultimate end through the pursuit of two intermediate goals: encouraging domestic proceedings against ICL violators (discussed hereby) and the aforementioned goal of contributing to the development of international legal norms (discussed above in connection with the “norm-support” ultimate end).

#### *(i) Encouraging domestic proceedings against ICL violators*

In the preamble of the Statute, the state parties recalled “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international

<sup>64</sup> Damaska (n 23) 336. See also Richard Wilson, “Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia” (2005) 27 Human Rights Quarterly 908.

<sup>65</sup> Martti Koskeniemi, “Between Impunity and Show Trials” (2002) 6 Max Planck Ybk of UN Law 1, 11ff; Stanley Cohen, “State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past” (1995) 20 Law & Social Inquiry 7, 21; Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (First Published 1963, Penguin, New York 2006) 253 (“The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes—‘the making of a record of the Hitler regime which would withstand the test of history,’ as Robert G Storey, executive trial counsel at Nuremberg, formulated the supposed higher aims of the Nuremberg Trials—can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment”).

<sup>66</sup> Stephen D Krasner, “Structural Causes and Regime Consequences: Regimes as Intervening variables” (1982) 36 International Organization 185, 186.

crimes,”<sup>67</sup> and affirmed that the effective prosecution of international crimes “must be ensured by taking measures at the national level and by enhancing international cooperation.”<sup>68</sup> The prosecutor declared that “[a] major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes.”<sup>69</sup>

Moreover, the principle of complementarity, which limits the jurisdiction of the ICC to cases in which states fail to properly fulfill their duty to investigate and prosecute international crimes, serves as a catalyst for states to comply with their obligation to investigate and prosecute international crimes. This is because a declaration of admissibility by the ICC may entail reputational costs for the states concerned that they would want to avoid,<sup>70</sup> and because the powers of the prosecutor to supervise national proceedings enable the ICC to nudge states to undertake national proceedings.<sup>71</sup> Although not explicitly stated in the Statute, broad consensus exists that such pressure is one of the primary purposes of the principle of complementarity.<sup>72</sup>

The Statute is silent, however, on whether (if at all) the ICC should address compliance problems through measures designed to build capacity at the national court level. It is unclear to what extent is the Court is equipped to engage itself in capacity building, and whether it is desirable for a judicial institution to do so in the first place.<sup>73</sup> Still, the OTP and the ASP seem to have acknowledged that the Court plays a certain role in actively assisting national jurisdictions to meet their obligation to investigate and prosecute.<sup>74</sup> The scope and the nature of the Court’s

<sup>67</sup> ICC Statute, preamble, para 6.

<sup>68</sup> ICC Statute, preamble, para 4.

<sup>69</sup> See Office of the ICC Prosecutor, “Paper on some policy issues before the Office of the Prosecutor” (September 2003) <[http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905\\_policy\\_paper.pdf](http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf)> 5.

<sup>70</sup> Kleffner (n 36) 318–26.

<sup>71</sup> Kleffner (n 36) 326–31 (addressing “complementarity as management”). The Prosecutor stated that “the Office will develop formal and informal networks of contacts to encourage States to undertake State action, using means appropriate in the particular circumstances of a given case ... The exercise of the Prosecutor’s functions under article 18 of notifying States of future investigations will alert States with jurisdiction to the possibility of taking action themselves.” See OTP Paper on some policy issues (n 69) 5.

<sup>72</sup> For an overview of the positions of states, academics, and other experts—as well as that of the prosecutor—on the role of complementarity as a catalyst for compliance, see eg, Kleffner (n 36) 309–310. Complementarity also safeguards states’ sovereignty and confers legitimacy on suitable national proceedings. For an analysis of the role of complementarity as a legitimacy enhancing tool, see Kleffner (n 36) 312–18.

<sup>73</sup> Kleffner (n 36) 328–29.

<sup>74</sup> The prosecutor and the ASP advocated the development of strategies to facilitate and assist states in conducting domestic proceedings, referred to as “positive complementarity.” See eg, Kleffner (n 36) 329; OTP Prosecutorial Strategy 2009–2012 (n 63) paras 15–17 (explaining that positive complementarity requires the ICC to “encourage genuine national proceedings where possible”); ICC Assembly of States Parties “Kampala Declaration” Declaration RC/Decl.1 (June 1, 2010), para 5 <[www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Decl.1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.1-ENG.pdf)> (noting that ICC states parties consider that the principle of complementarity requires them “to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally-recognized fair trial standards”).

236 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

involvement in such initiatives, as well as the exact meaning of a “positive complementarity” policy, remains an undecided issue.<sup>75</sup>

### **Legitimizing the application of ICL**

Two intermediate goals of the Court serve the ultimate end of legitimizing the application of ICL norms. These are the goals of conveying a message of condemnation and projecting an image of procedural fairness and legitimacy.

#### *(i) Conveying a message of condemnation*

The second paragraph of the preamble to the ICC Statute declares that the state parties are mindful of the millions of victims “of unimaginable atrocities that deeply shock the conscience of humanity.”<sup>76</sup> The ICC, like other international criminal institutions, is perceived to act on behalf of the whole international community, and is therefore entitled to pronounce upon crimes that offend universal values.<sup>77</sup> Moreover, as international trials are, by definition, more visible and are often regarded more credible than national proceedings, holding trials at the ICC signals the determination of the international community to stigmatize deviant behavior.<sup>78</sup> (Indeed, stigmatization of international criminals may also promote the aforementioned goal of deterrence.)

Note that international criminal institutions may condemn international crimes even in cases where the defendants are found not guilty, or in cases where the accused had personal mitigating circumstances resulting in mild sentences. The specific judgments and sentences that result from such cases may not create perhaps strong deterrence, but the judgment may still convey a message of condemnation that serves to legitimize the application of ICL to the relevant situation.<sup>79</sup>

#### *(ii) Projecting an image of procedural fairness and legitimacy*

Various provisions in the ICC Statute are designed to ensure that the proceedings are conducted in accordance with international standards of due process: these

<sup>75</sup> See eg, Kleffner (n 36) 331 (noting that the absence of an agreed-upon set of rules on capacity building creates a lack of transparency that is in itself detrimental to the promotion of states’ compliance with ICL).

<sup>76</sup> ICC Statute, preamble, para 2. See also paragraphs 4 and 9 of the preamble and Articles 1 and 5(1) of the Statute that speak of “the most serious crimes of concern ...”

<sup>77</sup> Cassese (n 3) 268. <sup>78</sup> Cassese (n 3) 269.

<sup>79</sup> For example, the Trial Chamber in the ICC in the case of Mathieu Ngudjolo acquitted the accused. *Case of the Prosecutor v Mathieu Ngudjolo* (n 63). However, the Trial Chamber noted the “wealth of evidence to show that during and after the 24 February 2003 attack, inhabitants of Bogoro were killed, women were raped and some were kept in captivity by the attackers, property was pillaged and, lastly, buildings were attacked and destroyed” (para 338). The Chamber also determined that the presence of children in combatant groups was a widespread phenomenon (para 516). The acquittal resulted from the Chamber’s finding that it is cannot be established beyond reasonable doubt that there was a link between the accused and the alleged crimes (the prosecutor appealed the judgment; the appeal is still pending).

provisions include, *inter alia*, detailed rules on the rights of suspects during an investigation and on the rights of the accused,<sup>80</sup> an explicit assertion of the presumption of innocence,<sup>81</sup> and a right of a convicted person to appeal on any ground that “affects the fairness or reliability of the of the proceedings or decision.”<sup>82</sup> The Statute also includes a general statement that the application and interpretation of the law by the Court “must be consistent with internationally recognized human rights.”<sup>83</sup> The drafters’ expectation that the Court would strictly adhere to high standards of procedural fairness is consistent with the view expounded upon in this book, according to which international courts are intended to legitimate the operation of international norms and institutions and that only legitimate courts can further confer legitimacy. It thus appears plausible to maintain that the ICC is entrusted with the intermediate goal of promoting the legitimacy of its operation—in particular, through adhering to due process standards—and with the ultimate end of legitimating the application of ICL in general.

### 10.3 Factors Controlling Judicial Outcomes

#### Jurisdictional powers

The subject-matter jurisdiction of the Court covers the most serious international crimes that constitute gross violations of human rights or international humanitarian law, namely, genocide, crimes against humanity, and war crimes, as defined in the Statute.<sup>84</sup> As noted above, the Court will also exercise, in due course, jurisdiction over the crime of aggression.<sup>85</sup> As a rule, international crimes that are not covered by the Court’s jurisdiction are either crimes that were perceived by the drafters as less severe in nature or crimes that do not raise serious impunity concerns, such as crimes that are typically committed by non-state actors and that states have an interest in their suppression (eg, piracy, illicit traffic in drugs, and possibly also terrorism).<sup>86</sup> Thus, generally speaking, it seems that the Court’s subject-matter jurisdiction suits one of the main goals of the Court, which is to end impunity.

However, certain attributes of the subject-matter jurisdiction of the ICC seem to constrain its ability to produce outcomes that would fully realize the Court’s goals. The Court’s present inability to exercise jurisdiction over the crime of aggression hampers its ability to address situations in which international peace and security was actually breached. Other subject-matter jurisdictional deficiencies—such as the exclusion of the crime of terrorism from the list of war crimes and crimes against humanity and the fact that the list of war crimes in non-international

<sup>80</sup> ICC Statute, Arts 55 and 67, respectively.

<sup>81</sup> ICC Statute, Art 66.

<sup>82</sup> ICC Statute, Art 81(b)(iv). See also ICC Statute, Art 83(2).

<sup>83</sup> ICC Statute, Art 21(3). <sup>84</sup> ICC Statute, Arts 6, 7, 8.

<sup>85</sup> ICC Statute, Art 8bis.

<sup>86</sup> These crimes are typically committed *against* states (see Cassese (n 3) 19).

238 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

armed conflicts lacks crimes that are undoubtedly part of customary international law—are also expected to limit the Court's ability to always respond adequately to atrocities.<sup>87</sup>

The Court's temporal jurisdiction (*jurisdiction ratione temporis*) is limited to crimes committed after the entry into force of the Statute, ie, since July 1, 2002.<sup>88</sup> The ICC's inability to address past atrocities may be viewed as a deficiency that would limit the success of the Court's mission of ending impunity. Still, practical considerations supported this limitation on the Court's jurisdiction. It is doubtful that an agreement could ever have been reached on the establishment of a permanent court if it had the power to delve into the history of state parties.<sup>89</sup> Nor is it likely that all of the current state parties would have joined the Statute under such terms. Additionally, a broad temporal jurisdiction would have overburdened the Court with complicated investigations into historical events. Thus, the aforementioned temporal limitation seems to shore up support for the Court and to promote its cost-effectiveness.

As for personal jurisdiction, in view of the lack of consensus on this issue during the Rome Conference, the Court's jurisdiction does not extend to legal entities, but only to natural persons.<sup>90</sup> Persons under the age of eighteen at the time of the alleged commission of the crime are also excluded from the Court's jurisdiction, due to difficulties in reaching consensus on a minimum age of criminal responsibility for minors under the age of eighteen (and perhaps also because of the complexity of trying juveniles before an international court).<sup>91</sup> Here too, the need to ensure broad acceptance of the Court's authority and cost-effectiveness militated in favor of a minimalist approach to jurisdiction.

The Court's territorial and personal jurisdiction emanate from the fact that the ICC is a treaty-based institution, and states joining the Statute delegate to the Court jurisdiction over their nationals and over the crimes committed within their territory.<sup>92</sup> Basing the ICC's jurisdiction on states' consent, rather than on a more controversial theory of universal jurisdiction, legitimizes the exercise of ICC jurisdiction and facilitates the consenting states' cooperation with legal proceedings before the Court. (The alignment of ICC jurisdiction with traditional bases of national criminal jurisdiction—territoriality and nationality of the perpetrator—also allows the ICC to rely on domestic proceedings against ICL violators as the

<sup>87</sup> Cassese (n 3) 80–83.

<sup>88</sup> ICC Statute, Art 11. If a state becomes party to the ICC Statute after July 1, 2002, the Court only has jurisdiction after the Statute entered into force for that state. Such a state may nonetheless accept the jurisdiction of the Court for the period before the Statute's entry into force, but in no case can the Court exercise jurisdiction over events that occurred before July 1, 2002.

<sup>89</sup> Schabas (n 8) 273.

<sup>90</sup> ICC Statute, Art 25(1). Schabas (n 8) 424.

<sup>91</sup> ICC Statute, Art 26. Schabas (n 8) 443–45.

<sup>92</sup> For a discussion of the notion that states delegate their jurisdiction to the ICC, see eg, Yuval Shany, "In Defence of Functional Interpretation of Article 12(3) of the Rome Statute A Response to Yaël Ronen" (2010) 8 JICJ 329 (arguing that "Article 12 of the ICC Statute is premised on a delegation-based theory, according to which states may delegate to the ICC criminal jurisdiction over certain crimes that would have otherwise fallen within the jurisdiction of their national courts [ie crimes committed within their territory or by their nationals]").

principal mode for enforcing ICL norms.) By contrast, in situations in which the jurisdiction of the Court is based on a referral by the Security Council in accordance to Chapter VII of the UN Charter, relevant national constituencies may more readily raise legitimacy challenges<sup>93</sup> and serious problems of state cooperation may occur (see, for instance, the Court's inability to apprehend the Sudanese officials it had indicted).

The Court may exercise its jurisdiction under the various Statute provisions only if the jurisdiction is "triggered." The three "triggering" mechanisms are a referral by a state party;<sup>94</sup> a referral by the UN Security Council acting under Chapter VII of the Charter of the UN;<sup>95</sup> or initiation of an investigation by the prosecutor of the ICC *proprio motu* on the basis of information that she receives.<sup>96</sup> The triggering mechanism may also affect the fulfillment of the Court's goals. Arguably, self-referrals (ie, referrals by the territorial state or state of nationality of the accused) are more likely to result in cooperation by the referring state than are referrals triggered otherwise; furthermore, referrals by the Security Council, representing broad community interests, may enjoy greater source legitimacy<sup>97</sup> than referrals brought by one state party with respect to another state party.

As explained above, the exercise of the Court's jurisdiction is subject to the principle of complementarity, the requirement of gravity, and a general consideration of the "interests of justice."<sup>98</sup> The policy that the prosecutor and Chambers have adopted and will adopt in the future regarding the interpretation and application of these jurisdiction and admissibility conditions may significantly influence the Court's ability to fulfill its goals. For example, the extent to which the Court would adopt a policy of "positive complementarity" that helps states to conduct domestic proceedings would have direct implications on the attainment of goals such as encouraging domestic proceedings and internalizing ICL norms.

As of July 2013, among the eight situations that are subject to investigations by the Court, five were "self-referred" to the Court by the territorial states in which the crimes were allegedly committed.<sup>99</sup> Unsurprisingly perhaps, due to cooperation by the self-referring states, successful arrests have been made in three of the self-referred situations. The two trials that have been completed to date also concern a self-referred situation, where the OTP was able to collect evidence from the crime scene (the situation in the DRC). At the same time, the non-self-referred situations pose complicated challenges to the Court, and the successful completion of proceedings is not in sight. Thus, the experience of the ICC suggests that state

<sup>93</sup> AFP, "Sudan war crimes suspect denies ICC 'political' charges" (Sudan Tribune, February 28, 2007) <<http://www.sudantribune.com/spip.php?article20501>>.

<sup>94</sup> ICC Statute, Arts 13(a), 14. <sup>95</sup> ICC Statute, Art 13(b).

<sup>96</sup> ICC Statute, Arts 13(c) and 15. An initiation of investigation by the prosecutor *proprio motu* is subject to authorization of a Pre-Trial Chamber. ICC Statute, Art 15(3).

<sup>97</sup> For a discussion of source legitimacy, see Chapter 7.

<sup>98</sup> ICC Statute, Arts 17, 53.

<sup>99</sup> These are the situations in Uganda, the DRC, the CAR, Mali, and Cote d'Ivoire (the latter was not a state party at the time of the referral, but accepted the Court's jurisdiction in accordance with Art 12(3) of the ICC Statute).

240 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

cooperation might be vital for the successful conclusion of proceedings before the Court, and that the cooperation of states is closely linked to the basis of jurisdiction and to the “triggering mechanism” that are invoked.

Another implication of the ICC’s basis of jurisdiction and the “triggering mechanism” is the lack of geographic diversity in the Court’s docket. All five “self-referrals” emanate from African countries, and the two Security Council referrals also pertain to situations hailing from the same continent. The combined effect of the limited number of ratifications of the Statute by non-African countries involved in volatile armed conflicts and the geopolitical limits actually placed on the referral process through the Security Council leave African countries as the Court’s main group of “client states”—a state of affairs having significant legitimacy consequences.

### Judicial independence and impartiality

The ICC’s judicial independence and impartiality bear a direct impact on its goal attainment potential, as an independent and impartial Court is more legitimate in the eyes of certain governments and thus better situated to attain its goals. Several provisions in the Statute aim to enhance the ICC’s judicial independence and impartiality.<sup>100</sup> Some of them require the ICC judges, prosecutor and deputy prosecutors to serve on a full-time basis and refrain from engaging in activities that can interfere with their work at the ICC.<sup>101</sup> Other provisions establish the procedures (eg, nomination by states, followed by secret election by the ASP)<sup>102</sup> and qualifications (eg, high moral character, relevant competence and knowledge)<sup>103</sup> for the appointment of the judges and lead prosecutors.

The Statute further reduces the likelihood of political interference in the work of the judges and lead prosecutors by guaranteeing them a non-renewable nine-year

<sup>100</sup> For the purposes of this section, judicial independence is understood as “the protection of the decision-making power of court judges and other senior officials from control and interference by other actors.” See Chapter 6.

<sup>101</sup> Thus, Art 40(2) of the ICC Statute restricts the judges from engaging in “any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.” Article 40(3) requires the judges to “serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.” Under Art 42(2), the prosecutor and his deputies must “serve on a full-time basis.” They must also be of different nationalities (thus further enhancing the Court’s impartiality). Article 42(5) prohibits the prosecutor and his deputies from engaging “in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.”

<sup>102</sup> ICC Statute, Art 36(6)(a) provides: “The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose … the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.” Article 42(4) stipulates: “The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor …”

<sup>103</sup> ICC Statute, Art 36(3) requires the judges to be “persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices” and have the relevant legal knowledge. Article 42(3) requires the prosecutor and his deputies to “be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases.”

term of service,<sup>104</sup> with privileges and immunities,<sup>105</sup> and no salary decreases during their terms in office.<sup>106</sup> The Statute also includes provisions strengthening the independence of the prosecution specifically: it requires the prosecutor and his staff to be independent from other Court organs, and refrain from following instructions given by external actors.<sup>107</sup>

Still, some of the ICC's structural features may restrict its judicial independence. For example, the Court's lack of power to coerce states to cooperate with it may push the prosecutor to select cases on the basis of the prospects of state cooperation. This attribute may allow states to threaten the Court with lack of cooperation in order to influence its decisions. In fact, some commentators have argued that the OTP was motivated by such considerations in connection with the Uganda situation, where it initiated proceedings only against members of the Lord's Resistance Army (LRA) rebel group and not against government forces.<sup>108</sup>

Furthermore, the absence of compulsory jurisdiction over states not parties to the Statute may limit the Court's independence vis-à-vis members of the Security Council (in particular, the permanent members), on whom it depends for obtaining cases otherwise not covered by the Court's jurisdiction. More significant, perhaps, is the UN Security Council's power to suspend ICC proceedings for a (renewable) period of twelve months, in an effort to maintain world peace and security (see Section 10.2).<sup>109</sup> The ability of a political organ, such as the Security Council, to interfere in the work of the ICC appears to be, *prima facie*, incompatible with the notion of judicial independence. It is also noteworthy that the state parties to the Statute (the Court's mandate providers), through the ASP, can influence the ICC by amending its constitutive instruments or restricting its budget (as discussed below).

Moving from judicial independence to judicial impartiality,<sup>110</sup> it may be noted that the Statute and ICC Rules establish a procedure for the disqualification of

<sup>104</sup> ICC Statute, Art 36(9) provides the general rule that "judges shall hold office for a term of nine years and ... shall not be eligible for re-election." It also sets out some exceptions, but these are applicable only to the first-ever election. Article 42(4) stipulates that "Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election."

<sup>105</sup> ICC Statute, Art 48.

<sup>106</sup> ICC Statute, Art 49. Moreover, the ICC Statute reduces the risk that the judiciary or prosecution will be influenced by the position of any given state by providing that no two judges may be nationals of the same state, and that the prosecutor and his deputies be of different nationalities. See ICC Statute, Arts 36 (7), 42(2).

<sup>107</sup> ICC Statute, Art 42(1), providing that the prosecutor will "act independently as a separate organ of the Court" and the members of his office "shall not seek or act on instructions from any external source."

<sup>108</sup> See eg, Sarah MH Nouwen and Wouter G Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" (2010) 21 *EJIL* 941, 951.

<sup>109</sup> ICC Statute, Art 16.

<sup>110</sup> For the purposes of this section, judicial impartiality is understood as "the absence of improper considerations affecting judicial decisions in a manner prejudicial to one or more of the parties to litigation." See Chapter 5.

242 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

judges and prosecutors in circumstances where they may be perceived as lacking impartiality.<sup>111</sup> An additional impartiality-enhancing feature of the ICC is the principle that trials are held in public (exposing, thereby, any improper preference or bias).<sup>112</sup> The Court may hold proceedings in closed chambers in exceptional circumstances only, in order to protect witnesses or victims or present confidential or sensitive evidence.<sup>113</sup>

### Judicial legitimacy

The ICC may have difficulties in attaining its goals without being regarded as legitimate, at least in the eyes of certain key constituencies. Consequently, many of the Court's features have the potential for enhancing its legitimacy.<sup>114</sup> For example, the mere introduction by the Court of a "rule of law" component into international politics is a symbolic act, which provides the ICC with an initial legitimacy capital. Many of the Court's applicable ICL norms, due-process features and targeted problem structures can also increase its legitimacy.

However, the Court has various "audiences," including states, international organization, victims, and accused persons. Certain features that will enhance its legitimacy in the eyes of one relevant audience may, simultaneously, reduce its legitimacy in the eyes of another audience. We can illustrate this point through reference to the legitimacy-enhancing features of due process before the Court: as explained in Section 10.2, the ICC's normative framework contains substantive and procedural norms to ensure that the proceedings (including at the investigation stage) are conducted according to international due process standards. As was discussed in Chapter 7, external observers generally will consider judicial outcomes resulting from a process that follows these standards to be legitimate. Still, victims may not consider legitimate proceedings requiring that a violation of the defendant's due process rights be remedied by a dismissal of the proceedings or a radical mitigation of punishment.<sup>115</sup>

<sup>111</sup> ICC Statute, Art 41(2) provides that: "A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence." The article allows suspects, accused persons, and the prosecutor to request the disqualification of a judge and requires the matter to be decided by an absolute majority of the judges. Similarly, Art 42(7) prohibits the prosecutor and his deputies from "participat[ing] in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, *inter alia*, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted." Article 42(8) allows suspects and accused persons to request the disqualification of the prosecutor or his deputies, and requires the Appeals Chamber to decide on the matter. Rule 34(1) provides additional grounds for disqualification of a judge, the prosecutor, or one of his deputies, including the performance of a prior function or expression of an opinion "that, objectively, could adversely affect the required impartiality of the person concerned."

<sup>112</sup> ICC Statute, Art 64.

<sup>113</sup> ICC Statute, Arts 64, 68.

<sup>114</sup> See Chapter 7.

<sup>115</sup> The Trial Chamber in the *Lubanga* case ordered such remedies, but the Appeals Chamber eventually overturned the order to provisionally release the accused. *Situation in the Democratic Republic*

Other legitimacy-enhancing features of the ICC include its victim participation and reparation schemes, the complementarity principle and gravity requirement, the interests of justice considerations, jurisdiction-triggering mechanisms, and its outreach activities. As explained in Section 10.2, the Statute facilitates victim participation and reparation rights; such participation and reparation may help restore the victims' dignity and provide them with material resources, enabling them to rebuild their lives. Furthermore, recognizing individuals harmed by atrocities as "victims" can, in itself, increase victims' sense of justice. The Court's victim-centered approach can render its proceedings and outcomes more legitimate not only in the eyes of victims and their relatives, but also in the eyes of many states, international organizations, and domestic civil society groups that regard catering for the needs of victims as an important element of restorative justice facilitated by the Court.

The principle of complementarity and the requirement of gravity can also enhance the Court's legitimacy. According to the principle of complementarity, enshrined in Article 17 of the Rome Statute, the ICC is a court of last resort and is therefore complementary (or residual) to the jurisdiction of national courts.<sup>116</sup> The Court will not exercise jurisdiction over a case if it is or has been addressed at the domestic level, unless the national proceedings are not genuine.<sup>117</sup> This norm has, in and of itself, the potential to enhance states' acceptance of the ICC's authority, as they are likely to be more inclined to accept an international body that prioritizes their acts and policies over its own and adheres, to a large extent, to the sovereignty principle.<sup>118</sup> The cost-effectiveness implications of the complementarity principle, directing the ICC to exercise jurisdiction only as a last resort, may also increase state parties' support of the Court.

Article 17 also enshrines the gravity requirement, by providing that a case is inadmissible before the ICC when it is insufficiently grave. Additional jurisdictional limitations of the ICC that reflect gravity considerations include the confinement of jurisdiction only to the most serious international crimes, and the Statute's strong suggestion that the ICC only prosecute war crimes committed

*of the Congo The Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo") ICC-01/04-01/06 OA 12 (October 21, 2008).

<sup>116</sup> Article 17 of the ICC Statute details the criteria for determining the admissibility of cases in light of the principle of complementarity. See also ICC Statute, preamble, para 10 and Art 1 (stating that the Court "shall be complementary to national criminal jurisdictions"). The multiple references to the complementary nature of the Court's jurisdiction were felt necessary in view of the significance of the principle, which was described by the Trial Chamber as "one of the cornerstones of the Statute" (*Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dyilo* (Decision on the Practices of Witness Familiarization and Witness Proofing) ICC-01/04-01/06 (November 8, 2006), para 34 footnote 38). On the drafting history that led to the multiple references to complementary jurisdiction, see Schabas (n 8) 51–52.

<sup>117</sup> ICC Statute, Art 17(1)(a)–(b).

<sup>118</sup> See Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, New York 1990) (claiming that nations adhere to international norms and institutions because they view them as legitimate).

244 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

as part of a plan or policy or on a large scale.<sup>119</sup> Even if their main rationale is instrumental (cost-effectiveness concerns), these limitations can also enhance the legitimacy of the ICC, as they assure states that the Court only intervenes in exceptional cases, where strong justice considerations support an international response. Likewise, “interest of justice” considerations ensure that the Court’s exercise of jurisdiction would not otherwise conflict with strong notions of justice, such as the disruption of alternative justice mechanisms operating at the domestic level<sup>120</sup> or harming the interests of victims.<sup>121</sup>

As already noted, the manner in which the Court acquires jurisdiction (ie, the Court’s jurisdictional bases and “triggering mechanisms”) may also have legitimacy-related implications: self-referrals enhance the Court’s legitimacy in the eyes of the referring states who explicitly consent thereby to the specific investigation; yet states that are not parties, whose nationals are accused of committing crimes on the territory of ICC state parties, regard the Court’s exercise of jurisdiction under circumstances in which their consent to jurisdiction is lacking as illegitimate.<sup>122</sup> This is because the exercise of jurisdiction conflicts, *prima facie*, with the notion that international adjudication cannot be imposed on sovereign states against their will (notwithstanding the fact that, formally speaking, the cases are brought against individuals, not states).

Where the prosecutor seeks to initiate an investigation *proprio motu* with respect to crimes that had occurred in the territory or by nationals of state parties, legitimacy challenges may still be raised. Although the *ex ante* consent to jurisdiction attendant to ratification of the Statute is a legitimacy-enhancing factor, the relevant state may still criticize the procedure applied by the prosecutor or the legality of her decision.<sup>123</sup> The prosecutor’s need to get an authorization from the ICC Pre-Trial Chamber before she opens a *proprio motu* investigation may somewhat mitigate, however, the seriousness of the challenges to the Court’s legitimacy.<sup>124</sup>

<sup>119</sup> As for crimes against humanity, their definition already contains an “organizational policy” element. See ICC Statute, Art 7 (“crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . .”).

<sup>120</sup> See ICC Statute, Art 53; Policy paper on the interests of justice (n 45) 7–8.

<sup>121</sup> Policy paper on the interests of justice (n 45) 5–6.

<sup>122</sup> The US objections to the ICC Statute, for example, are based, *inter alia*, on the contention that it effectively subjects states that have not consented to the ICC regime to the ICC. Jennifer K Elsea “U.S. Policy Regarding the International Criminal Court” (2006) CRS Report for Congress <<http://www.fas.org/sgp/crs/misc/RL31495.pdf>> 5–6.

<sup>123</sup> For example, Kenya is a state party to the ICC Statute, but it objected to the ICC’s assertion of jurisdiction over crimes committed on its territory and by its nationals in the context of the post-election violence in 2007–2008. See *Situation in the Republic of Kenya: in the Case of the Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute) ICC-01/09-02/11-26 (March 31, 2011). On May 30, 2011, Pre-Trial Chamber II rejected this application. Pre-Trial Chamber II’s decision was confirmed, on August 30, 2011, by the Appeals Chamber.

<sup>124</sup> Such *proprio motu* investigations commenced, following an authorization by the Pre-Trial Chamber, with respect to the Kenya and Côte d’Ivoire situations.

Although referrals by the UN Security Council may be regarded as legitimate by broad constituencies, given the ability of the Council to speak on behalf of the international community as a whole, some states, including those whose nationals constitute the subject of ICC proceedings, may still object to the Court's jurisdiction and regard proceedings initiated in the absence of state consent as illegitimate. For example, following the Security Council's referral of the situation in Sudan to the ICC, Sudan challenged the legitimacy of ICC proceedings and convinced other African countries to join it in its protest.<sup>125</sup> Significantly, the Court may not be in a position to hold trials without cooperation from the state in whose territory the crimes in question took place, and where the suspects, witnesses, and physical evidence are present.

For similar reasons, legitimacy in the eyes of populations directly affected by the investigation can be important for the ICC, as popular support of the ICC might pressurize governments to comply with ICL norms and ICC decisions. In this sense, the ICC's outreach activities can have a significant legitimacy-enhancing potential, as they can increase support for the Court among affected populations. Furthermore, outreach activities can be useful in managing expectations of victims from the ICC and in offsetting disappointments that might be caused by the Court's lengthy and cumbersome proceedings.

## Compliance

As explained above, one of the goals of the ICC is supporting ICL norms through deterrence, punishment (ending impunity), and encouraging internalization of ICL norms. Attainment of these intermediate goals is *inter alia* facilitated through the Statute's ban on state official immunities; the elaboration of crime definitions in the Statute and the "Elements of Crime," which provides states significant normative guidance; the complementarity principle, which incentivizes states (state parties and non-parties) to apply ICL norms in ways that meet international standards of fairness and due process;<sup>126</sup> and compliance with specific ICC decisions (ie, judgment compliance).

Although the ICC's ability to generate deterrence, curb impunity, and encourage ICL internalization would be undermined if its arrest warrants and other orders and decisions necessary for conducting criminal trials are not followed, the Statute does not provide the ICC with powers to coerce compliance with its

<sup>125</sup> Dapo Akande, "The African Union's Response to the ICC's Decision on Bashir's Immunity: Will the ICJ Get Another Immunity Case?" *EJIL Talk!* (February 8, 2012) <<http://www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case>>.

Against the context of this legitimacy challenge, unease has been expressed about the Court's exclusive focus, to date, on African situations. A benign evaluation of this state of affairs may be that the Court is providing an important law and order services for an African continent ravaged by conflict and atrocities; a less generous conclusion might be that the international community is primarily enforcing ICL in politically weak states, underscoring thereby the "double standards" that characterize its work.

<sup>126</sup> If states hold "sham" proceedings aimed at shielding suspects from ICC proceedings, the national measures will not be deemed genuine and the ICC may assert jurisdiction in such cases. ICC Statute, Art 17.

246 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

orders and decisions. At most, the ICC can publish its findings that certain states failed to comply with its decisions, or report instances of state non-compliance to the Security Council. Non-compliance decisions were issued, for instance, with respect to Malawi and Chad after their failure to arrest ICC suspect President Bashir of Sudan when he visited their territories. Although such decisions may publically shame the non-complying state and could deter other states from acting in a similar fashion, their impact on state conduct appears to be limited.

### Political conditions and resources

The increasing number of states that have joined the ICC Statute expands the Court's jurisdiction, and may also be indicative of its growing legitimacy. However, it also poses challenges to the Court, which might need to address the expectations of a larger group of politically and culturally heterogeneous states. As the reaction by African states to the cases involving Sudan and Kenya show, joining the ICC Statute provides no guarantee that states would continue to support the Court through thick and thin under any unforeseeable future circumstances.

As noted above, the main political body overseeing the operations of the ICC is the ASP.<sup>127</sup> The ASP is authorized to consider and determine the budget for the Court,<sup>128</sup> and may even bring about fundamental jurisdictional or structural changes through amendments to the Statute and other constitutive instruments.<sup>129</sup> Its mandate also includes providing "management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court"<sup>130</sup> and the election and removal from office of senior office holders.<sup>131</sup> Finally, the ASP has the general power to "perform any other function consistent with this Statute or the Rules of Procedure and Evidence."<sup>132</sup>

To date, the ICC has completed only two trials (and appeals are still pending), but the multiple proceedings that are pending before the Pre-Trial Chamber and the few cases that have already reached the trial stage created a heavy workload for the various organs of the Court.<sup>133</sup> The Court's overall work load depends on the

<sup>127</sup> It should be noted that sessions of the Assembly are open also to non-parties that are signatories to the ICC Statute or the Final Act, and to representatives of the UN and other international organizations, including NGOs. See Schabas (n 8) 1120–21. The ASP acts in its own right and through its subsidiary bodies such as the Committee on Budget and Finance. It convenes once a year, but its responsibilities are assured on a continuous basis through its permanent Secretariat and Bureau. See ICC Statute, Art 112(2)(c) and 112(3); Schabas (n 8) 1120–21, 1125–26.

<sup>128</sup> ICC Statute, Art 112(2)(d).

<sup>129</sup> ICC Statute, Arts 9, 51, 121–22.

<sup>130</sup> ICC Statute, Art 112(2)(b).

<sup>131</sup> ICC Statute, Arts 36, 42(4), 43(4), 46(2).

<sup>132</sup> ICC Statute, Art 112(2)(g). See also Schabas (n 8) 1124, referring to this clause as an "umbrella clause."

<sup>133</sup> According to ICC Judge Hans-Peter Kaul, the Court's second Vice-President, in the short period between January 1 and September 30, 2011, the ICC judges handed down as many as 601 decisions, orders, or judgments. See Address by Hans-Peter Kaul, Judge and Second Vice-President of the International Criminal Court at the international conference "Max Planck Conference on Unity and Diversity of the Judiciary and Law in Iraq" Held in Arbil, Iraq, November 26, 2011, page 9 (hereinafter "Address by ICC Vice-President Judge Kaul").

prosecutorial strategy regarding the overall number of prosecutions initiated,<sup>134</sup> the degree of states' cooperation with orders of the Court (especially arrest warrants),<sup>135</sup> and the nature and complexity of specific cases and procedures.

Obviously, the material resources that are available to the Court are a crucial factor in assessing the Court's capacity to handle its caseload and to attain its goals. Currently, the ICC has more than one thousands employees and holds six African "field offices" and a UN liaison office in New York.<sup>136</sup> In 2011, the Court's budget was 103,607,900 Euros, of which the Registry received 61,611,400 Euros, the Office of the Prosecutor 26,598,000 Euros, and the Judiciary 10,669,800 Euros (the rest of the budget is allocated to small organs, such as the Secretariat of the ASP and the Secretariat of the Trust Fund for Victims).<sup>137</sup> The sources of the Court's funds are primarily contributions made by state parties in accordance with the scale of assessment that is used by the UN,<sup>138</sup> and funds provided by the UN "in particular in relation to the expenses incurred due to referrals by the Security Council."<sup>139</sup> However, in view of the troubled relations between the US and the ICC, the two resolutions referring the situations in Darfur, Sudan, and in Libya to the ICC contain paragraphs in which the Security Council "recognizes that none of the expenses incurred in connection with the referral ... shall be borne by the UN and that such costs shall be borne by the parties to the Statute and those States that wish to contribute voluntarily."<sup>140</sup> The ICC accepted the referrals and has not made related financial demands from the UN.<sup>141</sup>

In sum, the material and political support afforded to the ICC is dependent mainly on the state parties, who are expected to cooperate with the Court in specific situations and cases and to lend a more general and long-term support of the Court and its policies through the ASP. Thus far, the ASP has been generally supportive of the ICC, and has agreed in the 2010 Kampala Review Conference to further extend the Court's jurisdiction so as to cover the crime of aggression and

<sup>134</sup> See eg, OTP Prosecutorial Strategy 2009–2012 (n 63) that includes, inter alia, the Prosecutor's rough assessments as to the numbers of future investigations, prosecutions and preliminary examinations that his Office is expected and able to conduct in the three-years period.

<sup>135</sup> In the words of ICC Judge and Vice-President Kaul: "the Court is absolutely, one hundred percent dependent on effective cooperation with States Parties, in particular when it comes to the key issue of arrest and surrender of the persons sought. The matter is simple: no arrest, no trial." See Address by ICC Vice-President Judge Kaul (n 133) 10.

<sup>136</sup> ICC, *The Court Today* (n 18); Address by ICC Vice-President Judge (n 133) 9.

<sup>137</sup> ICC, "Programme budget for 2011, the Working Capital Fund for 2011, scale of assessments for the apportionment of expenses of the International Criminal Court, financing appropriations for 2011 and the Contingency Fund" (December 10, 2010) ICC-ASP/9/Res.4, <[http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-9-Res.4-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.4-ENG.pdf)>. The huge amount that is allocated to the Registry is explained by the fact that the Registry provides the entire administrative support for the Court and the Office of the Prosecutor, including responsibilities in the areas of defense, victims and witnesses, outreach, and detention.

<sup>138</sup> ICC Statute, Arts 115(a) and 117.

<sup>139</sup> ICC Statute, Art 115(b). The Court may also receive a "voluntary contribution" in accordance with Art 116.

<sup>140</sup> UNSC Res 1593 (March 31, 2005) UN Doc S/RES/1593, para 7; UNSC Res 1970 (February 26, 2011) UN Doc S/RES/1970, para 8. See also Schabas (n 8) 1147.

<sup>141</sup> Schabas (n 8) 1147.

248 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

additional war crimes. The continued support of the mandate providers in the ICC may depend, to a large extent, on the prosecutorial and judicial policies that the Court will adopt in the coming years and their legitimacy and cost-effectiveness implications. Other factors, such as the global economic crisis, may also affect the material support afforded to the ICC, which, like all international criminal tribunals, is a very expensive international body to maintain.

#### 10.4 Outcomes

The literature about the ICC includes very few empirical studies about the Court's actual outcomes. One exception is a recent study undertaken by the Project on the Impact of International Courts on Domestic Criminal Procedures in Mass Atrocity Cases (DOMAC Project) (in which the authors were involved), which examined the impact of international criminal tribunals on domestic atrocity proceedings in the countries in which international crimes were committed.<sup>142</sup> Of the ten countries examined in the DOMAC study, four were subject to ICC proceedings or preliminary examination of a situation: the DRC, Uganda, Sudan, and Colombia.

The study demonstrated that ICC outputs, as well as some of the Court's structural and procedural features, may have led to significant outcomes particularly in states subject to ICC proceedings. For example, the ICC's investigations combined with its outreach programs and interactions with officials in Uganda (outputs) raised local awareness to the need to establish accountability for atrocities, which seems to be, in turn, one of the factors that led to the creation of a International Crimes Division in the High Court of Uganda in 2008, the initiation of the country's first ever war-crimes investigation in 2009 (in the case against LRA commander Thomas Kwoyelo), and the introduction of the national ICC Act of 2010.<sup>143</sup> While these outcomes were also the result of the shift in Ugandan policies on accountability, that very paradigmatic shift was in itself encouraged (at least in part) by the above-mentioned ICC outputs.<sup>144</sup> Hence, we may conclude that ICC outputs played a role in encouraging certain outcomes in Uganda that correspond to several ICC goals—in particular, norm support and regime legitimization.

Other ICC outputs that advance outcomes corresponding to the Court's goal of encouraging national trials include technical assistance offered by the OTP to actors engaged in judicial reforms in conflict and post-conflict countries. For example, the OTP assisted the EU-led "Rejusco" program that rehabilitated the justice system in the eastern DRC and enabled criminal trials to take place there

<sup>142</sup> The DOMAC Project empirically assessed the impacts of five different international criminal tribunals on the justice systems of ten different countries addressed by the ICTs. These studies are available at <<http://www.domac.is/reports>>. The ICTs that were examined under the DOMAC Project were the ICC, ICTY, ICTR, SCSL, and East Timor's Special Panels.

<sup>143</sup> Sigall Horovitz, "Uganda: Interaction between International and National Responses to the Mass Atrocities" (2013) DOMAC/18 <<http://www.domac.is/media/domac-skjol/DOMAC-18-Uganda.pdf>>.

<sup>144</sup> Horovitz (n 143).

(including trials addressing war-related atrocities).<sup>145</sup> This, in turn, promoted norm-internalization and ending impunity in the Congolese context.

Surveys of domestic implementation of the Statute may also provide us with valuable information about ICC goal attainment, as amendment of penal laws by state parties is indicative of norm-internalization leading to deterrence and reduced impunity.<sup>146</sup> (Such surveys often ignore, however, the question of whether the domestic legislation was applied in practice.) For example, the existence of domestic laws criminalizing genocide, war crimes, and crimes against humanity would likely promote greater compliance with ICL than would have taken place in absence of such domestic laws. Extensive engagement with ICL by domestic legal systems can also contribute to the attainment of other ICC ultimate ends, such as norm support, regime legitimization, and regime support.

The impact of the Court's norms is particularly significant in states subject to ICC proceedings. For example, a study conducted in 2009 by the NGO Avocats Sans Frontières shows that national military courts in the DRC directly applied the Statute's definitions of crimes and sentencing provisions with a view to improving the quality of their judgments.<sup>147</sup> Although the ICC did not actively encourage the DRC military courts to apply its norms, it stands to reason that the ICC's involvement in the DRC (including through outreach activities and other interactions with local stakeholders) created a certain environment of readiness and awareness in which local courts were inclined to refer to ICC norms.<sup>148</sup> Another possible example

<sup>145</sup> See eg, Sigall Horovitz, "DR Congo: Interaction between International and National Responses to the Mass Atrocities" (2012) DOMAC/14 <<http://www.domac.is/media/domac/DRC-DOMAC-14-SH.pdf>>48 ("An OTP official noted that his office assisted the EU-led Rejusco justice rehabilitation program based in eastern DRC ... By doing so, he felt the OTP had encouraged national proceedings. The official added that the constant interactions between the ICC and Congolese national authorities, as well as other entities involved in the country, have ultimately encouraged donor States to focus on developing Congolese judicial solutions. In his view, therefore, the number of judicial proceedings in the DRC would have been even lower if it were not for the ICC's intervention.")

<sup>146</sup> See eg, Databases on "National Jurisdictions," "National Implementing Legislation," and "National Cases Involving Core International Crimes" in the Legal Tools project of the ICC <<http://www.legal-tools.org/en/go-to-database/>>.

<sup>147</sup> Avocats Sans Frontières, "Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo" (2009) <[http://www.asf.be/blog/publications/asf\\_casestudy\\_romestatute\\_light\\_pageperpage/](http://www.asf.be/blog/publications/asf_casestudy_romestatute_light_pageperpage/)>. However, the study also shows that the relevant ICC norms were implemented in a haphazard manner by the Congolese military courts. Other studies have suggested that despite this important outcome, no evidence exists that ICC norms had any influence on due process standards in the DRC. See eg, Elena A Baylis, "Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks" (2008) University of Pittsburgh Legal Studies Research Paper 2008-06, 54–59 <[ssrn.com/abstract=1105244](http://ssrn.com/abstract=1105244)>. Notably, although the DRC is party to the ICC Statute, it has not implemented the Statute domestically as of the time of writing. However, such direct application of the Statute by local courts was possible because of the country's monistic approach to international law.

<sup>148</sup> For an empirical study proving the claim that international human rights treaties have such a "mobilizing effect," see Beth A Simmons, *Mobilizing for Human Rights—International Law in Domestic Politics* (Cambridge University Press, Cambridge 2009). Simmons shows that states eventually comply with the human rights treaties they ratify because of public pressure holding the state to its international commitments. She also shows that international actors may facilitate this process by educating the population about treaty norms and the state's violations of these norms.

250 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

of a normative impact can be found in the situation of Colombia, where the ICC norm of complementarity encouraged national criminal proceedings to apply certain ICL norms to civil war atrocities (an outcome that corresponds with an ICC goal).<sup>149</sup>

Interestingly enough, even in a non-cooperative country such as Sudan, the ICC's involvement contributed to an increased national awareness of the need to create a national infrastructure that could facilitate atrocity prosecutions (even if only relating to the ICC's investigation into events in Darfur).<sup>150</sup> Consequently, Sudan enacted laws and created institutions enabling the prosecution of atrocities. In particular, national laws were amended to cover international crimes, a Special Prosecutor was appointed to investigate crimes in Darfur, and three Special Courts for Darfur were established. In other words, the desire to "fend off" the ICC has led the Sudanese government to create legal norms and institutions that could facilitate national atrocity-related prosecutions.<sup>151</sup> In addition, the significant pressure imposed by the African Union (AU) on Sudan to establish accountability for the atrocities in Darfur is attributable, at least in part, to the ICC's involvement therein. Even if no serious proceedings have yet taken place in Sudan, the new laws and institutions created there may actually be used one day for their declared purpose of prosecuting atrocities.

While legal developments in the DRC, Uganda, Colombia, and Sudan may have also been encouraged by other variables (such as public pressure and development aid), the DOMAC Project suggested that they would not have transpired had it not been for the involvement of the ICC. We accordingly regard these as ICC outcomes. Such outcomes correspond to several ICC goals, including peace enhancement, deterrence, ICL compliance, regime legitimating, encouragement of local proceedings, and victim satisfaction. Through the domestic legal outcomes generated by the ICC, the Court may continue to influence ICL application long after it terminates its involvement in the country in question.<sup>152</sup> Still, the said outcomes have presented themselves to date only in certain contexts and with respect to specific country situations. Thus, they may not tell us much about whether the ICC is effective overall.

<sup>149</sup> Alejandro Chehtman, "The Impact of the ICC on Colombia: Positive Complementarity on Trial" (2011) DOMAC/17 <<http://www.domac.is/media/domac-skjol/Domac-17-AC.pdf>>. In contrast, the Ugandan proceedings concerning Kwoyelo were not merely a result of the ICC's complementarity norm, as Uganda was not seeking to remove a case from the ICC's docket. Rather, this outcome was a result of the shift in Uganda's domestic policy from amnesty to accountability for atrocities, which various ICC outputs (eg, its investigations, outreach programs, and interactions with officials in Uganda) at least partly encouraged. See Uganda: Interaction between International and National Responses to the Mass Atrocities (n 143).

<sup>150</sup> Sigall Horovitz, "Sudan: Interaction between International and National Responses to the Mass Atrocities in Darfur" (2013) DOMAC/19 <<http://www.domac.is/media/domac/DOMAC-19--Sudan--SH.pdf>>.

<sup>151</sup> Horovitz (n 150).

<sup>152</sup> But see, Audrey R Chapman, "Approaches to Studying Reconciliation" in Hugo van der Merwe, Victoria Baxter, and Audrey R Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (United States Institute of Peace Press, Washington DC 2009) 158 (claiming that international criminal tribunals, as temporary bodies with limited resources, are ill-equipped to promote national reconciliation, which "requires major long-term policy initiatives that are outside the purview of temporary bodies set up to facilitate and consolidate political transitions").

An additional set of ICC outputs that could yield relevant outcomes is found in the field of victim participation and reparation schemes. To date, the ICC has allowed thousands of victims to participate in court proceedings, by voicing their views and concerns (through their legal representatives), calling expert witnesses, presenting their own evidence, submitting written motions, etc.<sup>153</sup> The effects of these measures have not been scientifically assessed, but it has been argued that “victim participation would bring the Court ‘closer to the persons who have suffered atrocities’ and, thus, increase the likelihood that victims would be satisfied that justice was done.”<sup>154</sup>

Victim participation can also have a restorative effect on the victims themselves and their communities, helping them regain their dignity and achieve a sense of closure and allowing them to put the past behind them and build a new future. Such a restorative outcome appears to correspond with the ICC’s peace promoting goal. At the same time, victim participation may significantly lengthen the proceedings, risking violating the accused’s rights to a speedy trial; it may also place the accused in the seemingly unfair predicament of having to face two sets of accusers—the prosecution and the victims. Consequently, widespread victim participation may generate significant cost-effectiveness problems and detract from the image of procedural fairness that the ICC attempts to project. Such a practice may thus weaken the perceived legitimacy of the Court in the eyes of some observers.<sup>155</sup>

To conclude, ICC norms (including complementarity) and judicial outputs have encouraged legal and institutional developments in certain states because they joined the Statute and/or because they sought to shield their nationals from ICC proceedings. Notably, in cases where legal reforms were adopted by an ICC state party, such a development usually resulted from that state’s own sense of commitment to the ICL regime, as the Statute does not obligate its members to implement the Statute domestically (it only requires them to cooperate with the ICC). To date, the ICC’s impact on states that have not joined the Statute and that are not subject to ICC proceedings has received very limited scholarly attention.

<sup>153</sup> According to one report, “from 2005 until the end of March 2011, 4,773 victims had applied to participate in either one of the five situations currently before the Court ... or one of the cases arising out of those situations. Of those, 2,317, or nearly 50 percent, had been authorized to participate.” See Susana SáCouto, “Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?” (2012) 18 Michigan Journal of Gender and Law 297, 328, relying on information available at the ICC website at <<http://212.159.242.181/NR/rdonlyres/9B984A20-08A9-4127-87F9-2FDF7A4F0E53/283201/RegistryFactsandFiguresEN2.pdf>>. This data does not include the hundreds of victims that subsequently received permission to participate in the two Kenyan cases and that are expected to receive permission to participate in the Mbarushimana case.

<sup>154</sup> Susana SáCouto (n 153) 320, relaying on WCGJ 1997 PrepCom Recommendations.

<sup>155</sup> For a discussion of the tensions surrounding victim participation at the ICC and how these are dealt with in the ICC jurisprudence see Sigall Horovitz, “The Role of Victims” in Linda E Carter and Fausto Pocar (eds), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (Edward Elgar Publishing, Cheltenham 2013).

252 *The International Criminal Court (with Sigall Horovitz and Gilad Noam)*

## 10.5 Conclusions

The ICC appears to offer a more promising model of an international criminal tribunal than the ad hoc or hybrid criminal courts do, due to its capacity for generating long-term outcomes on a global scale. The permanent nature of the Court, the broad acceptance of its jurisdiction by states from different regions of the world and the high legitimacy enjoyed by the ICL regime—which the ICC comprises part of—provide hospitable conditions for attainment of goals: giving effect to the relevant ICL norms (through deterrence, ending impunity, and norm-internalization), solving problems on a variety of levels (from victim satisfaction to peace promoting) and legitimizing ICL. Specific structural and procedural attributes of the Court, such as the complementarity principle, the grounds for refusal of jurisdiction (gravity, interests of justice), and judicial independence and impartiality further support goal attainment.

Still, the Court continues to be the target of legitimacy challenges by states—both state parties and non-parties—that contest the exercise of jurisdiction without the explicit consent of the relevant territorial state and the accused's state of nationality, which is also translated into lack of cooperation. Furthermore, the weakness of its enforcement structures and its cost-effectiveness problems (which limit the number of complex cases it can simultaneously handle) hinder the realization of the Court's potential.

The mixed indicators regarding prospective goal attainment are not resolved by analysis of the Court's performance. The data available to date on this issue are partial in scope. Our findings suggest that the Court has had some impact on states, which resulted in norm internalization, improved ICL compliance, and catering to victim needs. However, this impact has been partial in scope and limited in its effect. It is thus probably too soon to appraise whether current judicial outcomes are indicative of across-the-board judicial effectiveness—that is, whether the features constraining the Court outweigh its goal-attaining promoting features.

## **פרק 5**

# **הדור השלישי של זכויות אדם**

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## CREATING INTERNATIONAL LAW: GENDER AS LEADING EDGE<sup>\*\*</sup>

CATHARINE A. MACKINNON\*

Gender as reality, analysis, and rubric has created some of the fastest and most far-reaching transformations in international law in our time. Gender crime in particular presents a striking trajectory of innovation on the international legal scene, going from nonexistence as such to accepted institutionalization in under thirty years—by any legal measure, the speed of light. The reality in which this evolution is grounded has been one of atrocity: atrocities that have become more visible as women and some men have spoken out to expose them, often through non-governmental organizations (NGOs), atrocities that have themselves evolved to fill dynamic functions in the conflicts among men in which they have become variously instrumental.

The feature that perhaps most distinguishes these developments, in contrast with others that have stimulated international legal innovation, is how utterly familiar the acts are. Sexual atrocities are normal in everyday life, occur in peace as well as in war, and are by no means confined to official actors or to conflict that is recognized as organized. In one form or another, the acts that make up gender crime are illegal in every legal system in the world. Yet they are breaking paths in international law while being largely ignored in mainstream international legal literature. Analysis of the evolution of gender crime reveals an emerging paradigm through which new international law is being created.

As conceptual innovation, the fundamental idea of gender crime originated in the early 1970s in the creation of sexual harassment law.<sup>1</sup> Substantively, it was in sexual harassment law that rape was first legally recognized as based in gender inequality, hence a violation of human and civil rights and a form of sex discrimination. The fundamental idea that originated here is that sex crimes are gender-based—that is, they happen because of the social meaning of sex: being a woman or a man in societies of femininity and masculinity. Crimes that happen because of gendered and sexualized roles, meanings, stereotypes, and scripts socially assigned to groups on the

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\* Catharine A. MacKinnon is the Elizabeth A. Long Professor of Law at the University of Michigan Law School and (long-term) James Barr Ames Visiting Professor of Law at Harvard Law School. © Catharine A. MacKinnon 2010, 2011, 2012, 2013. The collegiality of Christine Chinkin, and the assistance and engagement of Lisa Cardyn and Taylor Landis, are gratefully acknowledged. The author served as Special Gender Adviser to the Prosecutor of the International Criminal Court from 2008 to 2012. In a prior form, this analysis was published as Catharine A. MacKinnon, *Creating International Law: Gender as New Paradigm, in NON-STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES: FROM THE MARGINS* 17 (Cecilia M. Bailliet, ed., 2012).

<sup>1</sup> See generally CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

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\*\* MacKinnon, Katharine, "Creating International Law: Gender as Leading Edge", *Harvard Journal of Law & Gender*, 36 (1), 2013: 105-121.

basis of their sex were understood as criminal forms of sex discrimination: crimes of sex inequality. What had always been classified as a socially ungrounded sex crime—specifically rape<sup>2</sup>—was first understood as occurring because of the social status location and power differential of the parties in the gendered domain. This idea was conceived, and law created accordingly, because women listened to women and believed them and took what they were saying seriously. Nothing more, nothing less.

Among other things, this legal conceptual re-situation of these familiar facts meant that, although individuals victimized by these atrocities are often violated alone, in isolation and one at a time, the violation itself is intrinsically collective and group-based, not individual. Everyone who is raped is harmed personally, but rape (as one example) is understood in this approach as an attack on (most frequently) a woman because she is a member of the social group ‘women,’ socially defined and targeted as such for this specific violation. What had been thought of as a crime without social particularity, considered a crime against an individual victim, when understood as a gender-biased violation became reconfigured as a crime against groups being inflicted on its members. Women in this view are raped or otherwise sexually violated as women, men as men who are specifically marked for the humiliation, denigration, and conquest of feminization, typically based as well on their physical stature, age, ethnicity or religion or race, or perceived sexuality or gender. Rape, understood as a gender crime, became seen as an attack on gendered groups as such, often including their racial and ethnic particularities, at times imposed on each person one at a time, out of sight, sometimes en masse and in public.

The legal innovation termed “sexual harassment” has been widely accepted in national systems around the world, often if not always as sex discrimination.<sup>3</sup> Its underlying realization—that sexual aggression is gender-based—has been widely embraced and extended to many sex-based abuses, given international normative dimension by the United Nations Committee on the Elimination of Discrimination against Women in its General Recommendation 19 in 1992,<sup>4</sup> and has become stronger in operation as many nations have adopted CEDAW’s Optional Protocol.<sup>5</sup> The core insight of the centrality of gender inequality to crimes of sexual violence has been further

<sup>2</sup> *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (recognizing sex discrimination on facts of multiple rape). See also *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) (district court recognizing sexual pressure as sex discrimination for first time); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (appeals court recognizing sexual abuse as sex discrimination for first time).

<sup>3</sup> See generally *DIRECTIONS IN SEXUAL HARASSMENT LAW* (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

<sup>4</sup> U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, U.N. Doc. A/47/38 ¶ 7 (Feb. 1, 1992).

<sup>5</sup> Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 54/4, U.N. Doc. A/RES/54/4 (Oct. 15, 1999) (80 signatories, 104 state parties) (last checked Nov. 20, 2012).

developed by regional systems in a series of human rights cases in Europe, many on torture,<sup>6</sup> and instruments and cases in Latin America,<sup>7</sup> made especially concrete and detailed in the Convention of Belém do Pará,<sup>8</sup> and recently creatively extended in the African Protocol.<sup>9</sup> On facts of gender crime, state responsibility for inaction expanded from state actors to some nonstate actors in the human rights setting from the late 1980s to the early 2000s.<sup>10</sup> During the same period, attention to facts of gender crime, if seldom initially so called, migrated back into the international criminal justice system through ad hoc tribunals. The International Criminal Tribunal for

<sup>6</sup> See *Suheyla Aydin v. Turkey*, 25 Eur. Ct. H.R. 251 (1997) (holding official act of rape to be torture under the European Convention on Human Rights); *Akkoc v. Turkey*, 34 Eur. Ct. H.R. 51 (2000) (holding official sexual assault short of rape to be ill treatment under the European Convention on Human Rights). For further developments, see *M.C. v. Bulgaria*, 15 Eur. Ct. H.R. 627 (2004) (on rape), and *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009) (on domestic violence).

<sup>7</sup> See, e.g., *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶¶ 55–58 (2001) (finding that Brazil's years-long failure to prosecute the attempted murder of da Penha by her husband constituted state-condoned violence against women in violation *inter alia* of equal protection guarantees).

<sup>8</sup> Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Jun. 6, 1994, 33 I.L.M. 1534.

<sup>9</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the African Union, Maputo, July 11, 2003, CAB/LEG/66.6 (entered into force Nov. 25, 2005), available at <http://www.africa-union.org> (last visited Nov. 20, 2012), defines violence against women in art. 1(j) as "all acts perpetrated against women which cause or would cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war." Its innovative comprehensive approach to gender crime is evident throughout its over twenty articles, calling upon States Parties, for example, to "prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public," *id.* at art. 4(2)(a), "prevent the exploitation and abuse of women in advertising and pornography," *id.* at art. 13(m), and "protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest . . ." *id.* at art. 14(2)(c), the first mention of abortion in a multilateral international treaty. The Protocol also prohibits female genital mutilation. *Id.* at art. 5.

<sup>10</sup> In the gender area, this has been a gradual development through case law on the human rights side, often in the same cases that recognize the sex inequality dimensions to the facts. See *M.C. v. Bulgaria*, 15 Eur. Ct. H.R. ¶¶ 166, 185 (concluding through equality analysis that States are required to effectively prosecute nonconsensual sex acts and holding that Bulgaria did not fulfill its positive obligation to effectively criminalize rape in situation of acquaintance rape of young girl); *González et al. ("Cotton Field") v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 esp. ¶ 236 (Nov. 16, 2009) (finding, on facts of multiple rape and murder of women by unknown assailants, a state duty to investigate effectively, identify and punish perpetrators, and compensate victims); *Opuz*, Eur. Ct. H.R., ¶ 159 ("As regards the question whether the State could be held responsible . . . for the ill-treatment inflicted on persons by non-state actors, the Court recalls that the obligation on the High Contracting Parties . . . requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals."). *Opuz* is especially stunning in holding Turkey responsible for sex inequality when a previously-reported batterer killed his mother-in-law with impunity.

Rwanda (ICTR) gave depth and dimension to the pursuit of gender crimes implicitly if powerfully in the Akayesu<sup>11</sup> case and others following its definition of rape;<sup>12</sup> the International Criminal Tribunal for the former Yugoslavia (ICTY) developed tools for individual liability for collective criminality.<sup>13</sup> In the process, often in cases prosecuting facts of gender crime, criminal responsibility, including for acts of less-than-official actors, became more readily attributable to superiors.<sup>14</sup> The concept of gender crime has tacitly influenced other international rubrics as well—often the more so when the sex and the inequality do not appear as such on the page—for example in the international definition of trafficking in the Palermo Protocol.<sup>15</sup> These developments culminated in provisions of the Rome Statute of the International Criminal Court (ICC), where gender crime has received its highest expression to date, made explicit and mainstreamed in, as well as superimposed on, international criminal and humanitarian law<sup>16</sup> and embodied in the charging practices of its first Prosecutor.

<sup>11</sup> Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688 (Sept. 2, 1998) (defining “rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive... sexual violence, which includes rape, [is] any act of a sexual nature which is committed on a person under circumstances which are coercive.”).

<sup>12</sup> See CATHARINE A. MACKINNON, *Defining Rape Internationally: A Comment on Akayesu*, in ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 237, 237–46 (2006).

<sup>13</sup> See Patricia Viseur Sellers, *Individual(s') Liability for Collective Sexual Violence*, in GENDER AND HUMAN RIGHTS 153, 153–94 (Karen Knop ed., 2004). The ICTY brought few cases principally for rape, Prosecutor v. Kunarac being exceptional. Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

<sup>14</sup> See Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgment and Sentence, ¶¶ 1919–24 (Dec. 18, 2008) (holding Bagosora, a military officer, liable for command responsibility at trial for sexual atrocities by forces including unofficial ones); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶¶ 475–79 (May 15, 2003) (finding Semanza criminally responsible under arts. 6(1) and 6(3) for rape in a situation where he “addressed a crowd and . . . encouraged them to rape Tutsi women before killing them. Immediately thereafter, one of the men from the crowd had non-consensual sexual intercourse with Victim A[.]”); *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 692–695 (holding civilian *bourgmestre* individually criminally responsible for acts including rape, forced undressing, and sexual humiliation as crimes against humanity when committed by individuals he did not officially command); Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 394–399, (Int'l Crim. Trib. for the Former Yugoslavia, Feb. 22, 2001); see also Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, ¶¶ 327–8 (June 17, 2004) (holding defendant liable under Art. 6(1) for verbally “instigat[ing] the rape of Tutsi women and girls” who “were raped by young men who, being in the neighbourhood, heard the *bourgmestre's* [Gacumbitsi] instigation.”).

<sup>15</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25 (II), U.N. Doc. A/RES/55/383, at 54–55 (Nov. 2, 2000) (including “the abuse of power or of a position of vulnerability” for purposes of sexual exploitation as part of the definition of trafficking).

<sup>16</sup> Rome Statute of the International Criminal Court, arts. 7(1)(g), 7(1)(h), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (enumerating as crimes against humanity, “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization,

Gender crime thus evolved from tears in the eyes of women confiding in women to a national and transnational norm to an international crime in a few short years through the interaction of theory with practice, civil with criminal approaches, and domestic with international responses. In a dual motion, domestic and international human rights and civil rights rubrics cognized formerly principally criminal acts of violence against women as gendered even as criminal law on the international level incorporated gender analysis—now explicitly seen as effectuating human rights through criminal law<sup>17</sup>—into its treatment of sex crimes. The international community embraced the understanding that sexual assaults against women and girls are based on the sex of the victim or the perpetrator or both—that is, it grasped the gendered inequality of the relation of the parties to this criminal act in its social context—as reflected in the magisterial conceptually cogent report of the Secretary General in 2006.<sup>18</sup> Under the aegis of the concept of gender crime, international criminal and humanitarian law began paying more attention than it ever had to rape in conflict, giving new life and muscular practice to long existing but little used prohibitions,<sup>19</sup> creating something that had not been there before.

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zation, or any other form of sexual violence of comparable gravity” and “[p]ersecution against any identifiable group or collectivity on . . . gender. . . grounds” respectively); *id.* at art. 8(2)(e)(vi) (establishing as war crimes “rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions”).

<sup>17</sup> One strong example is found in the Rome Statute, *id.* at art. 21(3), which explicitly requires that the enforcement of applicable law under it be consistent with international human rights law and not discriminate based on gender.

<sup>18</sup> U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women: Rep. of the Secretary-General*, U.N. Doc. A/61/122/Add.1 (July 6, 2006) [hereinafter *U.N. Study on Violence Against Women*] (applying and explaining the international understanding that sexual assault of women and girls is based on sex).

<sup>19</sup> See, e.g., HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE*, IN THREE BOOKS bk. III ch. 5 § XIX, at 572–73 (J. Barbeyrac ed., Lawbook Exch. 2d prtg 2004) (1625) (discussing “[w]hether [r]avishing of [w]omen be against the Law of Nations” and concluding that it should be “as much punished in [w]ar as in [p]eace” and that “whoever ravishes [w]oman tho’ in [t]ime of [w]ar deserves to be punished in every [c]ountry”); Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (The Lieber Code), U.S. War Dep’t General Orders No. 100, § 2 arts. 37, 47 (Apr. 24, 1863), reprinted in *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 3, 8–9 (Dietrich Schindler & Jiří Toman eds., 2004) (acknowledging that United States troops, while occupying another country, will protect “the persons of inhabitants, especially women” and suggesting that rape in this context should be severely punished); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (protecting women “against any attack on their honour in particular against rape, enforced prostitution, or any form of indecent sexual assault”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 76, June 8, 1977, 1125 U.N.T.S. 3 (protecting women “against rape, forced prostitution and any other form of indecent assault” and giving additional special protection to pregnant women and mothers with dependent infants).

Until the Rome Statute's provisions, the infusion of gender awareness into international law on the criminal side relied upon interpretation that injected the theory into provisions, whose terms and elements had not previously been understood to include it—an approach that remains a fertile possibility. But the Rome Statute also went further. For the first time in black letter international criminal law, it made gender an element of an international crime in its definition of persecution as a crime against humanity.<sup>20</sup> Gender is also sensitively referenced and evoked throughout this multilateral international treaty, from its description of crimes to how victims and witnesses are to be treated procedurally.<sup>21</sup> Here, gender evolved beyond a practical norm or analytic overlay into a feature of positive international law, moving from between and under the lines into the text. In addition to the ground for crimes against humanity, all the sex crimes under the Rome Statute's prohibitions—including “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”<sup>22</sup> as well as “trafficking in persons” as a form of enslavement<sup>23</sup>—make up this innovative category “gender crime.” Men and boys are covered on the same terms as women and girls, when subjected to sexual atrocities and other forms of gender-based aggression. Regrettably, “gender” as defined in the Rome Statute does not explicitly encompass gays and lesbians as such,<sup>24</sup> but they are of course covered as women and men, and crimes of discrimination against them as gay or lesbian are often—in my view, virtually always—gendered.

Like many things in life, this development is better in French—*les crimes à caractère sexiste*—but unlike many things in French, this one is more politically direct. Doing something about such crimes, internationally

<sup>20</sup> Rome Statute, *supra* note 16, at art. 7(1)(h) (“Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court[.]”).

<sup>21</sup> See e.g., Rome Statute, *supra* note 16, at art. 43(6) (providing that the Victims and Witnesses Unit of the Registry, which protects and assists witnesses at risk on account of their testimony, “include staff with expertise in trauma, including trauma related to crimes of sexual violence.”); *id.* at art. 68 (discussing protection of the victims and witnesses in cases “where the crime involves sexual or gender violence” and “special means” that “shall be implemented in the case of a victim of sexual violence”).

<sup>22</sup> *Id.* at art. 7(1)(g).

<sup>23</sup> *Id.* at art. 7(2)(c) (defining enslavement).

<sup>24</sup> *Id.* at art. 7(3) (“For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”). Observers report that the intention of this addition was to exclude coverage of widespread and systematic atrocities committed on the ground of sexual orientation or homosexuality. See Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 76–79 (2005).

and otherwise, in the words of the ICC's first Prosecutor Luis Moreno Ocampo, marks a "new era."<sup>25</sup>

The most striking quality of the pursuit of gender crimes by the ICC has been their variable centrality to almost every prosecution of its first period. Each case shows how sexual abuse is a specific tool of each conflict, exposing the particular work it does in each setting. Thomas Lubanga made boys into rapists and girls into sex slaves in order to make them into child soldiers he could command and use at will.<sup>26</sup> In a signal example of gender mainstreaming, the Prosecutor argued that being taught to rape, as well as being raped, harmed the children who were forced to become soldiers.<sup>27</sup> Jean-Pierre Bemba and Germain Katanga were charged with sending their forces to rape en masse as retaliation for prior attacks, for resources, or for political power.<sup>28</sup> Bemba's troops were said to rape men in authority to destroy their capacity to lead, women to instill terror as well as to attain political control and to shatter community cohesion, aiming to eliminate support for forces politically seen as the enemy.<sup>29</sup> The arrest warrant of President Al Bashir of Sudan accused him of using rape in his genocide, no doubt because of its effectiveness in destroying the peoples of the South, and because the evidence it leaves is quieter than death, or so he may think.<sup>30</sup> For decades, Joseph Kony had, according to the ICC charges, violated the humanity of his (perhaps) sixty wives and the whole schools of girls he abducted and parceled out to his henchmen.<sup>31</sup> Very possibly, he wants this many girls at his

<sup>25</sup> Luis Moreno-Ocampo, Statement by Prosecutor of the Int'l Criminal Court at the Review Conference of the Rome Statute in Uganda, 3 (May 31, 2010).

<sup>26</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶¶ 32, 589, 892, 913 (Mar. 14, 2012).

<sup>27</sup> Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Opening Statement by the Prosecutor, 2, 8 (Jan. 26, 2009).

<sup>28</sup> Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-1/08, Opening Statement by the Prosecutor, 3 (Nov. 22, 2010) (observing that "[w]omen were raped systematically to assert dominance and to shatter resistance. Men were raped in public to destroy their authority, their capacity to lead."); Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 443 (Sept. 30, 2008) (concluding that there was "sufficient evidence to establish substantial grounds to believe that rape was a common practice following an attack and that combatants who forced women to engage in sexual intercourse intended to commit such acts by force or threat of force.").

<sup>29</sup> See Bemba, Case No. ICC-01/05-1/08, Opening Statement by the Prosecutor, 2–3.

<sup>30</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, ¶ 30 (Jul. 12, 2010) ("The Chamber is therefore satisfied that there are reasonable grounds to believe that acts of rape, torture and forcible displacement were committed against members of the targeted ethnic groups. Accordingly, the Chamber finds that there are reasonable grounds to believe that the material element of the crime of genocide by causing serious bodily or mental harm . . . is fulfilled.").

<sup>31</sup> See Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony, ¶ 16 (Jul. 8, 2005) (as amended Sept. 27, 2005) (Pre-Trial Chamber II noting, *inter alia*, "that the evidence submitted . . . suggests that JOSEPH KONY raped REDACTED and induced the commission of the crime of rape" as bases for the rape and sexual enslavement charges in Counts 1–3 of the Warrant). For a brief overview covering decades of such violence, see, for example, Marc Lacey, *A Mother's Bitter Choice: Tell-*

disposal and for his use as ‘wives,’ together with the power of a cult leader. For this, he needs conflict to continue. Maybe some Hutu *génocidaires* who fled Rwanda into Congo continue to rape in order to have something to bargain away for permission to return home.<sup>32</sup> Weaponized rape has proven a highly flexible tactic for multiple criminal strategies.

Rape of women always subordinates the raped as women. These cases provide a window onto the further work it can do in conflicts among men. Rape in war furthers war aims. Genocidal rape destroys peoples. When sexual abuse is a crime against humanity, it often seems to be an end in itself, done in order to do it, much as it is done every day of the week in every part of the world; in these conflicts seen as campaigns of crimes against humanity, the rapes may only be more visible or numerous and executed with more explicitly recognized organization. If rapes that are recognized as crimes against humanity are more frequent in their known occurrence, they are not necessarily more intense in their brutality. (Those who find rapes in conflict unusually brutal<sup>33</sup> are apparently unacquainted with the brutality of many

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<sup>32</sup> *ing Kidnappers No*, N.Y. TIMES, Jan. 25, 2003, <http://www.nytimes.com/2003/01/25/world/the-saturday-profile-a-mother-s-bitter-choice-telling-kidnappers-no.html?pagewanted=3&src=pm> (describing the aftermath of Kony’s infamous 1996 abduction of 139 girls from a Catholic boarding school in northern Uganda); CAR/DR Congo: LRA Conducts Massive Abduction Campaign, HUM. RTS. WATCH, Aug. 11, 2010, <http://www.hrw.org/en/news/2010/08/11/cardr-congo-lra-conducts-massive-abduction-campaign> (describing how “[t]he LRA assigns abducted girls to commanders for sex or as servants. Refusing sexual relations often results in death.”); Shantha Rau Barriga & Soo-Ryun Kwon, “As if we Weren’t Human”: Discrimination and Violence against Women with Disabilities in Northern Uganda, HUM. RTS. WATCH , Aug. 26, 2010, <http://www.hrw.org/en/reports/2010/08/26/if-we-weren-t-human> (describing the lasting harm of the LRA’s decades-long assault on the women of Uganda).

<sup>33</sup> The Democratic Forces for the Liberation of Rwanda (*Les Forces démocratiques de libération du Rwanda*, or FDLR) are widely known to have left Rwanda following the conflict and moved to Congo where they continue to perpetuate violence, including gender atrocities. See generally Ida Sawyer & Anneke Van Woudenberg, “You will be Punished”: Attacks on Civilians in Eastern Congo, HUM. RTS. WATCH, Dec. 13, 2009, <http://www.hrw.org/en/reports/2009/12/14/you-will-be-punished?print>, for further discussion.

<sup>34</sup> Examples include Jennifer L. Green, *Uncovering Collective Rape*, 34 INT’L J. SOC. 97, 100–108 (2004) (defining “collective rape” as “a pattern of sexual violence perpetrated on civilians by agents of a state, political group, and/or politicized ethnic group” and stating that “[c]ollective rapes are generally more intense and more violent than other forms of rape”); Kathryn Farr, *Extreme War Rape in Today’s Civil-War Torn States: A Contextual and Comparative Analysis*, 26 GEND. ISSUES 1, 6 (2009) (citing Green, *id.*, for proposition that war rapes are more brutal than others). The common brutality of rape need not be comparatively minimized—as it is in an otherwise knowledgeable analysis by Kristine T. Hagen & Sophie C. Yohani, *The Nature and Psychosocial Consequences of War Rape for Individuals and Communities*, 2 INT’L J. PSYCHOL. STUD. 14, 14–15 (2010)—to observe correctly that rapes in conflict are often extremely brutal. For example, Judy El-Bushra observes: “Common features found across the region include the sheer number of rapes, the extreme brutality of sexual encounters, the continuation of sexual violence after the war has ended, including ‘civilian rape’ and the ‘double violation’ whereby victims encounter stigma and are disowned by their families and communities after suffering sexual violence.” These factors, as she rightly implies, are continuous with rape in everyday life outside recognized zones of conflict. Judy El-Bushra, *Understanding Sexual Violence, HIV/AIDS and Conflict*, 35 FORCED MIGRATION REV. (Supp) 22, 22 (Oct. 2010).

rapes outside recognized zones of conflict.) But it is no accident that gender was first recognized as an express element in an international crime under the rubric of crimes against humanity, where the future of conflict lies. Campaigns of crimes against humanity are the messiest of the ‘new wars,’<sup>34</sup> least conforming to the junta model, organized principally along social hierarchical lines of which gender is one, often combined with ethnicity or religion or politics or economic interests rather than according to neat military hierarchies that fit the ‘old war’ model. Where reality is headed, international law is also headed, with gender as its leading edge.

Gender crimes, in other words, are prominent in ICC prosecutions because they are prominent in the contexts being prosecuted. This only becomes remarkable against the backdrop of the prior (and still largely existing) norms that ignore and deny their existence, shame their victims, define their injuries in legally unprovable or empirically unrealistic ways, and erect barriers to accountability that play on rape myths in the guise of procedure. Since these crimes have essentially never been taken seriously before domestically or internationally, at least on any large scale, rubrics like fair trial and right of confrontation, as just two examples, have never been shaped with these possible prosecutions and their dynamics in mind, as if the rapes actually happen.<sup>35</sup> It is as if there is a tacit agreement underlying enforcement in most jurisdictions to look the other way as women and children and sometimes men are sexually violated: to minimize, trivialize, denigrate, shame, and silence the victims, to destroy their credibility legally and socially and further shatter their psyches and dignity, so these abuses can continue unredressed and unimpeded. This is what impunity looks like. It is the way gender crimes are standardly treated (with occasional remarkable exceptions) every day in every corner of the world. The more power the accused has, the more this dynamic operates. The Rome Statute, and the body of the ICC’s first cases under it, says to the world that here, at least, this deal is off.

What light does the literature on the creation, force, and development of international law shed on gender crime’s emergence? The interesting answer, I think, is little to none. Much of that literature is engaged with questions that have no relevance to these developments. For example, the evolution of gender crime internationally does not illuminate or even ask the canonical question “why is international law obeyed” so central to that literature. As to gender crimes, it overwhelmingly is not. Of gender crimes, one cannot observe, with the sainted Lou Henkin, “that *almost all nations observe almost all principles of international law and almost all of their obligations*

<sup>34</sup> See generally MARY KALDOR, *NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA* (Stanford Univ. Press, 1999). Systematic attention to gender would strengthen this already illuminating analysis.

<sup>35</sup> For further discussion of the gendered vicissitudes of the right of confrontation in a real world context of sexual violence, see Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 21 (2012).

*almost all of the time.*<sup>36</sup> The more salient question is why laws against gender crime are largely not obeyed, domestically *or* internationally. The human rights obligations of nations to enforce their own laws against gender crime are largely flouted. Nor are states the principal actors in either disobeying laws against gender crimes or in enforcing obedience to them (something they largely do not do). This throws into relief the fact that sexually violated women, that is most women,<sup>37</sup> have been in this respect living on the other

<sup>36</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) (emphasis in original).

<sup>37</sup> This conclusion is based on empirical studies of sexual violation in many settings, analysis of their empirical predicates, which uncontroversially include underreporting, and decades of experience with the issue working with women all over the world. See CATHARINE A. MACKINNON, *SEX EQUALITY* 742 n.1 (2d ed. 2007) (citing quantitative studies of underreporting of sexual violation in the United States); *U.N. Violence Against Women Study*, *supra* note 18 (providing empirical and analytical context of violence against women worldwide).

Of the empirical studies, it can generally be observed that the more specific and in depth a study is, by location or population or form of sexual assault, and the longer and more in depth the research interview is, the higher the numbers found. Some of the best data on sexual violation has been collected in the United States over the past forty years. On rape alone, Diana E. H. Russell's probability sample of 930 women in San Francisco households in 1977 found that 44 percent of those who completed the in-person interview had experienced rape or attempted rape, half of them more than once. Diana E. H. Russell, *The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females*, 7 VICTIMOLOGY: AN INT'L J. 81, 81-93 (1982). Analyzing her data at my request, Diana Russell found that only 7.8 percent of the women in her sample did not report ever experiencing any form of sexual violation. This latter figure includes all the types of rape or other sexual abuse or harassment surveyed, noncontact as well as contact, from gang rape by strangers and marital rape to obscene phone calls, unwanted sexual advances on the street, unwelcome requests to pose for pornography, and subjection to peeping toms and sexual exhibitionists (flashers). DIANA E. H. RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* 20-37 (rev. ed. 1987); DIANA E. H. RUSSELL, *RAPE IN MARRIAGE* 27-41 (1990). See also CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 127 (1989). In a national representative random sample of over three thousand college women, fifty four percent reported experiencing "sexual victimization." Mary P. Koss, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. OF CONSULTING & CLINICAL PSYCHOL. 162, 164, 169 (1987) (defining sexual victimization to include unwanted sexual contact, sexual coercion, attempted rape, and rape). See generally MARY P. KOSS ET AL., *NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY* (1994); DIANA E.H. RUSSELL, *SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT* (1984).

As it is more acceptable (hence fundable) to study anything "violent" over anything sexual, many international studies research partner violence, then break out the figures on intimate partner sexual violence separately. See, e.g., Claudia Garcia-Moreno et al., *Prevalence of Intimate Partner Violence: Findings From the WHO Multi-country Study on Women's Health and Domestic Violence*, LANCET 1260, 1264 (Oct. 13, 2006) (presenting study of intimate partner violence of over 24,000 women in fifteen sites in twelve countries, sexual violence reported separately, underreporting recognized, finding from 6.3% in Serbia to 58.6% in rural Ethiopia, exceeding 40% in rural Bangladesh and rural Peru); Robin N. Haarr, *Wife Abuse in Tajikistan* 2 FEMINIST CRIMINOLOGY 245, 263 (July 2007) (reporting study of 400 women in Tajikistan of which 42.5% stated they experienced sexual violence by their husband); Michael A. Koenig et al., *Coercive Sex in Rural Uganda: Prevalence and Associated Risk Factors*, 58 SOC. SCI. & MED., 787, 791 (2004) (reporting that 73% of women in study say they have been subjected to at least "occasional" coerced sex by their current partner); Samia Alhabib et al., *Domestic Violence*

side of Henkin's 'almost all' hedge almost all the time. Nor has this reality significantly distinguished national from international law. It is not only the absence of enforcement, but a very real norm of nonobservance of the prohibition of gender crimes—of nonenforcement as a de facto matter of policy—that stands out.

For gender crimes, why nations obey international laws is thus the wrong question all the way from its unit of analysis to its presumptions and observations of reality. The question here becomes not only why many men disobey almost all laws against sexual assault almost all the time, but why, given this, they even have them. If most international and national laws are mostly obeyed, why are those against gender crimes mostly not? Why, in more pointed terms, do men, in their gendered capacities, first create and then routinely ignore laws against sexual abuse both within and across state lines? What light, if any, does pursuit of this question shed on why nations—meaning men organized into states—obey the laws they do obey, including when they are not enforced by force, which after all is the reason the question is being asked in the international context in the first place. The question then becomes why, given this context so overwhelmingly to the contrary, has it become possible for the ICC to strike out such an exceptional path.

In a gendered perspective—gender analysis being more than observation of demography or a two-part finger-pointing head-counting exercise—

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*Against Women: Systematic Review of Prevalence Studies*, 25 J. FAM. VIOLENCE 369, 373 (2010) (analyzing many studies that include measures of intimate sexual violence, finding values by region of approximately 15%–30% lifetime prevalence); R. T. Naved, et al., *Violence against Women with Chronic Maternal Disabilities in Rural Bangladesh*, 30 J. HEALTH POPULATION & NUTRITION 181, 182 (2012) (reporting that up to 50% of rural Bangladeshi women have experienced "within-marriage sexual violence").

On these figures alone, taking cultural variation and other cultural factors into account—and given that the figures on intimate partner violence alone do not include, for example, sexual abuse in childhood, stranger rape, sexual harassment in employment or education, or sexual assault in genocide or armed conflict—together with chronic under-reporting and variations in definitions, it is highly likely that some studies of all forms of sexual violation have produced major undercounts. See, e.g., HOLLY JOHNSON et al., VIOLENCE AGAINST WOMEN: AN INTERNATIONAL PERSPECTIVE 39 (2008) (providing data on lifetime experience of sexual violence among women in nine countries, rate varying from 6% (Philippines) to 41% (Costa Rica)); B. Wijma, et al, *Emotional, Physical, and Sexual Abuse in Patients Visiting Gynecology Clinics: A Nordic Cross-Sectional Study*, 361 LANCET 2107, 2111 (2003) (describing a study conducted in Nordic countries of emotional, physical, and sexual abuse, finding an average of lifetime reports of sexual abuse of women at 24.1% at Table 5).

Granted that definitions of sexual abuse vary, far more realistic are the findings that a majority of women have experienced sexual violence. See, e.g., Elsie Le Franc et al., *Interpersonal Violence in Three Caribbean Countries: Barbados, Jamaica and Trinidad and Tobago*, 24 PAN. AM. J. PUB. HEALTH, 409, 414 (2008) (stating that a majority of women respondents in each country studied have experienced sexual violence). Researcher Liz Kelly concluded, based on her in-depth study of sixty women in the United Kingdom, that "most women had experienced sexual violence in their lives" along a continuum of male behaviors. Liz Kelly, *The Continuum of Sexual Violence, in WOMEN, VIOLENCE AND SOCIAL CONTROL* 46, 47 (Jalna Hanmer & Mary Maynard, eds., 1987). Analyzing the data in depth finds that 93% of women surveyed experienced sexual harassment, 83% pressure to have sex, and 70% sexual assault. *Id.* at 53.

the answer may be that, as to gender crimes, men behaving in their gendered roles tend to reflexively create, obey, and enforce on other men those rules that respect and enhance their power as men, according to norms that, because they preserve male dominance over women and other men, are seen as being in their interest. Exceptions to this generalization are still just that: exceptions. Rules that serve this end, they will obey and see to be legitimate. Thomas Franck is thus on the right track in speaking of the power of legitimacy among nations,<sup>38</sup> but in omitting gender, he cannot fully illuminate it. The same difficulty besets his definition of legitimacy as “factors that affect our willingness to comply voluntarily with commands.”<sup>39</sup> This “our” is a bit gender-neutral. Not asking about gender means not asking, for one simple instance, why women obey laws, which overwhelmingly they do, even more than men do, although they have typically had virtually no voice in their creation. Perhaps the answer is that women are kept in line by an almost perfect combination of force with socialization, by a cultural hegemony that strongly bears upon the question of principle versus interest that the idealists and the realists fight over in international relations. One would think it would interest them.

Assuming Franck’s “voluntarily” means without immediate physical force, his definition of the legitimate could apply to compliance through intimidation or the socialization to sex-based hierarchy that undergirds inequality. Male power is precisely what “affects” women’s “willingness” to comply “voluntarily” with men’s “commands.” Does that make male power legitimate? Unequal social context corrupts true legitimacy. Translated in a gendered perspective, legitimacy is a flag flown for those conditions under which men think it is right to accede to other men’s power. The truth is, committing gender crimes, particularly against women, has seldom before taken away men’s sense that other men rightly exercised power over them. Given the norms of masculinity, these crimes have conferred such legitimacy more than they have undermined it. If this is right, men have essentially known all along that the laws against what are in reality gender crimes have never been the real rules. The real rules are that men with power can commit these crimes, and will allow certain other men to commit them, and may even respect other men because they commit them. This is in part because that is how masculinity is defined, and in part, reflexively and by conditioning rather than consciously, so they can commit these acts themselves if they want to, or can know they can.

On this reading of how male power is organized in this sphere, the laws against sexual violation have functioned fundamentally as window-dressing, as well as a tool men can use against other men when convenient for their hegemonic needs. Perhaps these rules serve a function wholly apart from inducing compliance: to legitimize an unequal social order by distracting

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<sup>38</sup> See THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

<sup>39</sup> *Id.* at 150.

from the real impunity for violations that everyone knows will go overwhelmingly undetected and unpunished. In this light, the distinctive contribution of the international arena, particularly the Rome Statute and most stunningly in the initial prosecutions under it, has been to treat laws against gender crimes like other legal prohibitions, as a new normal. Rule of law arrives. The aim of the Rome Statute in this respect is ultimately to delegitimize gender crimes as a means of attaining and exercising power.

Given the magnitude of these legal developments, with the evolving prominence of the instrumentalization of the crimes themselves, particularly striking is the extent to which mainstream literature in international law has largely gone right along in the absence of any deep engagement with gendered dynamics, indeed ignored gender as a factor in international relations altogether. Even as the actors on the real-world stage embrace and develop the concept and highlight its realities, this literature keeps asking its same questions and debating its same answers on the same theoretical terms, turning a blind eye to what these challenging developments and innovations expose and demand and imply and promise. The field's static typologies, long descriptive at best, neither predicted nor usefully describe these changes, far less do they trace or project their trajectory or grasp their significance or portent or contribute to their evolution.

Missing, among other things, is any conception that studying the behavior of nations, including compliance with law or not, is studying male behavior: behavior that is gendered to its core. Any contribution gender might make to analysis of the atrocities that have been formative to international law is absent, for example, when the formidable Hannah Arendt discusses Kant on "radical evil" as a phenomenon "about whose nature so little is known,"<sup>40</sup> and lovely Carlos Nino asks "how shall we live with evil?"<sup>41</sup> in considering accountability for past atrocities. When the social reference point for the crimes in view is not only the Holocaust as it has ordinarily been understood, or *terrorismo del Estado*, or even the Cold War, but intimacy, atrocities are less likely to be dismissed as blank "evil" nor are they "past." They can be accounted for, explained, and confronted, including when projected onto a large canvas of genocide or war, as the gendered actions of men practicing male dominance with whom their victims are all too familiar into the present moment. Women, who are not baffled moralists, know a lot about this phenomenon (as perhaps Arendt did but did not see what she knew as knowledge), living with it every day. Perhaps a turning point in the relative invisibility of gender analysis in this sphere has been reached, prepared by intrepid nongovernmental organizers and activists, advocates, jurists, and scholars, most of all by women and some men survivors.

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<sup>40</sup> HANNAH ARENDT, THE HUMAN CONDITION 241 (1958).

<sup>41</sup> CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL vii (1996).

One truly interesting and potentially consequential question that arises around gender crime that the international literature, notably that on “fragmentation,”<sup>42</sup> is further useless in illuminating concerns the treatment of sexual atrocities in international legal rubrics. Rape, for example, is now legally a recognized instrument of war, genocide, torture, and terrorism, and a common crime against humanity. It has been found integral to human trafficking, slavery, forced marriage, and the recruitment and training of child soldiers. And so it is. But should it continue to be flushed out everywhere it rears its ugly head, treated as a fact or violation under each legal heading, or instead recognized as a separate international crime on its own terms, and if so, structured how? Should rape be de-fragmented? Arguably rape violates customary international law.<sup>43</sup> But what precisely is at stake in the question of

<sup>42</sup> See Cecilia M. Bailliet, *Introduction to Non-State Actors, Soft Law and Protective Regimes 2-5* (Cecilia M. Bailliet ed., 2012) (for discussion and footnotes on the most relevant contributions to this literature).

<sup>43</sup> As rape in some form is a crime virtually everywhere, even if its prohibition is largely ineffective and unenforced, inquiry into this question would develop the literature on customary international law at a crucial point of tension within it. No universally accepted definition of customary international law exists, but a basic introduction can be found at *RESTATEMENT (THIRD) OF THE LAW: THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 (2)* (1987) (stating that “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation,” noting that such state practice “can be general even if it is not universally followed” and that “it must appear that the states follow the practice from a sense of legal obligation . . . a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law”). Scholars have discussed the process of development of custom for purposes of customary international law extensively. See, e.g., ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 32, 62 (1971). However, because it generally ignores gender crime, this scholarship does not interrogate the relationship between a formal prohibition and its practice with the clarity that investigating this context would provide.

Examples of legal authorities opining on the question of rape as a violation of customary international law include: Partial Award, Central Front Eritrea’s Claims 2, 4, 6, 7, 8 & 22 (Eritrea v. Ethiopia), 43 I.L.M. 1249 ¶¶ 37-38 (Eritrea-Ethiopia Claims Comm’n 2004) (basing agreement to arbitration on view that rape of civilians in conflict violates customary international law under Geneva Conventions); Partial Award, Central Front Ethiopia’s Claim 2 (Eritrea v. Ethiopia), 43 I.L.M. 1275 ¶ 35 (Eritrea-Ethiopia Claims Comm’n 2004) (same); Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, ¶¶ 165, 168 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10 1998), (discussing customary international humanitarian law as including rape as torture or as an outrage on personal dignity); Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 406, 408, 436 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶¶ 285-7 (Jan. 27, 2000); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 585, 599, 608 (Sept. 2, 1998); John Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002). See also Int’l Comm. of the Red Cross, *Customary International Humanitarian Law*, 93 (2005); Special Rapporteur, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, ¶ 36, U.N. Doc. E/CN.4/Sub.2/1998/13 (Jun. 22, 1998) (by Gay McDougall).

For discussion by legal scholars, see Christine M. Chinkin, *Women’s International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT’L L. 335, 336 (2001); Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where to From Here?*, 13 EUR. J. INT’L L. 697, 719 (2002); Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and*

whether it should be a single separate international crime? The law against rape has developed exponentially in its multiple concrete sites so far without becoming siloed; its jurisprudence has been flexibly cross-referenced and mutually supportive while its factual development has stayed grounded in its manifold contexts, the sexual assaults highlighted in place. Given that its prohibition in context has proven reasonably workable, once focused upon, what difference would it make if rape everywhere, serving every international criminal function, was pulled out and together to define a prohibition to be legally addressed separately? This raises a serious question for law of the relation between the conceptual and the practical. Is this change necessary? What precisely would it accomplish? If the answers are in the negative, what light does this shed on the impetus to de-fragment? No existing international literature I know, in particular that advocating coherence and harmonization, offers a grip on or insight into this matter, revealing the silver lining of neglect: the freedom to develop our own approaches, strategic and principled.

Leading further, the substantive law of gender crime has also opened procedural possibilities that this literature also gets nowhere near, including the possibility to undo, get around, neutralize or change the many obstacles, devices, traditions, and norms that have long operated in law to ensure that sexual assault as an everyday matter is never stopped. These doctrines appear gender neutral but function in the direction of ensuring that the legal system will never respond to the victims' experience, whatever the law criminalizes on its face. Gender crime, as it evolves as a matter of substantive law, is impelling the alteration of major technical rubrics like state versus non-state, challenging jurisdiction and sovereignty, interrogating the standards for fairness in trials and policy and organization in altercations, resisting many traditional cultural practices, and walking right across the line between war and peace. These abstractions may appear empty and neutral, their corresponding legal doctrines fair and principled, but in this setting, they have been anything but.

In this context, the international arena—the ICC in particular—presents a specific opportunity. Sexually violated women and international jurisdiction belong together, I think, not only because both are denigrated for not

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*Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 407–08 (2007); Patricia Viseur Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT'L L. 287, 297–98, 302 (2002); Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 300 (2003). See also David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 226 (2005) (discussing the legal status of rape in conflict under the even more demanding international norm of *jus cogens*); Dean Adams, *The Prohibition of Widespread Rape as a Jus Cogens*, 6 SAN DIEGO INT'L L.J. 357, 362, 397 (2005). Much of the literature on rape as a violation of customary international law relies on its recognition as a form of torture. Given that rape is also a gender crime, it constitutes a form of sex discrimination, on which international consensus is building that it too violates customary international law.

resorting to force in that neither has an army at its command. Most women and children are most violated at home, or close to home in the localities that form the states that have been, and on one level still are, the traditional units of international law.<sup>44</sup> The men at home are the least likely to do anything about gender violation because that is where they are most likely to do it themselves, so where they are most likely to identify with others who do it there. As a result, the further away from home women go, the experience has been, the more rights they get. Distance appears to attenuate the male bond, making it more likely that women's violations by men will be recognized as real.<sup>45</sup> When the men observing do not identify so closely with the doers of the acts, they are more likely to see what they are actually doing to women – i.e., they come closer to attaining what men mean by objectivity. This is both partly why women are inherently not a national group but a transnational one, and largely why gender crimes have been most powerfully recognized in international law first.

With the trans-historical and trans-cultural reality of gender crime is also highlighted the darker fact that as of yet, there is no “post-conflict” for gender crimes. The daily campaign of violence against women, well-documented as a worldwide war on women—with substantial variation but substantially invariant impunity—can be reframed as the longest-running siege of crimes against humanity in the history of the world. The conflict goes on, its weapons forged daily, lying around inexpensively to be seized for accelerated deployment in every conflict among men in which they become convenient, with no embargo imaginable and no disarmament treaties in sight. A gender perspective raises, along with the question of what kind of justice we envision and negotiate, the question of what peace means.

Pursuing the gender crimes the Rome Statute defines, wherever they happen of concern to the international community, presents the chance to develop grounded procedures and reality-based substantive doctrines that respond to the practical imperatives for their effective prosecution. Focus on those most responsible can include the rapists themselves (the so-called “little fish” when they *are* most responsible), as well as those who lead and deploy and permit their actions, sustaining the Nuremberg principle from both the top down and the bottom up.<sup>46</sup> Positive complementarity<sup>47</sup> could

<sup>44</sup> See U.N. *Violence Against Women Study*, *supra* note 18, at ¶ 112 (noting the pervasiveness of different forms of violence against women in intimate relationships is well established empirically and is the most common form of violence experienced by women globally).

<sup>45</sup> This argument is made more fully in Catharine A. MacKinnon, *Introduction: Women's Status, Men's States*, in ARE WOMEN HUMAN? 1 (2006).

<sup>46</sup> The Principles of the Nuremberg Tribunal, 1950, provide no exemption from international crimes for heads of state or their subordinates by virtue of their positions as such. Rep. of the Int'l Law Comm'n, 2d Sess., *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, §§ 103–04, (1950).

<sup>47</sup> This ICC standard could be seen as one form of Harold Koh's “transnational legal process,” through which international and domestic become interpenetrated, an accessi-

become a well-travelled two-way street between the national and the international, including the always-crucial NGOs. The opportunity is open for the ICC and other international institutions to act on what women know: there will be no meaningful peace or collective security in a world of gender injustice. By setting an example, supporting institution-building, and through co-operation, the response of the public order to gender crime can be transformed within and beyond recognized zones of conflict, in war and in so-called peace.<sup>48</sup> Neither utopian nor apologetic<sup>49</sup>—too attuned to the realities of power to fall into irrelevant moralism and too critical of those realities to rationalize *Realpolitik*—the gender paradigm for international law's creative development is taking effective steps toward real security and real peace.

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ble discussion of which can be found at Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337, 337–54 (2004).

<sup>48</sup> A thoughtful treatment of some preconditions for real peace, sensitive to issues raised here, is ELIZABETH REHN & ELLEN SIRLEAF JOHNSON, UNITED NATIONS DEV. FUND FOR WOMEN (UNIFEM), WOMEN, WAR, AND PEACE: THE INDEPENDENT EXPERTS' ASSESSMENT ON THE IMPACT OF ARMED CONFLICT ON WOMEN AND WOMEN'S ROLE IN PEACE-BUILDING (2002).

<sup>49</sup> See MARTTI KOSKENNIELI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (rev. ed. 2005).

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**פרק 6**

## **ארגוני זכויות אדם**

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# NGOs and the UN System in Complex Humanitarian Emergencies: Conflict or Cooperation?\*

*Andrew S. Natsios*

This article explores the evolving relationship between the United Nations (UN) system and nongovernmental organisations (NGOs) in responding to complex humanitarian emergencies, and describes the two sets of actors, their organisational cultures, governance and mandates. It examines why the two sets of organisations have been drawn into a closer collaboration in dealing with civil conflicts and famines, how that interaction is working from both an operational and policy perspective and whether both are suited as currently constituted to respond to ongoing challenges. What are the unique institutional competencies and weaknesses each brings to relief responses? How is the friction between the UN and NGOs manifested in their diverse missions, operational styles and organisational cultures?

This essay focuses on operational and organisational cooperation between NGOs and the UN system, but not on the role of the military or the media in the humanitarian response system, subjects that have been well covered elsewhere.<sup>1</sup> Although operational NGOs in particular have been increasing their activity in policy and advocacy work in complex emergencies, this essay also does not address this work, which would require another essay in itself.

In Africa, the Balkans, the Middle East and the former Soviet Union, the growing number of failed states has produced a widening level of chaos

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to which NGOs and the UN have tried to respond. However, even the most charitable assessment must conclude that their responses have had mixed results. These complex humanitarian emergencies are defined by five common characteristics: the deterioration or complete collapse of central government authority; ethnic or religious conflict and widespread human rights abuses; episodic food insecurity, frequently deteriorating into mass starvation; macroeconomic collapse involving hyperinflation, massive unemployment and net decreases in GNP; and mass population movements of displaced people and refugees escaping conflict or searching for food. This instability does not respect national boundaries and frequently spills over into neighbouring countries, many of which are themselves unstable. The spreading chaos does not appear to be subsiding and presents the international community with a major challenge.

Some observers have argued that these emergencies have caused a shift of increasingly scarce resources away from sustainable development to life-saving humanitarian interventions. The amount of funding provided by the United States Agency for International Development (USAID) to UN organisations, the International Organization for Migrations (IOM), the International Committee of the Red Cross (ICRC) and NGOs for relief interventions in complex humanitarian emergencies has risen dramatically beginning in the late 1980s. In 1989 the Office of Foreign Disaster Assistance (OFDA) and Food for Peace (FFP), both USAID offices, provided \$297 million in cash and food grants for humanitarian relief; by 1993 that had increased to \$1.2 billion.<sup>2</sup>

Funding for relief work is derived from four US government accounts: the OFDA, Title II of P.L. 480, Section 416 food aid (from the Department of Agriculture), and the refugee programme budget (in the State Department). Much of the actual increase during this period has been in food aid, which would probably not have been used for development purposes, and which is now in precipitous decline. These funds would not have been used for sustainable development, which is not as politically popular as disaster relief in the U.S. Congress or among the American people. This ambivalence over development assistance is reflected in Washington's relative contribution to relief efforts compared to other developed countries. The United States proportionally provides the tenth highest level of relief assistance among OECD countries, although it trails at 20th place in development assistance. It is not that relief funding is so high, it is that development assistance is so low.<sup>3</sup>

A complex response system has evolved to spend this money and respond to these emergencies, more by accident than design; it is composed of three sets of institutional actors: NGOs, UN organisations and the International Red Cross movement.

## Nongovernmental Organisations

NGOs are perhaps the most complex and diverse of these three sets of actors, particularly those involved in complex humanitarian emergencies. Although there are 1,500 NGOs registered with the UN system as having observer status, only 400 are registered with USAID, a process necessary for them to receive U.S. government grants.<sup>4</sup>

When Operation Restore Hope was deployed to Somalia in December 1992, there were 40 international NGOs working in the country. In November 1993, 76 NGOs had mailboxes at the UN High Commissioner for Refugees (UNHCR) offices at the Rwandan refugee camps in Goma, Zaire.<sup>5</sup> These NGOs were almost entirely based in the Western democracies. Although a mailbox in Goma is certainly an indication of some activity, these numbers are misleading. Many of these nongovernmental organisations provided services in Goma and Somalia on a modest scale for a few months and then left. Many others delivered gifts in kind—such as pharmaceuticals and clothing—to operational NGOs which then provided them to people in the refugee camps. Others are the national offices of the same international NGO: for example, Médecins Sans Frontières has national chapters in Spain, France, Belgium and the Netherlands, and members of these chapters worked together at Goma.

In short, most NGOs are not involved in relief. There are perhaps 20 in the United States and another 20 in Europe that work in complex emergencies. This work is sustained, technically sound and widespread enough to have an impact on the situation on the ground. Of these 40 NGOs, perhaps 10 UN and another 10 European NGOs receive 75% of all the public funds spent by NGOs in complex emergencies. The U.S. NGOs received 76% of all cash grants to NGOs for relief purposes from the U.S. government in fiscal year (FY) 1993 and over 87% of all food aid for relief purposes in FY 1993.<sup>6</sup> The European Union gave 65% of all relief grants to 20 nongovernmental organisations in FY 1994.

These relief NGOs frequently specialise in one or more of the five activities that are commonly understood to compose the relief discipline: food distribution, shelter, water, sanitation and medical care. To this may be added the rehabilitation efforts to bring a society traumatised by a complex emergency to minimum self-sufficiency: animal husbandry, agriculture and primary health care. Perhaps half of these NGOs perform relief work exclusively, whereas the other half work in both relief and development. The larger development NGOs (CARE, Catholic Relief Services, World Vision, Save the Children, and Oxfam/UK) have the added advantage in many complex emergencies of having had development programmes and staff to run them in the countries before the onset of the emergency. This advantage gives them a familiarity with the culture, ethnic

groups and development programmes of the country as well as with indigenous staff.

Since the Ethiopian famine of 1985—a watershed event for most of the 10 major NGOs that work in relief—a quiet revolution has taken place in doctrine and practice between relief and development.<sup>7</sup> Traditional relief efforts were commodity-driven and logically-based, with little programmatic, economic or developmental thought given to how the relief effort might be more than simply pushing down death rates and saving lives. Most NGOs, as a matter of policy, will now try to integrate into their relief work developmental components particularly focused in agriculture, microenterprise, primary health care, reforestation and road construction. This is done through food or cash for which recipients are assigned a specific project that community leaders have determined is of longer-term importance in the area. Much more effort now is spent on examining the economics of what is happening in famine, with the major food NGOs conducting household, food price and market surveys as a regular part of their relief interventions. A recent study of the USAID/OFDA effort in the Somalia emergency showed that 50% of its relief grants to NGOs contained developmental interventions.<sup>8</sup>

NGOs derive their financial support from both public and private sources. A few will accept no public sector money, while others get between 60%–70% of their income from donor governments.<sup>9</sup> Although UN funds and programmes have increasingly been making relief grants to NGOs, these grants do not yet approach the level of donor government grant assistance, a condition that may shortly change if present trends continue. NGO private funding resources come primarily from mass media appeals (most notably television), direct mail and major donor government contributions. U.S. law requires an NGO to raise at least 20% of its aggregate resources privately to be eligible to apply for government funding. Most donor governments have created disaster relief offices—such as Agency for International Development's OFDA, Food for Peace and the European Community Humanitarian Office (ECHO) of the European Union—to provide grant assistance to NGOs, the ICRC and UN organisations.

How these NGOs are organised and governed affects their work. They have chosen four models to organise themselves internationally. First, all began and some remain with one headquarters based entirely in one country, even though they work internationally in others, for example, the International Rescue Committee and the International Medical Corps. Second, some have many autonomous national chapters with independent field organisations, each reporting back to the home offices. This means several offices may work independently of each other in the same country, for example Save the Children and Oxfam. Third, some have chosen to create

many national fundraising offices that pool their collective funds and spend them through a single worldwide field organisation, which is indigenously staffed and managed, such as World Vision International and the International Federation of Red Cross and Red Crescent Societies. A variation of this is a hybrid of the second and third models, in which each national headquarters has its own field organisation but is assigned specific emergencies in which to work by a central international organisation to avoid competition in the same country, e.g. CARE. Fourth, others only work through indigenous local NGOs that are not part of their organisational structure; they have no independent operational capacity in the field outside such indigenous partner agencies as the Church World Service, Oxfam/US, and Christian Children's Fund.

Each model has particular advantages and drawbacks. The first model tends to be the fastest in operations and decision making and the least bureaucratic; the second tends to be the most flexible, internally competitive and, at times, organisationally contentious; the third tends to have deeper community roots and capacity to aggregate large amounts of money rapidly for a particular relief programme; and the fourth has the deepest community roots but does not have a field staff that it may direct to a particular emergency and so lacks flexibility and quality control.

NGOs are governed by boards of directors that tend to reflect the particular culture, history and mandates of the organisations concerned. The board of directors of the International Medical Corps, a U.S. NGO that specialises in emergency medical care in conflict, for instance, has been dominated by the medical professionals who founded it. Catholic bishops serving on the board of directors of Catholic Relief Services is another example. Since most NGOs raise money among a particular market segment of the American people, they must design their field programmes around the interests of their constituency or they may not survive. Under the NGO standards required by InterAction (the American nongovernmental organisation partnership association) of its 160 members, NGO bylaws must provide for term limits to ensure rotation of board members, require some racial and gender diversity, avoid appointing relatives of NGO executives, and limit the number of senior staff who serve on their boards. A similar set of standards exists for European and Third World NGOs which are members of the International Council of Voluntary Agencies (ICVA), the European equivalent of InterAction. Most major relief NGOs belong to either of these two associations and most try to conform to these standards. Their boards of directors approve annual budgets; hire; review and fire the chief executive officer; and control major corporate policy decisions. Some are involved in operations, approving, for example, each new programme initiative and advocacy position on public policy taken by the organisation.

The rash of recent emergencies has created the impression that NGOs

are in the business of ambulance chasing as they appear on the scene in large numbers to provide assistance. This impression is somewhat accurate. To attract private contributions to run their programmes, the NGOs must make use of news events and media coverage, which raise public awareness in a way that no paid advertisement could ever achieve. The more dramatic the event, the greater the media coverage, and the greater the ease of fundraising around it. Overhead rates for nongovernmental organisations are one of the few constant measures of success used to judge their worthiness as charities in the annual rankings of NGO efficiency in such publications as *Money Magazine* and the *Wall Street Journal*. These rankings affect NGO fundraising success in a self-reinforcing cycle that ultimately puts a high premium on early and visible involvement in relief operations. Fundraising around highly visible humanitarian crises raises more money at a lower cost than any other form of advertising or publicity. Certain NGOs have been attacked for what some critics call "relief pornography"—raising money by showing scenes of starving children that wrench the donor's heart and portray a sense of helplessness. This distorts an organisation's judgment on where to work and when, but it is not an easily addressed problem since without funding they cannot work at all.

Nongovernmental organisations are accountable to their boards, but accountability to their contributors and beneficiaries is more tenuous. Unlike a profitmaking business where customers can judge the quality of the service or product that they have purchased, the beneficiaries of the NGO contributions in a relief intervention have no regular way of registering individually their approval or dissatisfaction to donors of an organisation, or for that matter ICRC or UN performance. Likewise, private donors have no direct experience with the quality of the work that their contributions support. Good marketing does not necessarily ensure good programming. As a general proposition, NGOs make an effort in good faith—given the altruistic motivation of most of their workers and managers—to involve the people they serve in the field with how resources are spent. Community participation is an elemental axiom of NGO work. The wide variation in the quality of field programmes and the technical competence of staffs is a testament to the limitations of the existing system of accountability. Larger NGOs—the combined budgets of CARE, World Vision and Catholic Relief Services, the three largest NGOs, exceed \$1 billion—have developed many of the management information, evaluation and control systems of private sector corporations to monitor quality in their projects.

Perhaps the most encouraging recent trend in the NGO community has been the growing presence of indigenous nongovernmental organisations working in their own countries to provide services during complex emergencies. In Liberia, during the worst period of chaos in the capital city, Monrovia, in the summer and autumn of 1990, all UN agencies, interna-

tional NGOs, and even the ICRC had evacuated. The only Western presence at the time was a team of five operational staff from OFDA to run a relief effort to feed and provide medical care to 500,000 people in desperate conditions as four undisciplined militias fought for control of the city. The OFDA team enlisted the support of the local community to run the relief effort by forming an indigenous Liberian NGO that effectively distributed food, water and medical services. While the OFDA team withdrew six months later, the indigenous NGO did not and it continues its work today. The ICRC formed Somali women's committees to run hundreds of open air soup kitchens in Somalia in 1992, which fed hundreds of thousands of people during the worst of the chaos. These women's committees, independent of the ICRC, resurrected the moribund school system of Mogadishu and put 500 teachers and 20,000 students back in the classroom by using ICRC food aid to pay the teachers. The World Food Programme (WFP) worked with CARE and gave grants of local currency generated by the monetisation of food aid in Somalia in 1993 and 1994 to local Somali NGOs, which from all reports were quite effective on smaller scale projects. Bosnian Muslim NGOs have been the most effective in providing assistance during the conflict because they have been willing to take risks that international NGOs would never consider. Also they know the terrain and feel the suffering themselves. These indigenous NGOs are perhaps the fastest growing part of the relief response system and provide an intuitive understanding of local conditions that international NGOs could not hope to equal.

### The UN System

Four UN organisations have become such visible players in most complex humanitarian emergencies that describing their functions and mandates will describe most if not all of the operational work of the entire UN system in relief operations. They are the World Food Programme, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund (UNICEF) and the United Nations Development Programme (UNDP). The first three are clearly the strongest and most indispensable. Although UNDP technically has the mandate to manage UN emergency operations in the field, it has been unwilling or perhaps unable to manage and technically fulfil its assigned role, and it has not distinguished itself by the work it has done either in quality or speed. The creation of the Department of Humanitarian Affairs (DHA) in the UN secretariat in December 1991 to coordinate UN work in complex emergencies is testimony to UNDP's failure—coordination had been the assigned task of the UNDP for two decades. A half dozen other UN agencies, seeing the

movement of donor resources to complex emergencies, have flung themselves into the organisational chaos, but they arguably lack serious operational capacity or experience, and have only limited relief resources.

The WFP functions as the food aid agency of the UN system, providing a central coordinating role in developing crop production estimates, food aid requirements and logistics planning for major relief operations. At \$1.8 billion its annual budget is the largest of the big four. It signed its first worldwide NGO cooperative agreement for relief operations in February 1995 with Catholic Relief Services and it is now engaged in negotiations over similar agreements with three other NGOs. WFP has had only a limited history of work with international NGOs, a historical reality that it is fast overcoming. Although WFP is organisationally subordinate to the United Nations and the Food and Agriculture Organization (FAO), it has become virtually independent since the 1991 reforms.

UNICEF's special mandate is to focus on the relief and development needs of women and children, which has made it the focal point among the big four UN agencies for emergency medical interventions, mass inoculation campaigns for children, water and sanitation programmes and therapeutic feeding programmes for severely malnourished children in emergencies. This work has placed it for some time in closer contact with NGOs at the village level than any other of the big four organisations. UNICEF is the only one of the UN entities with a substantial popular following in donor countries and a contributor base that provides significant private support for its work.

UNHCR has the longest history of the big four funds and programmes; its predecessor was created during the 1920s under the League of Nations. It also has the longest history of work with NGOs and spends the largest amount of money—at least \$300 million annually—in grants to 130 NGOs, many of them indigenous. Although the bulk of its funding still goes to host governments to run refugee camps, the rush of events and the need for speed has made the NGO-UNHCR partnership more intimate and frequent in recent years, particularly in complex emergencies.<sup>10</sup>

UNDP, the development programme of the UN system, does only limited work with international or indigenous NGOs in emergencies. By tradition, as well as General Assembly guidelines, the UNDP resident representative in each country normally acts as the UN's resident coordinator with pre-eminent executive authority to coordinate other UN agencies. This authority also extends to disasters, although UNDP field representatives have been remarkably unprepared and unwilling to perform this function, with a few notable exceptions—for example Michael Priestley's strong leadership in Sudan during the civil war as UNDP resident representative was of consistently high quality. UNDP has occasionally funded certain

public service projects in complex emergencies, such as managing airport facilities, city water and electrical systems, and other public services needed to support life, particularly in urban areas. The UNDP niche in the provision of public services in complex emergencies is the least developed and most needed of functions of the UN system.

### The International Red Cross System

The International Red Cross movement arose out of the horrific conditions on the battlefield at Solferino in 1859, and its mandate has now been extended to alleviate suffering during conventional armed conflicts. The movement is the oldest, most disciplined and best organised of the three sets of actors of the international relief response system, with a worldwide budget of about \$600 million. The ICRC also conveys family messages across conflict lines, reunites families separated by war and protects prisoners of war.<sup>11</sup> Its budget is primarily funded by annual block grants from donor governments, and to a lesser degree national Red Cross and Red Crescent societies, in much the same way as the UN funds and programmes obtain their funding. The ICRC operates under a set of inviolate principles that have been integrated into the nine governing principles of the national Red Cross and Red Crescent societies. These include absolute political neutrality in a conflict; indeed, the Red Cross symbol is the visual embodiment of the principle of neutrality in war. ICRC operating procedures require that they work on both sides of any armed conflict and that they respond to and practise complete transparency in all operations, notifying both sides each time a convoy departs, arrives or is delayed. These procedures sometimes put them at odds with NGOs and the UN agencies, and it encourages their insularity as an organisation, although their rules make it possible for them to work in armed conflicts where few other institutions dare go.

The age, doctrine, funding mechanism and mandates of the ICRC set it apart from both the UN system and the NGO community. Other than UNHCR, no other humanitarian relief organisation has a mandate assigned to it under international law, as are the cases of UNHCR under the UN Charter and the ICRC under the Geneva Conventions and Additional Protocols. The ICRC is an international organisation, not an NGO, and yet it is outside the UN system. As an international organisation, the ICRC more jealously guards its autonomy and prerogatives than any of the other institutional actors—UN or NGO—and resists coordination, but it shares information, sometimes reluctantly, and will attend organising meetings. For the most part, however, it must be discussed separately from either non-governmental or intergovernmental organisations.

### Collaboration of NGOs with the “Big Four”

The collaboration of NGOs and the major four funds and programmes active in the humanitarian arena has increased dramatically over a short time. In most complex emergencies, host governments do not exist or exist in such anaemic form that they are ineffective as an interlocutor for the UN system, which deals with NGOs increasingly as the first responders. UN agencies have traditionally focused their attention on governments, their primary constituency, while NGOs focus on grassroots development at the village level and cooperate with developing country governments only at the regional or provincial level during emergency operations. Under this traditional paradigm, UN agencies viewed NGOs as subcontractors in a clearly subordinate position—paid for services performed—not as equal partners with unique capacities, particularly in humanitarian relief operations. This has caused the resentment by UN agencies of nongovernmental organisations when they do not act in the way expected, and by NGOs when they are treated as contractors rather than equal partners.

The UN system and the NGO community have made some progress at improved collaboration as the international humanitarian response system has matured. The Department of Humanitarian Affairs initiated monthly coordination meetings with NGOs in New York and Geneva to exchange information and discuss policy disputes in complex emergencies. UNHCR is well under way with its Partnership in Action (PARinAC) initiative to develop an operational and policy framework for working with NGOs. In complex emergencies, UN field offices have provided a natural coordination mechanism for nongovernmental organisations and UN organisations that has at least improved the exchange of information among the response agencies.

This recent UN and NGO marriage is more a relationship of convenience arranged by the press of events and overbearing donor governments than a passionate romance. The partners remain distrustful and moody when working together and are uncomfortable with the contrived arrangement. This discomfort is not based on an absence of familiarity with one another; they have good reason to be uncomfortable. The two sets of institutions compete for scarce donor government resources, speak to quite different constituencies that are frequently hostile to each other, recruit different kinds of people to work for them and move at distinctly different speeds. One institution measures success by whether host governments are pleased, the other by whether public and private donors are happy. One is more centralised, the other highly decentralised. NGO field directors generally have much more authority over the programme and management than their UN field counterparts, a situation about which many of the latter complain a great deal. One encourages risk-taking (some would argue cow-

boyism) and informality; the other advocates regular procedures and bureaucratic propriety. There are some overlapping functional claims between UN organisations and NGOs in complex emergencies, which means turf wars over competing roles and mandates. The UN system is more feudal than integrated, while the four agencies work essentially independently of one another.

While UN agencies and NGOs may wish for a discrete divorce or at least separation, in the chaos of complex emergencies they need each other more than they may want to admit. Each brings unique mandates and potential competencies to the relief response discipline, which are essential if collapsed societies are to be assisted in restoring some measure of self-sufficiency. The challenge now is to reach a consensus about who does what best to clarify institutional mandates and limitations, and better define roles.

As a general proposition, NGOs do their relief and development work at the grassroots level, which is labour intensive from a staff perspective, both expatriate and indigenous. Thus, they tend to have large field staffs that can carry out complex operations in remote areas. Philosophically, they are committed to empowering people at the lowest level of social organisation—the family and the village—to work collectively towards the sort of social and economic services that would typically be run by municipal government; however, NGOs are sometimes inconsistent in following their own ideology. Some services succeed more than others. These include community-based health care, primary and secondary education, agricultural extension work, water and sanitation projects, small-scale enterprise typically through cooperatives or small loans, road and bridge construction, and environmental programmes, particularly reforestation. These are the same operational and sectoral skills NGOs use in their relief response operations.

These strengths are at the same time weaknesses. The greatest single endemic weakness of NGOs is their reluctance to cede managerial or programme autonomy towards the goal of greater strategic coherence or managerial efficiency. Most lack either the will or the self-discipline to surrender autonomy and integrate their work with other actors. Their focus on the village and neighbourhood has been at the expense of dealing with national problems of governance, economic reform, planning and policy—which, when done badly, can cancel out overnight any grassroots successes their programmes may have enjoyed. NGOs have a problem of scale in their field programmes; they produce patches of green in barren landscapes, patches that are small, fragile and usually unconnected to each other.

UN funds and programmes are comparatively weak in field operations, with a modest presence usually in the country capital. They work under the UN Charter with the host government in each country. Most UN assistance

then moves through host government ministries where UN organisations cultivate relationships with senior policy makers and managers. They are not heavily involved with grassroots organisations, with the possible exception of UNICEF because of the nature of its mandate. This means that the UN is much more familiar with central government bureaucracies and public services than most NGOs.

These two quite different sets of NGO and UN missions mean that when countries sink into civil war or ethnic conflict, their relief roles not unnaturally reflect their missions and unique competencies; they do what they know best. The UN tries to negotiate country-wide access in conflict areas, exemptions from customs duties for relief commodities and protection agreements for relief workers from the violence of the conflicts—essential tasks at which NGOs have little experience or success. UN agencies are reluctant to violate the sovereignty of any of the organisations' constituencies and member states. This recalcitrance is not merely a function of the UN Charter, but also the prejudice of some UN staff, who are drawn from the educated elites of developing countries and retain a suspicion of Western colonial ambitions reasserting themselves under the guise of humanitarian interventionism. Only when the Security Council has voted for resolutions permitting a violation of state sovereignty will the system respond. NGOs have fewer inhibitions, except where they are working on both sides of a conflict and risk censure or danger from the national government. In fact, NGOs have violated state sovereignty over extended periods of time in at least four civil wars in Africa, Iraq and Bosnia. This same paradigm functions with respect to advocacy on human rights and diplomatic issues: UN staff are hesitant to criticise publicly a member state during a civil war, while NGOs do this more often in the context of their normal advocacy efforts.

There have been four reform efforts over the past three years to force UN agencies to work in a more cohesive and integrated way in complex emergencies. These reforms may have the combined effect of encouraging the UN system to design a single defined strategy in each complex emergency. NGOs look, however reluctantly, to the UN or provide some measure of operational coordination during complex emergencies, and these reforms strengthen the UN's capacity for doing so.

This coordination function was the major rationale for the creation of the DHA, led by an under-secretary-general in New York, the first of these reforms. Although DHA has made some progress in fulfilling its mandate, there are intrinsic institutional limitations built into the UN system itself that make this task unenviable. Although the secretary-general (to which the under-secretary-general who heads DHA reports) has legal authority over the big four UN programmes, they do what they want in practice. Their policy, budgets, personnel and procurement are self-contained, con-

trolled internally by these independent UN organisations. Their governing boards reflect donor and recipient country politics more than those of the central bureaucracy at the secretariat or of the secretary-general himself, which are not necessarily the same thing. The field offices of UN organisations in emergencies are not necessarily responsive to the special representative of the secretary-general or of the representative of DHA who is theoretically in charge of the coordination of the UN's relief operations in an emergency. These field offices report back to their organisational headquarters and not to DHA directors in the field. Agency field directors are not deliberately uncooperative. However, the DHA representative does not have the institutional authority to resolve any disputes over policy, management and strategy among the big four in the field except by intellect or personality. This is not easily remedied in the absence of unlikely changes in the basic authority of the secretary-general.

The second of these reforms was proposed by the Nordic countries and approved by the General Assembly in 1993. The reform gives the Economic and Social Council (ECOSOC) oversight over the policy, budget and management of the big four funds and programmes. This administrative innovation may begin to put some pressure on these agencies to work more intimately together in emergency situations and force some measure of accountability when they do not. It remains to be seen whether this innovation will have salutary operational or strategic consequences.

The third reform is now being drafted within the UN secretariat. It would encourage a greater degree of information sharing, joint policy and strategy development, and overall management among the under-secretary-generals in charge of the political, military and humanitarian functions in the departments of Humanitarian Affairs, Peace-keeping Operations and Political Affairs during complex emergencies. There has been until now no formal mechanism for integrating these functions in headquarters, a situation that has not encouraged coordination among these three functions in the field. If this reform is successful, it may lead to the UN equivalent of Washington's National Security Council as a coordination and management mechanism for more coherent direction in field operations during complex humanitarian emergencies.

The fourth and perhaps most important innovation has been the creation of the Inter-Agency Standing Committee (IASC): a coordination mechanism chaired by the UN under-secretary-general for Humanitarian Affairs. Created in January 1992, it is composed of the "big four" UN organisations: the World Health Organization; the Food and Agriculture Organization (which should not have been included in the group because of its lack of expertise and operational capacity in disaster response); the ICRC (the Federation of Red Cross and Crescent Societies); and the International Organization for Migrations; and representatives of the European

and U.S. NGOs. The IASC meets quarterly, but only its principals are allowed to attend. Between meetings, working groups do much of the staff work on specific issues. This mechanism has improved the flow of information, but has been unable to design comprehensive strategies or enforce discipline in the response system. It has two major weaknesses. The donor aid agencies that fund much of this work are not members, and DHA has not had the bureaucratic power to force integration of UN organisations. It is, however, a step in the right direction.

### Conclusion

Perhaps the single most serious challenge to the international community is developing and implementing strategies for dealing with failed states or preventing their collapse in the first instance. There is by no means a consensus among donor governments, NGOs, the ICRC and UN agencies on the need for a unified strategy in each complex emergency. Some argue that a thousand flowers should bloom and every agency should do its own thing. Information is shared reluctantly if donors insist, but nothing more. Given the gap between resources and needs, resources need to be leveraged to increase their influence. Conflicting strategies and objectives, or their abysmal absence, in complex emergencies with multiple actors frequently cancel each other out. Conversely, a single coherent strategy could allow the aggregation of sufficient resources to change the course of a conflict. Without clear objectives, the managers of the international response system will never know whether they have achieved their goals. Such achievements could convince wary parliamentarians, media and public opinion in donor countries that the heavy investment of public funds in relief response serves some successful purpose other than just keeping people alive so that they can die later. Given the declining donor resources for development and reconstruction after conflicts, as many developmental components as possible need to be built into relief responses. All these arguments suggest the need for a single unified strategy. Neither NGOs nor UN agencies are in a position to impose this sort of discipline. DHA, which might logically be charged with such a mission, has neither the political clout nor the resources to inject some discipline into this unruly, feudal response system.

While the UN system and particularly DHA will argue that their coordination work in complex emergencies amounts to a strategic plan, few of the actors—UN organisations or NGOs—wish to be coordinated, much less conform to a single strategy. Coordination has many meanings in management theory. In the present context of complex emergencies, it has become a mechanism for combining the wish lists of the UN and NGO relief agencies, even if the programmes have little chance of being funded, or

even contradict each other. It can become a lowest common denominator rather than a higher standard of policy or performance. Coordination in this context is not particularly helpful. It certainly does not solve the strategy problem.

Even if all actors in the response system agreed that some unified strategy were essential, one serious impediment remains. The highly decentralised, feudal nature of the response system itself is made up of the UN system, with three central headquarters staff directorates in the secretariat (humanitarian affairs, peacekeeping operations and political affairs); the big four UN organisations (UNDP, UNICEF, WFP and UNHCR); 40 major relief NGOs; the ICRC (and the Red Cross Movement, which is an organisationally discrete entity); the military units making up international forces (all of which report back operationally to their military command structures in their home countries rather than to the UN force commander in the field); the US State Department and foreign ministries of other interested countries; and the foreign disaster response offices of donor countries (OFDA and ECHO). If one were present at the creation of this Byzantine system, one could not have created a more complex and convoluted structure.

Wildavsky and Pressman argue persuasively that the more organisational entities involved in a decision-making process, the greater the opportunity for delay, if not paralysis.<sup>12</sup> They point out that the mathematical probability of reaching a decision on a public policy issue is quite low when dozens of organisations have veto power or the power to delay a decision. Maximum feasible participation in decision making, given the lengthy list of actors, equates to operational chaos, deadly delay and inevitable failure in disaster response. It is noteworthy that the most successful humanitarian response effort in the post-Cold War era—Kurdistan in 1991—initially involved no UN organisations or UN peacekeeping forces but rather three military commands that had just fought in the Gulf War together, one donor country response office and no more than half a dozen NGOs. Limited organisational participation in this context translated into operational success.

Absent is a complete reorganisation of the relief response structure, which is politically and administratively infeasible and perhaps even undesirable from a policy perspective, but we must focus on incremental reform of the existing humanitarian order. The most feasible and salutary changes that might now be made would be to aggregate relief actors within each organisational sector. The United Nations would centralise authority for the formulation of a single UN strategy in one entity, which after all was the original concept behind DHA. NGOs would similarly organise themselves through InterAction and ICVA. Donor disaster response offices would do the same. Then a small group of representatives, one for each set of actors

(UN, NGO, ICRC, military representatives if peacekeeping troops were involved and donor aid agencies), could meet and design a strategy. This ultimately would involve a workable entity of no more than half a dozen people. Any serious attempt at aggregation would require a commitment by the actors to cede much organisational autonomy, something that is now jealously guarded. Such structural reform would require a high degree of organisational discipline and perhaps even some sanctions for organisations which refuse to participate in good faith. This reform stretches even the most expansive definition of coordination, perhaps the most abused and ill-defined word in the disaster response vocabulary. It is perhaps the best we can do under the circumstances.

The response system cannot continue to function as it does now; it is on the verge of breakdown. With the exception of military forces, all the organisations are seriously overcommitted in coping with the demands being placed on them. The rolling tide of complex emergencies is moving so rapidly that organisations have been drawn into each new major crisis before completing work on the last. The emotional toll that these emergencies are taking on relief staff cannot be calculated quantitatively, but it is significant. What is the psychological toll on staff watching the genocide in Rwanda or the atrocities in Bosnia? This has meant that NGOs and UN organisations are increasingly sending inexperienced staff to the field to run massive operations that even seasoned managers would find intimidating. This work is not a nine-to-five, Monday to Friday job. A rationalisation of the existing response system would progress some way towards relieving at least some of the organisational stress at a time when institutions are at a breaking point. More importantly, these reforms would increase, but not guarantee, the chances for designing successful strategies for managing and perhaps resolving these crises.

The marriage of convenience between NGOs and the UN system in relief responses over time may become comfortable enough that *ad hoc* arrangements will work, even if a passionate love affair never occurs. For most NGOs and most UN organisations, the marriage is a recent affair, beginning sometime over the last half decade. The organisational cultures are understanding each other better, perhaps at times even respecting each other. Given the horrific circumstances in the field in which this marriage of convenience has been consummated, problems are hardly surprising. Both sets of actors need each other, and that organisational need may be the key to the success of the relationship. The rationalisation of the design and execution of a unified strategy will increase the chances for success of the responses to complex emergencies. Nothing works better than success—however it is defined—to cement a partnership. There have been precious few successes, which has resulted in name-calling and finger-pointing among the actors. Success encourages collaboration and coopera-

tion, failure discourages it. As the system matures, the marriage of convenience may ultimately work, but it will take time and patience.

## Notes

1. See Johathan Bentall, *Disasters, Relief and the Meida*, London: Tauris, 1993; and Andrew Natsios, "International Humanitarian Response System," *Parameters*, Spring 1995, pp. 68–81.

2. See *Office of Foreign Disaster Assistance Annual Report, FY 1991*, Washington, DC: Government Printing Office, 1991, pp. 8–9. However, little of this increased funding was initiated by the Bush administration, with the exception of the Kurdish emergency, where a special appropriation was requested. Congress offered the increased funding in the face of escalating disasters frequently in special appropriations outside the budget cycle. Without this rising tide of emergencies, appropriations for development assistance would have been no higher. Development assistance has never been a particularly popular programme in the U.S. Congress, but disaster relief (cash and food) continues to enjoy broad congressional and public support across party and ideological divides. In the case of food assistance for relief, much of the additional resources for complex emergencies has come from the Section 416 programme of the U.S. Department of Agriculture, food aid which would probably not have been programmed for development purposes. With the depletion of Section 416, surplus stocks in FY 1993 and changes in the agricultural price supports that ensure that this depletion will not be restocked, increased food aid for emergencies will undoubtedly come at the expense of food for development under Title II of the Office of Food for Peace. The World Food Programme's (WFP) relief and development programmes have traditionally received equal shares of resources until the late 1980s when an appreciable shift began. At present, relief receives two-thirds of total resources, while the rest is programmed to development. This increased food aid for relief has not resulted in an actual decline in food aid for development; relief sources pledged by donor governments have increased markedly.

3. See Department of Humanitarian Affairs rankings of ODC countries' response to consolidated humanitarian appeals.

4. See AID 1994 Annual Report, entitled *Voluntary Foreign Aid Programs, Bureau for Humanitarian Response*, Washington, DC: Government Printing Office, 1994, pp. 70–97.

5. I visited the UNHCR headquarters at Goma in November 1994 and counted the mailboxes.

6. This figure is an estimate based on the grant-making experience of OFDA and the Office of Food for Peace. Four NGOs (CARE, Catholic Relief Services, World Vision and the Adventist Development and Relief Agency) received 87% of all NGO food aid grants for relief and development under Title II of P.L. 480. See *Office of Foreign Disaster Assistance rankings of cash grants to NGOs for FY 1993*.

7. See Mary Anderson & Peter Woodrow, *Rising From the Ashes: Disaster Response to Development*, Boulder, CO: Westview Press, 1989.

8. See Refugee Policy Group, *Humanitarian Aid in Somalia: The Role of the Office of U.S. Foreign Disaster Assistance (OFDA) 1990–1994*, Washington, DC: Refugee Policy Group, November 1994, p. 27.

Andrew S. Natsios

405

9. *Voluntary Foreign Aid Programs*, pp. 70–97.
10. UN High Commissioner for Refugees, *Refugees*, 97, 1994, p. 8. This issue is devoted to NGOs and UNHCR, with particular emphasis on PARinAC.
11. See International Committee of the Red Cross, *ICRC 1993 Annual Report*, Geneva; ICRC, 1993, pp. 273, 277.
12. Aaron Wildavsky & Jeffrey Pressman, *Implementation*, Berkeley, CA: University of California Press, 1979, pp. 105–108, 147.

## **פרק 7**

# **זכויות האדם במשפט החקלאי האמריקני**

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## 12

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### An overview\*

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*Jack Donnelly*

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The preceding chapters have surveyed the international human rights policies of several diverse countries. Although the selection is not entirely representative – in particular, countries that even today largely overlook human rights in their foreign policy have been ignored, for obvious reasons – it is sufficiently broad to allow some preliminary conclusions about the state of human rights in post–Cold War foreign policy. Many states in the post–Cold War world include respect for internationally recognized human rights as part of their national self-images and as an objective in their foreign policies. Few, however, make more than occasional, modest sacrifices of other foreign policy interests in the name of human rights. In this concluding chapter, I will try to draw attention to both the reality and the limits of states' concern with international human rights.

Realists, who still dominate the intellectual and policy-making mainstream in most countries, properly emphasize the characteristic unwillingness of states to sacrifice material interests. Nonetheless, the fact that human rights are a bounded or secondary interest makes that interest no less real than those with higher priority. If the impact of limited interests is limited, that is still an impact. Even where human rights do not decisively tip the decision-making balance, they still may have some weight. And when a decision does hang in the balance, even the small additional weight of human rights considerations may prove to be decisive in determining national policy.

Human rights advocates properly emphasize the growing prominence

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\* Donnelly, Jack, "An Overview", David Forsythe (ed.), *Human Rights and Comparative Foreign Policy*, United Nations University Press, 2000, pp. 310-334.

of human rights in the foreign policy rhetoric, and even practice, of most states. Human rights today have become firmly entrenched on the foreign policy agendas of many, perhaps even most, states. The clear influence of human rights norms and values, as well as the importance that states give to verbal and symbolic dimensions of foreign policy, suggest further limitations in realist theories. Many states simply do not define their national interests entirely in terms of power, or even material interests.

Nonetheless, although in the late 1990s more and more states talk about human rights, probably with greater sincerity than in the past, few consistently do much more. And no state places human rights at the top of its agenda. In few are international human rights even near the top. This concluding chapter attempts to expand on this summary account of limited (but real) progress and impact, drawing heavily on the preceding case-studies. In addition, it highlights important elements of diversity in the international human rights policies and practices of contemporary states.

## I. Human rights and national identity

This volume has argued that for states, as for individuals, what one does is shaped by who one is. National interests are not given simply by objective factors such as geography, history, or position in the balance of power. Furthermore, national identity, like personal identity, is significantly a matter of ideals and aspirations. The national interest is a matter of what a state values, which is determined in part by how that state sees itself, both nationally and internationally. The international human rights policies of most states are in significant measure identity based; that is, they reflect the extent to which (national and international) human rights values have shaped or re-shaped understandings of who they are and what they value. The clear evidence of the preceding chapters is that many – almost certainly most – states today identify more strongly with internationally recognized human rights than even a decade, let alone half a century, ago.

### *Alternative identities*

The characteristic identification of late-twentieth-century states with human rights, however, must be seen in historical context. Iran, whose reluctance to identify itself with human rights seems so anomalous today, is much closer to the cross-cultural and trans-historical norm. Human rights have become central to the self-images of most states only in the past several decades – in many cases, only in the past decade or two.

## 312 AN OVERVIEW

Claims of superior civilization – for example, Roman, Christian, Muslim, European, and Chinese – have been a much more common basis for foreign policy than identification with a common humanity. In Western and non-Western societies alike, the right to rule has more often rested on a divine mandate, or simply superior power, than on popular sovereignty. Tradition and the demands of social order have justified many more governments than the rights of the citizenry have. The rights of a few, determined by birth, wealth, power, religion, virtue, age, race, or ethnicity, usually have been seen as superior to the rights of many or all.

Almost all societies have believed that rulers ought to treat their subjects fairly and seek to realize their interests. Few, however, have recognized *rights* of subjects (citizens) that can be exercised against their rulers. For example, Qing emperors and medieval European princes recognized a divinely ordained duty to rule justly. This heavenly obligation, however, was not accompanied by rights of the subjects to enjoy such rule. With such internal rights conceptions, it was inconceivable that human rights would have a place in international relations.

Even where rights of the ruled have been recognized, they have typically been seen as special, rather than general or universal, rights. For example, England's Magna Carta arose from a struggle between the king and the nobility in which the rights of the ordinary Englishman were never even considered. Even Britain's "Glorious Revolution" of 1688 was only about the rights of Englishmen. As Edmund Burke a century later noted so forcefully, these are very different from the rights of man.<sup>1</sup>

### *The rise of human rights identities*

The United States was the first country to place natural rights – the rights of man, or what we today more inclusively call human rights – at the heart of its national self-definition.<sup>2</sup> Many Americans have attributed this to superior virtue. Others, more plausibly, have pointed to the relatively flexible class structure made possible by the lack of a hereditary nobility, by massive immigration, and by the vast supply of "vacant" land. We should also note that Americans were among the first to have the language of natural rights readily available in their political struggles.<sup>3</sup> Soon after, inspired by both the general idea and the American example, others, beginning in France in 1789, advanced similar claims of rights.

Human rights were part of the founding self-image of the states of Central and South America, when they threw off Spanish (and Portuguese) colonial rule. But the tortured fate of human rights in most of Latin America since independence – Costa Rica over the past half century has been the exception that proves the rule – makes India a much

more interesting case. Indian independence in 1947 gave considerable additional impetus to the post–Second World War surge of decolonization. And, as Sanjoy Banarjee emphasizes in chapter 7, India's identification with the human rights values of self-determination and racial equality was (along with its relatively great power) central to its leadership efforts in the third world during the Cold War era.

Countries without human rights in their founding myths have in recent decades increasingly incorporated human rights into their national self-conceptions. In South Africa, for example, human rights became a central part of the national self-image through a revolutionary (although not especially violent) political transformation that brought the end of apartheid. Russia and Hungary might be interpreted in the same light.<sup>4</sup>

The United Kingdom and the Netherlands represent the path of evolutionary transformation. Although one can point to no decisive turning point, by the end of the Second World War both countries had come to identify themselves with the cause of universal human rights – at least at home. And once they had dismantled their colonial empires, in part through the influence of human rights ideas (in both metropolitan and colonized political communities), human rights emerged as an increasingly prominent part of national identity and foreign policy.

Dutch relations with Indonesia provide a striking example. Immediately after the Second World War, the Netherlands fought to maintain colonial rule. In the 1960s, massive Indonesian human rights violations were met by little more than muted verbal condemnation. By the early 1990s, however, as Peter Baehr shows in chapter 3, the Netherlands was willing to accept modest but real economic and political costs, and face the stinging charge of neo-colonialism, to press concerns over Indonesian human rights violations.

### *National and international dimensions*

In all these cases, national and international ideas and values interacted dynamically. The international dimension has been perhaps most striking in cases of revolutionary transformation, going back at least to Tom Paine's pamphleteering on behalf of the American and French revolutions.

In India, Gandhi learned from his earlier South African experiences and, like many later nationalist leaders in Asia and Africa, effectively used the “Western” language of self-determination and equal rights against colonialism. The struggle against apartheid in South Africa had an important international dimension that ultimately changed the foreign policies of most Western countries, turning even American conservatives

such as Newt Gingrich against support for continued white rule. Beyond any material costs associated with economic sanctions, this weakened the sense of legitimacy and resolve of many white South Africans.

In the Soviet bloc, the Helsinki Final Act and the follow-up meetings of the Conference on Security and Cooperation in Europe (CSCE) provided important support for human rights activists, especially in Russia and Czechoslovakia, and contributed subtly but significantly to the delegitimation of totalitarian rule.<sup>5</sup> Gábor Kardos in chapter 9 even suggests that the most important human rights activity of post-Soviet regimes has been to incorporate international norms into national law and practice.

The international dimension is also clear where human rights have been incorporated into national self-images by more evolutionary means. In most of Western Europe, participation in the Council of Europe's regional human rights regime has placed national rights in a broader international human rights perspective. Britain's decision in 1997 to incorporate the European Convention directly into British law is a striking example of the inter-penetration of national and international rights conceptions. A very different kind of international impetus was provided, in Europe and elsewhere, by Jimmy Carter's 1977 decision to make human rights an explicit priority in American foreign policy. It is no coincidence, for example, that the 1979 Dutch White Paper followed closely on the US example.

International human rights ideas have penetrated even Iran. As Zachary Karabell indicates in chapter 8, Iranian authorities and associated scholars, in addition to criticizing international human rights norms, have argued that these values are both presfigured by and largely incorporated in Islamic law. We should also note that the Iranian revolution that overthrew the Shah was a broad-based social movement that included human rights advocates who have been forced underground, but not eliminated. One might even suggest that recent "reformers" within the Iranian government, and their (apparently quite numerous) supporters in Iranian society, have been at least indirectly influenced by international human rights norms.

Independent human rights activists with prominent transnational connections – for example, Aung San Suu Kyi in Burma and Jose Ramos-Horta in East Timor – are an increasingly prominent feature of the political landscape. In addition, ordinary citizens have more and more come to frame their political and economic aspirations in terms of respect for human rights. Such individuals, and the groups that they represent and participate in, are nodes for an increasingly transnational process of normative transformation that is reshaping notions of political legitimacy and national identity – and, through these mechanisms, national foreign policies.

## II. Self and other, inside and outside

Human rights are held by all human beings, regardless of who or where they are. Thus authoritative international documents characteristically use formulations such as “Everyone has the right” and “No one shall be.” To identify with human rights is to identify with all human beings, regardless of nationality (or other status). To identify with human rights is to deny (at least some) fundamental moral differences between ourselves and others.

Talk of national identities, however, underscores the continuing power of particularistic, differentiating self-images. In addition to seeing ourselves as human beings, and thus part of a cosmopolitan moral community, we see ourselves as citizens – Indians, Costa Ricans, Hungarians, South Africans, Americans – as well as members of diverse ascriptive and voluntary groups, such as women, Asians, Europeans, Muslims, Catholics, workers, teachers, electricians, farmers, fathers, sisters, children, football fans, hackers, environmentalists, and human rights activists.

Although national identities may be neither as flexible nor as varied as individual identities, they have multiple elements, which we have seen may change over time. No country’s national self-image is exhausted by a commitment to human rights. For example, although Baehr, with little exaggeration, calls human rights a “sacred subject” in contemporary Dutch policy, he also emphasizes the continuing importance of a competing mercantile national self-image. Sergei Chugrov, in chapter 6 on the Russian Federation, argues for a deep cultural split that leads to a simultaneous identification with and rejection of “Western” human rights. In this section, I will explore some of this multiplicity by examining dominant conceptions of the boundaries between self and other and between inside and outside.

### *Nationalist and internationalist identities*

Are nationals and foreigners, “self” and “other,” seen as fundamentally different or alike? Imagine an ideal-type continuum. One end point would be marked by a purely national identity that denies any significant similarities between nationals and foreigners. Nazi Germany perhaps approximates this nationalist extreme. The distinction between civilized and barbarian peoples, drawn for example by classical Greeks, Qing Chinese, and nineteenth-century Europeans, also lies toward the nationalist end of the continuum.<sup>6</sup> The other end point would be a purely cosmopolitan identity that completely denies the moral or political significance of national (and other) differences. Religious figures such as Jesus

### **316 AN OVERVIEW**

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Christ, Mohammed, and the Buddha provide the clearest examples. Movements, both religious and secular, that profess and seek to spread a universal model of social organization and values provide an approximation in political practice.

Most of the countries considered in this volume fall near the middle of this continuum. The persisting centrality of national (and subnational) identities precludes a deeply cosmopolitan self-image in all contemporary states. But extreme isolationist nationalism is rare. Therefore, I will refer to (relatively) nationalist and (relatively) internationalist self-images, which help to shape states' choices of which rights receive special foreign policy attention, in which areas of the world.

Iran presents by far the least internationalist human rights vision among the countries surveyed in this volume, and one of the least internationalist (along with countries such as Burma and Saudi Arabia) in the contemporary world. In its foreign policy, Iran identifies primarily with co-religionists. Iran is committed to what it sees as universal (Islamic) values, but in a particularistic way that largely ignores the rights and interests of foreign non-Muslims. Difference rather than similarity is emphasized in dealing with what the rest of the world – and sometimes even Iran, as in the case of Bosnian Muslims – calls human rights issues.

Russia has endorsed the language of internationally recognized human rights. Nonetheless, most of post-Soviet Russia's bilateral human rights diplomacy, as Chugrov notes, has been directed toward Russian minorities in the "near abroad." Although minority rights certainly are important human rights, this near-exclusive focus on discrimination against co-nationals represents a self-identification that emphasizes the difference between self – Russians or, more broadly, Slavs (e.g. in Bosnia) – and other.

India's recent emphasis on issues of intolerance and terrorism is in some ways similar. Human rights issues tend to be viewed through the lens of national and regional concerns: communal strife throughout the subcontinent, plus the volatile combination of political and communal conflict in Kashmir and Sri Lanka. But India's focus has been more on a class of violations than on the particular characteristics of those whose rights are violated. Furthermore, the traditional Indian emphasis on self-determination and racial equality has involved a substantially more internationalist commitment to common values shared despite other, often dramatic, differences. Although less nationalist than Russia, India's international human rights policy has largely been restricted to these rather narrow sets of rights. Its much broader domestic commitment to human rights has not been significantly expressed in its international human rights diplomacy.

The orientation of the Netherlands is more fully internationalist,

involving a fairly comprehensive foreign policy commitment to *international* human rights. Although focusing on violent abuses of rights to personal security in prominent bilateral human rights disputes (Indonesia and Surinam), Dutch international human rights policy has stressed both civil and political rights and economic, social, and cultural rights. For example, development assistance is seen as an integral part of Dutch international human rights policy, in contrast to the largely tactical linkage characteristic of US policy. In addition, although former Dutch colonies do receive special consideration, and commercial interests are hardly ignored, the bulk of Holland's development assistance goes to countries chosen on the basis of shared values, need, and geographical diversity – in sharp contrast to, for example, France and the United States.

The United States lies closer to India than to the Netherlands. The American definition of human rights, which denigrates economic and social rights, is highly selective. Nonetheless, the American focus on civil and political rights is somewhat broader than that of India. And the global scope of American human rights initiatives, especially in the post-Cold War world, involves an unusually close identification of national and international human rights interests.<sup>7</sup>

### *Openness to international society*

States differ not only in the ways in which they associate themselves with human rights violations and struggles abroad, but also in their openness to international human rights pressures.<sup>8</sup> The Netherlands lies at the internationalist end of this spectrum as well. Holland freely submits itself not only to regional and international human rights scrutiny but to multilateral guidance. For example, Dutch non-discrimination law has been substantially reshaped through the Council of Europe's regional human rights regime, individual petitions to the Human Rights Committee, and decisions by the European Union's Commission and Court of Justice. In the Netherlands, the commitment to *international* human rights is for local as well as foreign consumption.

The United States, by contrast, is extremely reluctant to open itself to international scrutiny – although somewhat less reluctant than even 20 years ago. For example, when the United States finally ratified the International Covenant on Civil and Political Rights in 1992, it refused to accede to the (first) Optional Protocol, which authorizes the Human Rights Committee to receive individual petitions. More recently, the United States has resisted allowing Americans to be subjected to the independent authority of the proposed international criminal tribunal.

Iran's attitude is even more hostile to international scrutiny, as reflected

## 318 AN OVERVIEW

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in its paranoid, conspiratorial vision of American hegemony. India's more moderate sensitivity to outside human rights pressure is much closer to that of the United States. Although a leader in aggressive international human rights campaigns against apartheid, racism, and colonialism, India has consistently rebuffed international campaigns directed against its own practices. And, like the United States, it has refused to participate in the Optional Protocol's system of individual communications.<sup>9</sup>

Banerjee, in discussing this pattern of Indian foreign policy, distinguishes between assertive and defensive international human rights diplomacy. This formulation usefully points to a characteristic style of "addressing" international human rights concerns, namely, ignoring them or denying their legitimacy. But when he writes of India and China undertaking "joint defensive diplomacy on human rights, each remaining silent about the other's human rights violations,"<sup>10</sup> a decision to ignore human rights violations (or subordinate them to other national interests) is perversely described as a defensive human rights policy.

Targets of bilateral and multilateral international human rights initiatives do increasingly face the need to respond. Political alignment and appeals to sovereignty and self-determination provide less insulation than during the Cold War. Responses, however, can be defensive and nationalist, as is typical of countries such as India, Iran, and the United States, or open and internationalist, as is often the case in the Netherlands and Costa Rica.

India and the United States nonetheless remind us that nationalist defensiveness need not reflect a poor human rights record. India has for 50 years had one of the better domestic human rights records in the third world. Likewise, US opposition to international scrutiny is more principled than evasive, reflecting a deeply rooted sense of "exceptionalism" and an unusually stringent conception of sovereignty.

In discussing international norms, it is essential to recall that, in addition to human rights, sovereignty and non-intervention are vital norms of international society. All states, in fact, have a deeper and more enthusiastic commitment to sovereignty than to human rights.

We must not overestimate either human rights or sovereignty in their characteristic struggles. Although somewhat less jealous of their sovereignty than the United States or India, even Costa Rica and the Netherlands are not even close to giving it up even in the limited domain of human rights. For example, Costa Rica, when faced with an adverse ruling on the rights of journalists from the Inter-American Court of Human Rights in an advisory opinion that it had itself requested, simply ignored the Court. But the centrality of sovereignty to all states should not obscure the fact that they have very different understandings of its appropriate scope and implications, which reflect relatively nationalist

or internationalist self-images. The Netherlands, for example, sees itself more thoroughly as part of international (and European regional) society than does the United States; it participates in international society less selectively and less conditionally. The Netherlands is more willing to accept awkward or inconvenient (international and regional) norms and obligations, especially when there is a general commitment to a particular field of international activity (as in the case of human rights). As Baehr reminds us, we should not idealize Dutch policy. Nonetheless, Dutch international human rights policy rests on a comparatively deep commitment to international human rights norms and full participation in global and regional human rights regimes. The Dutch often see the range of sovereign prerogative as significantly limited by international human rights law. India and the United States, in contrast, see a greater tension between sovereignty and international human rights – at least when it comes to their own sovereignty. Not just on human rights, but in most other issue areas as well, India and the United States are very reluctant to accept the idea that they should bring their own divergent practices into conformity with international norms. They are much more likely to remind others of their sovereign right to pursue their own interests, as they see them, even when those interests conflict with international norms.

It is worth re-emphasizing that this has little to do with widespread systematic deviations from international norms. India, Costa Rica, and the Netherlands have few significant substantive disagreements about international human rights norms. The United States asserts its sovereign right not to be scrutinized almost as forcefully for civil and political rights, where normative differences are minor, as for economic and social rights. Openness to international scrutiny is a matter of national values and attitudes that are in principle (and in these cases in practice) independent of the substance of national human rights ideas and practices.

### *National attitudes towards international human rights*

The two dimensions of attitudinal variation discussed above can be combined in figure 12.1. This diagram maps the space occupied by the countries considered in this volume, which in this regard accurately represent the range of international attitudes (although the sample over-represents the top-right quadrant). The vertical axis, however, is severely truncated from what is theoretically possible. Figure 12.1 excludes cosmopolitan conceptions, of which there are no examples among contemporary states. Even within the realm of internationalist (as opposed to cosmopolitan) openness, considerable vacant but theoretically possible space at the top is not represented.

I want to draw attention to three features highlighted by figure 12.1.

## 320 AN OVERVIEW

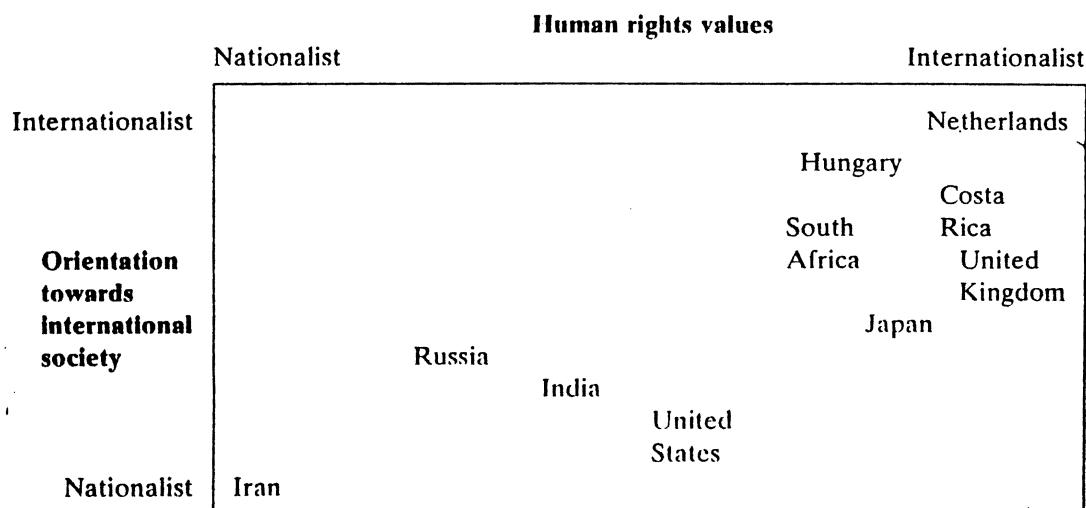


Fig. 12.1 National attitudes towards international human rights

First, although many states today accept substantial international monitoring, even the most internationalist reserve a near-exclusive national right to implement and enforce internationally recognized human rights. Even where international monitoring is accepted, states reserve a right to implement the findings of supervisory committees. The global human rights regime is largely a system of national implementation of international human rights norms. (The European regional regime is the exception that proves the rule. And even the European Court of Human Rights relies ultimately on the willingness of states to give national legal force to its findings.)

Second, the fact that countries are arrayed along a single diagonal reflects the tendency for internationalist (or nationalist) orientations to apply both when adopting international norms and when deciding whether or not to open oneself to international monitoring. Although states are at liberty to endorse international norms but assert a sovereign right not to be scrutinized by other states or multilateral bodies – as many European states did in the 1950s – adopting more internationalist human rights norms seems to exert a strong pull toward greater openness to international scrutiny.

Third, were we to compare the distributions 25 and 50 years ago, for both our subset of case-study countries and the full universe of states, we would see a clear progression towards greater internationalism on both dimensions. This is another way of noting that human rights have become a much less controversial and more firmly established subject on international agendas.

### III. The intensity of human rights commitments

International human rights policies are (at most) one part of national foreign policies, which all states consider to be driven primarily by the pursuit of the *national* interest. Therefore, unless we implausibly assume that international human rights take priority over all other national interests, human rights must sometimes be sacrificed to other interests and values. How often and in what circumstances are states characteristically willing to subordinate international human rights concerns? *How much* do states value international human rights? Answers to these questions are less encouraging (from the viewpoint of human rights advocates), and considerably less internationalist, than the analysis so far might suggest.

#### *Tradeoffs*

Consider another ideal-type continuum. A state might in principle put international human rights at the bottom of its priorities (unwilling to sacrifice any other interest in the pursuit of international human rights objectives) or at the very top (willing to subordinate all other interests that conflict with its international human rights concerns). The chapters in this volume suggest that most contemporary states lie toward the minimalist edge of this continuum. Human rights typically (but not always) lose out in conflicts with most (but not all) competing foreign policy objectives.

Imagine a simple foreign policy model with four interests: security, economic, human rights, and other. The chapters above provide no examples of states sacrificing significant perceived national security interests for human rights. Security conflicts may have somewhat moderated in number and intensity in many parts of the globe in the post–Cold War era. Therefore, human rights may be less often “trumped” by national security. But this is a change in the frequency of conflicts, not in the relative rankings of international human rights and national security.<sup>11</sup>

The chapters above do show states occasionally giving human rights priority over economic interests. For example, although Baehr emphasizes the limits of Dutch sanctions against Indonesia in the early 1990s, the Netherlands did accept modest but real economic (and political) costs. Such behaviour, however, is the exception rather than the rule, even for the Dutch.

International responses to the 1989 Tiananmen Square massacre illustrate the range of responses characteristic even in high-profile cases.<sup>12</sup> Most states that had substantial economic relations with China did adopt aid, trade, or investment sanctions. Japan did so with considerable reluc-

## 322 AN OVERVIEW

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tance, great inconsistency, and for the briefest possible period – yet with real costs to Japanese firms. The United States, by contrast, responded with sufficient vigour that economic sanctions were the central issue in US–Chinese relations until 1994, and a major irritant into 1997. The Netherlands and the United Kingdom took something of a middle course, in the context of a broader European response.

India, however, remained largely silent and thus indirectly, but intentionally, supportive of China. Russia, which also shares a border with China, largely restricted itself to verbal criticism. Japan's reluctance to pursue sanctions had important security as well as economic dimensions. Even the United States never consistently applied the military and political sanctions it announced.<sup>13</sup> Tiananmen thus illustrates both the characteristic subordination of human rights to national security and the occasional willingness of states to subordinate economic interests to human rights.

The residual category of “other interests” is so broad that little of general interest can be said. It is worth noting, though, that in most countries human rights could be usefully separated from the “other” category only relatively recently. And in most countries today there are more interests in the “other” category than human rights (at least occasionally) effectively compete with than even 10 years ago.

### *Choice of means*

So far we have measured the intensity of states' commitment to human rights by the interests they are willing to subordinate. We might call this the foreign policy opportunity cost of human rights initiatives. Intensity of commitment can also be measured by the direct costs a state is willing to bear, as seen in the means characteristically used to pursue international human rights objectives. When other interests do not override international human rights, how far are states willing to go?

Although there is a close relationship between these two measures of intensity of commitment – the higher the ranking of an interest, the more likely a state is to use strong means to realize it – the analytical distinction is sometimes useful. For example, even if human rights remain below security concerns, we still need to know which means a state is typically willing to use when security interests do not preclude action. To take an example from a different issue area, one of the striking changes in international relations over the past century has been the decline in the willingness of states to use force on behalf of economic interests, despite the fact that economic interests have not dropped significantly on the foreign policy agendas of many, if any, states.

International human rights interests are almost never pursued with

military force. Only when faced with genocide or severe humanitarian emergencies have states used force to pursue international human rights bilaterally (e.g. India in East Pakistan [Bangladesh]) or multilaterally (e.g. Rwanda, Bosnia, Somalia).<sup>14</sup> Furthermore, over the past half-century, most such massive and severe emergencies have not mobilized international armed force. Even in the post-Cold War era, forceful responses have not been universal. Consider, for example, the refusal to use force to halt the genocidal civil war in the Sudan. We should also emphasize that even a country like the Netherlands is reluctant to risk the lives of Dutch soldiers when it does participate in peacekeeping operations, such as those in Bosnia.

Moving down the ladder of strength of means we find occasional uses of trade and investment sanctions, most notably in the international campaign against apartheid in South Africa in the 1980s. But strong economic sanctions, as we have already noted, remain exceptional. States will sometimes pay more in money than in lives, but not all that often.

Aid is more regularly used to pursue international human rights objectives. Although aggregate data show only a modest relationship between foreign aid allocations and the level of respect for human rights in recipient countries,<sup>15</sup> aid allocations have in many particular instances been altered in response to human rights violations. Although the United States provides the greatest number of examples, the Netherlands and, to a lesser extent, the United Kingdom have also used aid regularly in the past decade or two to attempt to influence international human rights practices. Even Japan, which has historically been extremely reticent about linking aid and human rights, has included human rights considerations (at least formally) in allocating development assistance since 1992.

We should note, however, that aid and (especially) trade have been used primarily punitively to pursue international human rights objectives. The Netherlands (along with so-called “like-minded countries,” such as Sweden, Norway, and Canada) has made a fairly concerted effort over the past two decades to direct aid to rights-protective regimes, not just away from rights-abusive regimes.<sup>16</sup> In recent years, other countries have begun to give greater consideration to aid as a positive instrument in the pursuit of human rights – an inducement and reward, rather than just a punishing sanction.<sup>17</sup> Nonetheless, most states remain much more willing to use aid to punish bad human rights performance – and even then with little consistency – than to reward good performance.<sup>18</sup>

Verbal rather than material sanctions and inducements provide the heart of most international human rights initiatives. Condemnations of violations and praise for good or improved performance are the most common means used by all states to further their international human

## 324 AN OVERVIEW

rights objectives. Although words may be cheap, rarely are they free, especially in the world of diplomacy. In any case, verbal policy is an important and appropriate means for pursuing human rights, like other, interests. Furthermore, as I will argue in more detail below, verbal policy may help to alter or maintain the international normative environment within which states act.

States also regularly engage in symbolic action such as recalling ambassadors, suspending educational, cultural, or sporting exchanges, endorsing international investigations, and voting for condemnatory resolutions in international organizations. Even aid sanctions are often largely symbolic. For example, Dutch aid to Indonesia in the early 1990s was less than 2 per cent of the world total, and Japan responded to Holland's cuts by increasing its own assistance to Indonesia.

A growing number of states also provide direct and indirect support to local human rights activists and non-governmental organizations doing human-rights-related work. Such support may cross over from symbolic to material action. Even here, though, the material action is relatively indirect, channelled through local human rights advocates, rather than direct bilateral or multilateral action against another state.

In summary, we can say that international human rights initiatives are almost always subordinated to security interests, and usually subordinated to economic interests as well. Although virtually all foreign policy instruments have been used by states in pursuing international human rights objectives, from private diplomatic initiatives up to the use of force, the means used are usually verbal and symbolic. Nonetheless, international human rights initiatives are an increasingly common part of the foreign policy of most states. When human rights concerns coordinate rather than compete with other foreign policy interests – for example, in India's opposition to genocidal massacres in East Pakistan (Bangladesh) or US policy toward post-Tiananmen China – relatively forceful responses become possible. And the case of Rwanda, however tardy and weak the international response, suggests that in at least some extreme cases states will agree to use force to protect internationally recognized human rights even in the absence of supporting security or economic interests.<sup>19</sup>

#### IV. Evaluating international human rights policies

Most states in the contemporary world are more concerned with human rights at home than abroad. Liberal democratic regimes in particular regularly tolerate international human rights practices they would not even consider accepting nationally. Although cosmopolitan moralists may

condemn this “inconsistency,” it is an inescapable consequence of a world of sovereign states. States have a special legal and political responsibility for the rights and interests of their own nationals. National foreign policies are *supposed* to treat the interests of nationals and foreigners differently.

Not all differences, however, will be acceptable to states that have included international human rights among their foreign policy interests. Which are deemed acceptable and which are not raises important issues of moral and policy consistency that may influence the efficacy of international human rights policies.

### *The purposes of human rights policies*

Before we can say much about the consistency (or efficacy) of states’ international human rights policies, we need to know what they are attempting to achieve. The “obvious” goal of altering the behaviour of the country targeted by a particular initiative requires little comment. But many, perhaps most, international human rights initiatives have other purposes as well. Therefore, they cannot be evaluated simply – perhaps not even primarily – by success or failure in altering the human rights practices of targeted states.

An immediate and tangible impact need not even be among the goals of well-designed human rights initiatives. For example, India did not expect to change South African policy by supporting UN resolutions condemning apartheid. Holland did not imagine that suspending aid to Indonesia would alter the policies of the Suharto regime. No reasonable American expected that sanctions imposed after the Tiananmen massacre would establish democracy in China, or even return the country to the level of political openness it had reached in the late spring of 1989.

In these examples there was some hope of contributing to eventual changes. But, even here, the kinds of changes aimed for are varied. Deterring similar violations in the future may justify pursuing initiatives for which a state expects no tangible impact in the target country. A level of pressure that cannot be expected to alter behaviour in the immediate target may have a tangible impact on a weaker or more dependent country. Even in the immediate target, it may reduce or forestall repeat violations. Having previously been called to task, even states that refuse to remedy past abuses may be willing to moderate, or even eliminate, future abuses. International pressures on Chile and Argentina in the 1970s and El Salvador and Guatemala in the 1980s suggest the possibility of moderating future violations even by relatively recalcitrant regimes.

Even where there is no long-run expectation of altering behaviour in the target state, international human rights initiatives may reasonably be

## 326 AN OVERVIEW

undertaken. For example, the aim may be to “punish” rather than to “reform.” Even if competing interests or limited resources preclude altering behaviour in the target, states may reasonably choose to impose costs on those who violate internationally recognized human rights. Given the reluctance of states to use strong means on behalf of international human rights, such “punishment” most often is sadly, even ludicrously, weak. Nonetheless, imposing some costs on rights-abusive regimes is usually preferable to imposing none.

A more diffuse objective of international human rights initiatives may be to contribute to maintaining or transforming the international normative environment. Rather than seek to alter particular practices in any country, the aim may be to influence dominant conceptions of political legitimacy. Post-communist governments in Hungary, Poland, and Czechoslovakia, for example, saw themselves as beneficiaries of such a normative transformation, and their enthusiasm for strengthening the Organization for Security and Cooperation in Europe reflected their desire to contribute to its maintenance. American and European pressures for multi-party elections, especially since the end of the Cold War, have often been directed at influencing broader standards of legitimacy, beyond any impact they may (or may not) have in the immediate target country.

The “precedents” of international human rights policies, however, may have an internal rather than an external target. Their aim may be to establish or support a pattern, or future stream, of foreign policy initiatives. When the Carter administration suspended US aid to Guatemala in 1977, the purpose was at least as much to set a new precedent for American policy as it was to alter Guatemalan human rights practices. Baehr suggests that the precedent established by strong Dutch sanctions against Surinam in the 1980s helped to tip the balance in favour of sanctions against Indonesia in the 1990s. Sanctions that had little discernible short- or medium-term effect in Paramaribo seem to have had a significant medium- and long-term impact in The Hague.<sup>20</sup>

Finally, irrespective of any immediate or long-term impact – direct, indirect, or diffuse; internal or external – states may undertake international human rights initiatives because they are legally, politically, or morally demanded. The US Congress has required the President to impose sanctions for certain human rights violations, perhaps most notably in the Jackson–Vanik Amendment’s requirement that trade preferences be denied to countries that restrict emigration. Internal (and even international) political pressure may leave foreign policy decision-makers little choice but to act, as illustrated by both American and Japanese sanctions against China after Tiananmen. Occasionally, a response to international human rights violations is even seen by states as morally

demanded, irrespective of legal or political pressure. Rwanda and Somalia seem to have fallen into this category in the foreign policies of a number of states.

Hard as it may be for realists to comprehend, states sometimes find it important to stand up for what they value, independent of any other pressures or expected impact, at home or abroad. Such symbolic acts of “witness” – acting out of respect for and to give voice to one’s values – may influence the international normative environment, have a long-run impact on the target (or another) state’s human rights practices, or sustain a desirable pattern of foreign policy practice. But even if they do not, they may be demanded for their own sake.

We cannot understand many international human rights initiatives without considering the fact that they are perceived as morally desirable, perhaps even demanded. As we have seen, states are much more likely to “do the right thing” when the costs are low or other interests provide additional incentives. Nonetheless, international human rights initiatives occasionally are undertaken primarily because they are right. And even when self-interest is a large part of the motivation, international human rights initiatives often do reflect a solidaristic identification with the rights or well-being of foreigners.

### *Selectivity and consistency*

This appeal to morality, however, raises the tawdry image of trading moral values off against material interests. If human rights are moral values, how can they be appropriately or “consistently” sacrificed to non-moral interests? How can we “put a price” on life, liberty, and suffering?

Such questions rest on a contentious conception of morality. For example, utilitarianism and other consequentialist moral theories see morality as centrally concerned with calculating relative costs and benefits, rather than rigidly following a moral law. But even if we conceive of morality as a matter of categorical imperatives, challenges to the “consistency” of international human rights policies often confuse foreign policy and moral decision-making.

Realists rightly remind us that foreign policy decision-makers are required by their office to take into account the national interest, which is (at most) only partly defined by morality. Moral perfectionism is an inappropriate standard for foreign policy. Many realists, however, go too far when they categorically denigrate morality in foreign policy. The national interest may – and today for many states does – include a moral dimension. Moral interests are no crazier an idea than economic or security interests. The task of the statesman is to balance competing national interests, whatever their character.

## 328 AN OVERVIEW

Nonetheless, the realist tendency to contrast material and moral interests does point to a significant problem. The differences between human rights and, say, national security seem to be matters of quality, not mere quantity. How then are we to treat like cases alike – consistently – in the absence of a common metric? To pursue the balancing metaphor, how much does one unit of national security (whatever that might mean) weigh relative to a unit of human rights?

But is the problem all that much more severe for human rights than for, say, economic interests? As I am writing this, controversy is raging over Chinese launches of American satellites. Beyond partisan politics, of which there is much, the dispute involves fundamental disagreements about the relative weights that ought to be assigned to the security and economic interests involved. Such disputes seem very similar to those over the place of human rights in Sino-American relations.

Consider also the choice of means. How many American (or Pakistani, or Canadian) lives was it worth to save hundreds of thousands of Somalis from starvation in 1992? To save a smaller number of Somalis from factional warfare among their leaders in 1993? There is no apparent qualitative difference between such calculations and those involved in, for example, the Gulf War. How many American (or British, or Dutch) soldiers was it worth to expel Iraq from Kuwait? To overthrow Saddam Hussein? The problem of competing incommensurable interests is a general problem of foreign policy, not one restricted to human rights and other moral interests.

Issues of consistency do have a special force in moral reasoning. The “golden rule” of doing unto others as one would be done by underscores the fact that morality in significant measure means not making an exception for oneself (or those one is aiding). But, even from a purely moral point of view, only comparable human rights violations require comparable responses. Human rights may be “interdependent and indivisible,” but that does not require an identical response to every violation of every right.

Even from a purely moral point of view, considerations of cost may be relevant. Few would consider the United States to be morally bound, all things considered, to risk nuclear war in order to remedy human rights violations in China simply because it acted relatively strongly to remedy similar violations in, say, Guatemala. Conversely, the fact that no state is willing to threaten the use of force to free Tibet from Chinese domination, thus risking nuclear war, does not mean that considerations of moral consistency preclude the use of force in, say, East Timor. That option is precluded instead by competing economic and security concerns. Balancing competing values *requires* taking account of all the values involved. And consistency requires treating like cases alike *all things considered*, not just looking at similarities in human rights violations.

Furthermore, to address only moral (in)consistency is to address but one part of the relevant foreign policy. In addition to the authoritative international human rights standards of the Universal Declaration and the Covenants, which can be taken as a rough approximation of an international moral standard, states must consider their own often much more limited international human rights objectives, as well as other aspects of the national interest. Even if a state's actions or policies are morally inconsistent, they may be consistent from a foreign policy point of view.

For example, George Bush extended most-favoured-nation trading status to China in 1990 but denied it to the Soviet Union. Looking solely at human rights behaviours – Tiananmen versus perestroika, glasnost, new thinking, and the collapse of the Soviet empire – this seems wildly inconsistent. But considering all the interests involved, it is plausible, if controversial, to find no *foreign policy* inconsistency. Bush argued, not implausibly, that his actions properly balanced a complex set of competing security, economic, and human rights interests.

Consider again the “precedent” of Surinam for Dutch policy toward Indonesia. Would it have been “inconsistent” not to have suspended aid? Perhaps. But it might instead have reflected a reasonable and consistent calculation that the economic and security costs in Indonesia were sufficiently great to justify, perhaps even require, subordinating Dutch international human rights concerns.

We can know whether different responses to comparable human rights violations represent inconsistent foreign policy only if we know all the interests involved and the values (weights) attached to them. Alleged inconsistencies in international human rights policies may be – and I would suggest often are – consistent policies based on a relatively low weighting of international human rights interests. It may be inconsistent, from an abstract human rights point of view, for Hungary to undertake international initiatives on behalf of the Hungarian minority in Romania, but not on behalf of Russian minorities in Lithuania or Ukraine, or of the Tamil minority in Sri Lanka. But there is no evident conflict with the Hungarian national interest.

Hypocrisy, error, and inattention are no less common in foreign policy than in other human endeavours. But, in considering the issue of consistency, we must not confuse the standards of international human rights norms, nationally defined international human rights objectives, and the national interest more broadly conceived. Furthermore, all three must be distinguished from foreign policy actions that reflect a relatively low evaluation of a state's international human rights interests.

Human rights, as we have seen, usually have only a secondary place in the scheme of foreign policy interests. Human rights policies are at best a part – most often a rather modest part – of the foreign policy of most

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 330 AN OVERVIEW
 

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states. Therefore, it is unavoidable that even well-designed foreign policies will treat comparable human rights violations differently.

*Towards more effective international human rights policies*

Inconsistency may indeed reduce the efficacy of even well-meaning and otherwise well-planned initiatives. I would argue, however, that, although little in the preceding chapters speaks directly to this issue, much of the real and remediable (more than moral) inconsistency in international human rights policies arises from inattention and lack of coordination. Foreign policy, whether addressing human rights or other interests, tends to be made on a case-by-case basis, with relatively little coordination or strategic vision. Balances are struck not by omniscient rational actors but in more or less intuitive ways by usually harried decision-makers grappling with the particularities of pressing issues.

Bureaucratic politics also play a role. The frequent conflicts between human rights and national security officials are well known. Regional branches within the foreign ministry may operate with very different baseline assumptions and expectations. Those working with international financial institutions may come to the table with a very different perspective than those working with human rights institutions.

Bureaucratic organization thus may be significant to the success of a state's international human rights policy. For example, during the Carter administration, human rights concerns were infused more broadly through the foreign policy bureaucracy by devices such as the creation of a Bureau of Human Rights and Humanitarian Affairs within the US State Department and the inter-agency "Christopher group," as well as by congressionally mandated reporting (which required local embassies to give greater attention to human rights issues). The recent reorganization of the Dutch foreign ministry reflects a similar effort to integrate human rights concerns more into day-to-day work, rather than as a separate consideration added relatively late in the decision process.

The other principal source of inconsistency, I would suggest, is a tendency to overly grand policy pronouncements. Perhaps the classic example is Jimmy Carter's claim that human rights were the "heart" of American foreign policy. Having thus raised unrealistic expectations, many observers came to judge American actions as heartless and inconsistent.

Both kinds of inconsistency, however, are rooted in a relatively low valuation of international human rights. Excessively grand rhetoric is a sign of an interest having a lower value in practice than policy pronouncements suggest. And the higher an interest is valued, the more a state is likely to struggle against the tendency toward bureaucratic fragmentation. The biggest "problem" is that foreign policy decision-makers

often value human rights less than human rights advocates would like them to. In most countries, the single greatest contributor to more effective international human rights policies would be to increase the priority of human rights relative to other foreign policy objectives.

Consistency is a matter of correctly adding up the various prices and values already assigned to foreign policy interests. Sometimes just calculating correctly will be enough to get “better” human rights policies (judged from the standpoint of human rights advocates). This is especially true in foreign ministries where realist rhetoric has special force or in countries where national security and economics ministries dominate the decision-making process. But a much greater contribution – again, measured from the perspective of human rights advocates – could be made by “getting the prices right,” by increasing the price states are willing to pay in order to achieve their international human rights objectives.

This is one final way to restate the central argument of this chapter. Human rights have a greater prominence in the contemporary foreign policy of more states than at any other time in the past. The end of the Cold War has removed, or at least moderated, many impediments to more effective international human rights policies. But, while international human rights are working their way up the foreign policy agendas of a growing number of states, in few if any have they come even close to the top.

## Notes

1. In addition, of course, the rights of English women (and many other groups) were not at issue in either of these charters of rights. “Englishmen” meant, at best, propertied male citizens – and not even all of them were able to enjoy these rights equally.
2. From a vast literature see especially Michael H. Hunt, *Ideology and U.S. Foreign Policy* (New Haven, CT: Yale University Press, 1987); Hunt is particularly good on the combination of US confidence in its positive leadership with its racism. T. Davis and S. Lynn-Jones, “City upon a Hill,” *Foreign Policy*, no. 66 (1987), 20–38; these authors place the chauvinistic rhetoric of Ronald Reagan in proper historical context. Richard Rosecrance, *America as an Ordinary Country: US Foreign Policy and the Future* (Ithaca, NY: Cornell University Press, 1976); Rosecrance compares lofty American expectations with the early demise of the “American century.” The journalist Thomas L. Friedman notes that even foreign circles of opinion, in Lebanon for example, looked to a magnanimous and altruistic United States to save them from their own political deficiencies, in *From Beirut to Jerusalem* (New York: Anchor Books, 1989).
3. The idea of human rights – rights that one has simply as a human being and may exercise against one’s own society and state – was almost completely absent from political debate prior to the more radical stages of the English Civil War of the 1640s. It did not enter the mainstream of political debate in any country prior to the mid-eighteenth century.

## 332 AN OVERVIEW

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4. Such a reading would view Marxism-Leninism-Stalinism as a rejection of ostensibly universal but in fact bourgeois "human rights" in favour of, initially, the dictatorship of the proletariat, and, ultimately, a form of socialism that transcends individual rights. An alternative interpretation, advanced by many Soviet bloc theorists in the 1970s and early 1980s, would say that the Soviet model rested on an alternative (and more genuine) conception of human rights. Although I reject this reading (see, e.g., Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Human Rights Conceptions," *American Political Science Review* 76 (June 1982), 303–316), it would imply that in 1989 the dominant conception of the substance of human rights changed, following on a more evolutionary transformation that occurred during the Khrushchev, Brezhnev, and post-Helsinki eras.
5. See, for example, Sandra L. Gubin, "Between Regimes and Realism – Transnational Agenda Setting: Soviet Compliance with CSCE Human Rights Norms," *Human Rights Quarterly* 17 (May 1995), 278–302.
6. We should note, however, that the Greeks and Europeans also recognized very important differences, such as those between Athenians and Spartans or Germans and French, among "civilized" peoples. Furthermore, China saw civilization as accessible (through emulation and extended tutelage) to those who were not Han Chinese.
7. Ironically, Iran, for all its substantive differences from the United States, presents a similar combination of the aggressive promotion of allegedly universal values with a very strong nationalist twist. For completeness, we can place Japan and the United Kingdom somewhere between the United States and the Netherlands. South Africa, which as chapter 10 indicates is still struggling to determine how internationalist a vision it wishes to pursue, belongs in the same range of the spectrum. Hungary lies in this middle range as well: its special attention to Hungarian minorities in neighbouring countries would seem to place it much closer to the United States than to the Netherlands, but its identification with Europe pulls in the opposite direction. Costa Rica falls near the Netherlands, close to the internationalist boundary of contemporary international human rights policies.
8. Kathryn Sikkink draws a very similar distinction in "The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe," in Judith Goldstein and Robert O. Keohane, eds., *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca, NY: Cornell University Press, 1993).
9. Of the countries considered in this volume, as of 28 May 1998 Costa Rica, Hungary, the Netherlands, and Russia were parties to the (first) Optional Protocol. India, Iran, Japan, South Africa, the United Kingdom, and the United States were not. (Information taken from the United Nations High Commissioner for Human Rights' Web site <http://www.unhchr.ch>, at [http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boo/iv\\_boo/iv\\_5.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_5.html)).
10. See page 181 above.
11. This assessment may be too harsh and static, as a result of assuming a fairly conventional definition of national security, which, for all the talk of common security, peace building, and the like, remains the understanding most commonly held by contemporary states. For an introduction to alternative ways of conceptualizing the relationship between human rights and security, see David P. Forsythe, *Human Rights and Peace: International and National Dimensions* (Lincoln: University of Nebraska Press, 1993) and, much more briefly, Jack Donnelly, "Rethinking Human Rights," *Current History* 95 (November 1996), 387–391. For example, an emphasis on personal security for citizens would make human rights and national security in many instances complementary rather than competing concerns. On the broader issue of reconceptualizing security in a

- multilateral context, see Emanuel Adler and Michael Barnett, eds., *Security Communities* (Cambridge: Cambridge University Press, 1998), especially Emanuel Adler, "Seeds of Peaceful Change: The OSCE's Security Community-Building Model."
12. For a brief overview, see Jack Donnelly, *International Human Rights* (Boulder, CO: Westview Press, 2nd edn., 1998), chap. 6.
  13. The other countries considered in this volume either were preoccupied with internal issues or had no significant economic relations at stake.
  14. Some might want to add the inclusion of human rights into UN peacekeeping missions in countries such as Guatemala and Angola. In such cases, however, the willingness to use force on behalf of human rights was modest and entirely conditioned on human rights issues falling within a broader international peace and security mandate. The same is even more clearly true of humanitarian operations in northern and southern Iraq; the human rights of the Kurds were an afterthought, and those of the southern Shiites an even later (and more modestly felt) thought.
  15. There is a fairly substantial quantitative literature on human rights and aid in US foreign policy. David Carleton and Michael Stohl, "The Foreign Policy of Human Rights," *Human Rights Quarterly* 7 (May 1985), 205–229, present a classic finding of no linkage. David L. Cingranelli and Thomas E. Pasquarello, "Human Rights Practices and the Distribution of U.S. Foreign Aid to Latin American Countries," *American Journal of Political Science* 29 (August 1985), 539–563, argue for a modest but statistically significant relationship. Some of the most sophisticated recent work has been done by Steven Poe and his colleagues. See, for example, Steven C. Poe and James Meernik, "US Military Aid in the 1980s: A Global Analysis," *Journal of Peace Research* 32 (November 1995), 399–411; Steven C. Poe and Rangsima Sirirangsi, "Human Rights and U.S. Economic Aid during the Reagan Years," *Social Science Quarterly* 75 (September 1994), 494–509; Steven C. Poe, Suzanne Pilatovsky, and Brian Miller, "Human Rights and US Foreign Aid Revisited: The Latin American Region," *Human Rights Quarterly* 16 (August 1994), 539–558; and Steven C. Poe, "Human Rights and U.S. Foreign Aid: A Review of Quantitative Studies and Suggestions for Future Research," *Human Rights Quarterly* 12 (November 1990), 499–512.
  16. See, for example, Olav Stokke, ed., *Western Middle Powers and Global Poverty: The Determinants of the Aid Policies of Canada, Denmark, the Netherlands, Norway and Sweden* (Uppsala: Almqvist & Wiksell International, 1989).
  17. Proposals to establish trade preferences for rights-protective regimes, however, have not been seriously considered, at least in the United States, GATT, and the WTO. For one interesting academic proposal, focusing especially on labour rights, see George De-Martino, "Industrial Policies versus Competitiveness Strategies: In Pursuit of Prosperity in the Global Economy," *International Papers in Political Economy* 3 (No. 2, 1996), 1–42, at pp. 28–34.
  18. The rationale for this approach might be that respect for internationally recognized human rights should be routinely expected from all states, rather than treated as an internationally praiseworthy achievement deserving reward. Although I have considerable sympathy toward this view, it ignores the political realities of achieving progress in implementing human rights, especially when starting from a record of substantial, systematic violations. Working positively to support governments making human rights progress may be a far more effective strategy than using aid punitively, if only because systematic violators are unlikely to be swayed by the modest amounts typically involved in aid sanctions. Conversely, international financial support for governments making real progress is not only powerful symbolism but may in some cases have a real political impact.

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**334 AN OVERVIEW**

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19. NATO bombardment of Yugoslavia in response to repression and ethnic cleansing in Kosovo, which began as I was completing final revisions on this chapter, also suggests a growing willingness to overrule arguments of sovereignty in the face of severe humanitarian crises, at least in a regional context. Although security interests have been appealed to in justifying the attacks, that rationale seems weak and poorly thought out. The real driving force does seem to be humanitarian crisis. But the continuing reluctance to impose sanctions on Turkey for its systematic human rights violations in Kurdish areas of its country nicely illustrates the enduring priority of security concerns over human rights even in the Western/NATO region.
20. A different sort of primarily internal orientation is represented by the efforts of newly democratic governments in Argentina, Chile, and a number of countries to associate themselves with international human rights norms and initiatives in order to strengthen *national* human rights initiatives and to mobilize national support for human rights.

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# US foreign policy and human rights: The price of principles after the Cold War\*

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*David P. Forsythe*

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The United States, like virtually all other states, has constructed a positive self-image. This self-image centres on defence of personal freedom, understood as civil and political rights. The notion of the United States as symbol of individual civil and political rights, an idea not without some relative and historical validity, has been problematic enough in a domestic context – given such historical facts as slavery and racial segregation, racist immigration laws, anti-Semitism, and gender discrimination, *inter alia*. But the question of whether the United States should champion civil and political rights through an activist foreign policy has been much more problematical, giving rise to considerable debate since the founding of the Republic. Moreover, the United States mostly rejects any necessary relationship between socio-economic rights and the classical civil and political rights so central to Western liberal philosophy – aside from a commitment to the economic (civil?) right to private property. After the Cold War, the United States has continued to identify with leadership for civil and political rights in world affairs. But it has not always, or even very often, been willing to pay even a moderate price, in either blood or treasure, to see these rights implemented in foreign countries – as seems true for other democracies as well. It has also continued to reject a clear, consistent, and meaningful endorsement of most socio-economic rights. The United States, although making some positive contributions to the advancement of internationally recognized human rights through its foreign policy, still struggles to institutionalize attention to human rights.

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\* Forsythe, David, "US Foreign Policy and Human Rights: The Price of Principles After the Cold War", David Forsythe (ed.), *Human Rights and Comparative Foreign Policy*, United Nations University Press, 2000, pp. 21-48.

## 22 SOME LIBERAL DEMOCRACIES OF THE OECD

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abroad, especially as defined in the International Bill of Rights, and especially when even moderate costs are entailed.

### I. Introduction

Rare is the ruling élite that does not manipulate national opinion to produce a positive self-image. The United States is no exception to this generalization. The United States sees itself as standing above all for personal freedom. In this view the American revolution from 1776 and especially its Constitution from 1787 represented the broadest and most practical endorsement of individual human rights then known to political man. Given the subsequent cultural, economic, and political accomplishments of the United States, most Americans accept the view that the country represents a shining city on a hill, a beacon to all others; in this view the United States has much to teach others about the proper conduct of public affairs.<sup>1</sup> That other countries like France make similar claims to being a universal model for human rights with a *mission civiletrice* has not diminished the United States' sense of itself as positively unique. The core conception of what it means to be American entails allegiance to the US Constitution and the personal freedoms entailed in that document and its Bill of Rights.<sup>2</sup> Thus dominant American political culture is inseparable from a conception of human rights within a rule of law. The notion of civil and political rights is intrinsic to US political history.

Obvious defects in American society have done little to undermine the dominant view that the United States stands for personal freedom and has constructed an admirable society based on this principle. Systematic and legally approved discrimination against racial minorities, women, and certain foreign nationalities trying to immigrate to the United States has not undermined an American informal ideology that sees the country as representing equal freedom and opportunity for all. Part of this amorphous ideology holds that, if an individual is assertive and works hard, individual freedom will produce material good things. Thus there is little need for socio-economic rights, such as the right to publicly provided national health care.<sup>3</sup> Dominant American opinion is not very sympathetic to the idea that there can be too much personal freedom, so that those with power and wealth exploit those without. The presence in the United States of inner cities and rural areas with a poor quality of life is mostly attributed to the deficiencies of the inhabitants, not to any failings of the society or the political–legal system as a whole. The alleged lack of an American sense of community, by comparison with countries such as

Canada, is not given much attention and is certainly not attributed to an excessive commitment to individualism.<sup>4</sup> Criticisms of American individualism from various foreign parties, whether Canadian, West European, or Asian, *inter alia*, have yet to make notable inroads on traditional thinking. After the Cold War the Democratic Party joined the Republican Party in reducing welfare benefits for the poor and vulnerable, while emphasizing the individual work ethic and the need to grow the economy through governmental support for the business sector. The Reagan revolution persists, entailing an emphasis on individual freedom and competition – and American greatness. At the 1997 Denver summit of the seven largest industrialized democracies, plus Russia, President Clinton trumpeted this belief in the superiority of the American example, to the obvious reserve of the other participants.

Despite this self-image of leadership for human rights, it is by no means clear that the United States is easily given to moral crusades for personal freedom abroad in actual policy. It is true that distinguished analysts such as George Kennan and John Spanier have identified a moral strain in American rhetoric about foreign policy, such as Woodrow Wilson's "crusade" to make the world safe for democracy after the First World War.<sup>5</sup> But the noted historian Arthur M. Schlesinger, Jr. has shown that from the beginning of the Republic there has been debate about whether it should have an activist foreign policy in behalf of individual freedom abroad, or should lead by the more introverted model of constructing the good society at home.<sup>6</sup> A few examples suffice to make the point historically. The United States did not actively support various democratic movements abroad, as in 1848, and was one of the last states of the Western world to abandon slavery at home and then oppose it elsewhere. Neither in 1914 nor in 1939 did the United States rush to defend its democratic partners in Europe, but rather clung to a commercially inspired neutrality until attacks on its shipping and military installations, respectively, brought it into the two world wars. During the Cold War the United States undermined a number of elected governments and engaged in other anti-humanitarian interventions in order to increase its power vis-à-vis the Soviet Union.<sup>7</sup> Although some authors feared that increased rhetoric in behalf of human rights during the 1970s would lead to a moral crusade in US foreign policy,<sup>8</sup> the overall evidence strongly suggests that US concrete support for human rights abroad is a matter to be demonstrated rather than assumed.<sup>9</sup> The United States, like other states with a relatively serious (but far from perfect) commitment to certain human rights at home, may sometimes not be inclined toward a rights-supportive foreign policy – as French policy toward various contemporary African states so clearly demonstrates.<sup>10</sup>

## 24 SOME LIBERAL DEMOCRACIES OF THE OECD

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### II. Domestic factors

A variety of domestic factors in the United States combined after the Cold War to ensure some attention to human rights in foreign policy, but also to ensure that the government did not pay a high price to see those principles advanced in world affairs.

President Bush spoke of a “new world order” with increased attention to international law and human rights,<sup>11</sup> and President Clinton spoke of enlarging the global democratic community as one of the pillars of his foreign policy.<sup>12</sup> This was to be expected. Since the Nixon–Kissinger years (1969–1976), all Presidents have paid lip-service to advancing international human rights as part of a moral dimension to US foreign policy. Both principal political parties realized that a Kissinger-like emphasis on a realist or power politics approach to world affairs did not resonate well with American society.

Public opinion polls showed that the general public as well as opinion leaders did indeed list promoting and defending human rights in other countries, as well as helping to bring a democratic form of government to other nations, as “very important” goals of US foreign policy.<sup>13</sup> But in 1995 these goals were in 13th and 14th place, respectively, with only 34 per cent and 25 per cent of the general public listing them as very important. In contrast, 80 per cent or more of the general public listed stopping the flow of illegal drugs into the United States, protecting the jobs of American workers, and preventing the spread of nuclear weapons as much more important, *inter alia*. Analysts concluded that there was considerable American popular support for pragmatic or self-interested internationalism, but not a great deal of support for moral internationalism.<sup>14</sup>

There were many non-governmental organizations active in Washington on human rights questions. Two of the most prominent were Amnesty International-USA and Human Rights Watch. They were quite different. AI-USA used a general figure of 350,000 for its American membership, relied on public pressure to achieve its goals of specific protection on the ground, and manifested a restricted mandate focusing on prisoner matters – a mandate that had displayed “mission creep” over the years since its founding in the United Kingdom in 1961. Human Rights Watch relied on élite action rather than a mass movement, focused traditionally on a broad range of civil and political rights with some slight attention to socio-economic factors, and aimed more at affecting public policy than releasing specific prisoners. Legally oriented groups, such as the Lawyers’ Committee for Human Rights, were especially numerous. Physicians for Human Rights frequently used forensic science to testify in Congress about such subjects as political murder in places like El Salvador and

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US FOREIGN POLICY AND HUMAN RIGHTS 25

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Bosnia. American labour, ethnic, and religious groups also were active on international human rights issues. And foreign-based human rights organizations, such as Doctors Without Borders (*Médecins Sans Frontières*), were much in evidence in various policy debates. But Amnesty International, among others, bemoaned its lack of ability to orient US foreign policy toward more support for various human rights issues.<sup>15</sup>

The communications media based in the United States covered foreign human rights and humanitarian issues with such apparent influence sometimes that one spoke of “the CNN factor” in the making of US foreign policy. This was especially true after media coverage of the Kurdish plight in Iraq in 1991 and the plight of many starving Somalis in 1992 helped to produce US and international action on these issues. But the failure of media coverage to propel international involvement in Rwanda in 1994 and in eastern Zaire in 1997 showed the limits of the CNN factor. If an administration had a firm view of its interests, and especially of the dangers of involvement, it might not be much influenced by media coverage of foreign human rights problems.

The American business community is difficult to characterize on foreign human rights issues. Some American corporations, such as Levi Strauss, had a clear human rights policy. Strauss, based in San Francisco, refused to make blue jeans in China for human rights reasons. They were willing to pay whatever costs were involved in such decisions. The American garment industry was under increased pressure in the 1990s to do something about child labour and other issues about exploitation in its foreign operations. But most American corporations seemed not to support the interruption of business as usual for human rights purposes. Most American businesses interested in contracts in China, for example, came down on the side of delinking China’s human rights record from questions of trade and especially questions about most-favoured-nation (MFN) status. Under heavy business lobbying, a majority in Congress pushed for a delinking of China’s human rights record from MFN status, and the Clinton administration shifted gears to accept this orientation.

The Congress paid considerable attention to human rights in foreign policy from the mid-1970s, and on the House side – but not the Senate – there was a subcommittee of the Foreign Affairs Committee that tracked international human rights issues. The Congress acted in independent fashion on many foreign policy issues, relative to other legislatures. It had pushed the executive branch into action on a variety of human rights issues in the past in places such as Eastern Europe and South Africa. It had created a special bipartisan and bicameral Helsinki Commission to work for human rights in communist Europe during the Cold War. This Helsinki Commission continued its existence after about 1990 in efforts to promote democracy and the protection of national minorities in Europe.

## 26 SOME LIBERAL DEMOCRACIES OF THE OECD

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But especially after 1994 the Republican-controlled Congress seemed to reflect a certain fatigue with many foreign policy initiatives, especially those involving expenditure of money. Forty years of Cold War produced a wave of budget-cutting on foreign spending that made it difficult to undertake costly human rights programmes.

Although the Department of State manifested a human rights bureau from the mid-1970s because of congressional instructions, this office – renamed the Bureau of Democracy, Human Rights, and Labor – had little special clout in most administrations whether Democratic or Republican. Foreign Service Officers preferred assignment in other parts of the State Department as a faster track to career advancement. The office did compile annual country reports on the human rights situation in all other countries of the world, which received considerable domestic and foreign attention when submitted to Congress each year. Under congressional pressure, itself generated primarily by American conservative Christian groups, the office also started putting out an annual report on the persecution of Christians abroad. This report contributed to the saliency of the issue of religious freedom, which had long enjoyed a special status in the United States, given that many early settlers came to North America to escape religious persecution in Europe.

More important was the general opposition at high levels of the Defense Department to involvement of the US military in operations other than war or in low-level irregular warfare where the full power of the US high-tech, industrialized military establishment could not be brought to bear. The Pentagon was more comfortable fighting the Persian Gulf War against Iraq than in deploying limited force for limited and complicated human rights purposes in places such as Somalia, Haiti, and Bosnia. Especially after Madeleine Albright became Secretary of State, the Clinton administration was the scene of much debate between a Secretary of State who favoured military deployment for human rights purposes on occasion, and a Secretary of Defense and military staff who agreed with Michael Mandelbaum when he wrote that foreign policy was not social work and the United States was not Mother Teresa.<sup>16</sup> The Pentagon's reluctance to engage itself in less than all-out warfare led one commentator to observe that, since the United States wanted no casualties except in defence of traditional and narrow national interests, which was true of major European states as well, there were no Great Powers any more.<sup>17</sup> No state wanted to pay any significant price to control the outcome of most controversies that arose in international relations.

Because of this mix of domestic factors, one can better understand why human rights remained a fixture on the agenda of US foreign policy, but also why there were no crusades for human rights abroad entailing even moderate, much less high, financial and human costs. One can thus un-

derstand why the United States was reluctant to engage decisively while killing raged in places such as Bosnia and Rwanda, especially after American loss of life in Somalia. One can equally understand why the Clinton administration was mostly hesitant to pursue the arrest of war criminals, especially in the former Yugoslavia, fearing costly retaliation that would undermine public, congressional, and military support for the presence of US military forces in that complicated and unstable situation. One could fashion moral, legal, and even pragmatic arguments for US activism on a number of human rights issues abroad. One could argue, for example, that it would have cost the United States less money to stop the genocide in Rwanda than it paid out in subsequent years to help care for the refugees from genocide. The Clinton administration did take politically risky action for human rights in Haiti, since there was little support for that action in Congress and the Pentagon, although it was also pushed toward military deployment by domestic political forces – i.e. the congressional Black caucus demanding attention to the plight of Haitians, and politicians from south Florida demanding an end to unwanted Haitian immigration. But the central fact remained. Important parts of the American body politic – the general public, the business community, the Pentagon, and the Congress – were highly pragmatic and prudent about any costly crusade for international human rights. Clinton himself, a capable domestic politician and one not much given to sustained interest in foreign affairs, demonstrated no great personal passion on the issue of internationally recognized human rights.

### III. Multilateral human rights policy

#### *The International Bill of Rights*

Although the United States pictures itself as a leader for human rights in the world, it has long manifested an uneasy relationship with the International Bill of Rights, made up of the human rights provisions of the United Nations Charter, the 1948 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. In 1945 the United States was in favour of general human rights language in the UN Charter, but opposed more specific language creating enforceable legal obligations. Likewise, the United States took the lead in the UN Human Rights Commission in pressing for the adoption of the Universal Declaration, but insisted it was only a statement of aspirations.

The two basic Covenants, and other UN human rights treaties like the one on genocide, have been especially controversial in Washington.<sup>18</sup>

## 28 SOME LIBERAL DEMOCRACIES OF THE OECD

American nationalists fear that the preferred status of the US Constitution will be superseded by treaty law. Those in favour of internal states' rights fear that treaty law will excessively empower the federal government. Conservatives fear that international human rights principles will weaken American individualism and respect for private property. Racists fear further attention to principles of racial equality and multiculturalism. Unilateralists fear the further enmeshment of the United States in international (read, foreign) decision-making.

The prominence of these views during the 1950s, reflected in lobbying by the American Bar Association; caused the Eisenhower administration to eschew ratification of human rights treaties and to abandon a leadership role in human rights within international organizations.<sup>19</sup> The Kennedy administration successfully obtained ratification of several non-salient human rights treaties. The Carter administration, after Congress partially reversed itself and began to emphasize human rights abroad in some of its legislation from 1974,<sup>20</sup> submitted the two basic Covenants to the Senate for advice and consent, but did not lobby effectively for them. Things began to change superficially thereafter.

The Reagan administration, despite being the most unilateralist administration since the Second World War, secured ratification of the 1948 Genocide Convention in 1989. The Bush administration secured ratification of the 1966 Covenant on Civil and Political Rights in 1992. Both formal adherences were accompanied by senatorial reservations, understandings, and declarations of a highly restrictive nature.<sup>21</sup> In fact, the Dutch government challenged US actions as being violative of international law. In the Dutch view, shared by others, the reservations, understandings, and declarations were incompatible with the basic purposes of the treaties in question. It appeared to these critics that the United States was trying to appear to accept the human rights treaties in question without actually having to incur any real and specific legal obligations. It was clear that, on the subject of civil and political rights, the United States did not want to expand on the provisions in the US Constitution and Bill of Rights. Moreover, the United States did not want to give the International Court of Justice at The Hague the jurisdiction to handle genocide petitions, or the UN Committee on Human Rights in Geneva the jurisdiction to receive individual complaints from Americans. The United States did finally agree, under the Civil and Political Covenant, to submit a report on its civil and political rights to the UN Committee on Human Rights and to respond to questions about that report. Such a process transpired for the first time during the Clinton administration. This exchange immediately led to conflict between the Senate Foreign Relations Committee and the UN Human Rights Committee. Senator Jesse Helms, the Chair of the Senate Foreign Relations Committee,

challenged the right of the UN Human Rights Committee to make general statements about US policy decisions.

Although both the Carter and Clinton administrations have endorsed the UN Covenant on Economic, Social, and Cultural Rights, it remains especially controversial in Washington. Its values are in fact quite different from traditional American values, as noted above. The Republican Party and conservatives in general remain strongly opposed to the notion that the US government should be obligated, without the fundamental discretion to choose otherwise, to provide such things as food, clothing, shelter, and medical care to those who cannot purchase them in private markets. There is zero prospect, as of 1999, that the Senate Foreign Relations Committee would recommend to the full Senate that the latter give its advice and consent to this treaty. Even absent the Chair of that committee in 1997, Senator Jesse Helms of North Carolina, a strong critic of the United Nations and its human rights activities in general, Senate approval would be highly difficult to obtain.<sup>22</sup> Thus far no President, including Carter, wanted to use up limited presidential influence vis-à-vis Congress in fighting for ratification of this Covenant.

### *Regional developments*

The United States is a member both of the Organization of American States (OAS) and of the Organization for Security and Cooperation in Europe (OSCE). In the former it has displayed sporadic diplomacy for human rights while avoiding as many legal obligations as possible under both the American Declaration on the Rights and Duties of Man and the Inter-American Convention on Human Rights. In the OSCE, including its predecessor diplomatic process, the Conference on Security and Cooperation in Europe (CSCE), the United States has been highly active on human rights. One sees in these two regional organizations the same US pattern in foreign policy that one finds more generally. The United States frequently pushes civil and political rights for others through diplomacy, but is reluctant to reconsider its domestic laws and policies under international human rights instruments.

The inter-American system for the promotion and protection of human rights is complicated.<sup>23</sup> The United States has not been, and is not in the 1990s, a hegemonic leader for human rights in this regional arrangement.<sup>24</sup> The same domestic factors that caused reserve toward the International Bill of Rights at the United Nations caused the United States to reject the Inter-American Convention on Human Rights, with its attendant Court, and to contest the judgment that the American Declaration of the Rights and Duties of Man was legally binding on members of the OAS. Also, the United States during the Cold War saw the OAS as pri-

### 30 SOME LIBERAL DEMOCRACIES OF THE OECD

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marily a security arrangement for the containment if not rollback of communism. This view required the United States to downgrade the importance of specific human rights in the hemisphere, since many of its security allies were also brutal authoritarians. Moreover, given the history of US military interventions in the hemisphere, many hemispheric states refused to defer to US leadership on a variety of issues including human rights, fearing US motivations and intentions.

From time to time the United States has utilized the OAS to advance human rights concerns. The Carter administration did so in its efforts to oust the dictator Anastasio Debayle Somoza from Nicaragua in the 1970s, supporting the Inter-American Commission on Human Rights in its critical reports and diplomacy. The Bush administration did so in supporting the Santiago Declaration that declared any attack on democratic government in states of the hemisphere to be an international, and not domestic, matter – meriting a regional response. The Bush and Clinton administrations utilized the OAS, along with the United Nations, for electoral assistance and expanded peacekeeping operations (which include additional human rights programmes) in such countries as Nicaragua, El Salvador, Guatemala, and Haiti. Although the OAS has few programmes on the ground in the hemisphere and is not an organization that one can rely on for either military security or sustainable economic development, its human rights programme is the bright spot of the organization. This programme the United States has supported as it sees fit, but without fully integrating itself into OAS human rights activities – much less being a hegemonic leader for human rights. If US deployment of force is contemplated in relation to hemispheric human rights, as in Haiti or El Salvador, for example, the United States normally acts via the United Nations. This is because of OAS sensitivity to past uses of force in the hemisphere as controlled by the United States.

The old CSCE from 1974 manifested a human rights focus as one of its three main areas for diplomacy between the European communist and democratic states (with the United States and Canada as honorary Europeans). The third section of the Helsinki Accord (Basket Three) on human rights was devised by certain West European states, with the United States, under the influence of Henry Kissinger, being reserved about the wisdom of discussing such “internal” questions as human rights violations by the Soviet Union and its allies.<sup>25</sup> Once established, Basket Three came to be warmly endorsed by subsequent US administrations, which, prodded by private human rights groups such as Helsinki Watch, found it desirable to press the European communists on their human rights records. Because the old Soviet Union wanted certain security and economic arrangements from the West, a number of Western parties found it logical and advantageous to press the communists on human rights as a quid pro quo.

From the mid-1970s to about 1990, the European communists obtained very little through the CSCE pertaining to security and economics. But, although scientific analysis is difficult, there is reason to believe that constant US and Western pressure for human rights via the CSCE helped erode the legitimacy of communist authority in Europe. It is plausible to argue that communist endorsement of the Helsinki Accord, with its human rights and humanitarian provisions, including an obligation to disseminate the accord in all CSCE states, encouraged dissent from communist authoritarian rule. Numerous observers and participants have concluded that the CSCE process encouraged East European defection from the Soviet alliance circa 1989, and helped undermine the very existence of the Soviet Union up to 1991.<sup>26</sup> Many factors were at work, not least the many defects of the communist systems. And the United States was only one of many actors involved in highlighting communist deficiencies. Nevertheless, US foreign policy should be given some credit for developments, even if the CSCE provisions on human rights and humanitarian affairs were of West European origin.

After the Cold War, the United States was hesitant to transform the CSCE into the OSCE, given US concerns about the growing number of international organizations, bureaucracies, and budgets. Once the OSCE was created, however, the United States supported its efforts to protect minorities and advance human rights more generally throughout member states. The OSCE was especially active on human rights issues in countries of the former Yugoslavia. These efforts drew strong US support, as Washington was the primary player trying to make effective the provisions of the 1995 Dayton Accord. The Clinton administration had brokered that accord and had self-interested reasons for making it work. It thus welcomed efforts by the OSCE, along with others, to secure a liberal democratic peace in especially Bosnia and Croatia.

Space limitations preclude analysis of two other regional developments. The North American Free Trade Agreement (NAFTA) included provisions affecting labour rights in the United States, Canada, and Mexico. And the US push for an expanded North Atlantic Treaty Organization (NATO) sometimes entailed human rights arguments, namely that such expansion would provide another international framework for advancing democracy and managing minority problems. Significantly, the argument was made in connection with an expanded NATO that international security ultimately meant the security of persons inside states through protection of their human rights.<sup>27</sup>

### *International financial institutions*

For anyone concerned with the implementation of internationally recognized human rights, one of the great problems has been the role of the

### 32 SOME LIBERAL DEMOCRACIES OF THE OECD

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World Bank and the International Monetary Fund (IMF). These international financial institutions (IFIs) have historically seen themselves as strictly economic organizations that are precluded from acting on political grounds. Human rights, including socio-economic rights to adequate food, clothing, shelter, and health care, have been considered political factors by these two agencies, which control sizeable resources. The World Bank has come to accept that ecological concerns should be incorporated into its loan decisions as a regular part of its policy. The Bank has not come to a similar conclusion about various human rights. The Bank began to address issues of good governance, but tended to define this concept in accounting terms such as transparent economic decision-making. The IMF has been even more resistant than the Bank in addressing human rights issues, although some (inconsistent) shift might be taking place by the late 1990s. The United States has always been the most important state in these two IFIs and bears considerable responsibility for their record on human rights.

The crux of the problem is that the World Bank and the IMF may adopt loan policies that make it more difficult, rather than less, for a state to consolidate liberal democracy and protect a wide range of socio-economic human rights. The Bank and/or the IMF may insist on structural adjustment programmes (SAPs) that cause the state to shrink programmes and services to the people, particularly the most vulnerable people, for the sake of balancing the national budget, and thus increasing the private sector and particularly its exports. Such SAPs may cause popular dissatisfaction with, even riots or rebellions against, weak democratic governments. The Bank may make social assessments and provide some relief for social adjustments, but continues to resist the idea that it is obligated under international law to meet internationally recognized human rights. There is some evidence that IMF policies correlate with increased governmental repression in the short term, as governments under SAP conditionality seek to suppress popular discontent about harsh readjustment programmes.<sup>28</sup> If a weak democratic government, as in El Salvador, needs resources to carry out land reform and other costly programmes in order to satisfy various parties that have been in rebellion against past injustices, SAPs are definitely contrary to the implementation of socio-economic rights within a democratic framework.<sup>29</sup>

The United States has frequently pursued a contradictory foreign policy in a number of situations, working in general for civil and political rights but voting for SAPs in the two IFIs under discussion that undermine the prospects for implementation of international human rights standards. In some cases the United States has resolved this contradiction by using the Bank as leverage to advance civil and political rights. Thus, in a limited number of instances, the United States has joined some of its

democratic partners in the Bank to bring pressure on governments in places such as China, Kenya, or Malawi to improve the implementation of these rights. Yet in other situations the United States and its democratic allies have not insisted on political conditionality via the Bank. The overall record of the Bank on these matters is thus highly inconsistent. The Bank staff, composed mostly of traditional economists, resists systematic linkage with internationally recognized human rights, being willing to address social assessment only in the form of increased public participation in Bank projects. In this connection the Bank has created an Inspection Panel that can be triggered by private complaint. Periodically, state members of the Bank, however, compel it to delay or suspend loans because of massacres, repression, or authoritarianism.<sup>30</sup> In 1997 the United States succeeded in blocking an IMF loan to Croatia, because of that state's failure to do such things as protect minorities and arrest those indicted for international crimes. The United States had previously held up a Bank loan to the Serbian Republic within federal Bosnia, for similar non-implementation of the Dayton Accord. Thus under US pressure the Bank and Fund addressed some human rights factors, but on an inconsistent basis. The fact that the United States has never accepted the Covenant on Economic, Social, and Cultural Rights contributes to this highly problematic situation.

The European Bank for Reconstruction and Development, which was supported by the United States diplomatically and financially, contained an explicit clause on human rights in its articles of agreement. Thus this European regional bank was always supposed to factor human rights considerations into its loan decisions. On the other hand, the Inter-American Development Bank, which was greatly affected by US policy, was similar to the World Bank, with only sporadic and inconsistent attention to human rights considerations.<sup>31</sup>

### *United Nations action*

We have noted the United States' ambivalent attitude toward the International Bill of Rights. There has been more general US ambivalence toward the United Nations as a whole, especially with the increased influence of conservative circles of opinion in Washington in the 1980s and 1990s.<sup>32</sup> This ambivalence toward the United Nations was deepened when, during the Cold War, the majority of states in the UN General Assembly used the language of human rights to try to undermine governments allied with the United States in South Africa, Israel, and Portugal and its colonial territories.

Since the ending of the Cold War, the United States has persistently sought to advance its views about human rights through the Security

## 34 SOME LIBERAL DEMOCRACIES OF THE OECD

Council, the General Assembly, and the Human Rights Commission. As the one putative superpower during this era, it has met with considerable success in its policy objectives at the United Nations, and has broken some new legal and political ground in the process. Although the United States has been *primus inter pares* in the Security Council, it has met with more opposition in the Commission. In this latter body a strong undercurrent of reserve about US human rights policy has surfaced, articulated primarily by non-Western critics.

In the Council during the first decade after the Cold War, the United States has pushed with some success for three changes of major importance involving human right.. First, it has led in expanding the scope of Chapter VII of the Charter, involving matters on which the Council can take a binding decision, if necessary entailing coercive measures. In the process, the Council has shrunk the domain of exclusive state domestic jurisdiction. In dealing with Iraq's repression of Iraqi Kurds in 1991, Somalian starvation in 1992–1994, the breakup of former Yugoslavia during 1992–1995, the nature of government in Haiti during 1993–1996, and genocide in Rwanda in 1994, the United States led the Council in adopting a very broad scope to the notion of international peace and security. In effect, many human rights violations essentially inside states came to be viewed as constituting a threat to or breach of international peace and security, permitting authoritative Council decisions including the deployment of force and sometimes limited combat action. The 1992 Security Council summit of heads of state officially endorsed this expanded view of international responsibility, declaring that international peace could be disrupted by economic, ecological, and social developments, not just by traditional military developments.<sup>33</sup> The consequences of these Council decisions are potentially quite far reaching, leaving much less subject matter to be essentially within the exclusive domain of supposedly sovereign states. The United States has been central to all these developments, taking the lead in dealing with Iraq, Somalia, and Haiti, and being supportive of broad-reaching Council resolutions in the other relevant cases.

Secondly, the United States has also led in expanding the notion of UN peacekeeping that occurs mostly under Chapter VI of the Charter pertaining to the peaceful settlement of disputes. At the end of the Cold War the Council began to authorize complex or second-generation peacekeeping missions in countries such as Namibia, El Salvador, and Cambodia. Lightly armed military contingents, deployed with the consent of the parties in conflict, were increasingly accompanied by civilian personnel, and entailed considerable human rights duties. In places like El Salvador, deployments of human rights monitors actually preceded cease-fire agreements and the deployment of cease-fire monitors. Especially in in-

ternal rather than interstate conflicts, where the behaviour of the preceding government was a major cause of unrest, UN peacekeeping was mostly directed to improvement of human rights conditions and the creation and consolidation of a liberal democratic peace. Electoral assistance in various forms was frequently a part of these field missions. Narrow military or quasi-military functions were only a small part of most complex peacekeeping operations, although some of the operations were expanded to limited enforcement operations under Chapter VII. While the United States might or might not provide military elements to these field missions, it was always a key player in the authorization of second-generation peacekeeping. It was still true that the UN Security Council had never in its history deployed military force without the support of the United States.<sup>34</sup> Thus in many situations the United States led the United Nations in seeking not just peace based on the constellation of military power, but a liberal democratic peace based on many human rights.

Thirdly, the United States led the Council into the creation of two international criminal courts, one for the former Yugoslavia and one for Rwanda, the first such courts since 1946 and the international tribunals at Nuremberg and Tokyo.<sup>35</sup> In using the Council to create the 1993 and 1995 ad hoc courts with jurisdiction to prosecute and try individuals for certain violations of international law, the United States displayed mixed motives. On the one hand the United States did not want to engage in a costly intervention into the complicated situations of former Yugoslavia and Rwanda, where people of ill-will showed little hesitation in committing gross violations of human rights. In October 1993, events in Somalia had demonstrated to the United States that good intentions could lead to further death and injury. The two courts were created precisely because the United States in particular eschewed more decisive action. Here was further evidence that the United States was not interested in a costly crusade for human rights. On the other hand, the United States led the way in believing that *some* response had to be made to the evident killing and abuse of civilians on a massive scale. Thus the United States rejuvenated the idea of individual criminal responsibility for violations of the laws of war, crimes against humanity, and genocide. It provided more financial and personnel support to the two courts than any other state did. The United States eventually but successfully got agreement that NATO, embodied as SFOR, should arrest indicted suspects in the former Yugoslavia from mid-1997.

At the same time, the United States as a whole displayed consistent caution about a permanent UN criminal court.<sup>36</sup> It participated in negotiations for such a court, but in July 1998 it voted against the draft statute for such a court, which was approved by 120 states. Only six other states, mostly repressive, voted in the negative. The United States had tried to

## 36 SOME LIBERAL DEMOCRACIES OF THE OECD

weaken the projected court, and had engaged in heavy-handed lobbying in defence of its views. But Washington found itself isolated at the Rome diplomatic conference, much as it had been isolated at the 1997 Ottawa diplomatic conference that agreed to ban anti-personnel land mines. Clinton essentially caved in to a Pentagon that did not want an international criminal court pressing it to court-martial US military personnel who might commit war crimes. Clinton was also under pressure from the nativists in the Congress like Jesse Helms who refused to accept in principle that US personnel and policies should be subject to international review and control. Once again we see the United States using the United Nations when the issue is human rights for others, as in former Yugoslavia and Rwanda, but hesitant to put itself under UN human rights law and authoritative agencies.

Since the ending of the Cold War, the General Assembly has not been terribly important to US foreign policy. The United States prefers to focus on the Security Council, where it has a preferred position, where it has important allies making up a high proportion of members, and where it can utilize the authority of Chapter VII. From time to time the United States has supported certain initiatives in the Assembly, such as the attempt to have clarified a presumed right to humanitarian assistance for individuals in armed conflict and what at the United Nations are called complex emergencies. This initiative resulted in several Assembly resolutions whose combined effect was ambiguous. Whereas the United States and others succeeded in having adopted by consensus some language addressing humanitarian need in these situations, developing countries insisted on including language endorsing state consent before assistance could proceed.<sup>37</sup> The United States has supported other Assembly resolutions on human rights and humanitarian affairs, but their impact on world politics has been mostly marginal.

The United States used the Assembly to create the new office of High Commissioner for Human Rights during fall 1993. The United States lobbied hard for this position, but so did other actors both public and private. The United States was especially pleased when Secretary-General Kofi Annan named the former Irish President, Mary Robinson, as the second High Commissioner. However, the United States has not been a leader in efforts to increase the UN human rights budget, which remains at about 1 per cent of UN regular spending, or under US\$20 million. Congressional pressures have sought to reduce, not increase, most UN finances.

In recent decades the United States had displayed a highly active diplomacy in the UN Human Rights Commission. In the 1940s and 1950s in the Commission, to which the United States has always been elected by

the Economic and Social Council (ECOSOC), Washington was content with the Commission's self-denying ordinance by which it refused to take up specific human rights problems in specific states. The executive's policy was shaped by its attempt to appease a non-cosmopolitan Congress in the 1950s and 1960s, noted above. From about 1970 the United States was part of the bargaining that led the Commission to shift its orientation, as it agreed to address human rights issues not only in Israel, South Africa, and, somewhat later, Chile, but also in other countries such as Greece and Haiti.<sup>38</sup> From that time the United States has, in principle, led or supported efforts to create a focus on particular countries and subject matter through such mechanisms as rapporteurs and working groups. The United States cooperated with the UN rapporteur on racial discrimination when he paid an extended visit to the country, but the subsequent report resulted in very little American media coverage. The United States has also supported the 1503 resolution, by which ECOSOC authorized the Commission to process private petitions alleging a systematic pattern of gross violations of human rights, and eventually to give some sort of publicity to offending states. The main exception to this US record of support for Commission diplomacy of a specific nature occurred during the first Reagan administration when Washington sought to block attention in the Commission to some of its more brutal authoritarian allies in places such as Chile, El Salvador, and Guatemala.

If one looks at the list of countries during the Cold War targeted by way of Commission resolutions and decisions to create rapporteurs and working groups, that list is more or less balanced according to geography and ideology. This suggests some US success, along with the Western Group, in directing attention to a number of communist states and other adversaries. Since the Cold War, the overall list of states that has drawn Commission concern remains a reasonable one. However, the United States has been unable to get the Commission to adopt a resolution critical of China's human rights record. China has effectively mobilized a blocking coalition of states, appealing to a number of non-Western states with the argument that the United States and certain other Western states focus too much on individual civil and political rights, without sufficient attention to underdevelopment and cultural differences. In historical fact, the Commission *has* focused mainly on civil and political rights since about 1970, with relatively little attention to economic, social, and cultural rights. China has also utilized its growing economic leverage to threaten states with loss of business contracts if they vote for critical resolutions in the Commission. These threats were quite explicit with regard to Denmark and the Netherlands in 1997. While these and other states like Britain continued to align with the United States in efforts to censure

## 38 SOME LIBERAL DEMOCRACIES OF THE OECD

China, other European states such as France, Germany, Italy, and Greece refused to support the United States in the Commission during 1997 on the China question.

At the 1993 Vienna Conference on Human Rights sponsored by the United Nations, these same sorts of debates were played out.<sup>39</sup> The United States took the lead in trying to reaffirm the validity of universal human rights – while reserving to itself the discretion not to become a party to the Socio-Economic Covenant, not to allow individual petitions under the Civil–Political Covenant, not to ban the death penalty for common crimes, and not to give special protection to convicted minors under the age of 18. The Clinton administration did rhetorically endorse a right to development, although previous administrations had contested such a right in UN debates. A group of states led by China, Indonesia, Singapore, and Malaysia, *inter alia*, argued for a strong version of cultural relativism and national particularism, suggesting that universal human rights should yield to local conditions. At the heart of the public debate was the argument that the US conception of human rights was too individualistic and strictly Western, and thus inappropriate to, in particular, crowded Asian countries with a history of elevating duties to the community over individual rights. The final document of the Vienna Conference proved more satisfying to the United States than the Commission debates on China in the mid-1990s. The Vienna Final Act reaffirmed universal human rights for all, stating that all countries had the obligation to respect them. The universal nature of these rights and freedoms is beyond question. But some language in the Final Act indicated that national and regional particularities and various historical, cultural, and religious backgrounds must be borne in mind.

The United States, with the world's largest economy, is usually among the leading countries, or is the leading country, in supporting certain agencies that work for human rights and humanitarian progress. It is, for example, the largest contributor to both the International Committee of the Red Cross, which works for victims of war and of complex emergencies, and the Office of the UN High Commissioner for Refugees, which works with not only legal refugees but those who find themselves in a refugee-like situation. It should be noted, however, that the United States supports certain humanitarian programmes, which can be said to implement various human rights, precisely as a substitute for more decisive involvement. Some observers have estimated that it would have cost the United States less money to lead a military deployment in Rwanda in 1994 to stop genocide than it subsequently spent in helping to provide for the refugees from genocide. This type of analysis omits from the calculation of cost the probability of American military casualties from such an enforcement operation.

#### IV. Bilateral policy

##### *Foreign assistance*

From the mid-1970s the US Congress, in an ironic volte-face, required the executive to link US foreign security assistance, then later economic assistance, to internationally recognized human rights.<sup>40</sup> These laws were permissively written, with the executive able to utilize loopholes to avoid applying the statutes. Congress also lacked the will power, through follow-up oversight legislation, to compel various administrations to comply with the general standards that had been established in law. Congress then turned to more specific legislation. Perhaps the best known of these provisions was the so-called “Jackson–Vanik” amendment, requiring communist states desiring most-favoured-nation trading status with the United States to permit reasonable emigration. In addition to these and other congressional initiatives, various administrations on their own have manipulated US bilateral foreign assistance to reflect some concern with human rights.

Since 1981 a number of scholars have sought to establish the effect of human rights considerations in decisions about bilateral US foreign assistance. A general or summary effect has been difficult to prove. Some students of the issue have found that human rights concerns are evident in a first stage of decision-making, called the gate-keeping function, about which countries are eligible to receive foreign aid. Other studies looking at a one-stage process of foreign aid allocation have found little general and persistent influence from human rights considerations. A 1994 study covering Latin America found that human rights considerations did affect the disbursement of US economic and security assistance, as one factor among several, as long as a country was not deemed of major importance to the United States. But if a country, such as El Salvador in the 1980s, was considered highly important to US security, then other considerations like human rights fell by the wayside.<sup>41</sup> A 1995 study found that, with regard to US economic assistance to a broad range of countries, there was no correlation between levels of that assistance and the human rights record of recipient countries.<sup>42</sup> Likewise, a 1989 study showed no correlation between levels of US economic assistance and recipient countries’ records on either political rights (democracy) or right to life (summary executions and forced disappearances).<sup>43</sup>

A study published in 1999 argued that “human rights considerations did play a role in determining whether or not a state received military aid during the Reagan and Bush administrations, but not for the Carter and Clinton administrations. With the exception of the Clinton administration, human rights was a determinant factor in the decision to grant economic

## 40 SOME LIBERAL DEMOCRACIES OF THE OECD

aid, albeit of secondary importance ... Human rights considerations are neither the only nor the primary consideration in aid allocation.”<sup>44</sup>

Moving away from macro or summary interpretations, one can easily observe that on any number of occasions the United States will at least temporarily link economic and security assistance to various human rights concerns – almost always pertaining to civil and political rights.<sup>45</sup> In 1997 the United States suspended foreign assistance to Cambodia after the Hun Sen coup that interrupted coalition government in a fragile and imperfect democratic political system. In that same year the United States made foreign assistance to the Kabilia government in Zaire/Democratic Republic of the Congo dependent upon progress concerning several human rights issues, including an investigation into alleged massacres of refugees during fighting to oust the Mobutu government. As suggested by the broader studies, rarely is such US decision-making decisive in fully controlling a situation. Other states may not follow the US lead, thus lessening the impact of Washington’s policy. The US aid programme may not be large enough to affect foreign decision-making. But in some cases the US impact is great enough to cause foreign leaders to think seriously about whether or not they wish to forgo Washington’s support in order to continue their policies of the past. In 1993 the United States helped preserve movement toward liberal democracy and a winding down of civil war in Guatemala by suspending foreign assistance after an *auto-golpe* or attempt to seize excessive power by the existing President.

### *Humanitarian intervention*

Historically the United States has made claims to a unilateral right to humanitarian intervention in order, presumably, to protect lives and property in foreign states. Recent Presidents did so, for example, in 1965 in the Dominican Republic, in 1983 in Grenada, and in 1989 in Panama. President Carter, in authorizing the attempted rescue of Americans from Iran in 1980, made claims to self-defence rather than humanitarian intervention.<sup>46</sup> There being no codified right of humanitarian intervention in international law to rescue either one’s own nationals or foreigners, owing to the widespread and well-justified fear of its misuse, the United States is left with consideration of controversial exercises of power accompanied mostly by claims of self-defence (Iran, 1980) and/or of invitation to act by the consent of the government (Grenada, 1983). President Bush’s assertion of an additional right to use force to restore a properly elected government in Panama was met with widespread opposition. President Clinton later side-stepped this issue in Haiti by obtaining UN Security Council authorization to use all necessary means to remove an unelected government, which had deposed an elected one, because of

an alleged threat to international peace and security. Some uses of the US military to rescue both US nationals and foreigners have not been controversial in places such as Liberia and Somalia, because US action was met by widespread deference.

### *Democracy assistance*

The United States has manifested a long history of concern with democracy abroad – at least via rhetoric.<sup>47</sup> Since the end of the Cold War the United States has stitched together a crazy-quilt of bits and pieces of legislation and executive decisions that with some overstatement can be called a programme of official democracy assistance.<sup>48</sup> Because of its disjointed nature, no one in Washington could give a firm figure of how much was being spent *in toto* to advance liberal democracy abroad. The Agency for International Development estimated that it was spending almost US\$500 million per annum as of 1995. The State Department and the Justice Department also had their own programmes and budgets. Funding remained small relative to benchmarks such as the Marshall Plan of the late 1940s, or German spending on democracy in the area of former East Germany and its 17 million persons. The George Soros foundations spent more money for democracy and civic society in Russia than did the United States.

These official US activities were directed at three general targets: support for civic societies and the private groups found therein; support for state building, primarily via strong legislatures and independent courts; and support for free and fair elections with party competition. The absence of a compelling theory about what factors produced stable liberal democracy over time and place contributed to a lack of systematic governmental planning. The variety of conditions evident in Russia, Eastern and Central Europe, and the Western hemisphere, the principal areas of US interest, also led to a scatter-shot approach.

Evaluating the impact of the US democracy assistance programme is no easy task. The US role is intertwined with intergovernmental organizations such as the United Nations, the OSCE, and the OAS. The United States shares objectives with numerous private groups. US programmes are quite similar to those of the National Endowment for Democracy, a quasi-independent Washington-based agency funded by congressional appropriation. Other states have their own pro-democracy policies. Even in one country such as Romania, it is difficult to say what is the precise influence of US decisions for democracy, given the short time-frame so far, the plethora of other influences, and the absence of a proven theory of causation as a check-point.<sup>49</sup>

Several hypotheses suggest themselves for further enquiry. Particularly

## 42 SOME LIBERAL DEMOCRACIES OF THE OECD

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in the new states emerging from the former Soviet Union, and in much of Eastern Europe, US programmes in the name of democracy seemed more oriented to market restructuring for privatization than for democracy per se. Washington's semantics about market democracies seemed designed to legitimize this emphasis on economic reform. Some research suggests no automatic correlations between economic growth via markets and liberal democracy.<sup>50</sup> Absent a concerted push to make privately generated wealth compatible with democracy, private wealth can be easily combined with authoritarianism. This line of research and reasoning casts some doubt on the US emphasis on extensive privatization as a necessary precondition for liberal democracy. Although all stable democracies are based on some version of capitalism, a number of relatively stable democracies, such as France and Sweden, manifest relatively large public sectors.

In the Western hemisphere especially, relative lack of US attention to the economic resources of the public sector has hampered the consolidation of liberal democracy in places like El Salvador. This was noted above in the section on international financial institutions. US determination to shrink the public sector, in the name of an efficient private and for-profit sector, may not be what emerging democracies need in order to obtain popular support through expensive programmes of land reform, education, etc. In Eastern Europe, several electorates have returned to power a somewhat reformed communist party in protest against shrinking public services and in quest for a better quality of life. US democracy assistance may be driven as much by a bias against big government and in favour of big markets as by a programme that is appropriately tailored to the needs of the recipient. The fact that the United States is not a social democracy and does not recognize socio-economic human rights contributes to this situation.<sup>51</sup>

The amount of US spending for democracy abroad, and in general the real importance of this objective in US foreign policy, may be too small to generate profound influence in many countries. In a number of countries the United States may be more interested in traditional military security and economic arrangements advantageous to the United States than in liberal democracy. This hypothesis is difficult to test. Is the expansion of NATO to provide a check on the Russian Bear in the event of a more nationalistic and militarized government in Moscow, or is that expansion to provide an additional framework for the management of problems of democracy and other human rights in former European communist states? In any event, it is highly probable that, given the absence of congressional and public sentiment in support of further spending on foreign assistance, it would be desirable for the United States to concentrate on certain key or pivotal states. If the United States decides to leave the

basic question of guaranteeing public order in Albania to an Italian-led coalition of European states, it is difficult to understand why the United States should have a democracy assistance programme in Albania rather than transferring that spending to Indonesia.

Finally, it should be noted that the United States takes many decisions in its foreign policy apart from official democracy assistance that have an impact on democracy abroad. We noted above the US reaction to Hun Sen's coup in Cambodia in 1997, and to the Guatemalan *auto-golpe* in 1993. We could also note US deference to French policy in supporting the cancellation of national elections in Algeria in 1992; or US support for controlled Algerian elections in 1997. These ad hoc or reactive decisions do not present one pattern in support of, or opposition to, free and fair national elections. In some cases, e.g. Syria or Saudi Arabia, the United States does not push for liberal democracy, giving preference to traditional security and economic interests. In other cases, e.g. Albania or Kenya, the United States does support electoral freedoms. In still other cases, e.g. Nigeria, the United States endorses liberal democracy in the abstract but does not much push for it in quotidian diplomacy.

## V. Conclusions

The United States professes to be a leader for human rights in the world but displays an ambivalent attitude toward the International Bill of Rights and numerous other international human rights documents. In American society there is much scepticism not only about international rights standards in general, as compared with US constitutional norms, but also about economic rights and a claimed collective human right to development in particular. Nevertheless, in the United Nations, the OAS, and the OSCE the United States has either initiated or supported much diplomacy at least for civil and political rights. And in Somalia President Bush took significant action to respond to starvation and malnutrition, even if he did not address the issues in terms of socio-economic rights. Somalia notwithstanding, however, by emphasizing civil and political rights to the almost total exclusion of socio-economic rights, US diplomacy tends to spotlight repression while mostly ignoring oppression.<sup>52</sup>

Particularly noteworthy was US leadership, at least during 1991–1993, for an expanded UN programme of complex peacekeeping with overtones of Chapter VII enforcement action on issues that were substantially human rights issues. In other words, the United States agreed that international peace and security could sometimes refer to the security of persons inside states. This latter view logically entailed a far-reaching consideration of human rights.<sup>53</sup>

## 44 SOME LIBERAL DEMOCRACIES OF THE OECD

The United States appears to be belatedly addressing the interplay of economic and political rights through a debate about policy toward the international financial institutions. The United States, like its democratic partners, appears to be slowly moving away from the view that the World Bank and the IMF, *inter alia*, should be strictly economic organizations without a human rights component. As noted, the United States has sought to link both the Bank and the Fund to its human rights concerns in the former Yugoslavia (where human rights are intertwined with security issues). The United States may even eventually recognize that in places such as El Salvador, shrinking the resources of the public sector in the name of private markets and export-led economic growth, under the umbrella of structural adjustment programmes, may in fact impede the consolidation of liberal democracy. On balance, US foreign policy makers in various administrations and political parties do not display a consensus on the relationship between economics on the one hand and civil and political rights on the other. The bias is toward the primacy of market restructuring. This is evident in US bilateral programmes for democracy abroad, where more funds have been spent on market reform than on civic society, state building, and electoral assistance. In part this lack of careful attention to the interplay of economics and democracy is because social scientists lack consensus on the same subject.

The most notable feature of US foreign policy on human rights after the Cold War, whether multilateral or bilateral, is the desire to avoid significant costs of either blood or treasure. This is quite evident in Washington's desire to avoid even small-scale casualties after its Somalian experience, and in spending for official democracy assistance that falls far short of the expectations generated by the accompanying rhetoric. It is one thing for the United States to engage in the easy diplomacy for human rights that is detached from finances and coercion. It is another thing to take rights so seriously in foreign policy that one's diplomacy on the subject is in fact linked to means of implementation, beyond jawboning, in the face of obstacles.

It is persuasive for moralists to argue that, in the twenty-first century, an age of rights should demand at a minimum that there be no mass murder and no mass starvation. Insofar as the 1990s are concerned, when we review US foreign policy in places such as Bosnia, Somalia, and Rwanda, we are forced to conclude that one cannot rely on US foreign policy consistently to help ensure this minimal respect for international human rights. Some countries, like Rwanda, seem beyond the scope of American humanitarian concern. Others, like Bosnia, seem not worth the candle – too costly in terms of American vested interests. A third problem, evident in places such as Turkey and China, is that American economic and security interests dictate a lower priority to human rights.<sup>54</sup>

This record cannot help but detract from a more positive US record, at least for civil and political rights, in some countries like Guatemala and Burma.

The most fundamental problem blocking a consistently progressive stand on international human rights issues stems from a lack of political will at home to pay the necessary price to see even American, much less international, rights principles realized abroad. The real problem is the danger not of moral crusade but of moral abnegation. In this sense the American self-image of a nation standing for individual freedom for all is at considerable variance with international reality. The world is still a large and imperfect place, but states can set priorities and distinguish between gross and more minor violations of human rights. Extensive rhetoric about universal human rights, however, generates its own pressures over time to close the gap between rhetoric and reality.

## Notes

1. T. Davis and S. Lynn-Jones, "City upon a Hill," *Foreign Policy*, no. 66 (1987), 20–38.
2. David Jacobson, *Rights across Borders* (Baltimore, MD: Johns Hopkins University Press, 1996), 102 and *passim*.
3. Contemporary public opinion polls indicate superficial popular support for national health care, but this opinion tends to dissipate when questions are asked about cost, less coverage for some, and a larger state bureaucracy, etc. See further Audrey R. Chapman, "The Defeat of Comprehensive Health Care Reform: A Human Rights Perspective," in David P. Forsythe, ed., *The United States and Human Rights: Looking Inward and Outward* (Lincoln, NE: University of Nebraska Press, 1999).
4. See further David P. Forsythe, *Human Rights and World Politics* (Lincoln, NE: University of Nebraska Press, 1984), chapter V, p. 168, quoting the novelist John Fowles. See also Rhoda Howard, *Human Rights and the Search for Community* (Boulder, CO: Westview Press, 1995).
5. George F. Kennan, *American Diplomacy 1900–1950* (Chicago: Chicago University Press, 1951); John G. Spanier, *American Foreign Policy since World War II* (Washington, DC: Congressional Quarterly Press, 1992).
6. Arthur Schlesinger, Jr., "Human Rights and the American Tradition," *Foreign Affairs* 57/2 (1979), 503–526.
7. See especially David P. Forsythe, "Democracy, War, and Covert Action," *Journal of Peace Research* 29/4 (1992), 385–395; and Jack Donnelly, "Humanitarian Intervention and American Foreign Policy: Law, Morality, and Politics," *Journal of International Affairs* 37 (1984), 311–328.
8. Ernst B. Haas, *Global Evangelism Rides Again: How to Protect Human Rights without Really Trying* (Berkeley, CA: Institute of International Studies, 1978). For an example of assumptions about a US crusade not substantiated by the facts, see Joshua Muravchik, *The Uncertain Crusade: Jimmy Carter and the Dilemmas of Human Rights Policy* (Lanham: Hamilton Press, 1986).
9. David P. Forsythe, "Human Rights and US Foreign Policy: Two Levels, Two Worlds," *Political Studies* 43 (1995), 111–130; also in David Beetham, ed., *Politics and Human Rights* (London: Blackwell, 1996). The Spanish-American War of 1898 constitutes one

## 46 SOME LIBERAL DEMOCRACIES OF THE OECD

- of the better examples of American moralism in foreign policy, but even in this case the United States was driven as much by the quest for colonies and Great Power status as by the desire to liberate Cuba and the Philippines from Spanish tyranny. The United States did not grant Filipino independence until 1946.
10. Crag N. Whitney, "Paris Snips Ties Binding It to Africa," *New York Times*, 25 June 1997, p. A5. France had stuck with ageing African dictators too long in an effort to carve out a zone of French influence, had lost out in shifts of power, and was thus forced to realign its relations with various African governments.
  11. *U.S. Department of State Dispatch*, 28 September 1992, pp. 721–724.
  12. *Weekly Compilation of Presidential Documents*, 24 October 1994, pp. 2041–2044.
  13. Chicago Council on Foreign Relations, American Public Opinion Report-1995, [http://www.uicdocs.lib.uic.edu/ccfr/publications/opinion\\_1995/2-3html](http://www.uicdocs.lib.uic.edu/ccfr/publications/opinion_1995/2-3html).
  14. In addition to *ibid.*, see Ole R. Holsti, "Public Opinion on Human Rights in American Foreign Policy," in Forsythe, ed., *The United States and Human Rights*, op. cit.
  15. Ellen Dorsey, "U.S. Foreign Policy and the Human Rights Movement: New Strategies for a Global Era," in Forsythe, ed., *The United States and Human Rights*, op. cit.
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**US FOREIGN POLICY AND HUMAN RIGHTS 47**

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 48 SOME LIBERAL DEMOCRACIES OF THE OECD
 

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*George F. Kennan*

## MORALITY AND FOREIGN POLICY\*

I

In a small volume of lectures published nearly thirty-five years ago,<sup>1</sup> I had the temerity to suggest that the American statesmen of the turn of the twentieth century were unduly legalistic and moralistic in their judgment of the actions of other governments. This seemed to be an approach that carried them away from the sterner requirements of political realism and caused their statements and actions, however impressive to the domestic political audience, to lose effectiveness in the international arena.

These observations were doubtless brought forward too cryptically and thus invited a wide variety of interpretations, not excluding the thesis that I had advocated an amoral, or even immoral, foreign policy for this country. There have since been demands, particularly from the younger generation, that I should make clearer my views on the relationship of moral considerations to American foreign policy. The challenge is a fair one and deserves a response.

### II

Certain distinctions should be made before one wanders farther into this thicket of problems.

First of all, the conduct of diplomacy is the responsibility of governments. For purely practical reasons, this is unavoidable and inalterable. This responsibility is not diminished by the fact that government, in formulating foreign policy, may choose to be influenced by private opinion. What we are talking about, therefore, when we attempt to relate moral considerations to foreign policy, is the behavior of governments, not of individuals or entire peoples.

Second, let us recognize that the functions, commitments and moral obligations of governments are not the same as those

<sup>1</sup>American Diplomacy 1900–1950. Chicago: University of Chicago Press, 1951.

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\* Kennan, George, "Morality and Foreign Policy", *Foreign Affairs*, Vol. 64, No. 2, Winter 1985/86, pp. 205-218.

## 206 FOREIGN AFFAIRS

of the individual. Government is an agent, not a principal. Its primary obligation is to the *interests* of the national society it represents, not to the moral impulses that individual elements of that society may experience. No more than the attorney vis-à-vis the client, nor the doctor vis-à-vis the patient, can government attempt to insert itself into the consciences of those whose interests it represents.

Let me explain. The interests of the national society for which government has to concern itself are basically those of its military security, the integrity of its political life and the well-being of its people. These needs have no moral quality. They arise from the very existence of the national state in question and from the status of national sovereignty it enjoys. They are the unavoidable necessities of a national existence and therefore not subject to classification as either "good" or "bad." They may be questioned from a detached philosophic point of view. But the government of the sovereign state cannot make such judgments. When it accepts the responsibilities of governing, implicit in that acceptance is the assumption that it is right that the state should be sovereign, that the integrity of its political life should be assured, that its people should enjoy the blessings of military security, material prosperity and a reasonable opportunity for, as the Declaration of Independence put it, the pursuit of happiness. For these assumptions the government needs no moral justification, nor need it accept any moral reproach for acting on the basis of them.

This assertion assumes, however, that the concept of national security taken as the basis for governmental concern is one reasonably, not extravagantly, conceived. In an age of nuclear striking power, national security can never be more than relative; and to the extent that it can be assured at all, it must find its sanction in the intentions of rival powers as well as in their capabilities. A concept of national security that ignores this reality and, above all, one that fails to concede the same legitimacy to the security needs of others that it claims for its own, lays itself open to the same moral reproach from which, in normal circumstances, it would be immune.

Whoever looks thoughtfully at the present situation of the United States in particular will have to agree that to assure these blessings to the American people is a task of such dimensions that the government attempting to meet it successfully will have very little, if any, energy and attention left to devote

## MORALITY AND FOREIGN POLICY 207

to other undertakings, including those suggested by the moral impulses of these or those of its citizens.

Finally, let us note that there are no internationally accepted standards of morality to which the U.S. government could appeal if it wished to act in the name of moral principles. It is true that there are certain words and phrases sufficiently high-sounding the world over so that most governments, when asked to declare themselves for or against, will cheerfully subscribe to them, considering that such is their vagueness that the mere act of subscribing to them carries with it no danger of having one's freedom of action significantly impaired. To this category of pronouncements belong such documents as the Kellogg-Briand Pact, the Atlantic Charter, the Yalta Declaration on Liberated Europe, and the prologues of innumerable other international agreements.

Ever since Secretary of State John Hay staged a political coup in 1899 by summoning the supposedly wicked European powers to sign up to the lofty principles of his Open Door notes (principles which neither they nor we had any awkward intention of observing), American statesmen have had a fondness for hurling just such semantic challenges at their foreign counterparts, thereby placing themselves in a graceful posture before domestic American opinion and reaping whatever political fruits are to be derived from the somewhat grudging and embarrassed responses these challenges evoke.

To say these things, I know, is to invite the question: how about the Helsinki accords of 1975? These, of course, were numerous and varied. There is no disposition here to question the value of many of them as refinements of the norms of international intercourse. But there were some, particularly those related to human rights, which it is hard to relegate to any category other than that of the high-minded but innocuous professions just referred to. These accords were declaratory in nature, not contractual. The very general terms in which they were drawn up, involving the use of words and phrases that had different meanings for different people, deprived them of the character of specific obligations to which signatory governments could usefully be held. The Western statesmen who pressed for Soviet adherence to these pronouncements must have been aware that some of them could not be implemented on the Soviet side, within the meanings we would normally attach to their workings, without fundamental changes in the Soviet system of power—changes we had no reason to expect

## 208 FOREIGN AFFAIRS

would, or could, be introduced by the men then in power. Whether it is morally commendable to induce others to sign up to declarations, however high-minded in resonance, which one knows will not and cannot be implemented, is a reasonable question. The Western negotiators, in any case, had no reason to plead naïveté as their excuse for doing so.

When we talk about the application of moral standards to foreign policy, therefore, we are not talking about compliance with some clear and generally accepted international code of behavior. If the policies and actions of the U.S. government are to be made to conform to moral standards, those standards are going to have to be America's own, founded on traditional American principles of justice and propriety. When others fail to conform to those principles, and when their failure to conform has an adverse effect on American *interests*, as distinct from political tastes, we have every right to complain and, if necessary, to take retaliatory action. What we cannot do is to assume that our moral standards are theirs as well, and to appeal to those standards as the source of our grievances.

### III

So much for basic principles. Let us now consider some categories of action that the U.S. government is frequently asked to take, and sometimes does take, in the name of moral principle.

These actions fall into two broad general categories: those that relate to the behavior of other governments that we find morally unacceptable, and those that relate to the behavior of our own government. Let us take them in that order.

There have been many instances, particularly in recent years, when the U.S. government has taken umbrage at the behavior of other governments on grounds that at least implied moral criteria for judgment, and in some of these instances the verbal protests have been reinforced by more tangible means of pressure. These various interventions have marched, so to speak, under a number of banners: democracy, human rights, majority rule, fidelity to treaties, fidelity to the U.N. Charter, and so on. Their targets have sometimes been the external policies and actions of the offending states, more often the internal practices. The interventions have served, in the eyes of their American inspirers, as demonstrations not only of the moral deficiencies of others but of the positive morality of ourselves; for it was seen as our moral duty to detect these

## MORALITY AND FOREIGN POLICY 209

lapses on the part of others, to denounce them before the world, and to assure—as far as we could with measures short of military action—that they were corrected.

Those who have inspired or initiated efforts of this nature would certainly have claimed to be acting in the name of moral principle, and in many instances they would no doubt have been sincere in doing so. But whether the results of this inspiration, like those of so many other good intentions, would justify this claim is questionable from a number of standpoints.

Let us take first those of our interventions that relate to internal practices of the offending governments. Let us reflect for a moment on how these interventions appear in the eyes of the governments in question and of many outsiders.

The situations that arouse our discontent are ones existing, as a rule, far from our own shores. Few of us can profess to be perfect judges of their rights and their wrongs. These are, for the governments in question, matters of internal affairs. It is customary for governments to resent interference by outside powers in affairs of this nature, and if our diplomatic history is any indication, we ourselves are not above resenting and resisting it when we find ourselves its object.

Interventions of this nature can be formally defensible only if the practices against which they are directed are seriously injurious to our interests, rather than just our sensibilities. There will, of course, be those readers who will argue that the encouragement and promotion of democracy elsewhere is always in the interests of the security, political integrity and prosperity of the United States. If this can be demonstrated in a given instance, well and good. But it is not invariably the case. Democracy is a loose term. Many varieties of folly and injustice contrive to masquerade under this designation. The mere fact that a country acquires the trappings of self-government does not automatically mean that the interests of the United States are thereby furthered. There are forms of plebiscitary “democracy” that may well prove less favorable to American interests than a wise and benevolent authoritarianism. There can be tyrannies of a majority as well as tyrannies of a minority, with the one hardly less odious than the other. Hitler came into power (albeit under highly unusual circumstances) with an electoral mandate, and there is scarcely a dictatorship of this age that would not claim the legitimacy of mass support.

There are parts of the world where the main requirement

## 210 FOREIGN AFFAIRS

of American security is not an unnatural imitation of the American model but sheer stability, and this last is not always assured by a government of what appears to be popular acclaim. In approaching this question, Americans must overcome their tendency toward generalization and learn to examine each case on its own merits. The best measure of these merits is not the attractiveness of certain general semantic symbols but the effect of the given situation on the tangible and demonstrable interests of the United States.

Furthermore, while we are quick to allege that this or that practice in a foreign country is bad and deserves correction, seldom if ever do we seem to occupy ourselves seriously or realistically with the conceivable alternatives. It seems seldom to occur to us that even if a given situation is bad, the alternatives to it might be worse—even though history provides plenty of examples of just this phenomenon. In the eyes of many Americans it is enough for us to indicate the changes that ought, as we see it, to be made. We assume, of course, that the consequences will be benign and happy ones. But this is not always assured. It is, in any case, not we who are going to have to live with those consequences: it is the offending government and its people. We are demanding, in effect, a species of veto power over those of their practices that we dislike, while denying responsibility for whatever may flow from the acceptance of our demands.

Finally, we might note that our government, in raising such demands, is frequently responding not to its own moral impulses or to any wide general movements of American opinion but rather to pressures generated by politically influential minority elements among us that have some special interest—ethnic, racial, religious, ideological or several of these together—in the foreign situation in question. Sometimes it is the sympathies of these minorities that are most prominently aroused, sometimes their antipathies. But in view of this diversity of motive, the U.S. government, in responding to such pressures and making itself their spokesman, seldom acts consistently. Practices or policies that arouse our official displeasure in one country are cheerfully condoned or ignored in another. What is bad in the behavior of our opponents is good, or at least acceptable, in the case of our friends. What is unobjectionable to us at one period of our history is seen as offensive in another.

This is unfortunate, for a lack of consistency implies a lack

## MORALITY AND FOREIGN POLICY 211

of principle in the eyes of much of the world; whereas morality, if not principled, is not really morality. Foreigners, observing these anomalies, may be forgiven for suspecting that what passes as the product of moral inspiration in the rhetoric of our government is more likely to be a fair reflection of the mosaic of residual ethnic loyalties and passions that make themselves felt in the rough and tumble of our political life.

Similar things could be said when it is not the internal practices of the offending government but its actions on the international scene that are at issue. There is, here, the same reluctance to occupy one's self with the conceivable alternatives to the procedures one complains about or with the consequences likely to flow from the acceptance of one's demands. And there is frequently the same lack of consistency in the reaction. The Soviet action in Afghanistan, for example, is condemned, resented and responded to by sanctions. One recalls little of such reaction in the case of the somewhat similar, and apparently no less drastic, action taken by China in Tibet some years ago. The question inevitably arises: is it principle that determines our reaction? Or are there other motives?

Where measures taken by foreign governments affect adversely American interests rather than just American moral sensibilities, protests and retaliation are obviously in order; but then they should be carried forward frankly for what they are, and not allowed to masquerade under the mantle of moral principle.

There will be a tendency, I know, on the part of some readers to see in these observations an apology for the various situations, both domestic and international, against which we have protested and acted in the past. They are not meant to have any such connotations. These words are being written—for whatever this is worth—by one who regards the action in Afghanistan as a grievous and reprehensible mistake of Soviet policy, a mistake that could and should certainly have been avoided. Certain of the procedures of the South African police have been no less odious to me than to many others.

What is being said here does not relate to the reactions of individual Americans, of private organizations in this country, or of the media, to the situations in question. All these may think and say what they like. It relates to the reactions of the U.S. government, as a government among governments, and to the motivation cited for those reactions. Democracy, as Americans understand it, is not necessarily the future of all

## 212 FOREIGN AFFAIRS

mankind, nor is it the duty of the U.S. government to assure that it becomes that. Despite frequent assertions to the contrary, not everyone in this world is responsible, after all, for the actions of everyone else, everywhere. Without the power to compel change, there is no responsibility for its absence. In the case of governments it is important for purely practical reasons that the lines of responsibility be kept straight, and that there be, in particular, a clear association of the power to act with the consequences of action or inaction.

### IV

If, then, the criticism and reproof of perceived moral lapses in the conduct of others are at best a dubious way of expressing our moral commitment, how about our own policies and actions? Here, at least, the connection between power and responsibility—between the sowing and the reaping—is integral. Can it be true that here, too, there is no room for the application of moral principle and that all must be left to the workings of expediency, national egoism and cynicism?

The answer, of course, is no, but the possibilities that exist are only too often ones that run against the grain of powerful tendencies and reflexes in our political establishment.

In a less than perfect world, where the ideal so obviously lies beyond human reach, it is natural that the avoidance of the worst should often be a more practical undertaking than the achievement of the best, and that some of the strongest imperatives of moral conduct should be ones of a negative rather than a positive nature. The strictures of the Ten Commandments are perhaps the best illustration of this state of affairs. This being the case, it is not surprising that some of the most significant possibilities for the observance of moral considerations in American foreign policy relate to the avoidance of actions that have a negative moral significance, rather than to those from which positive results are to be expected.

Many of these possibilities lie in the intuitive qualities of diplomacy—such things as the methodology, manners, style, restraint and elevation of diplomatic discourse—and they can be illustrated only on the basis of a multitude of minor practical examples, for which this article is not the place. There are, however, two negative considerations that deserve mention here.

The first of these relates to the avoidance of what might be called the histrionics of moralism at the expense of its sub-

## MORALITY AND FOREIGN POLICY 213

stance. By that is meant the projection of attitudes, poses and rhetoric that cause us to appear noble and altruistic in the mirror of our own vanity but lack substance when related to the realities of international life. It is a sad feature of the human predicament, in personal as in public life, that whenever one has the agreeable sensation of being impressively moral, one probably is not. What one does without self-consciousness or self-admiration, as a matter of duty or common decency, is apt to be closer to the real thing.

The second of these negative considerations pertains to something commonly called secret operations—a branch of governmental activity closely connected with, but not to be confused with, secret intelligence.

Earlier in this century the great secular despotisms headed by Hitler and Stalin introduced into the pattern of their interaction with other governments' clandestine methods of operation that can only be described as ones of unbridled cynicism, audacity and brutality. These were expressed not only by a total lack of scruple on their own part but also by a boundless contempt for the countries against which these efforts were directed (and, one feels, a certain contempt for themselves as well). This was in essence not new, of course; the relations among the nation-states of earlier centuries abounded in examples of clandestine iniquities of every conceivable variety. But these were usually moderated in practice by a greater underlying sense of humanity and a greater respect for at least the outward decencies of national power. Seldom was their intent so cynically destructive, and never was their scale remotely so great, as some of the efforts we have witnessed in this century.

In recent years these undertakings have been supplemented, in their effects on the Western public, by a wholly different phenomenon arising in a wholly different quarter: namely, the unrestrained personal terrorism that has been employed by certain governments or political movements on the fringes of Europe as well as by radical-criminal elements within Western society itself. These phenomena have represented, at different times, serious challenges to the security of nearly all Western countries. It is not surprising, therefore, that among the reactions evoked has been a demand that fire should be fought with fire, that the countries threatened by efforts of this nature should respond with similar efforts.

No one will deny that resistance to these attacks requires

## 214 FOREIGN AFFAIRS

secret intelligence of a superior quality and a severe ruthlessness of punishment wherever they fall afoul of the judicial systems of the countries against which they are directed. It is not intended here to comment in any way on the means by which they might or should be opposed by countries other than the United States. Nor is it intended to suggest that any of these activities that carry into this country should not be met by anything less than the full rigor of the law. On the contrary, one could wish the laws were even more rigorous in this respect. But when it comes to governmental operations—or disguised operations—beyond our borders, we Americans have a problem.

In the years immediately following the Second World War the practices of the Stalin regime in this respect were so far-reaching, and presented so great an apparent danger to a Western Europe still weakened by the vicissitudes of war, that our government felt itself justified in setting up facilities for clandestine defensive operations of its own; all available evidence suggests that it has since conducted a number of activities under this heading. As one of those who, at the time, favored the decision to set up such facilities, I regret today, in light of the experience of the intervening years, that the decision was taken. Operations of this nature are not in character for this country. They do not accord with its traditions or with its established procedures of government. The effort to conduct them involves dilemmas and situations of moral ambiguity in which the American statesman is deprived of principled guidance and loses a sense of what is fitting and what is not. Excessive secrecy, duplicity and clandestine skulduggery are simply not our dish—not only because we are incapable of keeping a secret anyway (our commercial media of communication see to that) but, more importantly, because such operations conflict with our own traditional standards and compromise our diplomacy in other areas.

One must not be dogmatic about such matters, of course. Foreign policy is too intricate a topic to suffer any total taboos. There may be rare moments when a secret operation appears indispensable. A striking example of this was the action of the United States in apprehending the kidnappers of the *Achille Lauro*. But such operations should not be allowed to become a regular and routine feature of the governmental process, cast in the concrete of unquestioned habit and institutionalized bureaucracy. It is there that the dangers lie.

## MORALITY AND FOREIGN POLICY 215

One may say that to deny ourselves this species of capability is to accept a serious limitation on our ability to contend with forces now directed against us. Perhaps; but if so, it is a limitation with which we shall have to live. The success of our diplomacy has always depended, and will continue to depend, on its inherent honesty and openness of purpose and on the forthrightness with which it is carried out. Deprive us of that and we are deprived of our strongest armor and our most effective weapon. If this is a limitation, it is one that reflects no discredit on us. We may accept it in good conscience, for in national as in personal affairs the acceptance of one's limitations is surely one of the first marks of a true morality.

## V

So much, then, for the negative imperatives. When we turn to the positive ones there are, again, two that stand out.

The first of them is closely connected with what has just been observed about the acceptance of one's limitations. It relates to the duty of bringing one's commitments and undertakings into a reasonable relationship with one's real possibilities for acting upon the international environment. This is not by any means just a question of military strength, and particularly not of the purely destructive and ultimately self-destructive sort of strength to be found in the nuclear weapon. It is not entirely, or even mainly, a question of foreign policy. It is a duty that requires the shaping of one's society in such a manner that one has maximum control over one's own resources and maximum ability to employ them effectively when they are needed for the advancement of the national interest and the interests of world peace.

A country that has a budgetary deficit and an adverse trade balance both so fantastically high that it is rapidly changing from a major creditor to a major debtor on the world's exchanges, a country whose own enormous internal indebtedness has been permitted to double in less than six years, a country that has permitted its military expenditures to grow so badly out of relationship to the other needs of its economy and so extensively out of reach of political control that the annual spending of hundreds of billions of dollars on "defense" has developed into a national addiction—a country that, in short, has allowed its financial and material affairs to drift into such disorder, is so obviously living beyond its means, and confesses itself unable to live otherwise—is simply not in a position to

## 216 FOREIGN AFFAIRS

make the most effective use of its own resources on the international scene, because they are so largely out of its control.

This situation must be understood in relationship to the exorbitant dreams and aspirations of world influence, if not world hegemony—the feeling that we must have the solution to everyone's problems and a finger in every pie—that continue to figure in the assumptions underlying so many American reactions in matters of foreign policy. It must also be understood that in world affairs, as in personal life, example exerts a greater power than precept. A first step along the path of morality would be the frank recognition of the immense gap between what we dream of doing and what we really have to offer, and a resolve, conceived in all humility, to take ourselves under control and to establish a better relationship between our undertakings and our real capabilities.

The second major positive imperative is one that also involves the husbanding and effective use of resources, but it is essentially one of purpose and policy.

Except perhaps in some sectors of American government and opinion, there are few thoughtful people who would not agree that our world is at present faced with two unprecedented and supreme dangers. One is the danger not just of nuclear war but of any major war at all among great industrial powers—an exercise which modern technology has now made suicidal all around. The other is the devastating effect of modern industrialization and overpopulation on the world's natural environment. The one threatens the destruction of civilization through the recklessness and selfishness of its military rivalries, the other through the massive abuse of its natural habitat. Both are relatively new problems, for the solution of which past experience affords little guidance. Both are urgent. The problems of political misgovernment, to which so much of our thinking about moral values has recently related, is as old as the human species itself. It is a problem that will not be solved in our time, and need not be. But the environmental and nuclear crises will brook no delay.

The need for giving priority to the averting of these two overriding dangers has a purely rational basis—a basis in national interest—quite aside from morality. For short of a nuclear war, the worst that our Soviet rivals could do to us, even in our wildest worst-case imaginings, would be a far smaller tragedy than that which would assuredly confront us (and if not us, then our children) if we failed to face up to these

## MORALITY AND FOREIGN POLICY 217

two apocalyptic dangers in good time. But is there not also a moral component to this necessity?

Of all the multitudinous celestial bodies of which we have knowledge, our own earth seems to be the only one even remotely so richly endowed with the resources that make possible human life—not only make it possible but surround it with so much natural beauty and healthfulness and magnificence. And to the degree that man has distanced himself from the other animals in such things as self-knowledge, historical awareness and the capacity for creating great beauty (along, alas, with great ugliness), we have to recognize a further mystery, similar to that of the unique endowment of the planet—a mystery that seems to surpass the possibilities of the purely accidental. Is there not, whatever the nature of one's particular God, an element of sacrilege involved in the placing of all this at stake just for the sake of the comforts, the fears and the national rivalries of a single generation? Is there not a moral obligation to recognize in this very uniqueness of the habitat and nature of man the greatest of our moral responsibilities, and to make of ourselves, in our national personification, its guardians and protectors rather than its destroyers?

This, it may be objected, is a religious question, not a moral-political one. True enough, if one will. But the objection invites the further question as to whether there is any such thing as morality that does not rest, consciously or otherwise, on some foundation of religious faith, for the renunciation of self-interest, which is what all morality implies, can never be rationalized by purely secular and materialistic considerations.

## VI

The above are only a few random reflections on the great question to which this paper is addressed. But they would seem to suggest, in their entirety, the outlines of an American foreign policy to which moral standards could be more suitably and naturally applied than to that policy which we are conducting today. This would be a policy founded on recognition of the national interest, reasonably conceived, as the legitimate motivation for a large portion of the nation's behavior, and prepared to pursue that interest without either moral pretension or apology. It would be a policy that would seek the possibilities for service to morality primarily in our own behavior, not in our judgment of others. It would restrict our undertakings to the limits established by our own traditions

## 218 FOREIGN AFFAIRS

and resources. It would see virtue in our minding our own business wherever there is not some overwhelming reason for minding the business of others. Priority would be given, here, not to the reforming of others but to the averting of the two apocalyptic catastrophes that now hover over the horizons of mankind.

But at the heart of this policy would lie the effort to distinguish at all times between the true substance and the mere appearance of moral behavior. In an age when a number of influences, including the limitations of the electronic media, the widespread substitution of pictorial representation for verbal communication, and the ubiquitous devices of "public relations" and electoral politics, all tend to exalt the image over the essential reality to which that image is taken to relate—in such an age there is a real danger that we may lose altogether our ability to distinguish between the real and the unreal, and, in doing so, lose both the credibility of true moral behavior and the great force such behavior is, admittedly, capable of exerting. To do this would be foolish, unnecessary and self-defeating. There may have been times when the United States could afford such frivolity. This present age, unfortunately, is not one of them.

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## **פרק 8**

# **זכויות האדם ב מדיניות החוץ האירופית**

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# Explaining International Human Rights Regimes: Liberal Theory and Western Europe\*

ANDREW MORAVCSIK  
*Harvard University*

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Under what conditions are effective international regimes for the promotion of human rights likely to emerge? Case studies of European institutions — the European Convention on Human Rights, the European Community and the Conference on Security and Cooperation in Europe — confirm hypotheses more consistent with Liberal theories of international relations than their Institutionalist or Realist counterparts. The uniquely successful mechanisms of the European regime, in particular its fine-grained system of individual petition and supranational judicial review, function not by external sanctions or reciprocity, but by 'shaming' and 'coopting' domestic lawmakers, judges and citizens, who pressure governments from within for compliance. The evolution of these mechanisms presupposes the existence of an autonomous independent civil society and robust domestic legal institutions and, even in the relatively propitious circumstances of postwar Europe, required several generations to evolve. Such institutions appear to be, with only a few exceptions, most successful when they seek to harmonize and perfect respect for human rights among nations that already effectively guarantee basic rights, rather than introducing human rights to new jurisdictions. Those nations in which individuals, groups or governments seek to improve or legitimate their own democratic practices benefit the most from international human rights regimes.

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Under what conditions are effective international regimes for the promotion of human rights likely to emerge? The institutions of the European region — the European Convention on Human Rights, the European Community and the Conference on Security and Cooperation in Europe — constitute the world's most extensive and effective system of international institutions designed for this purpose. What explains its unique, but uneven, level of

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*Andrew Moravcsik*

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success? Under what conditions might similar institutions be successfully transplanted to other regions, for example, Eastern Europe, the former Soviet Union and the Western Hemisphere? This article seeks to answer these questions by offering a detailed analysis of the procedures and record of the major multilateral European institutions for the promotion of democracy and human rights, proposing hypotheses about the structural conditions that have facilitated their unique success, and generalizing those hypotheses to human rights regimes more broadly.

The theoretical analysis is grounded in the Liberal approach of international relations and international law, which asserts that the most fundamental influence on international cooperation is not relative power, as Realist theory asserts, nor the institutionalized contractual environment for structuring international bargaining, as Institutionalism (sometimes termed neoLiberal) theory maintains. In the Liberal view, the most important factor defining the opportunities for and constraint on cooperation is the level of convergence of national preferences, which in turn reflect the demands of those domestic groups represented by the state (Burley, 1993a; Moravcsik, 1992). Effective international regimes are likely to emerge only where they have deep roots in the functional demands of groups in domestic and transnational society, as represented by the domestic political institutions that mediate between society and the state. Regimes foster compliance with international norms not by altering the external incentives facing a unitary state, but by altering the domestic incentives facing societal groups and politicians, thereby shifting the domestic coalitions that define state preferences.

A Liberal analysis of the European human rights regime suggests that the distinctive institutional practices on which its remarkable record of success rest depend on the prior convergence of domestic practices and institutions. The unique mechanisms of the European system, in particular its finely-grained system of individual petition and supranational judicial review, function not by external sanctions or reciprocity, but by 'shaming' and 'coopting' domestic law-makers, judges and citizens, who then pressure governments for compliance. The decisive causal links lie in civil society: international pressure works when it can work through free and influential public opinion and an independent judiciary. The fundamental social, ideological and political conditions that give rise to active civil societies and representative political institutions, which in turn contribute decisively to the extraordinarily high rate of membership and compliance enjoyed by the European human rights regime, are distinctive to advanced industrial democracies.

Conventional theoretical treatments of international human rights regimes, in which some countries are assumed to employ regimes to ameliorate major human rights abuses elsewhere or to impose their preferred

### *International Human Rights Regimes*

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ideology, miss the central dynamic of the European system. The uniquely developed international institutions and practices of human rights protection in Europe — those elements that distinguish it most clearly from other such regimes throughout the world — are not designed to induce basic adherence to human rights on the part of illiberal governments, whether inside or outside European human rights regimes. While the norms ratified by the Helsinki process may have encouraged dissident groups in Eastern Europe and the promise of EC membership may have induced greater attention to human rights in potential applicant states, both consistent with Liberal theory, neither causal chain has been widely or consistently exploited to alter government policies. Nor has the experience of European countries in employing sanctions, diplomatic suasion and other traditional instruments of human rights diplomacy produced a particularly distinguished record of success.

The unique success of the West European system lies not in the transformation of undemocratic regimes, but in the improvement of democratic ones. West European human rights regimes harmonize and perfect human rights and democracy among nations that already effectively guarantee basic rights, rather than introducing them to new situations. It is those countries in which individuals, groups or governments wish to employ international human rights regimes to strengthen *their own democratic systems* that benefit the most from them. The most effective elements of the European human rights system are thus also the subtlest. This delicate process of legal harmonization proceeds slowly. Even where a critical mass of functioning democracies exist, the international institutional mechanisms require — if the European case is a guide — several generations to become broadly effective.

It follows that effective regimes on the European model are likely to spread only slowly to other regions. Constructing or improving similar institutions in other regions — whether in the Western Hemisphere, where such a system already exists on paper, or the former Soviet Union and all but the most advanced sections of Eastern Europe — is likely to have modest consequences over the short- and medium-term. A brief analysis of current policy in these regions confirms this prediction. More appropriate to non-European settings, and perhaps also to much of Eastern Europe, are more traditional instruments, such as the Conference on Security and Cooperation in Europe (CSCE) system. CSCE functions on an intergovernmental level; it is essentially a formalization of the sort of human rights monitoring procedures that already exist through bilateral initiatives and the activities of non-governmental organizations. While the formalization of state-to-state interactions might be helpful elsewhere, it is unlikely to function significantly more effectively than current procedures, although it may do so somewhat more consistently.

*Andrew Moravcsik*

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This article is organized as follows. Section 1 argues that international regimes influence policy by altering domestic constraints. Three policy instruments of international democracy and human rights promotion are distinguished, which I term *sanctioning*, *shaming* and *cooptation*. Each employs a distinct mechanism through which international pressure may alter the domestic calculations of governments regarding democracy and human rights: respectively, material, symbolic and institutional means of influence. Sections 2–4 examine the European institutions and practices for sanctioning, shaming and cooptation. The European Community (EC), Conference on Security and Cooperation in Europe (CSCE) and the Council of Europe's European Convention on Human Rights (ECHR) systems are examined. Section 5 analyses the results in light of Liberal theories of international relations and suggests general hypotheses about the conditions under which international human rights regimes are likely to succeed and fail.

### ***1. Sanctions, Shaming and Cooptation: Three International Instruments of Human Rights Protection***

International actions to increase domestic protection for human rights succeed only where they alter the domestic calculations of governments. Setting aside the use of military force, which is not legally sanctioned by the European human rights system, we can distinguish three international instruments for promoting democratization and domestic protection of human rights: *sanctioning*, *shaming* and *cooptation*. Each takes the same basic form: actions by foreign countries influence civil society in the target state, leading to a shift in the coalitions or calculations that underlie government policy, sparking in turn a change of policy.

What differs across these three modes is the precise international instrument that is employed and the resulting 'transmission belt' through civil society in the target state whereby external pressure shifts the domestic incentives facing governments. *Sanctions* seek to promote democracy and respect for human rights by linking these goals to preferential international economic arrangements. Sanctions exploit material power by denying domestic groups access to desired foreign goods and services, markets or capital. Where the instrument is effective, the concern of domestic groups for their economic well-being leads them to influence the government, thereby shifting the domestic political balance of power in favor of greater protection for human rights. Examples from the European system include the limitation of imports to EC markets; restrictions on exports of capital and goods; the curtailment of EC development aid; and the manipulation of

### *International Human Rights Regimes*

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bilateral association agreements with, or the eventual membership of, neighboring European countries.

The second instrument, *shaming*, seeks to enforce individual human rights and promote democracy by creating an international and domestic climate of opinion critical of national practices. Shaming exploits the symbolic legitimacy of foreign pressure and international institutions to unleash domestic moral opprobrium (Lumsdaine, 1993, McElroy, 1992). Shaming is instigated through the dissemination of information and the promulgation of norms, as well as through the creation and exploitation of international practical institutions that enjoy domestic legitimacy. The domestic balance of power shifts in favor of the protection of human rights when the government or the citizenry seeks to avoid undermining its reputation and legitimacy at home or abroad. Examples cited below include the Council of Europe's European Convention on Human Rights and various Conference on Security and Cooperation in Europe (CSCE) agreements and institutions, which define and publicize human rights violations.

The third instrument, *cooptation*, seeks to enforce human rights and promote democracy by coopting or reforming domestic political institutions and legal systems in such a way as to shift the domestic balance of power in favor of human rights protection. Through direct links with international political institutions and organized pressure from international groups, the purposes of semi-autonomous political elites can be influenced directly. Examples cited below include the efforts of the European Court of Justice to coopt the domestic courts that request and enforce its judgments, and the slow process of incorporating the European Convention on Human Rights into domestic jurisprudence and statute.<sup>1</sup>

## 2. *Sanctions*

Sanctions seek to promote human rights and democracy by linking respect for them to preferential economic relations. The threat to economic relations aims to mobilize key societal groups against human rights violations, thereby shifting the domestic balance of power in favor of greater protection for human rights. The only effective European organization for sanctioning, the EC, has a number of policy instruments at its disposal. First, the EC can impose negative import, export or investment sanctions on third countries, generally organized by the European Political Cooperation (EPC) mechanism. Second, it can restrict foreign development assistance and trade preferences under its Lomé Convention arrangements with former African and Caribbean colonies. Third, it can manipulate the promise of bilateral association agreements with, and potential membership for, neighboring European countries.

*Andrew Moravcsik*

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### *The European Community: Trade and Investment Sanctions*

EC countries possess a battery of varied and formally powerful legal means to coordinate trade and investment sanctions in support of human rights and democratization, yet the record of successful action is modest. The disparity between the open-endedness of potential means and the modesty of real action suggests that the constraint lies not in the lack of appropriate institutions or organizations, but in the unwillingness of EC governments to use them. This conclusion is born out by a closer examination of EC actions.

The Treaty of Rome provides a number of legal instruments for the imposition of sanctions.<sup>2</sup> Moreover, since neither the EC's foreign policy cooperation procedure (EPC, now termed 'Common Foreign and Security Policy' or CFSP) or the European Council, at which the heads of state and government meet for quadrennial summits, is directly limited by EC commercial law, governments may also coordinate any domestic legal or political instrument of foreign policy available to them. Decisions about sanctions could be taken by the Council of Ministers of the EC, acting either through its normal trade policy procedures or through less formal EPC/CFSP procedures for foreign policy cooperation. In addition, heads of state and government may agree to sanctions at meetings of the European Council — their regular quadrennial summits. Although all of these procedures require in practice a unanimous vote, the flexibility for member governments is otherwise near total.<sup>3</sup>

Sanctions have been imposed, most often through EPC. Over the past 20 years, EPC has moved incrementally toward more coordinated foreign policy-making. A 'true consultation reflex' has emerged, in which EC governments initially seek to establish a common position with regard to major multilateral issues.<sup>4</sup> Yet this system has not up to now resulted in the effective use of sanctions in support of foreign policy goals, particularly in crisis situations.

The record of the past decade illustrates the weakness of the EC commitment to coordinated sanctions (Hill, 1992: 145). In the Iranian hostage affair of 1980, EPC was unable to impose effective sanctions on Iran. In the Polish crisis of 1981, the EPC crisis mechanism 'spectacularly failed to function'; it proved difficult to convene meetings and Greece blocked the imposition of sanctions. In the Falklands/Malvinas crisis of 1982, the member states of the EC imposed collective sanctions on Argentina, but their renewal after the war began was criticized by Denmark and opposed by Ireland, with its neutral and anti-British heritage, and Italy, with its close relations to Argentina. Unable to overcome the opposition of these two states, the EC process broke down, permitting Ireland and Italy to pursue independent bilateral policies of breaking sanctions, while the other

### *International Human Rights Regimes*

governments, supportive of British policy from the beginning, maintained them in place.<sup>5</sup> In response to the Israeli Invasion of Lebanon in 1982, the EPC advised the Commission to delay signing of the financial protocol of a new trade agreement. The EC reacted to neither the KAL 007 crisis nor the Grenada invasion of 1984, with Greek dissent blocking action on the former. Divergent positions on the Iraq crisis of 1990, with the British supporting the USA and the French mediating, consigned collective European action to ineffectiveness, except where UN decisions took precedence. The imposition of limited sanctions of China in response to the Tiananmen Square massacre of 1989 constituted an isolated success.

The European experience in targeting two countries is particularly instructive for judging the potential for sanctions in support of human rights: Yugoslavia and South Africa. In the Yugoslav crisis of 1991, the EC played the role of mediator, but was not able to back up its actions with more symbolic economic sanctions, let alone military intervention, until joint Western action was taken under the UN. Close analysis of European decision-making suggests that the lack of coordination on the question of whether to accord diplomatic recognition to Croatia and the lack of strong measures in other areas was due primarily to divergent opinions or the absence of political will on the part of major member states, not to institutional failure. To be sure, a unanimous vote was required, but it would have made little difference if the system had been reformed to permit a commitment to be made by a qualified majority. At no point over the past three years was there a qualified majority for stronger policies of sanctions or intervention (Steinberg, 1992). Moreover, it is unclear whether successful multilateral sanctions would have made any difference. Collective Western sanctions have subsequently devastated the Serbian economy, with meagre political results.

South Africa is an even more instructive example, since there was the maximum possible ideological opposition to the domestic practices of a target state — overt and formal racism being universally condemned in the international community. Yet European governments proved very hesitant to levy expensive sanctions in support of human rights goals. On balance, sanctions may have had some cumulative, long-term effect in strengthening white opposition to apartheid in South Africa. But this analysis suggests that, with the possible exception of the investment ban, their effect was largely symbolic.

In the 1970s and 1980s, EC member states held strikingly different views on the proper response to apartheid in South Africa, with the UK and Germany interested primarily in maintaining trade, while other member states were more supportive of sanctions in the service of political goals. Until 1977, EC pressure on South Africa to dismantle apartheid and provide for the economic liberation of the black states was limited to rhetoric. In

*Andrew Moravcsik*

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1977, the EPC adopted a Code of Conduct for European firms doing business in the region, which normalized labor relations between European firms and black South African workers. Being simply an attempt to coordinate national policies, however, this lowest common denominator policy was implemented unevenly across different member states. From the perspective of scholars and human rights activists alike, it was a failure: it ‘prevented the implementation of sanctions, protected EC business interests in South Africa, and delayed anti-apartheid pressure for dis-investment’ (Holland, 1991: 186).

With popular pressure growing for a stronger policy, the EC Council of Ministers in 1985 proposed joint initiatives, many of which had already been implemented by individual member states. In addition to the limitation of certain oil exports to South Africa, these included: ‘the end of exchange of military attachés with Pretoria; the termination of nuclear and military cooperation, and of official contacts and international agreements in the sphere of security; an embargo of EC exports of arms and paramilitary equipment; and the discouraging of sporting and cultural contact “except where these contribute towards the ending of apartheid”.’ Yet the UK and Germany blocked any broadly applicable mandatory trade sanctions under EPC, rendering coordination ‘ineffectual and largely symbolic’ (Holland, 1991: 186–7).

In 1986, with pressure increasing even more, the member governments acted through EPC to adopt trade and investment sanctions, banning a modest amount of imported iron and steel from South Africa, prohibiting the import of krugerrands and limiting ‘new’ EC direct investment in South Africa. The latter provision was weak, exempting portfolio investments and remittable earnings from South African subsidiaries. Trade sanctions were imposed, but they affected only 3.5% of South African exports to Europe (Holland, 1991: 187–9). Moreover, only the suspension of iron and steel imports and the ban on krugerrands were actually implemented through EC regulations or decisions. The member states declined to give legal standing in the Treaty of Rome to other actions, instead employing EPC decisions to coordinate national policies. The result was that the cost of defection was considerably lower. With a thawing of the South African situation in 1990, for example, Britain unilaterally withdrew from the investment ban, a move that Irish Foreign Minister Gerrard Collins declared tantamount to the ‘destruction’ of EPC. There was at no time a consensus for moving further (Collins cited in Holland, 1991: 188).

It is at best unclear whether the strengthening of the EC in recent years will bolster its de facto ability to impose sanctions. The recent Maastricht Treaty expands these powers, explicitly acknowledging a security dimension, changing the name of the procedure to the Common Foreign and Security Policy (CFSP), and making provisions for member states to unanimously

### *International Human Rights Regimes*

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dictate that all secondary decisions concerning any single issue be made by qualified majority vote. It is difficult to see how these provisions would have made a difference in the case of either South Africa or Yugoslavia. The completion of the single market may limit the ability of states to impose bilateral sanctions on a target state, as did Denmark and Ireland on South African agricultural and coal products. Once such products are within the EC, they will be able to move anywhere within it, thereby evading bilateral restrictions. Whether this will spur European governments to greater cooperation or undermine what little has been achieved remains to be seen.

#### *Aid to Less Developed Countries: The Lomé Convention*

The second form of economic sanctions contains restrictions on aid. The Lomé Convention provides non-reciprocal trade preferences for selected African, Caribbean and Pacific (ACP) countries, mostly former colonies of EC member states.<sup>8</sup> The Lomé Convention has proved to be a weak but not totally ineffectual instrument for promoting democracy and human rights. The Lomé treaties contain no formal legal basis on which to halt aid in response to human rights abuses; indeed, any such restriction would be legally questionable. Moreover, the political legitimacy of the Lomé Convention in Africa rests to a large extent on its non-political image, for which continuing aid to Ethiopia despite its dismal human rights record, is often publicly cited as an example. Official activities are limited to actions of the EC's ACP-EEC bureau, which is permitted to examine cases of human rights and to prepare general reports (ACP-EEC, 1987: 131–2).

When the EC attempted a decade ago to insert a human rights clause in the renegotiated Lomé Convention, which would have permitted the suspension of aid, the ACP countries unified in opposition. They argued that the Convention should be non-political, that it gives ACP states no reciprocal power to sanction the EC, and that human rights include economic and development rights as well, which the EC systematically violates. In response, the EC dropped its insistence on the clause and did not even attach a unilateral declaration to the final treaty. (Shortly thereafter, the EC and ACP reversed ideological roles over South Africa, against which the latter demanded sanctions. This time the EC hid behind the apolitical nature of the institution and the ACP criticized such distinctions.)<sup>9</sup> The ‘Objectives and Principles of Cooperation’ section of the fourth Lomé Convention, signed in 1989, is more ambiguous, committing the signatories to two potentially contradictory rhetorical goals — the defense of state sovereignty and the protection of various human rights, including women’s rights and providing no explicit rules and procedures for achieving either.

*Andrew Moravcsik*

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Although there is little formal role for human rights concerns in EC relations with ACP countries, some observers of the Lomé Convention detect the emergence of an informal set of three criteria employed to condition aid on human rights grounds. Aid is likely to be restricted if (1) there is a particularly gross abuse of human rights; (2) a change of regime is foreseen in a relatively short time; *and* (3) the concerned state is not, like Zaire and Ethiopia, of major political interest. For example, aid to Uganda and Equitorial Guinea in the 1970s was limited and rechanneled through international charitable organizations. The EC Council of Ministers directed that aid to Uganda be spent in such a way as to impede government oppression. Although commodity support (STABEX) transfers continued, presumably because they were of interest to EC firms, food aid was restricted and only 5% of the indicative aid program that had been committed was actually disbursed. Aid was restored after the fall of Amin's regime. There is no evidence, however, that sanctions helped to undermine the Amin regime (Lister, 1988: 197).

#### *The EC and Democratizing European Countries: Aid, Association and Membership*

The EC has long employed a third form of economic sanction — aid, association and membership agreements with neighboring European governments — as a means of encouraging humans rights and democratization. Here, commitment to a basic principle has been clearly established: the European heads of state and government, meeting at the Lisbon European Council of September 1992, reiterated the importance of 'initiatives giving active support to countries which introduced democracy, enhanced human rights and promoted good governance' (Commission, 1993: 366–7). In practice, a commitment to liberal governance has facilitated the negotiation of bilateral aid or association agreements with the EC. Democratic government is also an explicit precondition for membership in the EC. Yet the effectiveness of these measures remains unclear.

This policy has been consistently applied. In 1962, Spain applied for an association agreement with the EC, which would have provided for preferential trade arrangements and economic aid. The EC response fell far below Spanish desires and expectations. The EC's acceptance of the application was initially blocked by pressure from Spanish dissidents, inside and outside of Spain, and the opposition of Denmark and the Netherlands. At the same time, the European Parliament's Birkelbach Report called for democratic conditionality for association agreements. (French and Italian farmers were also concerned about possible economic competition, but General de Gaulle appears nonetheless to have supported the application.) Only a linkage with the similar application from Israel led to the signing of

### *International Human Rights Regimes*

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an agreement with Spain in 1970 — eight years later. Not only were the terms of the agreement disappointing to Spain, but the agreement was deliberately signed for only six years, after which it would be up for renegotiation and during which time the political issues might arise again (Tsoukalis, 1981: 76–7).

In the mid-1970s, when Spain and Portugal began to democratize, European aid was discretely employed to assist the process. European Investment Bank (EIB) loans were targeted to prop up centrist parties in Portugal (Hill, 1992: 140). The history of relations between the EC and Mediterranean countries, in addition to the explicit requirement that member states be democratic, led many among Spanish, Portuguese and Greek elites and publics to view EC membership and democratization as mutually reinforcing. In each country, the preservation of democracy was a strong argument for accession; the desire to be a member of a regional economic, cultural and political union was a strong argument for democracy. Membership in the EC was seen as a means of combating radical left-wing or separatist pressures, as well as reducing the probability of a military coup. In Portugal it was a cornerstone of the anti-communist alliance; in Spain a bulwark against subnational regionalism (Tsoukalis, 1981: 110, 117, 123).<sup>8</sup>

The EC has more recently followed a similar pattern with respect to democratizing countries in Central and Eastern Europe. In early 1990, the EC began to explore the possibility of association agreements with Poland, Czechoslovakia, Hungary, Bulgaria and Romania. From the beginning, these agreements were ‘linked to compliance with the principles of democracy and economic liberalization. . . . They were to contain sections on political dialogue, free trade and freedom of movement, economic, financial and cultural cooperation’, as well as democratic institutions (Commission, 1991: 267ff.). All transitional agreements, much like the trade and economic cooperation agreements signed at the same time with Argentina and Chile, contain common understandings that the agreements are based on respect for democratic principles and human rights. In the East European cases the transition to a market economy is also specified as a ‘basic condition’ underlying the agreement (Commission, 1991: 356).

There is some evidence that conditionality is actually imposed, though not consistently. In 1990, agreements were signed with all countries except Romania, where a poor human rights record led EC countries to limit aid to humanitarian assistance. In December, however, a trade and cooperation agreement was signed with the USSR, although the human rights situation was not fully clarified. So-called ‘Europe Agreements’ were signed in December 1991 with the three ‘Visegrad’ countries: Poland, Hungary and the Czech and Slovak Federal Republic. These agreements, while short of full association agreements, supersede previous trade and cooperation

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*Andrew Moravcsik*

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agreements. In 1992 the negotiation of similar agreements with Romania and Bulgaria were authorized, but the Bulgarian negotiations went slowly, perhaps because of the uncertain human rights situation. On the whole, despite successful democratic transitions in many countries, the East Europeans were disappointed by the eventual association agreements, which reflected considerable protectionist pressure in Western Europe.<sup>9</sup>

### *Sanctions and the European Community: A Balance*

The EC is the major European institution able to employ aid, export and import sanctions as an instrument of policy. On balance, it appears that the widespread desire to maintain close economic and political relations with trading partners and former colonies, as well as the lack of catalyzing political change in the ACP states, has limited the EC's systematic use of sanctions or foreign aid restrictions as an instrument for the promotion of human rights outside the European continent. Among neighboring European states, the domestic political consequences of manipulating aid, association and accession agreements are more difficult to assess. The existence of the EC appears to act as a magnet, leading to a measure of 'anticipatory adaption' by neighboring countries, as evidenced by Eastern Europe (Haggard et al., 1993: 173–95). On the other hand, this may reflect unrealistic expectations about the speed and thoroughness with which the EC is prepared to offer membership and association. To be effective, the use of aid, association and accession appears to require a democratizing government and strong bilateral support from individual European countries. In Spain, for example, the slow negotiation of association and the promise of accession did not undermine the Franco regime, nor dissuade the army from attempting a coup, but it may have assisted on the margin to bolster democratic forces once the transition was underway.

### *3. Shaming*

Shaming, the second mechanism through which international pressure may influence dramatic developments, seeks to enforce individual human rights and promote democracy by creating a domestic and international climate of opinion critical of national practices, thus shifting the domestic balance of power in the target state toward the protection of human rights. Shaming operates by manipulating information about, and according ideological legitimacy to, certain domestic practices of states. The two most striking examples of European systems for promoting human rights and democratization through shaming are the Council of Europe's European Convention on Human Rights and the various documents and institutions emerging from the CSCE process.

### *International Human Rights Regimes*

#### *The Council of Europe and the European Convention on Human Rights*

The most important and effective multilateral institution concerned with the protection of human rights within Europe is the Council of Europe, under whose auspices the European Convention for the Protection of Human Rights and Fundamental Freedoms was drafted and signed in 1949–50. The ECHR system has been termed ‘the public order of Europe’ (Frowein, 1992).

In the immediate post-World War II period, heads of government and non-governmental organizations, mindful of the recent past, pressed for the creation of a regional human rights regime. Particularly influential was the International Committee of Movements for European Unity, which called a pan-European Congress in 1948. In its ‘Message to Europeans’, the Congress called, among other things, for a character of human rights enforced by a supranational court. In response, the European Convention was signed in 1950, entering into force in 1953. The ECHR has 23 signatories. Beginning with Hungary in 1990, East European countries are now becoming members (Sikkink, 1993: 144–9).

Unlike the United Nations Universal Declaration, the European Convention on Human Rights is limited to civic and political rights. It lists the rights to life, liberty and security of person; the right to a fair trial; freedom from retroactive laws, torture, slavery and servitude; freedom of thought, conscience, religion, expression and assembly; and the right to privacy and family life, as well as to marry and found a family. A number of other rights, controversial for various reasons during the founding conference, are enumerated in protocols. These include the right to peaceful enjoyment of one’s possessions; to education; to free elections; to liberty of movement and choice of residence; a ban on the death penalty in peacetime; the right to review of criminal sentences; the right to be free of the threat of expulsion; and protection against double jeopardy. The ECHR system does not extend to most social and economic rights, about which there is little consensus (Weiler, 1986: 1113). The Council of Europe did also sponsor a Social Charter — drafted between 1955 and 1958, signed in 1961 and in force as of 1965 — which recognizes the rights to work, to organize, to collective bargaining, to social security, to social and medical care, to protection of the family and to protection of migrant workers.

The basic task of the organization, however, is ‘soft law’ standard-setting, rather than adjudication or enforcement. Committees of independent experts report on the situation across Europe or in specific countries. Their recommendations are subsequently approved or rejected by an inter-governmental Committee of Ministers, voting by a two-thirds majority (Archer, 1990: 49).

*Andrew Moravcsik*

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The ECHR employs a subtle but effective institutional apparatus to promote compliance. According to the Convention, the enumerated rights are to be enforced through a system consisting of a commission and a court of human rights. It is unique among European human rights instruments in combining two provisions to promote effective enforcement by these bodies: the individual right of petition and compulsory jurisdiction for the international court (Robertson and Merrill, 1993: 250ff.).

The system functions as follows. Individuals or governments may petition the Commission for consideration of specific claims that human rights have been violated. Since governments tend to shy away from pursuing human rights claims, individual petitions, rather than state-to-state complaints, have contributed the most to the development of an international legal order. Unlike the EC (see below), whose court generally considers cases referred by national courts, individuals may submit petitions directly to the Commissions, a body elected by national representatives to the Council of Europe, rather than to national courts. This clause generated controversy during the drafting and was subsequently described as 'a remarkable innovation in international law' (Mower, 1991: 91). Article 26 permits the Commission to take up individual petitions only when domestic remedies have been exhausted; they can be neither anonymous nor destructive of human rights. The Commission may also conduct its own further investigation, which member states are required to assist. If the Commission determines that a violation of human rights may have taken place, and subsequent attempts to reach a 'friendly settlement' fail, the Commission may issue a report and refer the case to the Committee of Ministers, which votes by two-thirds majority on the case or, as occurs in most cases that are declared admissible, refers it to a court of human rights for a final judgment.<sup>10</sup>

What sanction does the Committee have in response to non-compliance? There are only two. First, the Committee may dictate that the Commission report be published. While this may initially have been considered an effective sanction, today 'whatever force lay in this threat has now been lost', because nearly all the Commission's reports are published anyway (Mower, 1991: 98–9). Today 'the desire of responsible governments not to be seen to be repudiating their human rights obligations is . . . normally all that is needed' (Robertson and Merrill, 1993: 328). The second sanction is expulsion, which has only arisen as a possibility in the Greek case of 1969, described below.

Despite its lack of overt compliance mechanisms, the ECHR system is generally considered to be highly effective at securing compliance. Between 1953 and the end of 1990, the Commission received 15,457 petitions, nearly all from individuals. Of these, 14,636 were declared inadmissible, 96 resulted in a friendly settlement, 430 resulted in a report by the Commission

### *International Human Rights Regimes*

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and 251 court decisions were handed down (Frowein, 1992: 227).<sup>11</sup> The large number of inadmissible petitions results from the stringent set of criteria that complaints must meet. Most were struck because all domestic remedies had not been exhausted; others did not present a *prima facie* case of violation of a right guaranteed under the Convention or were submitted anonymously (Robertson and Merrill, 1993: 273). Non-compliance is 'exceptional'. Insiders estimate that 75% of the member states display a 'high' degree of cooperation with decisions and 25% a 'moderate' degree (Mower, 1991: 20). The ECHR system required a long period to achieve this level of effectiveness. Until 1973, the ECHR had little effect on the legal order of member states; the next decade was a transitional period. In the 1980s, however, the ECHR system began to develop extensive European constitutional case law (Frowein, 1992: 357). Due to the greater knowledge about the system and its increasing geographical scope, there has been an exponential growth in the number of petitions, with the great majority being submitted in the 1980s. Before 1973, less than a dozen cases annually were declared admissible and there was an average of only one court decision; this figure has more than tripled over the past decade (Yearbook, various years).

The delay in the evolution of the ECHR legal order to its current level of effectiveness is explained by the fact that ratification of the instrument and adherence to various of its specific provisions is voluntary. Only recently has the near universal recognition of the individual right of petition and binding jurisdiction created the political preconditions for the Commission to adopt a more aggressive strategy in referring cases to the court — contributing to the effectiveness of the organization and the current rapid increase in its caseload. Up to that point, the Commission was inhibited by the fear that strong enforcement would dissuade governments from strengthening their commitment to the regime.

In order to become a full legal participant, governments must ratify the ECHR; recognize individual petitions and compulsory jurisdiction of the court, both of which are optional; and decline to take reservations to specific rights enumerated in the ECHR. Most major European countries, including Turkey, ratified the ECHR in the 1950s, but some, including France, Switzerland and the Iberian countries, did not do so until the mid-1970s. Widespread recognition of individual petitions under Article 25 was delayed for decades. For historical reasons, Germany and a handful of other countries recognized it immediately. The UK, however, did not permit individual petitions until 1966, Italy not until 1973 and France only in 1981. By 1991, only Malta and Cyprus had not recognized this right. Finally, voluntary recognition of the binding jurisdiction of the Court has been similarly slow to emerge, although it is now nearly universal. Finally,

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*Andrew Moravcsik*

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signatories have taken reservations concerning specific protocols and provisions of the ECHR, which continue to undercut the uniformity of protection.<sup>12</sup>

Where flagrant, systematic violations of the convention occur and judicial remedies are ineffective, the only recourse under the ECHR is to file a state-to-state complaint or to demand expulsion. There are substantial variations in the willingness of governments to file state-to-state complaints against flagrant violators of the ECHR when it is not directly in their interest to do so. There are two such cases, involving many of the same states. In 1967, Denmark, Sweden, Norway and the Netherlands filed a petition under the ECHR against the military government of Greece. An investigation was conducted and Greece withdrew from the Council of Europe to avoid expulsion; it was invited to return only with the re-establishment of democracy in 1974 (Sikkink, 1993: 149–50). In 1982, these four countries were joined by France, a traditional defender of Greek interests, in filing a similar petition against Turkey. In response, Turkey modified its behavior slightly and accepted individual right of petition. Ireland and Austria have brought state-to-state petitions for more transparently self-interested reasons (Frowein, 1992: 283–5ff.). Other states have been reticent to promote or contribute to multilateral enforcement. These cases suggest that the ECHR system does not provide an effective infrastructure to defend general guarantees of basic human rights.

The subtlety and delicacy of the ECHR's domestic mechanisms for enforcement of human rights are grounded not just in consensus, but in the workings of national legal and legislative systems. From a purely legal perspective, the emergence of the ECHR system might best be seen as one element in a broader process of expanding constitutional judicial review to political systems that had never fully practiced it, including the UK, most of Scandinavia and Benelux, and, to an extent, France (Frowein, 1992: 357; Stone, 1992). This helps explain why citizens of countries with strong constitutional protections and domestic judicial review, such as Germany and Italy, tend to bring proportionately fewer complaints. In such countries, ECHR norms have been incorporated into the basic legal structure through judicial action or legislative revision (both independently and as a conscious response to international norms); domestic courts provide adequate defense of such norms.<sup>13</sup> (This is true, as we shall see below, of the European Community legal system as well.) Those domestic legal orders with no judicial review for fundamental human rights have brought more cases and, in general, more important ones. A number of controversial cases have been brought against the UK, for example, challenging non-enforcement of gender wage equality in the workplace and practices of detaining prisoners in Northern Ireland (Frowein, 1992: 278).

### *International Human Rights Regimes*

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The ECHR is best seen as an instrument to perfect and harmonize pre-existing human rights guarantees, rather than to extend basic guarantees. Since it is dependent on domestic public opinion, legal legitimacy and legislative authority as tools to induce voluntary compliance through shaming, its unique level of compliance and effectiveness relies upon underlying socioeconomic and political factors, most notably an elite or popular consensus in favor of human rights, adequate protection for individuals who voice their opinions or raise complaints under the system, and institutions to transmit that consensus to policy-makers. Where such underlying preconditions are absent, these domestic mechanisms to transmit norms break down. In such cases, shaming must be transmitted by more traditional, state-centred diplomacy, to which we now turn.

#### *The Conference on Security and Cooperation in Europe*

The Conference on Security and Cooperation in Europe (CSCE) grew out of pan-European East–West negotiations during the 1970s — the so-called Helsinki process. The geographical scope of the CSCE process is unique; it is the only regional human rights organization with members across the European continent. CSCE meetings at Helsinki (1975), Belgrade (1977), Madrid (1980), Stockholm (1984), Vienna (1986–9) and Copenhagen (1991) have generated a series of international agreements on human rights. An expanding set of individual and collective rights have been codified in increasingly concrete and practical language. In recent years, following the democratization of Central and Eastern Europe, the system has been strengthened considerably. The Vienna Concluding Document, negotiated between 1986 and 1989, moved far beyond the Helsinki Accord and Madrid Document. It enlarged commitments to the individual's right to know, as well as protections against arbitrary arrest, degrading treatment, harsh detention and torture. It was particularly detailed on freedom of religion, and commitments to the freedom of movement have been strengthened. On the other hand, it remains weak on various areas where consensus was elusive, including capital punishment, compulsory military service, and visa policies (Buergenthal, 1992: 186–8; Bloed, 1991: 72–3).

The Charter of Paris for a New Europe, adopted at the November 1991 CSCE summit, moves further: not simply reaffirming support for human rights, democracy and the rule of law, but also seeking the protection of the 'ethnic, cultural, linguistic and religious identity of national minorities . . . without any discrimination' (Commission, 1991: 356). Although incomplete and carefully worded, these guarantees of minority rights are unparalleled in international treaties for their detail and thoroughness in treating this sensitive issue. Among other things, CSCE recognizes the right

*Andrew Moravcsik*

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to be a member of a minority group and to ‘unimpeded contact’ with members in other countries (Bloed, 1991: 67–9).<sup>14</sup>

As political agreements, rather than treaties, CSCE accords are not legally binding, internationally or domestically. The language of CSCE agreements consistently distinguishes between CSCE ‘commitments’ and international law ‘obligations’. Under international law, CSCE commitments become binding as customary law only if participating states come to treat them as such (Buergenthal, 1992: 200ff.). Nonetheless, CSCE accords can influence state behavior in two ways. First, the shaming process may create a symbolic environment that stimulates domestic opposition in non-complying governments. The publication of the Helsinki Accord, with its provision guaranteeing ‘the right of the individual to know and act upon his rights and duties’, had a dramatic and unexpected impact in various countries behind the Iron Curtain. It served as a focal point, stimulating the formation of ‘Helsinki groups’ throughout Eastern Europe (Buergenthal, 1992: 177). Whereas the major pressure for the recognition of religious rights in Eastern Europe clearly came from internal democratization, the CSCE is credited by some with offering a focal point, source of legal language and provisions for legal reforms (Luchterhand, 1991: 162–6).

Second, the CSCE contains extensive procedures for information exchange and intergovernmental consultation, developed mostly in recent years. The Vienna and Copenhagen meetings established a ‘four-step’ procedure for formalizing interstate human rights grievances, which amplifies the effectiveness of shaming. In step one, a state may address, to any other state, a request for information about domestic human rights protection. The request must be answered in writing within four weeks. If the first state is not satisfied with the information, it may move to step two by requesting a bilateral meeting, the agenda of which is limited to the original claim. If it still remains unsatisfied, it may elect to move to step three by contacting other states about the case. If the issue remains unresolved, step four permits states to voice their disagreements in a forum attended by all member states (Buergenthal, 1992: 199).

In addition, CSCE has recently created common institutions for information gathering. The CSCE’s Office for Democratic Institutions and Human Rights, based in Warsaw, has recently been enhanced to make it ‘the main institution of the human dimension’ of CSCE, in direct competition with the Council of Europe’s activities. (The shift from its former name, the ‘Office of Free Elections’, suggests a deepening of the conception of minimum democratic institutions; see McGoldrick, 1993: 423, 431.) This organization arranges missions, acts as a clearing house for information, and reviews implementation of CSCE commitments. Missions can be sent without the agreement of the state concerned. Similarly, the CSCE has created a High Commissioner on National Minorities, which may collect

### *International Human Rights Regimes*

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information, issue ‘early warnings’ and, with proper authorization, consult with parties to potential conflicts. EC countries, acting together, have strongly supported these changes.

By exchanging and publicizing information, and by forcing human rights onto the domestic and international agenda of governments, the CSCE structures the international and domestic shaming processes to maximum effect. This system relies upon the consensus of its members, but the level of domestic convergence required is lower than that required by the Convention system. It is difficult to assess the level of compliance with the CSCE system. While its early role as a focal point is striking, there is little evidence that its subsequent actions have had similar consequences.

#### *The European Community and Shaming*

By comparison to CSCE and the Council of Europe, EC institutions for shaming are less well-developed. The European Parliament and European Political Cooperation are active rhetorically, generating unilateral statements of regret and rebuke concerning international human rights abuses, but unlike the ECHR and CSCE systems, the EC procedures do not oblige involvement or response from foreign governments. Each year, the EC makes over one hundred behind-the-scenes representations, as well as issuing over one hundred public statements concerning human rights abuses outside of the EC, mostly through EPC (Commission, 1993: 368). The European Parliament also engages in promotional activities. In 1977, for example, the Parliament joined with Latin American counterparts in adopting Interparliamentary Conference resolutions denouncing the ‘hard and oppressive conditions’ and ‘the lack of basic freedoms’ in Latin America (Mower, 1980: 58–9). It issues numerous resolutions of concern and has recently adopted resolutions in connection with the financial protocols with certain (non-member) Mediterranean countries (Commission, 1993: 369). The European Parliament has often called for a greater institutional commitment to human rights. In response, the Commission proposed in 1990 that the EC accede to the European Convention (Commission, 1991: 354).

#### *4. Institutional Cooptation*

Cooptation, the third mechanism discussed in this article, seeks to promote international human rights by coopting domestic political institutions, particularly courts and legislatures, in such a way as to shift the domestic balance of power in favor of human rights protection. As we have seen, some of the international instruments examined above have subtle effects of this

*Andrew Moravcsik*

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kind. The European Convention on Human Rights, for example, encourages legislatures and courts to incorporate international norms into domestic statutes and jurisprudence. Yet the most impressive case of institutional cooptation is surely the human rights protection afforded by the EC's supranational court, the European Court of Justice (ECJ). The ECJ has established a transnational legal order by coopting domestic courts — and, through them, tacitly coopting individual litigants — into supporting European law. The result is the world's most effective supranational legal system. Among the principles of EC jurisprudence is the protection of individual human rights (Burley and Mattli, 1993).

The Treaty of Rome, which founded the EC, contains no list of protected individual freedoms equivalent to a bill of rights (Metropoulos, 1992). It enumerates only rights connected with the formation of an internal market: 'discrimination on the basis of nationality' (Art. 7) and limitations on the 'free movement of workers' (Art. 48). Further protections seemed unnecessary, given pre-existing protections by national courts and through the Council of Europe.<sup>15</sup>

Today, however, the ECJ doctrinally defends basic human rights. This shift occurred as the result of a bargain between the ECJ and national constitutional courts. To understand this bargain, it is essential first to understand the political process by which it was possible for the ECJ to expand the importance of EC law in general (Burley and Mattli, 1993). According to the Treaty of Rome, cases can come to the ECJ in a number of different ways: the Commission of the EC can bring cases against individual states; states can bring cases against one another; and certain individuals can bring cases 'of direct and individual concern'.

Yet few important cases reached the ECJ in these ways. The primary, though largely unforeseen, instrument of EC legal integration has been instead Article 177 of the Treaty of Rome, which permits national courts to refer cases involving European law to the ECJ for a preliminary ruling. If the national court is the court of final appeal, it is now required to do so, according to European jurisprudence. The acceptance by national courts of the doctrines of the supremacy of EC law over national law and 'direct effect' (the binding nature of EC law even where appropriate national implementing legislation has not been passed), gave individuals the opportunity to employ national courts to challenge national statutes and practices that conflict with EC law. The vast majority of ECJ cases reach the court in this way. Hence EC legal integration depends on a tacit alliance among the ECJ and two types of domestic political actors: individual litigants, who cite EC law, and national courts, which refer cases to the ECJ and incorporate ECJ rulings into their own judgments, which are then enforced through national procedures. It is on the basis of this tacit bargain that legal integration of the EC has taken place (Burley and Mattli, 1993).

### *International Human Rights Regimes*

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As the ECJ established supremacy and direct effect in the 1960s, some national courts — notably the constitutional courts of Germany and Italy, which practiced judicial review and were bound to defend explicitly enumerated individual freedoms — responded by declaring that they would not recognize European law where it clashed with the fundamental provisions of domestic constitutional law, including the protection of individual rights. In particular, the national constitutional courts noted the lack of explicit human rights guarantees in the Treaty of Rome.

The ECJ responded to this challenge to its autonomy in adjudicating conflicts concerning European law — which posed a simultaneous and more fundamental challenge to the uniformity and supremacy of the European legal system — by reading protection of fundamental rights into the basic law of the EC. In doing so, the ECJ recognized as a source not just the Treaty of Rome, but also ‘constitutional principles common to the member states’ and ‘international treaties . . . of which they are signatories’, the latter including the ECHR (Metopoulos, 1992: 136).<sup>16</sup> This effort was backed by an EC declaration recognizing the European Convention, though EC membership in it has been blocked. The link to the ECHR, which provides much of the guidance for the resolution of human rights questions, helps integrate the European system as a whole (Weiler, 1991: 1135).

The ECJ’s recognition of human rights led national courts to accept, at least provisionally, its judgments in this area. The ECJ was further able to move in the direction of US-style federal incorporation, whereby US federal (in this case, European) courts can oversee state (member state) actions for compliance with standards of fundamental human rights protection. This power is limited to the national implementation of EC legislation; the ECJ does not review purely national laws for compliance with principles of fundamental human rights (Metopoulos, 1992: 145ff.).<sup>17</sup> Some argue that oversight of national legislation is inevitable; even if not, as the scope of EC activities expands, this function is becoming more important (Weiler, 1986: 1136–42).

In establishing human rights law, the ECJ was responding to national constitutional courts and had to satisfy their stringent standards. For the moment, domestic constitutional courts in Europe remain generally more active than the ECJ in enforcing individual rights. The constitutional courts of Italy, Germany and other countries have not relinquished their claim to exercise concurrent judicial review (Weiler, 1986). The resulting plural system creates two possibilities for conflict to arise between international and national human rights norms, in which the ECJ might seek to ‘impose’ stronger or weaker human rights standards on its members. The first might arise when the ECJ and national courts resolve conflicts between competing fundamental rights in different ways. Recently, for example, the ECJ narrowly avoided deciding the question of whether the Irish constitutional

*Andrew Moravcsik*

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amendment banning abortion violates a fundamental human right. The second might arise when European and national law resolve conflicts between individual and social interests in different ways. Expanded EC legislation in areas like environmental policy, consumer protection and social protection makes such clashes almost inevitable (Metopoulos, 1992: 150ff.).

The acceptance of the ECJ's activities in the human rights area has been an offshoot of the influence it has gained by adjudicating disputes in the commercial realm and by serving as part of the EC, which itself enjoys a measure of legitimacy.<sup>18</sup> The ECJ has been careful not to overstep the boundaries of the legitimacy that these underlying factors provide (Weiler, 1991; Stein, 1981). Such legitimacy remains fragile. The Maastricht Treaty on Political Union contains a Protocol protecting the Irish anti-abortion amendment, while the revisions to Article 130, incorporating consumer policy, health policy, environmental policy and a number of other policies, specifically seeks to limit the power of the ECJ to review national derogations. Whether or not the Maastricht Treaty marks a trend toward the formal politicization and limitation of ECJ jurisprudence, the perceived political constraints on the court are tightening. Some predict that the ECJ will delay any further movement toward incorporation (Weiler, 1993: 46–32; Metopoulos, 1992: 163).

### *5. Lessons from the European Experience*

The analysis above suggests that the success of the European system, while striking in some areas, has been slow and uneven overall. The ECHR and EC systems have developed subtle and delicate institutions for the supranational adjudication of human rights issues, which command consistent compliance among the great majority of European governments. The CSCE and EC provisions for promoting human rights outside of the core of West Europe through the establishment of soft-law norms and the promise of eventual membership have been weak and uneven. The EC's experience with sanctions has been generally disappointing.

This pattern of success and failure suggests a number of hypotheses about the general conditions under which international human rights regimes can succeed. The experience of the Inter-American system under the OAS, as well as efforts to promote human rights in Eastern Europe and the former Soviet Union, all of which are briefly mentioned below, support the preliminary conclusions drawn from Europe.

*1. The most effective institutions for international human rights enforcement rely on prior sociological, ideological and institutional convergence toward common norms.*

### *International Human Rights Regimes*

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Human rights guarantees must ultimately be implemented by domestic governments. All three instruments of international human rights enforcement outlined above — sanctioning, shaming and cooptation — work by changing the domestic balance of power within and between societal actors and government institutions, thereby increasing the target government's incentive to respect human rights. Some elements within governments targeted by international pressures for human rights compliance will generally oppose compliance; the greater the opposition to compliance, the more external pressure is needed to alter it. Thus, barring the use of extensive coercion, substantial convergence of domestic policy is likely to be a precondition for international influence to be effective. The more the member states already respect human rights, the more successful the regime will be.

The uniquely successful record of European human rights regimes presupposes a strong domestic consensus and adherence to basic democratic norms. The underlying sources of stability for the European regime are a general respect for individual human rights in public and elite opinion, which leads member governments to avoid public non-compliance, and the existence of independent judiciaries and legislatures, which act semi-autonomously to promote human rights. More subtly, the regime has also paralleled purely legal trends: a gradual legal transformation throughout Western Europe toward more explicit systems of constitutional judicial review, and the regional convergence of commercial law, which has brought with it a certain amount of human rights jurisprudence (Stone, 1992).

These preconditions permit the use of subtle institutional forms of shaming and cooptation, which require the active participation of independent citizens, judges and legislators. Shaming requires the active support of domestic publics within the target state, who must share similar ideological norms. Cooptation requires assistance from courts or legislatures within the domestic polity of the target state, which must be able to act autonomously. Systems based on individual petition, which tend to be the most effective, rely on the existence of private individuals and groups with the requisite education, financial means, and security from retaliation to initiate a petition. The lack of such individuals and groups is explicitly recognized in other regional human rights systems, notably the inter-American system, which provides for petitions on the behalf of others, as well as low standards for the exhaustion of judicial remedies, yet such assistance is clearly not enough to make the system effective in combating fundamental human rights violations. Hence these preconditions are likely to be found only where target states are already democratic or democratizing.

By contrast, European efforts at traditional state-to-state human rights diplomacy have not been particularly successful. Efforts to shame the

*Andrew Moravcsik*

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Iberian, Greek and Turkish military governments of the 1960s, 1970s and 1980s appear to have been unsuccessful. In such cases, where democratization and adherence to human rights norms may pose a threat to regime stability, international pressure (short of outright coercion) is unlikely to be effective in the short-term without substantial pre-existing opposition.

This suggests what might be termed the 'tyranny paradox'. Human rights enforcement is most costly and least effective when directed against the worst human rights offenders. In Haiti, for example, with its weak commercial and financial classes and the strong role of the army in the polity and economy, serious respect for human rights would 'threaten the institutional power of the armed forces and the distribution of income and wealth'. In such cases, there is good reason to believe that 'authentic restoration could not be achieved by means short of force' or complete societal and economic collapse (Farer, 1994). Moreover, sanctions tend to diminish the welfare of the poorest and most deserving, while leaving rulers unscathed, as appears to have been the case in Iraq, Uganda and Haiti (Roberts, 1993: 20).

This is not to assert that international human rights instruments directed at dictatorships are necessarily futile, only that the unique institutions and practices of the West European system, which distinguish its performance from that of similar institutions in other regions of the world, result from its ability to perfect democratic governance, not to establish it. Hence the true measure of whether other human rights regimes, like the inter-American system, are achieving the same level of development as the European system is not their effectiveness in responding to dictatorships and coups in countries like Haiti, Guatemala and Peru. Instead, it is the perfection, harmonization and extension of human rights and democracy in countries like Argentina, Chile and Mexico and, secondarily, the facilitation of transitions to democracy in Nicaragua, El Salvador, Suriname and Paraguay. Those countries most active in their support for the OAS regime have been those, such as Chile and Argentina, who seek to mobilize international support for perfecting democracy and maintaining civilian rule in their own democracies. This is the motivation that most closely resembles that which gave rise to the European system.<sup>19</sup>

This finding is consistent with recent liberal theories of international relations and international law, which suggest that effective international institutions often presuppose established democratic legal and political orders and robust civil societies, within which domestic actors can work to assure compliance with international norms. Where non-liberal or quasi-liberal states are involved, there is little reason to expect that such untraditional instruments of international politics will function effectively (Moravcsik, 1992; Burley, 1993a, b).

### *International Human Rights Regimes*

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*2. The lack of international consensus, rather than the weakness of international institutions, generally imposes the binding constraint on international human rights enforcement.*

The obstacles to international institutional commitments by nations in the Western Hemisphere, Eastern Europe or the former Soviet Union stem not from the lack of effective and properly designed international institutions, but from the failure of governments to commit themselves to them. The European record suggests that such commitments develop slowly, even among stable and advanced industrial democracies. Although European institutions have long been capable of issuing declarations, imposing sanctions and developing proper norms, it has taken generations for the procedures that support them to become widely effective. This is particularly true of the most invasive, but ultimately most uniquely effective, European regimes, namely those (the EC and ECHR) that are based on the individual right of petition and binding supranational adjudication.

This is not to deny that other systems, for example, may be moving in the direction of the European system and, in the long term, may reach a similar point. The OAS, for example, currently appears to lack a consensus for moving further. The current consensus on developing the inter-American systems appears to lie in the direction of strengthening provisions against dictatorships. ‘Activist’ democracies in the OAS system are particularly willing to criticize distant dictatorships such as Haiti — the cases most remote from their own domestic concerns.<sup>22</sup> They appear much less willing to accept de facto supranational jurisdiction over the internal affairs of democratic governments. The declarations of OAS foreign ministers at recent meetings stress above all the attempts to combat dictatorship, rather than to improve democracy. This reflects the inability of governments to impose order domestically, as in the case of Brazil, or the defense of existing one-party systems for maintaining domestic order, as in the case of Mexico (Bloomfield, 1994). In countries like Peru, Honduras, and even Argentina and Uruguay, there is a tendency to view human rights concerns as secondary to national exigencies (Bloomfield, 1994; Méndez, 1994).

The importance of consensual, rather than institutional, limitations is particularly clear if one considers that the OAS system is, in a formal sense, patterned after the European system and stronger than its model. The OAS Commission has been in existence since 1959, charged initially with implementing the American Declaration on the Rights and Duties of Man of 1948 and, after 1979, the American Convention on Human Rights. In a number of ways, such as the recognition of petitions, the formal powers of the Inter-American Commissions and Court are more extensive than their European counterparts. Yet the system has not brought about a higher level of compliance with international norms. Moreover, in contrast to European developments, an increasing politicization of the Inter-American Court is

*Andrew Moravcsik*

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currently visible. These are sobering reminders of the limited independent contribution that international organizations can make to the consolidation of democratic practices.

Even in West Europe, it was only in the 1970s and 1980s, after decades of development, that the norms of binding supranational jurisdiction and individual right of petition were firmly established. Where domestic and international conflicts of interest make such links more risky — as in Central and Eastern Europe, or many parts of the Western Hemisphere — it is likely to require even more time. And in Europe, there remains far less international consensus on social and economic rights than on civic and political rights.<sup>20</sup> Strongly pressuring countries to accept binding jurisdiction and the individual right of petition before they are ready to accept it voluntarily is to invite open non-compliance, as occurred among European dictatorships.

*3. While awaiting the development of a system of supranational adjudication, more promising strategies may be to strengthen domestic civil society and political institutions, and to strengthen traditional international organizations that gather information and arrange consultations.*

Given that the civil societies and domestic institutions of most Latin American or East European countries are currently unable or unwilling to support the subtle intervention of the mature European-style regime, the primary task for international institutions is to create the preconditions for such a system. The analysis of the West European experience suggests two methods.

The first method is to strengthen domestic institutions through which individuals and groups in civil society can express their views. As the European system demonstrates, robust and independent public opinion, non-governmental organizations, legislators and judiciary are a critical link in creating a functioning system. Only where domestic institutions have the safe and impartial production of information and enforcement of claims are regimes likely to work. Election monitoring and oversight of peace agreements are examples (Vaky, 1993: 24–5). Since the instruments discussed here all rely upon the inexpensive provision of information about human rights violations, private and public international organizations that expand the capacity of private actors to transmit information are likely to promote human rights compliance both in the short- and long-term. The role of non-governmental organizations (NGOs) is critical in this regard.

Independent judiciaries comprise an especially important link. Among independent judiciaries, a ‘transjudicial dialogue’ can emerge, in which normative convergence develops through communication between judges and lawyers in different nations (Burley, 1993b). International regimes that foster transnational contacts and common standards among judges — as well

### *International Human Rights Regimes*

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as parliamentarians, political parties and regulatory agencies — would be a positive step toward creating the preconditions for effective supranational jurisprudence. Recent research suggests that the independence of judges is imperiled not just in non-democratic systems, but in democratic systems with *de facto*, long-term, one-party rule, of which Mexico is a notable American example<sup>21</sup> and which a number of East European countries may be developing.<sup>22</sup>

The second method is to strengthen more traditional information-gathering and consultative institutions like CSCE and EPC, which are more appropriate to the more diverse normative and institutional environment of Central and Eastern Europe — and, by extension, the Western Hemisphere. Such institutions also rely on an international normative consensus, but it need not run as deep. Such organizations work primarily by shaming internationally and perhaps by the implicit threat of sanctions, but they lack the fundamental grounding in domestic politics that make the ECHR and EC systems distinctive. They act as classical international regimes, contributing legal technique, generating information about common problems and providing for discussion. As such, they are unable to provide the unparalleled level of uniform protection provided by the unique system of Western Europe.

By contrast, there is little evidence from Europe that positive or negative sanctions in support of democratization and human rights are effective or replicable elsewhere. European countries do not, in general, view economic sanctions as a cost-effective means of imposing democracy and human rights. Attempts to pursue this strategy in Africa met with no clear successes. Such efforts tended to be costly, and intergovernmental political consensus behind their use has tended thus to be sporadic at best. Similarly, it seems that the OAS remains skeptical about the use of economic sanctions on governments that systematically violate human rights (Bloomfield, 1994).

A more subtle and perhaps more effective means of achieving a similar end, however, may be to make membership in regional trading arrangements conditional on adherence to norms of democracy and human rights. The possibility that the democratic precondition for membership and association in the EC has played an important long-term role in increasing the legitimacy of democracy in Southern and Eastern Europe cannot be ruled out. Under conditions of democratic transition, in which a number of outcomes are possible, including a reversion to authoritarian rule or communist government, the promise of EC membership may have helped tip the balance toward democracy, and it may help maintain the stability of democracies thereafter.<sup>23</sup> Certainly this is the way the issue was seen in Spain after the death of General Franco. The success of positive sanctions, however, may be difficult to replicate, because the focused ideological and economic pull of the EC is unmatched elsewhere in the world. In any case,

*Andrew Moravcsik*

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this is not an effective method to employ against entirely undemocratic governments. The possibility of delaying EC membership does not seem to have deterred Iberian, Greek or Turkish military coups. Moreover, sanctions or denial of association agreements may impede the social transformations necessary to create the preconditions for democracy.

In conclusion, the European case suggests that neither a view of human rights regimes as a projection of the beliefs of a dominant power, nor one which sees them as emanating from intergovernmental bargains on the basis of reciprocity, captures their essential dynamic. The European human rights regime was created by governments and groups anxious to secure human rights at home and has been extended through a slow process, lasting half a century, of shaming and coopting domestic governments into accepting incremental changes in their domestic practices. The most important preconditions for the creation of and compliance with the sort of highly refined regime norms found in Europe are strong pre-existing norms, practices and institutions of liberal democracy, which permit causal mechanisms to operate through civil society and semi-autonomous government institutions. Within such a community of established Liberal democracies, international regimes can contribute to the harmonization, perfection and adjudication of human rights, which can lead, over generations, to the emergence of the transnational rule of law. Outside of such a community, the instruments of international human rights statecraft remain more primitive and the results correspondingly more modest.

#### *Notes*

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1. In an attempt to focus on direct policy instruments for the international promotion of human rights and democracy, I have deliberately set aside two distinct groups of policies. The first group comprises education programs which tend to be small and would fit into the categories of *shaming* and *subversion*. The second group comprises indirect policies of achieving democracy and human rights, for example by promoting economic growth, spreading literacy, preventing conflict through military intervention, encouraging judicial independence, and so forth. Some of these will be examined at the end of the article.
2. Article 113 of the Treaty of Rome, providing for the Common Commercial Policy, was employed to impose sanctions against Iran and the USSR; Article

### *International Human Rights Regimes*

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224 was employed in the Falklands crisis; Article 223 to embargo arms against Iran in 1980. In addition, Article 235 offers general powers (see Holland, 1991: 184).

3. Trade sanctions under Article 113 could formally be imposed by qualified majority vote, but Article 113 decisions tend to be taken under an informal rule of consensus.
4. Guy de Bassompierre, cited in Holland (1991: 182).
5. See Hill (1992). For a contrary interpretation, see Martin (1992).
6. The Lomé Convention, which has been revised three times, replaced the Yaounde Convention, concluded in 1963. For an overview, see Lister (1988: 197).
7. The South Africa clause was most enthusiastically supported by the Dutch and British Labour governments, while other EC governments were notably less enthusiastic. See Lister (1988: 197–9).
8. Both European leaders and Mediterranean democratic politicians had led the southern publics to believe that the non-democratic government had been their only obstacle to membership. Hence they were surprised when the EC member countries hesitated, extending the negotiations and the transition period.
9. The role of the EC is one of coordination, not supranational implementation. The EC Commission does not play an important independent role in Eastern Europe, since direct EC aid (as opposed to bilateral aid from EC countries totals only 1–2% of total Western aid. The European Commission was detailed by the Paris G-7 Western Economic Summit of 1990 to coordinate G-24 activities, but had little autonomy in doing so. This coordination simply involved the provision of information and the organization of meetings. It did not include discretion over funding, except for the relatively modest amount of direct EC aid. For a skeptical view of the Commission's influence, see Haggard and Moravcsik (1993).
10. Strictly speaking, any state involved, including that of an individual petitioner, has the right to refer the case to the court. Individual petitioners do not have such a right. In practice, however, almost all referrals are made by the Commission. When Protocol 10 of the Convention comes into force, only a simple majority will be required in the Committee to refer a case. See Robertson and Merrill (1993: 300ff.).
11. The remainder were struck off the list for other reasons. This may underestimate, though probably not greatly, the number of cases in which governments had changed their decisions or policies at an early stage, resulting in a declaration of inadmissibility.
12. For example, as of 1991, Greece, Turkey, Malta, Switzerland and Liechtenstein had not signed Protocol 1, guaranteeing the rights of property ownership, education and free elections. On other areas, see Weiler (1986: 1141).
13. There is a scholarly debate as to whether the ECHR is self-executing. For an initial sally, see Buergenthal (1965). In Belgium, the Netherlands, Germany, Italy, Greece and Turkey, the Convention has been treated as self-executing; in Scandinavia, Ireland and Luxembourg, enabling legislation was required and was often slow in coming.

*Andrew Moravcsik*

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14. On the other hand, the wording is often loose, with governments committed only to 'endeavor' to achieve specified ends. Nor, of course, is there any recognition of a right to take political action to alter borders. Even so, Greece and Bulgaria submitted interpretative statements that restricted the potential application of these clauses.
15. At an early stage in the development of the EC legal order, the European Court of Justice (ECJ) recognized some fundamental rights of workers. For a more extensive history of this development, see Weiler (1986).
16. On the Court's motivations, see Weiler (1986: 1118; 1138).
17. This includes national derogations from EC law under Articles 36 and 56 for reasons of public order, safety and health.
18. To an extent, the growth of ECJ jurisprudence may have reflected the trend toward explicit judicial review in Europe mentioned above in the context of the Convention. But, as Weiler points out, while 'traditionally, resistance to an enumerated constitutional bill of rights is tied to principled resistance to judicial review', the Treaty of Rome granted the ECJ explicit powers of judicial review, but promulgated no bill of rights (1986: 1110).
19. On Chile's motivations, I draw on the public comments of Heraldo Muñoz, Permanent Representative of Chile to the Organization of American States at the Inter-American Dialogue Conference on 'Advancing Democracy and Human Rights in the Americas: What Role for the OAS?' (2–3 December 1993). It is perhaps no surprise that Chile, with its long democratic tradition, would advocate this position most strongly.
20. Although the need for the enforcement of socioeconomic rights may appear even more pressing in the Western Hemisphere than in Europe, it will probably prove difficult to gain the consent of governments to any binding rules in this area.
21. Lack of partisan uncertainty gives ruling coalitions or parties a greater incentive to 'capture' the judiciary. For an analysis of Japan's one-party rule, see Ramseyer and Rosenbluth (1993).
22. Tom Farer (1994: 14–15) speculates that Haiti was 'too remote and peculiar' to be part of the national interests of the USA and other American nations. Only the OAS, he argues, made it salient. Yet one might also argue the opposite. Precisely because Haiti is distant and dictatorial, it marked a good precedent for implementing the Santiago Declaration.
23. The Argentina–Brazil economic agreement of 1986 founding the MERCOSUR free trade zone, stressed that democratic governance was a 'basic requirement' for the participation of any third parties and an important purpose of the agreement was 'to consolidate democracy as a way of life and a system of government' (Muñoz, 1993: 86).

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*Andrew Moravcsik*

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## **פרק 10**

# **זכויות האדם בפוליטיקה הגלובלית במאה ה-21**

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## Conclusion

### **Visions and the Evolution of International Human Rights\***

To all the heroes and heroines in this country and the rest of the world who sacrificed in many ways and surrendered their lives so that we could be free. Their visions have become reality.

— Nelson Mandela of South Africa

The history of the evolution of international human rights, as we have seen throughout this book, is a history of the long and determined struggle for freedom and dignity. It is one inspired by visions of what it means to be truly human and a sense of responsibility to other members of the same human family. It is a history brought about by visionaries and by those men and women of determination willing to make sacrifices and sometimes take considerable risks in confronting vested interests, privilege, prejudice, and the claims of national sovereignty. Moreover, it is one in which revolutions, wars, and upheavals have played prominent and often critical roles in accelerating a process, accentuating the influence of politics, and helping visions become reality.

#### **The Nature and Power of Visions**

Visions, by their very nature, challenge our imaginations, cause us to reexamine our assumptions, and often raise profound and disturbing questions about our values. They tend to address some of the larger and more abstract issues of life that do not always lend themselves to simple solutions. They are sometimes imprecise, and what may be seen by one visionary in his or her own mind may not be at all clear to others or may be subject to different interpretations. Visions present hypothetical conditions and situations that require both a willingness and an ability to go beyond existing experience by means of imagination. In addition, visions focused on human rights pose their own particular difficulties. At precisely the time that they seek to address the best in people, for example, they are generally forced to confront the worst. Ironically, visions of human rights have always gained the greatest support during times of greatest human abuses, including slavery, torture, segregation and apartheid, conquest, or genocide. In

\* Lauren, Gordon Paul, "Visions and the Evolution of International Human Rights", Gordon Lauren (ed.), *The Evolution of International Human Rights, Vision Seen*, Philadelphia: University of Pennsylvania Press, 1998, pp. 280-298.

**282 Conclusion**

these circumstances, how is one to determine the genuine nature of human beings and what is possible? Such visions during challenging times also pose difficult and vexing questions that do not lend themselves to quick or conclusive or even satisfactory answers. Do we possess certain basic rights simply because we are all human beings? If so, what exactly are these rights and do they have universal applicability? Are some rights more important than others, or are they really indivisible and interdependent? What is the relationship between the individual and the larger society in which we live, and does the respect for rights entail corresponding responsibilities to other brothers and sisters?

It is exactly these kinds of difficult, thought- and conscience-provoking questions that endow visions of human rights with a power that encourages, enables, or actually forces people to test existing values, reexamine their assumptions, and sometimes change their minds. For this reason, those who witnessed the evolution of international human rights at one stage or another constantly commented on the remarkable power of visions to transform society by “stirring the conscience of humanity” and “changing patterns of thought,” even those entrenched with centuries of encumbered tradition behind them.<sup>1</sup> They have the capacity to cause men and women to consider the possibilities that kings and emperors may not be divine, that aristocratic class or caste divisions may not be part of the “natural order,” or that slavery may be morally wrong. They pointedly suggest the prospect that women deserve the same rights as men, that empires are not inevitable, that indigenous peoples are human beings, or that torture and genocide are ethically reprehensive and need not be tolerated. Similarly, they ask people to imagine that international norms can be established and that nation-states need not be allowed to claim that however they wish to behave and treat people is strictly their own business.

In addition, these visions possess a remarkable power to inspire, for they serve as carriers of hope. It is not at all difficult to understand how dreams of a world at peace and harmony as a result of the mutual respect of basic rights generate inspiration. They see the best in us rather than the worst. They look toward the possibilities of what might be rather than what is or what has been in an imperfect world, and call us to rise above the limitations and experiences of the past. These visions consider what we share as members of the same human family and what brings us together rather than what drives us apart. They see a world of common humanity without borders where the worth and dignity of each man, woman, and child is honored. They imagine the elimination of suffering based on distinctions of gender, race, caste or class, belief, ethnicity, or nationality. Moreover, they point the way toward behavior based on ethical norms and values rather than the exercise of raw power and brutal force. All this helps to explain why visions provide such enduring inspiration to those seeking human rights.

Indeed, these are the reasons why certain visions have touched people in powerful ways at their core, uplifted the human spirit, and enabled them to dream of what might be even at times of great cost and peril. They inspired countless numbers to follow those religious leaders who preached the brotherhood and sisterhood of all human beings. They encouraged others to embrace the visions of philosophers who spoke of ethical values and justice that respected the dignity of each person everywhere. These visions

**Conclusion 283**

gave hope to those who dreamed of freeing the enslaved, assisting the exploited, caring for the wounded, and protecting the persecuted, wherever they might be. They provided strength to millions seeking a time when women would enjoy the same rights as men, when racial discrimination and apartheid would end, and when colonial empires would crumble. In addition, these visions inspired those who hoped that the international community would someday be able to create an organization that placed a value on people rather than just states and that could develop standards of human rights that would be universally accepted and applied around the world. Today they do the same for those like José Ramos-Horta and his struggle for rights in East Timor, the successors to Mother Teresa as they care for the suffering, and Rigoberta Menchú Tum from Guatemala and her dreams of a world that respects the rights of women and indigenous peoples.

These same visions that inspire, however, also enrage, produce fear, and provoke resistance. To imagine a world in which each and every individual is treated with respect and dignity, receives equal protection, enjoys freedom, and is accorded social justice is to threaten virtually any tradition or practice based on privilege and hierarchy, birth or wealth, exclusivity, and prejudice. The reason is not difficult to explain, for as one experienced observer notes succinctly: "The struggle for human rights has always been and always will be a struggle against authority."<sup>2</sup> Visions of human rights, by their nature, defy the legitimacy and threaten the existence of all forms of political, economic, social, or cultural despotism, tyranny, dictatorship, oligarchy, or authoritarian control. Moreover, if they seek to apply these principles to the world as a whole, they challenge the jealously guarded claims of national sovereignty or cultural uniqueness. They are thus capable of presenting a potent focus and a resounding rallying cry for those who want change. This is why these visions of human rights are so frequently and strongly resisted and why some governments have resisted even publicizing, let alone implementing, the Universal Declaration of Human Rights in territory under their control.

Given these factors, the power of visions should never be underestimated. Ideas know no boundaries and have the capacity to change the world. Men and women who draw inspiration from visions of human rights understand this—as do those who fear them. In fact, it is for precisely this reason that visionaries and those who follow them so frequently face enormous pressure to keep their visions to themselves and to remain silent. At times they may be ridiculed as naive idealists or criticized as impractical dreamers, as discovered by the Buddhist *bodhisattvas*, Mo Zi when he wrote about moral philosophy, Al-Farabi when he described his vision of virtue from the perspective of Islam, Thomas Clarkson when he imagined ending the slave trade, Alejandro Alvarez and André Mandelstam when they dreamed of formulating international standards of rights, and Peter Benenson when he considered forming Amnesty International. Sometimes, they may be reviled and coerced, as experienced by Jean-Jacques Rousseau when forced into exile, Thomas Paine when burned in effigy, Emmeline Pankhurst when imprisoned and force-fed in jail, or Nelson Mandela when sent into confinement for twenty-seven years. On other occasions, the price to be paid for their visions of human rights is death, as experienced by Jan Hus when burned at the stake, Olympe de Gouges

**284 Conclusion**

when guillotined, Mohandas Gandhi and Martin Luther King, Jr., when assassinated, or Steven Biko when killed in a South African jail. The same fear of the power of visions of human rights exists today, as evidenced by all those largely unknown victims censored, punished for their beliefs, arbitrarily arrested, imprisoned without trial, tortured, starved, denied medical treatment, and otherwise coerced into being silent about human rights, as well as the more noted cases involving the attempts on the life of Bishop Carlos Felipe Ximenes Belo by the political leaders of Indonesia, and the house arrest of Aung San Suu Kyi and her followers by the military commanders of Burma (Myanmar), and the bounty offered by the government of Iran for the assassination of writer Salman Rushdie.<sup>3</sup>

Despite all of the historical evidence of the capacity of visions of human rights to transform attitudes, to create inspiration, and to provoke resistance, it is interesting that not all observers understand or appreciate this power. Instead, they dismiss these visions as “just dreams,” “only words,” “merely statements,” or “impractical speculations” unlikely to create anything more than a ripple on the course of human events. There were those who believed that an empire could never be seriously threatened by the ideas in a Declaration on the Granting of Independence to Colonial Countries and Peoples or a Declaration of the Asian-African Conference, that monarchy and aristocracy could never be dangerously contested by the concepts in some Declaration of the Rights of Man and Citizen, or that gender discrimination could never be significantly changed by statements in a Seneca Falls Declaration or a Declaration of Mexico on the Equality of Women. There were those who simply could not imagine that racism might be profoundly challenged by the words in a speech entitled “I Have a Dream” and a Declaration on the Elimination of All Forms of Racial Discrimination, or that national sovereignty and domestic jurisdiction might be critically jeopardized by the principles enunciated by some Atlantic Charter, or that norms of behavior might actually be created by ideas expressed in international declarations. Upon the adoption of the Universal Declaration of Human Rights, for example, any number of commentators tended to belittle the achievement. They described the text as “a mere declaration” and “a statement of principles devoid of any obligatory character.”<sup>4</sup> John Foster Dulles noted somewhat contemptuously that the Universal Declaration “merely sets up a standard.”<sup>5</sup> Others of the same mind dismissed it as “innocuous,” “ineffectual,” “purely declaratory,” “of no more value than a recommendation,” “a mere statement of political and moral principle,” and “a grandiloquent incantation” destined for only “futility.”<sup>6</sup> In the light of the subsequent impact of the Universal Declaration of Human Rights, it is unlikely that they would hold these same opinions today.

**People of Vision and Action**

Although visions possess this unusual degree of power and influence, they do not have the capacity to spring to life on their own or bring themselves to fruition. For this task they need people, or what Nelson Mandela calls the heroes and heroines. Such men and women may be quiet religious leaders teaching through prophecy or parables, they may be contemplative philosophers or poets providing influence through the written

**Conclusion 285**

word, they may be eager activists engaging in civil disobedience, they may be unlikely citizens reluctantly propelled by the course of events to become involved, or they may be government leaders.

The evolution of international human rights, as we have seen, has required in the first instance people serving as visionaries. There must be thoughtful men and women not only capable of imagining possibilities beyond existing experience themselves, but also of conveying these visions to others. They may do this through their teachings, as in the messages of the prophets Isaiah and Muhammed, the parables of Jesus, the instructions of Kong Qiu, or the lessons of Siddhartha Gautama and Chaitanya. They may achieve this through other forms of communication that infuse dreams such as the speeches of Cicero or Franklin Roosevelt, the poetry of Sultan Farrukh Hablul Matin or Ziya Gokalp, the letters of Abigail Adams, the manifestos of Karl Marx, the journals of Hideko Fukuda, the pamphlets of H. G. Wells, the decisions of the judges presiding over the International Military Tribunal at Nuremberg, the encyclicals of Pope John XXIII, or the songs of the civil rights movement such as "We Shall Overcome." These visionaries may transmit their ideas to others by means of lengthy treatises such as the published writings of Bartholomé de Las Casas, John Locke, Mary Wollstonecraft, or Kang Youwei. Or, they may convey visions through resolutions or proclamations such as the Universal Declaration of Human Rights.

For many, however, actions speak louder than words. It is clear from the experiences of history that one of the most effective ways of conveying visions of human rights to others has been by means of personal example. The actual behavior of dedicated and courageous women and men believing that they could make a difference and willing to make great sacrifices—sometimes including their lives—on behalf of principles of human rights provides credibility and inspiration that cannot be matched in any other way. Such people are a Francisco de Vitoria willing to risk imprisonment by criticizing his government's extermination of indigenous peoples, a Florence Nightingale willing to risk her own health by tending to the needs of wounded soldiers, a Qiu Jin willing risk punishment by organizing the first woman's movement in China, or a Fridtjof Nansen willing to put himself in danger by helping refugees. They include a Franz Bernheim willing to risk persecution by drawing international attention to the plight of Jews under the Nazi regime, a W.E.B. Du Bois willing to risk lynching by publicly criticizing racism in the United States before the world, a Kwame Nkrumah willing to risk his life by standing up to the mighty British Empire, an Andrei Sakharov and Elena Bonner willing to risk internal exile by speaking out on the abuses of rights by the Soviet Union, or a Václav Havel willing to risk imprisonment and possible torture by drawing international attention to the violations of human rights by his government. They also include cases of a worker for the International Red Cross worker delivering relief in the crossfire of a civil war or a staff member of the United Nations Centre for Human Rights providing technical assistance in a country known for its extrajudicial executions and arbitrary arrests.

In addition, time and time again in the long struggle for international human rights we have seen so many of these efforts made by the nonelite and relatively unknown. These include those historically willing to participate in peoples' protests, struggles,

**286 Conclusion**

revolutions, and even wars, in addition to daily and often common activities on behalf of human rights. They are the ones described by Eleanor Roosevelt as “everyday people” who take human rights seriously and work for, organize on behalf of, and sometimes sacrifice and suffer for a vision in which they truly believe. As she observed:

Where, after all, do universal human rights begin? In small places, close to home — so close and so small that they cannot be seen on any maps of the world. Yet they ARE the world of the individual persons; the neighborhood . . . , the school or college . . . , the factory, farm, or office. . . . Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.<sup>7</sup>

These are the men and women who discuss human rights where they live and work and who construct projects at the grassroots level to bring rights to life. They are the people who gather in streets and public squares, sign petitions, teach others, speak out, participate in letter-writing campaigns, passively resist, and march or chain themselves to fences as a means of drawing attention to abuses. They also are the individuals sometimes suddenly confronted with the unexpected, like the unknown man willing to risk death in the name of human rights by standing completely alone, planting his feet in the path of a moving column of armored tanks in Beijing.

There are times, of course, when individual people do not need to stand entirely by themselves. Instead, they can draw strength and support from other visionaries and activists by forming and participating in nongovernmental organizations. Within larger groups they can combine their energies and resources to draw widespread attention to particular abuses and create pressure sufficient to challenge authority and bring about change. As we have seen, the contributions made by people through NGOs often have been extremely important in the evolution of international human rights. The Society for the Abolition of the Slave Trade and the Société Française pour l’Abolition de l’Esclavage, for example, played critical roles in bringing an end to the shipment and sale of human beings as cargo and property. The International Woman Suffrage Alliance and the Fusen Kakutoku Domei made significant contributions in raising awareness about equal rights for women and in securing agreements on suppressing the traffic in women and children. The Commission to Study the Organization of Peace and the Institut de Droit International provided invaluable assistance and mobilized powerful pressure to create human rights provisions within the United Nations Charter. The Fédération International des Droits de l’Homme and the International League for the Rights of Man, among many others, all played vital roles in helping to shape and secure the Universal Declaration of Human Rights. The Pan-Asian Society and the Pan-African Congress contributed heavily to discussions and then actions concerning the right of self-determination and the rights of indigenous peoples. The National Association for the Advancement of Colored People and the League for the Abolition of Race Discrimination did the same for the eventual International Convention on the Elimination of All Forms of Racial Discrimination. Amnesty International and the International Commission of Jurists provided similarly vital contributions to the International Convention Against Torture.



Actions Speaking Louder Than Words: Beijing, 1989 (AP/Wide World Photos).

Today, people continue this tradition by playing invaluable roles through NGOs. Some support and participate in those NGOs that approach international human rights with a religious orientation such as the Baha'i International Community, the Commission of the Churches on International Affairs of the World Council of Churches, the Friends (Quakers) World Committee for Consultation, the International World Conference on Religion and Peace, the World Fellowship of Buddhists, the World Jewish Congress, and the World Muslim Congress. Other men and women are actively engaged with those having a more secular perspective including the Human Rights Internet, Human Rights Watch, the International League of the Rights and Liberation of Peoples, the Asian Coalition of Human Rights Organizations, and the International Service for Human Rights, among many others. Together they draw attention to abuses, provide support for the promotion of human rights, lobby for continued standard setting, apply pressure for serious implementation of existing treaties, conduct independent reports of their own, file human rights complaints, and submit information in international judicial and quasi-judicial proceedings containing material normally not included in state reports. Given the fact that they do not represent the interests or official positions of

**288 Conclusion**

governments, they are less restricted by diplomatic protocol and the responsibility to balance other policy considerations, and therefore possess the freedom to focus directly on human rights issues for their own sake and be much more vocal, outspoken, and fiercely critical of violations that occur. As Edith Ballantyne of the Women's International League for Peace and Freedom said recently when informed that NGOs might not be invited to high-level meetings concerning the Office of the High Commissioner for Human Rights: "If we are not invited, then too bad. We will simply attend anyway."<sup>8</sup> Indeed, at times people in nongovernmental organizations are so successful that governments fear them, attempting to restrict their activities and to control their access to the meetings of the Commission on Human Rights. Secretary-General Kofi Annan of Ghana recently acknowledged their great contributions, while one official at the Centre for Human Rights observed, "Without the people of the NGOs, the international program for human rights would be a mere shadow of itself."<sup>9</sup>

All these men and women acting either by themselves or in cooperation with others, despite the many differences between them, share a number of characteristics in common. Over a considerable period of time, they have been inspired by some vision of human rights emerging from religious belief, philosophical or political conviction, or their own personal experiences. They have believed that they had a responsibility to go beyond their own self interests and to do something on behalf of those unable to care for themselves or defend their rights. Toward this end, they have been willing to confront powerful vested interests and fierce opposition. They also have been able to overcome the skepticism generated by the imperfections in humankind and society. Moreover, they all have concluded that they need not resign themselves to meekly accepting the world as it was—but envisioning what it might become and believing that their efforts on behalf of international human rights could make a difference.

Some people of vision and action also include individuals serving in official capacities on behalf of governments. This may appear strange, since government leaders themselves historically have been the greatest violators of human rights, and none could survive a test of either consistency or untarnished achievement. As John Humphrey concluded after many years of working in this area for the United Nations, "in matters relating to human rights, individuals and governments are usually on opposite sides of the ring. In such matters, governments usually move when and only when they are forced to do so."<sup>10</sup> They are the ones, as we have seen, who traditionally have used the great power of the state at their disposal to abuse rights, to retain privilege, to keep international norms and institutions weak, and to hide behind the claims of national sovereignty. It is for this very reason that governments draw such wrath from human rights activists and are so frequently described as "the enemy."<sup>11</sup> But it is also true that in the world of international relations, the major actors are leaders of governments, and some of them have taken actions that in their own way, and whether intended or not, contributed to the evolution of international human rights.

One thinks, for example, of the early decisions of people such as Abraham Lincoln emancipating slaves in the United States, Alexander II liberating at least fifty million serfs in Russia, and William Gladstone using pressure to protect those persecuted for their religious beliefs overseas. Others include the policy decisions of Nobuaki Makino

**Conclusion 289**

representing Japan and Wellington Koo representing China to make efforts to obtain a clause on racial equality in the Covenant of the League of Nations, Peter Fraser representing New Zealand and official delegates from the Latin American countries to secure human rights provisions in the Charter of the United Nations, and the many representatives including Eleanor Roosevelt who negotiated and then adopted on behalf of their governments the Universal Declaration of Human Rights. Further examples can be found in the cases of those leaders willing to create regional bodies on behalf of human rights and all those from Asia and Africa, along with their supporters in the West, who worked so hard to move the United Nations out of a long and debilitating deadlock into a mode of action to adopt binding covenants and conventions on international human rights.

It is important to remember that in this regard none of the many activities taken by the United Nations in the field of human rights can be done without the approval of the leaders of member governments. Indeed, and for better or worse, the organization can take no action, including any in the entire human rights program, without their support. As Kofi Annan acknowledged recently, "The ultimate success of that effort remains, of course, in the hands of Member States."<sup>12</sup> Thus, all the standards that are set, the treaties that are drafted, the implementation mechanisms that are created, the decisions made by the Commission on Human Rights, the special rapporteurs that are sent to investigate abuses, the technical assistance and advisory services that are provided, and tribunals that are created to prosecute those who commit genocide, among the many other activities, all occur because the leaders of governments determine that they will. At the same time, government leaders decide whether their countries will honor their commitments in treaties, whether they will impose sanctions on other governments for violations of human rights, whether they will pay their bills to allow the organization to function, and, like Jimmy Carter as president of the United States, Nelson Mandela as president of South Africa, Mikhail Gorbachev as head of the Soviet Union, or Mary Robinson as president of Ireland, whether they will speak out on behalf of rights in the world—or not.

With such an incredibly wide variety of people ranging from dissidents to government leaders involved in one way or another with international human rights, it is hardly surprising that there would be vastly different visions, personalities, motives, and methods. Some champions of human rights believe that all rights are completely inseparable and indivisible, while others focus exclusively on certain kinds of rights that are self-serving and suit their own ideology or interests. Some advocates move with humble quietness or calm self-assuredness outside of public attention, while others openly seek publicity and often proceed with vocal stridency and arrogant self-righteousness. Some proponents genuinely value the intrinsic worth of human rights for their own sake, while others give their support only if it serves a political purpose such as responding to unwelcomed pressure at home or embarrassing an adversary abroad. In addition, historical experience reveals an enormous capacity for human beings to see the speck in the eyes of others while ignoring the mote in their own.

These features about people help to explain why support for human rights sometimes appears so erratic, selective, inconsistent, confusing, self-serving, and hypocritical.

**290 Conclusion**

cally fraught with double standards. During the eighteenth century, for example, many of those who spoke so eloquently on behalf of the inalienable and natural rights of all individuals had no intention of including women, black slaves, indigenous peoples, or the unpropertied among those who should receive protection. Not all of those who campaigned in the nineteenth century for the abolition of the slave trade or for the protection of the persecuted supported rights for exploited workers or for those subjected to colonial domination. Woodrow Wilson could advocate the right of self-determination and the right to enjoy religious freedom, but simultaneously and firmly reject the principle of racial equality. During the height of the Cold War, it was not at all difficult to find politicians in the United States eager to publicly criticize the Soviet Union and its clients in Eastern Europe in the name of human rights while at the same time determinedly supporting authoritarian, anti-Communist regimes and opposing the civil rights movement in their own home states. It was not uncommon to hear Communist governments strongly supporting the right of self-determination for peoples in Western colonial empires, but fiercely resisting the extension of that same right for those under their own control. Similarly, it is not unusual to hear some countries today speak loudly on behalf of economic and social rights and the right to development while at the same time restricting civil and political rights and failing to accord equal rights to women. But despite these serious problems and inconsistencies, each in their own way has made some contribution to the evolution of human rights.

**Events of Consequence**

None of these many individual men and women, however, existed with their visions in a vacuum. They all lived in specific times, places, and cultures around the world influenced by the course of events. During certain periods and in particular areas, of course, change proceeded slowly and traditional patterns of behavior remained much as they had been for centuries before. In these circumstances, contributions on behalf of human rights found themselves largely confined to the realm of theory rather than practice. On other occasions, historical events of great consequence created not only a context but also the conditions for change. They drastically transformed existing structures, vested interests, habits of thought, and cultural values that allowed, encouraged, or actually forced changes that enhanced international human rights.

One of the most interesting — and perhaps tragically ironic — features of this whole evolution is the fact that the major efforts to promote dimensions of human rights have been coupled with enormous human traumas and catastrophes. The early bills and declarations of civil and political rights, for example, emerged only with the upheavals of the English Revolution, the American Revolution, and the French Revolution. The end of the slave trade came only when the horrendous brutality of the Middle Passage and the treatment of several million human beings as mere property became so gruesome that it could no longer be ignored. The abolition of slavery and serfdom resulted only after traumatic civil and foreign wars. The energies expended to advance economic and social rights first resulted from the extent of massive suffering on the part of men, women, and children exploited by the Industrial Revolution. Efforts to create

**Conclusion 291**

the Red Cross and establish humanitarian law came in the wake of agonized suffering on battlefields. Moreover, the practice of humanitarian intervention emerged only when the level of persecution became so brutal and so extreme as to provoke international outrage.

This pattern proceeded with even greater force in the twentieth century. The innovative Minorities Treaties, extension of humanitarian law, the League of Nations, refugee assistance, and efforts to promote global health all came in the wake of the human tragedies resulting from the catastrophes of World War I, the Bolshevik Revolution, and massive epidemics. Serious discussions about international standards of human rights resulted from the extraordinary abuses perpetrated under totalitarian regimes, especially those of Stalin and Hitler. It was the experience of World War II and its crusade and the unimagined destruction of human life in the genocide of the Holocaust's "Final Solution" that exceeded all previously known bounds, however, that finally tipped the scales. After this, individuals, NGOs, and the governments of the international community refused to remain silent in the face of large-scale violations of human rights by creating the United Nations and adopting the Universal Declaration of Human Rights. With the subsequent destruction of colonial empires in Asia and Africa, the determination for international human rights grew even stronger, resulting in a whole series of efforts to set standards, establish binding covenants and conventions, create implementation mechanisms, and promote and enhance human rights around the world. More recently, the traumas of "ethnic cleansing" in the former Yugoslavia and the genocide in Rwanda have had much the same effect.

One of the reasons why these cause-and-effect relationships occur is that events such as revolutions and wars destroy existing structures of authority, privilege, and vested interests, thus making change possible. Violence and upheaval—whether they occur in Europe, North America, Latin America, Asia, Africa, the Middle East, or islands of the Pacific—result in a transformation of established institutions of control. And, whether they involve political, military, diplomatic, economic, social, or cultural dimensions, the consequence is a tearing away of power from those unwilling to share it voluntarily. Upheaval, of course, always contains the serious danger of leading to merely reshaped forms of abuse and control. But it also can open up new possibilities to make changes only previously imagined in dreams. Due to their duration and extent, the two world wars of the twentieth century certainly created revolutions in their own right, destroying monarchies, authoritarian and totalitarian regimes, social hierarchies, and empires, ultimately emancipating millions of men, women, and children around the world and launching a revolutionary movement on behalf of international human rights.

But events of consequence do much more than this, for they can change habits of thought as well. They often force people, as we have seen constantly throughout this book, out of the limitations of their established ways of thinking and previously accepted values into considering new possibilities of what might be and how people ought to treat each other. Sometimes they provide dramatic reminders that cultural values in any society can themselves be the result of the particular interests of those with power seeking to benefit from the way that culture is defined, and therefore not immutable. In this process, the visions themselves can be transformed. Perhaps this is what Secretary-

**292 Conclusion**

General Boutros-Ghali had in mind when he declared before the 1993 World Conference on Human Rights: "It is always when the world is undergoing a metamorphosis, when certainties are collapsing, when the lines are becoming blurred, that there is greatest recourse to fundamental reference points, that the quest for ethics becomes more urgent, that the will to achieve self-understanding becomes imperative."<sup>13</sup>

Upheavals compel those who lived through them to test their assumptions and seriously consider the legitimacy of existing authority, the purposes of government, the degree to which individuals should have certain basic human rights, and evolving visions of what those rights might entail. The revolutions of the seventeenth and eighteenth centuries, for example, raised questions about a first generation of human rights focused on civil and political rights. The socialist and Marxist revolutions of the nineteenth and first half of the twentieth centuries provoked discussions about a second generation of economic and social rights. World War II did much to radically transform the thinking of many women, racial minorities, and indigenous peoples from colonial empires who up to this point had been taught to think that they were somehow inferior. As Reverend Ndabaningi Sithole writes of the experience from Africa:

During the war the African came in contact with practically all the peoples of the earth. He met them on a life-and-death basis. He saw the so-called civilized and peaceful and orderly white people mercilessly butchering one another just as his so-called savage ancestors had done in tribal wars. He saw no difference between the primitive and the civilized man. In short, he saw through the European pretensions that only Africans were savages. This had a revolutionary psychological impact upon the African.<sup>14</sup>

The anticolonialist revolutions immediately following the war continued this evolving process by drawing attention to yet a third generation of human rights, concentrating on collective or "solidarity" rights such as those of self-determination and economic and social development.<sup>15</sup>

Traumas and catastrophes also affect patterns of thinking in still another perhaps more powerful way. That is, they often dramatically and shockingly reveal just how inhumane people can be to others. Shackled human beings packed like cord wood onboard slave ships, soldiers and civilians writhing in pain, floods of helpless refugees fleeing for their lives from persecution, bodies and minds mutilated by torture, unearthed graves of victims of summary executions, and mounds of corpses piled high as a result of genocide seize attention. Whether witnessed personally with horrifying directness or viewed through pen-and-ink drawings, photographs, the printed word, or visual images now sent instantaneously around the world by modern technology, these staggering scenes force people to confront their thinking and their values. They demonstrate perhaps as nothing else can the consequences of apathy, of ignoring human rights abuses, or of allowing leaders to hide behind a shield of national sovereignty. Just as important, if not more so, they stir the individual and collective conscience to reconsider the meaning of justice, of responsibility to others, and of being truly human. Time and time again, those men and women either eagerly or reluctantly involved with the evolution of international human rights have spoken about this feature of events and its power to move what they variously have called "global moral opinion," "the conscience of the international community," or "the conscience of mankind."<sup>16</sup>

## Process, Politics, and Perspective

The evolution of international human rights thus has been—and continues to be—one of considerable complexity, involving interaction among these elements of visions, people, and events in dynamic and often unanticipated ways. Visions possess considerable power, but they differ widely, and are constantly subject to modification, and what is seen clearly by some may remain completely invisible to others. Those women and men involved with human rights play absolutely critical roles, but they vary greatly in their personalities, methods, and motives. At the same time, although revolutions, wars, and upheavals provide often necessary conditions for change, they remain highly volatile and unpredictable. For all these reasons, the process of evolution most certainly is neither orderly nor precise. It is instead composed of twists and turns, fits and starts, advances and setbacks, and progressive movement and diversions, all heavily influenced by domestic and international politics.

Political factors, as we have explored from the very beginning, help to explain a great deal about the determined and long-standing opposition to human rights. Most of those with vested interests, power, and special privilege at stake fiercely resist sharing what they have with others or acknowledging that all people possess certain basic rights simply by being human beings. At the global level, this tendency also applies to those states adamantly unwilling to surrender the claims of national sovereignty or cultural uniqueness by allowing the international community to pass judgment on their behavior or how they treat people under their control. This can be seen not only in the past, but in the abuses and double standards that persist today against women, racial or religious minorities, the dispossessed and unpropertied, certain ethnic groups, and political prisoners, among others. Some governments confine themselves to symbolic gestures and lip-service, refusing to ratify, and thus be bound by, the international covenants and conventions on human rights. Others have ratified the treaties, but in practice do not comply with their obligations or do so only selectively, claiming special circumstances make them exempt from the established norms.

Given these features, it certainly is not surprising to hear many advocates of human rights despair over the heavy influence of politics. They accuse governments of being interested only in “political motivations” that seek self-serving advantages or narrow interests instead of the intrinsic merits of human rights. They express their “disappointment and consternation” over the constant tendency of members of the United Nations to resort to weakened compromises of politics rather than determined stands of principle, to be seduced by arguments that “cultural relativism” should exempt certain governments from internationally established norms, or to selectively apply standards by criticizing comparatively small countries while allowing the big and powerful to escape serious scrutiny. They deplore the role of official representatives on the Commission on Human Rights as being no more than “stripped-pants dignitaries rather than people of substance,” and criticize them for playing “a ping-pong game of diplomacy between nation-states” and creating no more than a “circus of hypocrisy and rhetoric.” If only it were not for “politics,” they argue, international human rights would be even further advanced than it is today.<sup>17</sup>

Considerable merit resides in some of these arguments, for political forces have often

**294 Conclusion**

greatly hindered and obstructed the evolution of international human rights. But it is also the case that the advances that have been made in this evolution are the result of politics. Regardless of the motives, none of the many achievements discussed in this book would have taken place without the political forces and political will necessary to make them happen. The human rights provisions in the United Nations Charter, for example, would not be there if it had not been for the influence wielded by the small- to medium-sized states and the NGOs, and the people they represented, gathered together at the San Francisco Conference. The Universal Declaration of Human Rights would have never been negotiated and adopted without the political determination of the vast majority of member states to do so. It took a new majority of the states from Asia and Africa emerging from the decolonization revolution to finally break a protracted deadlock and create the array of international human rights covenants and conventions. Similarly, the treaty mechanisms, special procedures, and tribunals, as well as the several regional human rights bodies, in existence today are all the result of political decision.

Not all developments in this evolution of international human rights, it is important to observe, have been so deliberate or direct. Indeed, sometimes politics plays strange tricks on the unsuspecting and produces unanticipated consequences. Those who issued the Atlantic Charter and then the Declaration of the United Nations during the course of World War II, for example, did so primarily to generate support for the temporary military crusade against their enemies. It was certainly not their intention to permanently upset the international balance of power or to jeopardize their own empires. But the consequence of openly advocating certain human rights, such as that of self-determination, eventually and transformed dramatically the status of colonial possessions throughout the world. As one African nationalist writes,

During the war the Allied Powers taught the subject peoples (and millions of them!) that it was not right for Germany to dominate other nations. They taught the subjugated peoples to fight and die for freedom rather than live and be subjugated by Hitler. Here then is the paradox of history, that the Allied Powers . . . set in motion those powerful forces which are now liquidating, with equal effectiveness, European domination in Africa.<sup>18</sup>

At the same time, in drawing attention to the attitudes of racial superiority in Nazi Germany during the war, they did not intend to have their own words be used against them to overthrow their domestic policies of segregation or discrimination in postwar peace. But this was the result.

Similarly, at the time of the adoption of the Universal Declaration of Human Rights, many governments did everything they possibly could to make sure that the text was not construed by their own people or by others to mean any more than they originally intended. They made speeches in the General Assembly, held news conferences, and issued press releases to inform all who would listen that the proclaimed vision represented “only a declaration” and a “mere recommendation.” They insisted that it was “simply” a general statement of principle and contained no legal obligations or binding commitments.<sup>19</sup> It thus came as a great surprise – and sometimes profound shock – to them when the Universal Declaration began almost immediately to take on an

**Conclusion 295**

authority and normative character of its own, serving as a model for national constitutions, influencing court decisions, inspiring new international legal instruments, and arousing critics at home and abroad to challenge their very claims of national sovereignty and their own records on human rights.

This same pattern continued during the height of the Cold War when the Soviet Union joyously welcomed the surprise announcement that the United States would never sign any of the United Nations-sponsored covenants and conventions on human rights as a glorious gift. Such a decision allowed the Soviets suddenly to present themselves as the only superpower who defended the exploited and championed human rights. In their enthusiasm, they energetically supported the right of self-determination for colonial peoples, cooperated with others in the United Nations in drafting the treaties, and then gave enormous publicity to their efforts in opposing apartheid. They had no intention whatsoever of jeopardizing the nature of their own regime or their own iron-fisted control over their Eastern European satellites. But this followed as the unintended consequence, for by drawing so much ideological and political attention to their support for certain aspects of international human rights, they made these issues well known to their own public. Dissidents quickly invoked the principles of the Universal Declaration of Human Rights and the obligations of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights against their own authorities. By giving such prominence to human rights for other purposes, therefore, Soviet authorities gave them respectability and thereby sowed seeds that eventually helped lead to the collapse both of the Soviet Union and its empire in Eastern Europe.<sup>20</sup>

Other governments have also found themselves surprised by politics and the consequences of their own rhetoric and actions in the area of human rights. China, to illustrate, eagerly threw itself into the struggle of decolonization and actually competed with the Soviet Union as to who could be the most prominent advocate for the right of self-determination in colonial territories. It enthusiastically endorsed arguments on behalf of the right to racial equality and the right to development, and ratified international conventions on the right to be protected against torture and rights for women and children. In the name of the Universal Declaration of Human Rights, it actively supported strong punitive measures against the “pariah regimes” of the white minority in South Africa for its policy of apartheid and of Israel for its suppression of the rights of the Palestinians in occupied territories. Yet, in taking these actions, the Chinese leaders unintentionally gave ammunition and legitimacy to their own human rights activists such as Fang Lizhi and international critics regarding the repression of the rights of Tibetans, the suppression of political expression at Tiananmen Square, and restraints on the right of citizens to fair trials, among other abuses.<sup>21</sup>

These political influences on the process of the evolution of international human rights should come as no surprise at this stage. As we have seen, they have always been there. The reason for this is that human rights raise some of the most profound of all issues of politics in the world. They challenge the authority of the state over its own people, attempt to impose defined limitations upon the arbitrary exercise of power, endeavor to eliminate special privileges, and seek to hold governments accountable to

**296 Conclusion**

certain norms of behavior. Political factors shape any formulation of rights, any obligation incurred, any procedure for implementation, and any practical means of enforcement. Thus, notes one observer with a lifetime of experience in this field, human rights by definition can never be divorced from politics. Indeed, he writes, "In a sense, nothing could be more political; and it would have been quite unreal had the great international debate on human rights not reflected the deep differences which divide nations and groups."<sup>22</sup>

All those who sought to advance the cause of human rights had to confront this fact of politics, then decide how to deal with it. Some saw the obstacles and in fear or frustration largely gave up, declaring the task to be "impractical," "naive," or "impossible," and confining themselves to the margins of verbal complaint or silence. Others decided to face the problems head-on with action, regardless of the consequences, and not only refused to be intimidated but even to compromise in any way with what they regarded as the "impure," "wickedness," and "evil" of politics. Still others determined that they would proceed as they could by progressive steps, accepting politics as the art of the possible in an imperfect world, making accommodation to the realities and constraints of the time when necessary, and acknowledging that half a loaf might be considerably better than no bread at all. They believed that desirable measures should not be postponed or rejected simply because someday there might be agreement on a perfect and complete solution.<sup>23</sup> As concluded by one observer of this persuasion, the evolution of human rights normally proceeds when taken one step at a time beginning with successes "in some matters, to some extent, for some people, against some organ of the State."<sup>24</sup>

Indeed, this very process of progressive steps explains much about the entire evolution of international human rights itself. Challenges to the exercise of power, hierarchical patterns of behavior, prevailing cultural values, and the degree of governmental authority over the lives of people came only as circumstances permitted. Interpretations over the legitimacy of "national sovereignty," the extent and mechanisms of "international responsibility," and the intention of what was or was not "essentially within the domestic jurisdiction of any state" emerged in different measure as time and place allowed. The same can be said about the very definition of "human rights" which has expanded through time to accommodate a variety of aspirations among people of different cultural and philosophical traditions around the world in accordance with the conditions, range of choice, and possibilities available. To fully appreciate this evolution, it is necessary to bring a sense of historical perspective to bear and to measure them not against a perfectionist abstraction or simply the last few years, but rather against the human condition over the last five centuries or more.

For nearly the entirety of human history, almost all of those who lived and died never knew the meaning nor the enjoyment of human rights. During most times and in most places of the world, they found themselves facing one kind of abuse or another. They confronted various forms of discrimination and patterns of dominance based on gender, race, class or caste, religion, ethnicity, or some other form of difference that divided people from one another. They encountered traditional societies, cultures, and despotic regimes that emphasized hierarchical relationships, sharp divisions between the few rulers and the many ruled, stratification between the powerful and the weak, and the

**Conclusion 297**

performance of obedience rather than the exercise of rights. Misogyny, racial prejudice, intolerance, segregation, torture, conquest, and human bondage in serfdom or slavery were the norm rather than the exception. Moreover, victims of these practices suffered under governments who confidently knew in advance that how they treated those under their control would be regarded as a matter exclusively within their own domestic jurisdiction and not at all subject to the scrutiny of distant states. Over the course of centuries, the practices, institutions, and laws of international affairs thus remained essentially silent on the subject of rights and precluded victims from ever having recourse to any assistance beyond their own borders. For all practical purposes, and throughout most of history, therefore, international human rights did not even exist.

Today, as a result of the extraordinary evolution discussed in this book, we live in a drastically different setting. Universal norms, or standards, have been set with the participation of all governments around the world representing different systems and cultures, and a sense of responsibility to others beyond one's own borders has grown enormously. A widespread belief exists that serious human rights violations in one country in one way or another do threaten the peace and security of others. For this reason, claims of exclusive national sovereignty, insofar as abuses against people are concerned, most certainly do not carry the conviction or the force they once did. In fact, during a recent international conference of government representatives meeting on the subject of war crimes, one spokesman even went so far as to declare: "There is no longer any such thing as 'domestic affairs' when it comes to human rights."<sup>25</sup> As a result of the technological revolution and a heightened determination among concerned men and women to investigate problems, serious abuses and gross violations of rights can no longer remain hidden for long and often appear in graphic detail on television screens. Moreover, a vast array of organizations, declarations, resolutions, judicial rulings, binding covenants and conventions, treaty-monitoring bodies, special procedures, technical assistance, NGOs, and thousands of experts and civil servants are now devoted to promoting and protecting international human rights. The availability of these collective norms and continuous means provide states, groups, and individuals innumerable opportunities to air complaints and file petitions, express aspirations, and seek practical protection for their rights or those of others. Never before in history have human rights been such a part of the political, legal, and moral landscape, or played such an important role in world affairs. Indeed, Nelson Mandela—who found himself transformed from a prisoner to president, hence dramatically able to see visions become a reality—recently declared that "human rights have become the focal point of international relations."<sup>26</sup>

When one considers all of the differences in the world and the formidable opposition faced all along the way, the magnitude of these remarkable achievements and the prominent role now played by human rights becomes all the more impressive. Phenomenal accomplishments have been realized, especially during the last fifty years, following the vision of the Universal Declaration of Human Rights. While recognizing how far the world has come, of course, it also is important to acknowledge how far it still has to go. Problems tenaciously persist, and not all issues of human rights are resolved and not all difficulties are solved. Abuses still occur, and at times there even appears to

**298 Conclusion**

be retrogression.<sup>27</sup> There thus remains what has been called “the unfinished ethical agenda of our time” and “the unfinished revolution—the revolution of placing the human person squarely at the center of national and international values.”<sup>28</sup> But in the tasks that lay ahead and in the vigilance and courage that will always be required to protect the rights of all men, women, and children wherever they might be, the perspective of history may offer considerable hope not only for the future, but also for the power of visions seen.

**352 Notes to pages 278–86****Conclusion**

1. Among many examples, see U.S. National Archives, RG 84, Box 89, File “Human Rights, 1946–1949,” “Statement to the United Nations on Forced Labor”; William Ewart Gladstone, *Bulgarian Horrors and the Question of the East* (London: Murray, 1876); and Henri Coursier “L’Evolution du droit international humanitaire,” *Recueil des Cours de l’Académie de Droit International*, 99 (1960): 361–465.

2. John Humphrey, *Human Rights and the United Nations* (Dobbs Ferry: Transnational, 1984), p. 41.

3. Among many examples, see “Sie halten uns wie Sklaven,” *Der Spiegel*, 14 October 1996.

4. See the statements cited in Nehemiah Robinson, *The Universal Declaration of Human Rights: Its Origins, Significance, and Interpretation* (New York: Institute of Jewish Affairs, 1950), p. 15.

5. John Foster Dulles, *War or Peace* (New York: Macmillan, 1950), p. 201.

6. Expressions as reported and as used in NANZ, EA 2, File 108/11/13/1(2), memorandum entitled “Human Rights Committee,” 12 February 1948, and memorandum entitled “Report by the New Zealand Observer,” 1 July 1948.

7. Eleanor Roosevelt, as cited in Blanche Wiesen Cook, “Eleanor Roosevelt and Human

Rights," in Edward Crapol (ed.), *Women and American Foreign Policy* (Wilmington: Scholarly Resources Books, 1992 ed.), p. 114.

8. Edith Balantyne, 7 April 1997, meeting of the Special Committee of International NGOs on Human Rights, Palais des Nations, personal notes.

9. Kofi Annan, 9 April 1997, as cited in United Nations press release, "Discours du Secrétaire Général"; and interview with an official who wishes to remain anonymous. See also Thomas Buergenthal, *International Human Rights in a Nutshell* (St. Paul: West, 1995 ed.), pp. 318-329; and Laurie Wiseberg, "Introductory Essay," in Edward Lawson (ed.), *Encyclopedia of Human Rights* (New York: Taylor & Francis, 1996 ed.) pp. xx and xxiv-xxvii.

10. Humphrey, *Human Rights and the United Nations*, p. 13.

11. This expression is frequently heard among nongovernmental organizations, as evidenced in Special Committee of International NGOs on Human Rights, meeting of 7 April 1997, Palais des Nations, personal notes.

12. Kofi Annan, 9 April 1997, in UN Press Release, "Discours du Secrétaire Général."

13. Boutros Boutros-Ghali, 14 June 1993, as cited in UN Publication DPI/1394/Rev.1/HR, *World Conference on Human Rights*, p. 6.

14. Ndabaningi Sithole, *African Nationalism* (London: Oxford University Press, 1959), p. 23.

15. For more discussion, see Burns H. Weston, "Human Rights," in Richard Pierre Claude and Burns H. Weston (eds.), *Human Rights in the World Community* (Philadelphia: University of Pennsylvania Press, 1992 ed.), pp. 18-20; and Vasak Karel (ed.), *Dimensions internationales des droits de l'homme*, 2 vols. (Paris: UNESCO, 1982).

16. See, among many examples, William Ewart Gladstone, *Lessons of the Massacre* (London: Murray, 1877), *passim*; NANZ, EA 2, File 108/11/13/1 (4), memorandum entitled "The Problem of Implementation," 1 December 1949; the Universal Declaration of Human Rights, Preamble; UN/GA, *Official Records, Plenary Meetings, 1966*, Meeting of 16 December 1966, p. 10; and H. Gordon Skilling, *Charter 77 and Human Rights in Czechoslovakia* (London: George Allen & Unwin, 1981), p. 153.

17. Expressions from UN Document E/CN.4/1996/NGO/22, "Organisation des Travaux de la Session," 26 March 1996; and the Special Committee of International NGOs on Human Rights, meeting of 7 April 1997, Palais des Nations, personal notes.

18. Sithole, *African Nationalism*, p. 23.

19. See UN/GA, *Official Records, 1948*, *passim*; and Robinson, *The Universal Declaration of Human Rights*, p. 15.

20. See Skilling, *Charter 77 and Human Rights in Czechoslovakia*, pp. 152 ff. I also am very grateful to J. Herman Burgers for discussions on this issue.

21. See UN Document E/CN.4/1997/L.91, "Draft Resolution on the Situation of Human Rights in China," 10 April 1997.

22. Humphrey, *Human Rights and the United Nations*, p. 25.

23. See Thomas Jefferson to James Madison, 15 March 1789, in Thomas Jefferson, *The Papers of Thomas Jefferson*, 26 vols. (Princeton: Princeton University Press, 1950-1995), 14:660; letter from Peter Benenson to John Humphrey, Private and Confidential, 13 March 1966, and International League for the Rights of Man, "Statement on the United Nations Commissioner on Human Rights," 30 March 1966, both in UN Archives/Geneva, SO 218, Box 218; and Albert Verdoort, *Naissance et signification de la Déclaration universelle des Droits de l'homme* (Louvain-Paris: Éditions Nauwelaerts, 1964), pp. 317 and 325.

24. H. Lauterpacht, *International Law and Human Rights* (New York: Garland, 1973), p. 131.

25. Participant at the London Peace Implementation Conference on Bosnia, as cited in the British Broadcasting Corporation's "World News Broadcast," 5 December 1996.

26. Nelson Mandela, as cited at <http://www.anc.org.za>, 18 August 1997. See also Robin Cook, "Human Rights Into a New Century," press release from the British Foreign Office, 17 July 1997; and Forsythe, *The Internationalization of Human Rights*, *passim*. among many others.

27. These can be seen in daily news reports; the discussions during the sessions of the Commis-

**354 Notes to pages 297–98**

sion on Human Rights; the annual reports of Amnesty International; at [http://www.usis.it/hr\\_reps](http://www.usis.it/hr_reps); and in Philip Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992), pp. 12–21 and 620–675; among others.

28. Blanche Wiesen Cook, “Eleanor Roosevelt and Human Rights,” p. 113; and Jan Mårtenson, “The Preamble of the Universal Declaration of Human Rights and the UN Human Rights Program,” in Asbjørn Eide et al. (eds.), *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press, 1992), p. 17.

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## **פרק 11**

# **זכויות האדם ו שינוי אקלים**

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## HUMAN RIGHTS AND CLIMATE CHANGE: CONSTRUCTING A CASE FOR POLITICAL ACTION\*\*

*Marc Limon\**

On March 28, 2008, the United Nations Human Rights Council adopted Resolution 7/23<sup>1</sup> on human rights and climate change, which, for the first time in a U.N. resolution, explicitly recognized that climate change “has implications for the full enjoyment of human rights.”<sup>2</sup> While this may appear a classic case of stating the obvious, the words are potentially highly significant both for climate change policy and for human rights policy. This Article will look at the implications of Resolution 7/23 for global climate change responses. It will argue that the application of human rights principles and norms can bring a range of benefits to international and national efforts to respond to global warming, and that the obstacles to doing so are mainly practical difficulties, related in particular to the entrenched “path dependence” of the two policy areas. This Article will also turn this premise around to suggest ways in which the issue of climate change could or should affect international human rights policy. In particular, it will argue that the issue of climate change points to the need for a reconceptualization of human rights, and suggests the need for a reconsideration of the utility of environmental rights. The Article mainly reflects the views of a political rather than a legal practitioner, although these views are necessarily embedded in law.

This Article is divided into four sections. First, it offers a brief overview of the international movement to draw linkages between climate change<sup>3</sup> and human rights,<sup>4</sup> an effort with which the Maldives has been inti-

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\* Marc Limon works as an Advisor at the Permanent Mission of the Republic of Maldives to the United Nations Office at Geneva. The views expressed in this Article are those of the author alone and do not represent or reflect the official position of any government or organization.

<sup>1</sup> The Resolution, which secured eighty co-sponsors, was adopted by consensus. U.N. Human Rights Council [UNHRC] Res. 7/23, U.N. Doc. A/HRC/7/78 (Mar. 28, 2008) [hereinafter UNHRC 7/23].

<sup>2</sup> *Id.* at pmbl.

<sup>3</sup> The UNFCCC definition of “climate change” is “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.” United Nations Framework Convention on Climate Change art. 1(2), May 9, 1992, S. TREATY Doc. No. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

<sup>4</sup> The term “human rights” refers to the core set of rights proclaimed under international law on behalf of all individuals, regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; accord International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The primary source texts are the 1966 ICCPR and ICESCR, and the 1948 Universal Declaration on Human Rights. The human rights laid out in these documents are generally referred to as “civil and political” on the one hand, and “economic, social and cultural” on the other. The former include rights to life, liberty, property, freedom of expression and assembly, political participation, a fair trial, privacy and home life, and protection from torture. The latter include rights to work, to education, to social

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\*\* Limon, Marc, "Human Rights and Climate Change: Constructing a Case for Political Action", *Harvard Environmental Law Review*, 33, 2009: 439-476.

mately involved. Second, it summarizes our current understanding of the nature and extent of those linkages. Third, it asks whether human rights principles *should* be integrated into climate change policy — what is the value added and what are the potential risks? Fourth, this Article presents some initial ideas on how the international community might usefully and practically operationalize the human rights-climate change interface in order to contribute to better policy responses. Finally, turning the overall premise around, this Article suggests ways in which international human rights law might adapt in response to the challenges posed by climate change and, in this respect, might perhaps learn from principles applied in environmental law.

#### A YOUNG AND FAST-EVOLVING AGENDA

International interest in the linkages between climate change and human rights is a relatively recent phenomenon. It has only been since 2005 that a small number of vulnerable states, indigenous groups, and non-government organizations have begun to take a series of separate yet mutually reinforcing steps to understand, highlight, and leverage those linkages. The impetus for these actions was three-fold. First, there was a general frustration on the part of vulnerable communities at the slow pace of progress in tackling climate change using the traditional politico-scientific approach. This in turn suggested that a new supplementary framework was needed. Second, there was a growing sense on the part of these groups that, with a scientific consensus on climate change largely in place, it was time to shift the debate onto the victims of the problem — namely individual people and communities around the world. Third, and linked to the previous point, those people and communities most at risk from climate change became increasingly frustrated at the lack of any kind of accountability mechanism to deal with a phenomenon caused by man and with devastating human consequences. This frustration was enhanced by the knowledge of unequal power relationships underlying the problem, as illustrated by the “inverse relation-

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security, to “enjoyment of the highest attainable standard of physical and mental health,” and to “adequate food, clothing and housing, and to the continuous improvement of living conditions.” ICESCR, *supra*, arts. 11(1)-12(1). Whereas the former rights are typically guaranteed through judicial mechanisms, including at the international level, the latter are aspirational (states, to the maximum of available resources, must pursue their progressive attainment) and have generally been dependent upon domestic welfare mechanisms in the absence of any dedicated international judicial machinery (although the recent adoption of the Optional Protocol to the ICESCR does for the first time provide victims of violations of economic, social, and cultural rights with an international accountability mechanism). See INT'L COUNCIL ON HUMAN RIGHTS POLICY, CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE (2008) [hereinafter CLIMATE CHANGE AND HUMAN RIGHTS], available at <http://books.google.com/books?id=yMOnLamOiccC&printsec=frontcover&dq=CLIMATE+CHANGE+AND+HUMAN+RIGHTS:+A+ROUGH+GUIDE>; G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008).

2009] *Limon, Constructing a Case for Political Action* 441

ship between responsibility for climate change and vulnerability to its impacts.”<sup>5</sup>

Climate change and human rights were first explicitly linked, it seems, in December 2005, when an alliance of Inuit from Canada and the United States, led by Sheila Watt-Cloutier, filed a petition with the Inter-American Commission on Human Rights.<sup>6</sup> The petition alleged that the human rights of the plaintiffs had been infringed and were being further violated due in large part to the failure of the United States to curb its greenhouse gas emissions.<sup>7</sup> In the words of the petition: “the effects of global warming constitute violations of Inuit human rights for which the United States is responsible.”<sup>8</sup> Although the petition was rejected without prejudice in November 2006, the Commission subsequently invited, in February 2007, the Inuit Alliance together with representatives of the Center for International Environmental Law (“CIEL”) and Earthjustice to provide testimony on the link between global warming and human rights.<sup>9</sup>

The Inuit case introduced the idea that rather than being a global and intangible phenomenon belonging squarely to the natural sciences, global climate change is in fact a very human process with demonstrable human cause and effect. It could thus, like any other aspect of human interaction, be placed within a human rights framework of responsibility, accountability, and justice. In the words of Mary Robinson, speaking during a lecture at Chatham House in December 2006: “Climate change has already begun to affect the fulfilment of human rights, and our shared human rights framework entitles and empowers developing countries and impoverished communities to claim protection of these rights.”<sup>10</sup>

On July 17, 2007, the then-President of the Maldives, Maumoon Abdul Gayoom, delivered a speech at the Royal Commonwealth Society in London to mark the twentieth anniversary of Maldivian advocacy on the question of climate change.<sup>11</sup> Reflecting on the intervening years of “failed promises

<sup>5</sup> U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2007/2008, at 3 (2007) [hereinafter HUMAN DEVELOPMENT REPORT].

<sup>6</sup> See MARTIN WAGNER & DONALD M. GOLDBERG, AN INUIT PETITION TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS FOR DANGEROUS IMPACTS OF CLIMATE CHANGE (2004) (paper presented at the 10th Conference of Parties to the Framework Convention on Climate Change in Buenos Aires, Argentina), available at [http://www.ciel.org/Publications/COP10\\_Handout\\_EJCIEL.pdf](http://www.ciel.org/Publications/COP10_Handout_EJCIEL.pdf).

<sup>7</sup> *Id.*

<sup>8</sup> Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005), at 70 [hereinafter Inuit Petition], available at <http://www.inuitcircumpolar.com/files/uploads/icc-files/finalpetitionicc.pdf>.

<sup>9</sup> Letter from Ariel E. Dulitzky, Assistant Executive Sec'y, Org. of Am. States Inter-Am. Comm. on Human Rights to the Inuit Alliance, Earthjustice, and Ctr. for Int'l Envtl. Law (Feb. 1, 2007) (inviting them to provide testimony before the Inter-American Commission on Human Rights), available at [http://www.ciel.org/Publications/IACHR\\_Response\\_1Feb07.pdf](http://www.ciel.org/Publications/IACHR_Response_1Feb07.pdf).

<sup>10</sup> *Rights Focus Sought over Climate*, B.B.C. News, Dec. 11, 2006, <http://news.bbc.co.uk/2/hi/europe/6166835.stm> (on file with the Harvard Environmental Law Review).

<sup>11</sup> Maumoon Abdul Gayoom, President of the Maldives, Speech at Royal Commonwealth Society (July 17, 2007), available at <http://www.maldivesmission.ch/fileadmin/Pdf/Envi>

and missed opportunities,” the President concluded that, in order to turn the situation around, the world would need to reconceptualize climate change as a profoundly human issue with human causes and human consequences.<sup>12</sup> The world would, in short, have to understand the “human dimension of climate change,” including the effects of climate change on human rights.<sup>13</sup>

In November 2007, the Maldives convened a Small Island States Conference to address these effects and the implications thereof.<sup>14</sup> The outcome of the meeting — the Malé Declaration on the Human Dimension of Global Climate Change — stated explicitly (and for the first time in an international agreement) that “climate change has clear and immediate implications for the full enjoyment of human rights” and called on the United Nations human rights system to address the issue as a matter of urgency.<sup>15</sup>

The Malé Declaration was taken to the Thirteenth Conference of Parties to the United Nations Framework Convention on Climate Change (“COP 13”) in Bali and was presented to assembled world governments by President Gayoom. It stated: “We [Small Island States] believe that climate change must be viewed not only as a danger to natural systems, but also as a direct threat to human survival and well-being. We are convinced that this negotiation process must not be viewed as a traditional series of government trade-offs, but as an urgent international effort to safeguard human lives, homes, rights and livelihoods.”<sup>16</sup> Echoing these sentiments, Kyung-wha Kang, Deputy U.N. High Commissioner for Human Rights, said, “[A]ny strategy to deal with climate change, whether in terms of adaptation or mitigation, must incorporate the consequences for humans, as individuals and communities, and the human rights framework is the most effective way to do so.”<sup>17</sup>

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ronment/Speech\_by\_President\_Gayoom\_to\_Royal\_Commonwealth\_Society\_July\_07.pdf. In 1987, President Gayoom gave two speeches in North America — one to Commonwealth leaders meeting in Vancouver and one to world leaders at the U.N. General Assembly in which he gave early warning about the peril of climate change — especially for small island states. See Maumoon Abdul Gayoom, President of the Maldives, Speech at Commonwealth Heads of Government Meeting (Oct. 15, 1987), available at [http://www.presidencymaldives.gov.mv/speeches/VANCOUVER\\_15101987.pdf](http://www.presidencymaldives.gov.mv/speeches/VANCOUVER_15101987.pdf); Maumoon Abdul Gayoom, President of the Maldives, Speech to U.N. General Assembly on the Issues of Environment and Development (Oct. 19, 1987), available at [http://www.presidencymaldives.gov.mv/speeches/UNGA\\_1987.pdf](http://www.presidencymaldives.gov.mv/speeches/UNGA_1987.pdf).

<sup>12</sup> Gayoom, Speech at Royal Commonwealth Society, *supra* note 11.

<sup>13</sup> *Id.*

<sup>14</sup> Permanent Mission of the Republic of Maldives to the United Nations Office at Geneva, Human Rights and Climate Change, <http://www.maldivesmission.ch/index.php?id=68> (last visited Apr. 8, 2009) (on file with the Harvard Environmental Law Review).

<sup>15</sup> Small Island States Conference, Malé, Maldives, Nov. 13-14, 2007, *Malé Declaration on the Human Dimension of Global Climate Change*, at 2 (Nov. 14, 2007), available at [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf).

<sup>16</sup> Maumoon Abul Gayoom, President of the Maldives, Address at 13th Session of the Conference of the Parties of the UNFCCC (Dec. 12, 2007), available at [http://www.maldivesmission.ch/fileadmin/Pdf/Environment/President\\_at\\_Bali\\_Conference\\_2012122007\\_final.pdf](http://www.maldivesmission.ch/fileadmin/Pdf/Environment/President_at_Bali_Conference_2012122007_final.pdf).

<sup>17</sup> Kyung-wha Kang, Deputy High Comm'r for Human Rights, Office of the U.N. High Comm'r for Human Rights, Address at the Conference of the Parties to the UNFCCC and its

Operating in parallel with these initial steps, a range of other actors also began to explore the interface between climate change and human rights, including the International Council on Human Rights Policy ("ICHRP"),<sup>18</sup> the Organization of American States,<sup>19</sup> Oxfam International,<sup>20</sup> Mary Robinson's Realizing Rights,<sup>21</sup> Kofi Annan's Global Humanitarian Forum,<sup>22</sup> and the United Nations Development Programme. The latter, in its 2007/2008 Human Development Report, argued that climate change represents "a systematic violation of the human rights of the world's poor and future generations, and a step back from universal values."<sup>23</sup>

In March 2007, these various strands were drawn together at the United Nations Human Rights Council's seventh regular session. During the session's ministerial and general segments,<sup>24</sup> Bolivia, Bhutan, Greece, Maldives,<sup>25</sup> Nigeria, Indonesia, and the Philippines all noted the serious consequences of climate change for the full enjoyment of human rights and called on the Council to address the human rights dimension.<sup>26</sup> Then, on

Kyoto Protocol (Dec. 14, 2007), available at [http://www.maldivesmission.ch/fileadmin/Pdf/Environment/DHC\\_Statement\\_Bali\\_Final.pdf](http://www.maldivesmission.ch/fileadmin/Pdf/Environment/DHC_Statement_Bali_Final.pdf).

<sup>18</sup> CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4.

<sup>19</sup> See Organization of American States [OAS], General Assembly Res. AG/Res. 2429 (XXXVIII-O/08), OAS Doc. AG/doc.4886/08 (June 3, 2008).

<sup>20</sup> See OXFAM INT'L, CLIMATE WRONGS AND HUMAN RIGHTS: PUTTING PEOPLE AT THE HEART OF CLIMATE-CHANGE POLICY (2008), available at <http://www.oxfam.org/sites/www.oxfam.org/files/bp117-climate-wrongs-and-human-rights-0809.pdf>.

<sup>21</sup> Mary Robinson, Barbara Ward Lecture at Chatham House: Climate Change and Justice (Dec. 11, 2006), available at [http://www.realizingrights.org/pdf/Barbara\\_Ward\\_Lecture\\_12-11-06\\_FINAL.pdf](http://www.realizingrights.org/pdf/Barbara_Ward_Lecture_12-11-06_FINAL.pdf).

<sup>22</sup> The Global Humanitarian Forum's inaugural annual meeting was titled "The Human Face of Climate Change," and the Forum's current strategic focus is "The Human Impact of Climate Change." See GLOBAL HUMANITARIAN FORUM GENEVA, FORUM 2008: THE HUMAN FACE OF CLIMATE CHANGE (2008), available at <http://www.ghf-geneva.org> (follow "A Forum Report: The Human Face of Climate Change" hyperlink).

<sup>23</sup> See HUMAN DEVELOPMENT REPORT, *supra* note 5, at 4.

<sup>24</sup> General segments feature keynote statements on human rights (ambassadorial-level) by states that were not able to be represented at ministerial- or senior government-level.

<sup>25</sup> The Minister of Foreign Affairs of the Maldives, Abdulla Shahid, also raised the issue of climate change in a speech during the sixth session of the Council. Abdulla Shahid, Minister of Foreign Affairs of the Maldives, Statement at the Sixth Session of the Human Rights Council of the United Nations (Sept. 20, 2007), available at <http://www.foreign.gov.mv/v2/speech.php?speech=10&page=3>.

<sup>26</sup> Ojo Maduekwe, Minister of Foreign Affairs of Nigeria, Statement at High-Level Segment of the Seventh Session of the Human Rights Council (Mar. 4, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Nigeria-E.pdf>; Sonam T. Rabgye, Permanent Representative of Bhutan to the United Nations, Statement at High-Level Segment of the Seventh Session of the Human Rights Council (Mar. 5, 2008) (on file with the Harvard Environmental Law Review); Alberto G. Romulo, Sec'y of Foreign Affairs of the Phil., Statement at High-Level Segment of the Seventh Session of the Human Rights Council: Behind a Common Cause: Advancing with Resolve, Finding Strength in Synergy (Mar. 3, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Philippines-E.pdf>; Abdulla Shahid, Minister of Foreign Affairs of the Maldives, Statement at High-Level Segment of the Seventh Session of the Human Rights Council (Mar. 4, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Maldives-E.pdf>; Sacha Sergio Llorenti Soliz, Vice Minister for the Coordination of Soc. Movements & Civil Soc. of Bol., at High-Level Segment of the Seventh Session of the Human Rights Council (Mar. 3, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Bolivia-S.pdf>; Franciscos Verros,

March 28, 2008, the Maldives, together with seventy-eight co-sponsors from all regional groups,<sup>27</sup> secured the adoption, by consensus, of United Nations Human Rights Council Resolution 7/23 on “Human Rights and Climate Change,” which, for the first time in an official U.N. resolution, stated explicitly that climate change “poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights.”<sup>28</sup>

The Resolution asked the Office of the High Commissioner for Human Rights (“OHCHR”) to prepare a “detailed analytical study on the relationship between climate change and human rights, to be submitted to the Council prior to its tenth session,” and further required that the study and a summary of the Council debate be sent to the Conference of Parties to the UNFCCC ahead of the Fifteenth Conference of the Parties to the United Nations Framework Convention on Climate Change (“COP15”) in Copenhagen, in order to inform negotiations.<sup>29</sup>

#### STATING THE OBVIOUS?

On January 15, 2009, the OHCHR published an advanced unedited version of the analytical study requested under Resolution 7/23.<sup>30</sup> The Report, which was based on written and oral submissions by over thirty states and thirty-five international organizations, national human rights institutions, NGOs, and academic bodies, marks a first attempt by the United Nations

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Permanent Representative of Greece to the United Nations at Geneva, Statement at High-Level Segment of the Seventh Session of the Human Rights Council (Mar. 5, 2008) (on file with the Harvard Environmental Law Review); N. Hassan Wirajuda, Minister for Foreign Affairs of Indon., Statement at High-Level Segment of the Seventh Session of the Human Rights Council (Mar. 4, 2008), available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/hls/Indonesia-E.pdf>.

<sup>27</sup> Cosponsors were (in order of signature): Maldives, Uruguay, Sri Lanka, Costa Rica, Switzerland, Greece, Burkina Faso, Spain, Iceland, United Kingdom, Bangladesh, Djibouti, Chile, Bhutan, Austria, New Zealand, Belgium, Finland, Germany, Mali, East Timor, Serbia, Slovenia, Portugal, Italy, Uganda, Panama, Montenegro, Peru, Nicaragua, Tuvalu, Fiji, Comoros, Micronesia, Cyprus, Mauritania, Ivory Coast, Albania, Malta, Luxembourg, Mauritius, Singapore, Estonia, Ireland, Madagascar, Bulgaria, Slovakia, Norway, France, Nepal, Zambia, Bolivia, Kenya, Botswana, Monaco, Philippines, Ghana, Syria, Pakistan, India, Azerbaijan, Netherlands, Ukraine, Senegal, Cape Verde, Sweden, Samoa, Suriname, Australia, Seychelles, Gambia, Marshall Islands, Nauru, Cameroon, El Salvador, Guinea, Indonesia, Malaysia, and Thailand. UNHRC, *Report of the Human Rights Council on its Seventh Session*, at 149, U.N. Doc A/HRC/7/78 (July 14, 2008) (*prepared by Alejandro Artucio*).

<sup>28</sup> UNHRC 7/23, *supra* note 1, pmb. During negotiations on the resolution, there was significant opposition to this paragraph with some countries arguing that there was no definitive U.N. assessment to prove the premise.

<sup>29</sup> *Id.* ¶¶ 1-3. Two other Council resolutions on the “right to adequate housing” (Res. 6/27) and the “right to food” (Res. 7/14), adopted during the Sixth and Seventh Sessions respectively, also made explicit reference to the effects of climate change on human rights. See UNHRC Res. 6/27, U.N. Doc. A/HRC/6/22 (Apr. 14, 2008) [hereinafter UNHRC 6/27]; UNHRC Res. 7/14, U.N. Doc. A/HRC/7/78 (July 14, 2008) [hereinafter UNHRC 7/14].

<sup>30</sup> Office of the U.N. High Comm'r for Human Rights [OHCHR], *Report of the Office of the U.N. High Commissioner for Human Rights on the Relationship Between Human Rights and Climate Change*, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) [hereinafter OHCHR Report].

human rights machinery to undertake a comprehensive assessment of the complex and multifaceted inter-linkages between climate change, environmental degradation, and human rights. Although the Report is extremely conservative in its analysis and conclusions (many of the national submissions go much further), it is nevertheless highly significant in that it marks a definitive break with arguments about whether there is indeed a relationship between climate change and human rights, and thus points toward a new debate on the implications of and necessary responses to that relationship.

It may seem surprising that such a break is necessary — that states or other entities would seriously argue with the premise that climate change does have implications for human rights (i.e., that there are linkages). However, at least at an official level, this was indeed the case.

During negotiations on Resolution 7/23, there was considerable opposition to the assertion, in preambular paragraph one, that climate change has “implications for the full enjoyment of human rights.” This opposition, led by major oil producing and oil consuming countries, was part legal (based on the argument that there was no official U.N. documentation to support the claim) and part strategic (if the point were to be conceded, it would necessarily open up various new avenues of debate). However, perhaps unwilling to argue that climate change *does not* have human rights implications in the Council, which holds its meetings in public, these countries eventually conceded the point.

Notwithstanding, evidence of residual resistance can be found in various national submissions to the OHCHR study.<sup>31</sup> For example, Canada only acknowledges that “there *can* be an impact on the effective enjoyment of human rights as a result of *situations arising* from environmental degradation *amplified* by climate change.”<sup>32</sup> Similarly, the United Kingdom (which was in fact a strong supporter of the Resolution) “recognises that climate change may impact on the full enjoyment of human rights at the national level.”<sup>33</sup> The United States meanwhile took a different approach — agreeing that “climate change . . . has implications for the full enjoyment of human rights,” but noting “of course, that [such] statements are factual ob-

<sup>31</sup> Indeed, such resistance was still evident in March 2009 during negotiations to follow-up U.N. Human Rights Council Resolution 10/4 on human rights and climate change, during which some delegations continued to push for softer language such as “climate change-related effects *may have* implications for the effective enjoyment of human rights,” and “these *potential* implications *may affect* individuals and communities around the world.” However, this conditionalized wording was not acceptable to the main co-sponsors as it would have represented a step back from what had been agreed in preamble paragraph 1 of Resolution 7/23.

<sup>32</sup> Submission of Canada to OHCHR Report, *Government of Canada Response*, at 1 (Nov. 2008) [hereinafter Canada OHCHR Report Submission] (emphasis added), available at <http://www2.ohchr.org/english/issues/climatechange/docs/canada.pdf>.

<sup>33</sup> Submission of U.K. to OHCHR Report, *Assessment at National Level of the Impact of Climate Change (Experienced or Anticipated) on Human Lives and on Population Most Affected and Vulnerable*, ¶ 20 (2008) [hereinafter U.K. OHCHR Report Submission], available at <http://www2.ohchr.org/English/issues/climatechange/docs/submissions/uk.pdf>.

servations rather than statements of international law.”<sup>34</sup> The U.S. submission also points out that the effects of climate change on the enjoyment of human rights can be positive as well as negative.<sup>35</sup>

In order to respond to concerns among some States expressed during negotiations on Resolution 7/23 that OHCHR lacks the expertise to undertake any work in the area of climate change, the Office’s Report uses the Intergovernmental Panel on Climate Change’s Fourth Assessment Report<sup>36</sup> (“IPCC AR4”) as a scientific foundation upon which its subsequent human rights analysis is built.<sup>37</sup> It then attempts to tackle a significant legal problem associated with drawing linkages between climate change and human rights — namely that climate change affects human rights only indirectly (with environmental degradation being the intermediary step) and, at present, “the universal human rights treaties do not refer to a specific right to a safe and healthy environment.”<sup>38</sup> To respond to this legal gap, the OHCHR Report draws attention to the 1972 Declaration of the United Nations Conference on the Human Environment<sup>39</sup> (“the Stockholm Declaration”), which “reflects a general recognition of the interdependence and interrelatedness of human rights and the environment,” as well as to the fact that “United Nations human rights treaty bodies recognize the intrinsic link between the environment and the realization of a range of human rights.”<sup>40</sup>

The OHCHR Report then outlines “how the empirical reality and projections of the adverse effects of climate change [i.e., the baseline provided by IPCC AR4] on the effective enjoyment of human rights relate to obligations assumed by States under the international human rights treaties.”<sup>41</sup> The Report asserts that global warming “will potentially have implications for the full range of human rights” but that certain rights are most directly implicated by climate change-related impacts.<sup>42</sup> These rights include the right to life, the right to adequate food, the right to water, the right to health, the right to adequate housing, and the right to self-determination.<sup>43</sup> Moreover, while these implications affect individuals and communities around the world, certain countries — including small island states; countries with low-lying coastal deltas; and countries liable to floods, drought, and desertifica-

<sup>34</sup> Submission of U.S. to OHCHR Report, *Observations by the United States of America on the Relationship Between Climate Change and Human Rights*, ¶ 14 (2008) [hereinafter U.S. OHCHR Report Submission], available at [http://www2.ohchr.org/English/issues/climate\\_change/docs/submissions/USA.pdf](http://www2.ohchr.org/English/issues/climate_change/docs/submissions/USA.pdf).

<sup>35</sup> *Id.* ¶ 15.

<sup>36</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (“IPCC”), FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007: SYNTHESIS REPORT (2007) [hereinafter IPCC AR4], available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf).

<sup>37</sup> OHCHR Report, *supra* note 30, ¶¶ 6-7.

<sup>38</sup> *Id.* ¶ 18.

<sup>39</sup> U.N. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the U.N. Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 (June 16, 1972) [hereinafter Stockholm Declaration].

<sup>40</sup> OHCHR Report, *supra* note 30, ¶¶ 17-18.

<sup>41</sup> *Id.* ¶ 69.

<sup>42</sup> *Id.* ¶ 20.

<sup>43</sup> *Id.* ¶¶ 21-41.

tion — are particularly vulnerable.<sup>44</sup> These arguments are strongly supported by certain national submissions (e.g., Maldives, Mali, and Marshall Islands), which catalogue and explore each of the affected rights in considerable detail and place these impacts in the context of geographical vulnerability.<sup>45</sup>

The Report also argues that “[v]ulnerability due to geography is often compounded by a low capacity to adapt,” meaning the poor are especially affected.<sup>46</sup> Moreover, climate change serves to exacerbate existing vulnerabilities, meaning that the rights of groups such as children, women, minorities, the elderly, and persons with disabilities are disproportionately threatened.<sup>47</sup> Both points in turn raise questions about equality and non-discrimination. Finally, the Report makes the important but often overlooked point that measures taken to mitigate (e.g., use of food crops for bio-fuels) and adapt to (e.g., dislocation from ancestral areas) the effects of climate change also have human rights implications.<sup>48</sup>

Following the publication of the OHCHR Report, it can now be said to be beyond any doubt, legal or otherwise, that climate change has serious and widespread implications for the full enjoyment of human rights. As the International Council on Human Rights Policy (“ICHRP”) notes in its book *Climate Change and Human Rights: A Rough Guide*, “As a matter of simple fact, climate change is already undermining the realisation of a broad range of internationally protected human rights.”<sup>49</sup> The Marshall Islands, in its submission, goes even further, arguing that climate change impairs not only the freedoms guaranteed “in human rights agreements, but also [those provided] within the U.N. Charter, and as part of customary international law.”<sup>50</sup>

As of March 25, 2009, the “simple fact” referred to by ICHR is now reflected and embedded in international law. On that date, the tenth session of the U.N. Human Rights Council adopted, by consensus and with eighty-nine co-sponsors, Resolution 10/4 on human rights and climate change.<sup>51</sup> Resolution 10/4 responds to the OHCHR Report by drawing out some key conclusions from the study and by outlining certain next steps. In terms of the former, the Resolution notes that “climate change-related effects have a

<sup>44</sup> *Id.* ¶¶ 29, 36, 56.

<sup>45</sup> See *infra* Annex 1 (outlining the various impacted rights); see also Submission of Maldives to OHCHR Report, *Human Rights and Climate Change* (Sept. 2008) [hereinafter Maldives OHCHR Report Submission], available at [http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Maldives\\_Submission.pdf](http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Maldives_Submission.pdf).

<sup>46</sup> OHCHR Report, *supra* note 30, ¶ 93.

<sup>47</sup> *Id.* ¶ 94.

<sup>48</sup> *Id.* ¶¶ 65-68.

<sup>49</sup> CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 3.

<sup>50</sup> Submission of Marshall Islands to OHCHR Report, National Communication Regarding the Relationship Between Human Rights & the Impacts of Climate Change (Dec. 2008) [hereinafter Marshall Islands OHCHR Report Submission], available at [http://www2.ohchr.org/english/issues/climatechange/docs/Republic\\_of\\_the\\_Marshall\\_Islands.doc](http://www2.ohchr.org/english/issues/climatechange/docs/Republic_of_the_Marshall_Islands.doc).

<sup>51</sup> UNHRC, *Report of the Human Rights Council on Its Tenth Session*, at 159, U.N. Doc. A/HRC/10/29 (Apr. 20, 2009) (prepared by Elchin Amirbayov).

range of implications, both direct and indirect, for the effective enjoyment of human rights” and goes on to list those rights that are particularly implicated.<sup>52</sup> It further states that the effects of climate change will fall hardest on the rights of those people who are already in vulnerable situations “owing to factors such as geography, poverty, gender, age, indigenous or minority status and disability.”<sup>53</sup>

### To ACT OR NOT TO ACT?

The knowledge, as expounded by the ICHRP and confirmed by Resolution 10/4, that climate change has serious negative implications for the realization of a broad range of internationally protected human rights and that “the interlinkages are deep and complex”<sup>54</sup> in fact, brings us up to date with the current status of the debate at the international level. Little or no consideration has been given, by governments or international organizations (nor, seemingly, by NGOs or academic bodies), as to what this new reality should mean in practice. If climate change does indeed have serious and widespread, deep and complex implications for human rights, then what, if anything, should be done about it?

In order to answer this fundamental and urgent<sup>55</sup> question, it is necessary to first ask: should the international community do anything? Only if the answer to that question is “yes” must the follow-up question be addressed: what responses should be considered?

In terms of the first question, it can, of course, be argued that if climate change has serious and wide-ranging human rights implications for millions of people around the world, especially when those implications include core rights such as to life and self-determination, and when the malign impacts fall heaviest on the weakest and most vulnerable, then the international community is duty-bound to respond. However, this argument misses one key point: the international community *is* already responding — a response supported by the almost two hundred states parties to the United Nations Framework Convention on Climate Change (“UNFCCC”) and pursued through

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<sup>52</sup> UNHRC Res. 10/4, pmbl., U.N. Doc. A/HRC/10/29 (Mar. 20, 2009) [hereinafter UNHRC 10/4]. The Resolution highlights, in particular: “the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination, and human rights obligations related to safe drinking water and sanitation.” *Id.* The Resolution also recalls that, under international human rights law, in no case may a people be deprived of its own means of subsistence. *Id.* It is particularly noteworthy and significant that states, especially major emitting states, agreed to include the right to life, the right to self-determination, and the right of nations to their own means of subsistence in the list.

<sup>53</sup> *Id.* (building on preambular paragraphs 8-9 in UNHRC 7/23, *supra* note 1).

<sup>54</sup> CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 3.

<sup>55</sup> If it is to effectively influence the Bali Process, which is due (though far from certain) to conclude in December 2009, the human rights community, led by the Council, will need to draw conclusions quickly and feed these into UNFCCC-level discussions and proposals.

negotiations under the Bali Road Map,<sup>56</sup> which is expected to lead to a new global climate change treaty by the end of 2009. While these negotiations were not initiated with the express intention of protecting and promoting human rights, it is nevertheless clear that the “full, effective and sustained implementation of the Convention through long-term cooperative action now, up to and beyond 2012”<sup>57</sup> would have, *inter alia*, that effect.

The problem with this argument is, of course, that despite over three decades of international advocacy on climate change,<sup>58</sup> the world is no closer to a workable solution today than it was in 1987, when the Maldives first issued warnings about climate change to the U.N. General Assembly.<sup>59</sup> Moreover, many observers doubt that the Bali Roadmap will succeed in reversing the trend. As James Gustave Speth, who has personally witnessed this unfolding failure as policy-maker, advocate, and academic, has concluded:

The current system of international efforts to help the environment simply isn’t working. The design makes sure it won’t work, and the statistics keep getting worse. We need a new design . . . . For twenty years thoughtful people and intelligent leaders should have known that we needed to get busy. Precious time has been wasted. And now a new generation has been given a climate problem that is deeper and more difficult.<sup>60</sup>

The national submission of the Marshall Islands powerfully highlights the growing lack of trust in the UNFCCC process, as well as the inverse and

<sup>56</sup> The Bali Road Map was the end product of the U.N. Climate Change Conference 2007/COP 13 in Bali, Indonesia. It consists of a number of forward-looking decisions that represent the various tracks that are essential to reaching a secure climate future. The United Nations Climate Change Conference in Bali, [http://unfccc.int/meetings/cop\\_13/items/4049.php](http://unfccc.int/meetings/cop_13/items/4049.php) (last visited Apr. 22, 2009) (on file with the Harvard Environmental Law Review). The Bali Road Map includes the Bali Action Plan (Decision 1/CP.13), which charts the course for a new negotiating process designed to tackle climate change, with the aim of completing this Plan by the United Nations Climate Change Conference 2009/COP 15 in Copenhagen in December 2009. U.N. Climate Change Conference 2007 Decision 1/CP.13, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008) [hereinafter Decision 1/CP.13].

<sup>57</sup> Decision 1/CP.13, *supra* note 56, ¶ 1; see also UNHRC 10/4, *supra* note 52, pmb.

<sup>58</sup> In 1979, the United States National Academy of Sciences published an assessment of the scientific basis for climate change which concluded that: “[i]f carbon dioxide continues to increase, the study group finds no reason to doubt that climate change will result and no reason to believe that these changes will be negligible.” Edward Cameron, *The Human Dimension of Global Climate Change*, 15 HASTINGS W.-NW. J. ENVTL. L. & POL’Y. 1, 8 (2009) (quoting NAT’L ACAD. OF SCI., CARBON DIOXIDE AND CLIMATE: A SCIENTIFIC ASSESSMENT, at viii (1979), available at [http://www.nap.edu/catalog.php?record\\_id=12181](http://www.nap.edu/catalog.php?record_id=12181)).

<sup>59</sup> In 1987, President Gayoom became the first world leader to raise the issue of climate change at the United Nations General Assembly when he delivered his famous “Death of a Nation” speech. Gayoom, Speech at Royal Commonwealth Society, *supra* note 11, at 6. A few weeks earlier, he also raised the issue at the Commonwealth Heads of Government Meeting in Canada. Gayoom, Speech at Commonwealth Heads of Government Meeting, *supra* note 11, at 2-4.

<sup>60</sup> JAMES GUSTAVE SPETH, *RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT*, at xii, 5—6 (2005).

proportional emergence of questions regarding the value of other approaches to reinforce or replace the traditional architecture:

There is general uncertainty as to if international climate negotiations will result in urgent or actual progress, or if the international community is merely going through the motions . . . . In summary, it may be difficult for [the Marshall Islands] to rely solely upon ongoing international negotiations as a means to assure its people their basic rights and fundamental freedoms.<sup>61</sup>

Thus the question becomes: can human rights principles, laws, and mechanisms be utilized to leverage a more effective response to climate change either inside or outside the UNFCCC umbrella? To answer this question, it is useful to undertake a risk-benefit analysis.

#### THE POTENTIAL BENEFITS OF A “RIGHTS-BASED APPROACH”<sup>62</sup> TO CLIMATE CHANGE

Relevant literature proposes a range of interconnected and overlapping benefits that human rights thinking can bring to climate change discussions. These include, *inter alia*: promoting a shift in emphasis from the physical sciences to the plight of individual people, their lives, and their communities; drawing attention and giving voice to the concerns and opinions of vulnerable and marginalized social groups; enhancing equity in international decision-making; encouraging more effective, fairer, and more sustainable policy outcomes through the promotion of accountability concepts and of participatory and democratic principles in decision-making; emphasizing international cooperation — even to the extent that cooperation might be deemed a legal obligation; and responding to gaps in the existing climate change policy architecture.<sup>63</sup>

First, a human rights perspective or “human rights lens”<sup>64</sup> helps shift the focus of international debate on climate change more directly onto indi-

<sup>61</sup> Marshall Islands OHCHR Report Submission, *supra* note 50, at 13-14.

<sup>62</sup> During OHCHR open-ended informal consultations on the relationship between climate change and human rights, on October 22, 2008, the Maldives delegation proposed substituting the phrase “rights-based approach,” which is suggestive of a completely new approach to existing UNFCCC processes, with the more complementary-sounding “human rights informed approach.” Press Release, OHCHR, Open-Ended Consultation on the Relationship Between Climate Change and Human Rights: Summary of Discussions ¶ 58 (Oct. 22, 2008) (internal quotations omitted), available at <http://www2.ohchr.org/english/issues/climatechange/docs/SummaryofDiscussions.doc>.

<sup>63</sup> See also Ibrahim Wani, Chief of the Research & Right to Dev. Branch, OHCHR, Address at the Small Island States Conference on the Human Dimension of Climate Change: The Environment and Human Rights (Nov. 14, 2007), available at [http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Maldives\\_Presentation\\_\\_Wani\\_111407\\_Final.pdf](http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Maldives_Presentation__Wani_111407_Final.pdf); Gayoom, *supra* note 16; Kang, *supra* note 17; OHCHR Report, *supra* note 30.

<sup>64</sup> Mary Robinson, Op-Ed., *Climate Change Is an Issue of Human Rights*, INDEPENDENT (London), Dec. 10, 2008, available at <http://www.independent.co.uk/opinion/commentators/mary-robinson-climate-change-is-an-issue-of-human-rights-1059360.html>.

viduals and the effects of climate change on their lives.<sup>65</sup> This, in turn, has important potential consequences for how climate change is perceived. One of the key failings of climate change diplomacy over the past two decades is that the phenomenon has been viewed as a scientific projection, “a kind of line graph stretching into the future with abstract measurements based on parts per million, degrees centigrade or centimetres. . . . [T]he international community has largely failed to translate the important and hard-won scientific consensus into an equally compelling vision of how the consequences of global warming are being felt by people and communities around the world. In other words . . . the world has failed to humanise climate change.”<sup>66</sup> This is more than just a conceptual argument — it has critical implications for the importance and urgency attached to climate change negotiations. It is far harder for world governments to remain ambivalent in the face of human suffering, especially when that suffering is on a global scale and is man-made, than is the case with physical phenomena such as melting icecaps or bleaching coral.<sup>67</sup> Humanizing climate change thus creates an ethical imperative to act that can with time translate into legal obligations: “[h]uman rights thinking habitually resituates ethical imperatives within a legal framework.”<sup>68</sup>

Second, using a human rights framework helps amplify the voices of those who are disproportionately affected by climate change — the poor, marginalized, and vulnerable people (including women, children, indigenous groups, and the old) who might otherwise not be heard and who, if empowered to do so, could make an important contribution to improving climate change policy.<sup>69</sup>

Third, by bringing the climate change debate to the level of individual people, all of whom have equal status under international law, a human rights approach has the potential to “level the playing field” in international negotiations, which have to date been dominated by large states involved in largely economically motivated power plays and trade-offs. As the Marshall Islands notes in its OHCHR submission, “international multilateral negotiations have created a platform under which [the Marshall Islands], with limited political weight, is forced to bargain desperately against large political powers, in an attempt to preserve what should otherwise be rights entitled to all humans.”<sup>70</sup>

Fourth, by focusing attention on individuals and by supplying a set of internationally agreed values around which policy responses can be negoti-

<sup>65</sup> Kang, *supra* note 17.

<sup>66</sup> Maumoon Abdul Gayoom, President of the Maldives, Statement at the Annual Meeting 2008 of the Global Humanitarian Forum (June 24, 2008), available at [http://www.maldivesmission.ch/fileadmin/Pdf/Environment/HEP\\_Speech\\_to\\_GHF\\_final.pdf](http://www.maldivesmission.ch/fileadmin/Pdf/Environment/HEP_Speech_to_GHF_final.pdf).

<sup>67</sup> See Statement by the Maldives at the General Debate Under Item 3, Tenth Session of the Human Rights Council (March 16, 2009), available at [http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Statement\\_HR\\_and\\_CC\\_10\\_session\\_hrc.pdf](http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Statement_HR_and_CC_10_session_hrc.pdf).

<sup>68</sup> CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 7.

<sup>69</sup> See OHCHR Report, *supra* note 30, ¶¶ 42-54.

<sup>70</sup> Marshall Islands OHCHR Report Submission, *supra* note 50, at 13.

ated and motivated, human rights thinking also has the potential to contribute, qualitatively, to the construction of better policy responses at both the national and international level. As OHCHR argues in its report:

Human rights standards and principles should inform and strengthen policymaking in the area of climate change, promoting policy coherence and sustainable outcomes. The human rights framework draws attention to the importance of aligning climate change policies and measures with overall human rights objectives, including through assessing possible effects of such policies and measures on human rights.<sup>71</sup>

The potential qualitative contribution that human rights principles and rules can make to climate change policy is further strengthened by the emphasis they place on accountability mechanisms, including, in the case of implementation of climate change policies, access to administrative and judicial remedies, and by the emphasis given to procedural rights such as access to information and access to decision-making, which are critical to the evolution of effective, legitimate, and sustainable policy responses.<sup>72</sup> The idea that human rights standards and principles, including access to information, decision-making, and a judicial remedy, might improve policymaking in the area of climate change was taken up by states in preambular paragraph ten of Human Rights Council Resolution 10/4.<sup>73</sup>

Fifth, the human rights framework also has the potential to help by emphasizing international cooperation. As OHCHR notes, “climate change can only be effectively addressed through cooperation of all members of the international community,”<sup>74</sup> and both the U.N. Charter<sup>75</sup> and the International Bill of Human Rights<sup>76</sup> contain language that emphasizes such cooperation. To draw attention to such obligations was indeed one of the original goals of the Maldives’ initiative on human rights and climate change:

<sup>71</sup> OHCHR Report, *supra* note 30, ¶ 80.

<sup>72</sup> Wani, *supra* note 63.

<sup>73</sup> “Affirming that human rights obligations and commitments have the potential to inform and strengthen international and national policy-making in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes. . . .” UNHRC 10/4, *supra* note 52, pmb.

<sup>74</sup> OHCHR Report, *supra* note 30, ¶ 84. As the Special Procedure mandate holders of the Human Rights Council, in a joint statement on International Human Rights Day, December 10, 2008, stated, “Today the interests of States, and the impacts of actions by States, are ever more interconnected. New challenges include ensuring global access to food, and those presented by climate change and financial crisis have potentially massive human rights and development implications. If we are to confront them effectively we must do so collectively.” Press Release, Special Procedures Mandate Holders of the UNHRC, The Universal Declaration on Human Rights — Sixty Years of Inspiration and Empowerment for Human Rights (Dec. 9, 2008), available at [http://www.unog.ch/unog/website/news\\_media.nsf/\(httpNewsByYear\\_en\)/B9EADC37E6D21C8CC125751A00352285?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/B9EADC37E6D21C8CC125751A00352285?OpenDocument).

<sup>75</sup> U.N. Charter art. 1, para. 3.

<sup>76</sup> The International Bill of Human Rights is an informal name for the Universal Declaration of Human Rights, *supra* note 4; ICCPR, *supra* note 4; and ICESCR, *supra* note 4.

The aim of the human approach to climate change is to remind all peoples of the bonds and mutual dependency that tie us all together. By highlighting the ultimate human impact of climate change, and by emphasising the web of rights and responsibilities that link us all together, we hope . . . [to] provide an added spur or catalyst to drive the world towards a mutually beneficial solution to the problem of climate change.<sup>77</sup>

At one level, the U.N. Charter, the Bill of Rights, and related human rights conventions help by stressing the importance of international cooperation.<sup>78</sup> As OHCHR has argued:

International cooperation to promote and protect human rights lies at the heart of the Charter of the United Nations. The importance of such cooperation is explicitly stated in provisions of the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and in the Declaration on the Right to Development.<sup>79</sup>

However, there are clear steps on the part of international human rights mechanisms to move beyond the moral impetus to cooperate, as derived from the core human rights treaties, toward a more legally binding understanding of the actual obligations of state parties under those treaties. For example, the Committee on Economic, Social and Cultural Rights,<sup>80</sup> in General Comment 3 states that:

[I]n accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. . . . It emphasizes that, in the absence of an active programme of international assistance and cooperation

<sup>77</sup> Abdulla Shahid, Minister of Foreign Affairs of the Maldives, Speech at the Opening of the Small Island States Conference on the Human Dimension of Climate Change (Nov. 13, 2007), available at [http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Statement\\_by\\_Minister\\_of\\_Foreign\\_Affairs\\_-\\_FINAL.pdf](http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Statement_by_Minister_of_Foreign_Affairs_-_FINAL.pdf).

<sup>78</sup> See *id.*

<sup>79</sup> OHCHR Report, *supra* note 30, ¶ 85 (footnotes omitted).

<sup>80</sup> It is worth recalling that each state that has ratified the ICESCR has a duty to respect, protect, and fulfil the rights laid down in that treaty for those coming within their jurisdiction, and these duties have their own specific scope under the treaty. INT'L COMM'N OF JURISTS, THE STATE OBLIGATION TO RESPECT, PROTECT, AND FULFIL ICESCR RIGHTS (n.d.), available at <http://www.icj.org/IMG/pdf/7.pdf>. The obligation to *respect* a right means the state must take no steps that would violate that right; the obligation to *protect* requires states to act to ensure that other actors, including private and international actors, are not permitted to violate the right; the obligation to *fulfil* requires that states take steps over time to progressively realize citizens' rights to food, shelter, health, and so on. *Id.*

on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its General Comment 2 (1990).<sup>81</sup>

While this General Comment was not written with climate change in mind, and while there are unfortunately no immediate plans on the part of the Committee to update it, the obligations that it identifies are clearly applicable to the case of climate change, at least in the case of international cooperation on adaptation (i.e., a positive obligation to render assistance) and, quite probably, on mitigation (i.e., a negative obligation to reduce emissions). The Committee on the Rights of the Child goes perhaps even further, arguing in General Comment 5 that states which ratify human rights conventions “take upon themselves obligations not only to implement [them] within their jurisdiction, but also to contribute, through international cooperation, to global implementation.”<sup>82</sup> In a summary of a number of different General Comments by the Committee on Economic, Social and Cultural Rights, the OHCHR in its Report proposes four distinct types of extraterritorial obligation in the context of international cooperation to promote and protect economic, social, and cultural rights. OHCHR argues that

States have legal obligations to:

- Refrain from interfering with the enjoyment of human rights in other countries
- Take measures to prevent third parties (e.g. private companies) over which they hold influence from interfering with the enjoyment of human rights in other countries;
- Take steps through international assistance and cooperation, depending on the availability of resources, to facilitate fulfilment of human rights in other countries, including disaster relief, emergency assistance, and assistance to refugees and displaced persons
- Ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights.<sup>83</sup>

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<sup>81</sup> OHCHR, U.N. Comm. on Econ., Social and Cultural Rights [UNCESCR], *General Comment 3: The Nature of States Parties Obligations*, ¶ 14, U.N. Doc. E/1991/23 (Dec. 14, 1990).

<sup>82</sup> OHCHR, U.N. Comm. on the Rights of the Child [CRC], *General Comment 5: General measures of implementation for the Convention on Rights of the Child*, ¶ 7, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003).

<sup>83</sup> OHCHR Report, *supra* note 30, ¶ 86; see, e.g., UNCESCR, *General Comment 12: The Right to Adequate Food*, U.N. Doc. E/C.12/1999/5 (May 12, 1999); UNCESCR, *General Comment 13: The Right to Education*, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999); UNCESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); UNCESCR, *General Comment 15: The Right to Water*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2002).

This is perhaps the most important and innovative contribution of the OHCHR Report to both the evolution of human rights law (as it pertains to international cooperation)<sup>84</sup> and, potentially, to the evolution of climate change policy. In short, it suggests that all states that are party to the ICESCR have a legal obligation through international cooperation (i.e., the UNFCCC process) to reduce emissions to levels consistent with the full enjoyment of human rights (i.e., safe levels) in all other countries (especially vulnerable countries), to fund adaptation measures in vulnerable countries (depending on the availability of resources), and to ensure that the international climate change agreement due to be penned at COP 15 in Copenhagen is consistent with those human rights obligations and, at the very least, does not adversely impact human rights.

The progressive nature of the OHCHR's analysis and conclusions on international cooperation inevitably meant that it became a focus of disagreement during negotiations on Human Rights Council Resolution 10/4. Many vulnerable countries<sup>85</sup> wanted the draft to recite the precise language used in paragraph ninety-nine of the OHCHR Report, namely that "international cooperation [to effectively address climate change] is not only expedient but also a human rights obligation and that its central objective is the realization of human rights."<sup>86</sup> However, others, especially developed countries, disagreed strongly, both legally and politically, with this reading of international human rights law, insisting that the legal obligation to fulfil human rights lies solely with relevant national governments. This ideological difference explains the rather convoluted nature of the final wording employed in preambular paragraph nine.<sup>87</sup>

Finally, human rights can potentially help fill important gaps in the existing international climate change regime. For example, the UNFCCC and the Kyoto Protocol both consciously ignore issues pertaining to the potential loss of sovereignty or statelessness caused by climate change-related impacts. As the Marshall Islands has noted, "[s]evere inundation or the total loss of land could result in the Marshall Islands ceasing to be physically habitable, which raises problems of migration, resettlement, cultural survival and sovereignty. These important issues have not been resolved in the international discussions on climate change."<sup>88</sup> Such an omission is extremely

<sup>84</sup> See John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33 HARV. ENVTL. L. REV. 477, 493-96 (2009).

<sup>85</sup> See, e.g., Maldives Delegation, Statement at the General Debate under Item 3 at the Tenth Session of the Human Rights Council (Mar. 16, 2009), available at [http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Statement\\_HR\\_and\\_CC\\_10\\_session\\_hrc.pdf](http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Statement_HR_and_CC_10_session_hrc.pdf).

<sup>86</sup> OHCHR Report, *supra* note 30, ¶ 99.

<sup>87</sup> "Recognizing also that climate change is a global problem requiring a global solution, and that effective international cooperation to enable the full, effective and sustained implementation of the United Nations Framework Convention on Climate Change in accordance with the provisions and principles of the Convention is important in order to support national efforts for the realization of human rights implicated by climate change-related impacts . . ." UNHRC 10/4, *supra* note 52, pmb.

<sup>88</sup> Marshall Islands OHCHR Report Submission, *supra* note 50, at 7 (internal quotation marks omitted) (quoting M. CRAWFORD ET AL., VULNERABILITY ASSESSMENT FOR ACCELER-

serious, especially when one considers that the citizens of many small island states, including Tuvalu, Vanuatu, the Maldives, and the Marshall Islands, are facing this possibility of becoming environmental refugees during the present century.<sup>89</sup> What are the obligations of states, in the context of climate change, to respect the right of self-determination and to prevent loss of statehood? What should happen to people who become stateless? What are the obligations of the international community in this regard? These are crucial and difficult questions which perhaps the science-led UNFCCC process is poorly placed to answer.

The international human rights system, together with the U.N. Security Council, could potentially play a valuable role in helping to fill this gap.<sup>90</sup> Indeed, the human rights treaty bodies have already taken steps to better understand the nature of state obligations in the context of self-determination. As the Maldives has noted in its national submission,<sup>91</sup> the Human Rights Committee in its General Comment 12<sup>92</sup> confirmed that states should refrain from interfering in the internal affairs of other states in a way that adversely affects the exercise of the right to self-determination. While the Committee did not, perhaps, explicitly contemplate interference in the manner imposed by climate change, catastrophic anthropogenic climate change-related events, such as the rendering of small island states uninhabitable, would clearly imply the denial of the right to self-determination. The Maldives submission continues:

Furthermore, Article 2 of the ICCPR imposes an obligation on the international community to take positive action toward the realisation of the right to self-determination, regardless of whether a people are located within the territory or jurisdiction of a particular State. This is suggestive of a positive obligation upon industrialised countries to protect the sovereignty of Small Island States by taking meaningful action to cut greenhouse gases before such States are rendered uninhabitable.<sup>93</sup>

Against the various potential benefits of deploying a human rights approach to climate change must be weighed the potential risks and drawbacks. These can be roughly divided into theoretical and practical problems. The theoretical difficulties in applying human rights thinking to climate

ATED SEA LEVEL RISE, CASE STUDY: MAJURO ATOLL, REPUBLIC OF THE MARSHALL ISLANDS (1993)).

<sup>89</sup> Cameron, *supra* note 58, at 6-7; see also Shahid, *supra* note 26.

<sup>90</sup> This is a point recognized in the conclusions of the OHCHR Report, which argue that “[f]urther study is also needed of protection mechanisms for persons who may be considered to have been displaced within or across national borders due to climate change-related events and for those populations which may be permanently displaced as a consequence of inundation of low-lying areas and island States.” OHCHR Report, *supra* note 30, ¶ 98.

<sup>91</sup> Maldives OHCHR Report Submission, *supra* note 45, at 39-40.

<sup>92</sup> OHCHR, Human Rights Committee [CCPR], *General Comment 12: The Right to Self-Determination of Peoples*, ¶ 14 (Mar. 13, 1984), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f3c99406d528f37fc12563ed004960b4?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f3c99406d528f37fc12563ed004960b4?OpenDocument).

<sup>93</sup> Maldives OHCHR Report Submission, *supra* note 45, at 7.

change are described in detail in the U.S. submission to the OHCHR study.<sup>94</sup> The United States identifies three main theoretical problems that would make any movement “toward a human rights-based approach to climate protection . . . [both] impractical and unwise[:]”<sup>95</sup>

1. “[C]limate change is a highly complex environmental issue, characterized by a long chain of steps between the initial human activities that produce greenhouse gas emissions and the eventual physical impacts that may result from those emissions. . . . Furthermore, many uncertainties exist regarding the magnitude of current and future climate change, including distinguishing between those impacts that are part of natural climate variability and those that are influenced by anthropogenic climate change.”<sup>96</sup>
2. “[C]limate change is a global phenomenon. A worldwide and diffuse set of actors — public and private, wealthy and poor — collectively determine the world’s anthropogenic greenhouse emission levels.”<sup>97</sup>
3. “[C]limate change is a long-term challenge. Emissions of carbon dioxide, on average, remain in the atmosphere for about 100 years. . . . Accordingly, the impacts of climate change today are caused not by recent emissions but the accumulation of greenhouse gases over long periods of time by a diffuse set of actors, most of whom would have been unaware of any potentially adverse future impact . . . .”<sup>98</sup>

According to the United States, “[a] complex global environmental problem with these characteristics does not lend itself to human rights-based solutions.”<sup>99</sup> While these arguments clearly have some merit, they are not yet conclusive and, more importantly, they reflect a one-dimensional view of the potential conceptual linkages between climate change and human rights. They are based on the premise that “[a] central purpose of human rights law . . . is providing remedies for the victims of specific rights violations. . . . This framework requires identifiable violations, and identifiable harms attributable to the violations . . . .”<sup>100</sup>

It is true of course that, at present, it is very difficult to argue that climate change represents a violation of human rights.<sup>101</sup> OHCHR in fact

<sup>94</sup> U.S. OHCHR Report Submission, *supra* note 34, ¶¶ 11-26.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* ¶¶ 18-19.

<sup>97</sup> *Id.* ¶ 20.

<sup>98</sup> *Id.* ¶ 21.

<sup>99</sup> *Id.* ¶ 23.

<sup>100</sup> *Id.* ¶¶ 23-24.

<sup>101</sup> Difficult, but not impossible. For example, the ICHRP has argued that “specific actors are responsible for climate change — namely those who overuse carbon fuels, albeit in highly varying degrees. . . . The question is thus whether this group can be broken down into definite and identifiable parties to whom responsibility can be attributed in a specific and discrete

concedes this point<sup>102</sup> in its report: “The physical impacts of global warming cannot easily be classified as human rights violations, not least because climate change-related harms often cannot clearly be attributed to acts or omissions of specific States.”<sup>103</sup> Moreover, even if responsibility and harm could be established, existing human rights law is primarily concerned with how a government treats its own citizens and others living within its territory and under its jurisdiction. It therefore provides no useful kind of accountability or redress framework for situations arising from phenomena such as climate change, where responsibility and harm are largely trans-national.

However, identifying and providing remedies for specific human rights violations is not the only potential role of human rights law. As Kyung-wha Kang has noted, “[h]uman rights supply not only legal imperatives, but also a set of internationally agreed values around which common action can be negotiated and motivated.”<sup>104</sup> Thus, human rights should not only be seen as a way of seeking redress for what has happened, but as a forward-looking means of encouraging the evolution of, and providing a qualitative contribution to, robust, effective, and sustainable policy responses at both the national and international level, across mitigation and adaptation.<sup>105</sup> It is in this progressive sense that the contemporary value of linking human rights and climate change is to be found, and it is in this progressive sense that the various benefits of a human rights approach, as enumerated earlier, come to the fore.<sup>106</sup> In short, in the limited sense understood by the United States, there are clear theoretical difficulties in applying human rights-based solutions to climate change. However, seen in the broader sense as a set of values and norms from which to draw inspiration, a human rights-approach

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manner.” CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 65. Another way of assigning responsibility and harm is suggested by *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497 (2007). Here, EPA was found responsible for harms caused by greenhouse gases because it was aware of the potential for harm and had the power to regulate emissions, but did not act. *Id.* at 533. If it had acted, some injuries, both past and future, might conceivably have been avoided. *Id.* at 500. In its OHCHR submission, the United States obliquely recognizes the possibility that “novel theories of responsibility” might be devised, leading to “climate-related human rights claims . . . gain[ing] traction.” U.S. OHCHR Report Submission, *supra* note 34, ¶ 96; *see also* Knox, *supra* note 84, at 488–89.

<sup>102</sup> Which, in addition to the U.S. submission, was also made by a number of other states, including the U.K.

<sup>103</sup> OHCHR Report, *supra* note 30, ¶ 26.

<sup>104</sup> CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 8.

<sup>105</sup> A third theoretical use of human rights proposed in the OHCHR Report — to emphasize to states that “irrespective of the additional strain climate change-related events may place on available resources,” they in any case “remain under an obligation to ensure the widest possible enjoyment of economic, social and cultural rights” — seems perverse from the perspective of small vulnerable countries, which are, in effect, being told to take additional strain so as to honor their obligations in the face of a phenomenon (climate change) for which they bear almost no responsibility. OHCHR Report, *supra* note 30, ¶ 77.

<sup>106</sup> This is not to say that human rights should not also eventually be used as an accountability framework for addressing harm, responsibility, and redress. However, at present, human rights law, which is overwhelmingly understood as a national contract between citizen and state, is not geared to this utility.

can potentially add much value to the existing politico-scientific climate change discourse.

In addition to theoretical issues, it is also important to address and respond to potential practical difficulties that may arise from linking human rights and climate change. A first key practical constraint that has plagued efforts to draw linkages between climate change and human rights from the beginning is what the ICHRP has termed “path-dependenc[y]”<sup>107</sup> but which might also be called “path exclusivity.” The climate change response process, led by the IPCC and the UNFCCC, is dominated in general by experts in the physical sciences.<sup>108</sup> As ICHRP has noted: “[t]he study of climate change began among meteorologists, became firmly entrenched in the physical sciences, and has only gradually — if inevitably — reached into the social sciences.”<sup>109</sup> Consequently, there is an almost complete lack of understanding of human rights systems and their potential value within the IPCC and, more importantly, within the UNFCCC process (both among states and the Secretariat).<sup>110</sup> Indeed, this lack of understanding sometimes manifests itself as outright hostility.<sup>111</sup> For its part, the human rights community, despite obvious overlap, has until recently been equally reluctant to address climate change.<sup>112</sup> This is both because the issue is seen by many states as one that belongs squarely in the natural sciences (i.e., it is the responsibility of environment ministries rather than foreign ministries),<sup>113</sup> and because human rights practitioners “are unlikely to take up issues framed as hypothetical or scenario-based.”<sup>114</sup> As well as making useful linkages between the two disciplines difficult, “path dependence” also leads to the oft-repeated argument by states that human rights must be dealt with by the Human Rights Council and climate change by the UNFCCC. As the United States notes in its submission, “the United States takes the view that a

<sup>107</sup> CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 3.

<sup>108</sup> *Id.* at 3. Although, in the case of the IPCC, the social sciences are making a belated impact. The Maldives secured a vice chair position on the IPCC Working Group II on Impacts, Adaptation and Vulnerability during 2008 partly on a platform of encouraging the expansion of the body’s work to include economics, social sciences, and human rights.

<sup>109</sup> CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 3.

<sup>110</sup> ICHRP has noted that the words “human rights” are almost totally absent from core UNFCCC and IPCC documentation. *Id.* Mainstream climate change literature also almost completely ignores human rights. *Id.*

<sup>111</sup> For example, some Caribbean small island state climate change negotiators have been openly hostile to any attempt to integrate human rights principles or language into the UNFCCC negotiations because, in essence, they see human rights as being limited to those core civil and political rights (e.g., right to freedom of expression, right to trial, right to vote, and right to life) that are often used as a tool for the developed world to criticize the developing world.

<sup>112</sup> CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 3.

<sup>113</sup> This reasoning also explains the reticence of many states to ask OHCHR to prepare the study on human rights and climate change, as they felt it was beyond the organization’s competence and capacity. This in turn explains why UNHRC 7/23 stipulates that the report must be compiled “in consultation with and taking into account the views of” the IPCC and UNFCCC, and also why the final report clearly states that it is entirely formulated on the basis of agreed science (i.e., IPCC and UNFCCC science). UNHRC 7/23, *supra* note 1, ¶ 1.

<sup>114</sup> CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 3.

'human rights approach' to addressing climate change is unlikely to be effective, and that climate change can be more appropriately addressed through traditional systems of international cooperation and international mechanisms for addressing this problem, including through the UNFCCC process."<sup>115</sup> Similarly, Canada noted in its national submission that it "joined consensus on resolution 7/23, notwithstanding initial concerns that the Council is not the most appropriate forum for a discussion on climate change issues. Canada believes the UNFCCC is the most appropriate forum in which to address issues related to climate change."<sup>116</sup> This of course ignores the fact that both climate change and human rights are horizontal issues and thus will necessarily (and indeed do) appear in the context of the work of a range of different U.N. bodies.<sup>117</sup>

A second, more strategic problem relates to a concern on the part of many states that the Human Rights Council and related bodies should not be seen to be replacing or duplicating the UNFCCC process or challenging its primacy on climate change matters. This led many members of the Council to effectively make their support for Resolution 7/23 dependent on the tacit understanding that the Council's eventual output on this issue (i.e., the OHCHR Report and a summary of the Council's views) would be dovetailed with or "fed into" the Bali Process.<sup>118</sup> The Council must not, it was urged, retain climate change as a permanent item on the agenda or set up parallel mechanisms to the UNFCCC.<sup>119</sup> A third, more tactical concern raised informally by some states is that including human rights in negotiations on the post-Kyoto climate change framework would perversely make delegations less likely to sign up to stringent emission reduction targets for fear that, if they were to fail to reach those targets, they might leave themselves open to litigation.

A final important practical constraint relates to a lack of political trust between developed and developing countries. In a broad sense, this lack of trust manifests itself, on the part of industrialized countries, in a fear that

<sup>115</sup> U.S. OHCHR Report Submission, *supra* note 34, ¶ 4.

<sup>116</sup> Submission of Canada to OHCHR Study, *Government of Canada Response to Request for Information by the Office of the High Commissioner for Human Rights Concerning a Request in Human Rights Council Resolution 7/23 for a Detailed Analytical Study of the Relationship Between Climate Change and Human Rights*, at 1 (2008) [hereinafter Canada OHCHR Report Submission], available at <http://www2.ohchr.org/english/issues/climatechange/docs/canada.pdf>.

<sup>117</sup> The impact of climate change, within the context of their mandate, has been or is being actively addressed by a range of different U.N. bodies including, *inter alia*, the United Nations Development Programme ("UNDP"), the World Health Organisation ("WHO"), and the Office of the U.N. High Commissioner for Refugees ("UNHCR").

<sup>118</sup> This explains the presence in UNHRC 7/23 of the instruction for the Council to "make available" the study and the summary of the debate to the Conference of Parties to the UNFCCC. See UNHRC 7/23, *supra* note 1, ¶ 3. "Make available" had originally read "transmit." However, this was opposed by some delegations that did not support such finality and wanted to leave the Council's options open.

<sup>119</sup> This explains the language in UNHRC 7/23 that refers to the UNFCCC as "*the comprehensive global framework to deal with climate change issues.*" UNHRC 7/23, *supra* note 1, ¶ 5 (emphasis added).

individuals or even countries that have suffered or will suffer harm could use any officially recognized linkages between human rights and climate change as a political or legal weapon against them.<sup>120</sup> Some developed countries also have concerns that developing countries may be using the issue of climate change as a “backdoor” to reintroduce the related and controversial issues of extraterritorial application of human rights and the establishment of a new universal “right to a safe and secure environment.”<sup>121</sup> For developing countries, mistrust manifests itself as a suspicion that the West wants to use human rights as a way of either preventing their development (i.e., climate change affects human rights and thus countries must slow the process of industrialization) or of conditionalizing climate change adaptation funds.<sup>122</sup>

On the last point, these suspicions are unlikely to have been allayed by a review of the U.K. and U.S. submissions to the OHCHR, which, in the case of the U.K. submission, calls for a compact for climate change funding under which recipient countries would “pledge to act appropriately by targeting the poorest and most vulnerable in their own countries, ensuring transparency and accountability of the finance, ensuring wide participation and integration of civil society and affected groups,”<sup>123</sup> and, in the case of the U.S. submission, claims that “[w]ell-governed societies are inherently more adaptable to changing economic, social and environmental conditions of all kinds.”<sup>124</sup>

Yet while these practical challenges are clearly important, they are certainly not an insurmountable obstacle to progress. Path dependency, for example, should be seen not as a reason to halt efforts to draw links between human rights and climate change, but rather as a motivation to continue — based on the understanding that the artificial barriers between the scientific and social study of climate change has been one of the causes of mankind’s

<sup>120</sup> This concern is clearly evident in the U.S. submission to the OHCHR study, which states: “Even if novel theories of responsibility are devised and climate-related human rights claims . . . gain traction . . . the overall results are not likely to meaningfully contribute to the underlying need to slow, stop and reverse worldwide emissions . . . . The process of pursuing human rights claims would be adversarial and require affixing blame to particular entities; this contrasts with efforts to achieve international cooperation that have thus far been pursued through the international climate change negotiations.” U.S. OHCHR Report Submission, *supra* note 34, ¶ 26.

<sup>121</sup> These concerns are evident in the U.K. submission, which made clear that “[t]he United Kingdom recognises that climate change may impact on the full enjoyment of human rights at the *national level*.” U.K. OHCHR Report Submission, *supra* note 33, at 4 (emphasis added). The U.S. submission offers lengthy arguments as to why a right to a sustainable environment is not a good idea even though this question was not even asked in the OHCHR’s request for input. U.S. OHCHR Report Submission, *supra* note 34, ¶¶ 11-27. In its submission, the United States said that it “considers a safe and sustainable environment to be an essential and shared goal — one that may further the realization of certain human rights . . . . However, the United States does not consider that a right to a ‘safe environment’ . . . exists under international law.” *Id.* ¶¶ 3-4.

<sup>122</sup> This explains the presence of repeated references in UNHRC 7/23 of “the right to development.” UNHRC 7/23, *supra* note 1, pmb.

<sup>123</sup> U.K. OHCHR Report Submission, *supra* note 33, at 3.

<sup>124</sup> U.S. OHCHR Report Submission, *supra* note 34, ¶ 6.

failure to respond. Indeed, there is evidence to suggest that these barriers are being broken down.

For example, during the twenty-ninth plenary session of the IPCC (August 31-September 4, 2008), a number of members emphasized the importance of reaching out to the social sciences for future assessment reports, while Amjad Abdulla from the Maldives, who was elected Vice-Chair of Working Group II, campaigned partly on the need to integrate a human or human-rights focus into the IPCC's work on climate change impacts.<sup>125</sup> Similarly, in late January 2009, both the OHCHR and the UNFCCC Secretariat decided to establish informal focal points on the issue of human rights and climate change to exchange information and coordinate action.<sup>126</sup>

Moreover, arguments that the international human rights machinery might replace or undermine the UNFCCC process, that the inclusion of human rights wording might make states less likely to sign up to binding targets through fear of litigation, and that human rights might be used as some kind of political or legal football between North and South, all reflect the misconception, referred to earlier, that the utility of a human rights approach is limited to recognizing and seeking remedy for violations of those rights, thus ignoring the normative or instructive value of human rights principles. Seen in this sense, it is clear that human rights thinking has the potential to strengthen and complement the IPCC and UNFCCC processes, rather than undermine, endanger, or replace them. As the OHCHR notes in its report, “[i]nternational human rights law complements the [UNFCCC] by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights,”<sup>127</sup> and, in the context of those negotiations, “[h]uman rights standards and principles should inform and strengthen policy-making . . . promoting coherence and sustainable outcomes.”<sup>128</sup> In conclusion, the various theoretical or practical arguments put forward to argue against further action on linking climate change with human rights are, for the large part, invalid and are, moreover, based on a fundamental misconception of the potential value and utility of human rights. That said, they do remain impor-

<sup>125</sup> IPCC, Geneva, Switz., Aug. 31-Sept. 4, 2008, *Draft Report of the Twenty-Ninth Session*, at 4-6, IPCC Doc. IPCC-XXX/Doc.5 (Apr. 2009), available at <http://www.ipcc.ch/meetings/session30/doc5.pdf>; see also Abdullahi Majeed, Deputy Minister of Env't of the Maldives, Statement During Discussion on Agenda Item 8: Future IPCC Activities (2008), available at [http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Statement\\_IPCC\\_0908.pdf](http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Statement_IPCC_0908.pdf).

<sup>126</sup> In a further sign of growing interest on the part of the UNFCCC Secretariat in the potential utility of human rights principles in the context of climate change policy, the Secretariat prepared a statement on human rights and climate change for delivery during the Tenth Session of the Human Rights Council. Unfortunately, due to changes in the scheduling of the Session, it was unable to deliver it. UNFCCC Secretariat, *Draft Oral Statement at the 10th Session of the Human Rights Council* (2009) (on file with Harvard Environmental Law Review).

<sup>127</sup> OHCHR Report, *supra* note 30, ¶ 99.

<sup>128</sup> *Id.* ¶ 80.

tant both as warning markers to guard against potential pitfalls and, especially in the case of path dependency, as potential obstacles to progress.

#### THE WAY FORWARD: BUILDING BRIDGES

On January 23-24, 2009, CIEL and the Friedrich Ebert Stiftung (“FES”) convened a two-day expert meeting on human rights and climate change at Chateau de Bossey near Geneva, which brought together for the first time a range of the foremost experts on the relationship between human rights and climate change.<sup>129</sup> The meeting represented the first concerted attempt by human rights and climate change policy practitioners working in tandem to move the common agenda forward by exploring ways to operationalize the human rights-climate change interface. The meeting addressed possible actions in the Human Rights Council and treaty bodies, as well as possible actions under the UNFCCC framework.<sup>130</sup>

Regarding the former, the meeting proposed and evaluated a variety of ways to address climate change and its consequences through the international human rights machinery.<sup>131</sup> Three main avenues of possible progress were addressed: within Special Procedures of the Human Rights Council, within the Council itself, and within human rights treaty bodies.<sup>132</sup>

Special Procedures (independent human rights experts with either a country or a thematic mandate) are in fact already active on the issue of climate change. For example, following lobbying by the Maldives and with the support of the main sponsor, Germany, Resolution 6/27 on adequate housing explicitly includes the impacts of climate change as one of the areas to be covered by the Special Procedure mandate,<sup>133</sup> and indeed during February 2009 the mandate-holder, Raquel Rolnik, visited the Maldives to prepare

<sup>129</sup> See also CIEL & FES, HUMAN RIGHTS AND CLIMATE CHANGE: PRACTICAL STEPS FOR IMPLEMENTATION 42 (2009) [hereinafter PRACTICAL STEPS], available at [http://www.ciel.org/Publications/CCandHRE\\_Feb09.pdf](http://www.ciel.org/Publications/CCandHRE_Feb09.pdf). Participants included Mary Robinson, former U.N. High Commissioner for Human Rights; Catarina de Albuquerque, the U.N. Independent Expert on the right to water and former Chair of the U.N. Working Group on the Optional Protocol to the Covenant on Economic, Social and Cultural Rights; Olivier De Schutter, U.N. Special Rapporteur on the right to food; Virginia Bras-Gomes, Member of the U.N. Committee on Economic, Social and Cultural Rights; Miloon Kothari, former U.N. Special Rapporteur on the right to adequate housing; Angus Friday, former Chair of the Alliance of Small Island States; Ibrahim Wani, Chief of Research at OHCHR; Marc Limon, Permanent Mission of the Maldives to the U.N. at Geneva; Kilaparti Ramakrishna, Chief of cross-sectoral issues at UNEP; and various representatives of the UNFCCC, World Bank, the Global Humanitarian Forum, the ICHRP, Earthjustice, CIEL, Tebtebba Foundation (indigenous persons group), and Harvard University. *Id.* at 34.

<sup>130</sup> See also *id.* at 13-32.

<sup>131</sup> See also *id.* at 13-27.

<sup>132</sup> See also *id.*

<sup>133</sup> UNHRC 6/27, *supra* note 29, ¶ 3. Resolution 6/27 was the first resolution by either the Human Rights Council or its predecessor, the U.N. Commission on Human Rights, to contain the words “climate change.” During the following Seventh Session, climate change was mentioned again in both Resolution 7/23 and Resolution 7/14. UNHRC 7/23, *supra* note 1, ¶¶ 1-3; UNHRC 7/14, *supra* note 29, pmb.

a thematic report on the effects of climate change on the right to housing.<sup>134</sup> To build on this, the CIEL-FES meeting proposed that other relevant Special Procedures, including on the right to food, on access to water, and on the right to health, also address the issue, either separately or jointly.<sup>135</sup> Because of the operational independence of Special Procedures, such reports would have the advantage of potentially being more expansive, progressive, and action-oriented than the OHCHR Report.<sup>136</sup> Indeed, this option was taken up by the Human Rights Council in Resolution 10/4, which “encourages relevant special procedure mandate-holders to give consideration to the issue of climate change within their respective mandates.”<sup>137</sup> A further, more long-term option would be to create a new Special Procedure mandate on human rights and climate change<sup>138</sup> that might, for example, be tasked with integrating a human rights perspective into national and international climate change policy-making.<sup>139</sup>

In terms of useful steps in the Council plenary, participants noted that it would be useful to hold a dedicated panel debate on human rights and climate change during either the Eleventh or Twelfth Session of the Council, during which States, OHCHR, Special Procedures, IPCC, and the UNFCCC Secretariat could hold an in-depth interactive dialogue. This would serve to improve understanding of the issues at stake, build further bridges between the disciplines, and send out a strong political message from state representatives in the Council to their colleagues in the UNFCCC Conference of Parties. Again, members of the Human Rights Council took up this recommendation in March 2009, deciding, in Resolution 10/4, “to hold a panel discussion on the relationship between climate change and human rights at its eleventh session in order to contribute to the realization of the goals set out in the Bali Action Plan and to invite all relevant stakeholders to participate therein.”<sup>140</sup> As was the case with Resolution 7/23,<sup>141</sup> the Council,

<sup>134</sup> UNHRC, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context: Preliminary Note on the Mission to Maldives*, ¶¶1, 3, U.N. Doc. A/HRC/10/7/Add.4 (Mar. 3, 2009) (prepared by Raquel Rolnik).

<sup>135</sup> See also PRACTICAL STEPS, *supra* note 129, at 13–16.

<sup>136</sup> Special Procedures are both “independent experts” (rather than a secretariat) and are encouraged to take forward and develop issues falling within their mandate rather than commenting on the existing status quo.

<sup>137</sup> The Council “[welcomes] the decision of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living to prepare and present a thematic report on the potential impact of climate change on the right to adequate housing, and encourages other relevant special procedure mandate-holders to give consideration to the issue of climate change within their respective mandates.” UNHRC 10/4, *supra* note 52, ¶ 3.

<sup>138</sup> See also PRACTICAL STEPS, *supra* note 129, at 17.

<sup>139</sup> Because new mandates are difficult to establish at the Human Rights Council, an alternative might be to expand the mandate of an existing Special Procedure, such as on toxic waste, to cover environmental degradation more broadly — and include the issue of climate change as one of the focus areas.

<sup>140</sup> UNHRC 10/4, *supra* note 52, ¶ 1.

<sup>141</sup> In which the Council decided to make the OHCHR Report and a copy of the subsequent consideration of Report at its Tenth Session available to the Conference of Parties to the UNFCCC. UNHRC 7/23, *supra* note 1, ¶ 3.

in Resolution 10/4, decided to make explicit reference to the need for its work to link to, complement, and support the UNFCCC process. Operative paragraph two requires that a summary of the panel debate be made available to the Conference of Parties to the UNFCCC for the latter's consideration.<sup>142</sup>

Another interesting option, discussed at Chateau Bossey, was to use the Council's new Universal Periodic Review ("UPR") mechanism to both explore the human impacts of climate change in different national contexts, and to remind major emitting states about the human rights implications of their actions.<sup>143</sup> For example, the national UPR Report of Tuvalu devotes considerable attention to the impacts of global warming on the rights of Tuvaluans,<sup>144</sup> while during the country's review in December 2008, the Maldives delegation noted that:

Tuvalu on its own is incapable of fully protecting the wide range of rights and freedoms directly implicated by climate change; even though those rights are guaranteed under national and international law. This is because the ultimate cause of climate change originates far beyond the borders of the country and far beyond its effective control. Thus, the international community, in particular the major emitting countries of the developed world, must themselves also take responsibility for promoting and protecting the human rights of Tuvaluans by arresting their dangerous interference with the global climate system.<sup>145</sup>

Human rights treaty bodies, especially the Committee on Economic, Social and Cultural Rights, also have an important role to play, both in an analytical and an advocacy sense. For example, states might be encouraged through treaty body reporting guidelines to include reference to the impacts of climate change in their state reports. Or, during the presentation of reports, members of treaty bodies might ask questions about the effects of climate change on human rights, or on the steps taken by states, individually and through international cooperation, to mitigate and adapt. Finally, treaty bodies could potentially play a very useful role in advancing the normative framework by issuing progressive general comments on, for example, the extent of states' legal obligations to cooperate internationally to protect eco-

<sup>142</sup> UNHRC 10/4, *supra* note 52, ¶ 2. Operative paragraphs 4 (which welcomes steps to establish institutional linkages between the OHCHR and the UNFCCC Secretariat) and 5 (which encourages the High Commissioner for Human Rights or a senior representative to participate in key climate change meetings) also reflect the Council's determination to support and not duplicate the UNFCCC Bali process. *Id.* ¶¶ 4-5.

<sup>143</sup> See also PRACTICAL STEPS, *supra* note 129, at 22-23.

<sup>144</sup> UNHRC, Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1*, ¶¶ 2, 42-43, 56-57, 75, U.N. Doc. A/HRC/WG.6/3/TUV/1 (Sept. 12, 2008) (prepared by Tuvalu).

<sup>145</sup> UNHRC, *Report of the Working Group on the Universal Periodic Review — Tuvalu*, ¶ 47, U.N. Doc. A/HRC/10/84 (Jan. 9, 2009).

nomic, social, and cultural rights in the face of climate change, or on the obligations of states in the context of disappearing states and their right to self-determination.

Ideas on the practical application of human rights principles within international climate change policy-making, expressed during the meeting, were less well-defined and mainly represented a set of a la carte aspirations rather than mutually-reinforcing components of a well-defined strategy. These included<sup>146</sup> the creation of a mechanism to provide greater participation among indigenous peoples and local communities in negotiations, especially with respect to the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (“UN-REDD”); the establishment of a new UNFCCC subsidiary body to study, monitor, report on, and provide guidance regarding the human dimension of climate change, including human rights; the drafting of technical papers by the Subsidiary Body for Scientific and Technical Advice (“SBSTA”), the Subsidiary Body for Implementation (“SBI”), or the Clean Development Mechanism Executive Board on the utility of human rights norms in the work of the UNFCCC; and the inclusion of human rights standards as a criteria when reviewing State implementation of UNFCCC commitments.<sup>147</sup>

Overall, the meeting demonstrated that while, on the one side, the international human rights community is now fairly well-advanced in terms of understanding and accepting the interface between the two disciplines, in terms of identifying workable options to further develop our understanding, and in terms of considering ways to reach out to the Bali Process, there is far less certainty, on the part of either human rights or environmental policy-makers, as to how to usefully leverage this evolving knowledge-base in the context of the climate change negotiations. This fundamental disconnect unquestionably represents the foremost challenge facing the contemporary human rights-climate change agenda.

How can this disconnect be resolved? How might human rights principles be integrated into climate change policy-making? While these are difficult questions, one thing seems certain: the answers must necessarily lie with the Conference of Parties to the UNFCCC rather than in the Human Rights Council. While the latter can make (and indeed is making) an important contribution by highlighting and exploring the relationship between human rights and climate change, in the final analysis, the prerogative to use this knowledge or not and the expertise to understand how it might be applied to climate change policy rests with the former. Human rights ideas and principles cannot be imposed on the Bali Roadmap. Rather, a case must be con-

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<sup>146</sup> See also PRACTICAL STEPS, *supra* note 129, at 7.

<sup>147</sup> This was in fact suggested by the Marshall Islands in its national submission, and was also referred to during the CIEL-FES meeting. Maldives OHCHR Report Submission, *supra* note 45, at 84.

2009] *Limon, Constructing a Case for Political Action* 467

structed for their organic integration and evolution, and that case must be won.

This probably entails two steps. First, it will be necessary to secure a formal entry point. While, as has been noted, the opening preambular paragraph to Resolution 7/23 may, to some, have been startling in its timidity, the words “climate change . . . has implications for the full enjoyment of human rights” were nevertheless of the utmost importance.<sup>148</sup> Those countries that insisted on their retention knew as much, as did those which insisted on their deletion. This is because they acted, in effect, as the thin end of a wedge. They represented a door to wider possibilities, an officially sanctioned basis for further engagement by a growing range of proponents. At the start of March 2008, the majority of delegates in the Human Rights Council privately and publicly questioned whether there was any relationship between human rights and climate change and asserted, on the contrary, that the issue of climate change had no place at the Council. By the beginning of March 2009, the situation had changed completely.<sup>149</sup> That climate change has implications for the full enjoyment of human rights is now taken as given, as is the understanding that the Council must move to assess the options for addressing this fact.<sup>150</sup>

What was true of the state representatives sitting in the Council is almost certainly true of state representatives sitting in the Conference of Parties to the UNFCCC and its subsidiary bodies. What is needed, therefore, in order to kick-start an organic assessment of the value, utility, and possible application of human rights principles in the context of climate change policy, is official wording in the agreed outcome document of COP 15 (whatever form it takes) recognizing that climate change has significant negative implications on the lives and livelihoods of individual people (especially vulnerable people) around the world, that climate change policy must therefore be premised on the need to protect and rehabilitate such individuals, and that human rights policy offers an important way of understanding the former and informing and facilitating the latter.<sup>151</sup>

<sup>148</sup> UNHRC 7/23, *supra* note 1, pmb1.

<sup>149</sup> The change was, in essence, due to gradual acceptance by states of the de facto reality of the idea contained in UNHRC 7/23 — that climate change has implications for the full enjoyment of human rights — both because it was now in an official U.N. document and because other stakeholders, such as U.N. human rights mechanisms, vulnerable communities, and NGOs, began regularly referring to it. What had been a philosophical argument became, over the course of a year, a perception of fact.

<sup>150</sup> See Statement by the Maldives at the General Debate Under Item 3, *supra* note 67.

<sup>151</sup> At the Fifth Session of the Ad-Hoc Working Group on Long-Term Cooperative Action under the Convention (“AWG-LCA”) (March 29–April 8, Bonn), a subsidiary body of the UNFCCC tasked under the Bali Action Plan to pursue the full, effective, and sustained implementation of the Convention, the Maldives delegation began the process of trying to integrate human rights language into the draft negotiating text being prepared by the Chair of the AWG-LCA. See, e.g., Maldives Delegation to the Fifth Session of the Ad-Hoc Working Group on Long-Term Cooperative Action, *Proposed Draft Wording to Be Sent as National Submission to Be Included in the Negotiating Text Under Shared Vision* (Apr. 2009), available at [http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Maldives\\_wording\\_AWG-LCA\\_April\\_09.pdf](http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Maldives_wording_AWG-LCA_April_09.pdf).

Such wording would then, as with Resolution 7/23, act as a basis for, and as encouragement to, further detailed analysis among climate change policy-makers as to how human rights principles and ideas might be applied in practice.<sup>152</sup> It would also serve as a useful point of entry or reference for interested NGOs, academics, and, of course, other relevant intergovernmental bodies — such as, for example, the Human Rights Council.

While such a scenario might offer a possible way forward, it is nevertheless clear that much remains to be done in the short- and medium-term to successfully and effectively integrate human rights principles into climate change policy, even if the level of interest in and support for such a course (both quantitatively and qualitatively speaking) gives some cause for cautious optimism.

But what of the longer-term? Some might argue that it is insufficient and unfair to focus solely on the normative or instructive value of human rights, and ignore or sideline their justicial value. It is all very well concluding, as the OHCHR, the United States, the United Kingdom, and others have, that it is legally impossible to connect harm with responsibility in the context of climate change, and thus to identify violations of human rights and place them within an effective accountability and redress framework.<sup>153</sup> But such a conclusion is unlikely to be acceptable to the Inuit of North America who every year see their lands eroding, their houses subsiding, their food sources disappearing, their friends or family falling through the thinning ice, especially when they know that their own governments in Ottawa and Washington have known about the ultimate cause of these tragedies for at least two decades and have done nothing to meaningfully curb emissions themselves or to promote international cooperation in this regard.<sup>154</sup> And what of the people of the Maldives, the Marshall Islands, Tuvalu, or Vanuatu who risk, because of the economically motivated actions of relatively prosperous people in far-off lands, losing their entire homeland — the country of their birth and the country that their ancestors have inhabited for millennia — and with it their entire culture?<sup>155</sup> Can we tell these people that their

<sup>152</sup> There are small signs that such an analysis has already begun. For example, during the Tenth Session of the Human Rights Council, the UNFCCC Secretariat prepared (but was finally unable to deliver) a statement on human rights and climate change in which it noted that “the human rights community can provide valuable information to UNFCCC parties as they assess, plan and implement their adaptation actions. The expertise of the human rights regime has to date been unavailable to adaptation practitioners even though human rights knowledge could be a significant addition to the methods and tools available to Parties.” UNFCCC Secretariat, *supra* note 126, ¶ 7.

<sup>153</sup> OHCHR Report, *supra* note 30, ¶ 70; U.K. OHCHR Report Submission, *supra* note 33, ¶ 1; U.S. OHCHR Report Submission, *supra* note 34, ¶ 25.

<sup>154</sup> Indeed, it could be argued that they have actually worked to actively block international cooperation. *See* Inuit Petition, *supra* note 8.

<sup>155</sup> Tuvalu sought legal advice on who might be held responsible for the imminent loss of homes and lifestyles but chose not to pursue litigation. *See* Akiko Okamatsu, Problems and Prospects of International Legal Disputes on Climate Change (Dec. 2, 2005) (unpublished paper), available at [http://web.fu-berlin.de/ffu/akumwelt/bc2005/papers/okamatsu\\_bc2005.pdf](http://web.fu-berlin.de/ffu/akumwelt/bc2005/papers/okamatsu_bc2005.pdf); Tom Price, *The Canary is Drowning: Tiny Tuvalu Fights Back Against Climate Change*, GLOBAL POL'Y F., Dec. 3, 2002, <http://www.globalpolicy.org/nations/micro/2002/1203canary>.

2009] *Limon, Constructing a Case for Political Action* 469

human rights have not been violated because it is difficult to apportion responsibility? Perhaps we must, but that is surely because the law is wrong, rather than because our instincts of fairness, equity, and justice are wrong.

It is perhaps through highlighting this de facto injustice that the greatest long-term benefit of linking human rights and climate change will be found, for climate change demonstrates, perhaps better than any other issue, the inadequacy of existing international human rights law in the context of the modern, globalized world. More importantly, it also gives hints as to how the law should be reformed, in two key ways.<sup>156</sup>

First, by confirming that climate change has a range of significant implications for human rights, the Human Rights Council has indirectly, but perhaps not inadvertently, drawn attention to a major gap in the international human rights conventions — namely the lack of an explicit right to a safe and secure environment. It is clear that climate change itself does not directly affect human rights. Rather, global warming causes environmental change, which in turn affects human rights. Thus, to properly protect and promote human rights — all of which are dependent on a safe and secure environment — it is clear that the international community should give renewed attention to the relative merits of declaring “environmental rights” at the international level:

[S]uch a move would have major implications for climate change and other trans-national environmental harms, but also for government policy and accountability both domestically and internationally. For this reason the idea is a controversial one, but perhaps the issue of climate change, one of the ultimate environmental manifestations of globalisation, points to the need for a renewed focus on this significant gap in the continuum between international human rights policy and international environmental policy.<sup>157</sup>

The concept of environmental rights is not a new one. As long ago as 1972, the Stockholm Declaration asserted that “[m]an has a fundamental right to freedom, equality and adequate conditions of life, in an environment

htm (on file with the Harvard Environmental Law Review); HOLLEY RALSTON ET AL., GERMANWATCH, CLIMATE CHANGE CHALLENGES TUVALU (2004), available at <http://germanwatch.org/download/klak/fb-tuv-e.pdf>. The legal options available to small island states facing disappearance at low warming thresholds have been investigated in some detail. See OHCHR, Sub-Comm'n on the Promotion & Prot. of Human Rights, *Working Paper: Prevention of Discrimination and Protection of Indigenous Peoples*, ¶¶ 11-15, U.N. Doc. E/CN.4/Sub.2/2005/28 (June 16, 2005) (prepared by Françoise Hampson).

<sup>156</sup> See Ahmed Shaheed, Minister of Foreign Affairs of the Maldives, Speech at Commonwealth Side-Event on “Human Rights and Climate Change: The Way Forward” (Mar. 3, 2009), available at [http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Speech\\_to\\_Commonwealth.pdf](http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Speech_to_Commonwealth.pdf).

<sup>157</sup> Marc Limon, *A Rights-Informed Approach to Tackling Climate Change*, MEA BULL., Nov. 21, 2008, <http://www.iisd.ca/mea-l/guestarticle58.html> (on file with the Harvard Environmental Law Review).

of a quality that permits a life of dignity and well-being.”<sup>158</sup> Unfortunately, that text represents both the starting point and the high point of international efforts in the area.<sup>159</sup> Although the fundamental right to an environment capable of supporting human society and the full enjoyment of human rights is recognized in varying formulations in the constitutions of over 120 states and directly or indirectly in several international instruments,<sup>160</sup> the fact remains that since Stockholm, efforts at the international level to establish a universal right to a safe and secure environment have floundered — if not gone backward.<sup>161</sup>

That environmental degradation has impacts on existing human rights is now widely acknowledged. Some international human rights treaties explicitly address the linkages between the protection of the environment and the enjoyment of human rights. For example, the Convention on the Rights of the Child recognizes that the enjoyment of human rights depends, *inter alia*, on a decent environment,<sup>162</sup> and ILO Convention No. 169 concerning indigenous and tribal peoples also provides for the protection of the environment of indigenous and tribal peoples.<sup>163</sup> The U.N. Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, and the Human Rights Committee, among others, have also issued recommendations related to environmental issues in their review of specific country reports,<sup>164</sup> while a range of human rights Special Procedures have noted the indispens-

<sup>158</sup> Stockholm Declaration, *supra* note 39.

<sup>159</sup> This is true even though the language from Stockholm was repeated in U.N. General Assembly Resolution 45/94, which stated that all individuals have a “fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being.” G.A. Res. 45/94, ¶ 11, U.N. Doc. A/RES/45/94 (Dec. 14, 1990).

<sup>160</sup> See, e.g., African Charter on Human and Peoples’ Rights art. 24, *adopted* June 27, 1981, 1520 U.N.T.S. 248 (providing that “all peoples shall have the right to a general satisfactory environment favorable to their development”); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 11, *adopted* Nov. 22, 1969, 1144 U.N.T.S. 144 (recognizing the “right to live in a healthy environment” and demanding that states parties “promote the protection, preservation, and improvement of the environment”); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 1, *adopted* June 25, 1998, 2161 U.N.T.S. 447 (providing for the right of every person of present and future generations to live in an environment adequate to his or her health and well-being).

<sup>161</sup> As the United States notes in its national submission, there is a lack of clarity as to the exact linguistic formulation for such a right, with the “right to live in a safe, secure and sustainable environment,” the “right to a safe and sustainable environment,” the “right to an environment capable of supporting human society” being some of the common variations. This is also, as the United States further notes, one of the concept’s weaknesses. U.S. OHCHR Report Submission, *supra* note 34, ¶¶ 11-12.

<sup>162</sup> See U.N. Convention on the Rights of the Child art. 24(2), *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (on the right to the highest attainable standard of health requires state parties to consider “the dangers and risks of environmental pollution” and ensure that all segments of society have access to information and education with regard to, *inter alia*, hygiene and environmental sanitation); *id.* art. 29(e) (includes “the development of respect for the natural environment” among the goals of educational programs).

<sup>163</sup> See Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 4, 7(3)-(4), *adopted* June 27, 1989, 28 I.L.M. 1382.

<sup>164</sup> Wani said:

ability of a healthy environment as a precondition for the effective enjoyment of human rights.<sup>165</sup> Resolutions 7/23 and 10/4 on human rights and climate change build on this consensus.

Moreover, case law from the European Court of Human Rights and the Human Rights Committee also indicates that environmental deterioration can lead to violations of human rights, including the right to life, the right to health, the right to respect for privacy and family life, and the right to freedom of expression.<sup>166</sup> As Judge Weeramantry explained in a separate opinion for the International Court of Justice:

[T]he protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.<sup>167</sup>

However, despite efforts by some human rights treaty bodies to try to compensate for the lack of an explicit right to a safe and healthy environment by creatively and expansively interpreting other fundamental rights,<sup>168</sup>

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For example, in relation to the pollution of water sources; protection of indigenous peoples' natural resources; environmental policies and their specific impact on the enjoyment of human rights; environmental degradation; natural disasters; the impact of large infrastructure development projects on the environment; environmental hazards affecting specific groups or minorities; and the dumping of toxic waste and its impact on the enjoyment of human rights.

Wani, *supra* note 63, at 6.

<sup>165</sup> Wani also noted:

The former Special Rapporteur on the human rights of migrants identified environmental degradation among the reasons why people leave their countries; the former Independent Expert on human rights and extreme poverty stressed the links between poverty and environmental degradation; the Special Rapporteur on adequate housing underlined that housing cannot be separated from other issues related notably to a safe and healthy environment; the Representative of the Secretary General on the human rights of internally displaced persons highlighted that natural disasters are among the leading causes of internal displacement; the Special Representative of the Secretary-General on human rights defenders included environmental activists in the group of civil society actors that are particularly exposed to violence and other violations of their rights; the mandate of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights has, since its creation, highlighted how international movements of waste can have negative effects on the enjoyment of several human rights, including the right to life, health, adequate food, health [sic], freedom of association or the right to form and join trade unions.

*Id.* at 7.

<sup>166</sup> These rights include the right to seek information and minority rights. See Stefano Sensi, *Human Rights and the Environment: A Practical Guide for Environmental Activists* (unpublished paper) (on file with Harvard Environmental Law Review).

<sup>167</sup> Maldives OHCHR Report Submission, *supra* note 45, at 13 (quoting Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25)).

<sup>168</sup> For example, "the U.N. Committee on Economic, Social and Cultural Rights — which monitors the implementation of the International Covenant on Economic, Social and Cultural

and despite recent calls by the President of the Maldives for immediate negotiations on a comprehensive international treaty on environmental rights,<sup>169</sup> the fact remains that, aside from international agreements on some procedural rights in the context of environmental protection, we are no closer to achieving a breakthrough today than we were in 1972 (indeed the lack of reference in the 1992 Rio Declaration<sup>170</sup> to a fundamental right to live in "an environment of a quality that permits a life of dignity and well-being" shows that we have in fact gone backward).

Resolutions 7/23 and 10/4, which take international understanding and recognition of the linkage between human rights and the environment much further than the United Nation's previous resolution on the subject — Commission on Human Rights Resolution 2005/60 on human rights and environment as part of sustainable development<sup>171</sup> — offer a good platform for a renewed debate on the relative merits<sup>172</sup> and feasibility of universally recognized environmental rights.<sup>173</sup>

However, the universal declaration of a right to an environment of a certain quality, although helpful in dealing with climate change, would not be enough in itself. It could help individuals hold their own governments accountable for environmental degradation by enabling recourse to international human rights mechanisms (e.g., treaty bodies) and, linked to this,

Rights (ICESCR) by State Parties — has attempted to address this gap by interpreting the right to health, enshrined in this International Covenant, as encompassing the underlying determinants of health, such as healthy environmental conditions." Wani, *supra* note 63, at 5-6.

<sup>169</sup> Maumoon Abdul Gayoom, President of the Maldives, Keynote Address at the Opening of the Small Island States Conference on the Human Dimension of Climate Change in Male (Nov. 13, 2007), available at [http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Speech\\_by\\_President\\_on\\_Human\\_Dimension\\_of\\_Climate\\_Change.pdf](http://www.maldivesmission.ch/fileadmin/Pdf/Environment/Speech_by_President_on_Human_Dimension_of_Climate_Change.pdf).

<sup>170</sup> G.A. Res. 45/94, *supra* note 159, ¶ 4.

<sup>171</sup> U.N. Comm'n on Human Rights, Human Rights Res. 2005/60, U.N. Doc. E/CN.4/RES/2005/60 (Apr. 20, 2005).

<sup>172</sup> The difficulties of establishing such a right are well-documented:

[W]hat is the content of this right and how would it be defined? What is the threshold quality of environment for purposes of human rights? Who are the holders of this right: is it a collective right or an individual right? Does it cover future generations? Who is the duty bearer responsible for promoting, providing for and protecting this right? More specifically, what responsibility would it impose on states? What would be the extra-territorial obligations created by such a right? What would be the added value, in term of protection, of such a right? While a right to an environment of a certain quality would certainly have rhetorical force, some have argued that in reality it would add little to what already exists in international environmental law.

Wani, *supra* note 63, at 10-11; see also Alan E. Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 43 (Alan E. Boyle & Michael R. Anderson eds., 1996).

<sup>173</sup> Such a debate could complement current work in this area being conducted in the context of the draft Fourth Programme for the Development of the Periodic Review of Environmental Law ("Montevideo Programme IV"). See U.N. Env't Programme, *Report of the Meeting of Senior Government Officials Expert in Environmental Law to Prepare a Fourth Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme IV)*, at 25, U.N. Doc. UNEP/Env.Law/MTV4/IG/2/2 (Oct. 28, 2008), available at [http://www.unep.org/law/PDF/MontevideoIV/Meeting\\_Report\\_MontevideoIV.pdf](http://www.unep.org/law/PDF/MontevideoIV/Meeting_Report_MontevideoIV.pdf).

might also facilitate or encourage the development of “novel theories of responsibility,”<sup>174</sup> such as the application of joint and several liability<sup>175</sup> in human rights law (it could therefore help, for example, the Inuit vis-à-vis their own governments). However, it is unlikely to be of much help in, say, the case of the Maldives, where responsibility lies beyond the state’s borders. Indeed, for someone in the Maldives to prove that his or her rights have been violated as a result of climate change and to hold those responsible (wherever they may be) accountable, would require a wholesale reconceptualization and reconfiguration of international human rights law as it is now understood — as, essentially, a contract between a state and its citizens. In other words, it would require the idea of human rights developed in the post-1945 world of nation-states and borders to begin to give way to a recognition that, in the globalized world, individual human interaction and personal cause and effect no longer respect traditional concepts of sovereignty. As a consequence, the idea that harm and responsibility must both reside within a single state would, according to this view, become redundant (especially in the case of economic, social, and cultural rights). As the ICHRP has noted, “more than most other issues, climate change throws into relief the inadequacies of the international justice system, given the scale and intimacy of global interdependence that drives the problem and must also drive its solutions.”<sup>176</sup>

Like environmental rights, this idea is not new, but has previously been avoided because of the fear that it would allow states with poor human rights records to avoid responsibility for human rights violations by blaming external actors (such as international terrorists or multinational corporations).

Such concerns should not be taken lightly, but here too perhaps linking human rights and climate change shows us, potentially, a path forward, a way of promoting international climate justice while maintaining a strong emphasis on the primary responsibility of states to protect the rights of their citizens and others within their jurisdiction.

<sup>174</sup> U.S. OHCHR Report Submission, *supra* note 34, ¶ 26.

<sup>175</sup> The Inuit Petition to Inter-American Commission on Human Rights “sought to hold one State responsible for activities undertaken in several countries, applying both criminal law principles of joint liability and, more innovatively, the UNFCCC’s own principle of ‘common but differentiated responsibilities.’” CLIMATE CHANGE AND HUMAN RIGHTS, *supra* note 4, at 42. Although the Commission ultimately did not find the case admissible, during a subsequent public hearing on the matter (Mar. 1, 2007), the Commissioners did ask how one state could be held liable for actions also conducted in numerous other states. Martin Wagner (Earthjustice), counselor for the petitioners, contended that each state is responsible separately as well as jointly. *Id.* ICHRP has noted that:

It is common in environmental litigation, where there are numerous polluters, for a court to shift the burden of proof and hold the defendant liable unless he or she can mitigate responsibility by proving the proportional liability of other wrongdoers. Under theories of joint and several liability, each wrongdoer is held responsible for the entire harm in some circumstances. Such doctrines serve to deter pollution by all and ensure greater likelihood of redress for victims.

*Id.* at 43.

<sup>176</sup> *Id.* at 64.

The principle of common but differentiated responsibility (“CBDR”) is one of the cornerstones of sustainable development and is particularly important in the context of international climate change diplomacy, as led by the UNFCCC and the Kyoto Protocol.<sup>177</sup> CBDR was first explicitly formulated in Principle 7 of the Rio Declaration, which states:

In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.<sup>178</sup>

CBDR, in short, can be said to express the need to evaluate responsibility for the remediation or mitigation of environmental degradation based on both historical contribution to a given environmental problem and present capabilities: it is a guiding principle of international cooperation and solidarity.<sup>179</sup> In the context of climate change, the practical consequences of CBDR are that differential obligations are imposed on the different parties to the UNFCCC and the Kyoto Protocol.

The preamble of the UNFCCC acknowledges “that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.”<sup>180</sup> Under the Kyoto Protocol, only countries listed in Annex I (developed countries and countries with economy in transition) have quantified emissions reduction obligations under the agreement.<sup>181</sup>

Might CBDR also be helpful in reshaping international human rights law to make it more reflective of and more responsive to the needs of a globalized world? While CBDR as it is understood in environmental law (assigning responsibility based on historical contribution to damage and capacity) is perhaps not directly applicable to human rights law, the underlying principles of justice and equity — i.e., the promise that responsibility will be distributed fairly — clearly are.

Might one foresee a future in which responsibility for respecting, protecting, and fulfilling the economic, social, cultural, and environmental rights of a given individual would be held in common by all states, but with

<sup>177</sup> Vito De Lucia, *Common But Differentiated Responsibility*, in *ENCYCLOPEDIA OF EARTH* (Jan. 28, 2007) (on file with Harvard Environmental Law Review).

<sup>178</sup> U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Report of the U.N. Conference on Environment and Development Volume I: Resolutions Adopted by the Conference*, at 4, U.N. Doc. A/CONF.151/26 (Jan. 1, 1993).

<sup>179</sup> De Lucia, *supra* note 177.

<sup>180</sup> UNFCCC, *supra* note 3, pmb.

<sup>181</sup> Kyoto Protocol to the UNFCCC, *adopted* Dec. 11, 1997, 2303 U.N.T.S. 148.

2009] *Limon, Constructing a Case for Political Action* 475

the greater or primary responsibility lying with the individual's own government? Or perhaps all states would have the duty to fully respect<sup>182</sup> and play a part in fulfilling (through "international assistance and cooperation") that individual's rights, whereas the individual's own government would have the obligation to respect, fulfil, and protect them?

These are clearly "difficult, complex and far-reaching questions,"<sup>183</sup> but perhaps climate change's greatest influence on human rights will be to demonstrate that the time has come to start answering them. As Mali argues in its submission:

[L]aws and institutions for the defence of human rights [must] evolve to adapt to the new reality of climate change. When vulnerable communities try to use human rights laws to defend their rights and seek climate justice, important weaknesses are revealed. It is almost impossible for populations in poor countries to identify and pursue channels of justice, to have their cases heard, or to prove responsibility.<sup>184</sup>

In conclusion, it is clear that drawing linkages between human rights and climate change has mutually reinforcing benefits for both areas of policy. On the one hand, human rights principles and concepts have the potential to complement traditional climate change negotiations and improve climate change policy by, *inter alia*, focusing attention on the impacts on individuals, especially vulnerable individuals, by emphasizing accountability, and by encouraging and strengthening international cooperation. On the other hand, climate change serves to highlight the inadequacies of existing international human rights law in a globalized world, while environmental policy principles (specifically CBDR) offer possible guidance on how to respond to those inadequacies. In short, if ideas from international human rights policy, which emphasizes equity within states, can successfully cross-fertilize with those from international climate change policy, which emphasizes equity between states, both disciplines stand to benefit as do, ultimately, mankind and the planet he inhabits. Notwithstanding the myriad difficulties and uncertainties inherent in such an exercise, this surely represents a compelling case for political action.

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<sup>182</sup> The Inuit Petition to the Inter-American Commission on Human Rights argued that governments and private actors have, at a minimum, a negative obligation to desist from harmful actions that lead to social and economic rights violations. Inuit Petition, *supra* note 8, at 70.

<sup>183</sup> Shaheed, *supra* note 156, at 7.

<sup>184</sup> Submission of Mali to OHCHR Study, *Human Rights and Climate Change* (Sept. 2008), available at <http://www2.ohchr.org/english/issues/climatechange/docs/Mali.pdf>.

## ANNEX

Climate Impact	Human Impact	Rights Implicated
<b>Sea Level Rise</b> <ul style="list-style-type: none"> <li>• Flooding</li> <li>• Sea Surges</li> <li>• Erosion</li> <li>• Salinization of land and water</li> </ul>	<ul style="list-style-type: none"> <li>• Loss of land</li> <li>• Drowning, injury</li> <li>• Lack of clean water, disease</li> <li>• Damage to coastal infrastructure, homes, and property</li> <li>• Loss of agricultural lands</li> <li>• Threat to tourism, lost beaches</li> </ul>	<ul style="list-style-type: none"> <li>• Self-determination [ICCPR;ICESCR,1]</li> <li>• Life [ICCPR, 6]</li> <li>• Health [ICESCR, 12]</li> <li>• Water [CEDAW,14; ICRC 24]</li> <li>• Means of subsistence [ICESCR,1]</li> <li>• Standard of living [ICESCR, 12]</li> <li>• Adequate housing [ICESCR,12]</li> <li>• Culture [ICCPR, 27]</li> <li>• Property [UDHR,17]</li> </ul>
<b>Temperature Increase</b> <ul style="list-style-type: none"> <li>• Change in disease vectors</li> <li>• Coral bleaching</li> <li>• Impact on Fisheries</li> </ul>	<ul style="list-style-type: none"> <li>• Spread of disease</li> <li>• Changes in traditional fishing livelihood and commercial fishing</li> <li>• Threat to tourism, lost coral and fish diversity</li> </ul>	<ul style="list-style-type: none"> <li>• Life [ICCPR, 6]</li> <li>• Health [ICESCR, 12]</li> <li>• Means of subsistence [ICESCR, 1]</li> <li>• Adequate standard of living [ICESCR, 12]</li> </ul>
<b>Extreme Weather Events</b> <ul style="list-style-type: none"> <li>• Higher intensity storms</li> <li>• Sea Surges</li> </ul>	<ul style="list-style-type: none"> <li>• Dislocation of populations</li> <li>• Contamination of water supply</li> <li>• Damage to infrastructure: delays in medical treatment, food crisis</li> <li>• Psychological distress</li> <li>• Increased transmission of disease</li> <li>• Damage to agricultural lands</li> <li>• Disruption of educational services</li> <li>• Damage to tourism sector</li> <li>• Massive property damage</li> </ul>	<ul style="list-style-type: none"> <li>• Life [ICCPR,6]</li> <li>• Health [ICESCR,12]</li> <li>• Water [CEDAW,14; ICRC 24]</li> <li>• Means of subsistence [ICESCR,1]</li> <li>• Adequate standard of living [ICESCR, 12]</li> <li>• Adequate and secure housing [ICESCR,12]</li> <li>• Education [ICESCR,13]</li> <li>• Property [UDHR,17]</li> </ul>
<b>Changes in Precipitation</b> <ul style="list-style-type: none"> <li>• Change in disease vectors</li> <li>• Erosion</li> </ul>	<ul style="list-style-type: none"> <li>• Outbreak of disease</li> <li>• Depletion of agricultural soils</li> </ul>	<ul style="list-style-type: none"> <li>• Life [ICCPR,6]</li> <li>• Health [ICESCR,12]</li> <li>• Means of subsistence [ICESCR,1]</li> </ul>

**פרק 12**

## **אחריות תאגידית**

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David Vogel

CHAPTER

# 6

## Corporate Responsibility for Human Rights and Global Corporate Citizenship\*

Improving the welfare of citizens in the developing countries where international firms do business is a critical dimension of CSR. Often associated with human rights, this dimension of corporate responsibility has gone beyond working conditions to encompass community development policies, relationships with repressive or corrupt regimes and their security forces, decisions about where firms should invest, the social and environmental impact of bank lending policies, and the establishment of norms of global corporate citizenship.

As the salience of these issues has grown, a number of corporations, primarily in extractive industries, have found themselves targeted by activists because of their human rights policies—or lack thereof. Civic pressures have led to a number of changes in company policies. Some firms in extractive industries have attempted to improve their relationships with the communities in which their investments are located, some have divested from Burma, some firms have developed human rights standards for investment and sourcing decisions, and several international banks have agreed to voluntary standards for assessing and monitoring the social and environmental impact of their lending decisions. In addition, the UN Global Compact has established a set of global norms for corporate citizenship that have been endorsed by more than 1,300 firms, including several from developing countries.

However, the overall social impact of these developments remains limited by several factors. First, the standards for corporate human rights

\* Vogel, David, "Corporate Responsibility for Human Rights and Global Corporate Citizenship", in David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility*, 2006, pp. 139-161.

#### 140 HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP

policies contained in the few voluntary codes that exist in this area are vague and poorly defined. Second, the “enforcement” of corporate commitments to human rights policies remains largely a function of NGO pressures and media attention, which means that many corporate practices are subject to little international scrutiny. Third, because the willingness of global corporations to factor the impact of human rights into their investment decisions varies widely, the impact of those firms that have attempted to do so has often been limited.<sup>1</sup> Finally, even the efforts of corporations that have tried to be responsible citizens have often been undermined or overwhelmed by the politics and policies of host-country governments.

This chapter evaluates the impact of several of the more salient dimensions of CSR for human rights. It begins by discussing one of the most visible disputes surrounding the role, behavior, and responsibilities of a Western company in a developing country, namely Shell in Nigeria. The conflicts Shell faced were instrumental in placing human rights issues on the agenda of firms involved in natural resource development. The chapter then turns to some of the human rights controversies surrounding the investments of extractive industries. Firms in these industries have experienced the major share of NGO and public scrutiny of their human rights policies, in large measure because they are often caught in the midst of violent conflicts between community residents and both government and private security forces responsible for protecting their investments. In addition, many natural resources are located in countries with corrupt and undemocratic governments, and with repressive security forces. As a result foreign firms have often found themselves accused of complicity in human rights abuses.

The next section examines the issues and controversies surrounding where companies should do business, describing the mixed successes of NGOs to force disinvestment from Burma as well as the broader debate over how firms should make investment decisions in countries where human rights abuses are well known. The final section of this chapter explores a broad policy initiative, namely the role of the UN Global Compact in promoting norms of global corporate citizenship.

#### Shell in Nigeria

Shell began its operations in Nigeria in 1937, while it was still a British colony. Large oil reserves were discovered in the late 1950s. After Nigeria

## HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP 141

became independent in 1960, a succession of governments, some civilian, though mostly military, squandered the country's oil wealth. Beginning around 1987, Shell became the target of a series of protests by various tribal groups, notably the Ogoni, an ethnic group of 500,000 people living in eighty-two communities in the Niger Delta region in southeast Nigeria. Shell, which accounted for half the country's oil production, was blamed for the harmful environmental impact produced by decades of energy investments as well for the continued poverty of the region, notwithstanding the substantial royalties paid to the Nigerian central government. According to two Nigerian environmental activists, Shell had exhibited "negligence and cynical indifference" to the welfare of the community in which its oil production was located. They added: "The general complaint is one of broken promises, developmental assistance programs that are abandoned halfway and poor quality facilities that break down and simply rust away as soon as they are installed."<sup>2</sup> Greenpeace reported that between 1982 and 1992 more than a third of Shell's oil spills worldwide, amounting to 1.6 million gallons, occurred in the Niger Delta region.<sup>3</sup> There were also frequent allegations of heavy-handed tactics by the police and army officers protecting the company's installations. Nigerian law required Shell to pay the salaries of many of these security forces, which further implicated the company in their activities.

A number of protests turned violent: at one demonstration in Ogoniland in 1990, eighty villagers were killed and 494 homes destroyed after Shell reportedly asked the commissioner of police for security protection. In 1993, as violence between Nigerian security forces and the Ogoni intensified, Shell withdrew its personnel from the region, stating that it would not return until it had "the local community on our side." It also asked the government to protect the installations it had left behind. The Nigerian government responded to continued attacks on Shell's installations by youth groups from the Ogoni tribe by expanding its military presence in the region, hoping that making the region more secure would persuade Shell to return. The commander of an internal security task force issued a memo calling for aggressive military action against activists and suggested putting "pressure on the oil companies" to help pay the costs of the operations.<sup>4</sup> Local groups estimated that the government attacks destroyed thirty villages and killed about 2,000 people, though this claim has not been independently verified.

In 1994, following the killing of four traditional Ogoni leaders by a mob, Ken Saro-Wira, an Ogoni activist who had been a prominent critic

#### 142 HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP

of Shell, along with a number of his associates, was arrested and charged with inciting his supporters to commit murder. Saro-Wira's arrest focused international attention on Shell's behavior in Nigeria. From his prison cell he called for an international boycott of oil from Nigeria. In Britain, Shell was strongly criticized by a coalition of unions, environmental groups, human rights organizations, and churches for its tacit approval of Nigeria's military regime, and several Internet sites called for a boycott of the company to protest its unwillingness to seek Saro-Wira's release from prison. Shell responded by averring that "politics is the business of government and politicians," adding that "the company does not and should not have [political] influence in Nigeria."<sup>5</sup>

After Saro-Wira was found guilty by a military tribunal, the company stated that it would be inappropriate for it to interfere with Nigeria's legal processes, though at the last minute it did lend its support to the international campaign for clemency for Saro-Wira.<sup>6</sup> On November 1, 1995, Saro-Wira and eight other Ogoni activists were hanged. The extensive global media coverage of the execution substantially increased public and media attacks on Shell and its role in Nigeria. Senior Shell officials conceded that the company's "image had been dealt a serious blow by the events in Nigeria." According to Shell's West African coordinator, "Saro-Wira's execution was a disaster for us."<sup>7</sup>

Shell, however, challenged the claims of widespread environmental degradation caused by its operations. In fact, Shell's facilities covered less than 1 percent of the land in the Niger Delta, and many oil spills were due to the sabotage of Shell's 6,000 kilometers of pipelines by local residents. Moreover, oil development was only one of several factors driving land degradation. While acknowledging that it should have acted earlier to address some of the local community's environmental concerns, a company official explained that the Nigerian government was its majority partner and that as a poor country it had been reluctant to sacrifice profits for environmental protection.<sup>8</sup> Shell did admit that the environmental standards at its oilfields in the Niger Delta were lower than in Europe or America and that it was responsible for oil spills that had contaminated a number of locations. Furthermore, its practice of burning off natural gas as a by-product of oil production created large and polluting flares.

Shell rejected the argument that it should withdraw from Nigeria, the source of 10 percent of the firm's total exploration and production profits. Shortly after the trial and execution, it announced that it was proceeding with plans to build a \$4 billion natural gas pipeline in partnership

## HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP 143

with the government. But in what was widely regarded as a breakthrough, Shell revised its business principles in 1997, explicitly mentioning its “support for fundamental human rights in line with the legitimate role of business.”<sup>9</sup> The following year, Shell published its first public report on community and environmental issues in Nigeria, promised to end the practice of gas flaring within ten years, and pledged to establish a youth training scheme in Ogoniland. The company also agreed to return 13 percent of federal oil and gas revenues it paid to the Nigeria government to the Niger Delta region—a fourfold increase from 1995. Shell also substantially increased its own funding to the area; to date it has sponsored more than 280 community development projects, primarily in health care and education, spending \$84 million in 2003.<sup>10</sup> Shell has also offered to clean up all spills in the Ogoniland that occurred after its departure.

At the same time, in an internal report that was subsequently leaked, Shell admitted that its operations in the Niger Delta had exacerbated conflict in the region: “The cumulative effect of [its] practices is a perception among communities that they cannot engage with [Shell] other than through forceful or obstructive action.”<sup>11</sup> Moreover, Shell has little to show for its community development expenditures. Most of the company’s development expenditures wind up in the pockets of local officials. In other cases, Shell has paid for the construction of community facilities, but not provided funding for operating them.<sup>12</sup> But even if its community development efforts were more effective, they would only go a small way toward meeting the demands and needs of the delta’s 7 million inhabitants, whose poverty will persist as long as state institutions remain ineffective. Shell cannot fill the vacuum created by the shortcomings of Nigeria’s government. Moreover, government corruption has also reduced the effectiveness of the federal government’s promises to increase revenue sharing.

Shell’s new environmental policies and expanded community development efforts also have not succeeded in reducing local hostility to the company. In 2004, in order to protect the 185,000 barrels a day that go through its pipeline that crisscross the Niger Delta region, Shell requested the assistance of Nigeria’s paramilitary police. Nicknamed by community residents “kill and go,” the police have been accused of brutality. Furthermore, the efforts of a U.K. company hired by Shell to clean up an oil spill in the Ogoni region disappointed local residents. According to a report in the *Financial Times*, “The earth and reeds in the area are still blackened and a large pool glints with the iridescence of petroleum. A

#### 144 HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP

local farmer complained, ‘When the spill occurred, it destroyed all the crops I had planted.’”<sup>13</sup> Not surprisingly, Shell’s future plans for energy development in Nigeria emphasize offshore investments, to minimize both local grievances and the sabotage of its facilities.

In a 2004 annual report on CSR, the British NGO Christian Aid wrote that notwithstanding Shell’s claims to have changed its ways, its oil spills are still ruining villages and its community development projects are still largely ineffective and divisive.<sup>14</sup> Yet in large measure because no local leader has been able to capture the international media attention accorded Saro-Wiwa, Western media attention and NGO criticisms of Shell’s role in Nigeria have noticeably diminished. And despite Shell’s wide-ranging efforts to behave more responsibly in the Niger Delta, the underlying social and environmental problems that led to protests against Shell clearly persist—graphically revealing some of the limitations of the exercise of corporate virtue in poorly governed countries.

### Extractive Industries and Human Rights

The uproar over Shell’s role in Nigeria, following on the heels of the international outcry over Shell’s plans to jettison the Brent Spar platform in the deep ocean, proved a watershed for the company and for the human rights movement.<sup>15</sup> It also influenced other companies’ policies. British Petroleum, faced with similar accusations about its handling of security problems in Colombia, acknowledged that the defense of human rights was part of its direct legitimate responsibilities.<sup>16</sup> Similarly, several European natural resource companies, including Rio Tinto, Norsk Hydro, Premier Oil, and Statoil, responded to the controversy over Shell’s role in Nigeria by incorporating references to human rights into their business principles or codes of conduct.<sup>17</sup> These statements, which typically refer to the 1948 UN Universal Declaration of Human Rights (UDHR), include commitments to promote transparency and to work cooperatively with local community groups.<sup>18</sup> But many firms remain reluctant to include human rights in their corporate principles on the grounds that doing so would undermine their commitment to political neutrality.

In addition to expressing a stronger commitment to human rights more generally, a number of companies in extractive industries have also undertaken efforts, both individual and collective, to improve their record in the specific areas of security, sustainable development, and corruption. The most important of these initiatives are discussed in the following sections.

### *Balancing Security and Human Rights*

In response to the increase in violence involving security forces responsible for protecting Western investments in developing countries, in December 2000 several extractive companies, along with NGOs and the British and U.S. governments, issued a set of "Voluntary Principles on Security and Human Rights."<sup>19</sup> The purpose of these principles was to guide companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights. The principles focus on three issues: possible human rights abuses in corporate security arrangements, company relations with state security forces, and company relationships with private security forces. They were initially signed by seven American and British based firms—Chevron and Texaco (who signed separately before their merger), Conoco, BP, Shell, Rio Tinto, and Freeport McMoRan—along with a number of prominent NGOs. Subsequently, three other American firms, Newmont Mining, Occidental Petroleum, and ExxonMobil, formally endorsed the principles, as did two Norwegian firms, Statoil and Norsk Hydro, as well as the governments of Norway and the Netherlands.

The Voluntary Principles impose few real obligations, though they do potentially expose their signatories to more intense NGO scrutiny. There are no formal reporting requirements or monitoring mechanisms. Nor are firms obligated to follow any predetermined set of requirements. Among the challenges of implementing the principles is the difficulty of communicating new policies to managers in the field, many of whom have little experience balancing human rights concerns with the need to maintain the security of company operations. A more serious problem is the risk of conflict with host country governments, which may be interested only in maximizing revenues and are hostile to community concerns that would interfere with this objective, especially if they are linked to separatist pressures. Moreover, many of the disputes between central government authority and local interests are long-standing, often stemming from deep-rooted ethnic conflicts. Finally, it is often difficult for Western firms to balance the need to protect company operations and personnel with a commitment to avoid human rights abuses, especially since firms have little leverage over the behavior of local security forces.

Consequently, the impact of these principles on actual corporate practices is uneven. In Indonesia, BP has annexed the Voluntary Principles to its contract for a planned liquefied natural gas facility in Papua New

## 146 HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP

Guinea, and has developed security guidelines for private security contractors based on them.<sup>20</sup> But violent clashes between residents and security personnel protecting foreign natural resource projects continue.<sup>21</sup> In West Papua, Indonesia, where Freeport McMoRan operates one of the world's largest gold mines, the company has to use thousands of policemen and soldiers to pacify locals who have lost tribal lands.<sup>22</sup> A local conflict turned fatal in August 2002, when two Americans and an Indonesian were killed near Freeport McMoRan's Gassberg mine in West Papua, Indonesia. The Indonesian military blamed the killings on separatist forces, but there is speculation that they were arranged by government security forces in order to persuade Freeport to maintain funding levels for state-provided security arrangements. American military advisers arrived in Colombia to train two army brigades to help protect a 500-mile pipeline operated by Occidental Petroleum that has been the frequent target of attacks by guerillas. And in March 2003 a violent pre-election uprising by ethnic Ijaw militants in Nigeria resulted in fatalities and military intervention that forced ChevronTexaco and Shell to shut down their facilities temporarily.

*Promoting Sustainable Development*

In 2000 rising public concern over the environmental and social abuses associated with extractive industry projects in developing countries led a group of natural resources firms, led by Rio Tinto, Western Mining Corporation, and Phelps Dodge, to establish the Mining, Minerals, and Sustainable Development Project. The project is governed by its fifteen corporate members, which include Anglo-American, BHP Billiton, Alcoa, Noranda, Sumitomo, Mitsubishi, Newport Mining, Freeport McMoRan, and Placer Dome, as well as twenty-seven commodity and regional trade and industry associations. In 2003, after extensive consultations, the partners drew up ten principles to guide corporate practices and policies. However, these principles are vague, involving little more than boilerplate commitments to "maintain ethical business practices" and engage in "continual improvements of our environmental performance." More important, although the principles provide for "independently verified reporting requirements," they do not specify how this is to be accomplished or whether or how their findings are to be made public. Moreover, independent monitoring is voluntary. Not surprisingly, the principles have been met with considerable skepticism.<sup>23</sup>

## HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP 147

A few firms, like Shell in the Niger Delta, have gone beyond the general commitments promoted by the Mining, Minerals, and Sustainable Development Project to address local environmental and social concerns directly. In Angola, where ChevronTexaco is investing \$5 billion a year to produce oil, the company is working with the government to develop environmental regulations that will govern its operations. Along with its partners TotalElfFina (Total), ENI-Agip, and the Angolan state-owned oil company, ChevronTexaco has also allocated \$24 million for community development projects over five years.<sup>24</sup> In Papua New Guinea it has worked with the World Wildlife Fund on a large-scale integrated conservation and development project that has avoided many of the negative social and environmental impacts of energy development in fragile ecosystems.<sup>25</sup> For its part, Shell has attempted to apply the lessons it learned in Nigeria to its development of a new gas project in Peru. Shell has signed an agreement with a local NGO to monitor the project's social and environmental impact and supported an elaborate consultation exercise to increase the company's knowledge of local issues.<sup>26</sup>

In Madagascar in 2004, Rio Tinto PLC hired an environmentalist to help redesign a major limonite mine that has long been opposed by British environmental groups. The company has spent eighteen years planning for the mine, trying to fashion a plan that would minimize its social and environmental impacts. However, many environmentalists still oppose the project on the grounds that few local residents will benefit from a major natural resource development project on their lands.<sup>27</sup> It is also generally more difficult for mining companies than for oil companies to voluntarily address environmental and community issues in developing countries because the former operate with much lower profit margins.

In West Papua, New Guinea, BP—which experienced a public relations disaster in 1997, when it used soldiers to guard a Colombian pipeline against Marxist guerrillas—has hired a team of sociologists and consultants to work with local residents to promote community development. The company, which is developing a \$2 billion gas plant, is seeking to show that its “much-trumpeted embrace of corporate social responsibility extends beyond the boardroom and into the boondocks.” However, in light of the long-standing tensions between the central government of Indonesia and the residents of West Papua the *Economist* observed that BP may not be able to expand production in Indonesia without harming its carefully cultivated reputation as a “responsible” oil company. Moreover there are likely to be conflicts between the government’s

## 148 HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP

practice of crony capitalism and the “caring capitalism” to which BP aspires.<sup>28</sup>

ExxonMobil’s \$3.5 billion 660-mile pipeline from the oil fields of Chad to Cameroon may well represent the most ambitious corporate effort to link energy exploration with human rights and community development to date. Responding to criticisms from NGOs, who hoped to turn the project into “Exxon’s Nigeria”—they had placed an ad in the *New York Times* headlined, “Here’s Your Chance to Invest in Corrupt Governments and Get High-Yield Rainforest Destruction at No Extra Cost”—the company agreed to work with NGOs and the World Bank to monitor the government’s use of its royalty payments, essentially assuming the roles of development agency, human rights promoter, and environmental watchdog at the same time.

Under an agreement reached with the government of Chad, 10 percent of oil revenues will be held in trust, 80 percent will be earmarked for education, health, and rural development, and 5 percent will go back to the oil-producing regions. All expenditures will be supervised by a nine-person committee that includes representatives of four NGOs. In addition, 145 meetings between Exxon and several NGOs resulted in sixty changes in the pipeline’s route as well as an agreement to create an environmental foundation and two national parks. The plan is groundbreaking and could influence other multinationals’ operations.<sup>29</sup> But it has proven both expensive and time-consuming; and it is unclear if its model can or will be adopted elsewhere.

Spending on environmental and social projects, in addition to helping soften NGO criticisms and improve a company’s international reputation, can be regarded as an extension of company investments in security. Yet such programs face numerous challenges. One is defining the limits of corporate responsibility. When companies contribute to health care or education projects in communities around their operations, they risk creating conflict between villages that benefit from these programs and those that do not. Moreover, such programs may raise local expectations about services or other benefits that a company is unable or unwilling to provide. In fact, the more companies do, the more they are expected to do—in some cases by local governments who then use a company’s programs as an excuse to cut back on their own social expenditures. Companies must also address how to deal with a community’s heightened expectations after they depart—as virtually all do when their resource development projects are completed. And, as Shell’s experience in the Niger Delta sug-

gests, even the most extensive and well-intentioned community development efforts are unlikely to adequately address local grievances, which tend to stem from long-standing conflicts between local communities and the central government as well as government corruption and repression.

As Bennett Freeman, the former U.S. deputy assistant secretary of state who developed the Voluntary Principles and who is now managing director for corporate responsibility for the public relations firm Burson-Marsteller, cautions, although multinational corporations can help, they shouldn't be viewed as the solution to all of the world's social and environmental problems; he warns that they are "stopgap measures" that are likely to be abandoned once a company departs.<sup>30</sup> John Kline, a professor in the School of Foreign Service at Georgetown University, sounds a similar note of caution: "Often, if you take [a community development program] as an isolated case, it seems rational and beneficial, but it's hard to project some of these things too far into the future—and companies may lack experience in areas that really have political functions."<sup>31</sup>

### *Combating Corruption*

A third dimension of the efforts of major foreign investors to support human rights has focused on promoting transparency in the relations between a company and its host government. In 2002 a worldwide coalition of 200 NGOs began urging governments and businesses to endorse yet another voluntary agreement, "Publish What You Pay" (PWYP). The purpose of this code is to put pressure on reputationally sensitive oil, gas, and mining firms to prove that they are not bribing corrupt officials or diverting funds that should be used for local development purposes.<sup>32</sup> A few extractive firms have begun to publish their payments unilaterally, including BP and Shell. But when BP promised transparency around its payments to the government in Angola, the latter threatened to expel the company and BP was forced to back down.<sup>33</sup> Much of the success of PWYP is dependent on that of a parallel public effort, the Extractive Industries Transparency Initiative, whose purpose is to make host-country governments publicly accountable for royalties they receive from multinational companies. But at this writing in 2005, only ten countries have agreed to abide by its principles. While several major corporations involved in construction, energy, metals, and mining have signed a "zero-tolerance" pact against paying bribes and a number of oil companies have adopted such a policy on their own, there are no mechanisms for monitoring or

**150 HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP**

enforcement.<sup>34</sup> Much of the impact of these policies will depend on the effectiveness of other international efforts to reduce public sector corruption.

### **Investment Decisions and Human Rights**

While firms in extractive industries are among the most visible targets of human rights activists, companies in a number of other sectors are also under growing pressure to incorporate human rights considerations into their investment and lending decisions. Some of these pressures have led businesses to curtail their activities in countries that have become the focus of public protest.

#### *Pressure to Divest: From South Africa to Burma*

CSR and human rights have long focused their attention on practices in individual countries. During the 1970s and 1980s, many NGOs in both the United States and Britain urged companies to sever their economic ties with the Republic of South Africa, and many did so.<sup>35</sup> In addition, corporate withdrawals helped prompt the American government to impose trade and investment restrictions. Since the early 1990s activists have mounted a similar campaign against foreign firms with investments in Burma (which adopted the name Myanmar in 1989).<sup>36</sup> Controlled by a military junta since the early 1960s, the government of Burma became increasingly repressive during the 1990s. The generals voided the results of a national election, imprisoned prodemocracy activist Aung San Suu Kyi (who won the Nobel peace prize in 1991), and forcibly conscripted hundreds of thousands of Burmese, including women and children, to work on construction projects, often with little or no pay. At the same time, foreign investment grew steadily, increasing more than fourfold during the first half of the 1990s. By the middle of the decade, approximately 325 foreign firms had business links to Burma through direct investments, subsidiaries, or partnerships—in some cases with the Burmese military, whose holding company is the country's largest investor.

The largest foreign investments in Burma were for the construction of two natural gas pipelines to transport gas from the Andaman Sea, which contained an estimated 5 million cubic feet of reserves. The result of a joint venture among the national energy companies of Burma and Thailand, the U.S. firm Unocal, and the French firm Total, the \$1.2 billion project began in 1996 and was completed two years later. Production began in 2000.

## HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP 151

Unocal has invested \$340 million in the pipeline, making it the largest American investor in Burma. Aware from the outset of the controversy raised by this investment, Unocal cosponsored a three-year, \$6 million socioeconomic development program and employed 2,000 workers at above-market wages to construct the thirty-nine miles of pipeline that ran through Burma.

Nevertheless, the pipeline project has been widely criticized by human rights, environmental, and consumer organizations. In 1995, after a survey team was attacked, the Burmese government sent large numbers of troops to the area. According to a UN official, "arbitrary killings, beatings, rapes and confiscation of property . . . [were] most commonly occurring in the border areas where the Army [was] engaged in military operations or regional development projects." The pipeline's opponents claimed that several villages had been destroyed or relocated to clear the pipeline route and charged that a railway built to transport security troops had inflicted widespread environmental damage and employed forced labor. Environmental groups predicted that the onshore pipeline would result in widespread environmental destruction of wetlands as well as to the mangrove ecosystems, and expressed concern about the lack of adequate environmental controls by the Burmese government on the pipeline's operations.<sup>37</sup>

In the early 1990s a group of students joined forces with Global Exchange, an international human rights organization, to form the Free Burma Coalition. Modeled on the anti-apartheid movement, one of its primary objectives was to weaken the military government by cutting off foreign investment. By early 1997 the coalition had achieved considerable success. It was at least partially responsible for the decision of Federated Department Stores, Disney, Eddie Bauer, Levi Strauss, Liz Claiborne, Reebok, and Sears to end their business ties in Burma. They were subsequently joined by Apple Computer, Eastman Kodak, Hewlett-Packard, General Electric, and PepsiCo—following a nationwide boycott of Pepsi and the firm's fast-food franchises, Taco Bell and Pizza Hut.<sup>38</sup> More significantly, both Texaco and Arco, which had been granted exploration concessions for a natural gas project, withdrew their proposed investments in response to consumer and investor pressures, as did Premier Oil, UK.

Unocal, not surprisingly, remains the primary target of the Free Burma Coalition. With active chapters on more than one hundred college campuses and in more than twenty-five countries, the coalition has sponsored consumer boycotts and letter-writing campaigns, urging its members to send their mutilated gas credit cards to Unocal's CEO. It also filed several

## 152 HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP

shareholder resolutions, one of which called on Unocal to adopt the International Labor Organization's Code of Conduct on Workplace Human Rights. In 2002 this resolution was supported by a record 31 percent of the shares voted.

Employing a novel tactic, the coalition filed a lawsuit under the hitherto obscure 1789 Alien Tort Claims Act on behalf of Burmese villagers, claiming they had been harmed when the army of Burma forced them to clear jungle for the company's natural gas pipeline and that companies could be held "vicariously liable" for the damage they caused.<sup>39</sup> This lawsuit was settled in December 2004, when Unocal agreed to pay an unspecified amount to the plaintiffs and to provide extra funds for development in areas surrounding the pipelines.<sup>40</sup> A similar suit is pending against Total. Both companies, however, insist that no forced labor went into the pipeline's construction and that they should not be held responsible for the conduct of the Burmese military.

It is testimony to the effectiveness of American public pressures for divestment, including a consumer boycott, that Unocal sold off its Union 76 service stations and consumer products divisions.<sup>41</sup> In its 1994 annual report, the company stated that it "no longer considers itself as a U.S. company," and in April 1997 it opened what it termed a "twin corporate headquarters in Malaysia" to which it posted the company's president and several senior executives.<sup>42</sup> Unocal's board of directors has periodically reviewed the project's social impact and continues to argue that it "represents a significant opportunity to bring sustainable, long-term benefits to the people."<sup>43</sup> Like Total, it has indicated that it plans to remain in Burma. Unocal has, however, responded to activists and shareholders by hiring a director of corporate responsibility, establishing an internal corporate responsibility steering team, and issuing a human rights report.

The pattern of corporate responses to pressures for divestment is similar in Burma and South Africa. In the latter there was considerable divestment by consumer goods and manufacturing companies, but none by firms involved in natural resource extraction. Moreover, a number of the American firms that left South Africa found it difficult to regain their market share after sanctions were lifted following the end of apartheid in 1993. Their competitive disadvantage vis-à-vis those firms who remained suggests that, at least in this case, corporate virtue was not rewarded. It remains to be seen whether this will also prove true in Burma, where democracy remains elusive. The country's military rulers appear indifferent

## HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP 153

to the economic losses caused by the withdrawal of some foreign investors and the restrictions of foreign trade and investment.

Moreover, not all firms are equally vulnerable to domestic pressures to change their business practices, especially when their policies are voluntary. Non-U.S.-headquartered companies have been and remain the major foreign investors in Burma. (In 1990 less than one-fifth of the foreign firms in Burma were headquartered in the United States.) One of the two controversial natural gas pipeline projects, worth \$1.2 billion, is managed by the French firm TotalFina Elf, which has a 31 percent equity interest. Mitsubishi is constructing a \$70 million storage facility as part of the natural gas project, which it will then lease for fifteen years. Both British American Tobacco and the courier DHL, a subsidiary of Germany's Deutsche Post, continue to do business in Burma, as do Mazda, Sony, Suzuki, Samsung, Daewoo, and Hyundai.<sup>44</sup> After Premier Oil of the United Kingdom sold its stake in a pipeline project following a sustained public divestment campaign, its share was purchased by Malaysia's state-owned energy firm.<sup>45</sup>

### *Beyond Burma*

A number of firms have become more discriminating in their sourcing and investment decisions. According to a survey conducted by Business for Social Responsibility in 2002, many multinational firms now have lists of countries that are off-limits to sourcing, with over half employing country selection criteria that include social indicators.<sup>46</sup> While Burma showed up most frequently on the lists of proscribed countries, thirty other countries also appeared on at least one corporate list, notably Sudan, the only other country from which firms have recently found themselves pressured to divest.<sup>47</sup>

Another survey, conducted by the United Kingdom's Ashridge Centre for Business and Society, reported that human rights issues had caused 36 percent of the biggest 500 companies to abandon a proposed investment project and 19 percent to disinvest from a country.<sup>48</sup> (However, only fifty-two of the Fortune Global 500 responded to this survey, virtually all of which were based in Europe or the United States.) Similarly, a World Bank survey of 107 companies from the extractive, agribusiness, and manufacturing sectors found that 36 percent of those responding had withdrawn from a country because of CSR concerns. In the extractive sector a majority reported that they have chosen not to enter a country because of CSR

## 154 HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP

concerns, but far fewer reported withdrawing once operations have been established. As a World Bank report explained: “To a greater extent than other sectors, the extractive sector faces high up-front capital expenditures, long-term horizons for return on investment, and steep political and social learning curves when entering each new country.”<sup>49</sup>

The experiences of Levi Strauss reflect some of the difficulties of balancing investment and human rights considerations. In 1993, when Levi Strauss implemented its “Guidelines for Country Selection” it decided to phase out production in China.<sup>50</sup> According to Levi Strauss’s manager of communications, the majority of participants in the company’s China Policy Group had recommended staying in China, but senior managers did not think the potential benefits outweighed the risks to brand image, corporate reputation, and long-term commercial interests.<sup>51</sup> As the only firm ever to restrict its investments in China on human rights grounds, the company’s decision attracted considerable publicity and was widely applauded by the human rights community.<sup>52</sup>

The company’s production volume from China initially decreased by about 70 percent, from 2.6 million units to 800,000. But it then made no further cuts. Five years later, in 1998, faced with declining sales, it quietly reversed its policy. The company officially claimed that the human rights situation in China had improved, thus making it possible to find responsible suppliers. But according to Peter Jacobi, the company’s president, commercial considerations drove Levi Strauss’s decision. “[The] company had no choice but to engage itself more fully in China or risk losing out in the competitive game of the global apparel business,” he explained, adding, “You’re nowhere in Asia without being in China.”<sup>53</sup>

### *Lending Decisions*

Financial institutions have also found themselves under pressure to incorporate human rights concerns into their corporate strategy. Bank-Track, an alliance of fifteen organizations, including Friends of the Earth and the Rainforest Action Network, has attempted to make banks more accountable for the social consequences of their lending decisions. According to a study by KPMG and F&C Asset Management, a European investment manager with \$217 billion under management, banks “are likely to continue to be drawn into the human rights debate, if not willingly then by default,” because they do not want to risk being associated with human rights abuses committed by their customers.<sup>54</sup>

## HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP 155

In 2003, ten major financial institutions agreed to adopt principles developed by the World Bank's International Finance Corporation for lending to infrastructure projects in developing countries.<sup>55</sup> Labeled the Equator Principles, they established environmental and social impact standards for project financing, ranging from environmental assessment and natural habitat protection to the protection of indigenous peoples and child labor. Borrowers that fail to comply with the loan conditions can be held in default.<sup>56</sup>

To date, the principles have been endorsed by twenty-eight financial institutions in fourteen countries who are collectively responsible for more than 80 percent of international project financing. Signatories include the Bank of America and Citicorp in the United States, as well as financial institutions in Germany, France, Great Britain, Australia, the Netherlands, Switzerland, Brazil, and Japan. The firms' motivations for joining have varied. Some were concerned about risk to their reputation; others, such as Citibank, were under pressure from activists who had encouraged consumers to cut up their bank credit cards; and others were seeking to position themselves as leaders in sustainable development. In some cases banks agreed to the principles in order to restore their reputations following a series of financial scandals.<sup>57</sup>

Under the principles, all lending projects are grouped into one of three categories, depending on the environmental and social risks associated with them. For the riskiest projects, such as dams and power plants, the banks agreed to require environmental impact assessments, public consultations, and increased transparency from the borrower. The principles were consistent with some institutions' existing practices and strengthened others'. The signatory banks hope the standards become industry norms so that they do not lose customers to competitors that are unwilling to uphold them.

Again, though, these principles have no enforcement mechanism—other than public and possibly peer pressure—or disclosure requirements, though Citibank and some others have agreed to report on their progress in implementing the agreement's provisions. When the first sixteen financial signatories met with representatives of thirteen NGOs in London in June 2004, six banks described in general terms what they had done to implement the principles and how their approach to project financing had changed since their adoption. Citibank, for example, has committed itself to work with the Rainforest Action Network to protect ecologically or socially fragile areas, and both HSBC and the Bank of America have established new guidelines for loans that affect forestry.

## 156 HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP

However, according to BankTrack, “Signatories are still funding unsustainable projects and . . . it is unclear to what extent banks are actually complying with the principles.” For example, BankTrack has criticized Equator banks for funding the Baku-Tbilisi-Ceylon pipeline because it violated “ethical, legal and human rights standards.”<sup>58</sup> A report issued by a consortium of global NGOs on the principles’ first anniversary criticized signatory banks for their lack of transparency in implementing the “Triple P”: the balancing of people, planets, and profits.<sup>59</sup> NGO officials believe progress is being made, but that there is still a long way to go.<sup>60</sup> However, NGO priorities are not necessarily the same as those of developing country governments. For example, many NGOs have opposed virtually every proposal to finance new dam construction in developing countries and are also against any lending for oil and gas projects. Yet many of these projects may make positive contributions to local and national development.<sup>61</sup> As in the case of pressures to end child labor, not all NGO demands on corporations create net social benefits.

### Toward Global Norms of Corporate Citizenship?

The most ambitious effort to develop norms for global corporations is the UN-sponsored Global Compact.<sup>62</sup> The idea for a global compact was first proposed by UN Secretary-General Kofi Annan in a speech to the World Economic Forum in January 1999. Officially launched two years later, it represents the first effort of the UN to work with business: its goal was to fill “the governance void of the global economy” and “humanize the globalization process.”<sup>63</sup> Its strategy is to identify a set of core principles covering human and workplace rights, corruption, and environmental responsibility and then to encourage companies to incorporate them into their global business operations.

The compact is a code of conduct but contains no certification standards. The compact “consider(s) companies to be participants engaged in a multi-stakeholder network, not members of a club that have met some performance standard to gain entry.”<sup>64</sup> By signing on to the compact, a company publicly commits to support its principles and to attempt to abide by them. The compact had originally required signatory companies to submit examples of how they had adopted its principles, but this requirement was discontinued at the end of 2002. It now requires companies to publish their progress in living up to the compact’s principles in their annual financial reports or in separate CSR reports, which are then

## HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP 157

accessible through the UN's web portal. The compact also has begun to develop plans for "delisting" inactive companies.

With 1,366 corporate participants, the Global Compact is the largest voluntary citizenship network, far exceeding, for example, the Global Reporting Initiative (387 participants) or SA8000 (353 participants).<sup>65</sup> Its local activities involve an additional 1,000 firms. Nearly half of the compact's membership are European firms, but only 8 percent are based in North America. Despite its considerable efforts to recruit American companies, they have not joined in large numbers. This appears to be due to three factors: fear of legal liabilities related to endorsing the compact's principles, concern about the implications of the compact's labor rights provisions, and a lower opinion of the value of the UN. In contrast, the compact has attracted substantial participation from developing countries: 147 signatories from the Philippines, 95 from India, 83 from Brazil, and 52 from Panama.

According to Georg Kell, the compact's executive director, the compact has attracted four kinds of firms. First are those companies that have been forced to adopt CSR policies owing to pressures from activists and now want to use the compact to encourage their competitors to adopt similar policies. Second are firms from developing countries who want to learn more about the potential for private-public initiatives. A third group of firms are interested in exploring future public-private initiatives, often with the assistance of international organizations. In the fourth category are those with executives "who are genuinely interested in making the world a better place" and want to encourage other firms to do likewise.<sup>66</sup>

The Global Compact has adopted a learning approach to redefining global CSR. To improve corporate practices and policies it sponsors learning forums where academics, executives, and NGO representatives discuss both the opportunities and challenges of global CSR. But 86 percent of the compact's signatories have not attended any international meeting, and six out of seven participants have yet to make any submissions to its online learning forum.<sup>67</sup> However, a recent survey reports that nearly half of the signatory companies have changed some policies in relation to the compact's ten principles and 34 percent cite the Global Compact as a significant driver of these changes. According to one manager, "Without the Compact, many projects would be happening, but only at a regional or local level. The Compact 'upsized' the issues and made them global." More than half of the survey respondents have entered into local part-

## 158 HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP

nership projects, incorporated human rights principles into company policies, or revised human resources policies to eliminate discrimination.<sup>68</sup>

For firms based in OECD countries, the compact is best understood as signaling their continued engagement with corporate citizenship, rather than a markedly new commitment, though it does appear to have promoted an increase in partnership projects between companies and international development agencies.<sup>69</sup> Its most likely impact will be on the human rights practices of firms from developing countries, many of whom have become participants in a global CSR network for the first time. The compact's impact on the supply of global corporate virtue has been "incremental," and some NGOs view companies' participation in the compact as "a defensive response by trans-national corporations to public pressure. By establishing this blue chip minimalism, they hope to avoid something that would lead to a more serious (and effective) means of accountability/regulation at the global level."<sup>70</sup>

Despite such critiques, the UN Global Compact's broad membership suggests that business norms regarding social responsibility are taking root beyond just the United States and Europe. Some firms in South Africa, Brazil, Mexico, Malaysia, and Costa Rica, among others, have begun to develop their own CSR programs.<sup>71</sup> Nonetheless, only a small portion of the tens of thousands of global firms have joined the compact.

### Assessing the Business Case for Human Rights

A report by Amnesty International warns companies: "The increasing scrutiny of corporate behavior by the media, consumer groups, community organizations, local and international nongovernmental organizations and the immediacy of global communication leave companies with little, if any, hiding place."<sup>72</sup> But not all firms are equally vulnerable to public disapproval: witness the large number of global firms that have remained in Burma or that continue to be associated with human rights violations. Many extractive industry firms have no visible brand; they do not sell directly to consumers and many are headquartered in countries where civic pressures are minimal or nonexistent. When the Canadian oil company Talisman, which had a major concession in Sudan, withdrew after activist campaigns caused its stock price to plunge, the largest foreign investors in this country became firms from China, Malaysia, and India, where NGO pressures are much weaker.<sup>73</sup>

There is a similar international response to calls for divestment from Burma, allegations of human rights abuses in other countries, and pressure to adopt codes of conduct and transparency. U.S. and British firms have been the most responsive to pressures in their home countries, followed by a few other European firms, but trailed by Asian corporations. Consider, for example, that "the vast majority of companies listed on the CAC 40 (the main stock exchange index on the French Bourse) . . . have subsidiaries or other commercial activities in many countries directly targeted by human rights activists."<sup>74</sup> When the *Financial Times* Stock Exchange launched its ethical index in 2001, it excluded ten French firms on the basis of human rights criteria: 25 percent of the CAC 40. As one executive from the French firm Total explained in a 1997 interview inquiring about the firm's investments in Iraq, Iran, and Libya: "It's just that the Lord put the reserves in places that are a bit hot on political grounds. We're a bit more relaxed about such countries than some of our competitors. . . . We're certainly more comfortable than some other European oil companies. Only some Asian companies feel as free to invest as we do."<sup>75</sup>

Moreover, as the experience of Levi Strauss in China illustrates, companies can be financially disadvantaged by voluntary restrictions on where they do business. No global manufacturing firm can afford not to produce or sell in China as a matter of principle, and none have. Indeed, Burma and Sudan are the only countries from which many Western firms have withdrawn their investments in response to activists' demands. Yet while Sudan's human rights abuses are unique, corporate investments in natural resource development continue to expand in many countries whose human rights practices are comparable to those of Burma, such as the Asian nations of the former Soviet Union. Burma is also a small, poor country with a limited market for consumer goods, and there is no shortage of other countries to which firms can outsource low-wage manufacturing. And while an individual oil company can withdraw from a region, or decline to do business in a particular country, the number of places it can exclude is limited by the geographic location of energy resources.

The failure of companies to take human rights issues into account in making investment decisions or managing business operations poses another business risk, namely that local violence can force withdrawal from a project. Like Shell, in 1999 Texaco was forced by community protests to halt its operations in the Niger Delta, and two years later ExxonMobil shut down production at a liquefied natural gas facility in

## 160 HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP

Indonesia for several months after it was attacked by armed separatists.<sup>76</sup> These business risks have prompted NGOs to lobby pension funds to consider development and human rights issues in their investment decisions.

Despite these risks, there is little evidence that investors believe they will have a material impact on financial performance. Either the business risks of investments in repressive, corrupt, or unstable regimes or regions are not significant, or whatever risks some firms face are outweighed by the benefits of these investments. In short, while there may be a business case for more responsible investment or community relations policies, investors and many firms have yet to appreciate it:

The reality is that many of the advantages of a good human rights record may not manifest themselves in the short term. . . . The costs (e.g. of developing and implementing human rights management systems) are incurred in the short term, [while] the benefits may be long term, and are, in many cases, likely to be extremely difficult to measure in financial terms. . . . Many companies . . . frequently see human rights as being at odds with short-term business requirements.”<sup>77</sup>

## Conclusion

Multinational firms face major challenges in developing and implementing human rights policies that extend beyond the employees of their subcontractors. In many respects they are in uncharted territory, under pressure to assume obligations that have historically been the responsibilities of governments or international institutions. A number of firms and banks have taken human rights issues into account in their investment decisions, others have taken steps to be more responsible corporate citizens abroad, and several banks have adopted social criteria for lending policies. But substantive changes remain limited: many standards for corporate human rights practices are ill-defined, the monitoring of particular business investments tends to be media-driven, and not all global firms face similar domestic pressure to act more virtuously.

Global firms that want to balance respect for human rights with business imperatives have few easy choices. Geir Westgaard, vice president for country analysis and social responsibility at Statoil, observes that globalization means that “what happens in an isolated area of a jungle becomes an international issue.”<sup>78</sup> This is a lesson that Shell, BP, Premier Oil, ExxonMobil, Newmont Mining, Rio Tinto, PepsiCo, and Citibank, among

## HUMAN RIGHTS AND GLOBAL CORPORATE CITIZENSHIP 161

others, have learned painfully. But even the most proactive investment or lending policies may not be able to avoid violence or human rights controversies in host countries, especially since local conflicts over foreign investment are often rooted in long-standing regional and ethnic tensions. And more responsible corporate practices may fail if the host government is itself repressive or corrupt or hostile or indifferent to environmental protection and community development. It does little good for a company to commit to a policy of not paying bribes if the host country government demands them. Moreover, while more irresponsible human rights practices can threaten a firm's international reputation, they can also restrict where it makes investments and loans, placing it at a competitive disadvantage if its competitors are less vulnerable to NGO and public criticism.

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# **זכויות האדם ביחסים הבין-לאומיים**

**מקרה  
מאמרים בעברית**

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# **תוכן העניינים**

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## **פרק 1**

# **המסגרת המחברית-מושגית**

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**פרק VII: זכויות האדם במשפט הבינלאומי |**

## **ארנה בן- Naphtali ויובל שני**

### **\* 3.3. ההגנה על זכויות אדם במגילת האו"ם**

המסמך הבינלאומי החשוב הראשון שבו יש הפנייה מפורשת ומשמעותית לנושא זכויות האדם הננו מגילת האו"ם שנערכה בשנת 1945. מנשכי המגילה, אשר פעלו תחת צלם של מאורעות מלחמת העולם השנייה, היו מודעים לצורך להשתית את הסדר העולמי החדש ואת הארגון הבינלאומי החדש – ארגון האומות המאוחדות – על בסיס מחויבות לעקרונות של צדק ומוסר, שהוו אנטיתזה לשיקולי ה"ריאיל פוליטיק" שמשלו בכיפה בתקופות מוקדמות יותר. למרות זאת, נציגי המדינות הגדולות התנגדו ליצירתם של מנגנונים משפטיים אשר יכרסמו כرسום-יתר בריבונותם וככפיפו את מערכת היחסים בין אורהיהם לפיקוח בינלאומי הדוק. התוצאה הסופית הייתה הכללתן במגילת האו"ם של מספר הראות, בעלות אופי הצהרתי ולא אופרטיבי, הנוגעות לצורך הגן על זכויות אדם. כך, למשל, המבוא למגילה קובע כי המדיינות החברות נחושות – "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person [and] in the equal rights of men and women"; וסעיף 1(3) למגילה קובע כי אחת ממטרות ארגון האו"ם הינה להשיג

**ו ארנה בונרפלט ליובל שטי**

שיתוף פעולה בקידום כבוד זכויות אדם וחירותים יסוד לכל, ללא אפליה<sup>42</sup>. באופן ספציפי יותר, המדיניות החברות התחייבו בסעיפים 55–56 למגילה לשתף פעולה עם הארגון לשם "universal respect for, and observance of, human rights and fundamental freedoms: freedoms for all without distinction as to race, sex, language, or religion"<sup>43</sup>.zelfstandig, הוראות אלו הינן נטולות תוכן אופרטיבי, שכן הן אינן מגדירות מהן זכויות האדם או מהן דרכי הפעולה הקונקרטיות שעל המדיניות לאמץ על מנת לקדם את ההכרה בזכויות האדם. עם זאת, במרוצת השנים התבררה חשיבותם של סעיפים המגילה העוסקים בנושא זכויות האדם.ראשית, לשון המגילה שימושה בסיס משפטית להכרה בשתי זכויות אדם ספציפיות – עקרון השוויון והזכות להגדרה עצמית<sup>44</sup>. שנית, העובדה שהמגילה הסמוכה את ארגון האו"ם לפועל לקידום ההגנה על זכויות אדם אפשרה לארגון להציג משאים לשם כך ולהקים גופים שונים העוסקים בפיתוח אכיפה דינית זכויות האדם. פעילות זו של האו"ם תרמה תרומה חשובה להתפתחות התחום.שלישית, ההפניה במגילה – אשר הינה אמונה בינלאומית חשובה ביותר (בעלת מעמד שניית לתרבות כמעמד מעין חוקתי) – לצורך לקדם את ההגנה על זכויות האדם בכללים בינלאומיים המשמשת את הקרקע מתחת לטענתן של מדינות רבות כי כבוד זכויות האדם הננו עניין פנימי-מדיני מובהק אשר אינו כפוף להסדרה ברמה הבינלאומית<sup>45</sup>. מגילת האו"ם היוותה אפוא שלב חשוב בבנاءם ענף זכויות האדם ובוניתה דוקטרינת כדורי הביליארד שנזכרה לעיל.

**3.4. ההכרזה האוניברסלית בדבר זכויות האדם**

שלב חשוב נוסף בהתפתחות דיני זכויות האדם במשפט הבינלאומי הנה אימוץ ההכרזה האוניברסלית בדבר זכויות האדם על ידי העצרת הכללית של האו"ם ביום 10 בדצמבר 1948<sup>46</sup>. בהכרזה נעשה ניסיון להגדיר את המונח זכויות אדם ולפרקן לזכויות קונקרטיות. אכן, סעיפים 3–27 להכרזה כוללים רשימה ארוכה יחסית של זכויות, המהווה, עד היום, את ליבתה הנורמטטיבית של תנועת זכויות האדם. בין הזכויות הקבועות בהכרזה ניתן למצוא, בין היתר, את הזכות לחיים, לחירות, לשווון, להליך משפטי הוגן, לפרטיות, לחני משפחה, לקניין, להכרה כאישיות משפטית, למקלט מדיני, לאורחות, להשתתפות בחיים הציבוריים, לביטחון סוציאלי, לעובודה ולתנאי עבודה ראויים, לרמות חיים נאותה, לבירות, לחינוך, לחני תרבות; את חופש התנועה, המחשבה, הדת והמצון, הביטוי, האספה וההתגדות; ואת איסור העבדות והעינויים. רשות זכויות זו מהוות אפוא שלב חשוב בكونקרטייזציה של הביטויי "זכויות האדם" המופיע במגילת האו"ם. כפי שנראה בהמשך, יש לייחס חשיבות רבה להחלטתם של מנשי ההחלטה לכלול ברשימה הזכויות בצד

Charter of the United Nations, 26 June 1945, art. 1(3), 59 Stat. 1031 (hereinafter — UN Charter)

ראו למשל: UN Charter, art. 1(2), 55

השווא: Nationality Decrees Issued in Morocco and Tunis, 1923 P. C.I.J. (Ser. B), No. 4, p. 24.

ההכרזה האוניברסלית, לעיל העירה 6. יום ה-10 בדצמבר מצוין מאז ביום זכויות האדם הבינלאומי.

**פרק VII: זכויות האדם במשפט הבינלאומי |**

זכויות "דור ראשון" (זכויות אזרחיות-מדיניות) גם זכויות "דור שני" (זכויות כלכליות, חברתיות ותרבותיות). בכך תרמה ההכרזה לשילוב קבוצת הזכויות האחרונה בקורפוס הכללי של דיני זכויות האדם הבינלאומיים.

פרט לחשיבותה של רשות הזכויות המופיעה בהכרזה האוניברסלית, יש בהכרזה הוראות חשובות נוספות המגדירות את העקרונות המרכזיים של דיני זכויות האדם במשפט הבינלאומי. כפי שכבר צוין לעיל, סעיפים 1-2 להכרזה מדגישים את האופי האוניברסלי של זכויות האדם ואת היותן זכויות בלתי ניתנות לשילילה. קביעות אלו מייצגות ניסיון לאמץ אל תוך הדין הבינלאומי היפותיבי תפיסה אידיאולוגית בעלת אופי מוחלט המבוססת על משפט הטבע ועל תורות מוסר פילוסופיות. הסדר חשוב אחד קיים בסעיף 28 הקשור בין יישום זכויות האדם לבין קיומה של מסגרת חברתית-פוליטית. הסדר זה מדגיש את מרכזיות מוסד המדינה בשיח זכויות האדם במשפט הבינלאומי, כמגן העיקרי על זכויות האדם. סעיף 29(1) להכרזה מציג את הרעיון ולפיו מצד זכויות האדם יש לפרט חוכות כלפי הקהילה שבה הוא חי. עם זאת, הסעיף גמנע מליזור ויקה בין הזכויות לחוכות (ואכן מקובל כיום לשולץ ויקה כזו)<sup>47</sup>. לבסוף, יש לציין כי סעיף 29(2) כולל "פסקת הגבלה" המחייבת יצירת איזון בין זכויות האדם של כל פרט לבין זכויות האדם של הפרטאים האחרים ואינטדרסים חברתיים כלליים:

"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

אשר על כן, הגבלת זכויות אדם תותר, בכלל, אם היא קבועה בדיין ונחוצה לשם הגשת תכלית רואה - הגנה על זכויות האדם של פרטיים אחרים או על אינטרס כללי שראוי להגן עליו בחברה דמוקרטית. מובן שקיימת קרבה ריעונית מובהקת בין "פסקת הגבלה" זו לבין פסקאות הגבלת חוקות פנים-מדיניות, לרבות בחוק-היסוד בנושא זכויות האדם שנתקבלו בישראל בשנת 1992<sup>48</sup>.

על אף חשיבותה התיורטית של ההכרזה האוניברסלית, היו מעמדה המשפטי והאפשרות לעשות בה שימוש אופרטיבי מוטלים בספק במשך שנים רבות. אי- בהירות זו נבעה מכמה גורמים: כאמור, ההכרזה אומצה על ידי העצמת הכללית של האו"ם. דא עקא, שהעצרת אינה מוסמכת לחוקק - היינו ליצור נורמות מהיבשות, וחלוקתיה הינן בגדר המלצה בלבד. בנוסף על כן, לשון ההכרזה עצמה מחייבת על כוונת המנסחים ליצור סטנדרט של דין רצוי, שיש לשאוף אליו בהדרגה<sup>49</sup>, ולא דין מצוי בעל תחוללה מידית. גם הימנעות המנסחים

B. Saul "In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities" 32 *Colum. Human Rights L. Rev.* (2001) 565 46

ס' 8 לחוק-היסוד: כבוד האדם וחירותו; ס' 4 לחוק-היסוד: חופש העיסוק. השוו: Canadian Charter of Rights and Freedoms, art. 1 47

UDHR, preamble ("The General Assembly proclaims this Universal Declaration of 48

I. אRNA ב-רשותם וובל שע

מלכול הוראות בנוגע לדרכי האכיפה של ההכרזה מצביעה על כוונה שלא להעניק למסמכ תוקף מחייב. לבסוף, הזכיות עצמן הוגדרו בהכרזה, על פי רוב בצורה כללית ביותר, אשר הותירה בידי המדינות מתוך פרשנות כמעט בלתי מוגבל.

עם זאת, במרוצת השנים הלכה והتبססה התווה שלפיה יש לדאות בהכרזה האוניברסלית כמשמעות ברובה הוראות של דין מנהגי<sup>49</sup>. עמדה מבוססת על הטיעונים הבאים: ראשית, ההכרזה נתקבלת בשעתו ברוב עצום בעצמת הכללית, ולא הטענויות (48 מדינות) הצבעו בכך, ושמונה מדינות – שש מדינות הגוש הקומוניסטי, דרום אפריקה וערב הסעודית – נמנעו בעת הצבעה). שנית, החלטות או"ם רבות מאוחרות יותר, אשר נתקבלו אף הן ברוב עצום, שבו והצהירו על מחויבות הקהילה הבינלאומית לסטנדרטים המנוויים בהכרזה האוניברסלית<sup>50</sup>. ה גם שהחלטות או"ם איןין יוצרות כשלעצמה דין מחייב, מקובל לדאות בשורה של החלטות המתකלות ברוב גדול, כולל מיגון מדינות מאוזרים גיאוגרפיים ומגושים פוליטיים שונים, כדי לקיומו של קונצנזוס ביןלאומי שעליו ניתן לבסס דין מנהגי<sup>51</sup>. שלישייתו, רוב הוראות ההכרזה נכללו בסופו של דבר באמנותו ביןלאומיות שאליהן הטריפו רוב מדינות העולם. גם בכך יש משום הצהרה על כוונה להנוג על פי מירביה הנורמות הכלולות בהכרזה ואינדיקציה לקיומה של תחושת מחויבות (opinion juris) מצד מדינות רבות בנוגע למעמדן המחייב של הזכיות. רבייעית, מדינות רבות משתמשות בהכרזה האוניברסלית כאמת מידה לכבוד דיני זכויות האדם, הן בדיון הפנימי שלתן<sup>52</sup> והן ביחסיהן עם מדינות אחרות<sup>53</sup>. כל אלו הנם אינדיקטוריים לקיומם של יסודות המנגנון הבינלאומי – פרקטיקה ותחושת מחויבות – בנוגע לרוב הזכיות (הכוונה בעיקר לזכויות המנוויות באמנות זכויות האדם השונות ולזכויות שביחס אליהן אין קבוצה ממשמעותית של מדינות מתנגדת לתוקפן המחייב).

Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition  
("and observance")

ליון, רואו: H. Hannum "The Status of the Universal Declaration of Human Rights in 49

National and International Law" 25 *Ga. J. Int' & Comp. L.* (1995–1996)

ראו למשל: דאו למשל: Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/24 50

(Part I), p. 20 (1993); United Nations Millennium Declaration, G.A. Res. 55/2, U.N.

.GAOR, 55th Sess., Supp. No. 49, p. 4, U.N. Doc. A/55/49 (2000)

לديון במעמדן של החלטות או"ם, רואו את הפרק בנושא "מקורות המשפט הבינלאומי", 51

המהווה נספח לספר זה.

ראו למשל: Spanish Constitution, article 10(2) ("The principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted 52  
3648/97 ; in conformity with the Universal Declaration of Human Rights...")

סתמeka נ' שר הפנים, פ"ד נג(2) 782, 728

כך, למשל, דוחות זכויות האדם השנתיים של מחלקה המדינה בארץות-הברית בוחנים את 53  
מצב זכויות האדם בעולם לאור ההכרזה האוניברסלית.

**פרק VII: זכויות האדם במשפט הבינלאומי****3.5. האמנות של 1966**

על רקע מעמדה הנורמטיבי הלא-ברור של ההכרזה האוניברסלית, יוזמה נציבות זכויות האדם של האו"ם בשנת 1949<sup>54</sup> את ערכיתה של אמנה בינלאומית שבה יעוגנו זכויות האדם המוניות בהכרזה באופן משפטי מחייב ומפורט, הכוופ למנגנון אכיפה מהיבים. דא עקא, שתהליך זה התבדר כמורכב ביותר וטעון מבחינה פוליטית, בין היתר לאור המתייחסות הבין-גושית של יוזמותה את המלחמה הקרה שהתנהלה באותה שנות מלוא עוזה. בסופה של דבר, תהליך 'תרגום' ההכרזה לטקסט משפטי מחייב נמשך 17 שנים – עד לשנת 1966 (עשר שנים נוספות החלפו עד כנישתן לתקפה של האמנות של 1966). יתר על כן, התוצר הסופי של התהליך שונה בכמה מובנים חשובים מהחzon המקורי של יוזמי מהלך הקודיפיקציה.

אחד מסלעי המחליקת העיקריים שהקשו על המשא ומתן לקראת ערכיתה של אמנה זכויות אדם בינלאומית היה מעמדן של הזכויות החברתיות-כלכליות. מדיניות קפיטליסטיות, כגון ארצות-הברית ומדינות קרובות לה מבחינה פוליטית, היו מוכנות להכיר בזכויות האמורות עקרוניות של דין רצוי במסגרת הלא מחייבת של ההכרזה האוניברסלית. אך הן התקשו שלא להכיר בהן כזכויות משפטיות אופרטיביות הקבועות באמנה מחייבת<sup>55</sup>. לעומת זאת, מדינות הגוש הקומוניסטי, שאליהן הצטרפו מדינות "העולם השלישי" (או המדינות המתפתחות), נקטו عمדה ולפיה הזכויות הכלכליות-חברתיות הינן זכויות בעליות אופי מקדמי, היינו יישומן מהוועת תנאי לאכיפת זכויות אזרחיות ומדיניות (עמדת זו התבבסה על הטיעון שלפיו זכויות אזרחיות ומדיניות, כגון חופש הפגנה או חופש הביטוי, הינן זכויות של "אנשים שביעים", וכי יש לספק קודם לצרכים קיומיים חיוניים, כגון מזון, בריאות וחינוך). הפשרה שנתקבלה בסופה של דבר הייתה פיצול הטקסט של ההכרזה לשתי אמנות נפרדות – האמנה הבינלאומית לזכויות אזרחיות ומדיניות (International Covenant on Civil and Political Rights) והאמנה הבינלאומית לזכויות כלכליות, חברתיות ותרבותיות (International Covenant on Economic, Social and Cultural Rights) (ICESCR).

המסגרת המשפטית השונה שנבחרה לשתי אמנות הכווצות אפשרה, בנוסף על כך, קביעות מנגנוני יישום ואכיפה שונים: יישומן של זכויות דור ראשון נועד להיות מיידי, ואילו זכויות דור שני, אשר מיושם מכך הקצת משאים רבים, נועדו להיות מושמות באופן פרוגרטי. פשרה נוספת שנתקבלה בשלב ניסוח האמנות של 1996 הינה השמטה זכויות מסוימות הכלולות בהכרזה האוניברסלית מרשימה הכווצות שנכללו באמנות – הדוגמה הבולטת לכך הינה הזכות לנקיון שלא נכללה אף אחת משתי האמנות וזאת בגין התנגדותן העזה של המדינות הקומוניסטיות. לבסוף, יש לציין כי גם באשר למנגנוני האכיפה נתגלעה מחלוקת בין המדינות שדרשו ביקורת שיפוטית אפקטיבית, במתחנות

54. דאו להלן, תת-פרק 5.1.

55. M.J Dennis &amp; D.P. Stewart "Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?" 98 A.J.I.L. (2004) 462, 482–483

56. בכך למועד כתיבת שורות אלו, ארצות-הברית עדין אינה צד לאמנה בדבר זכויות אזרחיות ומדיניות.

**I. ארנה ב-ורפתי וובל שי**

מקבילה לזו הקיימת תחת האמנה האירופית לזכויות האדם, לבין המדיניות שהתנגדו לכול ביקורת חיצונית על מזון וזכויות האדם שלו. בסופו של דבר הושגה פשרה ולפיה כל המדיניות החברות ידועחו על אופן יישום האמנות לגוף בינלאומי – הוועדה לזכויות האדם Economic and Human Rights Committee (HRC או ECOSOC Social Council) או המועצה הכלכלית-חברתית (Economic and Social Council) (escof.org) (סמכוות המועצה העוברו מאוחר יותר לוועדה לזכויות כלכליות, חברתיות ותרבותיות) אשר היא מוסמך להמליץ המלצות לא מחייבות. מדיניות החברות באמנה לזכויות אזרחיות ומדיניות המעוניינות בפיקוח אינטנסיבי יותר יכולו להסםיך את הוועדה לזכויות האדם לדון כגוף מעין-שיפוטי בתלונות המוגשות נגדן.

למרות הנסיבות הרבות הכרוכות בעירכתן, האמנות של 1966 מהוות שלב חשוב בהפתחותה של תנועת זכויות האדם הבינלאומית מתנווה אידאולוגית-פוליטית לענף משפט רבי-השפעה. ראשית, האמנות של 1966 מספקות למדינות החברות הכוונה נורמטטיבית משמעותית בהרבה מזו שניתן לחילוץ מן הכרזה האוניברסלית: חלק מהזכויות הקבועות באמנה מנוטחות לצורה מפורשת ביותר (למשל, סעיף 14 לאמנה לזכויות אזרחיות ומדיניות אינו מסתפק בקביעה כי קיימת הזכות להליך משפטי הוגן ופומבי, כפי שנעשה בהכרזה האוניברסלית, אלא מפרט רכיבים רבים של הזכות – זכות השתיקה, חזקת החפות, זכות לייזוג משפטי, זכות לערעור ועוד), ובאשר לזכויות האחרות, הרי שהפרקтика של הוועדות הממוננות על אכיפתן תרמה רבות להברהה היקפן<sup>57</sup>. שנית, האמנות זכו לקבללה נרחבת – מירבית מדינות העולם חברות ביום בשתי האמנות גם יחד ומחויבות לישם את הוראותיהן<sup>58</sup>, עובדה המדגישה את אופיים המחייב של דיני זכויות האדם. גם ישראל הינה צד לשתי האמנות (היא הצטרפה אל שתיהן בשנת 1991). עם זאת, יש לציין כי הטרופותה של ישראל לאמנה לזכויות אזרחיות ומדיניות לוותה בשתי הסתייגויות – (1) הסתייגות מתחולת סעיף 9 (המגביל מעיצרים שריוטיים) בזמן חירום; ו–(2) הסתייגות מתחולת סעיף 23 (המכיר בזכות להינשא ובשווון בין בני זוג במהלך חייו הנישואין ולאחר פירוקם) והכפפותו לדין הדתי הנהוג בישראל בנושאי נישואין וגירושין.

**3.6. האמנות הספרטיפיות**

בצד המהלך המרכזי של יצירת שתי אמנות זכויות האדם העיקריות – האמנה לזכויות אזרחיות ומדיניות והאמנה לזכויות כלכליות, חברתיות ותרבותיות – יזמו גופי האו"ם הממוניים על קידום ההגנה הבינלאומית על זכויות האדם את עיריכתן של אמנות בינלאומיות נוספות, ספרטיפיות יותר בהיקף הכיסוי שלו. המש האמנות הספרטיפיות שנרככו בין השנים 1965–1990 אכן נועדו לקדם את ההגנה על זכויות אדם מסוימות או על קבוצות בני אדם מסוימות, אשר ההגנה על זכויות האדם שלון מצריכה תשומת לב מיוחדת.

**חמש האמנות הינן:**

\* האמנה הבינלאומית בדבר ביעורן של כל הצורות של אפליה גזעית, 1965 (International Convention on the Elimination of All Forms of Racial Discrimination, 1965).

<sup>57</sup> על עבודות הוועדות,ראו להלן תת-פרק 5.2.

<sup>58</sup> נכון למועד כתיבת שורות אלו ל-ICCPR הצטרפו 156 מדינות ול-153 – מדינות.

**פרק VII: זכויות האדם במשפט הבינלאומי**

Convention on the Elimination of All Forms of Racial Discrimination —

<sup>59</sup>(CERD)

האמנה הבינלאומית בדבר ביטול אפליה נגד נשים לזכורותיה, 1979 \*

Convention on the Elimination of All Forms of Discrimination against

<sup>60</sup>(Women — CEDAW)

האמנה הבינלאומית נגד עינויים, וצורות אחרות של יחס או עונישה אכזרית, בלתי

אנושית, ומשפילה, 1984 \*

<sup>61</sup>(Forms of Cruel, Inhuman or Degrading Treatment of Punishment — CAT

האמנה הבינלאומית לזכויות הילד, 1989 \*

<sup>62</sup>(of the Child — CRC)

האמנה הבינלאומית להגנה על זכויות כל מהגרי עבודה ובני משפחותיהם, 1990 \*

International Convention on the Protection of the Rights of All Migrant)

.<sup>63</sup>(Workers and Members of their Families — MWC

ישראל הינה צד לכל אחת מהאמנות הללו, זולת האחורה (אם כי, יש לצין, כי ישראל אינה חריגה בעמדתה זו והרוב המכרייע של מדינות המערב, הקולטות מהగרי עבודה, לא הצטרף לאמנה). ניתן לצין גם, כי ה策רפוותה של ישראל לאמנה לביטול האפליה נגד נשים לוותה בשתי הסתייגיות מסעיפים 7(ב) ו-16 המחייבים מינוי נשים לכל התפקידים הציבוריים (הסתיגות נועדה לאפשר את המשך איד-מינון של נשים לכהונה בבתי דין רבניים) ושוויון מלא בנוגע לענייני נישואין וגירושין.

59 האמנה הבינלאומית בדבר ביעורן של כל הצורות של אפליה הגזעית, 21 דצמבר 1965, כ"א ע' 547 (להלן – האמנה נגד אפליה גזעית). נכון למועד כתיבת שורות אלו ה策רפו לאמנה 170 מדינות.

60 האמנה הבינלאומית בדבר ביטול אפליה נגד נשים לזכורותיה, 18 דצמבר 1979, כ"א 31, ע' 179 (להלן – האמנה נגד אפליה נשים). נכון למועד כתיבת שורות אלו ה策רפו לאמנה 183 מדינות.

61 האמנה הבינלאומית נגד עינויים וצורות אחרות של יחס או עונישה אכזרית, בלתי אנושית ומשפילה, 10 דצמבר 1984, כ"א 31, ע' 249. נכון למועד כתיבת שורות אלו ה策רפו לאמנה 141 מדינות.

62 האמנה הבינלאומית בדבר זכויות הילד, 20 נובמבר 1989, כ"א 31, ע' 221. נכון למועד כתיבת שורות אלו ה策רפו לאמנה 192 מדינות.

63 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec. 1990, G.A. Res. 154/45, annex, 45 U.N.GAOR, Supp. No. 49A, p. 262, UN Doc. A/45/49 (1990) לאמנה 34 מדינות.

I. אRNA בז-רפחלי וובל שי**4. היקף ואופן תחולתן של אמנות זכויות האדם המרכזיות****4.1. סעיפי המסדרת של האמנות של 1966**

סעיפי המסדרת (הינו, הסעיפים הכלליים המסדרים את אופן החלטן של הזכויות הספרטניות) של שתי האמנות משנת 1966 הנם בעלי חשיבות רבה, שכן הם מגדירים את היקפן ואופיין של החובות המוטלות על המדינות החברות. בתתי-פרק זה נבחן בקצרה את סעיפי המסדרת של האמנה לזכויות אזרחיות ומדיניות, ואת הסעיפים המקוריים באמנה לזכויות כלכליות, חברתיות ותרבותיות. הגם שהדין להלן מתמקד בעיקר בשתי אמנות מרכזיות אלו, חלקים ניכרים ממנה רלוונטיים לפרשנות ולישום האמנות הספרטניות והאמנות האזוריות אשר יידונו לkrarat סוף הפרק.

**4.1.1. החובה לכבד ולהבטיח זכויות אדם****סעיף 2(1) לאמנה לזכויות אזרחיות ומדיניות קבוע כי:**

"Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant..."

הוועדה לזכויות האדם, הגוף הממונה על יישום האמנה, קבעה בשורה של החלטות כי יש **לפרש את הביטויים** "to respect" (לכבד) ו- "to ensure" (להבטיח) כמתיחסים לרכיבים שונים של זכויות האדם המנווית באמנה. את החובה לכבד יש להבין כחובה נגטיבית המוטלת על המדינה להימנע מגעיה בפרטם, ואילו את החובה להבטיח יש להבין כחובה פוזיטיבית המוטלת על המדינה להבטיח כי פרטים לא יגעו כתווצה מפעולות של פרטים אחרים או של גורמים אחרים (פגעי טבע, פעולות מדיניות זרות וכדומה). כך, למשל, קבעה הוועדה כי הזכות לחיים (סעיף 6 לאמנה) מטילה על המדינה לא רק חובה נגטיבית שלא לשלול חיים של פרטים, אלא גם חובה פוזיטיבית להילחם באלים רבת-היקף (הפרות המבוצעות על ידי פרטים אחרים) ולפער להפחית תמותת תינוקות (פגיעה בזכות הנובעת מגורמים טבעיים)<sup>64</sup>. על בסיס פרשנות זו, ביקרה הוועדה הביטויים שונים של המלחמה הישראלית בטרור – מחד, היא הביעה חשש כי מדיניות הסיכולים הממוקדים שנתקטה ישראל במהלך האינתיפאדה השנייה עשויה שלא להתיישב עם הרעיון הנגטיבי של הזכות לחיים (ככל שמדובר בפעולות עنيשות או רתعتיות ולא מניעתיות)<sup>65</sup>; מאידך, הוועדה

Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), 64  
 Compilation of General Comments and General Recommendations Adopted by  
 .Human Rights Treaty Bodies, U.N. Doc. HR\GEN\Rev.1, p. 6 (1994)  
 Concluding Observations of the Human Rights Committee, Israel, U.N. Doc. CCPR/ 65  
 .CO/78/ISR (2003), para. 15

**פרק VII: זכויות האדם במשפט הבינלאומי |**

הבעה דאגתה בדבר מספרם הגבוה של קורבנות הטרור (מצב אשר עלול שלא להתיישב עם חובתה של ישראל לנוקוט צעדים מתאימים על מנת להגן על אזרחיה)<sup>66</sup>. יש לציין, כי הפרשנות שניתנה למונחים לכבד ולהבטיח על ידי הוועדה לזכויות האדם עולה בקנה אחד עם המთודולוגיה הפרשנית של גופי זכויות אדם בינלאומיים אחרים הרואים אף הם בזכויות האדם כיכולות רכיב נגטיבי ופוזיטיבי גם יחד. אכן, בית הדין האירופי לזכויות האדם קבע למשל כי מכך שהאמנה האירופית לזכויות האדם מטילה על המדינה חובה להבטיח (to secure) זכויות אדם – יש להסיק כי על המדינה מוטלת חובה לנוקוט אמצעים פוזיטיביים להעניק לאנשים<sup>67</sup>, להגן על מגנים מפני התנצלות של עברי או רוחה<sup>68</sup>, להגן על ילדים מפני הזנחה פושעת של הוריהם<sup>69</sup> ולחזור מקרי מוות<sup>70</sup>. באופן דומה, קבע בית הדין הבין-אמריקני לזכויות אדם בפסק הדין החשוב הראשון שלו, בפרשנת ולסקן רודריגז, כי הזכות לחיים מטילה על המדינה לא רק חובה למנוע פגיעה בחייהם של תושביה, אלא גם לחזור מקרי היעלמותם של פרטים, להעמיד לדין את האחראים לכך ולדאוג לפיצוי הקורבנות<sup>71</sup>.

משמעות תפיסה זו הינה כי זכויות האדם במשפט הבינלאומי חלות גם במקרים בין פרטים<sup>72</sup>, אם כי דיני זכויות האדם הבינלאומיים מחייבים את החובה המשפטית ליישם זכויות אלו על המדינה, ולא מטילים במישרין חבות על הפרטים עצם. במקרים אחרים, אמנות זכויות האדם מחייבות את המדינה להסדיר את היחסים בין הפרטים בחברה באופן שיעללה בקנה אחד עם זכויותיהם של הפרטים שלא להיות קורבנות להפרות זכויות אדם מצד פרטים אחרים. מכל מקום, יש להדגש כי החובה הפוזיטיבית המוטלת על המדינה הינה חובה יחסית ולא חובה מוחלטת – הינו, קיימת חובה לנוקוט רק אמצעים סבירים הנחוצים לצורך ההגנה על זכויות האדם של הפרטים<sup>73</sup>.

סעיפי המסגרת של האמנה לזכויות כלכליות, חברתיות ותרבותיות אינם משתמשים בלשון ברורה להגדיר את אופי החובה המוטל על המדינה. סעיף 2(1) מורה למדינות לנוקוט אמצעים מתאימים על מנת למש באופן מלא (full realization) את הזכויות הקבועות באמנה, אם כי, כפי שנראה בהמשך, ההגשה יכולה שתתבצע באופן הדרגתי. למרות זאת, הוועדה הממונה על יישום האמנה הגדרה את החובה המוטלת על המדינה במונחים מקבלים לאלו הקיימים ברגע לאמנה לזכויות אזרחית ומדיניות כחובה לכבד (חובה נגטיבית) ולהבטיח (חובה פוזיטיבית) את הזכויות, והחובה الأخيرة תומנת בחובה גם את

Concluding Observations of the Human Rights Committee, Israel, U.N. Doc. CCPR/C/79/Add.93 (1998), art. 17	66
<i>X v. Netherlands</i> , Eur. Ct. H.R. (Ser. A), No. 91 (1985)	67
<i>Platform "Ärzte für Das Leben" v. Austria</i> , Eur. Ct. H.R. (Ser. A), No. 139 (1988)	68
<i>Z v. UK</i> , 34 E.H.R.R. 97 (2002)	69
<i>Kaya v. Turkey</i> , 1998-I Eur. Ct. H.R. 65	70
<i>Velasquez Rodriguez v. Honduras</i> , I/A Court H.R. (Ser. C), No. 4 (1988)	71
השו לדוקטרינה הגרמנית של ה- Drittewirkung, שלפייה יש לקרוא הוראות משפט חוקתי	72
אל תוך המשפט הפלטי: A.Z. Drzemczewski <i>European Human Rights Convention in 199–202 A.D.</i> Domestic Law (1983) 199–202	
יולס. ד"נ 22/82 בית יולס נ' רביב, פ"ד מג(1) 441.	73
<i>Osman v. U.K.</i> , 1998–VIII Eur. Ct. H.R. 3159	

**| ארנה בונרפלט וובל שי**

החוּכָה לְמִנּוֹעַ פְּגִיעָה בָּזְכוּיּוֹת מִצֶּד פָּרְטִים אַחֲרִים, וְגַם אֶת הַחוּכָה לְהַגְשִׁים (to fulfill) אֶת הַזְּכוּיּוֹת עַל יָדֵי יִצְרָרֶת תְּשׁוּתִית מִתְאִימָה לְמִימּוֹשָׁן (to facilitate), הַסְּפָקָה יִשְׂרָה שֶׁל שִׁירּוֹתִים (to provide) וְקִידּוּם הַשְׁמִישׁ עַל יָדֵי הַפָּרְטִים (to promote). כֵּךְ, לִמְשֻׁלָּ, קְבֻּעה הַוּעָדָה כִּי הַזְּכוֹת לְבָרִיאָות כּוֹלֶלֶת, בֵּין הַיִתְרָ, חַוָּה שֶׁלָּא לְאָסּוֹר גִּישָׁה לְטִיפּוֹלִים רְפָאִים (חוּכָה נְגִטִּיבִית), חַוָּה לְאָסּוֹר אֱפָלָה בְּאַסְפָּקָת שִׁירּוֹתִי בְּרִיאָות פָּרְטִים (חוּכָה פּוֹזִיטִיבִית הַנוֹּגֶעֶת לִיחָסִים בּוּנְיוּן פָּרְטִים), חַוָּה לִיצְרוֹר תְּשׁוּתִית לִמְתָן שִׁירּוֹתִי בְּרִיאָות טּוּבִים, בָּאַמְצָעוֹת הַכְּשָׁרָת סְגָל רְפָאִי (חוּכָה פּוֹזִיטִיבִית לִיצְרוֹר תְּשׁוּתִית), חַוָּה לְסַפְקָה שִׁירּוֹתִי בְּרִיאָות לְמַעֲוטִי יְכוֹלָת (חוּכָה פּוֹזִיטִיבִית לְסַפְקָה שִׁירּוֹתִים) וְחוּכָה לְסַיִעַ לְפָרְטִים לְקַבֵּל הַחְלָטוֹת מוֹשְׁכּוֹת בְּנָגָעַ לְבָרִיאָותם (חוּכָה פּוֹזִיטִיבִית לְקַדֵּם הַזְּכוֹת)<sup>4</sup>. מִכְּאָן, שַׁהְתְּפִיסָה הַמִּקְוָבָלָת הַיּוֹם בְּנָגָעַ לְכָל זְכוּיּוֹת אָדָם הַיָּה כִּי הָן כּוֹלְלוֹת רְכִיבִים נְגִטִּיבִים וּפּוֹזִיטִיבִים גַּם יְחִידָה.

**4.1.2. האופי הפרוגרסיבי של הזכויות מן הדור השני**

**סעיף 2(1) לאמנה לזכויות כלכליות, חברתיות ותרבותיות מדרגות אופייה הפרוגרסיבי של החובה להגשים את הזכויות הקבועות באמנה:**

"Each State party to the present Covenant undertakes to takes steps, individually and through international assistance, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

סעיף זה מכפיף את יישום הזכויות לשולש תנאים: (א) ייחסיות – הגשמה הזכויות תלויה במשאבים העומדים לרשות המדינה; (ב) פרוגרסיביות – הגשמה הזכויות יכולה שתהא הדרגתית; (ג) בחירת אמצעים – המדינה שומרת בידה את הסמכות לקבוע באילו אמצעים – תחיקתיים או אחרים – יוגשו הזכויות. בכך נתנו מנשי האמנה ביטוי לדרישון כי זכויות מהדור השני שונות מזכויות הדור הראשון, בשל אופי הפוֹזִיטִיבִי הדומיננטי. על כן ניתן למדינה מרווה תמרון רחב ביותר בכל הנוגע לקצב ולאופן הגשמהן. בambilים אחרים, האמנה לזכויות אזרחיות ומדינתיות קבועות זכויות משפטיות שיש ליישמן באופן מיידי, ומנגד, ניתן לטעון כי האמנה לזכויות כלכליות, חברתיות ותרבותיות יוצרה וכוונות בעלות אופי שאיפתי (aspirational) – הינו דין רצוי שיש לשאוף אליו, ולא זכויות המטילות חובות אכיפות בהוויה. עם זאת, התפיסה המודרנית המקובלת באשר למעמדן של הזכויות מן הדור השני הינה שונה, וכיימת נוכנות גדרה והולכת לקרוא לתוכה חובות פעללה קונקרטיות. אכן, הוועדה לזכויות כלכליות, חברתיות ותרבותיות, הממונה על יישום האמנה, קבעה בהערה

Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000) 74

### פרק VII: זכויות האדם במשפט הבינלאומי

פרשנית מטעה<sup>5</sup>, כי יש להבחן בין "גרעין קשה" (minimum core) של זכויות המחייב יישום מיידי לבין מעתפת הזכויות אשר לגבייה אכן קיימת חובת יישום פרוגרסיבית. אמן גם "הגרעין הקשה" של הזכויות כפוף לסיג היחסיות, אך במקרה זה מוטל על המדינה נטול כבד להראות כי אין ביכולתה לממן את מימוש "הגרעין הקשה" של הזכויות, באמצעות העומדים לרשותה (או בסיווע הקהילה הבינלאומית). בין הזכויות המצוות ב"גרעין הקשה" מונתה הוועדה את הזכות לשירות רפואיים חירום, הזכות להיות חופשי מרעב, הזכויות למחלשה, הזכות לחינוך יסודי ועוד<sup>6</sup>. מעניין לציין, כי הבחנה דומה התפתחה במשפט החוקתי הישראלי, בין זכויות כלכליות-חברתיות הכלולות בזכות החוקתית לכבוד האדם המחייב את המדינה להבטיח לתושביה תנאי קיום מינימליים, בין זכויות כלכליות-חברתיות אחרות, אשר אינן נהנות מהגנה חוקתית דומה<sup>7</sup>.

הוועדה לזכויות כלכליות, חברתיות אף צינה כי מוחבת היישום הדרגתית החלת על זכויות המעתפת, המצוות מחווץ ל"גרעין הקשה", עולה כי על מדינות להציג על שיפור מתמשך במצב הזכויות בשטחן, ומוטל עליהם נטול כבד להזדקיק נסיגה לאחר מכן (backslicing) בהיקף ההגנה על הזכויות. לבסוף, יש לציין כי הוועדה קבעה כי מגבלות היחסיות והפרוגרסיביות אינןחולות כלל על זכויות שממושנן איננו כרוך בהוצאה תקציבית (כגון זכויות גנטיביות); וכי חופש בחירת האמצעים של המדינה אינו בלתי מוגבל וכפוף לפיקוח הוועדה<sup>8</sup>.

יוצא אפוא כי ההבדלים בין זכויות מן הדור השני מן הדור הראשון, הכוללים אף הם כורך רכיבים פוזיטיביים בעלי אופי יחס, אינם דרמטיים, כפי שנדרשה היה. עם זאת, מדיניות רבות, ובהן ישראל, נוהגות בפועל להעניק הגנה חוקתית נרחבת יותר לזכויות אזרחיות ומדיניות מאשר לזכויות כלכליות, חברתיות ותרבותיות, תוצאה הנובעת בעיקר מסיבות היסטוריות, כלכליות ופוליטיות<sup>9</sup>.

#### 4.1.3. היקף התחוללה הגאוגרפי והפרטוני של האמנות

סעיף 2(1) לאמנה לזכויות אזרחיות ומדיניות מטיל על המדינה חובה להעניק את הזכויות הקבועות בה לכל הפרטים המצוים בשטחה והכפויים לסמכתה subject to its jurisdiction. המשמעות המדוקפת של הוראה זו הינה שנואה בחלוקת ובעלת רלוונטיות מיוחדת לישראל בגין שליטה המושכת בשטחים שנכbsו על ידה בשנת 1967 והשאלה שתתעוררה בדבר תחולת האמנות בשטחים.

Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III, p. 75

86. על מעמדן של העורות פרשניות, ראו להלן, תת-פרק 5.

Ibid, at para. 10.

77 ראו למשל רע"א 4905/98 גמזו נ' ישעיהו, פ"ד נה(3) 360; בג"ץ 5578/02 מנור נ' שר האוצר, תקדין עליון (2) 2429; בג"ץ 366/03 עמותת מחויבות לשולם וצדקה חברתי נ' שר האוצר (טרם פורסם).

78 CESCR, General Comment 3, *supra* note 75, at para. 4.

79 ראו י' רבין וו' שני "מבוא - הזכויות החברתיות - רעיון שהגיא זמנו" זכויות כלכליות, חברותיות ותרבותיות בישראל (י' רבין וו' שני עורכים, תשס"ה) 11, 18.

## | ארנה בונרפטלי וובל שי

ראשית, יש להדגיש כי אمنות זכויות האדם חלות על כל הפרטים המצוים בשטח המדינה, ללא קשר לאזרחותם. אمنם יש הוראות מסוימות המקנות לאזרחים זכויות יתר (למשל, סעיף 25 לאמנה לזכויות אוראחיות ומדיניות הדן, בין היתר, בזכות לבחור ולהיבחר), אך הרוב המכريع של הזכויות מgive לכל הפרטים גם יחד.

שנית, הביטוי "מצויים בשטחה" אינו מעורר בדרך כלל קשיים פרשנאים מיוחדים, שכן הוא מכון לפרטים השווים בשטחה הריבוני של המדינה<sup>80</sup>. עם זאת, הביטוי "כפופים לסטטוסה" התברר כבעיתי יותר. במסגרת הדיווחים שמסירה לוועדות האו"ם השונות טענה ישראל, כי הביטוי נוגע לפרטים המצוים בשטח השיפוט שלה, שעליו חל הדין הישראלי היינו לישראל בגבולות הקו הירוק, בתוספת מזרח ירושלים ורמת הגולן, אולם ועדות האו"ם השונות סברו בכלל, בצדק לדעתנו, כי יש להבין את המונח סמכות באופן מרחב כולל את כל הפרטים החיים בשטחים המצוים תחת שליטתה האפקטיבית של מדינת ישראל – היינו, גם בשטחי הגדרה המערבית ורצועת עזה<sup>81</sup>.

לבסוף, קיימת מחלוקת פרשנאים באשר לשאלה אם התנאים הקבועים בסעיף 2(1) הנם תנאים חלופיים או מצטברים. הgem שישישראל וכמה מלומדים רואים בתנאים תנאים מצטברים, ועדות האו"ם, כמו גם בית הדין הבינלאומי בהאג בפרשת החומה בשטחים נקבעו גישה הפוכה הראות בתנאים תנאים חלופיים<sup>82</sup>. נראה כי הגישה הדומיננטית בפרקטיקה של הגופים הבינלאומיים (כמו גם בספרות המשפטית) היא זו המחייבת את האמנה לזכויות אוראחיות ומדיניות גם בשטחים תחת שליטת המדינה – שטחים כבושים או שטחים במעמד מיוחד אחר (למשל מושבות או שטחי חסות). יתר על כן, יתכן והאמנה גם מכסה פעולות שלטוניות, כגון מעצרים או פועלות צבאיות, המבוצעים על ידי שלוחיה של המדינה בשטח שאינו מצוי בשליטתה (יש לציין כי לגבי היבט זה של תחולת האמנה הפרקטיקה של הגופים הבינלאומיים אינה אחידה)<sup>83</sup>.

בבסיס העמדה הפרשנית שנתקבלה על ידי גופי זכויות האדם השוניים מצויה ההשערה כי יש לפרש אمنות זכויות אדם באופן המعنיך את מרבית האפקטיביות להוראותיה והמקדם את מטרותיה הומניטריות. תפיסה פרשנית זו הובילה את גופי האמנות השוניים לפרש גם את סעיפי התחולת של אمنות זכויות האדם האחרות – לרבות האמנה לזכויות כלכליות,

<sup>80</sup> עם זאת, בפרקטיקה הთעוררה שאלת אחריות המדינה לפרטים המצוים בשטח ריבוני שלא אשר איןו מצוי עוד בשליטתה האפקטיבית. ראו למשל *Ilașcu v. Moldova*, judgment of 8 July 2004 (ECHR).

<sup>81</sup> O. Ben-Naftali & Y. Shany "Living in Israel 'ao'm בנושא, ראו: in Denial: The Application of Human Rights to Occupied Territories" 37 *Is. L.R.* (2003–2004) 17.

<sup>82</sup> *Ibid*, at p. 34–37–68–69; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, advisory opinion of 9 July 2004, 43 *I.L.M.* 1009, at para. 108–111. וא: M.J. Dennis "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation" 99 *A.J.I.L.* (2005) 119.

<sup>83</sup> ראו: Ben-Naftali & Shany, *supra* note 81, at pp. 64–65, 71–87.

**פרק VII: זכויות האדם במשפט הבינלאומי |**

חברתיות ותרבותיות שאינה כוללת כל סעיף תחולה – באופן שיעניק הגנה על כל הפרטימ המצויים בשטחים הנשלטים באופן אפקטיבי על ידי המדינה.<sup>84</sup>

**4.1.4. החובה להעניק סעד אפקטיבי**

סעיף 2(3) לאמנה לזכויות אזרחיות ומדיניות מטיל על המדינה חובה להעניק סעד אפקטיבי לקורבנות שזכויות האדם שלהם הופרו. חובה זה כוללת בחובה את זכות הפניה לערכאות שיפוטיות או אחרות, את הזכות לקבל סעד מאותן ערכאות ואת הזכות לאכוף את הסעד שניתן<sup>85</sup>. גם שהאמנה לזכויות כלכליות, חברתיות ותרבותיות אינה כוללת הוראה דומה, הוועדה הממונעת על יישום האמנה קבעה, בהסתמך על סעיף 8 להכרזה האוניברסלית משנת 1948, כי החובה להעניק סעד אפקטיבי הינה חלק מהקורפוס הכללי של זכויות האדם.<sup>86</sup>

משמעותו כלל זה הינה כפולה. ראשית, החובה להעניק סעד אפקטיבי מדגישה כי דיני זכויות האדם מטילים על המדינות לא רק חובות מסדר ראשון – הינו חובות למנוע הפרות זכויות אדם – אלא גם חובות מסדר שני – הינו חובות לפעול לתיקן הפרות באמצעות מגנוני פיצוי וסעדים אחרים (כגון השבת המצב לקדמתו). שנית, על מנת שהמדינות יעדמו בדרישת הסעד האפקטיבי ויכולו לאפשר לבתי המשפט שלהם להעניק סעדים בגין הפרות זכויות אדם, נדרש, ככלל, התאמה של הדין הפנימי במדינה להוראות האמנות, וזאת באמצעות חקיקה מיוחדת הקולתת את האמנה לדין הפנימי או באמצעות אחרים (כגון חוקות פרשניות, קיומן בדיון של נורמות מקבילות לאלו הקיימות באמנה וכדומה).<sup>87</sup> חיזוק לדרישה אחרת זו ניתן למצוא בדרישה לחתת תוקף להוראות האמנה בסעיף 2(2) לאמנה לזכויות אזרחיות ומדיניות ובסעיף 2(1) לאמנה לזכויות כלכליות, חברתיות ותרבותיות.

**4.1.5. עקרון השוויון**

סעיף 2(1) לאמנה לזכויות אזרחיות ומדיניות וסעיף 2(2) לאמנה לזכויות כלכליות, חברתיות ותרבותיות מחייבים את המדינה למש את זכויות האדם של הפרטימ שבשתחה בלבד ככל אפליה מטעמי גזע, צבע, מין, לשון, דת, דעה פוליטית או אחרת, מוצא לאומי או חברתי, רכוש, ייחוס או כל מעמד אחר. בנוסף, אוסר סעיף 3 לשתי האמנות על אפליה נגד נשים (אם כי הוראה זו אינה מוסיפה מבחינה משפטית על הקבוע בסעיף איסור האפליה הכלליים, וחטיבתה הינה בעיקר במשמעותו הסמלי). מכאן שהאמנות האמורות מאמצות את עקרון השוויון כעקרון-על החולש על יישום כל הזכויות האחרות.

<sup>84</sup> Ibid, at pp. 18–21

<sup>85</sup> ס' 2(3)(ב)–(ג) לאמנה לזכויות אזרחיות ומדיניות.

<sup>86</sup> Committee on Economic, Social and Cultural Rights, General Comment 9, The

<sup>87</sup> Domestic Application of the Covenant, UN Doc. E/C.12/1998/24 (1998), para. 10

<sup>87</sup> ראו ר' לפידות ואח' חובת קליטה של אמנות בנושא זכויות אדם לדין הישראלי (תשס"ג)

<sup>24</sup>, 20–17

**I ארנה בונפלט וובל שע**

יש לציין, כי היקףם של הסעיפים האמורים מוגבל לאפליה הנוגעת ליישום הזכויות הקבועות באמנות, והם אינם כוללים אפליה הנוגעת למשורי חיים אשר אינם מוסדרים בשתי האמנות של 1966 (כגון נושאים הקשורים לזכות הקניין). על כן יש לקרוא ל'סעיפים אלו את סעיף 26 לאמנה לזכויות אזרחיות ומדיניות האוור אפליה על פי חוק, בכל תחומי החיים. עוד יש לציין כי רשימת עילות האפליה האסורה המנויה בסעיפי המוגרת הרלוונטיים אינה רשימה סגורה.

התפתחותם של דיני זכויות האדם לאחר ההכרזה האוניברסלית מציבה על קבלת הולכת וגוברת של הרעיון שלפיו איסור האפליה כולל גם אפליה מכונית וגם אפליה תוכאתית – הינו, מהיבש שוון להלכה ולמעשה<sup>88</sup>. ביטוי מובהק לדעינו אחרון זה ניתן למצואו בסעיף 1(1) לאמנה נגד אפליה גזעית ובסעיף 1 לאמנה נגד אפליה נשים. האמנה נגד אפליה נשים אף מחייבת את המדיניות לפעול לביעור סטריאוטיפים מפליליים<sup>89</sup> ומעודדת אותן לאמץ מדיניות של העדפה מתקנת<sup>90</sup>. עם זאת, גופי זכויות האדם השונים קיבלו את הבדיקה בין אפליה פסולה לבין הבדיקה לגיטימית – שנתרפהה על ידי הוועדה לזכויות האדם כהבנה המבוססת על קритריונים אובייקטיביים וסבירים, המכוונת לתכלית רואיה והעליה בקנה אחד עם האמנה<sup>91</sup>.

#### **4.1.6 השיעית חלק מהזכויות שאמנה לזכויות אזרחיות ומדיניות בעותות חרום**

סעיף 4 לאמנה לזכויות אזרחיות ומדיניות מאפשר לממשלה המצודה בשעת חירום להשעות באופן זמני חלק מהתחייבויותיה לפני האמנה, וזאת מתוך הכרה בכך שהאמנה נועדה לחול בראש ובראשונה בעותות שלום. עם זאת, מכלל הן אלו שומים לאו – ממשמען, מן האפשרות להשעות את תחולת חלק מן ההוראות בתנאים מסוימים, אשר יפורטו להלן, ניתן להבין כי האמנה תמשיך לחול בכפוף למגבליות האמורויות גם בשעת חירום, לרבות בעותות מלחמה או מתקפת טרור (המשמעות של זכויות אדם במסגרת מלחמה ומאבק בטרור תידוע בתת-פרק 7.3 להלן). אכן, בית הדין הבינלאומי בהאג קבע בחוקות הדעת של בנוסה חוקיות נשך גראייני והחומה בשתיים כי אמנה זכויות האדם ממשיכות לחול גם בשעת מלחמה, אם כי המשפט הבינלאומי הומניטרי מהוות דין ספציפי אשר לאורו יש לפרש את הוראות אמנה זכויות האדם<sup>92</sup>.

סעיף 4 לאמנה מתנה את עצם הפעלתו בשלושה תנאים. התנאי הראשון, אשר הנה מחייביו באופןו, קובע כי המדינה ניצבת בפני "שבעת חרום כללית המאיימת על חי האומה". מהעדרה פרשנית של הוועדה לזכויות האדם אשר נתפסה בשנת 2001 עולה כי מדובר

<sup>88</sup> HRC, General Comment 18, *supra* note 9, para. 7. <sup>88</sup> ראו 7.

<sup>89</sup> ס' 5 לאמנה נגד אפליה נשים.

<sup>90</sup> ס' 4 לאמנה נגד אפליה נשים.

<sup>91</sup> .HRC, General Comment 18, *supra* note 9, at para. 13. <sup>91</sup>

<sup>92</sup> *Legal Consequences of the Construction of a Wall*, *supra* note 82, at para. 105–106;

*Legality of the Threat or Use of Nuclear Weapons*, 1996(I) I.C.J. 226, 240

#### פרק VII: זכויות האדם במשפט הבינלאומי

בSTITואציות קיצוניתות כגון מלחמה, מהומות בהיקף נרחב או אסון טבעי רב-מדים<sup>93</sup>. התנאי השני, אשר הננו תנאי פרודורי, הוא כי המדינה הכריזה על שעת החירום בהתאם להליכיה החקתיתם. תנאי זה נדרש להקשות על מדינה לטען לפני חוץ כי היא מצויה במצב חירום, בשעה שהכרזה לא עבירה את מגנוני הבקורת הפנים-מדיניים שנעודו למנוע ניצול לרעה של סמכויות חירום שלטוניות. לבסוף, יש להודיע על החריגה מיד לזכיר הכללי של האו"ם, והוא יודיע על כך למדיינות החברות האחרות.

פרט לתנאים העוסקים בכניסה במצב חירום, יכולתה של המדינה להשנות במצב חירום את התחביבותיה על פי האמנה אינה בלתי מוגבלת. ראשית, ישנן מספר הוראות אשר לא ניתן לסתות מהן גם בשעת חירום. זה הדין בנוגע לזכות לחיים (סעיף 6), איסור העינויים (סעיף 7), איסור העבודה או השימוש (סעיף 8(1)-(2)), האיסור של מסר בגין חוב אורחית (סעיף 11), האיסור של ענישה פלילית רטרואקטיבית (סעיף 15), הזכות להיחס כבעל אישיות משפטית (סעיף 16) וחופש המחשבה המזפון והדת (סעיף 18). האיסור לסתות מוכניות אלה גם בשעת חירום עשוי לנבוע מחשיבותן האינהרטית של הזכויות האמורות אשר הינן בחלוקת בעלות אופי קוגנטי) או מהערכות מנסחי האמנה כי אין זה סביר כי יתקיים קשר סיבתי בין מצב החירום לבין הצורך בהשעית הזכות (זה המצב, למשל, בנוגע לסעיפים 11 ו-18 לאמנה).

שנית, על האמצעים להיות נחוצים ומידתיים – "במידה הנדרשת במדוקדק מפהת חומרת המצב"<sup>94</sup>. שלישיית, על האמצעים לעלות בקנה אחד עם התחביבותיה הבינלאומיתות האחרות של המדינה (בעיקר, מכוח המשפט הבינלאומי ההומנייתי אשר נועד לחול דוקא במצב חירום – הינו, בעת מלחמה). ולבסוף, על האמצעים הננקטים להיות בלתי מפלים. כאמור לעיל, ישראל הודיעה בעת הצרפתה לאמנה על קיום מצב חירום בשטחה ועל שמירת זכותה לחרוג מסעיף 9 לאמנה (האוסר על מעזרים שרירתיים), וזאת על מנת להכשיר את המשך מדיניות המעצרים המנהליים שלה. בית הדין הבינלאומי בהאג הביע את דעתו בחוות הדעת בנושא החומה בשטחים כי בהיעדר הודעות נוספות, ישראל לא הייתה רשאית לחרוג מסעיפים אחרים של האמנה<sup>95</sup>. יתר על כן, הוועדה לזכויות האדם הביעה בשנת 1998 את דאגתה מההתשכחות מצב החירום בישראל והזמין אותה לבחון מחדש את הצורך בחידוש ההכרזה על מצב החירום<sup>96</sup>. אכן, ספק רב גם בעינינו אם חקיקת שעת החירום בישראל, על היבטיה השוניים והמגוונים (למשל, סמכות ממלכתית להפקיע כל רכב פרטיים) הנם אמורים המופעלים "במידה הנדרשת במדוקדק מפהת חומרת המצב", בהתאם לדרישות האמנה לזכויות אורחיות ומדיניות.

Human Rights Committee, General Comment 29, States of Emergency (article 4), 93  
U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

ס' 4(1) לאמנה לזכויות אורחיות ומדיניות. 94

*Legal Consequences of the Construction of a Wall*, supra note 82, at para. 136 95  
HRC (2003), supra note 66, at para. 11. ראו גם: HRC (1998), supra note 65, at para. 11 96

12. השוו לעניין זה את עתירת האגודה לזכויות האזרח בנושא חקיקת שעת החירום בישראל: בג"ץ 3091/99 האגודה לזכויות האזרח נ' הכנסת, אשר עודנה תלואה ועומדת במועד כתיבת שורות אלו.

**I ארנה בורפטל ויבל שע****4.1.7 סעיף ההגבלה הכללי של האמנה לזכויות כלכליות, חברתיות ותרבותיות**

האמנה לזכויות כלכליות, חברתיות ותרבותיות אינה כוללת סעיף שעת חרום, אלא פסקת הגבלה כללית המצויה בסעיף 4 והמאפשרת לממשלה לסייע את הזכויות הכלכליות לפי חוק, לתכנית רואיה ("אך ורק למטרת קידומה של הרווחה הכלכלית בחברה דמוקרטית") ובאופן המתישב עם טבען של הזכויות. הכוונה בביטול האחرون הינה ככל הנראה למגבלות אשר אינן מאיינות את הזכות באופן גמור, אלא משמרות הגנה על "הגראין הקשה" שלון.

לשם השלמת הדיון בסעיפי המסדרת של האמנות של 1966 ניתן לציין את סעיף 5 לשתי האמנות האוסר ניצול לרעה של הזכויות על ידי פרטים באופן המכונן להוביל להכחנתן (חריג מסווג "דמוקרטיה מתוגנת"). הסעיף אף מבادر כי לא ניתן לעשות באמנה שימוש על מנת להגביל זכויות המוכרות באמנות זכויות אדם אחרות.

**4.2 הזכויות המנווירות**

האמנות של 1966, ביחד עם ההכרזה האוניברסלית של 1948, מהווים את " מגילת זכויות האדם הבינלאומית" (international bill of rights). יש אפוא חסיבות נורמטטיבית רבה לרשימת הזכויות המופיעות בשלושת המסמכים האמורים. תתי-פרק זה יסקור את הזכויות המרכזיות המצוויות בשתי האמנות של 1966, ואת ההגבלות שניתן להטיל על אופן יישומן.

**4.2.1 זכויות מן הדור הראשון**

האמנה לזכויות אזרחיות ומדיניות כוללת רשימה של עשרים ושתיים זכויות אדם, אשר ניתן לאפיין כזכויות דור ראשון – זכויות אזרחיות, המגדירות את חופש הפרט מהתערבות שלטונית, זכויות פוליטיות, המקדמות את שיולבו של הפרט בתהליכיים הפוליטיים המתקיים בחברה. בפועל, הבחנה בין שתי תתי-קבוצות הזכויות אינה חדה, ואף אינה הכרתית.

רשימת הזכויות המנווירות באמנה כוללת את הזכויות לחים (סעיף 6), איסור העינויים ויחס ועונש בלתי אנושי, אכזרי ומשפיל (סעיף 7), האיסור העבודה (סעיף 8), הזכויות לחיות ולבייחון אישי (סעיף 9), הזכות לתנאי מעדר ומסר רואיים (סעיף 10), איסור המאסר בגין חוב חזוי (סעיף 11), חופש התנועה (סעיף 12), זכותם של תושבים זרים להיליך גירוש נאות (סעיף 13), הזכות להיליך משפטី הוגן (סעיף 14), האיסור על ענישה רטראקטיבית (סעיף 15), הזכות להכרה בפרט כאישיות משפטית (סעיף 16), הזכות לפרטיות (סעיף 17), הזכות לחופש מחשבה, מצפון ודת (סעיף 18), הזכות לחופש הדעה והביטוי (סעיף 19), איסור התעמולת למלחמה והסתה לשנאה גזעית (סעיף 20), חופש האספה (סעיף 21), חופש התנגדות (סעיף 22), הזכות לחיה משפחחה (סעיף 23), זכותם של קטינים לאמצעי הגנה מתאימים (סעיף 24), הזכות ליטול חלק בחיים הציבוריים, לבוחר ולהיבחר (סעיף 25), איסור האפליה על פי חוק (סעיף 26) וזכותם של מיעוטים לתרבות, דת ושפה (סעיף

**פרק VII: זכויות האדם במשפט הבינלאומי |**

27). יש לציין, כי מספר זכויות אדם מדור ראשון אשר נכללו בהכרזה האוניברסלית לא נכללו באמנה לזכויות אזרחיות מדיניות: הזכות למקלט מדיני (סעיף 14 להכרזה), הזכות לאזרחות (סעיף 15 להכרזה) והזכות לKENNIN (סעיף 17 להכרזה). עם זאת, יתכן שניית לטעון כי חלק מזכויות אלו הפקו, כmiribit הזכויות בהכרזה, לדין בינלאומי מנהגי.

יש להציג כי הרכב הזכויות הקבועות באמנה לזכויות אזרחיות ומדיניות והגדרתן של הזכויות הללו משקפים אפשרות פוליטית, אשר נועד לאפשר למיניות רבות ככל האפשר להצדרף לאמנה. כך, למשל, האמנה אינה אוסרת הטלת עונש מוות, אלא מגבילת את אופן ביצועו (למשל, אוסרת הוצאה להורג של קטינים ונשים בהירין)<sup>97</sup> וקובעת כי מדינה אשר ביטלה את עונש המוות מנועה מהחזיר<sup>98</sup>. הסדר זה נועד לאפשר הטרפות לאמנה של מדינות הדוגלות בעונש מוות (כגון ארצות הברית). אכן, עיקר העיסוק של הוועדה לזכויות האדם בנושא עונש המוות התמקד בבחינתן יישומן של המגבלות האמורות לעיל ובධון בשאלת אם הטלת עונש אינה עולה בנסיבות מסוימות כדי עונש בלתי אנושי, אכזרי או משפיל (בניגוד להוראות סעיף 7 לאמנה)<sup>99</sup>. דוגמה נוספת לאיוצים הפליטיים שעמדו בפני מנגשי האמנה הינה הגנה המונתקת לזכויות המיעוטים הקבועה בסעיף 27, אשר הינה מוגבלת למדי ואנייה כוללת זכות לאוטונומיה פוליטית או לאוטונומיה בתחום החינוך. גישה מינימליסטית זו נבעה, ככל הנראה, מחששן של מדינות רבות מפני עידוד נתיות בדיניות של מיעוטים בשטח<sup>100</sup>.

**4.2.2. זכויות מן הדור השני**

האמנה לזכויות כלכליות, חברתיות ותרבותיות מגנה על עשר זכויות דור שני – היינו זכויות בועלות אופי פוליטיבי ודומיננטי. רשימה הזכויות כוללת את הזכויות הבאות: הזכות לעבוד (סעיף 6), הזכות לתנאי עבודה נאותים (סעיף 7), הזכות להתאגד באיגוד מקצועי ולשבות (סעיף 8), הזכות לביטחון סוציאלי (סעיף 9), החובה להגן על מוסד המשפחה ועל

<sup>97</sup> ס' 6(5) לאמנה בדבר זכויות אזרחיות ומדיניות. עם זאת, הפרוטוקול השני לאמנה, שבו חברות 55 מדינות (ישראל לא הטרפה אליו), אוסר עונש מוות. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. Res. 44/128, annex, 44 U.N. GAOR Supp. No. 49, p. 207, U.N. Doc. A/44/49 (1989)

<sup>98</sup> ס' 6(2) לאמנה בדבר זכויות אזרחיות ומדיניות. לפי הוועדה לזכויות האדם סעיף זה מונע מדיניות שהבן אין עונש מוות להסגר עבריינים למדינות שבחן קיימים עונש מוות, אלא אם כן המדינה המבקשת את ההסגרה מתחייבת שלא להוציא להורג את הפרט המוסגר. *Judge v. Canada*, Comm. No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003)

<sup>99</sup> ראו למשל: *Ng v. Canada*, Comm. No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994); *Pratt v. Jamaica*, Communication No. 210/1986, U.N. Doc. CCPR/C/35/

<sup>100</sup> Soering v. U.K., Eur. Ct. H.R. (Ser. A), No. 161 (1989) D/210/1986 (1989) בואפן דומה, מקובל כי סעיף 1 לשתי האמנות של 1966, המכיר בזכות להגדרה עצמית של כל העמים, אינו מקנה זכויות למיעוטים לפרוש משטחן של מדינות קיימות. השוו: Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8082/Annex (1970).

**I. אRNA ב-נ-ר-פ-ת-ל-י י-ו-ב-ל ש-ע**

בני המשפחה (סעיף 10), הזכות לרמת חיים נאותה (סעיף 11), הזכות לרמת בריאות גבוהה (סעיף 12), הזכות לחיינוך (סעיף 13), הזכות להשתתף בחיה התרבות ולי-הנות מיתרונות הקדמאות המדעיות (סעיף 15(1)(א)-(ב)) והזכות להגנה על קניין רוחני ולחופש מדעי (סעיפים 15(1)(ג) ו-15(2)-(3)).

**4.2.3 הגבלות על הזכויות**

כאמור לעיל, סעיף 29 להכרזה האוניברסלית קובע כי זכויות אדם הינן יחסיות וכי יש לאזן בין זכויות של פרטים אחרים לבין אינטרסים ציבוריים כלליים. ביטוי לרעיון זה ניתן למקרה בהוראות סעיפי המսגרת של האמנות של 1966 שנזכרו לעיל – בעיקר סעיף החיריגה של האמנה לזכויות אזרחיות ומדיניות (סעיף 4) וסעיף ההגבלה הכללים של האמנה לזכויות כלכליות, חברתיות ותרבותיות (סעיפים 2(1) ו-4). יתר על כן, חלק מזכויות האדם המנווית באמנות של 1966 כוללות פסקאות הגבלה מפורשות מסוימות, סעיף 19(3) לאמנה לזכויות אזרחיות ומדיניות מתרגלו הגבלות מסוימות על חופש הביטוי:

"The exercise of the right provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals".

הוראות מגבלות דומות ניתן למצוא גם בENGAGE התנוועה (סעיף 12 לאמנה לזכויות אזרחיות ומדיניות), לזכות לפומביות ההליך המשפטי (סעיף 14(1) לאמנה לזכויות אזרחיות ומדיניות), לחופש הדת והאמונה (סעיף 18 לאמנה לזכויות אזרחיות ומדיניות), לזכות האספה (סעיף 21 לאמנה לזכויות אזרחיות ומדיניות) ולהופש התאגדות (סעיף 22 לאמנה לזכויות אזרחיות ומדיניות וסעיף 8 לאמנה לזכויות כלכליות וחברתיות). יתרה מכך, מקובל לראות בחוק מגדרת הזכויות הגדרות הכוללות מגבלות מסוימות. כך, למשל, קבע בית הדין הבינלאומי בהאガ בחוות הדעת בנושא חוקות הנשק הגראוני כי מן העובדה שסעיף 6 לאמנה לזכויות אזרחיות ומדיניות אסור על שלילת חיים באופן שרירותי ("No one shall be arbitrarily deprived of his life") עולה כי שלילת חיים בנסיבות מסוימות – כגון מלחמה – עשויה להיות חוקית<sup>101</sup>. באופן דומה, קבעה הוועדה לזכויות האדם כי האיסור להטערע שרירותית בנסיבות הפרט (סעיף 17 לאמנה לזכויות אזרחיות ומדיניות) כולל רק פגיעות בלתי חוקיות וסבירות בזכות הפרטiot, ומכאן, איןנו בלתי מוגבל<sup>102</sup>. ניתן למצוא הוראות הגבלה מסוימות דומות גם בENGAGE לזכות לחרויות

<sup>101</sup> .Legality of Nuclear Weapons, *supra* note 92, at p. 240  
<sup>102</sup> *Toonen v. Australia*, Comm. No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

**פרק VII: זכויות האדם במשפט הבינלאומי |**

אישית, הכוללת איסור מעוצר שדרודתי (סעיף 9 לאמנה לזכויות אזרחיות ומדיניות), לזכות הכניסה של אדם למידינתו שלו, שאינה ניתנת לשילוח באופן שדרודתי (סעיף 12(4) לאמנה לזכויות אזרחיות ומדיניות), הזכות ליטול חלק בחיה הציבור, שאינה סובלת הגבלות בלתי-סבירות (סעיף 25 לאמנה לזכויות אזרחיות ומדיניות), הזכות להגנה על חיי המשפחה, הדורשת הגנה וסיוע רחבים ככל האפשר (סעיף 10 לאמנה לזכויות כלכליות, חברתיות ותרבותיות) ולזכות לבリアות המגלמת שאיפה לרמת הבריאות הגופנית והנפשית הגבוהה ביותר שאפשר להשיג (סעיף 12 לאמנה לזכויות אזרחיות ומדיניות).

לבסוף, יש לציין גם כי חלק מהגדירות הזכויות משתמש במונחי שתומים גמישים למדי המאפשרים שינויים באופן הנסיבות בהתאם לנסיבות הרלוונטיות. כך, למשל, סעיף 9 לאמנה לזכויות אזרחיות ומדיניות מחייב הבא את עצורים בפניו שופט בנסיבות (promptly) ולקיים משפטים בתוך זמן סביר (reasonable time). באופן דומה, הזכות לתנאי עבודה צודקם ונאותים (סעיף 7 לאמנה לזכויות כלכליות, חברתיות ותרבותיות) והזכות לרמת חיים נאותה (סעיף 11 לאמנה לזכויות כלכליות, חברתיות ותרבותיות) סובלות פרשנות גמישה ותלוית נסיבות וקשר חברתי. ניתן לציין, כי גם הזכות לשוויון, אשר נזכרה לעיל, אינה זכות מוחלטת, שכן היא אוסרת על הבחנה לגיטימית בין פרטיהם שהשונות ביניהם הינה רלוונטית. משמע, גם הגדירה זו מאפשרת גמישות בלתי מבוטלת בישום הנורמה.

מכל האמור לעיל עולה כי דיני זכויות האדם מתאפיינים בגמישות רבה המאפשרת לאון בין הוראות זכויות ספציפיות לבין זכויות ספציפיות אחרות ואינטראיסים חברתיים כלליים, ונראה כי לשון הוכחות סובלות יישום המשנה מסיטואציה לסיטואציה. פרשנות ברוח זו של דיני זכויות האדם עשויה לענות במידה רבה על הביקורת שתובא להלן, הרואה בהפעלה נוקשה ואחדידה של עקרון האוניברסליות שבבסיס תנועת זכויות האדם סוג של אימפריאליות תרבותי בלתי רצוי<sup>103</sup>. לעומת כי יישום זכויות האדם בתוך מסגרת אנגלית אוניברסלית באופייה, תוך ביצוע התאמות ספציפיות לפי תנאי המדינה הרלוונטי, משקף שילוב ראוי בין האוניברסליות לבין רעיונות של יהדות תרבותית. שילוב כזה אף הנו בעל פוטנציאל גבוהה יחסית לקבל תמיכה פוליטית ומשפטית מצד המדינות החברות בקהילה הבינלאומית.

נראה גם כי ההגבלות הספציפיות הנלוות לזכויות השונות מיתירות במידה רבה את סעיפי ההגבלה הכלליים, ובעיקר את סעיף 4 לאמנה לזכויות אזרחיות ומדיניות (סעיף החיריגה), שכן אין צורך לפנות לסעיף הגבלה כללי מקום שבו קיים סעיף הגבלה ספציפי יותר. בנסיבות אלה, נראה כי תפקידה העיקרי של הכהוצה על מצב חירום לפי סעיף 4 הינו ליצור חזקה משפטית כי הנסיבות הרלוונטיות מצדיקות הגבלה על זכויות אדם ולאפשר לקהילה הבינלאומית לפפק בצוותה הדוקה יותר על הנעשה במדינה המתמודדת עם מצב חירום.

יש לציין חריג בולט אחד למוגמה הרואה בזכויות האדם זכויות יחסיות. סעיף 2(2) לאמנה נגד עינויים משנת 1984 קובע כדלקמן:

<sup>103</sup> ראו למשל: J. Donnelly "Cultural Relativism and Universal Human Rights" 6 *Hum. Rts.* Q. (1984) 400; G. Binder "Cultural Relativism and Cultural Imperialism in Human Rights Law" 5 *Buff. Hum. Rts. L. Rev.* (1999) 211 התרבותיות, ראו להלן תת-פרק 7.1.

## ו ארנה בז'רפתלי וויבל שי

"No exceptional circumstances whatsoever, whether a state of war or of a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture".

הווראה זו, כמו גם היעדרה של הגבלה מפורשת בנוגע לאיסור העינויים המצויה בסעיף 7 לאמנה לזכויות אזרחיות ומדיניות, והוצאתו של הסעיף מגדר הנסיבות אשר ניתנים להריגה בשעת חירום, מובילה כנראה למסקנה כי יש לדאות באיסור נגד עינויים הקיימים בדיון הבינלאומי המודרני כאיסור מוחלט. זו אכן העמדה הדומיננטית בספרות ובפסיקה<sup>104</sup>. אשר על כן, ספק אם "בג"ץ העינויים", אשר הותיר על כנה את האפשרות כי עובדי המדינה המבצעים עינויים ייהנו מהגנת הצורך בפלילים<sup>105</sup>, עולה בקנה אחד עם התיחסיביותה של ישראל לפיקוד העינויים.

ניתן לציין, כי יש החלוקים על התקוף המוסרי של הקביעה שלפיה שום נסיבות, קיצוניות ככל שתהינה, לא יצדיקו עינויים (למשל, כאשר קיים בידי הרשות מידע אמיתי כי בידי חשוד מצוי מידע היכול להציג חיהם של אלף בני אדם מפני מות אימנתני). עמדה זו מציבעה גם על אי-קיוומו של איסור מוחלט דומה באשר לזכות לחיים כביטוי לאנומליות שבאיסור גורף על עינויים. נראה לנו אפוא כי האיסור הגורף על עינויים באמנה נגד עינויים נובע מהכרעה פוליטית בעיקרה של מנגנון האמנה נגד עינויים שלא להתרח חרגים כלשהם לאיסור העינויים, וזאת מתוך חשש מפני יצירתו של "מדרון חלקלק" אשר יעודד מדיניות לנצל לרעה חריגים מסווג "פצצה מתתקתקת" ומתחוך השקפה כי עינויים כמעט תמיד אינם יעילים ואי-ינם מוצדקים. מכאן, שיש להבין את אופיו הגורף של האיסור לאו דווקא בגין הפגיעה ברעיון האנטיאני של התייחסות לפרט כל מטרה ולא כל אמצעי<sup>106</sup> (שכן דיני זכויות האדם אינם שלולים פגיעה בהיותם של מעטים על מנת להציג רבים), אלא בעיקר לאור ההכרה בקיושי שהיא נוצר לפקח על אופן הפעלת שיקול דעת בידי המדינה החברות באמנה לו הנורמה הייתה מנוסחת כנורמה יהשית. ניתן לטעון כי נוקשותה של הנורמה נגד עינויים ואי התאמתה למקרים קצה נדרים הינה מחיר סביר לתשלום בעבר הגברת הودאות המשפטית הנלוות לניסוחה של נורמה כנורמה מוחלטת.

E. Benvenisti "The Role of National Courts in Preventing Torture of Suspected Terrorists" 8 *E.J.I.L.* (1997) 596; Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\Rev.1 at 30 (1994) <sup>104</sup>.

בג"ץ 5100.94 הוועד הציורי נ' עינויים בישראל נ' ממשלה ישראל, פ"ד נג(4) 817 <sup>105</sup>. I. Kant "Metaphysical Foundations of Morals" *The Philosophy of Kant* (New York, C.J. 106 Y. Shany "The Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment and Punishment: Can the Absolute be Relativized under Existing International Law?" (November 25, 2005)

<http://ssrn.com/abstract=856905>

**פרק VII: זכויות האדם במשפט הבינלאומי****4.3. הסתייגיות**

אמנות וזכויות האדם, בדומה לאמנות בינלאומיות רבות אחרות, מאפשרות למדיינות חברות להסתיג מהוראותיהן. אפשרות זו נובעת מן ההכרה כי השינויים הרבה בין המדינות מתקיימים מכך של השגת מכנה משותף מלא בוגע לכל הזכויות המוניות באמנות. היכולת להסתיג מחלוקת מסעיפי האמנה הינה אפוא מרכיב חשוב בעידוד ה策טרופות המוניות אל האמנות מצד מדינות העולם, לרבות מדינות אשר לא היו מצטרופות למשטר ולשיח הנוצר ממסגרתו בלבד. עם זאת, הסתייגיות מאמנות וזכויות האדם עלולות להקטין באופן משמעותי ערך עצמן ולפגוע, אגב כך, בהגשמה מטרותיהן של האמנות.

אכן, מדינות רבות צירפו שורה של הסתייגיות מרחיקות לכת לאמנות וזכויות האדם שאליהן הן ה策טרופו: כך, למשל, הסתייגת ארצות הברית, בהיקף כזה או אחר, מהוראות הבאות של האמנה לזכויות אזרחיות ומדיניות, אשר איןן תואמות באופן מלא את הדין האמריקני: האיסור של תעומלה למלחמה והסתה לשנה (סעיף 20); האיסור של הוצאה להורג של קטינים (סעיף 6); האיסור של עינויים (סעיף 7); החובה לאפשר רטראקטיביות לkill בפלילים (סעיף 15); החובה להתיחס באופן מיוחד לעברינאים קטינים (סיעיפים 10(2)(ב), 10(3), 14(4)).<sup>107</sup> גם ישראל הסתייגת כזכור מהזכות לחירות אישית (סעיף 9) ומן הזכות לחיי משפה (סעיף 23). גם שדינית האמנות של המשפט הבינלאומי מתרידים ככל הסתייגיות מאמנות, בהיעדר קביעה אחרת בהן, הרי שהסתיגיות אין יכולות להיות מנוגדות לנושא האמנה ולמטרתה.<sup>108</sup> מכאן שחוקיות חלק מהסתיגיות אשר צירפו לאמנות וזכויות האדם השונות עשויה להיות מוטלת בספק.

הוועדה לזכויות האדם הממונה על אכיפת האמנה לזכויות אזרחיות ומדיניות ציינה בהערה פרשנית שפורסמה בשנת 1994 מספר דוגמאות לסוגי הסתייגיות העוללות להיות בלתי חוקיות: הסתייגיות הגורעות מנורמות משפטיות מנהגיות או קוגנטיות; הסתייגיות המנוגדות לעקרונות מסווגים בבסיס המשטר שהאמנה יוצרת (כגון, עקרון ההגדרה העצמית, עקרון השוויון, הצורך ביישום האמנה בדיון הפנימי והמגבלות על זכות החריגה); הסתייגיות המגבילות את יכולת הפיקוח של מגנוני האכיפה על המדינה המסתיגת; והסתיגיות גורפות המכפילות למעשה את האמנה בדיון הפנימי.<sup>109</sup> לפי עמדת הוועדה, התוצאה המשפטית של הסתייגות בלתי חוקית אינה ביטול ה策טרופות המדינה לאמנה, אלא ביטול הסתייגות והישארות אקט ה策טרופות על כנו.<sup>110</sup> יש לציין, כי מסקנה אחרתה זו סופה ביקורת מצד חלק מהמדינות החברות ותוקפה שנוי בחלוקת.<sup>111</sup>

<sup>107</sup> הנוסח המלא של הסתייגות האמריקנית מופיע בכתובת האינטרנט הבאה: [http://www.ohchr.org/english/countries/ratification/4\\_1.htm](http://www.ohchr.org/english/countries/ratification/4_1.htm)

<sup>108</sup> VCLT, art. 19(c)

<sup>109</sup> Human Rights Committee, General Comment 24 (52), *supra* note 13

<sup>110</sup> *Ibid*, at para.18

<sup>111</sup> R. Goodman "Human Rights Treaties, Invalid Reservations, and State Consent"

<sup>112</sup> 96 A.J.I.L. (2001) 531, 532

**| ארנה בונפטלי וובל שי**

בעיה חריפה עוד יותר של הסתייגיות נרחבות, המרוכנות למעשה מתוכן את אקט ההצטראפות לאמנה, קיימת בפרקטיקה הנוגעת בקשר לאמנות הספציפיות. כך, למשל, הסתייגה ערבי הסעודית בעת שהצטראפה לאמנה נגד אפלילית נשים מן האמנה באופן הגורף הבא:

"In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention"<sup>112</sup>

מדינות אסלאמיות אחרות הסתייגו אף הן מהוראות מרכזיות של האמנה נגד אפלילית נשים; וכזכור, גם ישראל הסתייגת משני סעיפים של האמנה (האוסרים אפליליה ב민ויו למשרות ציבוריות ומתייבים הבתחת שווין זכויות במשפחה), מטעמים של דין דת<sup>113</sup>. הגם שחלק מהסתיגיות הגורפות של מדינות האסלאם הובילו להנגדויות של מדינות חברות אחרות, שכן הסתייגיות אלו מנוגדות בבירור למטרת המרכזיות של האמנה – ביעור כל הצורות של אפלילית נשים – אלו נמנעו בדרך כלל מלדרוש את אי-החלפת האמנה ביחסים ביניהן לבין המדינה המסתיגת<sup>114</sup>. תוצאה אחרת זו נובעת ככל הנראה מאופיין הבלתי הדדי של האמנות – הינו, מהעירד זיקה ישירה בין מערכת הזכויות והחוויות שבין המדינה לפרט ובין מערכת היחסים הפוליטית שבין המדינה המסתיגת לבין מדינות שלישיות. מצב דברים זה מעודד מדינות להשלים למעשה עם הסתייגיות של מדינות אחרות, שכן הפתחת היקף ההגנה לתושבי המדינות המסתיגות אינו נוגע במישרין לאינטראסים הפוליטיים של המדינות השלישיות.

## **5. מגנוני האכיפה הגלובליים של דיני זכויות האדם הבינלאומיים**

דיני זכויות האדם הבינלאומיים מייצנים סטנדרט גבוח, העולה על סטנדרט ההגנה המקביל הקיים בדין הפנימי של מדינות רבות. אך כמו בתחום משפט בינלאומי אחרים, מגנוני אכיפת הדינים הנמ חלים למדי. עם זאת, נדמה כי בעית האכיפה הקיימת בתחום זכויות האדםקשה עוד יותר מזו הקיימת ביחס לתחום משפט בינלאומיים אחרים, וזאת לאור אי-התאמתם של מגנוני האכיפה הקלאסיים של המשפט הבינלאומי (כגון, סנקציות בינלאומיות) – אשר נועדו להסדיר יחסם בין מדינות – לטיפול בהפרות

<sup>112</sup> ראו: <http://www.un.org/womenwatch/daw/reservations-country.htm>. בנוסף,

הסתיגה ערבי הסעודית מהוראות האמנה בנוגע לאי-אפליליה בין גברים ונשים (ס' 9(2) בנוגע לאזרחות ילדיהם ומתניות השיפוט של האמנה (ס' 29(1)).

<sup>113</sup> בפסק דין של בית המשפט לענייני משפטה ברמת-גן משנת 2003 נקבע כי ההסתיגות הישראלית לסעיף 16 לאמנה (הבנות לשווין בין בני זוג במהלך חייו הנישואין ולאחר פירוקן) אינה חוקית, דבר המוביל לבטלות ההסתיגות. בש"א (ת"א) 10408/01 ל.ש. נ' ל.א., תק-מש (1) 2003.

<sup>114</sup> ראו: art. 21(3).

**פרק VII: זכויות האדם במשפט הבינלאומי**

דין שביצעו מדינות כלפי פרטימ. גם כאשר קיימת אפשרות משפטית למדינות לטעות זו את זו בגין הפרות זכויות אדם (מכוח עקרון ה- *erga omnes*), שיקולים פוליטיים – הינו, חוסר רצון להסתכסך עם מדינות אחרות, חשש מתביעות הדירות וענין מועט בוגרים של פרטימ שאינם אזרחי המדינה התובעת – מוביל בדרך כלל לא-הפעלתם של מגנוני האכיפה הבין-מדינתיים. נדמה כי חוסר נוכנות של המדינות להפעיל מגנוני אכיפה בין- מדינתיים או ליצור מגנוני אכיפה מיוחדים ויעילים ברמה הגלובלית מחייב יותר מכל על מחויבות חלקית מצד המדינות לנורמות הקבועות באמנות זכויות האדם הבינלאומיות. כאשר מצרפים את חולשת מגנוני האכיפה לבנייה בסיסית הסתיגיות שנדרונה לעיל, נראה כי מדינות רבות מצטרפות לאמנות זכויות האדם משיקולים תמייניים גרידא, מבלתי שהדבר מלאוה בהפנה אמרית של תוכני האמנות ובויתור ממשי על ריבונות המדינה לטובת הערכיהם האוניברסליים שבבסיס הדיינים. לעומת זאת, כפי שנפרט בהמשך, ברמה האזרחית, בעיקר באירופה, קיים מודל אפקטיבי יותר של אכיפת זכויות אדם, עובדה זו מדגישה עוד יותר את חולשת המנגנונים הקיימים ברמה הגלובלית.

**5.1. המנגנונים הפוליטיים****5.1.1. נציבות זכויות האדם והਮועצה לזכויות אדם**

הגוף המרכזי אשר פעל עד לאחרונה באו"ם לקידום ההגנה על זכויות האדם הננו הנציבות לזכויות אדם (Human Rights Commission), אשר הוקמה ב-1946. הנציבות הורכבה מנציגיהן הדיפלומטיים של 53 מדינות, המייצגות את הקבוצות האזרחיות השונות באו"ם. היא התקנסה מדי שנה לישיבה בת ששה שבועות בג'נבה שבהណן מצב זכויות האדם בעולם (הנציבות יכולה היהת להתקנס גם במושבים מיוחדים נוספים). הנציבות הייתה אפוא, עד זה לא מכבר, גוף זכויות האדם הבינלאומי היחיד בעל סמכות לדון בכל בעיות זכויות האדם, בכל מקום בעולם.

עם זאת, לנציבות לא ניתנו סמכות לקבל החלטות מחייבות, אלא רק להמליץ המלצה ולחביר נושאים לטיפולם של גופי האו"ם אחרים (בעיקר המועצה הכלכלית-חברתית ECOSOC – אשר היהת הארגן הראשי המפקח על עבודות גופי זכויות האדם של האו"ם). היא גם שימשה לעתים פורום לניסוח סטנדרטים של הגנה על זכויות אדם (חלק מהמשאות מתן לקראת ההכרזה האוניברסלית והאמנות של 1966 בוצע בנציבות). יתר על כן, הנציבות הייתה רשאית למנות גופי משנה, להסミニם לחקור הפרות זכויות אדם ולדון, מאוחר יותר, במקרים החקירה, וזאת לפי החלטות 1235 ו-1503 של המועצה הכלכלית-חברתית<sup>115</sup>. מכוח

ECOSOC Res. 1503 (XL VIII), 27 May 1970, UN ESCOR Supp. 48 (No. 1A) at p. 115  
8–9, UN Doc. E/4832/Add.1 (1970); ECOSOC Res. 1235 (XLII), UN ESCOR Supp.  
42. הליך 1503 תוקן על ידי המועצה הכלכלית-חברתית<sup>115</sup>  
חברתית בשנת 2000, 16 June 2000, UN ESCOR, Supp. No. 1,  
.at p. 24, U.N. Doc. E/RES/2000/3 (2000)

**| ארנה בונראטלי וובל שי**

ההחלטה הראשונה מינתה הנציבות מעט לעת מומחים – דוחים (rapporteurs) או קבועות עבודה (working groups)<sup>116</sup> – על מנת לחקור את מצב זכויות האדם במדינה מסוימת (country mandate) או לחקור את מצב יישומה של זכויות אדם מסוימת או נושא מסוים הנוגע לכבוד זכויות אדם (thematic mandate)<sup>117</sup>. בנוסף לכך מינתה הנציבות מעט לעת ועדות חקירה הדנות במצב ספציפי שבו קיים חשש כי מופרות זכויות אדם בהיקף נרחב. חלק מדווחות המומחים הייתה השפעה לא מבוטלת על התנהגות המדינות וזאת בשל מקצועיותם של הדוחים, יכולות הדוחות, אופיים הרשמי והחשיפה הפומבית שלהם זכו. עבודות הדוחים הדגישה, אפוא, עבור המדינות את הצורך לחת דין וחשבון לגולפים בינלאומיים בגין מען זכויות האדם שלה. פרסום הדוחות, והדיון בהם בנציבות, עשויים היו לגרום פגיעה במוניטין של מדינות מפרות (תהליך המכונה לעיתים ביוש פומבי או public shaming) ולהרתיע מפרי זכויות אדם פוטנציאליים אחרים.

מנגנון אחר, שפעל לצורך הנציבות הנו "מנגנון 1503" אשר אפשר לוועדת מומחים בשם תת-הנציבות לקידום והגנה על זכויות האדם (Sub-Commission on the Promotion and Protection of Human Rights<sup>118</sup>) לדון בתלונות המוגשות ממקור כלשהו נגד מדינות המפרות זכויות אדם, ובכללן שהتلונה מצביעה על הפרה חמורה ושיטיתית. תת-הנציבות ביראה בדרך כלל את התלונה מול המדינה הנילונה באופן דיסקרטי, אם כי בסמכותה היה להעביר את הטיפול בתלונה לנציבות, ולתת אגב כך פומביות להפרה הנטענת.

למרות מגוון הפרוצדורות אשר עמדו לרשות הנציבות, מדובר בה מבוגן חלש במיוחד, ללא סמכויות אכיפה של ממש. הנציבות שימה בעיקר כפורים דיפלומטי לדיניהם במצב זכויות אדם, אשר לא הוביל על פי רוב לשינוי של ממש במצב העניינים. יתר על כן, הפוליטיזציה של הדיונים בנציבות, אשר באה לידי ביטוי בהפעלה סלקטיבית של המנגנונים השונים – התמקדות בהפרות זכויות אדם במדינות מסוימות והתעלמות מהפרות זכויות אדם, חמורות לא פחות, במדינות אחרות, הובילו לפגיעה בקרת הנציבות ובഫחתה יכולת ההשפעה שלה על דעת הקהל הבינלאומית. כך, למשל, ההתמקדות המופרעת של הנציבות במצב בישראל (כמעט מחצית מההחלטות של הנציבות שעסקו במצב זכויות האדם במדינה מסוימת בשנת 2005 עסקו במצב בישראל ובשתיים) פגעה באמינות המלצות הנציבות, והדבר הקל על ישראל, כמו גם על מדינות אחרות, להתעלם מהן. יש לציין,

<sup>116</sup> נכון למועד כתיבת שורות אלו פועלם דוחים מדינתיים בנוגע למדיינות והאזורים הבאים: אוזבקיסטן, אפגניסטן, בורונדי, בלروس, האיטי, השטחים הפלשיינים, ליבריה, מיאנמר (בורמה), סודאן, סומליה, צ'אד, צפון קוריאה, קונגוז, קובה, קמבודיה.

<sup>117</sup> נכון למועד כתיבת שורות אלו פועלם דוחים וקבוצות עבודה תמטיים לנושאים הבאים: דירר, יחס לבני אדם ממוצא אפריקאי, מעצרים שרירתיים, מכירת ילדים, חינוך, הימולומיות כפויות, חוותות להורג וחוץ-משפטיות, עוני קיצוני, זכות למזון, חופש הביטוי והדעת, חופש הדת והאמונה, בריאות, הגנה על פעילי זכויות אדם, מאבק בהימלטות מאימות הדין, עצמאות שופטים ועורך דין, עמים ילידיים, עקרבים, שכירין חבר, מהגרים, גזענות, שינויים כלכליים מבניים בקשר עם החורי חובות, הגנה על זכויות אדם במסגרת המאבק בטרור, עינויים, חומרים ופסולת רעללה, שחר לבני אדם, אלימות נגד נשים.

<sup>118</sup> עד 1999 פעלת תת-הנציבות תחת השם: Sub-Commission on Prevention of Discrimination and Protection of Minorities

#### **פרק VII: זכויות האדם במשפט הבינלאומי |**

כיצודם הלא חוקית של עבירות הנזיבות נפגעה גם בעקבות הרכבת הנזיבות, אשר העניק ייצוג נכבד למדינות בעלzas מazon עגום של אי-כבוד זכויות אדם בסיסיות<sup>119</sup>.

על רקע מציאות בלתי מספקת זו הציג בשנת 2005 מזכ"ל האו"ם לבטול כליל את הנזיבות ולהעביר את סמכותה למועצה לזכויות אדם (Human Rights Council) אשר תורכב מדינות שקיבלו על עצמן לפעול על פי הסטנדרטים הגבוהים ביותר של זכויות אדם. הצעתו של המזכ"ל נתקבלה ובשנת 2006 הוחלפה הנזיבות ב萌ועצה לזכויות האדם<sup>120</sup>, במועצה מכיהנות 47 מדינות אשר נבחרו על ידי כל המדינות החברות באו"ם, והיא מיועדת להתכנס לפחות עשרה שבועות בכל שנה. בעת כתיבת שורות אלו (זמן קצר לאחר הבניוס הראשון של המועצה) עדין מוקדם להעריך אם הקמת המועצה מסמנת שינוי ממשי באופן פועלות גופי זכויות האדם של האו"ם. כמו כן, לא ברור אם מגנוני הדוחות והתלונות שפعلו לצד הנזיבות ימשיכו לשרת, לאורך זמן, גם את המועצה החדשה.

##### **5.1.2 גופים אחרים**

בצד המועצה, שהינה גופ זכויות האדם המרכזי של האו"ם, פועלים מספר גופים נוספים בעלי מנדט צר יותר, המוצמצם לתחום זכויות אדם ספציפי. בין הגוף הללו ניתן למנות במיוחד את הנזיבות לטעם האישה, את הנזיבות העליונה לפוליטים אט סוכנות החינוך, מדע ותרבות (UNESCO) ואת הקן לענייני ילדים (UNICEF). בשנת 1993 הקים האו"ם את משרד הנזיב העליון לזכויות האדם, על מנת לתאם בין גופי זכויות האדם השונים הפועלים תחת חסות האו"ם, ולהעניק להם שירותים אדמיניסטרטיביים. הנזיב העליון, העומד בראש המשרד, משמש מנהל הבירוקרטיה של האו"ם בתחום זכויות האדם ומהווה את ה"פנימם הציבוריות" של מערכת ההגנה הגלובלית על זכויות האדם.

##### **5.2. ועדות האמנה**

בצד המנגנונים הפלטתיים שנזכרו לעיל, פועלות ועדות מומחים המונחות על יישום שבע אמונות זכויות האדם העיקרי שנדרכו תחת חסות האו"ם. ועדות המומחים מונחות מספר חברים, המשתנה ממאנה לאמנה (הוא נע בין 10 חברים בוועדה נגד עינויים ל-23 חברים בוועדה נגד אפליה נשים). חברי הוועדה נבחרים על ידי המדינות החברות באמנות השונות לפי מומחיותם, אם כי הרכבת כל ועדה בכללותה נועד לייצג את המיגון הקיים בין המדינות החברות<sup>121</sup>.

<sup>119</sup> כך, למשל, נבחרה בשנת 2003 לוב לעמוד בראש הנזיבות. מזכ"ל האו"ם אף טען בדו"ח שפורסם בשנת 2005 כי מדינות בעלzas מazon גרווע של אי-הגנה על זכויות אדם מבקשות להצטרף לנזיבות על מנת להבטיח כי זו לא תכוון את ביקורתה כלפייה. Secretary General *In Larger Freedom: Towards development, security and human rights for all*, UN Doc. A/59/2005 (2005), at para. 182.

<sup>120</sup> דאו: (2006) (2006), UN Doc. A/RES/60/251 G.A. Res. 60/251, 3 Apr. 2006,

<sup>121</sup> אינדיקציה אפשרית לדומיננטיות השיקולים המצוויים בסיס מינוי חברי הוועדות הינה העבודה כי בעשור האחרון ננתה ישראל מנציגות מרשימה בשלוש ועדות שונות (פרופ'

## | ארנה בורנפטל ויובל שי

תקידן של ועדות האמנה כולל שתי פונקציות המשותפות לכל הוועדות – כתיבת דוחות תקופתיים וחיבור הערות פרשניות (general comments or recommendations). מכוח הפונקציה הראשונה, אשר הינה מגננון האכיפה היחיד הבוחן את הציאות לאמנה מצד כל המדיניות החברתיות, על כל מדינה להגיש מעט לעת (במוצע, אחת לחמש שנים) דו"ח מكيف על אופן יישום כל אחת מהאמנות בשטחה. הוועדות משויות לאחר מכן את המידע הכלול בדי"ח למידע המגיע אליהן ממקורות אחרים, לרבות מ"דוחות צללים" של ארגוני זכויות האדם. הוועדות אף מקיימות מגושים עם נציגי המדינה על מנת לדון בעיות העולות מהדו"ח (הדיון האמור מכונה בשיח האו"ם כ"דילוג קונסטרוקטיבי"); ובסיומו של התהליך, הן מפרסמות הערות מסכימות (concluding observations) המתארות את מצב יישום האמנה בשטח המדינה החברתית ומציגות המלצות לשיפור המצב.

למשל, ועדות זכויות האדם, הבוחנת את אופן יישום האמנה לזכויות אזרחית ומדיניות, ביקרה בשנת 2003 את ישראל בגין הסתכימות מופרחות על מצב החירום שבו היא מצויה על מנת להגביל זכויות אדם בארץ ובשטחים. עוד היא ביקרה היבטים מסוימים של מדיניות הסיכוןים; את הקמת גדר ההפרדה; את הגבלות על התאזרחותם בישראל של פלסטינים הנושאים לישראלים; את אי-הכרה בסרבני מזרח; את השילוב המוגבל של ערבים בשירות הציבורי ועוד<sup>122</sup>. הוועדה המקבילה, הבוחנת את יישום האמנה לזכויות כלכליות וחברתיות ביקרה אף היא בשנת 2003 את ישראל בגין מעמד הסוציאו-אקונומי הנחות של התושבים הערבים; בגין העדפה הניתנת לאזרחים יהודים במסגרת חוקי ההגירה והמרקעין; בגין הגידול באבטלה בישראל; בגין אפלית נשים בדייני הגירושין הנוהגים בארץ; בגין מעמדם של הכפרים הבדויים הלא מוכרים ועוד<sup>123</sup>. גם שמהמלצות אין מחייבות, עצם הדיאלוג עם הוועדה ויוקרטן המקצועית של רוב הוועדות יוצרים לחץ פוליטי מסוים על המדינה להפגין שיפור ברמת יישום האמנה או להסתכן בפגיעה במוניטין שלה בתחום.

הפונקציה השנייה של הוועדות – כתיבת הערות פרשניות, מהוות כלי שבאמצעותו הוועדות מעניקות באופן מודע הנחיה למединות החברתיות בדבר האופן שיש ליישם את האמנה. בכך, מתגברות הוועדות על בעית חוסר הקונקרטייזציה של חלק מהនורמות הקבועות באמנה הנובעת מהלשון הכללית של חלק מהすべים וממייצות הפסיקה המתකלת מנגנון התלונות הפעילים מכוח האמנות (כפי שובייר להלן, חלק מהאמנות אין בכלל כלל מגנון תלונות). כך, למשל, פרסמה הוועדה לזכויות האדם הערות פרשניות חשובות על אודות הזכות לחיים, עקרון השוויון, זכויות מיעוטים, זכויות המשפחה, האפשרות להסתיג מהאמנה ועוד; והוועדה לזכויות כלכליות חברתיות ותרבותיות פרסמה הערות פרשניות, בין היתר, על אודות הזכות לדירות, לבリアות, לחינוך, ובדבר זכויותיהם של קשיישים. כמו ההערות המסכימות, גם ההערות הפרשניות אין מחייבות באופן רשמי, אך

דיוויד קרצ'מר היה חבר בוועדה לזכויות האדם; פרופ' קרמל שלו, פרופ' פרנסס רדיי וד"ר רות הלפרין-קדרי היו חברים בוועדה נגד אפלית נשים; ועוד יהודית קרפ הייתה חברה בוועדה לזכויות הילד. יציג זה מרשים במוחך לאור העובדה, כי אין לישראל נציגות בעשורים האחרונים בנציבות זכויות האדם וmirabilis גופי האו"ם האחרים.

HRC (2003), *supra* note 65 122

Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Israel, U.N. Doc. E/C.12/1/Add.90 (2003) 123

**פרק VII: זכויות האדם במשפט הבינלאומי |**

בהתאם מעמדן המוחדר של הוועדות כ"שומרות החותם" של האמנות, יש להן השפעה לא מכוונת על פרשנות האמנות בידי מדינות, בתים משפט מדינתיים ובינלאומיים, ארגוני וقوות אדם וכיוצא באלו.

בנוסף לכך, רוב הוועדות נוהגות גם מסמכות שלישיית – הסמכות לבחון תלונות שב簟 נטען כי האמנה לא מושמת כהכללה. למשל, הוועדה לזכויות האדם מוסמכת לבחון תלונות בין-מדינתיות כאשר אלו הוגשו נגד מדינות אשר הצהירו על קבלת סמכות הוועדה לבחון תלונות שכאלה על ידי מדינה אחרת שחשפה עצמה אף היא למנגנון התלונות הבין-מדינתיות. עם זאת, אף על פי שclasspath מהמדינות החברות באמנה הסמיכו את הוועדה לדון בתלונות בין-מדינתיות, מעולם לא הוגשה תלונה שכזו (גם לפי האמנה האחרות המאפשרות תלונות בין-מדינתיות – האמנה נגד עינויים, האמנה נגד אפליה גזעית והאמנה לזכויות מהגרי-עובדת, מעולם לא הוגשו תלונות כאלה). נדמה כי דבר זה מעיד על חוסר רצונן של המדינות להקריב את יחסיהן הביני-לאומית לצורכי קידום ההגנה על זכויות האדם, וזאת במיוחד לאור קיומן של אלטרנטיבות המאפשרות לפרטיהם להתלונן בעצם נגד חלק מהמדינות החברות בתחום מן האמנות.

אכן, הצד הסמכות הרדומה לדון בתלונות בין-מדינתיות, מוסמכות חלק מועדות האמנה אף לדון בתלונות פרטיים נגד מדינות החברות באמנה שקיבלו את סמכות הוועדה הרלוונטיות לדון בתלונות כאלה. כך, למשל, לוועדה לזכויות האדם סמכות לדון בתלונות בגין למעטה שני שלשים מהמדינות החברות אשר אימצו את הפרוטוקול האופציוני המשמש את הוועדה לדון בתלונות פרטיים<sup>12</sup>. מנגנוןים אופציוניים דומים גם בגין אפליה גזעית וזכויות אחרות – האמנה נגד אפליה גזעית, האמנה נגד עינויים, האמנה נגד אפליה נשים והאמנה לזכויות מהגרי עבודה (מנגנון אחד זה טרם נכנס לתוקף). מכוח סמכות זו, מקבלות ועדות האו"ם בכל שנה عشرות רבות של תלונות אשר נבחנות על ידי הוועדות ומופנות, במידת הצורך, לtagות המדינות. בסוף תהליך בחינת התלונה, אשר כולל, בעיקרו, שיקילת טיעונים בכתב מצד הפרט המתלונן ומצד המדינה הנלוונה, לא טיעונים בלבד-פה) מפרסמת הוועדה את עדמותה (views). שוב, אף שמסקנות הוועדה אין מחייבות מבחינה משפטית, הרי שבמקרה זה אופיו המעינ-שיפוטי של ההליך, כמו גם יוקרתן של הוועדות, מנסה על מדינות להתנער מההמצאים העובדיים והמשפטיים העשויים להיפסק כנגדן.

בצד מנגנון החקירה, קיימים גם מנגנונים מיוחדים המאפשרים לשתי ועדות – הוועדה נגד עינויים והוועדה נגד אפליה נשים – לחזור הпроות חמורות או שיטתיות של האמנות הרלוונטיות לפועלותן, וזאת באמצעות כל החקירה מיוחדים הכוללים מינוי חוקר מטעם הוועדה, דיאלוג דיסקרטי עם המדינה ולעתים אף ביקור בשטחה. עם זאת, מדינות החברות באמנות נגד עינויים רשאות להוציא עצמן מגדר סמכותם של מנגנון החקירה המיוחדים, ומנגנון החקירה לפני האמנה נגד אפליה נשים הנו אופציוני.

יש לציין, כי ישראל אינה צד לאף אחד מן המנגנונים האופציוניים המאפשרים תלונות פרטיים או תלונות בין-מדינתיות, והיא הוציא עצמה מכל תחולת מנגנון החקירה

Optional Protocol to the International Covenant on Civil and Political Rights, 16 Dec. 124  
1966, 999 U.N.T.S. 302  
הتلונות של הד-ICCPR.

**| ארנה בונפרטלי וובל שע**

המיוחדים לפי האמנה נגד עיניים. עם זאת, היא חברה, כמו יתר המדיניות החברות באמנה נגד אפליה גזעית, במנגנון התלונות הבין-מדיניות הקיימים לפי אמנה אחורונה זו (אם כי, כאמור, מנגנון זה מעולם לא הופעל). נדמה שחוור נוכנותה של ישראל להכפיף עצמה למנגנוני התלונות או למנגנוני החקירה המיוחדים והקיים מכוח האמנות משקפת חוסר אמון במנגנוני הבינלאומיים או, לפחות, חשש אמיתי מפני קביעה מעין-SHIPOTIT לפיה ישראל אינה עומדת בסטנדרטים הבינלאומיים המקובלים בנוגע לאמנות זכויות האדם המרכזיות.

לסיכום, מנגנוני האכיפה הפעילים לאכוף את דיני זכויות האדם ברמה הגלובלית הננים אפקטיביות מוגבלת. לגופים הפליטיים (המוחצת לזכויות אדם, ובמעבר הנציבות לזכויות אדם) סמכות לדון בכל הפרת זכויות אדם, אך הם אינם מוסמכים לקבל החלטות מחייבות, ויוקרטם מוגבלת. לעומתם, עדות האמנה נהנות בדרך כלל מיוקרת רבה יותר, אך הן נעדרות סמכות בנוגע למדיניות אשר איןן חברות באמנות, והשפעתן על מדיניות חברות שלא הצטרפו למנגנוני התלונות והחקירה מיוחדים מוגבלת. מובן כי מצב עניינים זה אינו מקרי. נהפוך הוא, הוא משקף בחירה פוליטית מודעת של המדיניות החברות באו"ם להותיר בידיהן מרחב תמרון רחב בנוגע לאופן יישום התחביבותיהם לפי אמנה זכויות האדם ולהפחית את המחדיר הפליטי והמשפטית העשי לנבע מהפרת האמנות. יש לבקר במצב עניינים זה, המניציח קיומה של מחויבות מן הפה אל החוץ לערכיהם שבבסיס תנועת זכויות האדם הבינלאומית ולהגבלה על ריבונות המדיניות שдинמי זכויות האדם מחייבים. ביקורת זו מתקבלת משנה תוקף כאשר בוחנים את האפקטיביות הרבה יותר של מנגנוני ההגנה האזרחיים על זכויות האדם – אפקטיביות המדינישה את אי-מצוי הפטונציאל של המנגנונים הגלובליים. בינה זו הינה נושא של תת-הפרק הבא.

## **6. מנגנוני ההגנה האזרחיים על זכויות האדם**

בצד התפתחות דיני זכויות האדם ברמה האוניברסלית, התרחשה החל משנת 1948 ואילך פעילות מקבילה של יצירת סטנדרטים והקמת מנגנוני הגנה גם ברמה האזרחית – בעיקר בשלוש יבשות – אירופה, אמריקה ואפריקה. קידום זכויות האדם ברמה האזרחית נבע במידה מסוימת מן הקשיים שהחטعروרו בגין קונצנזוס בנושא זכויות האדם ברמה הגלובלית וכן ההנחה כי הקربה הגאוגרפית, ההיסטוריה, הדתית, הפליטית והאידיאולוגית בין מדינות השוכנות באותו אזור תוכל לאפשר התקדמות מהירה יותר אל עבר הגנה על זכויות אדם. באירופה נלווה לכך תחושת דחיפות מיוחדת לאור הטרואמה של אירופאי מלחמת העולם השנייה ורצונן של מדינות מערב אירופה להציג אльтרנטיבת אידיאולוגית לקומוניזם. מעבר לכך, להגנה האזרחית על זכויות אדם הייתה תכלית נוספת: היא נועדה להגביר את שיתוף הפעולה בין המדינות באזרע, קודם תפיסות ערכיות ופוליטיות משותפות בדבר צורת הממשל הריאויה, ולתרום בכך לכך לתחביבי אינטגרציה פוליטית אזרחית. אכן, שלושת מנגנוני זכויות האדם הקיימים ברמה האזרחית פועלם תחת מסגרות פוליטיות רחבות של שיתוף פעולה אזרחי – מועצת אירופה (ארגון המקדם שיתוף פעולה בין 46 מדינות אירופיות), ארגון המדינות האמריקניות (ארגון המקדם שיתוף פעולה

**פרק VII: זכויות האדם במשפט הבינלאומי**

בין 35 מדינות יבשת אמריקה והאיחוד האפריקני (לשביר, הארגון לאחדות אפריקה, שבו חברות 53 מדינות אפריקניות).

**6.1. מגנון זכויות האדם האירופי**

במרכז מגנון זכויות האדם האירופי מצויה האמנה בדבר הגנה על זכויות אדם וחירותים יסוד משנת 1950 שבה חברות 46 מדינות אירופיות<sup>125</sup>. האמנה, אשר נועדה תחת תוקף חלק מזכויות הדור הראשון אשר היו כלולות בהכרזה האוניברסלית, תוקנה עם השנים, באמצעות 14 פרוטוקולים משלימים אשר הוסיפו הגנה על זכויות אדם נוספות (למשל, הזכות לKENNIN, האיסור על עונש מוות, הזכות לבחור ולהיבחר והזכות לחינוך) וביצעו רפורמות במבנה מגנוני הפיקוח על יישום האמנה. עד 1998, נאכפה האמנה באמצעות נציגות זכויות אדם האירופית (European Commission on Human Rights) אשר הייתה מוסמכת לבחון תלונות שהגישיו המדינות האחת נגד השניה בגין הפרת האמנה, ובנוגע למדינות שהסבירו לכך, גם תלונות של פרטים אשר זכויות האדם שלהם הופרו. הנציגות יכולה לדוחות את התלונה, לנסות ולמצוא פתרון של פשרה או להזכיר דו"ח ובו המלצותיה יכולה לחשוף את הטענה. במקרה אחרון זה, יכולה הנציגות, על סמך הכתוב בדו"ח, גם להעביר את התלונה להמשיך טיפול בפני גופו פוליטי – ועדת השירותים של מועצת אירופה (Committee of Ministers) – או לגוף שיפוטי – בית הדין האירופי לזכויות אדם (of European Court of Human Rights) היושב בשטרסבורג ואשר הנה בעל סמכות לפرسم פסקי דין מחייבים. עם זאת, סמכותו של הגוף האחראי בנוגע למדינות החברות באמנה הותנה בהסכם המדינה הנילוגה. במקרה שבו הסכמה זו ניתנה בדרך כלל, באמצעות הצהרה כלילית), הרי שפטיתת ההליכים בבית הדין יכולה להתבצע לא רק על ידי הנציגות, אלא גם על ידי מדינות חברות אחרות ולאחר שהנציגות סיימה לטפל בעניין. בשנת 1994, לאחר כניסה לתוקף של הפרוטוקול התשייעי לאמנה נוצרה אפשרות לפרטים ליזום פניה לבית הדין נגד מדינות החברות בפרוטוקול זה, וזאת לאחר שהתיק נדון בנציגות.

בשנת 1998, עם כניסה לתוקף של הפרוטוקול השני לאמנה, נבצעה רפורמה מרתקת לכתחילה במגנון האכיפה של האמנה. הנציגות בוטלה וסמכויותיה הועברו לבית הדין. יתר על כן, הצורך בהסכם נפרד של המדינות מגנון תלונות הפרטים ולסמכות בית הדין בוטל, וכל החברות באמנה הפכו להיות כפופות באופן אוטומטי לסמכות השיפוט המחייבת של בית הדין אשר הוסמכו לוון בכל תלונה של פרט נגד מדינה חברה או של מדינה חברה אחת נגד מדינה חברה אחרת. את מקומו של הדיון הדוציאלי בתלונות בנציגות ובבית הדין החליף המנגנון הבא: תלונות המוגשות לבית הדין נדונות, אם נמצאו קבילות, בפני הרכב של שבעה שופטים; עם זאת, בית הדין מוסמך לבחון מחדש, בהרכב מורחב של 17 שופטים החלטות של הרכב המקורי המעוררות קושי עקרוני או מעלות שאלת פרשנית קשה<sup>126</sup> (יש לציין, כי ניתן להעביר את הדיון להרכב מורחב גם במהלך הדיון בהרכב המקורי, עוד לפני שנתקבלה ההחלטה שם). בעקבות הרפורמה של 1998 עלתה באופן

<sup>125</sup>.EHR Conv. *supra* note 3

<sup>126</sup>.ECHR, art. 43 בבית הדין מכון מספר שופטים זהה למספר המדינות החברות באמנה.

## ו. ארנה בז'רפקטלי וויל שער

חד מספר התקים המובאים בפני בית הדין מכמה עשרות תיקים בכל שנה לאלפי תיקים בשנה. הפרוטוקול ה-14 (שטרם נכנס לתוקף), המסמן, בין היתר, את בית הדין לדוחות על הסף במקרים מסוימים עתרות שאינן מוגשות על פניהן הפה קשה של זכויות אדם ועוד להתמודד עם בעיות העומס שנוצרה עקב הרפורמה האמורה.

קשה להפריו בחשיבותו תרומותו של בית הדין האירופי לקידום ההגנה על זכויות האדם באירופה. קיומה של ערכאה בינלאומית בעלת סמכות שיפוט שבוחנה ובבעל סמכות להנפיק פסקי דין מחייבים, מכפיה למעשה את מערכות המשפט המדינתיות לפיקוח שיפוטי אפקטיבי. יתר על כן, מדיניות מערב-אירופה העניקו במהלך השנים גיבוי פוליטי מרשים למננון, והפכו את החלטות בית הדין לאכיפות מבחינה מעשית. כך, למשל, המדיניות המועמדות להצטרך לאיוח האירופי נדרשו להצטרך לאמנה האירופית ולהציג, לאחר זמן, מאוזן של ציאות להחלטות בית הדין.

יתר על כן, החל משנות ה-70 של המאה הקודמת, התאפיינו החלטות בית הדין באימוץ פרשנות דינמית – מעין חוקתית – להוראות האמנה האירופית, באופן שהגדיר מחדש את דיני זכויות האדם הבינלאומיים, בכל הנוגע לתחילה שלהם במקום ובזמן, לקיומו של רכיב הגנה פוזיטיבי על הזכויות, לנקודת האיזון שבין זכויות לבין הగבלות על היקפן ועוד. כך, למשל, פסל בית הדין את חוקי הסובי-יודיצה הבריטיים כמנוגדים לחופש הביטוי<sup>127</sup>; אסר הסגרת חזותים אירופים לארצות-הברית במקרים שבהם המוסגים צפויים להמתנה ממושכת עד להוצאה לפועל של גור דין מוות הצפוי להיגזר עליהם, בשל הסבל הנפשי הקשה הנגרם לנודנים במהלך כליאתם<sup>128</sup>; אסר טכניקות חקירה פוגעניות של השודים בטror<sup>129</sup>; ופסל הפלית הומוסקסואליםocab<sup>130</sup>.

בקשר זה, ניתן לציין כי בית הדין עשה בפסיקותיו שימוש נרחב ומוסכל בדוקטרינת "מתחים שיקול הדעת" (margin of appreciation) המרסנת את מידת המעויבות של בית הדין בהחלטות אשר לגבייהן יש לבתי דין פנים-מדינתיים יתרון ייחסי, וזאת על מנת לדרכוש, בין היתר, את אמוןן של המדיניות החברות ומערכות המשפט הפנימיות שלחן<sup>131</sup>. על בסיס זה אפשר בית הדין, למשל, למדינות לבצע מעצרים מנהליים בשעת חירום<sup>132</sup>; לפסול ספרים שנתפסו בעיניהם כבלתי מוסריים<sup>133</sup>; ולהסדיר את מעמדם המשפטי של עוברים<sup>134</sup>. אכן, הדינמיקה שנוצרה בין הפיקוח השיפוטי בשטרסבורג לבין המדיניות החברות – הכוללת פיקוח בינלאומי על הדין הפנימי, כמו גם הפריה הדידית ויצירת שיח המוביל להפנמת נורמות האמנה, עודדה את מדיניות אירופה לבצע רפורמות בדיני זכויות האדם הפנימיים

.Sunday Times v. U.K., Eur. Ct. H.R. (Ser. A), No. 30 (1979) 127

.Soering, supra note 99 128

.Ireland v. U.K., Eur. Ct. H.R. (Ser. A), No. 25 (1978) 129

.Lustig–Prean v. U.K., 31 E.H.R.R. 23 (2001) 130

לדעת נרחב בנושא ראו: H.C. Yourow *The Margin of Appreciation Doctrine in the*

*Dynamics of European Human Right Jurisprudence* (London, New York, The Hague,

1996); Y. Arai–Takahashi *The Margin of Appreciation Doctrine and the Principle of*

*Proportionality in the Jurisprudence of the ECHR* (Antwerpen, 2002)

.The Lawless case, Eur. Ct. H.R. (Ser. A), No. 3 (1961) 132

.Handyside v. U.K., Eur. Ct. H.R. (Ser. A), No. 24 (1976) 133

.Vo v. France, ECHR judgment of 8 July 2004 134

**פרק VII: זכויות האדם במשפט הבינלאומי |**

שלهن. באמצעות רפורמות שכאה מבקשות המדינות להימנע מהמבוכה ומהនזק הפוליטי הכרוכים בקיומה מצד בית הדין כי האמנה האירופית הופרה. כך, למשל, בריטניה, אשר פועלותיה נמצאו פעמים רבות מנוגדות לאמנה האירופית, אימצה בשנת 1998 את חוק זכויות האדם – Human Rights Act – שיביא את האמנה האירופית אל תוך הדין הבריטי והסמיך בתו משפט מקומיים לקבוע כי דין המקומי אינו עולה בקנה אחד עם הוראות האמנה (קיומה המאפשרת לדרגים הפוליטיים ליזום הלים מקוצרים לתיקון החקיקה הפנים מדינית).

ניתן לציין כי לצד האמנה האירופית, ובית הדין הפועל לאכפה, פועלים מספר ממשרדי זכויות אדם נוספים תחת הסוטה של מועצת אירופה. החשוב מביניהם הננו משטר ההגנה על זכויות חברתיות המושתת על המגילה החברתית האירופית משנת 1961<sup>135</sup> – אמנה החופפת בקווים כלליים את האמנה בדבר זכויות כלכליות, חברתיות ותרבותיות שנדרונה לעיל. על אכיפת אמנה זו מופקדת הוועדה האירופית לזכויות חברתיות (European Committee of Social Rights of) אשר בוחנת דוחות תקופתיים מטעם המדינות החברות במגילה. בנוסף, משנת 1998 ואילך מוסמכת הוועדה לדון גם בתחוםות של ארגוני עובדים וארגוני זכויות אדם נגד אותן מדיניות אשר נטען כי הפרו את המגילה החברתית, וזאת אם המדיניות הcapeו עצמן לסמכות זו של הוועדה. משטרי הגנה אחרים של מועצת אירופה עוסקים, בין היתר בהגנה על קורבנות עינויים ובהגנה על מייעוטים<sup>136</sup>. ניתן לציין כי גם ארגונים בינלאומיים אחרים שמרכזם באירופה, כגון האיחוד האירופי (European Union) והארגון לביטחון ושיתוף פעולה באירופה (Organization for Security and Cooperation in Europe) פעלים גם בתחום זכויות האדם – הן במישור יצירת סטנדרטים (למשל, מגילת זכויות היסוד של האיחוד האירופי)<sup>137</sup> והן במישור הפקוח על יישומם (הארגון לביטחון ושיתוף פעולה באירופה פועל מאוד בתחום הפקוח על בחירות ובתחום ההגנה על מייעוטים).

**6.2. מגנון זכויות האדם הבין-אמריקני**

מנגנונים אזרחיים מקבילים למנגנון ההגנה על זכויות האדם באירופה התפתחו גם ביבשת אמריקה וAfrika. גם שמנגנונים אלה דומים בהיבטים רבים למנגנון האירופי, האפקטיביות שלהם הינה, ככל, נמוכה בהרבה מהמנגנון האירופי. פער זה נובע, ככל הנראה, בראש ובראשונה מהיעדרה של מסורת פוליטית דמוקרטית במדינות המשתייכות לאזרחים הללו המייחסת חשיבות מכרעת להגנה על זכויות אדם במובן המודרני. במקומ

135 European Social Charter, 18 Oct. 1961, E.T.S. 35 עד כה אשררו 27 מדינות אירופיות את המגילה.

136 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 Nov. 1987, E.T.S. 126; Framework Convention for the European Convention on the Protection of National Minorities, 1 Feb. 2005 Exercise of Children's Rights, 25 Jan. 1996, E.T.S. 160; Convention on Human Rights and Biomedicine, 4 April 1997, E.T.S. 164.

137 Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1

**| ארנה בונראטלי יוכבל שי**

זאת, בעיות הפתוח הכלכלי באמריקה הלטינית ובאפריקה הובילו במשך שנים רבות לאי-יציבות ולפגיעה בשלטון החוק במדינות אלו. אשר על כן, בעיות זכויות האדםביבשת אמריקה וביבשת אפריקה בהן נדרשו המנגנון האזרחיים לטפל הין בעיות יסוד קשות בהרבה מalto שהובאו, על-פי רוב, בפני המנגנון האירופי, והיכולת של מנגנון משפט בינלאומי, המבוססים במידה כזו או אחרת על שיתוף פעולה עם המדינה המפלה, לטפל בהם בהצלחה הינה מראש מוגבלת יותר.

המנגנון הבינ'-אמריקני להגנה על זכויות אדם פועל, כאמור לעיל, תחת חסות ארגון המדינות האמריקניות שבו חברות כל מדינות היבשת. משנת 1948 ואילך פועל הארגון<sup>138</sup> על מנת לקדם את ההגנה על זכויות האדם ביבשת באמצעות שורת הכרזות ואמנות (ההכרזה האמריקנית בדבר זכויות וחובות האדם<sup>139</sup> הקדימה במספר חודשים את ההכרזה האוניברסלית) ובאמצעות מוסדות שתכליתם הגנה על זכויות האדם.

כמו באירופה, לבו של המנגנון האמריקני מצוי באמנת זכויות אדם כללית – האמנה האמריקנית לזכויות אדם (American Convention on Human Rights)<sup>140</sup>, המככילה בדרך כל לאמנה בדבר זכויות אזרחית ומדיניות<sup>141</sup>. בדומה למודל האירופי שקדם לרפורמה של 1998, האמנה נאכפת באמצעות נציגות Inter-American Commission on Human Rights (Inter-American Rights), שמרכזה בוושינגטון, ארצות הברית, ובית דין לזכויות אדם (Court of Human Rights), היושב בסן-חוזה, קוסטה ריקה. תלונות נגד מדיניות אשר הפרו את האמנה מוגשות קודם כל לנציגות (אם כי, בניגוד למודל האירופי המקורי, כל המדינות החברות כפופות למנגנון תלונות הפרטים, ונדרשת הסכמה מיוחדת דווקא למנגנון תלונות הבינ'-מדינתיות); הנציגות מוסמכת להעביר תלונות במקרים מתאימים לבית הדין (סמכות מקבילה מצויה גם בידי המדינות החברות), אם כי סמכות בית הדין מותנית בהסכמה המדינה הנילונה. בנייגוד לעמיתה האירופי שהנו בעל סמכות מוגבלת ביותר להעניק חוות דעת מייעצות, לבית הדין הבינ'-אמריקני סמכות רחבה לחתות חוות דעת

<sup>138</sup> בין האמנות שנתקבלו על ידי ארגון המדינות האמריקני ניתן לציין את האמנות הבאות: Inter-American Convention on Forced Disappearance of Persons, 9 June 1994, 33 I.L.M. 1429 (1994); Inter-American Convention to Prevent and Punish Torture, 9 Dec. 1984, O.A.S. Treaty Series No. 67; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 9 June 1994, 33 I.L.M. 1534 (1994); Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities, 7 June 1999, OAS AG/RES. 1608 American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992)

<sup>139</sup> American Convention on Human Rights, 22 Nov. 1969, 1144 U.N.T.S. 123 (hereinafter – I/A CHR).

<sup>140</sup> עם זאת, בשנת 1988 נערך פרוטוקול המרחיב את הגנת האמנה גם בנוגע לזכויות כלכליות וחברתיות מסוימות. בית הדין הבינ'-אמריקני לזכויות אדם אף הוסיף לדון בשתיים מן הזכויות האמוריות ( הזכות לחינוך וזכות השכלה). Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 17 Nov. 1988, O.A.S. T.S. 69 (1988).

### פרק VII: זכויות האדם במשפט הבינלאומי<sup>142</sup>

בנושאים הקשורים לאמנות זכויות האדם השונות המחייבות את המדינות החברות בארגון המדינות האמריקניות<sup>143</sup>.

פעולתו של המנגנון האמריקני מאופיינת במספר בעיות. ראשית, 10 מ-35 המדינות החברות בארגון המדינות האמריקני, ובهنן ארצות-הברית, קנדה וקובה<sup>144</sup>, לא הצטרפו כלל לאמנה האמריקנית בדבר זכויות האדם, ומדינה אחת (טרינידד וטובגו) פרשה ממנה. יתר על כן, לא כל המדינות החברות באמנה האמריקנית קיבלו את סמכות בית הדין. מכאן, שהיקף הכספי הגאוגרפי של מנגנון האכיפה של האמנה הננו חלקי, וכשליש מדינות הבשת אינן כפפות לסמכות שיפוטית מחייבת, אלא לפיקוח הרופף יותר של הנציגות. בהקשר זה, יש לציין כי לנציגות סמכויות כליליות להגן על זכויות האדם גם בשטחן של מדינות שלא הצטרפו לאמנה (סמכוות אלו הוקנו לנציגות עוד בשנת 1959, בטרם נערכה האמנה האמריקנית לזכויות האדם), אך היא מנועה מליישם את האמנה בנוגע למדינות אלו, וכיולה לעשות שימוש רק בסטנדרטים הכלליים יותר המזמינים בהכרזה בדבר זכויות וחובות האדם.

שנית, שיתוף הפעולה בין הנציגות לבית הדין היה לקוי במשך שנים רבות, ומספר התיקים שהופנו לבית הדין על ידי הנציגות היה קטן, וזאת אף שהנציגות קיבלה עד כה אלפי פניות. כך, למשל, הופנה התקיק הראשון לבית הדין רק בשנת 1986 (שמונה שנים לאחר כניסה האמנה לתוקף), וגם לאחר מכן, והוברו תיקים לבית הדין ב"טפטוף איטי". עם זאת, בשנים האחרונות חל שיפור במישור זה, וקצב העבודה של בית הדין התגבר (אם בשנים 1987–1999 פרסם בית הדין 62 החלטות, התפוקה של בית הדין כמעט כפולה בין השנים 1999–2004). למרות זאת, כמות התקיקים המגיעים להכרעה שיפוטית ביבשת אמריקה הננו עדין נמוך באופן משמעותי מאשר באירופה.

לבסוף, כפי שצוין קודם, הפרות זכויות האדם שעמן נאלצו להתמודד גופי זכויות האדם הבינ'-אמריקניים היו קשות במיוחד, דבר אשר הציב אתגר מיוחד בפניו. תики היעלמויות, כגון ולסקו רודריגז<sup>145</sup>, העלו לא רק בעיה הומינידית קשה, אלא גם בעיה במישור הראייתי (במקרה היעלמותם רבים אין כל ראיות פיזיות שמהן ניתן ללמוד על גורלו של הפרט שהועלם). יתר על כן, הגנה על זכויות אדם בתנאים שביהם הנילונה אינה משתפת פעולה עם החקירה, ואף אינה מגנה על עדים (למשל, במהלך ההליכים בפני בית דין בפרשׂת ולסקו רודריגז נרצח אחד מהעדים מטעם המתלונן), הינה כמעט בלתי אפשרית. כך שבזמן שבית הדין האירופי מצא עצמו עוסק בשנים האחרונות יותר ויותר בשאלות חדשות, המחייבות אתגרים משפטיים חדשים בפני זכויות האדם (כגון, הגנה על זכויותיהם של טרנס-סקוטואלים לשינויים אישיים<sup>146</sup>, הזכות למות בכבוד<sup>147</sup>, והגנה על פרטם מפני זיהום הסביבה<sup>148</sup>), עיקר פעילותו של בית הדין הבינ'-אמריקני יוחדה

142 I/A HRC, art. 64.

143 חברותה של קובה בפעולותיוuter ארגון המדינות האמריקניות הושעתה בשנת 1962 וטרם חודשה עד היום.

144 Velasquez Rodriguez, *supra* note 71.

145 *Goodwin v. U.K.*, 35 E.H.R.R. 18 (2002).

146 *Pretty v. U.K.*, 35 E.H.R.R. 1 (2002).

147 *Lopez Ostra v. Spain*, Eur. Ct. H.R. (Ser. A), No. 303-C (1994).

**| ארנה בונרפטלי וובל שי**

עד כה לטיפול בהפרות זכויות האדם הבסיסיות ביותר, כגון הזכות לחיים<sup>148</sup> והזכות להליך משפטי הוגן<sup>149</sup>.

### **3.3. מנגנון זכויות האדם האפריקאי**

המנגנון האוורי השלישי, הציעր מבין המנגנונים האווריים, ובעל רמת האפקטיביות הנמוכה ביותר מביניהם, הנו המנגנון האפריקני הפועל במסגרת האיחוד האפריקני (הכולל את כל מדינות יבשת אפריקה, פרט למרוקו). המנגנון האפריקני מושתת על אמנה זכויות אדם מרכזית – המגילה האפריקנית לזכויות אדם ועמיים<sup>150</sup> – המعنיקה הגנה לזכויות דור ראשון, לזכויות דור שני ולמספר זכויות דור שלישי (זכות להגדרה עצמית, הזכות לשוויון בין העמים, זכות לפיתוח, זכות לשולם ובתחזון וזכות לאיכות סביבה ראוייה). עם זאת, נדמה כי בכמה תחומיים מייצגת המגילה סטנדרט הגנה נמוך יותר מהמקובל באמנות הגלובלית (למשל, בנושא ההgelבות על חופש הביטוי<sup>151</sup> או בנושא הזיקה בין קבלת זכויות לבין מילוי חובות<sup>152</sup>). מעבר לכך, הבעייה העיקרית של המנגנון האפריקני הינה מנגנון האכיפה החלש שלו – הנציבות האפריקנית (African Commission on Human and Peoples' Rights) (African Commission on Human and Peoples' Rights) פעלת עד כה שלא ליובי בית דין, ועובדתה סכלה מבעיות תקציב ומפוליטיזציה (אשר באה לידי ביטוי במינוי פוליטיים לכחן בנציבות ובפיקוח הדוק למדי של גופים פוליטיים על עובדות הנציבות ועל פרסום החלטותיה). בעקבות זאת, השפעת הנציבות על דעת הקהל האפריקנית הייתה זניחה. עם זאת, בשנים האחרונות יש מגמה מסוימת של שיפור הבאה לידי ביטוי בחשיפה רבה יותר של הציבור האפריקני לעבודת הנציבות ובשיפור בתפקודה. יתר על כן, מדיניות האיחוד האפריקני החליטה בשנת 1998 על הקמתו של בית דין אפריקני לזכויות אדם ועמיים (African Court of Human and People's Rights), אשר יפעיל במתכוון מקבילה לו של בית הדין הבינ-אמריקני (בנוגע למדינות אשר הכירו בסמכות השיפוט שלו). האמנה המקימה את בית הדין נכנסה לתוקף בראשית שנת 2004, אך נכון למועד כתיבת שורות אלו, בית הדין טרם החל לפעול.

## **7. אתגרים מיוחדים בתחום ההגנה על זכויות האדם**

ניתן להצביע על כמה נושאים ובעיות הקוראים תיגר על האתוס האוניברסלי והמאפיינים האינדיבידואלייטיים של דיני זכויות האדם הקיימים ביום במשפט הבינלאומי. נוסף על כן,

148 ראו למשל: *Las Palmeras case*, I/A Court H.R. (Ser. C), No. 90 (2001).

149 ראו למשל: *Castillo Petrucci v. Peru*, I/A Court H.R. (Ser. C), No. 52 (1999).

150 African Charter on Human and Peoples' Rights, 27 June 1981, 21 I.L.M. 58 (1982).

151 אמרנת זכויות אדם נוספת אשר התקבלה על ידי מדינות (hereinafter – African Charter)

152frican Charter on the Rights and

153 Welfare of the Child, 11 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990)

154 African Charter, art. 9

155 African Charter, art. 27–29

**פרק VII: זכויות האדם במשפט הבינלאומי |**

התפתחויות פוליטיות, כגון התהווות הטרור הבינלאומי, מעמידות בספק את התאמתם של דיני זכויות האדם למציאות השוררת במאה ה-21.

**7.1. יחסיות תרבותית**

רענון היחסיות התרבותית, מייצג כיון ביקורתם חשוב הקורא תיגר על רעיון האוניברסליות שבבסיס דיני זכויות האדם. כזכור, בסיס האידאולוגיה של תנუת זכויות האדם במשפט הבינלאומי מוצי הרעיון ולפיו לכל אדם, בכל מקום, "סל" זהה של זכויות בסיסיות. לעומת זאת, יש הסברים כי זכויות אדם הינן מסגרת נורמטטיבית תלולה חברה ותרבות, וכי לצד התפיסה המערבית הבאה לידי ביטוי בדיני זכויות האדם המודדים את מירנות הפרט בנוגע לקולקטיב, יתכננו מודלים אחרים, ראויים גם כן, של קיום חברתי. לדיני זכויות האדם אין אפוא יתרון תפיסות מוסדרות או פוליטיות אחרות ויש להשוו את היתרונות והחסרונות היחסיים של התפיסות המתחרות עבור הפרט והחברה הספרטיפיים. אשר על כן, הניסיון לכפות סטנדרטים של זכויות אדם על חברות אשר אין מעוניינות בכך מייצג התנסאות מוסרית, וניתן לראות בו סוג של אימפריאליזם מודרני.

ניתן להבין התנגדויות של מדינות רباتות להחלת סטנדרטים של זכויות אדם בנושאי דת, חופש ביטוי או שוויון בין המינים כביטוי לרעיון היחסיות התרבותית. כך, למשל, טענתן של כמה מדינות במורה אסיה (כגון מלזיה וסינגפור) כי קיימים "ערכים אסייתים" שלסדר ומשמעות המצדיקים הgalloping freedoms על חופש הביטוי וחופש הבחירה הפליטי הינה למעשה טענה כי הערכים הרלוונטיים המצוים בדיני זכויות האדם אינם מתאימים לתרבות השוררת באותו זמן. באופן דומה, טענות מצד מדינות מסוימות כי הדמוקרטיה הינה רעיון מערבי, כי חופש הביטוי נסוג מפני קדושת הדת (ולכן אינו כולל, למשל, הגנה על ביטוי כפירה) וכי שוויון מלא בין נשים לגברים אינו מתישב עם האופי המסורתי של החברה, מבטאות אף הן רעיונות של יחסיות תרבותית.

מבחינת הדין הפוזיטיבי דין של טענות מסווג זה להידחות, שכן אמנות זכויות אדם והדין המנהגי בנושא זכויות האדם מחייבים ישות מלא של הסטנדרט הבינלאומי בכל מקום. עם זאת, טענות יחסיות תרבותית מערערות על הלגיטימציה הפליטית של מגנונו האכיפה של דיני זכויות האדם וחומרות תחת האפקטיביות של הנורמות. הן אף מהבלות במקרים מסוימים בעצם ה策טרופות לאמנות זכויות אדם או מובילות לצירוף הסטייגיות נרחבות מהוראותיהן. האתגר הניצב מול תנუת זכויות האדם הנה אפוא כפול:ראשית, כיצד ליזור מערכת כללים אוניברסלית הכוללת בתוכה מידת מספקת של גמישות אשר תאפשר את התאמת הסטנדרט האוניברסלי לניבעות תרבויות פרטיקולריות מבלתי לוותר על יישום הערכים שבבסיס הנורמה האוניברסלית, מאידך. מסגרת כזו, המייצגת אייזון בין ארכים מקומיים לעקרונות מוסריים כלליים, עשויה להפתיע את ההתנגדות הפליטית ליישמן של דיני זכויות האדם. כפי שציינו לעיל<sup>153</sup>, רעיון מתחם שיקול הדעת margin of appreciation (appreciation

153 ראו לעיל, תת-פרק 6.

**ו ארנה בונרפלט וובל שע**

הבעיה השנייה מצויה במישור הtektonic – היינו כיצד להתמודד עם חריגות מהסטנדרט האוניברסלי בשל טעמים תרבותיים. בהקשר זה, פועלות נמרצות לאכיפת הסטנדרט שאינה מלולה בשינוי התרבותיות הרווחות והגולות להפרה, עלולה לגרור נזקים לא מבוטלים ולסבול מאפקטיביות נמוכה. כך, למשל, המאבק החשוב בטקסים ברבריים של מילת נשים באפריקה (female genital mutilations) אינו יכול שלא להביא בחשבון את הפגיעה ביכולת להינשא של אישה שלא עבירה את הטקס ובלחץ החברתי הכבד אשר משפחות הנשים מפעילים עליהם לעبور את הטקס. מכאן שאסטרטגיית המאבק בפרקטיות תרבותיות הפוגעות בזכויות אדם חייבת להביא בחשבון גם שינוי ערכי לטוח אדורן. נדמה כי לפחות במקרים מסוימים נדרש איזון בין הצורך שבתקון מיידי של העול המוסרי שבבסיס הפרקטיות (לפחות מנקודת ראות של דיני זכויות אדם) לבין שיקולים פרגמטיים התומכים בהתמודדות הדרגתית עם הבעיה.

בעיה מיוחדת של לגיטימציה קשורה לנוכנותם של פעילי זכויות אדם לפעול בשם של קורבנות הפרות זכויות אדם בגין רצונם. האופי המוחלט של האידאולוגיה האוניברסלית, אשר הינה האידאולוגיה הדומיננטית של תנועת זכויות האדם, אכן עשוי להצדיק מאבק בפרקטיות תרבותיות, כגון אפליה נשים או נישואין כפויים, גם כאשר קורבן ההפרה אינו מעוניין כלל לשנות את מצב הקויים. במקרים אלו טוענים הצדדים בתעלמות מעדת הקורבן כי השלמתו עם המצב הקויים נובעת מ"תודעה כוזבת" אשר יש לפעול לשנotta<sup>154</sup>. יש לציין כי טענה זו הינה בעצמה טענה אנטי-ליברלית, שכן משתמש ממנה כי פעילי זכויות האדם יודעים טוב יותר עברו הפרט מה טוב עכברו. אכן, יש הסברים כי במקרים שכיהם לקורבן יש יכולת בחירה אם להיות במסגרת התרבותית היליברלית (exit) ויכולת להשפיע על תכנית (voice), אין מקום להתרבות חיצונית מצד קהילת פעילי זכויות האדם<sup>155</sup>. בכלל מקרה, נראה כי הדיון האמור חושף את הסתירה בין תכניות הליברליים של דיני זכויות האדם, לבין הבניות האנטי-ליברליות של האידאולוגיה שבבסיסה תנועת זכויות האדם אשר מתיחסת בעוינות לתפיסות אידאולוגיות מתחזרות של הטוב. במילים אחרות, חופש ההגשמה העצמית של הפרט העומד בסיס תנועת זכויות האדם עשוי להוביל לדחיתת הרעיונות המהותיים אותם מנסה התנועהקדם על-ידי הפרטים המוגנים עצם.

**7.2. זכויות קבועתיות**

מתוך נוסף, קרוב במידה מסוימת למתח הנובע מרעיון היחסיות התרבותית, הננו המתח בין האופי הליברלי-האנדריבידואליסטי של דיני זכויות האדם, המתמקד בנסיבות הפרט, לבין זכויות של קולקטיבים. ודוק, בהינתן שהאדם הנוי ייצור חברתי, לא ניתן להגשים רבות משאיות הפרט וצרכו אלא במסגרת קבועה. עם זאת, דיני זכויות האדם התייחסו

T.E. Higgins "Anti-Essentialism, Relativism and Human Rights" 19 *Harv.* 154  
. *Women's L.J.* (1996) 89, 117–118

155 ראו למשל: M. Sunder "Piercing the Veil" 112 *Yale L.J.* (2003) 1399, 1410–1411

**פרק VII: זכויות האדם במשפט הבינלאומי**

עד כה בסkeptיות לזכויות קבוצתיות – סעיף ההגדירה העצמית המצויה באמנות של 1996<sup>156</sup>, התפרש במצטומם כנגוע לקבוצות שאינן מוחות חלק מדינה קיימות ולגיטימיות<sup>157</sup>; וסעיף 27 לאמנה בדבר זכויות אזרחיות ומדיניות, המגן על זכויות מיוחדים, מעניק למייעוטים הגנה מועטה. נראה כי הגנה המוגבלת בדיין הקיים על זכויות קבוצתיות נובעת משני טעמים עיקריים: ראשית, המדיניות, שהן תפקיד מכירע ביצירת סטנדרטים של משפט בינלאומי, מתיחסות בחשדנות לזכויות של קבוצות, כגון מיוחדים אתניים או דתיים, שכן הן רואות בהכרה משמעותית בזכויות של הקבוצה כאיום פוטנציאלי על שלטון הרוב במדינה, על מרותה של המדינה ועל אחיזתה. מצד שני, פיעילי זכויות האדם מתיחסים אף הם, במקרים רבים, בחשדנות לתביעות של קבוצות מייעט לאוטונומיה ולשםור תרבותם המיוונית, שכן תרבות זו אינה תואמת במקרים רבים את הערכיהם הליברליים שבבסיס תנועת זכויות האדם.

בנסיבות אלו, אין זה מפתיע כי חלק מבתי הדין הבינלאומיים והמדיניות שעסקו בתחום זכויות המיוחדים בחרו לטפל בבעיות של זכויות מיוחדים דרך פריווזמה של זכויות פרטיים. כך, למשל, פסקה הוועדה לזכויות האדם כי "מלחמות השפה" בקוויבק שבקנדיה, שבמסגרתן ניסה הרוב דיבר הצרפתי להגביל פרסום חוות בשפה האנגלית מונגdot בראש ובראשונה לחופש הביטוי של התושבים דוברי האנגלית<sup>158</sup>. באופן דומה, קבע הרוב בבית המשפט העליון הישראלי בפרש עדאלת כי שאלת הכיתוב בערבית על שלטי רחובות בעירם מעורבות נוגעת לזכות התושבים העربים לכבוד, לפי חוק יסוד: כבוד האדם וחירותו<sup>159</sup>.

לאור כל זה, יש הטוענים כי תנועת זכויות האדם מתאפיינת בהטיה "אטומיסטית", המקדשת את צורכי הפרט על חשבון צורכי הקבוצה ויוצרת קשר ישיר בין המדינה לפרט, מוביל להתייחס לתקיפה המתווך האפשרי של הקבוצה אליה משתיך הפרט. בעשותם כך מחייבים דיני זכויות האדם את מעמדן של הקבוצות החברתיות התרבות-מדיניות ופוגעים במסגרות מסורתיות של סולידיריות חברתיות. יתר על כן, הגנה על זכויות הפרט והגנה על מסגרות קבוצתיות עשויות להתנגש זו בזו, ככל אותן מקרים שבהם המסגרת הקבוצתית אינה נתפסת כמסגרת שmagnum באופן נאות זכויות פרטיים (למשל, אם הקבוצה מקיימת פרקטיקות מפלות). ההטיה האינדיבידואליסטית של דיני זכויות האדם בולטת במיוחד בנסיבות חברות מסורתיות, שבהן חלק חשוב מהגדרת הפרט את עצמו הינה השתיכותו לkollektiv (משפחה, חמולה, שבט, קבוצה דתית וכדומה), אשר הפרטיקות התרבות-מדיניות שלו עלולות להיות מוגדרות כבלתי-הימצא במתח עם תפיסות מודרניות של זכויות האדם. מכיווןן של חברות כאלה נשמעות טענות של יחסיות תרבותית ולפיהן מודל זכויות האדם אינו מתאים לשימור יהדותן התרבותי.

<sup>156</sup> ס' 1 לאמנה בדבר זכויות אזרחיות ומדיניות; ס' 1 לאמנה בדבר זכויות כלכליות, חברותיות ותרבותיות.

<sup>157</sup> ראו למשל: Cassese, *supra* note 31, at p. 63; F. L. Kirgis "The Degrees of Self Determination in a United Nations Era" 88 *A.J.I.L.* (1994) 304

<sup>158</sup> *Ballantyne v. Canada*, Comm. Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993)

<sup>159</sup> בג"ץ 4112/99 עדאלת נ' עירית ת"א-יפו, פ"ד נו(5) 393.

**| ארנה בונפרטלי וובל שי**

יש להניח כי גם בעתיד יהיה על תנועת זכויות האדם להתמודד עם התביעות להגנה אפקטיבית יותר על זכויות קבוצתיות. נראה כי התרבותות תביעותיהן של קבוצות מיעוט לאוטונומיה תרבותית ופוליטית והמשך הביקורת על הנטיות האימפריאליסטיות של דיני זכויות האדם, יפיעילו לחץ גדול והולך לנוכח תפיסה מלאה יותר של זכויות קבוצתיות. דבר זה יחייב הגדרה מחדש של מערכת היחסים במושלש פרט-קבוצת-מדינה, באופן המעצים את חשיבותה היחסית של המסדרת הקבוצתית בעידן פוסט-מודרני בו המדינה נתפסת כגורם רלוונטי פחות מבעבר.

**3.7. זכויות אדם, מלחמה וטרור**

אתגר נוסף המזמין בפניו תנועת זכויות האדם הבינלאומית הבו המאמץ להחיל את דיני זכויות האדם במצבם, בכלל, וכנגד אום הטרוור, בפרט. נדמה כי אין חולק, כפי שצוין בתת-פרק 4.1.6. לעיל, דיני זכויות האדם ממשיכים לחול גם בשעת חירום, לרבות בזמן מלחמה, במערכות היחסים שבין המדינה לבין תושביה. לעומת זאת, יש החולקים על תחולת הדינים ביחס לאינטראקציות המכוסות עליידי כללי המשפט הבינלאומי ההומניטרי: ביחס לתושבים זרים הנפגעים מפעולות מלחמות מוחוץ לשטח המדינה או לתושבי שטחים קבועים<sup>160</sup>. על פי גישה זו, דיני זכויות האדם אינם חלים באופן אקסטרה-טריטורילי, ומכל מקום הם נסוגים בפני הדין הספציפי – המשפט הבינלאומי ההומניטרי, אשר מציע במקרים אלו מוגרת מלאה של כללים ואיזונים שנוצרה במיוחד על מנת להסדיר מצבים מלחמה.

ה גם שהפרקטיקה של המדינות בנושא אינה איחוד, הרי שככל הגופים השיפוטיים הבינלאומיים אשר דנו בשאלת קביעו כי דיני זכויות האדם ממשיכים לחול בזמן מלחמה. ה-ICJ קבע מפורשות בחותם דעתו בנושא חוקיות הנשק הגרעיני משנת 1996 כי דיני זכויות האדם רלוונטיים לבחינת חוקיות השימוש בכל נשק מסויימים בזמן מלחמה<sup>161</sup>. בשתי החלטות מאוחרות יותר – החומה בשטחים והסכוך בקונגו, קבע ה-ICJ כי דיני זכויות האדם חלים בשטחים קבועים<sup>162</sup>. גם בית הדין האירופי לזכויות האדם קבע בעבר כי האמנה האירופית לזכויות האדם חלה גם במצב כיבוש ובנסיבות תומשים המתרחשים בתחום שטחה של המדינה החברת באמנה<sup>163</sup> (עם זאת, בית הדין האירופי קבע כי האמנה האירופית אינה חלה ביחס להפטצות אויריות בשטחה של מדינה אחרת, אשר אינה חברה באמנה האירופית, שכן אזור ההפטציה אינה מצוי תחת שליטהה של המדינה המפטיצה<sup>164</sup>).

<sup>160</sup> ראו למשל: Dennis, *supra* note 82. לדין בעמדת ישראל בנושא, ראו: Ben-Naftali & Shany, *supra* note 81.

<sup>161</sup> Legality of Nuclear Weapons, *supra* note 92.

<sup>162</sup> *Legal Consequences of the Construction of a Wall*, *supra* note 82, at para. 105–113; *Armed Activities in the Territory of the Congo* (DRC v. Uganda), ICJ judgment of 19 Dec. 2005, at para. 211.

<sup>163</sup> ראו למשל: Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995); Isayeva v. Russia, judgment of 24 Feb. 2005 (ECHR).

<sup>164</sup> Ben-Naftali & Shany, *supra* note 81, at p. 81–83.

**פרק VII: זכויות האדם במשפט הבינלאומי |**

נדמה לנו כי העמדה לפיה דיני זכויות האדם במקביל לכללי המשפט הבינלאומי ההומניטרי הינה עדשה משפטית רואיה. החלטת דיני זכויות האדם במצבם מלחמה משפרת את ההגנה על קורבנות המלחמה וממלאת פערים נורטטיביים הקיימים בדיין ההומניטרי (אשר חלקים מרכזים שלו נוצרו במהלך המאה ה-19 ובראשית המאה ה-20 ונתקפסים היום כאנרכו-ניסטיים). יתר על כן, הקביעה כי דיני זכויות האדם חלים גם בזמן מלחמה מאפשרת פיקוח מצד גופי זכויות אדם על התנהלות מדינות בעת מלחמה, באופן המשלים את מגנוני האכיפה החלשים של המשפט הבינלאומי ההומניטרי. פיקוח כזה מגדם את רעיון שלטון החוק גם במצבים של מלחמה. עם זאת, אף אנו בדעת כי הדיין ההומניטרי מהו זה דין ספציפי וכי במקרה של התנששות נורטטיבית תינתן עדיפות להוראותיו על פני אלו של דיני זכויות האדם.

בעיה חדשה ונוסף הנוגעת לתחולת דיני זכויות האדם במצב קוונפליקט אלים הינה השפעת המלחמה בטרור על אופן החלטת האמנות הקיימות. גם שהטרור אינו מייצג צורה חדשה של מאבק פוליטי, הרי שהתחזוקות הטרור האסלאמי בשנות ה-90 של המאה הקודמת והפיגועים ההומניטרים שבוצעו על ידי ארגון אל קעאידה בשטח ארצות-הברית ב-11 בספטמבר 2001, מייצגים "עלית מדרגה" באiom הטרור, אשר הובילה לתגובה נגד נחששה מצד הקהילה הבינלאומית (משטר סנקציות נגד טרור ומדינות תומכות טרור<sup>165</sup>), פלישת ארצות-הברית לאפגניסטן ועוד). השינוי בעוצמת האיום אף הוביל מוסדות בינלאומיים לבחון מחדש את הכללים המשפטיים הקיימים למלחמה בטרור<sup>166</sup>.

השאלה הנשאלת בתדריות גדולה והולכת מאז פיגועי ה-11 בספטמבר 2001 הינה אם דיני זכויות האדם הקיימים מייצגים איזון נאות בין זכויות הפרט לבין צורכי הביטחון של המדינה וזכויותיהם הבסיסיות של קורבנות טרור פוטנציאליים. גם שדיני זכויות האדם כוללים, כאמור לעיל, הסדרי חריגה, המאפשרים השעיית זכויות אדם בשעת חירום, הפרדיוגמה הבסיסית של הדינים הינה של תחולת בעת שלום, וחריגה מהפרדיוגמה הינה אפשרית רק במקרים קיצוניים. לעומת זאת, המאבק בטרור העולמי הנה מאבק מתמשך, אשר סופו אינו נראה באופק. על כן הוא עשוי לייצג מצב חירום בלתי מוגבל (הקרה הישראלית, שבו מצב החירום נמשך מאז קום המדינה הנה מקרה דומה)<sup>167</sup>. בנסיבות אלו, יש הסבורים כי לא ניתן היה להסתמך לארוך זמן על סעיפי החריגה באמנות זכויות האדם השונות, וכי נדרש רפורמה בדילימם הקיימים בעת שלום, אשר יוכל להעניק למדיינות כלים אפקטיביים למלחמה בטרור – בין שהמאבק בטרור הנה בעצימות גבוהה או נמוכה<sup>168</sup>.

<sup>165</sup> ראו למשל: Security Council Resolution 1267, UN Doc. S/RES/1267 (1999); Security Council Resolution 1373 (2001), UN Doc. S/RES/1373 (2001).

<sup>166</sup> ראו למשל: Report of the Secretary-General's High Level Panel *Threats, Challenges and Change: A More Secure World : Our shared responsibility*, UN Doc. A/59/565 (2004).

<sup>167</sup> ראו למשל, ס' זייזיק ברוכים הבאים לדבר של הממשי: חמיש מסות על ה-11 בספטמבר וairyutim Smocim (2002) 117–118.

<sup>168</sup> ראו למשל: D. Jinks "International Human Rights Law and War on Terrorism" 31 *Denv. J. Int'l L. & Pol'y* (2002) 58.

## | ארנה בונראטלי ויובל שע

כתירוץ להעוצמת השלטון ולפגיעה בזכויות הפרט. על פי גישה זו, קיימים אינטדרסים פוליטיים התומכים בהעוצמת האיים הנשקף מן הטרור העולמי – מעבר למידות האמיתיות – על מנת לאפשר למדיינה להגדיר מחדש את יחסה לפרטים המצוים בשטחה<sup>169</sup>.

נראה אפוא כי בעtid הנראה לעין יהיה על תנועת זכויות האדם למצוא דרכיהם פרשניות ואחרות שיאפשרו ביצוע התאמות בדיון הקיים על מנת להתמודד עם המציאות הפוליטית המשתנה, מבלתי ליותר על הגשמת הערכים שבביסיס הדינמים. ייתכן שעדתת הפרגמטית של הוועדה לזכויות האדם בוגעת למדיניות הסיכולים המוקדים של ישראל, אשר אינה תוקפת את עצם המדיניות אלא מעלה חשש כי נעשה בה שימוש לרעה<sup>170</sup>, מסמנת את נוכנותם של גופי זכויות האדם לפרש מחדש את הדינמים בנסיבות של מאבק בטרור.

### 8. השיח הנורמטיבי על אודות זכויות האדם

דיני זכויות האדם של המשפט הבינלאומי מבקשים לפרש הגנה ביןלאומית על בני אדם באשר הם, וזאת באמצעות רשות צפופה של אמנות ותחרות ומיגון מגנוני האכיפה. מן הדיון שערכנו עולה כי מטרה זו הושגה באופן חלקי: מספר מדינות עודן מתנגדות באופן מפורש או משתמע לכללי יסוד של דיני זכויות האדם; ההגנה המוענקת לחלק מזכויות האדם (בעיקר הזכויות הכלכליות-חברתיות) אינה מלאה ומגנון האכיפה הנם חלים למדי (חריג לכך, הנה בית הדין האידרופי לזכויות האדם). יתר על כן, באופן החלת דיני זכויות האדם במצב חירום, מלחמה וטרור מעלה מספר לא מבוטל של בעיות פרקטיות ותיאורטיות.

הכרה בהשפעה המוגבלת של דיני זכויות האדם מחייבת פתוח מסגרות משפטיות נוספות על מנת להגן על זכויות אדם בסיסיות בזמן מלחמה ושלום. הפרק הבא יעסוק במסגרת חשובה שכזו – המשפט הבינלאומי הפלילי, אשר מפליל הפרות חמורות של זכויות אדם מסוימות בכלל עת.

<sup>169</sup> רדו למשל זייזיק, לעיל העירה 167, בעמ' 120–122.

<sup>170</sup> רדו לעיל העירה 66.

## פרק V

### משפט בינלאומי פלילי

#### 1. מבוא: מאפייני היסוד של המשפט הבינלאומי הפלילי ומבנה הפרק

המשפט הבינלאומי הפלילי עוסק בחובות המוטלות על פרטים תוך קביעה כי הפרtan מקימה אחריות פלילית אישית ומהיבת העמדה לדין. מבחן מבנית, ענף זה של המשפט הבינלאומי משלים הן את הדין הבינלאומי הומניטרי שנידון בפרק III והן את דיני זכויות האדם שבhem עסק פרק VII. זאת, כיוון שעבירות על פי המשפט הבינלאומי הפלילי הן ברובן המכrüע פעולות מהוות הפרות ממשמותיו של הוראות דין אלה. הטלת חבות אישית בגין הפרות אלה אינה מיתרת את אחריות המדינה להפרות חמורות של זכויות אדם או של הדין הומניטרי; היא משלימה אותה. ויקה משלימה נוספת מתקיימת בין דיני זכויות האדם לבין המשפט הבינלאומי במובן זה שהפרט, בהבדל מן המדינה, מהווה את הנושא המרכז של ענפי משפט אלה. אך בניגוד לדיני זכויות האדם, המטילים חובה על המדינה לכבד את זכויות האדם ולהבטיחן, המשפט הבינלאומי הפלילי מטייל, כאמור, חובות על הפרט. הטעם להטלת חבות על הפרט הוסבר על ידי בית הדין הצבאי הבינלאומי בניירנברג, בכך ש"פשעים נגד המשפט הבינלאומי מבוצעים על ידי בני אדם, ולא על ידי ישות ערטילאית; ורק באמצעות העשנות הפרטיהם המבצעים פשעים אלה ניתן לאכוף את הוראות המשפט הבינלאומי"<sup>1</sup>.

עם זאת, כדי כי בה במידה שהמדינה, הנושא המסורתני של המשפט הבינלאומי, הינה ישות ערטילאית, כל הפעולות המיויחסות לה נועשות על ידי בני אדם. ממילא ההבחנה בין אחריות המדינה לפעולות מסוימות, למרות הפיקציה הגלומה בייחוסן אליה, לבין אחריות הפרט לפעולות מסוימות המוגדרות כפשעים, אינה נגוררת רק מן העובדה כי מאחרוי מסך התאגדות של המדינה עומדים בני אדם. ההבחנה נגוררת הן מן השוני באופי הפעולות והן מן הצורך הנגורר להבטיח אכיפה יעילה של נורמות המשפט הבינלאומי; אופי הפעולות שבಗינן כמה אחריות לפDET על פי המשפט הבינלאומי הפלילי טמון בחומרתן הייחודית.

<sup>1</sup> למשל, תביעה נגד יוגוסלביה לשעבר, בגין אחריותה להשמדת-עם שהגישיו בосניה והרצגובינה, התחלה בבית הדין הבינלאומי בהאג, בית דין המוסמך להכריע בסכסוכים בין מדינות, במקביל להליכים פליליים בגין פשע השמדת-עם שהתנהלו נגד פרטים בפני בית הדין לפשיי מלחמה ביוגוסלביה. ראו בהתאם: *Application of the Convention on the Prevention and Punishment of the crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), filed on 20 March 1993; Prosecutor v. Krstić, ICTY Case No. IT-98-3-T, T. Ch. I, 2 August 2001; Prosecutor v. Karadžić, ICTY Case No. IT-95-5/18, amended indictment filed on 31 May, 2000; Prosecutor v. Milošević, ICTY Case No. IT-02-54-T, amended indictment filed on 21 April, 2004*

<sup>2</sup> *Judgment of the Nuremberg International Military Tribunal (30 Sept. 1946), 22 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946* (1948) 411, 466

## ו ארנה ב-רפטלי וובל שי

מקובל לסוג פעולות ממין זה לשתי קבוצות, אם כי קו הבחנה ביןיהן אינו ברור ועשוי להיטשטש: פעולות הפוגעות באינטראסים משותפים למירביה המדיניות (למשל, עכירות סמים, מימון מעשי טרור, חטיפות מטוסים ותבלות בהם) ופעולות אשר, לדברי בית המשפט העליון בישראל בפרש איבמן, "זעוזו את המצחון האנושי"<sup>3</sup>. מעשים המזועעים את המצחון האנושי הנם מעשים הפוגעים בכבוד האדם – גם אם אדם זה נתפס כאובי, ואולי אף במיוחד בשעה כזו – ובהגהה המוענקת לקבוצות מיעוט אתניות, דתיות, גזויות ואחרות מפני פגיעה אנושה. אלה הם, במהותם, מעשי אלימות הפוגעים בערכיוasis של הקהילה הבינלאומית, וממילא הם נתפסים גם כמי שמסכנים את השלום ואת הביטחון (למשל השמדת-עם, פשעים נגד האנושות ופשעי מלחמה). החובה שלא לפגוע בערכיוasis של כל חבר בקהילה הבינלאומית כלפי כל יתר החברים, ופגיעה בהם מקימה וכותת מהibility בתכלית תבوع את מימושם<sup>4</sup>. גורם נוסף שהוביל להתפתחות נורמות של משפט בינלאומי פלילי הינו ההכרהVIC ביכולת המוגבלת של המנגנון הפלילי לטפל בהן בגין מקום ביצוע העבירה (למשל, בלב ים), הנסיבות המיוחדות (למשל, מלחמה) או תנאים פוליטיים בתקי אפריים (למשל, העמדה לדין של ראשי השלטון עצם).

הניסיון האנושי מורה כי אין המוסדות הבינלאומיים והן המדיניות נכשלו במניעתם של מעשים אלה כמו גם בענישת מבצעיהם, וזאת חרף התפיסה כי הם פוגעים בערכיהם ובאינטרסים משותפים לכל המדינות. כישلون זה מעמיד אכן בסימן שלאה את הנחת המוצא בדבר קיומה ממשי של קהילה בעלת אינטרס וממנה ערבי משותף, את קיומה של "אנושות" שכגדה ניתן לבצע פשעים<sup>5</sup>. עם זאת, גם אם קיומה של קהילה כזו הוא מודמיין, הוא ודאי נתפס כפוטנציאלי שיש לשאוף להגשו: כל שיטת משפט פועלת הן על מנת לש凱ף את ערבי הקהילה שעליה היא חלה והן על מנת לסייע בכנונה. המשפט הבינלאומי הפלילי מבקש, בין היתר, לעשות כן על ידי יצירת חובה להעמיד לדין ולהעניש את הפרטisms האחראים לביצועם של פשעים בינלאומיים ותוך כינון סמכויות שיפוט ומנגנון אי-אכיפה שנועד להבטיח את מימוש החובה.

העליה מן האמור הוא כי המשפט הבינלאומי הפלילי מהווה, בראש ובראשונה, מנגנון תגובה שיפוטי על ביצוע של מעשי אלימות חמורים במיוחד. מנגנון זה אינו מהווה את אפשרות התגובה היחידה למעשים ממין זה, כי אם מנגנון המועד להשלים אמצעים אחרים – ובכללם סנקציות פוליטיות, כלכליות וצבאיות; מנגונים מעין-שיפוטיים, כגון

ע"פ 336/61 איבמן נ' הי"מ, פ"ד טז 2033. 3

B. Simma "From Bilateralism to Community Interest in International Law" 250 4  
*Recueil des Cours* (1994–VI) 230–233

4–5 A. Cassese *International Criminal Law* (Oxford, 2003)

למשל, הטלת סנקציות על ידי מועצת הביטחון של האו"ם שעה שמעשי הוויה מסכנים את השלום והbijthon או עלולים לסכןם, או נקיטת אמצעי-נגד על ידי מדינות אינדיוידואליות. מעניין לציין בהקשר זה כי בשנים האחרונות הוטלו סנקציות כלכליות אישיות על מנהיגים שמועצת הביטחון קבעה כי הם מסכנים את השלום והbijthon: מועצת הביטחון בהחלטה 1333 מה-19 בדצמבר 2000 (S/RES/1333) קראה להקפאת כספיו של אוסטריה בnaldn ושל מקורבי, ובהחלטה 1532 מה-12 במרץ 2004 (S/RES/1532), הטילה סנקציה דומה על כספי צ'רלס טילור, נשיאה לשעבר של ליבריה.

**פרק VII: משפט בינלאומי פלילי**

עדות אמת ופeos<sup>7</sup>; מנגוני פיצויים, כגון תוכנית השילומים לפיצוי קורבנות הנאצים<sup>8</sup>, מנגוני תביעה נזיקית<sup>9</sup> ומנגונים לتبיעה פלילתית מדינית המאפשר העמדה לדין בפני בית משפט מדינתי על בסיס סמכות שיפוט מסורתית המבוססת על זיקה בין המדינה השופטת לבין הפשע, העבריין או הקורבנות – במיחוד שעה שלא אינם מופעלים כלל או מופעלים במידה ובאופן בלתי מספקים<sup>10</sup>.

המשפט הבינלאומי הפלילי מהוועה ענף של המשפט הבינלאומי הפומבי, ומילא הוא ניזון מאותם מקורות נורטטיביים המפורטים בסעיף 38(1) לוחקת בית הדין הבינלאומי (ICJ): אמנה, כללי מנהג, עקרונות כלליים ומוקורות משניים<sup>11</sup>, וכפוף לאוותם כללי פרשנות<sup>12</sup>. עם זאת, מדובר בענף משפטי חריג בנוגע למשפט הבינלאומי הפומבי. המנייע המרכזי להתחזותו של המשפט הבינלאומי הפומבי הוא מבקש בעיקרו להסדיר אינטרסים מתחדים בין מדינות ריבוניות באופן שיאפשר את יישובם בדרך שלום, ואילו הנטקציה המרכזית של המשפט הבינלאומי הפלילי היא רפרסיבית: הוא מבקש להעניש מבוצעים של פשעים, אם כי, כמובן, פעולה זו אף היא נועדה לקדם ערכים אינטרסים<sup>13</sup>.

See C. Stahn "Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor" 95 *A.J.I.L.* (2001) 952; J. Sarkin & E. Daly "Too Many Questions, Too Few Answers: Reconciliation In Transitional Societies" 35 *Colum. Human Rights L. Rev.* (2004) 661  
ראו: Agreement Between the State of Israel and the Federal Republic of Germany on Compensation נחתם ביום 10.5.1952. נכנס לתוקף ביום 27.3.1953. פורסם בכ"א 69.

9  
בארצות-הברית ניתן לATAB בתביעה נזיקית מבוצעים פשעים בינלאומיים מכוח חוק מ-1789 Torture Victim Protection Act, Alien Tort Claim Act, 1992, ועוד חוק מ-1995 חייב (TVPA), ובתיoutes ככל הפל נפוצות למדי שנים האחרונות. למשל, ב-1995 דיבאן קראדיץ', לשלם פיצויים בית משפט אמריקני את הנהיג הכוחות הסרביים בbosניה, דיבאן קראדיץ', לשלם פיצויים לקורבנותיו שהגישו את התביעה מכוח חוק ה- ACTA, בסך של כ-4.5 מיליארד דולר, ראו: תאגיד בארה"ב בגין הפרות חמורות של זכויות אדם, ראו, למשל, Doe v Unocal, 70 F. Supp. 880 (C.D. Cal 1997). אפשרות זו היא חשובה במיוחד במקרים של תאגידים טרנסלאומיים מסוימים קיימת יותר עצמה מאשר בידי רוב המדינות, המשפט תאגידים טרנסלאומיים מסוימים קיימת יותר עצמה מאשר בידי רוב המדינות, המשפט הבינלאומי הפלילי איינו אפשרות, בשלב התפתחותו הנוכחי, העמדה לדין פלילי בגין פשעים שהתבצעו על ידי תאגיד. ראו גם: J. F. Murphy "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution" 12 *Harv. Hum.Rights J.* (1999) 1

10  
על הפרדיגמה המשפטית להטמודות עם מעשי זועה ראו, למשל, A. Cassese "On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" 9 *E.J.I.L.* (1998) 2

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ראו אמנת וינה בדבר דיני אמנות משנת 1969. The Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331  
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במשפט הבינלאומי מקבל להבחן בין כללים מסדר ראשון לכללים מסדר שני. הכללים מסדר ראשון קובעים נורמות מחייבות ואילו כללים מסדר שני מסדרים הטלת אחריות במקורה של הפרת אותן נורמות. ראו גם: D. Bodansky & J. R. Crook "Symposium: The ILC's State Responsibility Articles: Introduction and Overview" 96 *A.J.I.L.* (2002) 773

## | ארנה בונרפלט ווובל שע

מצוות זו, למשפט הבינלאומי הפלילי מאפיינים הדומים לאלה של המשפט הפלילי המדינה יותר מאשר לענפים אחרים של המשפט הבינלאומי הפלילי. ואכן, עקרונות היסוד של המשפט הבינלאומי הפלילי, ובכללם עקרון האחריות האישית, עקרון החוקיות, ואחרים, יובאו אל המשפט הבינלאומי מן המשפט הפלילי המדינתי.<sup>14</sup> בדומה, מידת הדיק והבירות הנדרשת מן הכללים המרכזיים אותו היא גבורה יותר מזו הקיימת בענפי משפט בינלאומיים אחרים, למשל, דיני זכויות האדם, שהתקפותיהם עשויה להשיב, דוקא, מידת בלתי מבוטלת של עמיות.<sup>15</sup> מבחינה זו מדובר בענף משפטי שהוא בין-כלאים במובاهו, ובזוזן בה בעת זו, מדין הבינלאומי של זכויות אדם (והדין הומניטרי) והן מדין הפלילי המדינתי.מצוות זו, ראוי לשים לבairony היסטורית מסוימת המאפיינת את התקפות המשפט הבינלאומי: תנועת זכויות האדם, שהתקפה במידת רבבה מתווך בקשרו על משפטיים מסוימים של הדין הפלילי המדינתי, מובילה בסופו של דבר לפיתוח מגנוני אכיפה פליליים, ומגיעה לשיאה הנוחה בಹקמת בית דין ביןלאומי פלילי בהבדל מבית דין בינלאומי לזכויות אדם.<sup>16</sup>

בתת-פרק 2 להלן נعمוד על נקודות הציון המרכזיות בתהליכי התקפות זה.

התקפות המשפט הבינלאומי הפלילי מרכיבת,מצוות הראייה של דין הפויזיטיבי, הן מיפויו כללים מהותיים הקובעים מהן העבירות הבינלאומיות והן מיפויו כללים דינוניים העוסקים בסמכויות שיפוט הנิตנות להפעלה בגין ביצוען. הכללים המהותיים מפרטם אילו סוגים פעולות מהוים פשעים בינלאומיים (actus reus); מה הוא הרכיב הנפשי הנדרש על מנת שפועלות אלה תיתפסנה כאסורות (mens rea), ומה הן הנסיבות המקנות פטור מהחירות לפעולות אלה. בהיבטים מהותיים אלה המשפט הבינלאומי הפלילי עוסקת בתת-פרק 3. תת-פרק 4 עוסק בהיבט הדיווני של המשפט הבינלאומי הפלילי, הן במישור של הפעלת סמכות שיפוט על ידי טריבונלים מדינתיים והן במישור של הפעלת סמכות שיפוט על ידי טריבונלים בינלאומיים וטריבונלים מעורבים (Mixed Tribunals).

## 2. ציוני דרך בהתקפות המשפט הבינלאומי הפלילי

תהליכי התקפותו של דין הבינלאומי הפלילי הוא דו-ראשי במובן זה שהוא מאופיין הן על ידי רכיב מהותי, קרי קביעת נורמות שהפרtan מהווה פשע, והן על ידי רכיב פרוצדורלי,

<sup>14</sup> על העקרונות הכלליים של המשפט הבינלאומי הפלילי ראו ס' 22 – 25 לחוקת בית הדין הבינלאומי הפלילי (ס' 22: *nullum crimen sine lege*; ס' 23: *nulla poena sine lege*); Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CN.9/183/9, P. Saland "International Criminal Law Principles" *The Making of the Rome Statute – Issues, Negotiations, Results* (The Hague, R.S. Lee, ed., 1999) 189–216.

<sup>15</sup> נציין כי ללא עמיות מדינות לא יסכימו להתחייב באמנות אלו, אך בהיעדר מוסד שיפוטי חזק המסוגל לאכוף את הנורמות, עמיות כזו מהווה חיסרון.

<sup>16</sup> F. Megret "The Politics of International Criminal Justice" 13E.J.I.L. (2002) 1261

**פרק VII: משפט בינלאומי פלילי**

קרי, קביעת סמכות שיפוט על החשוד בהפרת הנורמה. גם שורשו של המשפט הבינלאומי הפלילי נטוועים, כפי שנראה, בעת המודרנית המוקדמת, לתחילה התפתחתו של התחום קשר הדוק להתקפות תנועות וציונות האדם. תנועה זו שתונופתה במחצית השניה של המאה ה-20 הינה אחת התגבות למלחמות העולם ה-II, מערערת את התפיסה המסורתית של פיה למדינה הסמכות הריבונית הבלעדית בנוגע למעשים ולאנשים הנמצאים בתחוםה. בה במידה ברוי כי סיפור התקפות הדין הבינלאומי הפלילי אינו רק פועל יוצא של התקפות ליניאריות של תודעת חשיבותן של זכויות האדם תוך דילול עקרון הריבונות, כי אם סיפור מרכיב הבניוי, כפי שציינו מבואו, הן על תפיסות ערכיות הנטוועות בתרבויות הפוליטית הליברלית והן על אינטראסים תלויי זמן ומקום. מיילא, לא ניתן לראות בתהיליך זה כמי שנות על ידי פרוגרמא משפטית עקבית ולכידת, והוא מביא לידי ביטוי את מערכת היחסים הסובכת שבין התודעה לבין הניסיון ובין האידאליזם לבין הריאליות.<sup>17</sup>

באופן מסורתי, הפרט היה כפוף לסמכות השיפוט של המדינה שבסטהה הוא חי, ואכיפה פלילתית הייתה מענינה של המדינה שבסטהה בוצעה העבירה בלבד. החציג המركזי לכל זה היה שוד הים (Piracy), ופעולות שוד הים היו הפעולה הראשונה שהוגדרה כפשע על ידי המשפט הבינלאומי המודרני כבר בראשיתו, במהלך המאה ה-17. שוד הים הוגדר כאובי המין האנושי (*hostis humani generis*) משום שפעולתו פגעה בחופש הימים ובקניין הפרט. בצד קביעה נורמטיבית זו נקבע, כי לכל מדינה סמכות לחפש אחריו ולהעמידו לדין, וזאת אף ללא קיום זיקה בין הפשע, הקורבנות או העברין.<sup>18</sup> יש לשים לב כי פעולה שוד הים אינה ממין הפעולות הפגעות בערכי היסוד של החברה האנושית וה"מזועגות את המצחון האנושי". מדובר בפעולת גול אשר, בשל היותה נפוצה במאות - ה-17 וה-18, פגעה באינטראסים של מדינות שעסקו בסחר בינלאומי בדרכים ימיות, והמעשה נקבע כעבירה המקימה סמכות שיפוט אוניברסלית על מנת למנוע פגיעה באינטראס משותף ולנוכח היעדר ייעילותן של סנקציות אחרות למיגורה<sup>19</sup>. הגדרה מוסמכת ועדכנית של המעשה מצויה בסעיף 101 לאמנת הים מ-1982.<sup>20</sup> ביום, עבירת הפיראטים מתבצעת רק באזרע מזורה אסיה, ולנוכח חשיבותה הפחותה יחסית לא נוסיף לדון בה בפרק זה. עם זאת, לעבירה זו ממשמעות מרכזיות מזוותה הראייה של תהליכי התקפות היסטוריים, הוואיל ולגביה נקבע לראשונה עקרון סמכות השיפוט האוניברסלית – שענינו הקיינית סמכות לכל מדינה להעמיד לדין חשור בбиיעו פשעים בינלאומיים גם בהיעדר זיקה בין

.Ibid 17

The crime of piracy, or robbery and depredation upon the high seas, is an offence" 18  
against the universal law of society; a pirate being, according to Sir Edward Coke,  
hostis humani generis." W. Blackstone, *Of Public Wrongs* (Book IV) (Boston, R.M.

.Kerr, ed., 1962) 66, 72

יש לציין כי למורות מדיניות דגל של אוניות שנפגעו על-ידי פיראטים היו מוסמכות להעמידם לדין על בסיס זיקה טריטוריאלית הרואה באוניה כשותה ערך לטריטוריה המדינית, אמצעי זה לא היה יעיל די, שכן הוא לא אפשר למדינות האחרות שטרם נפגעו ושיהה ביכולתן לתפוס את הפיראטים, לעשות כן.

ראו: UN Convention on the Law of the Sea, 10 December 1982, U.N. Doc. A/ 20  
.CONF.62/121, 1833 U.N.T.S. 3

ו ארנה בונרפלט וובל שי

לבין החשור, המעשה, מקום ביצועו, וקורבנותיו – סמכות שנועדה להבטיח כי אויבי המין האנושי לא יימלטו מאחריות. עקרון סמכות השיפוט האוניברסלית תקף ושריר עד היום לגבי פשעים בינלאומיים ונדון בו בתת-פרק 4.

במהלך המאה ה-19 הפרק הסחר בעבדים לפשע על פי המשפט הבינלאומי, וזאת מכמה אמנות אשר הקנו למידנותה שהצטרפו אליהן את הסמכות להעמיד לדין סוחרי עבדים בהיעדר זיקה נספפת לעצם ביצוע הפשע<sup>21</sup>. אמנה העבדות מ-1926 (אשר תוכנה ב-1953), אשר מדיניות רבות הצטרפו אליה, מקימה סמכות שיפוט אוניברסלית על החשודים בביצוע העבירה<sup>22</sup>. מופעה העדכני של העבדות כעבדית הסחר בבני אדם, בעיקר לצורכי תעשיית המין הגלובלית, מהויה פשע ביןלאומי שבו עוסקות כמה אמנות ביןלאומיות, וזאת בצד מגנוניים מדינתיים נוספים, כגון החוק האמריקני המתנה מתן סיוע למדינות בפעילותן למיגור התופעה מתחומי הסמכות שלהם, ונדון בה בתת-פרק 3.

פשע הפיראטיות ופשע העבדות או השברוד הם עבירות שבבסיסן מניעים כלכליים ושביצוען אינו מצריך מעורבות ממשלה. בכך הן מובחנות מן הקטגוריות המרכזיות של העבירות הבינלאומיות כיום – פשעי מלחמה (War Crimes), פשעים נגד האנושות (Crimes against Humanity) והשמדת עם (Crime of Genocide) ופשע התוקפנות (Aggression) – עבירות שביצוען מצריך, בר גיל, מעורבות, או למצער עצמת עין, ממשלחתית ומוגן מיגוזן טעם המטעטים את קו התפר שבין אידיאולוגיה פוליטית לבין שנאה לקבוצה מוגנת, המדיירה את בני הקבוצה מכלל בני האדם, והכרוכה ברצון להכחידה, לשעבده או לפגוע בה באופן חרור אחר. הבחנה נספפת היא שבניגוד לעבירות מהסוג הראשון, שנוצרו במשפט הפלילי הפנימי והפכו לחלק מהמשפט הבינלאומי בשל התפשטותן אל מחוץ לגבולות המדינה, עבירות מהסוג השני נוצרו והוגדרו מלכתחילה במשפט הבינלאומי.

ההכרה בכך שמעשים הנופלים לקטגוריות אלה מהווים פשעים בינלאומיים הינה תולדה של מלחמת העולם השנייה, אך שורשיה מוקדמים יותר ונטועים בהתפתחות דיני המלחמה בכלל, והדין הומניטרי בפרט<sup>23</sup>. גם בהקשר של התפתחות זו ניתן להבחן בפיתוח מחייב של דין מוהורי בצד דין פרוצדורלי: נקודת הציון הראשונה בתהליכי הקודיפיקציה של דין אלא היא ניסוחו של Lieber Code ב-1863, הפנתה לtower המשפט צבאי האמריקני ויישומו במהלך מלחמת האזרחים האמריקנית<sup>24</sup>. על בסיס קוד זה הועמדו אנשי צבא לדין עם סיום המלחמה, בפניו בתו דין צבאים אמריקניים בגין הפרות חמורות של הוראותיו, בעיקר

<sup>21</sup> עם זאת קשה לטעון כי העבירה גירה בשעתו סמכות שיפוט אוניברסלית, ונראה כי כל שהיא באמנות היה האصلة הדנית של סמכות שיפוט המבוססת על זיקות מסורתית, בין המדינות החתוםות. ראו: E. Kontorovich "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation" 45 *Harv. Int. L. J.* (2004) 183, 192–194

<sup>22</sup> Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, 60 L.N.T.S. 253; Protocol Amending the Slavery Convention, 182 U.N.T.S. .51

<sup>23</sup> לדין הבחנה בין דיני המלחמה לבין הדין הומניטרי, ראו פרק III.  
<sup>24</sup> הקוד אומץ על ידי הנשיא לינקולן כ- Army order no. 100: instruction for the Government of the United States in the Field

## פרק VII: משפט בינלאומי פלילי

אליה הנוגעת ליחס לשביי מלחמה<sup>25</sup>. כללים דומים אומצו לתוכה דיני הצבא במדינות שונות בעשורים האחרונים של המאה ה-19, ומילא נסלה הדרך לקודיפיקציה של דיני המלחמה במישור הבינלאומי. אמנות האג 1899 ו-1907<sup>26</sup> הן התוצאה של תהליך זה<sup>27</sup>.

מבחן מהותית הוגדרו פשיי מלחמה כהפרות של דיני הלחימה שביצעו על ידי לוחמים במסגרת סכום בינלאומי. מבחינה פרוצדורלית, סמכות שיפוט על לוחמים שביצעו פשיי מלחמה שעה שפعلו במסגרת תפקיד رسمي ניתנה הן למדינות (מכוח זיקת אזרחות העבריין) והן לממשלה האויב שנגדה לחמו (מכוח זיקת אזרחותו של הקורבן). אין תימה כי במירב הנסיבות היהת זו אכן מדינת האויב שהפעילה את סמכות השיפוט האmorית, וזה הופעל ברגיל על חילו צבא בدرج נמוך יחסית.

תהליך הקודיפיקציה של המשפט הבינלאומי, ובכללו של דיני הלחימה, שהוא אמרור להמשך ולהתחפה בוועידת האג השלישי, הייתה מתוכננת ל-1915, נבלם על ידי מלחמת העולם הראשונה (1914–1918). עם סיום המלחמה, באמצעות השלום של רוסאי, נקבע כי נאשימים בהפרת דיני המלחמה – ובכללם הקיזור הגרמני – יוועדו לדין בפני בתי משפט של בעליות הברית<sup>28</sup>. ניסיון זה אمنם כשל, אך הוא חשוב מפני שבמסגרתו נוסחה לראשונה האפשרות להעמיד לדין אישי ממשל בכירים, ולא רק דגי רקק, בגין אחריותם האישית לביצוע פשיים בינלאומיים. אפשרות זו הפכה למציאות לאחר מלחמת העולם השנייה.

בהיסטוריה המודרנית, מלחמת העולם השנייה בכלל ושותת היהודים בפרט, נתפסות כקו פרשת המים בתחוםים רבים, והאמור נכון אף לגבי התפתחות המשפט הבינלאומי הפלילי: הקמת בית הדין הבינלאומי הצבאי בנוירנברג (International Military Tribunal)<sup>29</sup> — IMT והעמדתם לדין בפניו של בכיר המשפט הנאצי שנৎפס<sup>30</sup> (ולאחר מכן) היפני<sup>31</sup> היו אירוע מכונן בכך מובנים מרכזיים: (א) העמדתם לדין של אישי ממשל

<sup>25</sup> לפסקה של בית דין צבאיים אמריקניים הן בהקשר של מלחמת האזרחים והן בהקשר מלחמות בינלאומיות מאוחרות יותר ראו: W. Winthrop *Military Law and Precedents* (Buffalo, NY, 2<sup>nd</sup> ed., 1920) 839–862.

<sup>26</sup> Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899, 187 Consol. T.S. 429,

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, 205 Consol. T.S. 277

<sup>27</sup> ראו: The Peace Treaty of Versailles, 28 June 1919, para. 230–227, 225 Consol. T.S. 188.

<sup>28</sup> Charter of the International Military Tribunal, 8 Aug. 1945, 82 U.N.T.S. 279 בנוירנברג התקיים משפטם של 22 מבכירי המשטר הנאצי. להחלטת בית הדין בנוירנברג ראו: Judgment of the Nuremberg International Military Tribunal, *supra* note 2. (כולל פרוטוקולים של המשפטים). ראו גם: *Nuremberg Trials: The Reader's Companion to American History* (E. Foner, eds., 1994) (and J. A. Garraty, eds., 1994).

<sup>30</sup> ראו את חוקת בית הדין באתר: <http://www.yale.edu/lawweb/avalon/imtfech.htm>. בטוקיו התקיים משפטם של 28 נאשימים מבכירים הממשלה והצבא היפני. להחלטת הtribunal ראו: *The*

## ו ארנה בורנפטל ויובל שי

ומפקדי צבא בכירים על בסיס נורמות של המשפט הבינלאומי הייתה חסרת תקדים. אישים אלה שוב לא יוכל להסתתר מאחוריו מסך ריבונות המדינה ששירותו; (ב) דחיתה של טענת ההגנה של הנאשמים כי הם פעלו בהתאם לחוקי מדינתם, עיגנה את עדיפותם הנורמטיבית של כלל המשפט הבינלאומי על פני כלל המשפט הפנימי ככל שהדבר נוגע ל חובות בינלאומיות של פרטיהם; (ג) לדין המהותי נוספו שתי קטגוריות של עבירות: פשעים נגד השלום – קטgorיה שבמופעה העדכני מכונה "תוֹקְפָנוֹת" – ופשעים נגד האנושות; (ד) הקניית סמכות שיפוט על אישיים בכירים שהואשמו בפשעים אלה לבית דין בינלאומי והפעלה על ידו. עם זאת, יש לציין בהקשר זה האחרון, כי הרכבת בית הדין ייצג את חברי הקהילה הבינלאומית שניצחו במלחמה, את בנות הברית, ולא את כלל חברי הקהילה, הגם שהרכבת זה מובן מטעמים פוליטיים, הוא חשף את בית הדין, ועמו את ההליך המשפטי הבינלאומי הפלילי, לטענה כי הוא מייצג צדק של מנצחים, ומילא איזדק במובנו הנורמיibi, אם גם לא פוליטי<sup>31</sup>. לבסוף, יש לציין בהקשר זה כי בית דין של נירנברג וטוקיו היו טריבונלים שכוננו אד-hook ובעל-סמכות שיפוט מוגבלת מבחינת מקום, וכן מהות לב的日子里 תפקיים בכירים מדינות הציר במלחמה העולם השניה. עם סיום המשפטים הם חדרו מלהתקיים. למורות מגבלות אלו, אין להמעיט בחשיבות התקידות של הקמתם הטריבונלים: הפרדיגמה של המשפט הבינלאומי הפלילי, שעל פיה פשעים בינלאומיים הם פשעי מדינה הגורדים אחידות של מנהיגיה ומקיםם סמכות שיפוט לקהילה הבינלאומית להעמידם לדין, קרמה עור וגידיים.

מלחמת העולים השנייה היוותה זרז גם להתפתחויות נוספות על אלה המזוהוות לעיל של הדין הבינלאומי הפלילי הן מבחינה מहותית והן מבחינה פרוצדורלית: (א) בשנת 1948 נכרתה אמתת הג'נוסיד (Genocide) שיצרה את קטגורית הפשע "השמדת עם" במובן מקטוריית ה"פשעים נגד האנושות", ובעה כי על מדינה שבשתחה בוצע הפשע להעמיד לדין את החשודים בביצועו או להסיגם לבית דין בינלאומי<sup>32</sup>; (ב) בשנת 1949 אומצו אמנות ג'נבה, שיצרו קטגוריות נוספות של פשעי מלחמה. אלה הוגדרו כ"הפרות חמורות של האמנות" (Grave Breaches of the Geneva Conventions) וכולות רצח, עינויים, גירוש, מניעת זכות להליך משפטי הוגן, לקיחת בני ערובה ופגיעה נרחבת ובלתי מוצדקת ברכוש כאשר הן מבוצעות נגד אנשים מסוימים<sup>33</sup>. אמנות ג'נבה כוננו גם גירסה מוחמירה של עקרון סמכות השיפוט האוניברסלית בגין הפרות חמורות שלן, בהטילן חובה על המדינות

*Tokyo Judgment*, the International Military Tribunal for the Far East, 29 April 1946  
— 12 November 1948, Chapter X (Roling & Ruter, eds., 1977)

גם באתר <http://www.stephen-stratford.co.uk/imtf.htm>

ראו: 6 "From Nuremberg to the Rwanda Tribunal: Justice or Retribution?" M. Mutua. 31

*Buff. Hum. Rts L. Rev.* (2000) 77

האמנה בדבר מניעתו וענישתו של פשע השמדת עם, כ"א 1, מס' 5, ע' 65. 32

אמנת ג'נבה להטבת מצבם של פצועים וחולמים מבין אנשי הכוחות המזוינים בשדה הקרב, משנת 1949 (להלן: אמתת ג'נבה הראשונה), אמתת ג'נבה להטבת מצבם של פצועים, חולמים ונטרפי אניות מכין אנשי הכוחות המזוינים בהם, משנת 1949 (להלן: אמתת ג'נבה השניה), אמתת ג'נבה בדבר הטיפול בשביי מלחמה, משנת 1949 (להלן: אמתת ג'נבה השלישית); אמתת ג'נבה בדבר הגנת אזרחים בימי מלחמה, משנת 1949 (להלן: אמתת ג'נבה הרביעית) אמתת ג'נבה, כ"א 1, מס' 30. ראו ס' 50 33

**פרק VII: משפט בינלאומי פלילי**

להעמיד לדין או להסיג חשודים בביוץ<sup>34</sup>. ישראל הצטרפה לכך הן לאמנת הג'נסיסיד (בעברית: האמנה בדבר מניעתו וענישתו של הפשע השמדת עם) – ואף הפנימה אותה לדין הפנימי בישראל<sup>35</sup> – והן לאמנת ג'נבה<sup>36</sup>.

מקובל לראות במלחתה הקריה כמי שהקיפה, בין היתר, את תהליך פיתוחו של המשפט הבינלאומי הפלילי. תפיסה זו, המבzieעה מבובן על היהות החקיר פועל יוצא של מציאות פוליטית מורכבת, היא ככל נכונה, בעיקר בהקשר של פיתוחה הפן הדינוני או המוסדי של התחום: פעילות הכנה לקרה הקמתו של בית דין ביןלאומי פלילי קבוע שהחלתה במסגרת ארגון האומות המאוחdot (האו"ם) בסמוך לכריתת אמנה הג'נסיסיד (שכאמר צופה את הקמתו), לא נשאה פרי ובפועל נגזה<sup>37</sup>. עם זאת, במהלך המלחצת השנייה של המאה ה-20 ניתן להזות התפתחות רואיה לציוון בדיון המהותי: (א) בשנת 1976, במסגרת המאבק נגד משטר האפרטהייד בדרום-אפריקה, אומצה האמנה נגד האפרטהייד (Apartheid) אשר כוננה גם סמכות שיפוט אוניברסלית<sup>38</sup>. נציג כי הגם ש-101 מדינות הןצדדים לאמנה זו, מדינות אלה אינן כוללות את מדינות המערב, ובכללן ישראל<sup>40</sup>; (ב) בשנת 1977 הוספו שני פרוטוקולים נלוים לאמנת ג'נבה, והפרוטוקול הראשון הוסיף לרישימת "ההפרות החמורות" של האמנות מעשים נוספים כגון: פגיעה מכוונת בייעדים אזרחיים, העבירת אוכלוסייה לשטח כבוש, אי-החותמת שבויי מלחמה, וביצול לרעה של סמלים רפואיים<sup>41</sup>. ישראל, מטעמים שנידונו בפרק III, אינהצד לפראוטוקולים<sup>42</sup>; (ג) בשנת 1984 אומצה

<sup>34</sup> לאמנת ג'נבה ה-1; ס' 51 לאמנת ג'נבה ה-2; ס' 130 לאמנת ג'נבה ה-3; ס' 147 לאמנת ג'נבה ה-4.

<sup>35</sup> ראו ס' 49 לאמנת ג'נבה ה-1; ס' 50 לאמנת ג'נבה ה-2; ס' 129 לאמנת ג'נבה ה-3; ס' 146 לאמנת ג'נבה ה-4.

<sup>36</sup> ישראל אישרה את האמנה ביום 9 במרץ 1950.

<sup>37</sup> החוק בדבר מניעתו וענישתו של הפשע השמדת עם, תש"י-1950, ס"ח 42, בע' 137.

<sup>38</sup> ישראל אישרה את האמנות ב- 6 ביולי 1951.

<sup>39</sup> החלטת מועצת הביטחון מספר 260 מה-9 בדצמבר 1948 הזמין את הוועדה למשפט ביןלאומי של האו"ם לבחון את האפשרות של הקמת גוף שיפוטי ביןלאומי פלילי. הוועדה הגישה לעצרת הכלכלית טוויות חוקה בשנים 1951 ו-1953, אולם העצרת הכלכלית החליטה לדוחות את אימוץ החוק עד לניסוחה הגדירה מוסכמת של פשע התקופנות (ראו החלטת העצרת הכלכלית מס. 897 (IX) מה-4 בדצמבר 1954).

<sup>40</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 Nov. 1973, 1015 U.N.T.S. 203.

<sup>41</sup> כאמור, אף כי אמנה זו, כאמנות אחריות הקובעות עבירות פליליות, מתירה פעולה סמכות אוניברסאלית על ידי המדינות החברות. אולם ככל שאמנות אלוחולות ביחס לפעולות שבוצעו בשטח מדינות לא חברות, על-ידי אורחים של מדינות לא-חברות, הפעלת אמנות אלו עשויה להתפרש כהתערבות בענייניה הפנימיים של המדינות הללו (אלא אם מדובר בדיון מינתי).

<sup>42</sup> הפרוטוקול הנוסף הראשון לאמנות ג'נבה מיום 12 באוגוסט 1949 בדבר הגנת קורבנות סכוסכים מזוינים ביןלאומיים (הפרוטוקול I) מיום 8 ביוני 1977; הפרוטוקול הנוסף השני לאמנות ג'נבה מיום 12 באוגוסט 1949 בדבר הגנת קורבנות סכוסכים מזוינים שאינם בינלאומיים (פרוטוקול II). תרגום רשמי: הוועד הבינלאומי של הצלב האדום, הפרוטוקולים לאמנת ג'נבה, מהדורה עברית 2004. ראו ס' 85 לפרוטוקול הראשון.

<sup>43</sup> ראו פרק III.

**| ארנה בונרפלט ליובל שי**

האמנה נגד עינויים, שף היא כוננה סמכות **שייפות אוניברסלית**<sup>3</sup>. פשע העינויים, כפי שנראה בתת-פרק 3 להלן, הפק באופן זה לפשע שרגלו האחת נטוועה בדייני זכויות האדם ורגלו האחורה נטוועה בדיין ההומניטרי, והגם שישנן הבחנות בין רכיבי העבירה בין שתי מערכות הדינים, הוא מציביע על הקשר הדרוש שביניהן. ישראל, כפי שצוין בפרק III, הינה צד לאמנה זו<sup>4</sup>; (ד) לבסוף יש לציין את כריתתן, למנ שנות ה-70 של המאה ה-20, של שורת אמנות נגד טרור<sup>5</sup>, אמנות שמسيעות, כפי שנראה, לייצרתו של פשע הטרוריות, כמו גם את אימוץן של אמנות העוסקות בעבירות סמיים<sup>6</sup>, ועבירות אחרות הקשורות

ס' 5 לאמנה נגד עינויים ונגד יחס ועונשים אכזריים ובلتאי אנושיים או משפליים, 10 דצמבר 43  
1984, כ"א, מס' 1039, עמ' 249.  
ראו פרק III. 44

45  
בין אמנות הטrror הרבי-צדדיות הפתוחות להצטרכות אוניברסלית: Convention on Offences and Certain Other Acts Committed On Board Aircraft, 14 September 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 14 December 1973; International Convention Against the Taking of Hostages, 18 December 1979; Convention on the Physical Protection of Nuclear Material, 3 March 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 24 February 1988; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 10 March 1988; Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1 March 1991; International Convention for the Suppression of Terrorist Bombing, 9 January 1998; International Convention for the Suppression of the Financing of Terrorism, 25 February 2000.

46  
בן נתממו מספר אמנות אזוריות למאבק בטרור: Arab Convention on the Suppression of Terrorism, 22 April 1998; Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1 July 1999; European Convention on the Suppression of Terrorism, 27 January 1977; OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, 2 February 1971; OAU Convention on the Prevention and Combating of Terrorism, 14 July 1999; SAARC Regional Convention on Suppression of Terrorism, 4 November 1987; Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, 4 June 1999.

וראו באתר <http://www.unodc.org/unodc/en/terrorism.html> וכמו <http://untreaty.un.org/> (English/Terrorism.asp

במהלך השנים אומצו אמנות רבות העוסקות בסחר בסמים (החל באמנת האופיום משנת 1912). כיום מפנים בעיקר לשילוש אמנות מרכזיות בנושא סמים שאומצו במסגרת ארגון האו"ם: Single Convention on Narcotic Drugs, 30 March 1961, 520 U.N.T.S. 151; Convention on Psychotropic Substances, 21 February 1971, 1019 U.N.T.S. 175;

## פרק VII: משפט בינלאומי פלילי

לפניות פשע מאורגן<sup>47</sup>. ישראל הינהצד למירביטת האמנות הללו<sup>48</sup>.  
פיתוח מואץ של התחום החל בשנות ה-90 של המאה ה-20, והוא מקיים זיקה כרונולוגית  
ברורה לסוף המלחמה הקורת. זיקה זו מושחתת את התפיסה המוגנת את פיתוחו המוסדי של  
המשפט הבינלאומי הפלילי, ניצחונו של הליברליזם הפוליטי, אם כי אין, כמובן, להבין  
מכך שהפוליטיקה הליברלית חפה מאינטראטים. המאפיין המרכזי של פיתוח זה נוגע למיסוד  
מנגנון אכיפה ובנגזר, לפיתוח הדין מהותי, ונקודות הציון המרכזיות שלו הן אלה:

(א) בכוונתן של מדינות להפעיל סמכות שיפוט אוניברסלית כלפי חסודים בбиוץ  
פשעים בינלאומיים, והפעלתה הلقה למשעה. מגמה זו החלה בספרד ובאנגליה  
בhallucinogenic נגד הרודן הצ'יליאני אוגוסטו פינושא<sup>49</sup>, והתפשטה למקרים נוטפים, אשר  
המפורטים שבhem התנהלו בבלגיה, מדינה שחקיקתה הפנימית הקנתה לה סמכות  
SHIPOT אוניברסלית רחבה ביותר, ואשר מכוחה נפתחו הלייכים הנגד שר החוץ  
הكونגולזי<sup>50</sup>, הן נגד ראש ממשלה ישראלי אריאל שרון<sup>51</sup> והן נגד חסודים בביוץ

Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances,  
.20 December 1988, U.N. Doc. E/CONF.82/15

ראו למשל אמנת פלרמו למאבק בפשע המאורגן והפרוטוקולים הנלוויים לה. 47  
The Convention against Transnational Organized Crime, 15 November, UN Doc. A/55/383

מדינת ישראל חתמה על שתיים מתוך אמנות הטרוור של האו"ם ואשרדה שמותה אחרות.  
האמנה בנווגע לעבירות ופעלויות אחרות המבוצעות במטוסים נוטפים, אושרדה ב-1969<sup>18.12.</sup>;  
האמנה בדבר מניעת הטייפות מטוסים, אושרדה ב-6.08.1971; האמנה בדבר מניעת פעולות  
בלתי חוקיות נגד בטיחות התעופה האזרחית, אושרדה ב-30.06.1972<sup>30.06.1972</sup>; האמנה בדבר מניעת  
פגיעה באנשים בעלי הגנה בינלאומית, אושרדה ב-31.07.1980<sup>31.07.1980</sup>; האמנה בדבר ההגנה על  
חומר גרעיני, אושרדה ב-22.1.2002<sup>22.1.2002</sup>, הפרווטוקול בדבר מניעת מעשי אלימות בלתי חוקיים  
בנסיבות תזועפה המשמשים לתזועפה אזרחית בינלאומית, אושרדה ב-5.5.1993<sup>2.5.1993</sup>; האמנה בדבר  
מניעת פיזצי טרוור, אושרדה ב-10.2.2003<sup>10.2.2003</sup>; האמנה בדבר מניעת מימון טרוור, אושרדה  
ב-10.2.2003<sup>10.2.2003</sup>. ישראל חתמה על האמנה בדבר מניעת ליקיחת בני ערובה ב-19.11.1980<sup>19.11.1980</sup>, ועל  
האמנה בדבר סימון חמומי נפץ פלסטיים למטרת גילויים ב-01.03.1991<sup>01.03.1991</sup> (השו לעיל העדרה  
ה-45). ישראל גם חקרה בשלוש האמנות המרכזיות של האו"ם בנושא סמים – ראו לעיל העדרה  
.46

R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte [1999] 49  
All E.R. 97, 109, 188 (להלן: פרש פינושא).

ב-11 באפריל 2000 הוציא בית משפט בבלגיה צו מעצר בינלאומי נגד שר החוץ של קונגוז  
בגין הסטה לשמדת-עם. הלייכים אלה נפסקו בעקבות החלטת בית הדין הבינלאומי בהאג  
בעניין קונגוז נ' בלגיה (Arrest Warrant of 11 April 2000 (DRC. v. Belgium), 2002 I.C.J. 3. לתייאור הלייכים בבלגיה ראו פסקאות 13-15 להחלטת בית הדין הבינלאומי. לדין  
A. Cassese "When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case" 13 EJIL (2002) 853, 855; D. S. Koller "Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court" 20 Am. U. Int'l L. Rev. 7 (2004); A. L. Zuppi "Immunity v. Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice" 63 La. L. Rev. (2003) 309

הלייכים נגד ראש ממשלה ישראלי, אריאל שרון, נפתחו בבלגיה ב-18 ביוני 2001, על 51  
בסיס תלונה של 23 נציגי הטבח בסבירה ושתילה. הבסיס המשפטי להגשת התלונה היה

ו ארנה בז'רפקטלי יוכל שע

**פשעים ברואנדה<sup>52</sup>.**

(ב) כינון, על ידי מועצת הביטחון של האו"ם, של בתי דין בינלאומיים פליליים להעמדתם לדין של האחראים לביצוע פשעים בינלאומיים ביווגוסלביה לשעבר ב-1993 (ICTY — International Criminal Tribunal for Yugoslavia) וב-1994 (ICTR — International Criminal Tribunal for Rwanda). בתי דין אלה פועלים על בסיס חוקות הקובעות הן את הדין המהותי, הן את סדרי הדין והן את סמכויות השיפוט של כל בית דין<sup>53</sup>. באשר לתחילה התפתחותו של המשפט הבינלאומי הפלילי, יש לשים לב כמה תופעות בהקשר של הקמתם ופעילותם של בתי דין אלה: ראשית, הקמתם על ידי מועצת הביטחון מבססת, מבחינה נורמטיבית, את הזיקה שבין הפרה חמורה של זכויות אדם וערכי יסוד אוניברסליים לבין השלום והביטחון העולמיים; שניית, הגם שבתי דין אלה, כמו בתי הדין הצבאים בניירנברג ובטוקיו, הינם בת-ידיין אד-הוק, קרי סמכות השיפוט מוקנית להם ספציפית לאירועים מסוימים, הם שונים מקודמיהם במובן זה שהרכבתם אינו מייצג צד מנצח במלחמה ביןלאומית, וכאן ניכרת התפתחות לכיוון של שיפוט נייטרלי. שלישיית, פסיקותיהם של בתי הדין תרמו תרומה משמעותית ביותר הן לפיתוח אחד של סדרי הדין וככליל האכיפה של המשפט הבינלאומי הפלילי והן לפיתוח הדין המהותי. על חלון נعمוד בתת הפרק הבא העוסק בדיין המהותי, אך בהקשרנו ראוי לציין כבר כת עת פסיקת ה-ICTY שהרחיבה באופן הדרגתי את תחומית כללי הדין ההומניטרי גם על סכסוכים חמושים פנימיים (Internal armed conflicts)<sup>54</sup>. לבסוף, עצם כינונו ופעילותם של בתי דין אלה זירעו את מימוש הרעיון של הקמת בית דין פלילי בינלאומי קבוע.

(ג) ב-17 ביולי 1998 אומצה, בוועידה ביןלאומית שכונסה ברומה למטרת כינונו של בית דין בינלאומי פלילי קבוע, חוקתו של בית הדין<sup>55</sup>. חוקה זו היא אמנת ביןלאומית אשר נכנסה לתוקף ב-1 ביולי 2002, ומכוונה פועל כיום בעיר האג בית הדין הבינלאומי הקבוע (International Criminal Court — ICC). חוקת בית הדין מהווה את

חוק המאפשר העמדה לדין בבלגיה על בסיס סמכות אוניברסלית (Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 1993 (as amended in 1999) (Belgium), reprinted in 38 I.L.M. (1999) 918 (ההילכים הסטיימיו בהחלטת בית המשפט העליון הבלגי, שלפיה ניתן להעמיד לדין את שרון בגין פשעי מלחמה, פשעים נגד האנושות והשמדת עם, אולם לא כל עוד חסינותו עומדת לו כראש ממשלה ישראל להחלטה רואו: I.L.M. 596, 42). כן פורסמה באנגלית ב-<http://www.cass.be/juris/jucf.htm>.

בלגיה נערך בשנת 2001 משפט פלילי נגד ארבעה אורתדים רואנדים שהושמו במעורבות ברצח העם ב-1994. הם הורשו ונגזו عليهم עונשי מאסר בין 12 ל-20 שנה וראו הודהה לעיתונות של ארגוןมนשטי מה-8 ביוני 2001 ב-/eng=385) (<http://web.amnesty.org/library/index>?open&of=eng-385) (במאי 2005 הועמדו לדין שני אורתדים רואנדים נוספים על חלקם ברצח העם (ראו ידיעה בעיתון הגארדיין מה-10 במאי 2005, באתר <http://www.guardian.co.uk/print/0,3858,5189909-113078,00.html>).

Statute of the International Tribunal for the Former Yugoslavia, Security Council Resolution 827, U.N. Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, Security Council Resolution 955, U.N. Doc. S/Res/955 (1994)

.Prosecutor V. Tadić, ICTY Case No. It-94-1-A, App. Ch., 15 July 1999 (Prosecutor V. Tadić, ICTY Case No. It-94-1-A, App. Ch., 15 July 1999) (חוקת רומא, לעיל העלה 14).

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**פרק 7: משפט בינלאומי פלילי**

הקודיפיקציה המקיפה ביותר שנעשתה עד כה לנורמות המשפט הבינלאומי, שבתוכנן נدون בתת-פרק 3. סמכות השיפוט של בית הדין והיחס המתקיים בין סמכות השיפוט האוניברסלית מזו וסמכות השיפוט של מדינות בעלות זיקה לפשע או לפושע מזה, ידינו בתת-פרק 4. ביום 100 מדינות הן צדדים לחוקת רומא. מבין הדמוקרטיות המערביות בולט היעדרן של ארצות-הברית ושל ישראל: שתי המדינות (בצד חמיש מדינות נוספות: סין, קטאר, עיראק, לבנון ותימן) הצבעו נגד נוסח החוקה, חתמו עליה אך הודיעו כי אין בכונתן לאשרה. הטעמים שהניעו אותן לאי-הצטרפות לחוקת בית הדין מבטאים חשש כי בית הדין יפעיל את סמכותו נגד אורחתה.<sup>56</sup> אכן, הטעם המרכזי, גם אם לא הרשמי, לאי-הצטרפותה של ישראל לחוקה הוא החשש מפני העמדה לדין של חילילים ישראליים בגין מעשים שבוצעו במסגרת האינתיפאדה השנייה, והעלולים להיחשב כפשעי מלחמה (למשל חיסולים; סיכולים ממוקדים; גירוש); הערכה בכפיה של אוכלוסייה; תיחום מקום מגוריים) וחששה הספציפי מפני העמדה לדין של מנהלים לנוכח הוראת סעיף 8(2)(ב)(8) לחוקה הקובע כי העבירה אוכלוסית הכבש לשטח הכבש במישרין או בעקיפין תיחשב כפשע מלחמה, הוראה המכונה "סעיף התנהלות".<sup>57</sup>

ברז שהקמתו של בית הדין הבינלאומי הקבע נועדה לモעד את הסיכון שצדק סלקטיבי הטעון בטריבונלים אד-הוק, במובן זה שהקמתם של טריבונלים

<sup>56</sup> הטעם המרכזי לאי-הצטרפותה של ארצות-הברית לחוקה נובע מלשון ס' 12 לחוקה העוסק בסמכות השיפוט של בית הדין והקובע, בין היתר, כי בבית הדין תהא סמכות במקורה שבו המדינה שבשיטה בוצע הפשע אינה חברה בחוקת בית הדין, אך נתנה את הסכמתה לפעולת סמכותו בדיעד ולצורך אירוע ספציפי. החשש האמריקני הוא כי חיליליה, השותפים לכוחות שלום ברחבי העולם, יחשפו באופן זה לתלוות המונעות ממניעים פוליטיים, מהלך העולם למנוע ממנה לשתח את חיליליה בכוחות אלה ומילא לסכן את השלום וביטחון ולא להבטיחו. חשש זה אף הניע את ארצות-הברית לחוקק את החוק להגנה על אנשי שירות אמריקנים, American Service-Members' Protection Act of 2002 H.R.4775 אמריקנית לא תעבור כספים לבית הדין ולא תסייע לו בمعצר חשודים, באיסוף ראיות או בהעבירה מיידע. כן קבע החוק כי ללא הבתחת חסינות מוחלטת לחילילים אמריקנים מפני סמכות השיפוט של בית דין לא תצטרף ארצות-הברית לכוחות שמירת-שלום של האו"ם. החוק אף מוסיף וקובע כי ארצות-הברית לא תעבור סיוע צבאי למדינות אשר אדרו את החוקה, מלבד חברות NATO' ובועלות ברית חברות אחרות, ומסמיך את הנשיא לגורות על נקיות כל האמצעים הדרושים כדי לשחרר אזרח אמריקני או אזרח של בעלת ברית העוזר גדול רצונו על ידי בית דין או מטעמו, הוראה שבגינה זהה החוק לכינוי "חוק הפלישה להאג". בצד חקיקה זו כרתה ארצות-הברית הסכמיים דו-צדדיים עם שורת מדינות שביהם מתהיוות מדינות אלה להסגר אזרח אמריקנים לבית דין (לעמדת ארצות-הברית בנושא ראו: U.S. Department of State, Fact Sheet: The International Criminal Court, Aug. 2 2002 <http://www.state.gov/t/pm/rls/fs/2002/23426.htm>). ישראל הייתה אחת המדינות הראשונות שחתמה על הסכם זה. לדין בעמדת ארצות-הברית ראו ש' מטיאס ומ' שרון "בית הדין הפלילי הבינלאומי" המשפט ט (תשס"ד).<sup>23</sup>

<sup>57</sup> לדין בעמדת הישראלית ראו מטיאס ושרון, לעיל בעמ' 23; "שני" ישראליים על ספסל הנאשימים? השלכות כניסה לתקוף של חוקת רומא מבחינת מדינת ישראל" המשפט ט (תשס"ד) 51. ראו דין בתת-פרק 4.3 להלן.

**ו ארנה בז'נפחל וויבל שי**

פליליים ביוגוסלביה וברואנדה – אך לא במקומות אחרים שבהם מתבצעים פשעים בינלאומיים – מצביעה על שיקולי אינטראטיטי. עם זאת, אין כל ערובה שבית הדין הקבוע אכן יפעיל רק אוניברסלי במובן זה שהן מועצת הביטחון של האו"ם, המוסמכת, כפי שנראה, להפנות מקרים לבית הדין, והן בית הדין עצמה מפעילים שיקול דעת שאינו גודר מרכיבים פוליטיים בנסיבות שביהם יוגש כתוב אישום. נקודה אחרתנו זו מעלה כי אכן אין להבין את הлик התפתחותו של המשפט הבינלאומי הפלילי כמידע על ניצחונם המובהק של ערכיו הליברליים, ולמצער, להכיר בכך שהוא האחרון חף מאיןטרסים. אכן, עצם העובדה שמדינות ששיתן הפליטית רוחקה מאוד מהolibרליזם תמכו בהקמתו של בית דין בינלאומי והצטרפו לחוקתו, מצד העובדה שמדינה כארצות-הברית בחרה שלא להצטרף אליו, ויתרה מכך, אף נקטה צעדים שמטרתם לסכל את אופשות העמדתם לדין של אמריקנים בפניו, מצביעה על כך ששיקולי אינטראטיט שמניעו בוגע לבית הדין אשר תהא ששיתן הפליטית. ממילא מדובר בכלל מדיניות מקומות מוסדות מורכבים יותר, והשאלה המעניתה בהקשר זה היא מדוע בכלל מדיניות מקומות מוסדות שפעולתם עלולה, בנסיבות מסוימות, לפגוע באינטראט. שאלת זו יפה כמובן לא רק לעניין הקמתו של בית דין הבינלאומי הפלילי, אלא לכל הлик המיסוד הבינלאומי. ראיינו כי התפיסה שעלה פיה הлик זה מבטא את ניצחון הליברליזם היא פשטיית מדי. גם הגרסה הריאלית שעל פיה מדיניות מקומות מסוומ שמן סוברות שהם יקימו את האינטראט הפליטי שלhn תוך הסואתו כאינטראט בינלאומי, פשטיית לא פחות, במובן זה שברור שהקמתו של מוסד בינלאומי יכול להעלות בקנה אחד עם אינטראטים של מדינה בזמן מסוים, אך להיות מנוגדת להם בזמן מאוחר יותר.agem שלא יוכל במסגרת זו להיכנס לעומקו של דיוון, נדמה שאת הטעמים להליך המיסוד הבינלאומי יש למצוא לא בפרדיגמה הליברלית ולא בפרדיגמה הריאלית, אלא להפך, בהכרה כי קו הגבול המפריד ביןיה הוא במידה רבה מדומיאן: האינטראט אינו נועד מן התפיסה הליברלית, אך הוא כולל גם את עצם קידום האתוס הליברלי והמשך האמונה בנאותו מצד קהל הבוחרים בתרבויות-liberalites בעידן של גלובליזציה ותקשות המונחים, וממילא מחייב פעולה העולה בקנה אחד עם ערכים ליברליים. כיוון מוסדות בינלאומיים בכלל, וב查看全文ו, הקמת בית דין בינלאומי פלילי בפרט, הוא ממין הפעולות הללו. העולה מן האמור הוא, כי אין להבין את עצם הקמת בית דין כمبرאה לידי ביטוי מחויבות עקרונית לצדק אוניברסלי, לזכויות אדם ולהתנהגות נורמטטיבית, אך ניתן להבינה כמי שיזכרת את תנאי האפשרות לקידום מחויבות כזו.

**3. המשפט הבינלאומי הפלילי המהותי****3.1. כללי**

טיפול של הлик התפתחותו של המשפט הבינלאומי הפלילי, כמתואר בתת-פרק 2 לעיל, מורה כי מדובר בהליך תלוי נסיבות והקשר שאיןו משקף מדיניות בינלאומית עקבית, לכידה ועקרונית. התוצאה, בהתאם, היא שקיימות כיום לעללה מ-280 אמנות המפלילות

**פרק VII: משפט בינלאומי פלילי**

מעשים מסוימים<sup>58</sup>; ישנים מעשים (כגון מעשי טרור וסחר בסמים) המופללים בכמה אמננות שודומה שהחוט המקשר ביניהם הינו רופף ביותר, וישנים מעשים שאף על פי שישطعم רב בהפלתם, הם אינם מהווים פשעים (כגון פגיעות חמורות בזכויות אדם המבוצעות על ידי תאגידים בינלאומיים) או שההסדר הקיים לגביהם אינו מספק בעילן (כגון פשע התוקפנות).

חרף זאת, ניתן להצביע על מעשים שלגביהם התפתח במהלך השנים האחרונות כמי מהווים פשעים בינלאומיים. קונצנזוס כזה מתקיים לגביו מעשים העומדים בתנאים הבאים:<sup>59</sup>

- (א) הם מפרים נורמות של המשפט הבינלאומי המינ Hegelian. יש לשים לב כי יתכן שנורמות אלה אף מצויות באמננות, אם אמננות אלה הן אמננות דקלרטיביות לפחות בנסיבות לנורמות אלה, או אמננות שתרמו לייצירתה של נורמה מינית;<sup>60</sup>
- (ב) הם מפרים נורמות שנעודו להגן על ערכי יסוד אנושיים המשותפים לכל חברי הקהילה הבינלאומית וממילא נורמות המחייבות הן את הקהילה והן את הפרטמים המרכיבים אותה. יש לציין כי ערכיהם אלה, בתורם, מעוגנים באמנות זכויות אדם; באמנות ג'נבה ובפרוטוקולים הנלוויים להן; באמנת הג'נסיד; באמנה נגד עינויים ובאמנות העוסקות במעשי טרור מסוימים;
- (ג) קיימ אינטראס אוניברסיטלי במיגור פשעים אלה, ולפיכך, בתנאים מסוימים, הם מקימים סמכות שיפוט אוניברסלית;
- (ד) הפרת הנורמה מקימה אחריות פלילתית אישית.<sup>61</sup> יש לציין, עם זאת, כי אם האדם פועל במסגרת תפקיד בכיר כגון ראש מדינה, שר חוץ או נציג דיפלומטי, והוא עדין

58 ראו: (M. C. Bassiouni *Introduction to International Criminal Law* (Ardsley, 2003) 58–117. בעמודים 116–117 מתוארים 28 הפשעים המצוינים באמנות שווה, והם: תוקפנות; השמדת עם; פשעים נגד האנושות; פשעי מלחמה; אחזקה ו/או שימוש בלתי חוקי בנשק; גניבת חומר גרעיני; שכירות הרב; אפרטהייד; שעבוד ופרקטיות דומות; עניינים וצורות אחרות של יחס אכזרי, בלתי אנושי או משפיל; ניסויים בלתי חוקיים בני אדם; שוד ים; חטיפת מטוסים ומעשים בלתי חוקיים נגד בטחון באויר הבינלאומי; מעשים בלתי חוקיים נגד כלី שיט ובטעון פלטפורמותם בים הפתוח; איומים ושימוש בכוח נגד אנשים מוגנים על ידי המשפט הבינלאומי; פשעים נגד עובדי או"ם ואנשים קשורים; לקיחת אורהים בני ערובה; שימוש בלתי חוקי באמצעות הדואר; התקפה תוך שימוש בחומר נפץ; מימון מעשי טרור; סחר בלתי חוקי בסמים ועבירות סמיים קשורות; פשע מאורגן; הרס או גניבה של אוצרות לאומיים; מעשים בלתי חוקיים נגד ארכות הסביבה; סחר בינלאומי בחומר תועבה; יזופי מטבע; הפרעה בלתי חוקית בקשר לככלי תקשורת בינלאומיים תת-ימיים; מתן שוחד לפקידיים ורים.

59 Cassese, *supra* note 5, at pp. 23–25. נציין כאן כי השימוש בביטוי "פשעים בינלאומיים" נועד להצביע על פשעים אוניברסיטליים, ולא על פשעים "זגילים" אשר מערכות משפטיות מדיניות משתפות פוללה במשמעותם.

60 נציין כי קססה מגדר את התנאי הרבי עליון: אדם שביצע פשעים העומדים בתנאים לעיל במסגרת תפקידיו הרשמי במדינה, לא תוכל זו האחونة לטעון כי מדיניות אחרות מנועות מההעמידו לדין לאור החסינות המינית הקיימת לגביו מעשים אחרים שבהם אדם פועל כסוכן של מדינה.

**| ארנה ב-רפתקן וובל שי**

מכהן בתפקיד זה, תעמוד לו חסינותו האישית המלאה מפני העמדה לדין, כפי שנקבע על ידי בית הולודים בפרשת פינושה<sup>2</sup>, ועל ידי בית הדין הבינלאומי בפרשת קונגנו נ' בלגיה<sup>3</sup>.

המעשים העומדים בתנאים אלה נופלים לקטגוריות הפשעים הבינלאומיים הבאים: (1) פשעי מלחמה; (2) פשעים נגד האנושות; (3) השמדת עם; (4) פשע התוקפנות; (5) מעשי עינויים; (6) שעבוד וד- (7) מעשי טרור. כפי שנראה, הן מעשי עינויים, הן מעשי שעבוד והן מעשי טרור מהווים, בנסיבות מסוימות, פשעים נגד האנושות ופשעי מלחמה, אך יש להם גם קיומם כקטגוריות פשעים נפרדות. יש לציין כי בשלב זה, עבירות סמיים לסוגיהן, עבירות שחר בלתי חוקי בנשך ועבירות הון, אינן עומדות בתנאים לעיל ממש שמקורם פליליותן הוא באמנותו קונגסטיטוטיביות<sup>4</sup>.

בתת-פרק 3.2 להלן נعمוד על כל אחת מקטגוריות הפשעים הבינלאומיים העומדות בארבעת התנאים המctrברים שצוינו לעיל. הדיון יציג את מהות הקטgorיה ואת נקודות הציון המרכזיות בתחום ההפלה של המעשים המהווים אותה, יתמקד במעשה ובכוונה שיש לייחס לעושה<sup>5</sup> על מנת להקים אחריות פלילית, ובבחינה משווה של הדין הישראלי.

62 Pinochet, *supra* note 49 – הכReLUתו של לורד בראון-וילקיןסון, עמ' 112–115; לורד הופ מקרייה, עמ' 145–152; לורד סוויל מנידיגיט, עמ' 169–170; לורד מילט, עמ' 171–191; לורד פיליפ, עמ' 180–181.

63 .*The Arrest Warrant of 11 April*, *supra* note 50, para. 57–61  
64 ראו למשל אמנות לעניין הסחר בסמים, לעיל העירה 46; אمنت פלטרו העוסקת בפשע מאורגן והפרוטוקולים הנלוויים לה לעניין סחר בני אדם, הברחת מהגרים וסחר בכלים נשק (ראו בהרחבה באתר סוכנות האו"ם ללוחמה בפשע, [http://www.unodc.org/unodc/en/crime\\_cicp\\_convention.html#final](http://www.unodc.org/unodc/en/crime_cicp_convention.html#final)) דומה כי גם פשע האפרטהייד, אשר כפי שנראה, בנסיבות מסוימות מהווה פשע נגד האנושות, אינו עומד ביום בתנאים אלה, וזאת, כפי שצוין לעיל, משום שהרכיב המדיניות שהן צדדים לאمنت האפרטהייד אינו מאפשר לראות בה אמנה מינימלית ומשום שאמנה עצמה הגדרה את הפשע באופן ספציפי למקום ולזמן מסוימים (ראו דיוון ליד העירה 40 לעיל). עם זאת, הכללתו של פשע האפרטהייד כפשע בקטגוריות הפשעים נגד האנושות בסעיף 7 לחוק רומי, עשוי להצביע על התפתחותו כנורמה מינימלית עצמאית שהפרטה גוררת אחריות פלילית גם שעיה אינה מבוצעת באופן ההופך אותה לפשע נגד האנושות.

65 ראו ס' 30 לחוק רומי לעיל העירה 14.

**פרק 7: משפט בינלאומי פלילי****4.4 אכיפת המשפט הבינלאומי הפלילי על ידי בתי דין בינלאומיים וurosbis****4.4.1 כללי**

אכיפת המשפט הבינלאומי הפלילי בבתי דין בינלאומיים מהוות מנגנון נוסף למימוש הרעיון שהנושא באחריות לפשעים בינלאומיים לא יימלט מעונש. נקודות הצוון המרכזיות בפייתוח מנגנון זה נידונו בתת-פרק 4.2 לעיל. כיום פועלים שלושה סוגים של בתי דין כאלה: (א) בתי דין בינלאומיים מיוחדים שהוקמו מכוח החלטה של מועצת הביטחון של האו"ם, ואשר חוקתם מגבילתה את סמכות השיפוט שלהם להעמדתם לדין של חסודים ביצוע פשעים במסגרת סכסוכים ספציפיים. אלה הם בתי דין אד-הוק ונדון בהם בתת-פרק 4.4.2; (ב) בית דין פלילי בינלאומי קבוע שהוקטו מהוות אמנה בינלאומית ריביצידית שאינה מגבילה את סמכות השיפוט שלו לסכסוך מסוים, והוא מוסמך להפעיל;; בcpfפף למגבלות מסוימות, על כל אדם. בתי דין זה נדון בתת-פרק 4.4.3; (ג) בתי דין בינלאומיים המכובדים (אד-הוק) על אנשים החשודים ביצוע פשעים בסכסוך מסוים, אך הם נבדלים מבתי הדין הבינלאומיים הללו בכך שהם חלק כינונם, חוקותיהם, הרכב השופטים שלהם ומימונם, מאופייניהם בשילוב בין גורמים בינלאומיים לבין גורמים מדינתיים. נעמוד על מאפיינים אלה בתת-פרק 4.4.4.

**4.4.2 בתי דין בינלאומיים פליליים אד-הוק**

ארבעה בתי דין בינלאומיים פליליים שסמכותם הוגבלה לסכסוכים ספציפיים (אד-הוק) כוננו במהלך המאה ה-20: שניים מהם, בית הדין הצבאי הבינלאומי בנירנברג ובית הדין הצבאי הבינלאומי בטוקיו כוננו על ידי בנות הברית לאחר מלחמת העולם השנייה והוסכו להפעיל סמכות שיפוט על פושעים נאצים ויפנים בהתאם. עם סיום המשפטים, חדלו בתי הדין מלהתקיים. שני בתי הדין הנוספים, בית הדין הבינלאומי הפלילי ליגוסלביה ובית הדין הבינלאומי הפלילי לרוזנדה, כוננו על ידי מועצת הביטחון מכוח הסמכויות המוענקות לה בפרק VII למגילת האו"ם להבטחת השלום והיציבות העולמית. הם עתידיים לסייע את פעילותם בשנת 2010. בתת-פרק זה נעמוד בקצרה על מאפיינו המרכזוי של ההליךם בפני כל אחד מבתי דין אלה, ועל ההבדלים ביניהם.

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כיבין המדיניות בעלות סמכויות שיפוט חופפות, המבוססות על בסיסי סמכות מינהגיים, זכות הקדימה ניתנת ראשית למדינת הטריטוריה, שנית, למדינת האזרחות של המבצע ושלישית, למדינת האזרחות של הקורבן.

**| ארנה בונפרטלי וובל שע****(א) בית הדין הצבאי הבינלאומי בגרמניה – IMT  
the Major War Criminals, Nuremberg – IMT**

חוות נירנברג נוסחה בועידת לונדון ב-1945 על ידי בעלות הברית שניצחו במלחמת העולם השנייה, הוקמה כווננה בית דין צבאי בינלאומי בעיר נירנברג בגרמניה לשפטת נאצים שביצעו פשעים בינלאומיים שהוגדרו בה התקופת מלחמת העולם השנייה (1939–1945). עשרים ואחת מדינות נוספות הטרפו לחוקה זו. בבית הדין כיהנו ארבעה שופטים מארכיע מדינות הברית. בין נובמבר 1945 לאוקטובר 1946, הוגשו כתבי אישום נגד עשרים וארבעה מבכירים הנאצי, (ובכללם, הרמן גרינג, סגן של היטלר, יואכין פון ריבנטروب, שר החוץ הנאצי, וילhelm קיטל, רמטכ"ל הצבא הנאצי ואדמירל דיניץ, יורשו של היטלר כקנצלר גרמניה), ונשפטו עשרים ושניים נאשמים (אחד מן הנאשמים התאבד טרם נשפט, ואחד נמצא בלבתי כשיר לעמוד לדין). אחד מן הנאשמים, בורמן, נשפט, והרשע אף נידון לעונש מוות שלא בנווכחותו; שלושה מן הנאשמים זכו והיתר הורשעו לפחות באחד מסעיפי האישום. על שנים עשר מהנאשמים הוטל עונש מוות, ועשרה מתוכם הוצאו להורג בתלייה באוקטובר 1946 (אחד מהם, גרינג, התאבד בתא קודם לביצוע גזר הדין, ואילו בורמן מעולם לא נמצא). כפי שצוין לעיל, הלייכים פליליים התקיימו גם נגד חסודים בدرج גמור יותר הן מכוח חוק מועצת השלטון מספר 10 והן מכוח חוקים מדינתיים.<sup>312</sup>

יש לציין כי על פי סעיף 10 ו-11 לחוק נירנברג, בית הדין הוסמך לראות בחברות בארגון פלילי בסיס להרשעת החברים בו, ובפועל ראה ב.-S.S., בGESTAPO וב"יחידת המנהיגות" של המפלגה הנאצית ארגונים פליליים. נקודה זו רואה לציון מיוחד משומש שהוראה דומה נעדרה מחוקת בית הדין הצבאי הבינלאומי בטוקיו, והיא אף אינה קיימת בחוקות בתי דין המאוחרים יותר. כפי שצוין לעיל, יש מקום היום לחשיבה מחדש בדבר הפלתתם של ארגונים מסוימים באופן שיקים אחריות פלילתית לחבריהם בהם, וזאת לאור העוצמה הרבה שיש לתאגידיים טרנסלאומיים ולארגוני פשיעה בינלאומיים, עצמה המייצרת את תנאי האפשרות להפרות חמורות של זכויות אדם על ידי ארגונים אלה.

**(ב) בית הדין הצבאי הבינלאומי בטוקיו – IMTFE – IMT for the Far East**

ההחלטה על הכוונה להעמיד לדין את בכירי המשטר היפני התקבלה עוד במהלך ועידת לונדון ופורסמה על ידי בננות הברית בהצהרת פוטסדאם. ביוני 1946 פרסם הגנרל האמריקני דאג'לאס מק'ארתור באמצעות צו צבאי את חוקת בית הדין הבמאי הבינלאומי למורוח הרחוק שהוקם בטוקיו. הלייכים בבית הדין החלו במאי 1946 והסתימו כשתים וחצי לאחר מכן. במהלך הלייכים אלה הואשמו עשרים ושמונה יפנים, ועמדו לדין והורשעו עשרים וחמשה מתוכם (שניים מהנאשמים נפטרו, ואחד חלה והוכר כמי שאינו כשיר לעמוד לדין). שבעה מן הנאשמים נידונו למוות, ומירבית המורשעים שנידונו לתקופות מאסר שוחררו בעקבות חניות שניתנו לאחר הסכם השלום עם יפן שנחתם ב-1951 על ידי 48 מדינות. יש לציין

<sup>312</sup> לפסקת ה-IMT ראו לעיל הערות 2, 29, 31 וכן ראו ב- G. Ginsburgs & V.N. Kudriavtsev (eds) *The Nuremberg Trial and International Law* (Dordrecht, 1990)

**פרק VII: משפט בינלאומי פלילי I**

כי קיסר יפן לא הועמד לדין והמשיך במילוי תפקידו, כך שבפועל הוענקה לו חסינות מפני העמדה לדין. בצד משפטים אלה נערכו גם משפטיים מדינתיים נגד נאשמים יפנים מדרג נמוך יותר.

בבית הדין הצבאי בטוקיו כיהנו אחד-עשר שופטים, הן מבוגרות הברית והן מדינות נוספות. ניכר שונות משמעותית בין פסקי הדין שניתנו במסגרתו – המואפיינים בחילוקי דעתות בין השופטים, חילוקי דעתות שהשתרעו גם על מקור הסמכות שכוחו פועל בבית הדין (אם כיבוש יפן יתר את הסכמתה או שהוא גם מכוח הסכמתה) לבין אלה שניתנו על ידי בית הדין בניירנברג. במקרים מסוימים באה לידי ביטוי בין היתר, תחושת אי-הנאות שלילוותה את המשפטיים בעקבות ארrouz היסטורי: הטלת פצצות האטום על היירושימה ונגסאקי, וכן דומה כי ההפעזה האטומית חוקקה בתודעה האנושית יותר מאשר המעשים שבಗינם הועמדו בכיריהם היפני לדין<sup>313</sup>.

הקמת בתי הדין והכרזותיהם היוו, כפי שצוין בתת-פרק 4.2 לעיל, אבני דרך מרכזיות הן בפיתוח הדין הפלילי המהותי והן בישומו של עקרון האחריות האישית הפלילית. עם זאת, ביקורת רבה נמתה על ההליכים בפני בית הדין אלה. עיקרת של זו כללה הפרת עקרון החוקיות; את אי-האגינות של ההליכים (למשל היעדר זכות עדור), וכמוון, את היותם מגנוני צדק של הצד שניצח במלחמה, והעמיד לדין את אויביו המובסים. העובדה כי עיקר העדויות בבתי דין אלה התבוסטו על מסמכים ולא על עדויות בעל-פה, אף יקרה מרחק בין ההליך המשפטי לבין השגתו של אחד מיעדיו: השפעה על השיח הציבורי הכללי, ובתוך כך, כריתה אוזן קשחת לסייעם של הקורבנות. די בהקשר זה לחשוב על החשיבות העצומה שהוקנתה למספר הקורבנות במשפט אייכמן ולהשלכות שהיא לה על השיח הציבורי בישראל, על מנת לעמוד על משמעותה של עדות בעל-פה בהקשר משפטי נאשמים בפשעים בינלאומיים. בתי הדין הבינלאומיים המיוחדים שהוקמו במהלך שנות ה-90 של המאה ה-20 חייבים, במידה רבה, את כינונם לעצם קיומם התקידימי של בתי דין של נירנברג וטוקיו, והגם שהם אינם חסינים מביקורת, טעםיה של זה והאחרונה שונאים מלאה שהופנו כלפי קודמיהם: אין בחוקותיהם משום הפרה של עקרון החוקיות, הרכב השופטים והליך הדיון אינםchosפדים בעיקרו של דבר לטענות של אי-האגינות, עדויות בעל-פה מהוות את דרך המלך של מעשה העדות, ובוודאי אין מדובר בצדק מזוית הראייה של צד מנצח במלחמה. להלן נعمוד בקצרה על הлик הקמתו של כל אחד מבתי דין אלה ועל סמכות השיפוט שלהם. לאור הדמיון והקשר המבני בין שני בתי דין כמו גם הזותם בכללי פועלתם, ידונו אלה במשותף.

(ג) בית הדין הבינלאומי הפלילי ליווגסלביה לשעבר International Tribunal for Former Yugoslavia – ICTY

ה-ICTY הוקם ביום 27 במאי 1993 מכוח החלטת מועצת הביטחון במסגרת פרק VII

313 לפסקת ה-IMT ראו: R. Pritchard and S. Zaide (eds.) *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of The International Military Tribunal for the Far East* (1981)

**| ארנה בורנפטל וובל שי**

למגילת האו"ם<sup>314</sup>. מקום מושבו של בית הדין הוא בעיר האג, בהולנד. סמכות בית הדין מוגבלת בזמן באשר לפשעים שבוצעו לאחר ה-1 בינואר 1993 ו מבחינת מקום לפשעים שבוצעו בשטחי מדינות יוגוסלביה לשעבר<sup>315</sup>. סמכות שיפוט זו מתקיימת לצד סמכויות שיפוט מדיניות, אם כי החקיקה קובעת כי לא-ICTY סמכות עדיפה במובן זה שהוא מוסמן להורות למדינות להעביר אליו הילכים המתקיים במסגרתם, וזאת על מנת למנוע מצב שבו ההליכים המדינתיים מתקייםים למראית עין בלבד ומתיק מגמה למןוע פтиחת הילכים על ידו<sup>316</sup>. כן מוסמן בית הדין להפנות הילכים שנפתחו בפניו לבתי משפט של מדינות שבهن הוכח העשה או שבهن נעצר הנאשם. בהתאם לתוכנית להשלמת פעילות בית הדין שנתקבלה על ידי האו"ם, על בית הדין לסייע את כל ההליכים המתקייםים בערכאה הראשונה עד 2008, ואת כל הילכי הערוור עד 2010<sup>317</sup>. תאריך יעד זה מחייב, אכן, הפניה של תביעות נגד נאים מדרג בינוני לפחות לבתי משפט מדינתיים. יצוין כי בהבדל מן המצב במשפטים נירנברג וטוקיו, ה-ICTY נתקל בקושי בשנותיו הראשונות באיתורם של נאים מן הדרג הבכיר. פריצת הדרך בהקשר זה באה בשנת 2001 עם הסגרתו לבית הדין של נשיא יוגוסלביה לשעבר, סLOBודן מילושביץ', שמשפטו התקיים עד למותו במרץ 2006<sup>318</sup>. בשנת 2001 הסגירה את עצמה לבית הדין הנשייה לשעבר של הרפובליקה הבוסנית-סרבית, בילגאנגה פלאבסקי', שהודתה באשמה בגין איישום אחד ונידונה ל-11 שנות מאסר<sup>319</sup>. בעת כתיבת שורות אלה, הוגשו כתבי אישום נגד שני בכירים, רドובאן קראדייץ' וראטקו מלאדייץ', שטרם הוגשו לבית הדין<sup>320</sup>. עד שליהו שנת 2005 פרסם בית הדין 20 הכרעות ו-18 גורי דין במסגרת עסקות טיעון של הערכאה הראשונה ו-17 הכרעות של ערצת הערוור<sup>321</sup>.

(ד) **בית הדין הבינלאומי לרואנדה – ICTR**

ה-ICTR הוקם ביום 8 בנובמבר 1994, אף הוא מכוח החלטת מועצת הביטחון במסגרת פרק VII למגילת האו"ם<sup>322</sup>. מקום מושבו של בית הדין הוא בעיר ארוונה, בטנזניה. סמכות

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established 314 by Security Council resolution 827. This resolution was passed on 25 May 1993.

315 ראו ס' 8 לложות בית הדין.

316 ראו ס' 9 לложות בית הדין.

317 ראו החלטות 1503 (2003) ו- 1534 (2004) של מועצת הביטחון של האו"ם וכן הצהרת נשיא מועצת הביטחון בנושא מה- 23 ביולי 2002 (S/PRST/2002/21).

318 Prosecutor v. Milošević, ICTY Case No. IT-02-54, "Kosovo, Croatia and Bosnia",

Kosovo: Second Amended Indictment, 29 October 2001, Croatia: Second Amended Indictment, 28 July 2004, Bosnia: Amended Indictment, 21 April 2004

319 Prosecutor v. Plavšić, ICTY Case No. IT-00-39&40/1, T. Ch. III, 27 February 2003

320 Prosecutor v. Mladić, ICTY Case No. IT-95-5/18-I, Amended Indictment, 11 October 2002; Prosecutor v. Karadžić: Amended Indictment, 31 May 2000, *supra* note 1

321 ראו באתר בית הדין <http://www.un.org/icty>

322 Security Council Resolution 955 (1994), U.N. SCOR, 49th Sess., 3453d mtg., Annex, at p. 5, U.N. Doc. S/RES/955

**פרק VII: משפט בינלאומי פלילי**

בית הדין מוגבלת בזמן בוגע לפשעים שבוצעו אך ורק בשנת 1994<sup>323</sup>, אם כי יש לצרין של פי פרשנות בית הדין, ניתן להציג בפניו כראיות פעולות תכנון או ארגון מוקדמות יותר של פשע שבוצע בעקבותיהן בשנת 1994<sup>324</sup>. סמכות בית הדין מבחינת מקום חלה על פשעים שבוצעו בשטח רوانדה כמו גם על פשעים שבוצעו על ידי ארגנים רوانדים במדינות שכנות<sup>325</sup>. דומה ל-ICTY, גם סמכות שיפוט השיפוט של ה-ICTR מתキימת הצד סמכויות שיפוט מדינתיות ותוקן עדיפות לבית הדין<sup>326</sup>. גם בית דין זה כפוף למועד סיום פעולתו כפי שנקבעו בתוכנית ההשלמה של האו"ם<sup>327</sup>. בעת כתיבת שורות אלה טרם הושגוו לבית הדין 10 בני אדם שנגדם הוגשו כתבי אישום. עד שהיינו בשנת 2005 פרסם בית הדין 22 הכרעות של הערכתה הראשונה ו-11 הכרעות של ערכאת העורור<sup>328</sup>.

(ה) **מבנה בתים המיוחדים ועקרונות פועלותם**  
המבנה של בתים המיוחדים הוא זהה, ובחלקו אף משותף. כל בית דין מורכב משלושה אגפים:

(1) **ערכאות שיפוט** – ערכאות שיפוט כוללות כמה ערכאות ראשונות, כל ערכאה ראשונה מורכבת משלושה שופטים, וערכאת ערעור אחת, המשותפת לשני בתים הדרצינגל לקיומה של ערכאת ערעור משותפת הוא קידום הרמונייזציה בפסקה. בכלל אחד מבתי הדין מכינים באופן קבוע 16 שופטים ממיגון מדיניות, אשר ממונאים על ידי העצרת הכללית מתוך רשימה מועמדים שעברו את אישורה של מועצת הביטחון. בצד שופטים אלה מכנים 9 שופטים זמניים (ad litem) המתמנים להכרעה בתיק מסוים מתוך רשימה של 27 שופטים שנקבעה ב-2001 על ידי העצרת הכללית במטרה לסייע להאצת ההליכים בתים הדרצינגל<sup>329</sup>.

323 ראו ס' 7 לוחקת בית הדין.

Ngeze and Nahimana v. The Prosecutor (Decision on the Interlocutory Appeals), 324 Cases No. ICTR-97-27-AR72 and ICTR-96-11-AR72, App. Ch., 5 September 2000; Prosecutor v. Nsengiyumva (Decision on the Defence Motions Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment), Case No. ICTR-96-12-I, T. Ch. III, 13 April 2000, para. 27-33; Prosecutor v. Nahimana (Decision on the Defence Preliminary Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence), Case No. ICTR-96-11-T, T. Ch. I, 12 July 2000; Prosecutor v. Kabiligi and Ntabakuze (Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void Ab Initio), Case No. ICTR-96-34-I, T. Ch. III, 13 April 2000, para. 38-44; Prosecutor v. Niyitegeka (Decision on Defence Motion on Matters Arising from Trial Chamber Decisions and Preliminary Motion based on Defects in the Form of the Indictment and lack of jurisdiction), Case No. ICTR-96-14-T, T. Ch. II, 20 November 2000, para. 38; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, T. Ch. II, 13 March 2001

325 ראו ס' 7 לוחקת בית הדין.

326 ראו ס' 8 לוחקת בית הדין.

327 ראו לעיל העדרה 317 (ביחס לתוכנית ההשלמה).

328 בכתבובת www.ictr.org.

329 ראו סעיפים 11-13 של חוקת ה-ICTR, סעיפים 12-14 של חוקת ה-ICTY.

**| ארנה בורפטל וובל שע**

- (2) משרד התובע – אגן זה מנוהל על ידי תובע ראשי ומורכב מיחידת חקירות ומיחידת תביעות. עד שנת 2003, חלקו שני בת הדין נוסף לערכאת ערעור משותפת גם תובע ראשי משותף; כיום מכחן בכל בית דין תובע נפרד. התובע הראשי נבחר על ידי מועצת הביטחון<sup>330</sup>.
- (3) משרד הרשם – אגן זה מספק שירותים מינהל, תחזקה וabweטה לשני האגפים לעיל. כמו כן הוא מספק שירותי לسنגורים המייצגים את הנאים ומספר על יחידה המספקת הגנה ותמייה (לוגיסטית, פיסית ונפשית) לקורבנות ולעדים<sup>331</sup>.
- בתי הדין פועלים מכוח חוקות המגדירות את הפשעים שעליהם הם מוסמכים להפעיל סמכות. פשעים אלה, כפי שראינו, משלבים את המשפט הבינלאומי המינהגי, וממלא הטענה הנוגעת להפרת עקרון החיקוות שהועלתה בהקשר של המשפטים בבית הדין של נירנברג וטוקיו, אינה מועלית, במשמעותם, למצער ברמה העקרונית. החוקות גם מבטיחות את הגינות ההליכים ומעגנות את זכותו של הנאשם למשפט הוגן, וביניהן את חובת נוכחות במשפט, ואת חזקת חפותו. כמו כן, ובהבדל מחוקות קודמיהם, החוקות מוציאות מכלל אפשרות הטלת עונש מוות, ובכפוף לכך קובעות כי חומרת העונשה תיקבע בהתאם לנוהג במדינות בהן בוצעו הפשעים<sup>332</sup>. יש להוסיף ולציין כי דיני הראיות של שני בת הדין קובעים כי כל ראייה רלוונטייה היא קבילה וכי ברגיל, על עדויות להינתן בעל-פה<sup>333</sup>. משקל זה שנitin לעדות בעל-פה הוא המצדיק גם את קיומה של מערכת הגנה לעדים במסגרת אגן הרשם של כל בית דין. כפי שצווין לעיל, קשה להפריז בחשיבותן של עדויות בעל-פה של קורבנות פשעים בינלאומיים. עם זאת, העובדה שבתי הדין אינם ממוקמים במדינות שבהן חיים מרבית הקורבנות מצמצמת באופן משמעותי את האפקט שהיא יכולה להיות להן בשיח הציבורי במדינות הרלוונטיות.
- הויאל ובתי דין אלה הוקמו מכוח החלטות של מועצת הביטחון, לא ניתן לראות בהם כמי שמבצעים "צדוק של מנצחים", והם אכן בפועל מעמידים לדין חזודים בפשעים מכל הפלגים המעורבים בסכוך שבמסגרתו הם התרחשו. עם זאת, מועצת הביטחון אינה גוף נייטרלי, כי אם גוף פוליטי. העובדה כי גוף זה הוא שהחליט על עצם הקמתם בבית דין לפשעים שבוצעו ביוגוסלביה לשעבר וברואנדה, אך לא במקומות אחרים שבתiem בוצעו מעשי זועמה (למשל בצ'צ'ניה ובטיבט), הושפעה את ההחלטה כולה לטענה של "צדוק סלקטיבי"<sup>334</sup>. כן ניתן לציין כי עלות פעילותם של בת הדין הללו יקרה במיוחד, ומהיבת

330 ראו ס' 15 לחוקת ה-ICTR, ס' 16 לחוקת ה-ICTY.

331 ראו ס' 16 לחוקת ה-ICTR, ס' 176 לחוקת ה-ICTY.

332 ראו ס' 23 לחוקת ה-ICTR, ס' 24 לחוקת ה-ICTY.

333 ראו כללי סדר הדין והפרוזדורה של ה-ICTR, Rules of Procedure and Evidence Adopted on 29 June 1995 on קללים 89–98. הפניה להוראות הנוגעות לדיני ראיות בחוקות.

334 היבטים נוספים הכרוכים בטענה שמדובר בצדוק סלקטיבי ובמשוא פנים נגזרים מן העובדה שמועצת הביטחון היא המנה את התובעים הכלליים, וכייה גם הסמכות להרכיב את הרשימה של המועמדים לתפקיד שפטה של ביסמה ממנה העצרת הכללית את השופטים. כך, למשל, נטען כי החלטות שלא להעמיד לדין את אנשים מכוחות נאט"ז על מעורבותם בפשעי מלמה ביוגוסלביה לשעבר ואת אנשי כוח שמירת השלום של האו"ם ברואנדה בגין הפרתם את המידנה בזמן שבו היו יכולים למנוע את פריצת מעשי הטבח הין החלטות נגעות פוליטית. כן נטען כי הרכב בית הדין ביוגוסלביה משקף נטייה אנטיסרבית של מירביה חברי מועצת

**פרק VII: משפט בינלאומי פלילי**

את הקהילה הבינלאומית להקצת משאבים ניכרת. כינונו של בית הדין הבינלאומי הפלילי התאפשר, במידה רבה, על יסוד הניסוי והניסיונות של בתיהם המוחדים, ועزم כינונו כמוסד קבוע כללי בעל סמכות שיפוט על החשודים בביצוע פעעים המפורטים בחוקתו נועד, בין היתר, לחתמו עמו חלק מן הטענות הנוגעות לשלקטיביות של אכיפת המשפט הבינלאומי הפלילי.

**4.4.3. בית דין בינלאומי פלילי ICC – International Criminal Court**

הרציונל שבבסיסו ה-ICC זהה לזה העומד בסיסה של הפעלת סמכות אוניברסלית על ידי מדינות: גם הוא מיועד מנצחו מצב שבו אדם החשוד בביצוע פעעים בינלאומיים לא ניתן את הדין משום שהמדינה בעליה הזיקה המסורתי למעשה נמנעת מההעמידו לדין. עם זאת, הפעלת סמכות שיפוט בינלאומיות ריכוזית אינה זהה להפעלת סמכות שיפוט אוניברסלית מכוזרת, אף שהיא עשויה לצמצם את הצורך בהפעלה, היא אינה מיתרת אותה. לשון אחרת, ה-ICC משלים, אך אינם מחליפה את מגנון הסמכות האוניברסלית. בה במידה, כפי שנראה, העיקרון הבסיסי ביותר למשמעות סמכות השיפוט של בית הדין הוא עקרון השירות. עיקרונו זה מורה כי גם מגנון סמכות השיפוט הבינלאומי של ה-ICC – בדומה למגנון סמכות השיפוט האוניברסלית – מעדיף הפעלת סמכות שיפוט על ידי מוסדות המדינה הרלוונטיות, ובמקרה שזו מפעילה את סמכותה באופן ראי, תתייתר סמכותה. מילא מערכ שיפוט הבינלאומי מיום לעוד את הפעלת מעדכנת המשפט של המדינה בעליה הזיקה המירבית לפשע. על מנת לבסס טענה זו, נציג בקצרה את ההליכים המרכזיים שננקטו לצורכי הפעלתו של בית הדין ואת המבנה שלו, ונתמקד בתנאים להפעלת סמכותו מבחינה פרטונלית (*ratione personae*).

בבית הדין הבינלאומי הפלילי הוא מוסד קבוע הפועל בהאג, הולנד, על בסיס חוקה שנחתמה ברומא ביום 17 ביולי 1998, ונכנסה לתוקף ביום 1 ביולי 2002, לאחר שתתנאי הקבוע בה לכינוסה לתוקף, קרי, שימי יום לאחר אישורו של שישים מדינות, התמשך.<sup>335</sup> חוקת בית הדין מורכבת מ-128 סעיפים המסוגים ל-13 חלקים, והמהווה את המסמך החשוב ביותר בהתפתחותו של המשפט הבינלאומי הפלילי, הן מבחינה מוחותית והן מבחינה דינונית. העבירות המצוויות בתחום סמכותו העניינית (*ratione materiae*) של בית הדין (השמדת עם, פשעים נגד האנושות, פשעי מלחמה, ובכפוף להגדלה מוסכמת, תוקפנות)<sup>336</sup> נידונו בתפקיד 4.3 לעיל. בית הדין מוסמך להפעיל את סמכותו מבחינת זמן (*ratione temporis*) נידונו בתפקיד על עבירות שכובצעו לאחר כינוסה לתוקף של חוקתו.<sup>337</sup> העובדה כי מדובר במוסד קבוע,

הבטחון. ראו למשל: M. P. Scarf "A Critique of the Yugoslavia War Crimes Tribunal" .25 *Denver J. Int'l L. & Pol.* (1997) 305

<sup>335</sup> ס' 126(1) לחוקת רומא.

<sup>336</sup> מכוח ס' 127 לחוקה, ניתן היה להרחיב את סמכות השיפוט העניינית על עבירות נוספות באמצעות תיקון החוקה. תיקון זה מציריך רוב של 7/8 מן המדינות החברות. מכוח ס' 121 ניתן לנitin יהא להציג תיקון לחוקה שבע שנים לאחר כינוסה החוקה לתוקף, קרי, ב-2009.

<sup>337</sup> ס' 24 לחוקת רומא.

**| ארנה בורנפטל וובל שי**

משמעות כי בהבדל מבתי-הדין המיוחדים אשר הוקמו לאחר ביצוע הפשעים שהם מוסמכים לשופט, מדובר במוסד בעל אפקט הרתעתי שעשוי להיות משמעותי. בפגש הראשון של אסיפת המדיניות החברות בספטמבר 2002, אומצו כמה מסמכים היוניים לפעולות בית הדין, ובוניהם מסמך המפרט את כללי סדר הדין ודיני הדין ראיות של בית הדין, ומסמך "יסודות העבירה" (Elements of the Crime), שנועד לסייע לשופטים בפרשנות העבירות שלגביהן יש לו סמכות שיפוט עניינית<sup>338</sup>. בפגש השני, בתחילת פברואר 2003, בחרה אסיפת המדיניות החברות את 18 השופטים הראשונים<sup>339</sup>, ובאפריל אותה שנה נבחר התובע הכללי הראשון, לואיס מורנו אוקמאפו<sup>340</sup>. בשלבי שנת 2005, אף הlixir עוד לא הגיע לשלב ההכרעה השיפוטית, אך מתנהלות שלוש הkiriyot והוצאו צוין מעוצר נגד חמישה חסודים ביצוע פשעי מלחמה ופשעים נגד האנושות באוגנדה<sup>341</sup>.

מבחן מבנית, בית הדין מרכיב מרובה אורגנים: משרד התובע האחראי על היקורת תלונות המבאות בפניו, הכתנת כתבי אישום וניהול התביעה; ערכאות שיפוט (הכוללות עריכאת קדם-משפט המוסמכת להחלטת על פתיחת ההליכים, ובמובן זה משמשת כגוף המבקר את פעולות התובע); עריכאת משפט (היושבת בהרכב של שלושה שופטים) ועריכאת עדעור (היושבת בהרכב של חמישה שופטים ובכללם נשיא בית הדין); נשיאות (הכוללת את הנשיא ושני סגניהם הנבחרים על ידי השופטים עצם) והאחרait, בשיתוף עם משרד הרשם, על ניהול בית הדין, ומשרד הרשם המספק לבית הדין תמיכה מינימלית, ואשר אליו כפופה ייחידה המספקת תמיכה לוגיסטית, רפואיות ונטפית לעדים ולקורבנות<sup>342</sup>. היומה לפתיחת הליך בפני בית הדין יכולה לנבוע משלשה גורמים: מועצת הביטחון; מדינה; חברה; והתובע.

**סמכות השיפוט של בית הדין** חלה על מקרים חמורים במוחדר<sup>343</sup> של ביצוע העבירות המפורטות בחוקתו בהתקיים אחת מן הזיקות הבאות<sup>344</sup>:

(א) הסכם המדינה שבסיטה בוצעה העבירה – אישורו החוקה על ידי מדינה שבסיטה בוצעה העבירה מבטא הסכמה זו מראש ובאופן כללי. מדינה שאינה צד לחוקת בית

338 ס' 9 לחוקת רומא.

339 ס' 36 לחוקה עוסק בכישורים, במינוי ובבחירה של השופטים. ב/MIT, כשופטים יכולים להתמנות אזרחי המדינות החברות, והם נבחרים תוך מתן ייצוג הולם לשיטות המשפט השונות, לאזרחים גיאוגרפיים ולМИג'דר. בין 18 השופטים הראשונים נבחרו גם שבע נשים. מבחינות CIS, על השופטים להיות כשירים לכזה ממשימות השיפוט הרמות ביותר בארץ. כמו כן, על מחזיותם מן השופטים להיות בעלי רקע מעשי וקדמי במשפט פלילי, ועל חמישה מהם להיות בעלי רקע במשפט בינלאומי ובמיוחד משפט הומיניטרי ודיני זכויות אדם. השופטים נבחרים לתקופת כהונה של 9 שנים שאינה ניתנת לחידוש.

340 ס' 42 לחוקה עוסקת בתפקיד התובע, בכישורי ובתיכני בתירונו.

341 ראו עדכונים באתר בית הדין בכתובת [www.icc-cpi.int](http://www.icc-cpi.int).

342 ס' 34 לחוקה. סדר הצגת הארגונים בס' הוא (א) נשיאות; (ב) עדעור, עריכאת שיפיטה, ועריכאת קדם-משפט; (ג) משרד התובע; (ד) רשם. בטקסט סדר הצגת הארגונים עוקב אחר הגיון החקלאי.

343 ס' 5(1), 17(1)(ד) ו-53(2)(ג) לחוקה.

344 ס' 12 ו-13 לחוקה.

**פרק VII: משפט בינלאומי פלילי**

הדין, ושבטחה בוצעה העבירה, רשאית אף להסכים להפעלת סמכות שיפוט על ידי בית הדין כדיעבד ולצורך אירוע ספציפי.

(ב) הסכמת מדינת האוזחות של הנאשם – אישורו החוקה על ידי מדינת האוזחות של הנאשם מבטא הסכמה זו מראש ובאופן כללי. גם במקרה זה, מדינה שאינה צד לחוקה רשאית להסכים אדי-הוק להפעלת סמכות השיפוט של בית דין.

(ג) הפניה של מועצת הביטחון – מועצת הביטחון, שעה שהיא משתמשת בסמכויות לשימירת השלום והביטחון מכוח פרק VII למגילת האו"ם, מוסמכת להכפיף כל אדם, ללא תלות בהסכםה של מדינת האוזחות שלו או המדינה שבה בוצעה העבירה, לסמכות השיפוט של בית דין. הפניה זו של מועצת הביטחון מפנהה, לפיך, את רעיון הפעלת סמכות האוניברסלית לתוך מגנון השיפוט הבינלאומי, במובן זה שאין הפניה מטעמה צריכה להסכם מדינה בעלת זיקה לפשע.

הפעלת סמכות על בסיס זיקות ההסכמה הללו, כפופה לסייעים הבאים:

(1) מדינה רשאית להצטרכ לחוקת בית דין תוך צירוף הסתייגות מסמכות השיפוט של בית דין בגין פשעי מלחמה שבוצעו בתוך שבע שנים ממועד ההצטרכות.<sup>345</sup>

(2) מועצת הביטחון, שעה שהיא פועלת מכוח פרק VII למגילת האו"ם, מוסמכת לעכבות הליך בפני בית דין למשך שנה, וסמכותה זו ניתנת להידוש מדי שנה.<sup>346</sup>

(3) לבית דין אין, כפי שכבר צוין לעיל, סמכות שיפוט על חסודים בגין עבירות שבוצעו לפני מועד כניסה החוקה לתוקף.<sup>347</sup>

(4) לבית דין אין סמכות שיפוט במקרים שבמהם מדינה בעלת סמכות שיפוט קיימה או מקיימת חקירה או הליך משפטי באותו עניין, ובלבך שהליך זה הוא אמיתי ואפקטיבי.<sup>348</sup>

הליך "眞實" מעיד על כוונת המדינה להעמיד אדם לדין, בהבדל מאשר על כוונתה לסכל את העמדתו לדין בפני בית דין הבינלאומי. הליך "אפקטיבי" מצבייע על יכולת המדינה לקיים הלि�כי משפט תקינים. סיג זה, המכונה "עקרון השינויות" או "עקרון המשלימות" (Complementarity Principle), קובע אפוא את העדיפות הניתנת לשיפוט מדינתי על פני שיפוט בינלאומי<sup>349</sup>, ובה בעת מכפיף את מערכות המשפט המדינתיות לביקורת שיפוטית של בית דין הבינלאומי, ומתרץ אותן לפעול תוך התאמה לאמות המידה של המשפט הבינלאומי הפלילי. גם שסעיף 17 קובע את עקרון השינויות בנוגע לכל מדינה המפעילה סמכות שיפוט, ובכללה מדינה המפעילה סמכות שיפוט אוניברסלית, דומה כי העקרון מניח הפעלת סמכות מדינית של המדינה בעלת הזיקה המירבית לפשע. מסקנה זו נשענת, בין היתר, על לשון סעיף 18 המנחה את התובע באשר לאופן הפעלת עקרון השינויות וקובע כי עליו להודיע לכל המדינות שכן צדדים לחזקה, כמו גם לאותן מדינות שברגיל יפעילו סמכות שיפוט

<sup>345</sup> ס' 124 לחוקה.

<sup>346</sup> ס' 16 לחוקה.

<sup>347</sup> ס' 24 לחוקה. עלולה להתעורר שאלה באשר לתחולת סמכות השיפוט של בית דין ביחס לעבירות מתמשכות. ראו דיוון במאמרו של שני, לעיל הערכה.<sup>57</sup>

<sup>348</sup> ראו פסקה 10 במבוא לחוקה וס' 17, 18 ו-19 לחוקה.

<sup>349</sup> בנקודה זו יש שוני מהותי בין חוקת רومא לחוקות בת הדין המוחדים שבהם נקבע סדר עדיפויות הפוּך.

| ארנה ב-רפואי וובל שי

על העברות, כי נמצא בסיס סביר להתחלה חקירה. באופן זה הוא מאותת למדינה בעלת הזיקה המירבית לפשע כי עליה לבחור אם להפעיל את סמכות השיפוט שלה, במקרה שבו היא תבחר שלא לעשות כן, ורק במקרה זה, יחל ההליך בבית הדין.<sup>350</sup>

ישראל, כפי שצוין לעיל, אינהצד לחוקת בית הדין, וממילא אין אורהiah כפופים אוטומטיות לסמכות השיפוט שלו מכוח זיקת השטח או זיקת האזרחות. הסכירות כי היא תיתן הסכמתה אד-הוק להפעלת סמכותו על אורהiah נמוכה ביותר. אין להבין מכך כי לא עשויה להתקיים כל זיקת הסכמה בין ישראל לבית הדין: ישראל עשויה לתת את הסכמתה אד-הוק להעמדתם לדין של טרוריסטים שעשיהם בוצעו בשטחה לאחר מועד כניסה החוקה לתוקף, והulosים כדי פשע מלחמה או פשע נגד האנושות, אם כי, במקרה זה עשוי בית הדין לדרש הפעלת סמכות מקבילה ביחס לפעולות ישראל נגד הטורקים.<sup>351</sup> בה בעת, קיימת אפשרות כי לבית הדין תהא סמכות על אורהiah החשודים ביצוע פשעים המקיימים את סמכותו העניינית – במיוחד מדויק בפשעי מלחמה – לאחר מועד כניסה החוקה לתוקף, ואשר לגבייהם מערכת המשפט בישראל אינה מפעילה את סמכותה, במקרים הבאים:<sup>352</sup>

(א) האורהיה הישראלי הוא בעל אזרחות זורה של מדינה שהיאצד לחוקה.  
 (ב) מועצת הביטחון מסמיך את בית הדין לשפט בעניין שהחשוד בו הוא אורהיה, יש לציין כי אפשרויות זו קיימות להלכה יותר מאשר למעשה כל עוד ארץ-הברית מתמידה בהתנגדותה לבית הדין כמו גם בתמיכתה בישראל, וזאת נוכח חברותה הקבועה של ארץ-הברית במועצת הביטחון המעניקה לה זכות וטו בגין החלטות מכוח פרק VII.

(ג) העבירה הנטענת בוצעה ברמת הגולן, שטח נוסף לישראל באופן בלתי חוקי, ושחריבון החוקי בו, סוריה, הסכימה לסמכות השיפוט של בית הדין.  
 (ד) העבירה הנטענת בוצעה בשטח הנتون לשיליטה האפקטיבית של ישראל ככוח כובש, במקרה שבו הרשות הפלסטינית מסמיך את בית הדין להפעיל סמכות שיפוט לגבייה, ובית הדין יכול ברשות הפלסטינית כישות המוסמכת להעניק לו סמכה כזו.<sup>353</sup>  
 ברי כי הפעלת סמכות שיפוט על אורהiah החשודים ביצוע פשעים בינלאומיים על ידי בית משפט ישראלים תיתר אפשרות אלה.

העולה מן האמור הוא כי קיימים יום מגוון של מנגנון שיפוט מדינתיים ובינלאומיים לאכיפתו של המשפט הבינלאומי הפלילי, המיעדים להפעלה שעה שהמדינה בעלת הזיקה המירבית לפשע אינה מפעילה את סמכותה על החשודים, בין מטעמי חוסר נוכנות ובין

350 חובת הודיעה זו אינה חלה במקרה שבו העניין הועבר לבית דין על ידי מועצת הביטחון.

351 ראו הצהרת התובע בגין אוגנדה מיום 2.12.05 <http://www.icc-cpi.int/library/cases/> ICC-02-04-05-67\_English.pdf עמ' 9-8.

352 ראו מאמרו של שני, לעיל הערכה 57.

353 שם, בע' 74-75. שני מעלה אף את האפשרות שירדן, מדינה שהיאצד לחוקה, תוכר על ידי בית הדיןCMDינה המעניקה זיקה לשטחים שנכבשו ממנה ב-1967 לצורכי הסמכתו של בית הדין. שם, בע' 75-76.

**פרק VII: משפט בינלאומי פלילי I**

מטעמי היעדר יכולת<sup>354</sup>. מנגנון נוסף שבוណן להלן, הוא מנגנון המשלב שיפוט מדינתי עם שיפוט בינלאומי, והמיועד בעיקר לתגבר את יכולת מערך השיפוט המדינתי שבצדו הוא מתקיים.

**4.4.4 בתים דין מעורבים – Mixed Tribunals**

בתיהם דין מעורבים הנם בתיהם דין שאופן הקמתם, סמכויות השיפוט הענייניות שלהם, התובעים והנאשמים שלהם ומימונם, משלבים ממך בינלאומי עם ממך לאומי. בתיהם דין אלה הם חדשניים, ואין בידינו בשלב זה להעריך את הצלחתם. נסתפק לפיכך בתיאור תמציתן של הטעמים להקמתם, ודיוון קצר במאפייניהם המשותפים להם.

הקמתם של בתיהם דין מעורבים נועדה ליצור את תנאי האפשרות הנוחות למדינה על מנת להעמיד לדין חזודים בבחירה פשעים בינלאומיים הבינלאומיים זיקה עם המדינה השופטה, שעה שמערכת השפיטה הפנימית אינה מסוגלת להתמודד עם העמדה לדין בגין פשעים בינלאומיים ומערכת השפיטה הבינלאומית אינה מציעה פתרון במודל של הטריבונלים אדריכוק. בפועל, מדובר בסיווע בהקמת מערך משפטי הנועד לתת פתרון לבעה הבהא: מירביה הפשעים הבינלאומיים בשנים האחרונות מתרכשים במסגרת סכוסכים פנים-מדינתיים (אשר, לעיתים, כפי שאכן ארע בזיגוסלביה לשעבר, מתפתחים לכלל סכוסכים בינלאומיים). סכוסכים אלה בתורם, מובילים לקריסת מוסדות המדינה, ובכללם מעדכת המשפט (כפי שלמשל ארע בסירה ליונה). לעיתים (ככמקרה של טימור המורהית), הם מובילים להקמת מדינות חדשות שבחן יש צורך להקים מראשיתן מערכות מינהל ושיפוט. מילא ברி שככל אחד מן המצבים הללו, מערכת המשפט המדינית אינה מסוגלת לקיים משפטיים מורכבים הנוגעים לפשעים בינלאומיים. בה בעת, גם המערכת הבינלאומית אינה מסוגלת להציג פתרון: סמכות השיפוט של בית הדין הבינלאומי הפלילי עשויה שלא לחול על החשודים, למשל, אם מדובר בפשעים שבוצעו קודם ל-1 ביולי 2002, ועלותם של בתיהם דין בינלאומיים מיוחדים עלולה למנוע החלטה על הקמתם. בתיהם דין המעורבים מציעים, לפחות להלכה, פתרון יצירתי למצב זה. יתרונות נוספים של בתיהם דין אלה כוללים לגיטימציה פנימית רבה יותר, עלות נמוכה יותר וכן בניה יכולות שיפוטיות בתחום המדינה.

ככלל, בתיהם דין המעורבים מוקמים במהלך של שיתוף פעולה בין המדינה שבה בוצעו הפשעים לבין הקהילה הבינלאומית, והם פועלים בשטחה של המדינה בה בוצעו העבירות; אם כי במקרים בהם המדינה עצמה עומדת מאחריה הפשעים, הסיכוי להקמת בתיהם דין מעורבים קטן, מלבד במקרים של חילופי משטו. בשני אלה הם נבדלים במובhawk מתי הדין המיוחדים. שיתוף פעולה זה בא לידי ביטוי בהרכבת השופטים והתביעה, הccoliלים זה לצד זה שופטים ותובעים בינלאומיים ומקומיים; בסמכות השיפוט העניינית הchallenge הן על עבירות על פי דין המדינה והן על פשעים בינלאומיים ובסדרי הדין. בהקשר זה השיטה

<sup>354</sup> עקרון השוויות אמן איינו מציין את עדיפותה של המדינה בעלת הזיקה המירבית לפשע, ולכארה עולה כי עדיפות תינתן לכל שיפוט מדינתי, ובכללו זה של מדינה המפעילה סמכות שיפוט אוניברסלית. אפשרות זו היא תיאורטית ביותר לאור הרצינול המנחה את הפעלת סמכות השיפוט האוניברסלית ומייעוט ההליכים המתבססים עליה.

**| ארנה בז'רפחטי וובל שי**

המדינהית מתאימה את עצמה לאמות המדינה הבינלאומיות הן בהקשר של הליך הוגן והן בהקשר של עונישה (ולכן, למשל, גם אם השיטה המקומית מותירה או אף מחייבת הטלת עונש מוות, אפשרות זו אינה קיימת בבית דין מעורב). בתי דין מעורבים פועלים מאז 1999 בקוסובו<sup>355</sup>, ובティmor המזרחי<sup>356</sup> ובסירה לאונה מאז 2002<sup>357</sup>. בשנים האחרונות הוקמו בתי דין מעורבים בקמבודיה<sup>358</sup> ובbosניה-הרצגובינה<sup>359</sup>. לבסוף, יש לציין את הקמת את "בית הדין המיוחד לעיראק", על ידי כוחות הקואליציה. בית דין זה מתמקד בפשעים שבוצעו בעיראק בגיןו של סדאם חוסיין. למרות מאפיינים בינלאומיים רבים, ספק אם בית דין זה יוכל להיתפס כבית דין מעורב, הן בשל אופייה השינוי בחלוקת ביןלאומית של המעורבות האמריקנית, הן בשל היעדר שופטים בינלאומיים והן משום שהוא מוסמן להטיל עונש מוות<sup>360</sup>.

בתיהם הדין המעורבים מוקמים, כאמור, על מנת לסייע בכינונו או בתיקודו הראי של מערכות משפט מדיניות. במובן זה תרומתם עשויה להשווים מעצמה אכיפה של המשפט הבינלאומי הפלילי ולתרום להטמעתו של נורמות של הליך פלילי הוגן, ולהרמונייזציה בין הדין הבינלאומי לדין המקומי. לא מן הנמנע גם שעם פקיעת המנדט של בית דין מעורב מסוים, ייעדו ישונה, והוא יוטמע במערכות המשפט המדינתיות כמנגנון משפטי מנוסה, הממוקם ממילא במדינה מסוימת ואשר חלק ניכר מצוות עובדיו המנהלי והמצווע הוא מקומי. לבסוף, יש לציין שהקשר זה כי מאפיינים אלה של בית דין המעורבים עשויים לתרום לכך שהכרעותיהם תהינה משמעותיות לא רק לפיתוח המשפט הבינלאומי הפלילי אלא גם לשיח הציבורי במדינה שבה הם פועלים.

#### **4.5 תהליך הגלובליזציה של המשפט הבינלאומי הפלילי ועמדת ישראל**

**התפתחויות במנגנון האכיפה של המשפט הבינלאומי הפלילי שנסקרו לעיל, הן חלק**

ראו: UNMIK Reg. 2000/64 on the Assignment of International Judges/Prosecutors and/or Change of Venue, U.N. Doc. UNMIK/REG/2000/64 (Dec. 15, 2000)

ראו: UNTAET Reg. 2000/11 on the Organization of Courts in East Timor, sec. 10.1, 10.3, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000)

ראו לעיל הערכה 79.

ראו: 'הערכאות המוחdot בקמבודיה' הוקמו מכוח הסכם בין ממשלת קמבודיה לבין העצרת הכללית של האו"ם. את החוק הקמבודי הkowski את האמנה ניתן למצוא באתר האינטרנט <http://csf.colorado.edu/bcas/main-cas/camb-law.htm>. ('Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001)

ראו: בית הדין לפשיי מלחמה בbosניה-הרצגובינה הוקם בסרייבו ומכוונה Sarajevo Special War Crimes Chamber" Security Council briefed on establishment of War Crimes Chamber within State Court of Bosnia and Herzegovina, United Nations Press Release SC/7888, 8 October 2003, <http://www.un.org/News/Press/docs/2003/sc7888.doc.htm>.

ראו: לביקורת על בית הדין המיוחד לעיראק Iraq: Tribunal's المאמר Human Rights Watch "Iraq: Tribunal's Trial Concerns" (NY, 17 Dec. 2004) ניתן למצוא את המאמר באתר <http://hrw.org/english/docs/2004/12/16/iraq9907.htm>.

**פרק V: משפט בינלאומי פלילי**

בלתי נפרד ממה שאנו מכנים כיום "גLOBלייזציה": היליך טרנספורטיבי וחובק כולל, המונע על ידי כוחות כלכליים, טכנולוגיה ותקשורת והמאופיין על ידי אינטראקטיה תמידית ונמשכת<sup>361</sup>. זהו תהליך שיש המברכים וייש המרכיבים עלייו, אך בררי שתהא אשר תזהה העמדה לגביו, אף מדינה אינה יכולה להרשות לעצמה להתעלם ממנו. הגלובליזציה של המשפט הפלילי הינה אספект אחד של תהליך זה. בה במידה שאספект זה מבטא מאמץ להרתיע, למנוע ולהעניש בגין מעשי זוועה באמצעות משפט ומוסדות, קשה לבסס, לפחות לכואורה, התנוגדות כלפיו.

הדיון בפן המהותי של המשפט הבינלאומי הפלילי הצבע על אי-התامة בין הנורמות הבינלאומיות לבין הדין הפלילי בישראל. ביום, לעומת רוב רובן של הדמוקרטיות המערביות, התומכות בכנים ובഫוללה של סמכות השיפוט האוניברסלית והבינלאומית, עומדת ישראל (במעט) בדידות בלתי-זיהורה בעיליל בחשדנותה ובהתנגדותה לשתייהן, וכי שצווין לעיל אף סירבה לאשר את חוקת רומה; אך בעבר – בתקופה החופפת לתקופת המלחמה הקרה – הייתה ישראל בין המדינות הבודדות אשר שאפו לגשר בין שאיפות לבין הישגים בנוגע להפללת הפרות המוראות של זכויות אדם<sup>362</sup>.

ניתן להסביר את השינוי בעמדתה של ישראל במצבה הביטחוני הייחודי: מבחינת ישראל השימוש בכוח הינו עובדת חיים, המביאה את ישראל לסרב להכפפת בחירותיה הצבאיות לסמכותם של בתים משפט זרים<sup>363</sup>. אולם בררי כי עמדתה של ישראל נתנת להסבר מורכב יותר. לצורך הדיון הנוכחי, נסתפק בזכרון כמה אירועים ספציפיים: קרייסת תהליך השלום ופריצת האינתיפאדה השנייה בשנת 2000, לצד פתיחת הליכים המבוססים על סמכות שיפוט אוניברסלית נגד ראש הממשלה אריאל שרון בגין אחירותו, כביכול, לאירועי סברה ושתייה על ידי המוסדות הבלגים<sup>364</sup>, כמו גם נגד קציני צבא ישראלים אחרים במדינות שונות<sup>365</sup>; הביקורת שהותחה כנגד ישראל בועידת המדינות החברות לאמנות ג'נבה בשנת 2001; הכללת סעיף 8(ב)(8) בחוקת רומה, וחוזות הדעת המיעצת שנtan ביה الدين<sup>366</sup>

<sup>361</sup> היליך מערב החלפה הדרגתית של מושג המדינה הריבונית (מושג שייצר את תנאי האפשרות לאימפריאלים) במושג חדש של ריבונות גLOBליית, אם כי מבורת (איימפריה במובנה הפוסט-מודרני), ומחליף את התקmekות הראשון בגבולות, ובחוסר התנגדות לסמכות המוחלטת של המדינה בתחום גבולות אלו, בסדר חדש ומבוור אשר אינו מכיר בגבולות שהוא ממשיך להרחיב ולטשטש. מנקודת מבט זו אין זה מפתיע כי הון השיח המשפטי הלאומי והן זה הגלובלי משפיעים כמו גם מושפעים מתחילה זו. ראו: M. Hardt & A. Negri Empire (Cambridge, 2000).

<sup>362</sup> דיוון זה מבוסס על המאמר של בנ-גפתלי ומייכאלி לעיל הערכה 247.

<sup>363</sup> J. Joffe "It's Still Only a Dream" *Time Magazine* (8 July 2002) 38.

<sup>364</sup> לעיל הערכה 51.

<sup>365</sup> כך למשל בספטמבר 2005 הוציא צו מעוצר נגד אלוף בamil דודון אלמוג, בעקבות תלונה שהגישי משרד עורכי דין בלונדון. לפרט התלונה ראו: <http://www.hickmanandrose.co.uk/news06.html>.

<sup>366</sup> Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention of 5 December 2001, available online at [http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc/docum2.Par.0006.UpFile.pdf/mg\\_011205\\_4gcdeclarn\\_e.pdf](http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc/docum2.Par.0006.UpFile.pdf/mg_011205_4gcdeclarn_e.pdf).

| ארנה בורנשטיין וובל שי

הבינלאומי בעניין אי-חוקיותה של גדר ההפרדה<sup>367</sup> – חוות דעת שאומצה על ידי העצרת הכללית של האו"ם ברוב עזום<sup>368</sup> – תרמו מעט מאוד לנכונות ישראלית לחבר אל תהליך הגלובליזציה של המשפט הפלילי. במקומם זאת, התגובה הישראלית להתקפות אלו נעה על הציר שבין מגננה אפולוגטית, לולוזל במשמעותו ולהתבדלות ביקורתית המציגת את ההליך ככוח החשוף בהכרח לפוליטיזציה<sup>369</sup>.

עמדות אלה אינן ייעילות, שכן, אין בסירובה של ישראל לאשר את חוקת רומי, או בגיןויה את הפעלת סמכות השיפוט האוניברסלית על ידי בתי משפט זרים כפוליטית, כדי להוות מחסום מהפעלת סמכויות אלה נגד אורחים ישראלים החשודים בביצוע פשעים בינלאומיים. מנגד, יש חשיבות להשתתפות של ישראל בתהליך המקדים יישום נורמות בינלאומיות. שוווני, אשר תשמש את ישראל הן לפני חוץ, לסיכול הלכדים הננקטים במדינות אחרות כנגד מלאי תפקידים וקציני צבא בכירים; והן, וחשוב מכך, לפני פנים, כהנחייה והדרכה למקבלי החלטות ולציבור כולם בדבר הנורמות הרוויות בחברה דמוקרטית.

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<sup>367</sup> *Legal Consequences of the Construction of a Wall*, *supra* note 194

<sup>368</sup> דאו החלטת העצרת הכללית מיום 20 ביולי 2004, A/ES-10/L.13/Rev.I, 150 DINOT הצביעו בעד ההחלטה (כולל מדינות האיחוד האירופי), 6 הצבעו נגדה (כולל ארה"ב) ו-10 נמנעו (בניהם קנדה ואוגוסטיאן).

<sup>369</sup> D.A. Blumenthal "The Politics of Justice: Why Israel Signed the International Criminal Court Statute and What That Signature Means" 30 *Ga. J. Int'l. & Comp. L.* (2002) 593, 596–600.

## **פרק 2**

# **התפתחות רעיון זכויות האדם**

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ח�ים כהן

**פרק ב'****זכות החיים\***

הזכות לחיות נובעת, כאמור, מן האיסור להרוג. קין שהרג את הבל, לא רק עשה עוול גדול לנרצח, על כל פנים לא נכתב על העוול זהה ולא כלום; אבל כתוב שקול הדמים של הבל זעק אל האלוהים מן האדמתה. העוול של הרצח הוא כלפי אלהים; ואכן, החוק הראשון, מיד לאחר המבול, ומילא גם האיסור הראשון שבתורה, הוא "שופך דם האדם, באדם דמו יישפר". שם גם נמצאת התשובה לשאלת מודיע אלהים אינו סובל שפיכות דמים: "כי בצלם אלוהים עשה את האדם". מי שופך דם אדם, הורג את צלם האלוהים.

כך דרש רבי עקיבא: כל מי שופך דמים, מעליים עליו באילו הוא "ممעת את הדמות", באילו הוא גורע מאלוהים עצמו. וכן, יש בכלל שפיכות דמים מסוים "טומאה" שمبיאים על ארמת הקודש שאנו חים עליה: "ולארץ לא יוכפר לדם אשר שופר בה כי אם בדם שופכו, ולא תטמא את הארץ אשר אתם יושבים בה" לא תטמא — על ידי שפיכות דמים.

ענישת שופך דם האדם, בשפיכת דמו שלו. נפש תחת נשף, היא מצותו של אלהים, שכותב עליו כי כל הנפשות שלו הן: הוא יכול לעשות בהן ברצונו; כמו שהוא יכול להמית בעצמו, כך הוא יכול למצוות עליינו להמית את אלה שהמיתו. בתורה מצוויות הרבה עבירות חמורות, שעונשן הוא "מות יומת": אנו נעשים מעין שליחים של הקב"ה, שבדרך כלל הוא נוטל את החיים כמו שהוא נותן; אלא יש והוא מצווה עליינו להמית במקומו.

עד היכן דברים מגיעים, ניכר בדיון העגלת העורפה: נמצא חلل

\* כהן, חיים, **זכויות אדם במקרא ובתלמוד**, תל אביב: משרד הביטחון, 1989, עמ' 15-20.

## 16 אוניברסיטה משודרת

באדמה, ואין יודעים מיהו הרוצח, כי אז באים הוקנים והשופטים והכוננים, רוחצים וידיהם על "עגלת ערופה בנחל" ואומרים: "ידינו לא שפכו את הדם הזה ועינינו לא ראו". כל עוד הרוצח מסתובב חופשי ולא בא על עונשו, לא קיימנו מצוות האלוהים והארץ בטומאתה עומדת, ובמוקם העונש דרישה "כפרה" אחרת.

בנטילת החיים, ברגע או גם בהריגה, יש, אפוא, מושם התערבות בפריווילגיה אלוהית ליטול את החיים. רק אלוהים מミת. אדם אסור לו להמית אלא במצוות האל.

כלפי כל אדם יש לי זכות לחיות, ככלפי אלוהים אין לי זכות לחיות. הוא יכול להמית אותו בכל רגע, אם במחלה ואם בדרך אחרת. אם יעשה כן, אין לי שום זכות לטעון כנגדו, והוא שלל ממי את אשר הוא נתן לי, את הזכות לחיים. אבל אינו יכול למש את הזכות לחיים שיש לי כלפי אדם, כאשר הוא הורג אותו; כמו שאיני יכול למשה, בשביות-הדין חייב להמיתני במצוות האלוהים.

במקרה נשרד המוסד של גואל-הדם, שלוותו בתגובה האנושית האינטינקטיבית של נקמה. אם מתייחסים מישחו קרוב לי – את אבי, את אימי, את בני – מطبعו אנוש הוא שאינו רוצה להרוג את ההורג. יצר הנקמה שבאדם הושם בנסיבות חוקית: אין גואל הדם רשאי להרוג את ההורג, אלא אם הרג בשוגגה; ובתESIS בפני השימוש בזכות זו את הקימו את ערי-המקלט, שהן ימצאו ההורג בשוגגה מקלט מפני גואל-הדם הרודף אחריו. ועוד נעמוד על טיבן של ערי המקלט בהקשר אחר. אם ההורג בשוגגה כך, הדעת נותרת כי הרוצח בכוונה תחילתה לא כל שכן שגואל-הדם יוכל להמיתו. אבל חוק הוא שגמ גואל-הדם לא יmitt אותו, כל עוד לא הוכח בפני בית-הדין שהוא הוא שעשא את המעשה, ושהוא עשה אותו בכוונה תחיליה (ולא נפרט כאן מה הראיות הדרויות לעניין זה). הסיבה לכך היא שהרוצח בכוונה תחיליה חוטא, ראשית כל, כנגד האלוהים, ולא גואל-הדם אלא בית-הדין המוסמן מצווה להענישו. לפני יצר הנקמה של גואל-הדם יש להגן על השוגג שאינו ראוי לעונש; כנגד בית-הדין המבצע את החוק אין נתונים מקלט. כל הסימנים מעמידים שדעתם של חכמי ה תלמוד לא הייתה נוחה מן הצעו האלוהי להמית את הרוצח, או פושעים אחרים שביברו עבירות שדרין מוות. מה עשו כדי למנוע את הוצאות להורג, כשהתורה ציוותה "מוות ימות"?

על הדרישה המפורשת מן התורה לשני עדיראה שראו את עצם מעשה הפשע ביביעו, שבלעדיהם אי-אפשר להוכיח את זכותו של

## זכויות אדם במקרא ובתלמוד 17

הפשע, הוסיף עוד שני עדי התראה, ואלה שנים שיבואו לפני בית-הדין ויעידו שהוזירו אותו לפני שביצע את הפשע, כאמור: אך שהמעשה שאתה עומד לעשותו, אסור על-פי התורה, ואם תעשה אותו, אך לך שדין מוות. יש אומרים שלא די בכך, ובפירוש שיאמרו לך שדין מוות, מחייבים גם להסביר לך לאיזו מתיות בית-הדין הוא צפוי, לסקילה, להריגה, לשריפה או לחניקה. לאחר שהאיש ישמע וידע היטב גם את האיסור וגם את העונש, שוב אינו יכול לומר, הרגתי מבלי לדעת שאסור להרוג, או מבלי לדעת מה היא עונשי. אלא גם בכך לא סגי: עדין צריך שהאיש יאמר לעדי התראה: "אתם עדי, שאני יודע את הדין; אני יודעת שאסור להרוג, ואפקעל-פיכך ועל מנת כן, אהרוג". אם לא אמר להם ואת בלשון מפורשת, ההתראה שלעצמה אינה מועילה; הוא צריך בעקבותיה "להתיר עצמו למיותה". מי שאמר לו, אך לך שאסור להרוג, וכך לך שם אתה הורג את פלוני, כי אז אתה עצמן תיהרג בחרב, הוא מסתמא כבר לא הרגע: או שחשקת ההריגה כבר חלפה עברה ממנו, או שימתחן בביצוע מעשו עד שהערדים יסתלקו — וזה הדין הוא שיש עורך בעדי-התראה ועדין-מעשה חדשים.

נראה אפוא, כי הצורך בעדי התראה בנוסף על עדי המעשה, היה בו כדי לבטל כליל את עונש המוות. ואכן, המשנה המפורסמת המוסרת את דברי רבי עקיבא ורבי טרפון, "אילו היינו בסנהדרין לא נהרג אדם מעולם", מקדימה לכך שטנהדרין האחראית להוצאה-להורג פעם אחת בשבוע שנים, ויש אומרים פעם בשבעים שנה, "נקראת חובלנית", כאילו הדיינים מחבלים בחיה אדם. בנגד אלה מופיעה דעתו של רבנן שמעון בן גמליאל האומר: "אף הם מרבים שופכי דמים בישראל": אם לא הורגים את הרוצחים, לא מענישים אותם כדין, כי אז לא יהיה מה שירתיע רוצחים מלרצוח. הוא היה הקרימינולוג שבחברה, ואיילו רבי עקיבא ורבי טרפון היו ההומאניסטים.

בגמר מתפלמים החכמים ושותאים, כיצד זה יתרן להימנע מהוציא אדם להורג, אם באמת עשה מעשה, ואם כדין הות rhe. התשובה היא שכאשר יגיעו לידי חקירת שתיעורב של העדים, ישאלו אותם שאלות כאלה, שמן הסתם יסתובכו בסתירות, ומישיטרו זה את זה, לא יהיה עוד ערך לעדויות ולא יהיה מנוס מזיכוי הנאשם. צאו וראו מה מאוד השתדלו חכמי התלמוד להักษות על הטלת עונשי מוות — אפילו מטעם בית-הדין, אפילו כתוב בתורה שהפשע מוות יומת. כל האמצעים הדיוניים היו כשרים, וב└בד שלא יתערבו

## 18 אוניברסיטה משודרת

בפריווילגיה האלוהית, במונופולין של אלוהים, ולא ימיתו אדם. עוד יותר מזה יש להתפלא ולהתפעל ממה שעשו חכמי התלמוד לעניין הcket. בرت הוא עונש מוות שמטיל אלוהים, לא ביום-דין של בשר ודם. במקרה נאמר: "ונכרתה הנפש ההיא מקרב עמיה", ופירושו של אלוהים בוחר את הומן הנראה לו ואת העוראה הנראית לו לבריות את הנפש מקרב העם, כלומר, לסיים את חייו של החוטא. חכמי התלמוד ראו איום זה של בرت בדבר שאינו עולה בקנה אחד עם מה שאנחנו היינו רואים היום כזכותה האלוהית: אם אכן אני חי תחת איום מתמיד של מכת האלוהים, שהוא-הוא הבוחר לו את הרגע ואת הדרכן להענישני, משמע, שהדבר יכול לקרות מייד, אחר, בעוד שבוע, וב奏ורה שאין לדעתה מראש, ואולי אף בזורה האכזרית והאiomה ביותר, ואני עלול להיענש גם על מה שעשיתי לפני שניים, ואולי היהי ביןתיים איש טוב וישראל. אמן נכוון הוא שרחמי האלוהים אין להם גבול, אבל מי יודע, מי יערוב לי שדווקא בענייני שלי אלוהים ישتمש ברחמיו ולא יבוא במשפט עמי ויאמת את איזמו הכתוב בתורה, שנפשי תיכרת מקרב העם.

ראו חכמים כי למעשה גם זה עונש מוות, ואף אכזרי יותר, משום שהוא בלתי צפוי ובלתי מוגדר, והוא עלול לגרום לחדים מתמידים ובלתי נסבלים. פסקו וחוקקו שני שחייב ברת, לוקה – כלומר, מקבל 39 מלכות – ומשלקה הפושע יצא ידי עונשו, ונפשו לא תיכרת מקרב העם: הלוקה יהיה ולא ימות. זכותו לח חיים שמורה לו, ניצלה, בכivel, מידיו אלוהים בטרם הספיק לפגוע בה. ואם תשאל, איך יוכל להיות בטוח שלאלוהים אמן יסבול את יומרת ההחלפה של הכרת במלכות? אולי הוא צוחק לו במרומיו ואומר: הם נותנים לו 39 מלכות, אבל אני אשלח את הכרת שלי בזמני ולפי רוחי וטעמי? החכמים ניסו לפרטור גם בעיה זו. אחד אומר: כלל הוא, ואלוהים הלא יודע את הכללים הגדולים, שאין מענישים על אותה עבירה פעמיים: אנחנו כבר העשנו אותו במלכות, הוא כבר קיבל את 39 המכות שלו, כבר סבל מהן, כבר ספג את שלו, ואלוהים לא יעניש אותו פעם שנייה. אחרי כלות הכל, הוא אלוהי צדק, הוא אלוהי רחמים, "השופט בכל הארץ לא יעשה משפט"? אחר אומר: כל עונש אשר אתה מטיל על אדם, יש בו ממש כפירה – ביחיד אם הנענש גם עושה תשובה, גם מתחרט על מעליו, וגם סופג מלכות. כשהאדם כבר כיפר על מעשיו, אין עוד על מה להענישו. לברית אין עוד אובייקט, נעלמה העילה. כבר חזרת בתשובה, כבר קיבלת עונש, כבר עשית כפירה, והסיפור ثم ונשלם.

## זכויות אדם במקרא ובתלמוד 19

אבל רבי יצחק, שהיה אחד מן היריסטים הגדולים בין חכמי התלמוד, חולק על חבריו ואומר: הכרת טוב יותר ואכזרי פחות מליקות; כשהמודבר בכרת יש בלבד של כל פושע ופושע תקווה, שמא ירחם, אולי לא יימצה את הדין; והתקווה הלא היא מטבע האדם. מה שאין כן במליקות, שכאנו מיידי, והסתבל ממשי. מוטב אפוא להשאיר את הכרת בעינו ואת הפשע — לרוחמי שמים, ולא להטיל על בית-דין ענישה שלא הוסמרק בתורה להטילה.

אבל עצם הרעיון שיש להשתדל לשמר על חי אדם, אפילו אם מותו צריך לבוא מיידי שמים — שмотיב לגוזר עליו עונש של מליקות, ובלבך שלא יענש בהמתה, בין בידי אדם ובין בידי שמים — מוכיח עד כמה הרוחיקו חז"ל לכת לשמור על הזכות לחיים. והם הצליחו במשימותם לא רק לגבי אלה שבית דין עלי אדמות מצויה להמיתם,

אלא גם לגבי אלה שעונש המות מובטח להם ממשים.

הדבר השלישי מעשרה הדיברות מצויה: "לא תישא את שם האלוהיך לשוא, כי לא ינקה ה' את אשר ישא את שמו לשוא". אם אתה נשא את שם אלוהיך לשוא, אם אתה נשבע בשם לשר, עונך חמור עד כדי כך שאינך יכול "להינקות" ממנה. בדקו חכמים ומצאו כי כתוב שם: "לא ינקה ה' את אשר ישא את שמו לשוא". אלהים לא ינקה, אבל אנחנו ננקה גם ננקה. אם הוא איןנו מוכן לשלוח על שבועת שקר בשמו, אנחנו נסלח. אנחנו, בית דין שלבשר ודם, ניטול לעצמנו את כל החופש להציג גם פושע חמור מפסק דין מוות ולהתויר בחיות, אפילו אם אלהים בכבודו ובעצמו איןנו מוכן לעשות זאת. היפוכו של דבר: אם אלהים אומר במפורש שהוא לא ינקה, יכולם אנו ללמידה מעין הסכמה שנאנחנו ננקה גם ננקה.

הלכה מפורסמת היא, שיהיו אשר ידו המצוות והאיסורים הכתובים בתורה, ביסודות מונח העיקרון של "וחי בהם ולא שימות בהם": כל מה שאלוהים ציווה עליינו לעשות, חייבים אנו לעשות רק בתנאי ובכפוף לכך שאפשר לחיות, שקיים המצוות לא ניתן לידי סכנה נפשות, לידי קיפוח נפש. קיפוח נפש דוחה את הכל. ויש רק שלושה פשעים שעליהם נאמר שעריך ליהרג ולא לעבור — שפיכות דמים, עבירות אלילים וגילו עריות. אבל גם לגבי שלושת אלה חל הדין שייהרג ולא יעבור רק בצדgor, רק במעמד עשרה בני-אדם או יותר, ורק אז חייבים ליהרג ולא לעבור, והוא כדי לקרש את השם ברבים. בחרך שלך, בכנעך, עליך להעדייף אפילו גילי עריות, אפילו עובדות אלילים, על אבדן חייך. מסופקני אם הסיג הזה תופס גם לגבי שפיכות דמים:

## 26 אוניברסיטה משודרת

לעולם איןך יודע אם דרכך סמוך מרצו של הזולת, ועד שאתה חי, מוטב שהשני יהיה. נחלקו הדעות בין חכמים ראשונים, מה עדיף ממה, חייך או חי חברך. רבינו עקיבא אומר: "וחי אחיך עמר – חייך קודמים לחי אחיך". אם יש לך ברירה, או להישרד בעצמך בחיות או להחיה את חברך, מוטב שאתה תחיה, גם אם חברך ימות. אבל בנ-פטורה אומר: לא יהיה לך לחיות ולראות מותו של חברך: מוטב שתנתן לחברך לחיות, אפילו תמות בעצמך, ולא תתהלך כל ימיך במחשבה הנוראה הזאת שאתה, על ידי כך שחיית, אולי גרמת למותו של חברך. מבחינת הזכות לחיים, משקפת דעתו של רבינו עקיבא את היציר האנושי הטבעי להישרדות – ואולי הוא ראה שדרישה על-אנושית היא להעדיף את חיי חברך על פני חייך שלך. לעומת זאת גורסת בנ-פטורה, שהאדם המוסרי מתגבר על יציריו הטבעיים, ותמיד ימצא עוז בנפשו ליחס לחיי אדם אחר ערך גדול יותר – או לפחות ערך לא פחות גדול – מאשר לחייו שלו עצמו. ולא בכדי נזקק רבינו עקיבא לפטוק מפורש בתורה, "וחי אחיך עמר", כדי להתבסס עליו, לעומת בנ-פטורה, אשר לא ראה צורך להישען, לא על פ██וק זה ולא על פ██וק אחר, ואולי אף בסבור היה כי פשטו של "וחי אחיך עמר" הוא ששנייכם תחיו, ולא שיחיה האחד על חשבון מותו של אחיו.

אף גם זאת מיסוד זכויות-האדם הוא, שעד שאתה טובע זכות לעצמך, חייב אתה לתת אותה הזכות לזרעך; ואין אתה רשאי להשתמש בזוכתך – והזכות לחיים בכלל זה – על חשבון שלילת הזכות מזרעך.

יוצאת מכלל זה הזכות – או ההכרח – להתגוננות: הבא عليك להרגך, מותר לך להשכים ולהרגחו; ולא זו בלבד אלא מצווה היא להצעיל נרדף מיד רודף, "ואפלו בהרים הרודף", ואפלו אם הרודף אינו רודף להרוג, אלא רק לאנוש אישה. אמרת שם אדם יכול להצעיל את הנרדף בדרך אחרת, "אלא העיל בנפשו של רודף והרגו, הרי זה שופך דמים" – והריגת הרודף מותרת רק כמצוין אחרון. אבל "לא תעמוד על דם רעך", אלא תצלנו מן הסכנה, גם הוא ביתוי לקדושת חי הזולת. ואם על דם רעך אסור לך לעמוד, על דרכך שחק על אחת כמה וכמה.

## **פרק 4**

# **סוגיות היחסות התרבותית**

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יוסי דהאן

## פרק ח

### רבי-תרבותיות וצדק חברתי\*

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המשפט "אנחנו חיים בעולם רבי-תרבותי" הוא אחד המשפטים השכיחים לתיאור העולם שבו אנו חיים. אפיון זה מציין את העובדה שמדינות רבות בעולם כוללות קבוצות דתיות, אתניות ולשונות שונות. קיומן של קבוצות אתניות שונות תחת אותה מדיניות פוליטית ריבונית הוא מקור למלחוקות ולקונפליקטים שנובעים בחלוקת מדינית של הקבוצות האתניות השונות להכרה, הגנה ואוטונומיה בתחום גבולות המדינה.

הגירה של אנשים, בעיקר מדינות עניות למדיינות עשירות, וגידול בהיקף הגירתה עבדה בין מדינות בעשרות השנים האחרונות, שני את המבנה הדמוגרפי של מדינות רבות. כמו כן, בשלושת העשורים האחרונים החלה במדינות דמוקרטיות רבות התעוררות פוליטית של קבוצות המזדהות על בסיס אתני ומצוות את זהותן התרבותית כזהות בעלת ערך, המחייבת הכרה פוליטית, חברתית וככללית בשדה הציורי. הטענה שאנחנו חיים בעולם רבי-תרבותי מצינית את מה שנוהגים לכנותו "עובדת הרבי-תרבותיות". אם תיאוריות של צדק חברתי אמורויות להתייחס אל המצוות שבה אנחנו חיים ולהציג עקרונות מסוים כללים לעיצוב מוסדות וסדרים פוליטיים, חברתיים וככליים, הן אין יכולות להתעלם מ"עובדת הרבי-תרבותיות". תיאוריות צדק אמוראות להציג לנו עקרונות להתמודד עם שאלות פוליטיות מרכזיות שמtauוררות במצוות רבי-תרבותית, כמו מדיניות הגירה והגירת עבודה, אופי התכנים בתוכנית הלימודים בבית הספר, ייצוג פוליטי של קבוצות תרבותיות שונות, הזכות לאוטונומיה מקומית של קבוצות מיעוט לאומיות ותרבותיות, הצגת סמלים דתיים במוסדות ציבור, זכויות לשוניות ונושאים חשובים אחרים, הנמצאים כולם על סדר היום הפוליטי של מדינות רבות.

**116** תיאוריות של צדק חברתי

ישראל היא דוגמה מובהקת למדינה רביתרבותית הכוללת קבוצות לאומיות ותרבותיות שונות: מיעוט לאומי ערבי-פלסטיני, יהודים חרדים, מזרחים, אשכנזים, קבוצות מהגרים מדינות שונות ומהגרי עכודה. שאלות על אודות גבולות האוטונומיה התרבותית עלות מעט לעיתים בשיח הציבורי. שאלות כמו – מה צריכה להיות מדיניות הגירה כלפי מהגרי עבודה וילדייהם, השווים בישראל שנים רבות? מה צריכה לכלול תוכנית לימודים במערכות החינוך הנפרדות והאוטונומיות של קבוצות המיעוט החרדיות? מהי מידת האוטונומיה שמנעה צורך להנחות הלאומית הערבית-פלסטינית? ושאלות נוספות נספנות, מן הסוג הזה, הן חלק מסדר היום הלאומי הישראלי.

חשוב להזכיר, כי יש להבחין בין עובדת הרביתרבותיות, ככלומר, קבלת התיאור של מצבנו כמציאות רביתרבותית, כמו פיין מרכז של העולם הציבורי הפוליטי, לבין אימוץ רביתרבותיות כתפיסה נורמטטיבית הכוללת עקרונות שאמורים להנחות הסדרים פוליטיים מסוימים שייעניקו מקום מרכזי להזות התרבותית. אדם יכול לומר שהוא מכיר בכך שהמציאות היא רביתרבותית, אולם להזיק בעמדה שעקרונות צדק חברתי אינם צריכים להתחשב בזות התרבותית כמרכיב רלוונטי בחלוקת של טובי חברותיים, כלכליים ופוליטיים.

המונח "רביתרבותיות" הוא חדש יחסית. לראשונה הופיע רק בשנות השישים והשבעים של המאה העשרים, בעיקר במדינות כמו קנדה ואוסטרליה. הוא ייצג את תגובתן של הממשלות במדינות אלה לעובdet קיומו של פולרליזם אטני, אשר כולל קבוצות שאינן מעוניינות להיטמע בתרבויות הרוב ודורות הקרה בייחודיות התרבותית. אציג, כבר כאן, כי אין "תיאוריה של רביתרבותיות". רביתרבותיות כוללת מגוון רחב של תיאוריות העוסקות בעקרונות, במטרות וב策עדי מדיניות שונות המקדמים רביתרבותיות. עם זאת, למגוון התפיסות ביחס לרביתרבותיות משותפת ההנגדות למדינות "כור ההיתוך", מדיניות המנסה לכפות אחידות תרבותית, למחוק או לטשטש והוות תרבויות יהודיות של קבוצות שונות על סמך ההנחה כי קיימת דרך חיים אחת נכונה לכינון והות תרבותיתopolיטית. משותפת להן גם התפיסה שעילפיה זהות תרבותית היא זהות מוכנת ובעלת ערך כשלעצמה, בעיקר אלה המשתייכים לקבוצות מיעוט.

התפיסה הרביתרבותית הנורמטטיבית, שהיא אעטוק בפרק זה, מתיחסת בין היתר לתיאוריות הפוליטיות הליברליות שהציגו בפרקם הקודמים, והיא מבקרת אותן על התעלמותן מן הזות התרבותית של היחיד. תיאוריות הצדק הליברליות, למרות חילוקי הדעות ביניהן על תוכנם של עקרונות החלוקת של משאים חברותיים וככלelialים, שותפות להנחה הבסיסית אשר לפיה עקרונות צדק מחייבים הענקת זכויות שותות לכלול.

לצד חילוקי הדעות הקיימים בין התיאוריות השונות בשאלות כמו – אילו זכויות צריכות להיות מוענקות? מהו מקור הצדקה שלהן? מהו היקפן? ושאלות עקרוניות אחרות, קיימת הסכמה שהוכחות צריכות להיות מוענקות לכל אורך, בלי להתחשב במאפיינים כזע, מין, דת, מוצא או מאפיינים אחרים. מנקודת המבט הליברלית הם נחשים למאפיינים בלתי רלוונטיים מבחינה מוסרית, ועל כן אינם יכולים לשמש בסיס להענקת זכויות.

אפשר לומר, כי מבחינת ההיסטוריה להווית השונות של האורחים, הליברלים, זה שהיה קיים לפני הגישה הרב-תרבותית הנודומטיבית, הוא "יעיור צבעים". עקרונות הצדק של התיאוריות הליברליות השונות מתייחסים לכל יחיד באופן המפשיט ממנה מאפיינים והותמים ייחודיים. בסיסי זכאותם הם אורתוטו והיותו חבר שווה בקהילה הפלטית. התפישות הרב-תרבותיות מתנגדות להנחה היסוד המרכזית הזאת של התיאוריות הליברליות על אודות היחיד נטול הווהות. לפי תפישות אלה, לא ניתן להפריד בין זהותו הפלטית של היחיד לבין זהותו התרבותית. הפרדה שמתעלמת משiccotם של יהודים לקבוצות תרבותיות ובאה לידי ביטוי בדרישה מן המדינה לגלות לפיהם ניטרליות תרבותית, מעניקה, בדרך כלל, מעמד מועדף לקבוצות הרוב התרבותית הדומיננטית.

הפילוסוף הפלטיטי הראשון שניסח תיאוריה שיטתית של רבי-תרבותיות היה הפילוסוף הקנדי, ויל קימליקה (Kymlicka). בשני ספרים מרכזיים – *Multicultural Citizenship and Culture* (1989) ו-*Community* (1995) קימליקה מנסה להוכיח תיאוריה רבי-תרבותית נורמטיבית מנקודת מבט ליברלית. הוא סבור שתיאוריות ליברליות פלורליסטיות, כגון אלו של ג'ון רולס ורונלד דברקין, נותנות מענה לפולרליזם מוסרי, ככלומר – לעקרונות צדק חלוקתיים כליליים, המתחשבים בעובדה שחברה דמוקרטית כוללת אנשים בעלי ערכים ותפישות עולם מוסריות ודתיות שונות, אלא שתיאוריות ליברליות אלו ואחרות אינן מיחסות חשיבות לפולרליזם תרבותי. לטענתו, הן מניחות בטיעות שחברים השיכים לאותה קהילה פוליטית שייכים גם לאותה קהילה תרבותית. תיאוריות צדק ליברליות מתעלמות, לטענת קימליקה, מן העובדה שמדינות דמוקרטיות רבות הן מדינות רב-לאומיות ו/או מדינות פוליאתניות (מדינות הכוללות כמה קבוצות אתניות). במדינות רב-לאומיות התקימו לפני הקמתן קהילות תרבותיות שונות, למשל הקהילה האבוריג'ינית באוסטרליה או קהילת דובי הצלפתית בקוויבק בקנדה. במדינות פוליאתניות מתקיים מגוון של קהילות אתניות, שמקورو בהגירה של קבוצות אתניות שונות למدينة אחת במהלך יותר מדור אחד.

לדעת קימליקה ותיאורטיקנים אחרים של רבי-תרבותיות, הכוללות תפיסה של אורתות איחוד ועקרונות צדק כליליים לחלוקת משאבים חברתיים וככליליים

בלבד, איןנו מונחים לעניין העולות מקיים מגוון של קבוצות תרבותיות במדינה הדמוקרטית המודרנית.

המשמעותית בתיאוריית הליברליות מניחים שכפי שעקרונות צדק ליברליים מגנים על מייעוטים דתיים באמצעות הסדרים של הפרדת הדת מהמדינה והענקת הזכות לחופש הדת, באותו אופן הם מגנים גם על הזכות להזות תרבותית יהודית. אנשים יכולים לבטא את זהותם התרבותית במישור הפרטível ולפתח אותה באמצעות שימוש זכות ליברלית להתאגדות וליצור קהילות תרבותיות שלהם. תפקידה של המדינה הוא להגן על חברי קבוצות המיינט מפני אפליה או התנהגות שמקורה בדעות קדומות, אולם היא חייבת לשומר על מדיניות ניטרלית ביחסה לקבוצות התרבותיות השונות. העיקרון של הפרדת המדינה מן האתניות שולל כל הכרה של המדינה בקבוצות אתניות ושימוש בזהות אתנית כקריטריון להענקת זכויות או משאבים חברתיים וככללים.

מבחינה זו, מדיניות ההעדפה המתקנת הליברלית היא היוצאה מן הכלל, החרגע המעיד על הכלל. אחת ההזדמנויות המרכזיות למדיניות העדפה מתקנת היא שצד של פיצוי על אי-צדק שנעשה בעבר לקבוצה מסוימת הוא צעד זמני, שנחוץ על-מנת ליצור חברה צודקת שבה זהות יהודית כלשהי לא תהיה חשיבות.

לטענת המבקרים, "הנטרליות התרבותית" של התפיסה הליברלית מעניקה למעשה יתרון לאינטרסים של מי שישיק לתרבות קבוצת הרוב על-פני האינטרסים של אלה השיכים לקבוצות המיינט התרבותיות. לטענתם, המדינה אינה יכולה להימנע מלהחליט בשאלות תרבותיות מרכזיות העולות על סדר היום הפוליטי, כמו שפה, חגיגים, ימי חופשה ציבוריים וסמליה של המדינה. הכרעה בנושאים אלו כרוכה בהכרה בהכרה בצורךיהן של קבוצות לאומיות או אתניות מסוימות. בקבלה החלטות בסוגיות אלו במדינה לאומי דמוקרטי, השלטון יקדם בדרך כלל את התרבות של הרוב. לרוב יש עצמה פוליטית רובה יותר, המאפשרת לו להגן על האינטרסים הקבוצתיים התרבותיים שלו לעומת קבוצות מיינט אחרות ולקדם אותם. לדעת קימליקה, לא ניתן הפרדה מוחלטת בין המדינה לקבוצות האתניות. מדיניות דמוקרטיות וב-תרבותיות אין יכולות להיאשר ניטרליות – הן בהכרח מקדמות והוות תרבותיות קולקטיביות מסוימות ומקפתות אחרות.

לאחר מלחמת העולם הראשונה, ליברלים רבים הניחו שכינונו של זכויות אדם בסיסיות בחופש הביתי, חופש ההתאגדות וחופש המיצפון, יפתרו את הקונפליקטים בין מייעוטים אתניים. הם סברו כי הגנה על זכויות בסיסיות אלו, המוננקות ליהדים, תיתיר את הצורך בהגנה נוספת באמצעות הענקת זכויות קבוצתיות לקבוצות מיינט התרבותיות.

תפיסה עקרונית זו נמצאת גם בסיס הכרזה הכללית של האו"ם בדבר זכויות אדם, הכרזה שבה לא מוזכרות זכויות מיוחדים אתניים או לאומיים. אולם לדעת קימליקה, זכויות אדם המוענקות ליחידים אין נותנות מענה לקבוצות מיוחס תרבותיות. הן אינן מסוגלות לפטור את רוב השאלות הקריטיות השינויים בחלוקת העולות בהקשר של מיוחסים תרבותיים, שאלות כמו האם שפת המיעוט התרבותי צריכה להיות מוכרת על ידי המוסדות הציבוריים הרשמיים כמו הפרלמנט, בתיהם המשפט ומוסדות אחרים? האם המדינה צריכה לממן מערכת חינוך אוטונומית לכל מיעוט לאומי ותרבותי? באיזו שפה צריכים להתנהל הלימודים במערכות חינוך אוטונומיות של קבוצות מיוחס? האם יש להאיץ סמכויות של שלטון עצמאי לקבוצות מיוחס אתניות על-מנת להעניק להן יכולת שליטה על היישן הקולקטיביים באזוריים שבהם הן גרות? האם יש להעניק הגנה מוחדרת לקבוצות מיוחס תרבותיות על-מנת לשמר על השמות הטריטוריאלית של המקומות שבהם הן מנהלות את היישן?

לדעת קימליקה, דוקטרינה מסורתית של זכויות אדם אין מעניקות תשובה לשאלות אלו. הזכות לחופש הביטוי אינה נותנת תשובה לשאלת איזו מדיניות לשונית לאמץ. הזכות לחופש התנועה אינה מעניקה לנו תשובה לשאלת איזו מדיניות הגירה ומדיניות התאורחות לאמץ וכן הלאה. שאלות מדיניות בסוגיות חשובות אלו מוכרעות בדמוקרטיה באמצעות הליכים פוליטיים רגילים, על-פי הכרעת הרוב. לדעתו, תיאוריה של צדק במדינה רביתרוביית צריכה לכלול, מצד אחד, זכויות אוניברסליות המוענקות לכל אחד באופן בלתי תלוי לשיכותו התרבותית, ומצד שני, זכויות קבוציות המוענקות לקבוצות מיוחס תרבותיות בתור שכאה. קימליקה מעוניין להציג הענקת זכויות קבוציות למיוחסים תרבותיים על בסיס ערכים ליברליים יסודיים – שוויון ואוטונומיה. הוא מנסה להצביע על החשיבות הקריטית שיש לתרבות במימוש ערך האוטונומיה. במשמעות ליברלי, כיבור האוטונומיה של היחיד פירושו, בין היתר, מניעת התערבות של השלטון בחילוטיהם של האזרחים בשאלות, כמו במה להאמין, מה לומר, איזו תפיסת חיים לאמץ ועוד. כל אלה הן הכרעות הנוגעות לחייהם האישיים של האזרחים. לכל אחד יש זכות לבחור כיצד לחיות את חייו, אולם הבחירה לבחור בחירות משמעויות בחינו תלوية בתרבות החברתית (societal culture) אשר לה אנחנו שיכים. התרבות החברתית כוללת מסורת ומנהגים העומדים בסיס הפרקטיות והמוסדות שלנו. המבנה התרבותי של החברה אשר לה אנחנו שיכים יוצר את ההקשר שבו אנחנו מביצים את הבחירה שלנו (Kymlicka, 1996).

לטענת קימליקה, התרבות החברתית מעניקה דרך חיים בעלת משמעות בכל קשת הפעילויות האנושיות – החברה, החינוך, הדת, הבידור והכלכלה; כל תחומי החיים הציבוריים והפרטיים שלנו. רק בתוך ההקשר התרבותי זהה יש לאוטונומיה

שלנו משמעות. למשל, האופציה לחיות אורח חיים חקלאי אינה קיימת עבור מי שאינו חברה עירונית. אנחנו יכולים להנחות מאוטונומיה ולזכות בכבוד עצמי רק בתוך הקשר תרבותי. קימליקה טוען, שהתיאוריה של רולס הינה צריכה להניח שהצדדים למשא ומתן, המוצאים מאהורי מסך הבורות ובוחרים עקרונות צדק, מתייחסים לחברות בקהילה ותרבותית מסוימת כאלו אחד מן הטוביין הראשוניים. כזכור, טוביין ראשוניים כחריות, הودמנויות, עושר, הכנסה וטוביין אחרים משמשים אמצעים למימוש כל תוכנית חיים. באותו אופן, והות וחברות בתרבות מסוימת אף הן אמצעי הכרחי לחיים בעלי משמעות. לדעתו, הצדדים למשאיות מושגיים לגלוות לאחר הרמת מסך הבורות כי החברה שם שיכים לה שונה לחלוון מזו שם גדו בה; שם חיים בתחום המדברת שפה ודה, שיש לה דת שונה ומנגנים שאינם מוכרים להם כלל. יכולת של בני אדם ליצור ולעצב את תפיסת החיים הטוביים שלהם כרוכה באופן אינטימי לחברות בתרבות תרבותית מסוימת. לכן, לטענת קימליקה, כל יחיד וכייא לתרבותו שלו. מן הטעם זה יש להגן על אנשים השיכים לקבוצות מיעוט תרבותיות, אותן אנשים שתרבותם מאוימת ונמצאת בסכנת היעלמות. זכויות קבוצתיות הן אמצעי מרכזי להענקת הגנה זו.

קימליקה סבור שנייתן להצדיק הענקת זכויות קבוצתיות למיעוטים לאומיים גם על סמך הנחת מוצא מרכזית נספת, שהיא חלק מתיאורית הצדק של ג'ון רולס. זהה ההנחה הקובעת שיש לפצות בני אדם על כל אישווין הנובע מגורמים שריורתיים שאינם נמצאים תחת שליטתם. שיכותו של אדם לקבוצה מיעוט לאומית, למשל, היא שריורתיות, שכן הוא לא בחר להיותו לתוכה.

כפיזו על אישווין הקים בין אנשים השיכים לקבוצת הרוב לבין מי ששייכים לקבוצות המיעוט, ניתן להעניק למיעוט זכויות קבוצתיות, שמרtan הכרה ושימור התרבות של חברות וחברי קבוצות המיעוט. מה כוללות אותן זכויות קבוצתיות?

גייקוב לוי (Levy), מחבר הספר (2000) *Multiculturalism of Fear*, מבחין בין שמות קטגוריות של זכויות קבוצתיות:

- זכויות המוניקות לקבוצות מיעוט תרבותיות פטור מהחלת חוקים הפוגעים בתרבויות;
- זכויות סיווע – זכויות המסייעות לקבוצות המיעוט לבצע פעולות שהרבות יכול לבצע ללא סיווע;
- זכויות לשולטן עצמי;
- זכויות לכפות כללים ההלים על יחסם עם אנשים מוחוץ לקהילה, למשל איסור על מי שלא שיר לקהילה לרכוש קניין השיך לקהילה;

- זכויות לכפות את הכללים הפנימיים של הקהילה על חבריה, גם כאשר כללים אלו פוגעים בזכויות אחרות;
- זכויות להכרה בקוד החוקי של הקהילה;
- זכויות לייצוג בשלטון;
- זכויות להכרה בקיום, בסטטוס ובערך של קהילת המיעוט התרבותית.

קימליקה מבחן בין שלוש קבוצות של זכויות קבוצתיות האמורות להיות מוענקות לקבוצות אתניות ולאומיות: זכויות של שלטון עצמי, זכויות פוליאתניות וזכויות לייצוג מיוחד.

זכויות שלטון עצמי ממשמעון האצלה של סמכויות שלטוניות לקבוצות מיעוט לאומיות, ככלומר, לקבוצות ילדים. דוגמה לקבוצות מיעוט לאומיות ילדים הם אינדיאנם החיים בארצות הברית, קנדים דוברי צרפתית החיים בקוויבק, פלסטינים בישראל או אבוריג'ינים באוסטרליה.

אולם קימליקה סביר ש אין להעניק זכויות של שלטון עצמי לקבוצות תרבותיות אחרות שהיגרו לאותה מדינה. למגרים תוענקנה רק זכויות פוליאתניות, שכן זכויות המבטיחות מניעת אפליה, נגישות ואינטגרציה של חברי הקבוצה לתרבות המרכזית, תמייהה כספית והגנה על פרקטיקות יהודיות לאותה קבוצה דתית או אתנית. גם הקבוצות הילידיות וגם קבוצות המהגרים יכולות לזכות בזכויות ייצוג מיוחדות המבטיחות להן ייצוג במוסדות השלטוניים.

הבחנה שעורך קימליקה בין הקבוצות הילידיות לקבוצות המהגרים מבוססת על הטיעון, שבעוד התרבות הדומיננטית נפתחה באמצעות המדינה על קבוצת המיעוט הילידית, שנחנכה בעבר שלטון עצמי, מהגרים השיכים לקבוצת מיעוט אתנית בהרו לעזוב את מדינתם ולהاجر למדינה שבה הם חיים. לדעת קימליקה, מהגרים אלו אינם מעוניינים בדרך כלל בשלטון עצמי, אלא רק בשימור זהותם ומסורתם שלהם. המדינה הרב-תרבותית, על-פי קימליקה, כוללת קבוצות מיעוט לאומיות או קבוצות מהגרים אתניות, או את שתי הקבוצות הללו כאחד.

הוגם לירலים הבינו חשש כי הצעתו של קימליקה להעניק למינים לאומים זכויות לשולטן עצמי תעודד אותם להיפרד מהמדינה שבהם חיים ותגרום להם לנסות ולכונן מדינת-לאום משל עצם, או תביא לפיצול המדינה לקהילות פוליטיות תרבותיות אוטונומיות, מה שיפגע באחדות החברתית הנחוצה לקיום מדינה יציבה. קימליקה מшиб

## 122 תיאוריות של צדק חברתי

לטענה זו באומרו כי אדרבה, מניעת זכויות של שלטון עצמי ממיוחסים לאומיים מסוכנת יותר מהענקת זכויות לשולטן עצמי, וסיכויה רבים יותר לגרום למיעוט החש עוניות כלפי מדינה המתעלמת מהאינטרסים החיווניים ביותר ליצור מסגרת מדינית עצמאית משלה.

ביקו פארק (Parekh, 2000), פילוסוף אנגלי המצדד ברב-תרבותיות, מבקר את טענותו של קימליקה של מהגרים אין זכות לחיות בתרבויות אחרות באותו אופן שבו זכאות קבוצות מיוחס לאומות. אם תרבות היא אחד הטוביין הראשונים - אומר פארק - קשה להבין מדוע סביר קימליקה שהמהגרים צריכים לוותר על זכאותם לתרבות. משמעות קביעה זו של קימליקה, טוען פרק, מקבילה לטענה שאדם חייב לוותר על זכותו להירות.

בשנים האחרונות, כמו מן הזכיות הפלוליאטניות שמוסנקות לקבוצות מהגרים השיכים לקבוצות מיוחס תרבותיות, מעוררות מחלוקת פילוסופיות ופוליטיות חריפות, בעיקר במדינות המערב. למשל, בתחום שנות השבעים של המאה העשרים נחקק בבריטניה חוק המחייב אנשים הרוכבים על אופנו לחובש קסדת מגן. מבكري החוק טענו כי החוק הוא אפליה על רകע דתי, מפני שהוא מאלץ רוכבים השיכים למיוחס היסיקי וחובשים טורבן לבחור בין לדבוק באמונה, לחובש טורבן ולהימנע מרכיבה על אופנו, לבין רכיבה על אופנו הכרוכה בהסרת הטורבן. ואכן, ב-1976 שונתה החוק, ובני העדה היסיקית באנגליה, החובשים טורבן, קיבלו פטור מחבישת קסדה. פטור זה החלט שהטורבן עומד בתנאי הבטיחות המתאים לרכיבה על אופנו.

במקרה זה ניתן היה ליישב בין התייעות התרבותיות לדרישות החוק, אולם במקרים אחרים לא ניתן ליישב בין התייעות המתנגשות. לדוגמה, בעניין כללי שחיטה הומנית: במדינות מסוימות קיימת חקיקה המחייבת שחיטה הומנית של חיות על-מנת לצמצם את סבלן (כגון ההנחיה להם את החיים לפני הריגתן), אולם במדינות רבות מוענק פטור מכללי שחיטה אלו ליהודים ולמוסלמים השוחטים את החיים בהתאם לכללים הדתיים שלהם, המנוגדים לכללי השחיטה הומנית. מבקרים ליברליים של כללים דתיים אלו סבורים שעיל-מנת למנוע את סבלן של החיים, קבוצות דתיות אלו חיבות לשנות את הכליהן, אולם חברי הקבוצות הדתיות מסרבים לשונות שלכללים הללו חшибות מרכזיות בדתם. שלא כמו במקרה של חבישת הטורבן – במקרה של כללי השחיטה לא ניתן ליישב בין הכללים השונים ובין מערכות הערכים עליהם מתבססים.

מחלוקת נוספת הקשורה לרב-תרבותיות, ונדמה שהיא גם המפורסמת מכולן, היא "פרשת כיסוי הראש המסורתני" בצרפת: שתי אחות ממוצא צפון-אפריקאי הגיעו לביתה הספר כשל ראנן כיסוי ראש מסורתי (hijab). באותו בית-ספר ניתן בשנים קודמות פטור מלימודים לתלמידים יהודים ששירבו להגיע ללימודים ביום שישי אחר הצהרים

ובשבת בבוקר. והנה, במקרה של התלמידות המוסלמיות, מנהל בית-הספר התנגד שהתלמידות יישבו בכיתה כשלראשן כייסוי ראש, בטענה שהדבר מנוגד לעיקנון מרכזי הקובלע את חילוניותם של בת-הספר החרפתים. אותן סולידריות עם התלמידות, נערות מוסלמיות רבות בחרפת החליטו לכסות את ראשם וכייסוי הראש המסורתי, hijab.

בסופו של דבר הוחלט שתלמידות ותלמידים יוכלו לענוד בבית-הספר סמלים דתיים דיסקרטיים כמו צלב, אבל לא סמלים ראוותניים, ונקבע שה-hijab הוא אכן סמל דתי ראוותני. הביקורת כלפי החלטה זו של השלטונות הייתה, שהתייר לענוד צלב מצד אחד והאיסור לעוטות כייסוי ראש מצד שני, נתנים ביטוי לאפליה כלפי הדת המוסלמית. מנגד נטען טענות ולפיהן כייסוי הראש של נשים במטבחת הוא מנהג דתי המבטא את שעבודן של נשים בתרכות המוסלמית. בחלוקת זו ניצב מצד אחד העיקנון המקדש את חילוניותה של צרפת ומדיניותה הרשמית, שככל מי שrox להפוך לאזרוח צרפתית, חייב להיעשות חלק ממנה (בבית-הספר הוא אחד המנגנונים המרכזים להנחלת ערכי האזרוח החרפתית), ואילו מנגד ניצב העיקנון הנוגע לזכות של אנשים השוכבים לקבוצות מיעוט תרבותיות לשמר את זהותם הדתית.

דיממות דומות בהקשר של זכויות קבוצתיות עלות מעט לעת גם בהקשר הפוליטי, התרבותי והחינוכי בישראל. למשל, בפסק דין שנitin בשנת 2005, בעקבות עתירה מנהלית שהוגשה לבית-המשפט המחוזי בירושלים, עלתה השאלה המרכזית הבאה: האם יכולים תלמידים לדרש לקבל למוסד חינוכי של הקהילה החרדית, ומה מידת הביקורת שנייתן להפעיל על תנאי הקבלה של המוסד? או אם לנוכח השאלה בהקשר נורטטיבי רב יותר – כיצד יש לפטור את המתה בין עיקנון השווון לבין יכולתן של קהילות שלtout במוסדות חינוך קהילתיים שאינם תחת פיקוח?

העתירה לבית-המשפט הוגשה בשם שלושת ילדים משפחת אלקסלי, שהוריהם דרשו שילדיהם ישולבו במוסד החינוכי "תלמוד תורה ביתר עילית", מוסד המנוהל על ידי עמותה. משרד החינוך, אליו פנו ההורים, סבר ש מבחינה מעשית אין בכךו לחיב את בית-הספר לקבל את הילדים וכך סקרה גם עיריית ביתר עילית. יש לציין, משרד החינוך מממן את בית הספר ב-55% מכל התקציב שמקבלים מוסדות מלכתיים רשמיים.

ב"תלמוד תורה ביתר עילית" קיימים שני מסלולים. מסלול אחד כולל ילדים מבתים חסידיים וירושלמיים שפהט האידיש היא שפתם, ובכיתות שבהן הם לומדים כתובים ומדוברים אידיש ירושלמית. במסלול الآخر לומדים ילדים של חסידי חב"ד, אשר להם, לטענת מנהלי המוסד, מנהגים משיחיים שונים ומשוניים. הנהלת התלמידות תורה

סבירה שילדיו משפחתי אלקסלי הם ילדים מוחוננים, בעלי אמוןנות משליחות, המאמינים כי האדמו"ר מלובביטש הוא המלך המשיח – אמונה המונוגדת לאמוןתם הבסיסית של חברי הקבוצה החסידית הירושלמית. כמו כן, מנהלי בית-הספר, שצינוו שילדיו המשפחה מדברים עברית וains יודעים אידיש, הביעו נכונות לקלוט את ילדי משפחתי אלקסלי בבית-הספר אך רק בכיתות חב"ד – הצעה שנדחתה על ידי הורי הילדים. הנהלת התלמוד-תורה התקיימה להורים כל מי שייכים לכת משיחית, ולכן החלטה שלא ניתן יהיה לקבל את ילדיהם לבית-הספר, אלא אם ישנו את אורח תייהם והדבר יוכח לאחר תקופת צינון של שנה בתלמוד תורה אחר (עת"מ 1320/03 אלקסלי ואח' נ' עיריות ביתר עילית ואות').

היהדות בסכוסך המשפטי זהה שהתנהל בבית-המשפט המתויז בירושלים והענין שהוא מעורר נזקים מהօפן שבו התייחס אליו השופט בעו אוקון. הואבחן את הסכוסך לפי אמות-מידה נורמטטיביות כליליות, החורגות מפרשנות לשונית או תכליתית צרה של לשון החוק. השופט הציג את הדימויים הערכיות המרכזיות העולות מן הקונפליקט הדתי-תרבותי הקונקרטי, תוך התייחסות לספרות הפילוסופית העוסקת בדימויים של רב-תרבותיות, והגיע לפתרון משפטי של הסכוסך באמצעות איזון בין הערכים המתנגדים השונים. במסגרת הדיון כאן אתייחס רק לחלק מנימוקיו של השופט אוקון.

אחד מן השאלות המרכזיות שבוחן השופט נוגעת למגבלות שאוון יש להחיל על התארגנויות קהילתיות תרבותיות. לדעתו, לצד הענקת זכויות קבוצתיות ומימון ציבורי לקבוצות אתניות ומייניות לאומים, יש להבטיח לחברות ולהחברי קהילות אלו זכות יציאה ממשית. הוא כותב: "החופש לעזוב קבוצה אינו נקבע רק על-פי פתיחותה של התבראה הסובבת, אלא גם על-פי היכולות שאפשר לרכוש בתחום הקבוצה שימושיים אלה, יכולות הוללות את שוק העבודה ומעניקות להם הזדמנויות להשתלב באופן יצני בחברה". לדעתו, מסגרות חינוך קהילתיות נפרדות חייבות להבטיח את תירות הנידות של בני הקהילה.

בית-המשפט אימץ במקרה זה עמדה זהה לו של קימליקה: הוא העמיד במרכזו את ערך האוטונומיה, אולם הדגיש את האפשרות של בנות ובני הקהילה למש את זכות היציאה מן הקהילה התרבותית אשר לה הם שייכים כמרכיבי מרכיבי של ערך האוטונומיה. השופט כותב: "ילדים אינם קהיל שבי של הקהילה בה הם גדלים. על כן, צריך להבטיח את יכולת הנידות של התלמידים ולהקנות להם אמצעיavor להשתלב בחברה ולצאת מהקהילה. דרישת זו נובעת מה צורך להגן על האוטונומיה של האדם, ועל האוטונומיה של קטינים במיניהם".

זאת ועוד, לדעת השופט, יש להטיל דרישת נספת על התארגנויות קהילתיות, תרבותיות וחינוכיות נפרדות, והיא הדרישה לשווין. "השוון" – מצין השופט – "חייב להיות הן בתנאים של הקהילה מול הכלל או מול קהילות אחרות, הן בעצם תנאי החצטרפות אל הקהילה. מעבר לכל אלה, יש לבדוק תמיד את שמרית קווי-הגבול של הקהילה על בסיס מבט כללי, הנוגע לציבור בכללותו".

השופט אוקן לא הוציא במקורה זה צו המחייב את המוסד החינוכי לקלוט את בני משפטת אלקסלי בבית-הספר, מפני שההורם סיכלו את האפשרות לבחון את התאמת ילדיהם לבית-הספר, אולם הוא כותב שלאלא התנאות התורמים, "היהתי נוטה להתערב בהחלטות בית-הספר". עם זאת, הורה השופט לעומת המנהלת את בית-הספר להציג אמות-מידה ברורות הנוגעות לתוכניות הלימודים, לדרכי קבלת תלמידים ולדרכי בחינת ההתאמאה של תלמידים לתוכנית הלימודים. כמו כן, הורה למשרד החינוך להפעיל אמצעי פיקוח על הליכים אלו.

דילומות משפטיות דומות עלו השנה האחרון בהקשר של זכותם של מוסדות חינוך של הקהילה החרדית ליהנות מיום לימודים ארוך ומתוכניות הזונה של משרד החינוך. בשני עניינים אלו פסק בית-המשפט העליון – בפסק דין שעוררו מחלוקת ציבורית רחבה, כי תלמידים שאינם לומדים במסגרות החינוך הממלכתיות אינם זכאים ליהנות מיום לימודים ארוך ומתוכניות הזונה.

אחד המבקרים המרכזיים של התפיסה הרבי-תרבותית הוא הפילוסוף בריאן בררי (Barry, 2001). בררי סבור, שם קיימים טעם מוסריים האוסרים על פעילות מסוימת, טעםם אלו אינם ניתנים לביטול על ידי האמירה שהפעילות שבה מדובר היא חלק אינטגרלי של תרבותך. העובדה שאתה ואבותיך נהגים לבצע פעולה במשך שנים רבות אינה מצדיקה את המשכה של פעילות זו. "אם לבעלי עבדים בדורות ארצת-הברית הייתה נגשנות למלון האופנתי העכשווי", כותב בררי, "הם היו מסבירים שהתרבות שלהם כרוכה בקשר הדוק למוסד היהודי הזה, והם היו מוחים ומאשים את מתנגדיו העבדות בכך שהם אינם מעניקים להם הכרה" (Barry, 2001, p. 258). היותו של מנהג מסוים חלק מן התרבות שlk אין הצדיק דבר. יש תרבויות הרואות להערכה, ויש תרבויות הרואות לגנאי. הטענה שמנהג מסוים הוא חלק מתרבותך אינו טעם מוסרי עצמאי לתמיכה באותו מנהג. בררי מאשים את הדוגלים בגישה הרבי-תרבותית בפטישיזציה של התרבות.

קימליקה, שהתיאוריה שלו היא אחד ממושאי הביקורת של בררי, אינו סבור שככל פרקטיקה תרבותית היא כשלעצמה בעלת ערך. כאמור, דעתו היא כי החשיבות של

תרבות היא בתרומה לאוטונומיה ולשוויון. התפיסה הרבי-תרבותית של קימליקה היא אינסטורומנטלית, ולפיה כאשר מרכיבים מסוימים של תרבויות אינם תורמים לאוטונומיה ולשוויון, הם מבדים את הצדקתם ועל כן אין לשמרם. זכויות קבוציות מעניקות לקבוצות מיעוט תרבותיות הגנה מפני התערבות חיצונית, אבל גם על החלטותיה הפנימיות של קבוצות המיעוט יש להטיל מגבלות על מנת להבטיח את חירותיהם הבסיסיות הפרטימ השיכים לאותן קבוצות. לדעתו, קבוצות המגבילות את חירותיהם הבסיסיות ביותר של חברה שוללות את ההצדקה הבסיסית לקיומן כקבוצות – מתן אפשרות ליחיד לבצע בחירה אישית בעלת משמעות. ליברליזם פנימי, המטיל מגבלות על חוקיתן והחלטהן של קבוצות המיעוט, אינו עולה בקנה אחד עם קיומן של קבוצות פונדמנטיסטיות פוליטיות ודתיות, המתנגדות לצית לכל حقיקת הפגיעה לדעתם במנגיהם הדתיים, האסתטיים והמיןאים.

מצדי הרבי-תרבותיות, המנסים לבדוק את גישתם על בסיס ערכיהם ליברליים, מעלים טיעון נוסף, ולפיו אם הנחת יסוד מרכזיות של התפיסה הליברלית היא שכadam ראוי לכבוד, ואם אכן אנחנו מכירים בעובדה שהיחסים של בני-אדם נטוועים בתרבותם, אזוי התיחסות אליהם בכבוד משמעותה הענקת כבוד שווה לתרבותם ולדרך חייהם. נגד טענה זו טועןברי, שהבעיה היא כי תרבות לא-liberalיות מפרות את העיקנון הבסיסי של הענקת כבוד שווה לכל אחד. בכך מי שמחזיק בהנחה הייסוד הליברלית לגבי התיחסות בכבוד לכל אחד, אינו יכול לתמוך בתרבות המקדמת, למשל, אינטלקט של גברים ומפלות נשים, או נוהגות בפרקטיות אחרות הפגעות בעיקנון הליברלי הבסיסי של הזכות לכבוד, שעליו מסתמכים מצדדי הגישה הרבי-תרבותית. לדעתו שלברי, רבי-תרבותיות אינה מתיששת עם ערכי של משטר ליברלי.

אבישי מרגלית ומשה הלברטל מציעים במאמר "ливרליזם והזכות לתרבות" (1998) הצדקה עקרונית אחרת לתפיסה רבי-תרבותית, תוך התיחסות למציאות הישראלית. הם טוענים, כי לבני אדם יש זכות לתרבות שבה הם חיים. ההצדקה לזכות זו נובעת מן התפקיד המכרייע שיש לתרבות בעיצוב אישיותו של כל פרט. התרבות היא אורח חיים המקיים את כל היבטי החיים של בני-אדם. היא מגדרה את פעילויותיהם ואת מערכות היחסים שלהם ומעצבת את טעיהם ובחירותיהם. לטענתם, כל בני-אדם מיחסים ערך רב לזהות האישית שלהם, יכולת לשמרם לאורך זמן תכונות הנחשות בעיניהם ובעיני אחרים כתכונותיהם המרכזיות. התרבות הייחודית של פרטם היא בסיס לפיתוח המרכיבים של זהות האישית. הם דנים בשתי קבוצות מיוחדות בחברה בישראל, הקבוצה החרדית והקבוצה הערבית-פלסטינית, והם מציינים, כי בתרבות החרדית, היהו של אדם תלמיד-חכם היא מרכיב בויהי האישיות של הפרט בחברתו, ואילו עבר ערבישראל, השימוש בערבית כלשון דיבור היא מרכיב מרכזי בכינון זהות האישית שלהם.

לדעתם, קבוצות מיעוט כמו שטי אלון, החרדית והערבית, שאוthon הם מגדירים כמייעוטים שתרבותיהם אינן ליברליות, ראויות לייחנות מן הזכות לתרבות. זכות זו כוללת שלוש רמות: הרמה הראשונה היא הזכות לקיים את אורח חיים ללא הפרעה. הרמה השנייה מוסיפה לרמה הראשונה את הזכות להכרה מצד החברה הכלכלית, למשל עליידי ייזוג הולם של תרבויות המיעוט במרקחים ציבוריים, כמו בשיח הציבורית בתקשורת. שתי הרמות הראשונות עלות בקנה אחד עם היחס של תפיסות ליברליות לרבי-תרבותיות. אולם לשתי הרמות הללו מצרפים מרגלית וhalbרטל רמה שלישית, החורגת מן העקרונות הליברליים: הזכות לקבל תמיכה באורת החיים שלהם על-מנת שתרבויות תוכל לשגשג. ביחס לקבוצת המיעוט החרדית, המשמעות המעשית היא תמיכה כספית במוסדות תורניים, שם המרכז התרבותי של הקהילה, ובתלמידי חכמים. בעוד תרבויות הרוב הדומיננטית מסוגלת לדאוג לעצמה, תרבויות מיעוט זוקקות לסייע על-מנת לשרוד ולשגשג. לדעתם, עובדה זו מחייבת את המדינה הניטרלית להישאר ניטרלית ביחס לתרבות הרוב, ובעת ובזונה אחת לנוכח את העמדה הניטרלית ולתמכה בתרבותיות מיעוטים לא-liberalities, הפוגעות בחירות הפרט, כמו הקהילה החרדית שבאה כל האספקטים המרכזיים בהיהם האישים של אנשי הקהילה נשאלים על-ידי מוסדותיה וככליה. הטיעון הליברלי של מרגלית וhalbартל בנוגע לזכות לתרבות נשען על תרומה של התרבות המוסמכת לאינטרסים החינויים של הפרט. لكنם סבורים כי יש לאפשר לפרט זכות יציאה מן הקהילה שאליה הוא שייך; ככלומר, לקהילה החרדית אין זכות לכפות על חבריה להישאר בקהילה – היא חייבת לאפשר להם לעזוב אותה, אם רצונם בכך.

ביקורת מרכזיות נוספת נספה נגד תפיסות כשל קימליקה, מרגלית וhalbартל ותיאוריות רב-תרבותיות אחרות בהקשר זה היא הביקורת הפמיניסטית. לפי אחת מן הטענות הפמיניסטיות המרכזיות נגד הגישה הרכבתית, הענקת זכויות קבוציות לקהילות תרבותיות ודתיות מעניקה הגנה לקבוצות המפלות ופוגעות בזכויות ובאינטרסים חינויים של נשים. הפילוסופית סוזן אוקין (Okin), מן המבקרות הפמיניסטיות החשובות של הרב-תרבותיות, יוצאת נגד הניסיון של הוגים ליברליים כקימליקה, מרגלית וhalbартל ואחרים להצדיק רב-תרבותיות בטיעונים ליברליים המעידים במרקם את חירותו ורוחתו של הפרט (Okin, 1999).

אוקין טוענת, כי טיעונים מן הסוג שמציגים קימליקה, מרגלית וhalbартל, המבוססים על הטענה שהפרט זוקק "לתרבות مثل עצמו/עצמה" לפיתוח הערכה עצמית ומחשבה עצמאית על-מנת לבחור באורת החיים המתאים לו, נוטים להתעלם מהיבטים מרכזיים של התרבותיות המסורתית אשר להגנתן הם יוצאים. הם מתעלמים מן הבית ומן המשפחה,

שם המקומות המרכזים שבהם מעוצבת אישיותם של חברי הקהילה. הבית, טענת אוקין, הוא המקום העיקרי שבו מונחים התרבות, הערכים והמסורת, אלה המועברים מדור לדור. הבית הוא התחום שבו נקבעים הכללים והתקנות של חיי הכלל והפרט, אלא שהבית והמשפחה, שמנקודת המבט הליברלי שיערים לתוך הפרט ולא לתוך הציבור, הם גם מקומות שבהם מתקיימים אידיושוין והגבלה חירויות.

המשמעות של עקרון הצדקה השימור של אורח חיים ותרבות – כפי שטענים מרגלית ולברטל – בשם הזכות להזות אישית, באה לידי ביטוי בחברה החרדית בטיפוחם של גברים כתלמידי חכמים. תפיקן של הנשים בחברה החרדית הוא לאפשר את מימוש המטרת החברתית זו. מכאן נובע, טענת אוקין, המבקרת באופן ישיר את גישתם של מרגלית ולברטל, שטיפוח הזהות האישית של נשים בחברה החרדית שלויל לחלוין. "מה יעלה בגורלה של ילדה שנולדה לתרבות זו והיא מעוניינת למדוד לימודי קודש? מה גורלה של אישة בחברה החרדית שאיננה אוחבת ילדים, ואינה מעוניינת לסתת אותן ולגדלם? איזו אישיות היא תוכל לפתח, אם נגור עליה להשתייך למעמד משני בחברה שאיתרעה מולה להיוולד בה?" מבקשת אוקין (Okin, 1998). איך אפשר לטען – כך היא שואלת – שהותות שלתן מתוחזקת בתרבות שמדכאת אותן במהלך כל חייה?

רוב התרבות, טענת אוקין, רואות בשליטת הגברים בנשים את אחד מייעדיهن המרכזיים. מטעם זה, תרבויות רבות עוסקות בתחום של חיי האישות, שבו המיעוט התרבותי נהנה שליטה מוחלטת בנושאים דוגמת חוקי הנישואין והגירושין, החזקת ילדים, חלוקת רכוש המשפחה ודיני ירושה. רוב הדוגמאות לפקחת פטור על ידי קבוצות תרבותיות מהחלת חוקי המדינה עליהם, עניין באידיושוין בין המינים: נישואים, נישואין כפויים, מערכות גירושין המKEEP נשים, ריבוי נשים ומילת נשים.

הדרישה לפטור מדרישות של שוויון ותירות מתקיימת לא רק במישור הלאומי, אלא גם במישור הבינלאומי, שבו קיימים ניסיון להחיל נורמות אוניברסליות של זכויות אדם. קבוצות אתניות מקומיות, אשר להן חוקים ומנהגים הפוגעים בזכויותיהם של נשים, מתנגדות להחלתן של זכויות אדם אוניברסליות.

טענת אוקין, מרגלית ולברטל אינם יכולים לבסס את זכויותיהן של קבוצות לא-LIBERLIOT על טיעונים LIBERLIOT. במקרים שבהם תרבויות מיעוט מקיימות מערכת חיים פטריארכלית, ורבות מקבוצות אלו אכן מקיימות מערכות כאלו, הענקת זכויות קבוצתיות לאותם מיעוטים אינה מגדילה בהכרח את חירותיהן של נשים.

התנגדות נוספת של בריאן ברி, אשר לה שותפים רבים ממבקרי התרבות-תרבותיות משמאלי, היא, שרב-תרבותיות יוצרת פוליטיקה של הכרה (recognition), הפוגעת בפוליטיקה של חלוקה (distribution). על-מנת לקדם עקרונות של צדק חברתי – טוענים המבקרים משמאלי – יש צורך בסolidarities חברתיות, המתבטאת בהכרה במטרות וב价值观ים משותפים. אולם פוליטיקה של רב-תרבותיות היא פוליטיקה סקטוריאלית, הגורמת לפיצול ולמחלקות בין קבוצות חברתיות שונות המבוססות על זהויות תרבותית שונות. לטענת המבקרים, התפיסה התרבותית-תרבותית שוגה במרקם רבים בויהי העול. לעיתים קרובות, סבלם של אנשים השיכים לקבוצות מייעות תרבותיות איננו נובע מזוחותם התרבותית, אלא מן העובדה שהם אינם זוכים להזדמנויות שווות במערכת החינוך או בשוק העבודה, אינם זוכים לשכר ראוי שאמור לאפשר להם למש את צורכיהם הבסיסיים, ונמנעת מהם הזכות להשתתף באופן אפקטיבי בחיים הכלכליים, החברתיים והפוליטיים. הגורם המרכזי לכך אינו זהותם התרבותית. ההתקדמות של הגישה התרבותית-תרבותית זהות גורמת להזנחה המאבק בגורםים הסיבתיים האמיטיים לאי-שוויון חברתי וככלילי ולעוני בחברה כפיטליסטית. רב-תרבותיות – הם טוענים – מתרכות במאבקים שליליים בתחום הייזוג התרבותי הסימבולי וזונחת כך את האינטנסים החברתיים והכלכליים של אלה שעיליהם היא מתימרת להגן.

במאמר שפרסמו קית בנטינג, רוברט ג'ונסטון וויל קימליקה (Banting, Johnston and Kymlicka, 2006), הם בחנו באופן אמפירי את השאלה האם אכן יש הבדל במדינות הרווחה בין מדינות שנקבעו מידי נסיבות רב-תרבותית רחבה כלפי מייעוטים, קבוצות ילדיות וקבוצות מהגרים, לבין מדינות שלא נקבעו מידי נסיבות רב-תרבותית ממשמעותית. תקופה המחקר שלהם השתרכה בין שנת 1980 לסוף שנות התשעים. את השינויים במדינות הרווחה הם בחנו על-פי ארבעה מרכיבים: 1. הוצאות חברתיות כחלק מהתקציב הלאומי הגולמי, 2. ממד חלוקת הכנסות כפי שהוא בא לידי ביטוי במדינות מסוימות והעברות. 3. שיעור העוני בקרב ילדים. 4. שיעור אי-השוויון בהכנסות. מסקנת המחקר שלהם היא שאין קשר סיבתי בין אימוץ מדיניות רב-תרבותית לבין היחסות המדינית הרווחה. כך, למשל, הם מצבאים על העובדה שקנדאה ואוסטרליה הנחשות המדיניות רווחה, הן מדינות הנקבעו מידי נסיבות רב-תרבותית ממשמעותית, בעוד מדינות חברית ובריטניה שאינן נקבעו מידי נסיבות רב-תרבותית ממשמעותית, אין מקרים מדיניות רווחה. בKİצ'ר, מסקנת בנטינג, ג'ונסטון וקימליקה היא שאין קשר בין אימוץ מדיניות רב-תרבותיות לבין קידום מדיניות רווחה. הפילוסופית האמריקאית, ננסי פריזר (Fraser), יוצאת נגד הפרדה בין פוליטיקה תרבותית של הכרה לפוליטיקה חברית כלכלית של חלוקת משאבים חברתיים וככלילים. היא סבורה, כי תיאוריה מקיפה וראויה של צדק צריכה לכלול הן מרכיבים תרבותיים של הכרה והן מרכיבים חברתיים וככלילים של חלוקה. פריזר, שנקודת המוצא שלה היא אמפירית – נובעת

מהתבוננות במתරחש בעולם החברתי, הכלכלי התרבותי והפוליטי – מבחינה בשתי קטגוריות של אי-צדק. אי-צדק אחד הוא אי-צדק חלוקתי – מקורו בגורמים חברתיים וככלכליים. אי-צדק זה בא לידי ביטוי בניצולם של עובדים שפירות עבודתם נלקחים מהם לטבות אחרים, בשילוח כלכלי של עובדות ועובדים המועסקים בתעסוקה נעדרת זכויות ובKİפה השולל מהם אמצעי קיום בסיסיים. אי-הצדק الآخر מקורו בהיעדר הכרה, לדוגמה, כאשר זהותנו וזו של אלה החברים בקבוצת התרבותית אשר לה אני שיך, אינה זוכה לייצוג במוסדות העוסקים בייצוג, כגון כל התקשורת או מערכת החינוך, או כאשר המוסדות הללו וכן אורותם רבים מתייחסים אלינו בחוסר כבוד ומשפילים אותנו בשל זהותנו, או כאשר זהותנו ותרבותנו זוכות למעמד שלילי בחברה ולפרשנות עונית ומשפילה מצד מוסדות תרבותיים וחינוכיים, או יניתן לומר כי זהותנו גורם אי-צדק הכרתי (Fraser and Honneth, 2003).

באופן אנלטי שתי הגישות הללו, החלוקתית והכרתית, מתיחסות לקובלקטיבים שונים, ועקרונות הצדקה שלهن חלים על האנשים השivicים לשני הקובלקטיבים הללו. הגישה החלוקתית מתיחסת למעמדות חברתיים המוגדרים על-פי מאפיינים כלכליים, ואילו הגישה ההכרתית מתיחסת לקבוצות שאין זוכות להכרה. אמנם, קבוצות חברתיות מסוימות סובלות בעיקר מא-צדק חלוקתי. למשל, עניים השivicים לקבוצת הרוב הלטן בארץות-הברית סובלים מא-צדק חלוקתי. קבוצות אחרות, לעומת זאת, יכולות לסבול מא-צדק שהוא בעיקר אי-צדק הכרתי. הומוסקסואלים ולסביות סובלים מא-הכרה במיניותם ובאורח חייהם. ישנן קבוצות שסובלות הן מא-צדק חלוקתי והן מא-צדק הכרתי. לדוגמה, נשים סובלות הן מעוני וניצול כלכלי והן מחוסר הכרה שבא לידי ביטוי, בין היתר, בייצוגים משפילים של נשים. לטענת פריזר, גם קבוצות שנדרמה שהן סובלות מא-צדק חידמי, ככלומר רק הכרתי או רק חלוקתי, בבחינה מדוקדקת יותר נגלה כי הן סובלות מא-צדק גם בממד الآخر. עניים, למשל, הנראים לקבוצה הסובלות לכואורה אך ורק מא-צדק כלכלי, סובלים לדעתה גם מא-צדק הכרתי, שבא לידי ביטוי בייצוגים תרבותיים משפילים שלהם בדיון הציבורי. במדינות לא מעטות, וגם בישראל, מוצגים העניים לעיתים כאנשי מותאמים מספק על-ימנת להיחלץ ממצבם, כתפילים חברתיים הנוהנים מן הגלומות שמעניקה להם מדינת הרווחה – גמלאות המומוניות מכספה של אורותים יצירוניים. לדעת פריזר, בבחינה מעמיקה ומדוקדקת אפשר לגלוות, שבכל תופעה של אי-צדק חברתי קיימים הן ממד מעידי והן ממד תרבותי. בחלק מהן אי-הצדק של הממד ההכרתי יהיה דומיננטי, לדוגמה – במקרים של אפליה על רקע נטיה מינית, ובחלק אחר אי-הצדק החלוקתי יהיה הממד המרconi, כמו במקרה של עוני בקרב אורותים השivicים לקבוצת הרוב הדומיננטית. בחלק מגילויי אי-הצדק, שני הממדים יהיו נוכחים במידה שווה, כמו במקרים של אפלית נשים או אפלית מיעוטים על רקע גזע. לבן, מדיניות שטרתת להיאבק בא-צדק צריכה להביא

בחשבון את שני הממדים ולהבטיח שתיקון איז'צדק במדד אחד לא יגרום לאי-צדק במדד الآخر. אם נחזור לדוגמת הסיווע הכלכלי לעניים באמצעות גמלאות, יש לבחון האם מדיניות כזו, שהיא מדיניות של צדק חלוקתי, לא תהיה מלאה בהשלמה ויצירת תיוג שלילי לקבוצת הנזקקים העניים, כלומר, להבטיח שתיקון איז'הצדך החלוקתי לא יגרום לאי-צדק הכרתי.

עבור פרียור חלוקה והכרה, כלכלה ותרבות, אינם תחומי נפרדים, אלא שתי נקודות מבט אנלטיות שבאמצעותן ניתן לנתח תופעות חברתיות. היא מכנה את גישת "Perspectival Dualism". כך, למשל, אפשר לבחון מדיניות חלוקה של משאבים כלכליים, כפי שהיא באה לידי ביטוי בתקציב המדינה, באמצעות נקודות המבט הכלכלי, ו לבחון באמצעות ניתוח מגדרי של התקציב כיצד סדר העדיפויות התקציבי משפייע על מעמדן החברתי של נשים. אפשר גם להשתמש בנקודת המבט החלוקתית על מנת לבחון את ההשלכות הכלכלליות של אי-צדק הכרתי, שבא לידי ביטוי, למשל, בחוסר הכרה במעמדם של הומוסקסואלים ולסביות קבוצת חברתייה בעלת מעמד שווה.

בכתבה המאוחרת מציגה פרียור, בנוסף למדי ההכרה והחלוקה, מדד שלישי של צדק ואי-צדק – המדד הפוליטי. מדד זה מתייחס להיותם של אנשים שותפים שווים בחיים הפוליטיים. לדעת פרียור, על מנת למש צדק פוליטי יש להסיר את כל המכשולים למיומו. בזונה של מדד זה צריכה להתייחס למחסומים המונעים השתתפות פוליטית, מכשולים בהדרה ובדיקה לשולטים פוליטיים שונים. לדעתה, דמוקרטייזציה של החיים הקולקטיביים, כלומר, הענקת שליטה אפקטיבית לאזרחים על-מנת שיוכלו לעצב את חיים כאזרחים שווים ואוטונומיים, היא הדרך להיאבק בהדרה ובשוליות פוליטיות.

חברה צודקת חייבת להעמיד במרקזה את עקרון ההשתתפות השווה (of participation). עיקרונו זה מהיבב הסדרים חברתיים שיאפשרו לאנשים לפעול יחד, חברות וחברים שווים מעמד בקהילה פוליטית, חברתית, כלכלית ותרבותית יישום עיקרונו זה מהיבב את מימושם של שני תנאים מרכזיים, האחד אובייקטיבי והآخر בין-סובייקטיבי. התנאי האובייקטיבי מתייחס לחלוקת משאבים חברתיים וכלכליים וקובע שחלוקת המשאבים צריכה לאפשר לאנשים לחיות חיים עצמאיים ולהשתתף באופן שווה בחיים הקולקטיביים. התנאי הבין-סובייקטיבי מתייחס להכרה, והוא מהיבב מיסוד ערכים תרבותיים באופן שיבתו יחס שווה לכל האזרחים ויונקו להם הזדמנויות שווה להציג הכרה חברתית.

כיצד עוברים מאי-צדק לצדך? פרייזר מבחינה בין שתי אסטרטגיות למאבק בא-צדך חלוקתי והכרתי: צדק משמר (affirmative justice) וצדק משנה (transformative justice). צדק משמר כולל מדיניות וצעדים שמטרתם לשפר מצבות תרבותית וככללית בלבתי צודקת. כזו היא מדיניות רבת-תרבותית בתחום החינוך, שמטרתה הסרת דימויים סטריאוטיפיים של קבוצות מייעוט בחומרה לימוד. המדיניות הזאת היא ביטוי לצדק משמר בתחום ההכרה. העלאת גובה דמי האבטלה שמקבלים מובטלים תהיה מדיניות של צדק משמר חלוקתי במדינת רוחה ליברלית. בעוד צדק משמר מיועד לנסות לשפר את תוכנות הבלתי צודקות של מדיניות, מטרתו של צדק משנה, לעומת זאת, היא לשנות את הגורמים המרכזיים היוצרים מדיניות ותוכנות בלבתי צודקות. לדוגמה, בתחום החלוקתי, מדינה ליברלית שפועלת על-פי תפיסת הצדק המשמר תנסה את מערכ הקצbowות על מנת להטיב את מצבם של אלה הנמצאים בתחום הסולם החברתי כלכלי. לעומת זאת, תפיסת הצדק המשמר תנסה לשנות את המשטר הכלכלי וממבנה קפיטליסטי למשטר סוציאליסטי, שבו דפוסי חלוקת העבודה, המשטר הכלכלי ובנה קבלת החלטות הכלכליות, שיופיע דמוקרטי, יהיו שונים באופן דרמטי. באופן דומה, בתחום ההכרה, בעוד תפיסה של צדק משמר תקדם מדיניות שתנסה לבטא יחס שווה להזויות התרבותיות השונות בחברה, הרי תפיסה של צדק משנה תנסה לשנות את היררכיות הזהויות הקיימת ולהביא לשינוי זהויות עצמן, כפי שהדבר בא לידי ביטוי, לדעת פרייזר, בפוליטיקת הזהויות הקווירית, היוזאת נגד הגישה המבוססת על הפרדה בין הזותות המיניות הגברית לבין המינית הנשית.

כמו בィקורת הועלו כלפי התיאוריה של פרייזר. בィקורת מרכזית אחת יוצאת נגד הפרדה שהיא יוצרת בין התחומי ההכרתי-תרבותי מצד אחד לבין התחום החלוקתי-כלכלי מצד שני. איריס יאנג (Young, 1997) וג'ודית בטלר (Butler, 1998) מצביעות על קיום קשר סיבתי בין שני התחומים. לדוגמה, לתיגז וחס משפיל כלפי אנשים בעלי זהות חריגה יש השלכות בתחום החלוקתי-כלכלי לגבי אותם אנשים. אנשים בעלי זהות מינית חריגה אינם זוכים לשירותים בריאותיים שווים וראויים או להגנה משפטית שתגן על ביטחונם האישני. באותו אופן, צדק חלוקתי שבא לידי ביטוי בנסיבות לא-מצוים כלכליים יכול לסייע לקבוצה לשמור את זהותה התרבותית. מדינת הרווחה אינה עוסקת רק בחלוקת משאבים, אלא יש לה גם תפקיד חשוב בעיצוב זהותם של האזרחים.

ביקורת אחרת מעלה אקסל הונט (Fraser and Honneth, 2003) פילוסוף גרמני שאטו מנהלת ננסי פרייזר דיאלוג על סוגיות זהות ומעמד בספרם המשותף *Redistribution or Recognition*

נקבע על-ידי שיכותו למעמד מסוים, הרי במשמעות הכלכלי הכספי נקבע ערכו של אדם על-פי הישגיו בשוק העבודה, אלא שקיימת מחלוקת לגבי מה נחשב לעבודה בעלת ערך ולהישג. לדוגמה, מאבקים חברותיים חלוקתיים במשמעות הכספי, כמו מאבקים פמיניסטיים להכרה בעבודות הבית ולגידול הילדים כעבודה בעלת ערך, הם בסיסם מאבקים הכרתתיים. לכן, בניגוד לחלוקת של פריזר, הוא סבור שמאבקים חברותיים לחלוקת משאבים כלכליים אינם אלא מאבקים להכרה.

בריגהאוז (Brighouse, 2004) מותח ביקורת מסווג אחר על פוליטיקת ההכרה של פריזר, שתכליתה המוסרית היא לצור הסדרים מוסדיים תרבותיים שיבתו יחס שווה של כבוד לאורחות החיים, האמננות והערכיהם של כלל אנשי החברה. טענת בריגהאוז היא, שהתכלית המוסרית לפि פריזר אינה יכולה לשמש בסיס לתפיסה כוללת של צדק בחברה פלורליסטית וديمقרטית. הוא טוען כי ניסיון מצד המדינה ומוסדותיה ליישם את תפיסת הצדק ההכרתי תהיה בו כפיה על קבוצות חברותיות שאמנותיהן וערכיהן שונים מ תפיסת הצדק ההכרתי שבה דוגמת פריזר. לדוגמה, על אנשים השוכנים לקבוצות מיעוט דתי, המזוקים, בין השאר, באמונה שהומוסקסואליות היא חטא מוסרי, או באמונה שתפקידן של נשים במשפחה הוא לשאת בעבודות הבית ולגדל ילדים, אין זה רצוי לכפות את עקרונות הצדק ההכרתי של פריזר. אם עקרונות צדק בחברה דמוקרטית ופלורליסטית אמורים להיות ניתנים להזדהה עבור קבוצות שונות בחברה, קבוצות שלעיתים קרובות מחזיקות באמנות ובערכים מתנגדים, הרי כפיה של מערכת ערכים אחת – כמו זו המגולמת בתפיסת הצדק של פריזר – על קבוצות אנטיליברליות, המחזיקות בתפיסות טוב אחרות, עלולה לפגוע בלביתימציה של השלטון בענייני קבוצות אלו ובאפשרות העקרונית לכונן תפיסה של צדק חברתי המשותפת לכל אנשי החברה.

## 134 תיאוריות של צדק חברתי

## פרק ט צדק גלובלי

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אי-השוון בין מדינות שונות בעולם הולך ותרחב, ומספר האנשים החיים בעוני ומחסור הוא עצום, והולך וגדל. בשנת 2001, קרוב למחצית מאוכלוסיית העולם היה על סכום של פחות משני דולר ליום. יותר ממיליארד בני אדם חיים בתנאי עוני קיצוני, על פחות מדולר אחד ליום. על-פי חישוביו של הפילוסוף תומס פוגה (Pogge, 2002), חצי מאוכלוסיית העולם היה על הכנסת הרבה יותר נמוכה מזו של התושבים העניים ביותר החיים במדינות העשירות. לשם השוואת, בארצות הברית קיימים 350,000 משקי בית שהונם עולה על עשרה מיליון דולר. התנאים הקשים הללו של עוני קיצוני גורמים לכך שבכל שנה מותים 18 מיליון בני אדם בטרם עת, ו-50 אלף בני אדם מותים מדי יום, מתוכם 34,000 ילדים מתחת לגיל חמוץ. מספר זה של ילדים הוא שליש ממספר האנשים שמתים מדי שנה.

המחשה דרמטית למספר הילדים שמתים מדי יום בשל תנאי עוני קיצוני ניתן למצוא בדי"ח של ארגון הבריאות העולמי. שם נכתב ש"כל 15 שנים מת ילד, או עשרים מטוסי ג'מבו מלאים ילדים מתרסקים מדי יום" (Mandel, 2006, p. 103). על-פי נתוני הארגון לשנת 2002, בערך ארבעה מיליון ילדים אנסים סובלם מששלול כל שנה, 2.2 מיליון מהם מותים כתוצאה מכך, רוכם ילדים מתחת גיל חמוץ. תוחלת החיים של אדם שנולד באחת מן המדינות העשירות היא 77 שנים, בעוד תוחלת החיים של מי שנולד במדינות עניות מותיר אותו חסר יכולת וחסרי אמצעים להתחזק בפני אסונות טבע בהוריקנים, רעידות אדמה ובצורת, והם הקורבנות העיקריים של אסונות אלה. עוני ותנאי מחסור קשים גם אינם אפשריים לאנשים אלה להתגונן בפני ניצול כלכלי ודיכוי פוליטי.

אי-השוון הקיימים בין מדינות שונות בעולם בא לידי ביטוי, בין היתר, בפערים עצומים בתוצר הלאומי. למשל, בשנת 1989, מtower תוצר עולמי כולל של 18 טריליאון דולר, התוצר הלאומי של שתי המדינות העשירות ביותר, יפן וארצות הברית, היהו 45% מסכום זה (8.2 טריליאן), בעוד התוצר הלאומי הגלומי של ארבעים וארבע מדינות הפחות מפותחות הוא פחות מ-0.6% מהtower העולמי. השוואה בין אי-השוון הקיימים בתוך מדינות לבין אי-השוון הקיימים בין מדינות מגלה, שאי-השוון בין מדינות הוא גבוהה הרבה יותר מאשר אי-השוון בתוך מדינות. משקלו של אי-השוון בין אנשים החיים באותו מדינה קטן יחסית לאי-השוון השorder בין אנשים החיים במדינות שונות. אם היו ממצאים לחוטין את אי-השוון התוך-מדינת, עדין 70% מאי-השוון הגלובלי היה נותר בעינו.

אל מול תמונה עגומה זו עולה ספק, האם לנוכח אי-השוון העצום כל כך ניתן בכלל לשנות במידה משמעותית מציאות זו. כיוון שצדדים משמעותיים לצמצום אי-השוון בין מדינות יחייבו ירידת דרסטי ו שינוי קיצוני באורח חיים וברמת חיים של אנשים החיים במדינות העשירות, קיים ספק לגבי האפשרות לבצעם. אולם תוצאות מעין אלו, אין מבאות בחשבון, שעבור חלק גדול מהאנשים הסובלים מעוני חמור וקיצוני זה, גם תוספת קטנה להכנסתם ולנכיסיהם תגרום לשיפור משמעותי בתנאי החיים. על-פי הדוח לפיתוח אנושי של האו"ם, העברה של רק 4% מעוררם של 225 האנשים העשירים ביותר בעולם תספק לאשפכת חינוך ושירותי בריאות בסיסיים לכלם, ובעיקר לנשים, תזונה, מים ושירותי סניותיה לכל. לטענתו של תומאס פוגני, "העברה של 1% מההכנסה הכלכלית הגלובלית מהמדינות העשירות למדינות העניות תגרום לחיסולו של עוני קיצוני בעולם כולו" (Pogge, 2002). אף שההעברות חד-פעמיות לא יפתרו את בעיית העוני לחוטין, הנתונים הללו מצביעים על כך שאין צורך בשינוי דרסטי באורח חיים של תושבי המדינות העשירות על-מנת לצמצם במידה משמעותית את מדי העוני ואי-השוון בעולם.

אולם לפני שנבחן את הצעות לצמצום העוני ואי-השוון, יש להסביר על מספר שאלות עקרוניות: האם ניתן להגדיר אי-השוון כלכלי בין מדינות כבלתי צודק? האם מופתלת علينا חובה לסייע לאנשים החיים במדינות רחוקות אחרות, ורק שכלל אין אנו מכירים? האם כאשר בוחנים אי-השוון, יש להתייחס לאי-השוון בין מדינות או שמא יש להתייחס רק לאי-השוון בין היחידים החיים באותה מדינה?

עד לפני זמן לא רב, פילוסופים מדיניים העוסקים בשאלות של צדק חברתי יצאו מתוך הנחה, שימוש עקרונות הצדק הוא המדינה. על-פי גישה מסורתית זו, חבות הנגורות מעקרונות צדק חלוקתי אמורות לחול על אנשים השוכנים אותה מדינה או אותו

לאום, והן אינן אמורות לחול באופן גלובלי. בשנים האחרונות רבים ה考לות המערעררים על הנחה זו ומעלים שאלות לגבי היקף החולות של עקרונות הצדק (scope of justice) – שאלות בנוגע לישיותם של עקרונות הצדקה, בנוגע לבעלי הזכות לקבל את הטוביין הכלכליים וללאה שעיליהם מוטלת החובה לחלק את המשאבים הכלכליים והחברתיים – מושאי החלוקת האם אלו ייחדים, מדינות או עמים?).

בפרק זה אציג ארבע תשובות שונות לשאלת האם עקרונות צדק חלוקתי החלים בתחום מדינות צריכים לחול גם באופן גלובלי, אם בין מדינות, בין עמים או ייחדים שאינם משתיכים לאוותה מסגרת פוליטית או לאותו לאום.

הגישה הראשונה שהיא אדון מכונה העמדה הריאליתית. מקורה של עמדה זו בתיאוריות של יחסים בין-לאומיים. קשה להגדיר במדויק את העמדה הריאליתית, אולם אפשר לומר באופן כללי כי על-פי עמדה זו שיקולים מוסריים צריכים להיות מוגבלים בתחום הפוליטי הפנימי ולא ליחסים בין מדינות. יחסיים בין-לאומיים, מדיניות אינן נוגאות על-פי כללי מוסר, אלא נוטות למשמש את האינטרסים העצמיים שלן, בעיקר באמצעות הגדלת עצמן. קיימת מחלוקת לגבי השאלה, האם העמדה הריאליתית היא בוגדר טעונה דסקרייפטיבית, כלומר, היא מתארת באופן אמפירי את התנהגותן של מדיניות, או שמא זו עמדה נורמטיבית, הקובעת שלאן הרואיו שתחול על מדיניות חובה לקדם עקרונות צדק גלובלי, וחובתן המוסרית העיקרית היא לנסות לקדם ככל האפשר את האינטרסים של עצמן.

קריאה מדוקדקת של טענות ריאלייטיות מרכזיות מגלה שהעמדה הריאליתית כוללת גם מרכיבים תיאוריים וגם מרכיבים נורמטיביים. העמדה הריאליתית אינה מסתפקת בתיאור התנהגותן של מדינות ביחסיהן עם מדינות אחרות, התנהגות המאופיינת אך ורק במימוש האינטרסים העצמיים של המדינה, אלא גם קובעת שהמחויבות המוסרית של מדינות היא אך ורק לקדם את האינטרסים העצמיים שלן באמצעות הגדלת עצמן, ללא התחשבות באינטרסים של מדינות אחרות ובشكولي צדק.

על-עדת הריאליתית יש מסורת ארוכה. אחד מן הריאלייטים המוקדמים היה הוגה המפורסם ליד פירנצה, ניקולו מקיאוולי (Machiavelli, 1527-1469). בספרו הניסיך מייעץ מקיאוולי לשלית להימנע מהתנהגות מוסרית למען קידום האינטרסים העצמיים שלו, אף שהוא לא Ziel לחולטן בשיקולים מוסריים ואף סבר שלמען קידום מטרתו נדרש השולט להציג מצג-שוווא כאילו הוא פועל מטעמים מוסריים (מקיאוולי, 2003). בתקופה המודרנית, אחד החוקרים המזוהים ביותר עם התפיסה הריאליתית הוא איש

מדע המדינה האמריקאי הנש מורגנטאו. אולם נדמה שגם מורגנטאו ניתן להבחן בעמدة דו-משמעות כלפי הכללתם של שיקולים מוסריים במדיניות חוץ. מצד אחד, הוא סבר שתחום היחסים הבין-לאומיים הוא תחום אוטונומי, הנשלט על-ידי כללים משלהו, כללים משוללי תוכן מוסרי. אולם מצד שני, הוא כתב כי "יש לזכור תמיד שאין זה רק הכרח פוליטי, אלא גם חובה מוסרית, כלל מנהה וכוכב המורה את הדרך ביחסיה של כל מדינה עם מדינות אחרות, קובע שהיא צריכה למש את האינטראס הלאומי שלה". (Caney, 2006, p. 8).

אחד הטיעונים המרכזיים של התומכים בגישה הריאליתית, לפיו מדיניות צדירות למש את האינטראסים העצמיים שלhn בלי להתחשב בשיקולים מוסריים, מבוסס על תמונה עולם שתיאר הפילוסוף האנגלי, תומאס הובס, באמצעות המאה ה-17 בספריו הדוע לויתן. על-פי תורת האמנה החברתית של הובס, במצב הטבעי, מצב המאופיין, בין היתר, בהיעדר רשות שלטונית מרכזיות חזקה שיכולה לאכוף את כלליה, אין שום סיבה שייחדים יティלו על עצם מגבלות במימוש האינטראסים העצמיים שלהם. במצב הטבעי "לכל אדם יש זכות לכל דבר, אפילו לגופו של הזולתו" (הובס, 1962, עמ' 120). במצב הטבעי, הטלת מגבלות מוסריות על עצמי באופן חד-צדדי הוא צעד בלתי רציוני, כיוון שהטלת מגבלות כאלו תhapeק אותו לטרפּ קל.

חלק מהמצדדים בעמدة הריאליתית סבורים, שתחום היחסים הבין-לאומיים בין מדינות אכן מקביל במצב הטבעי שלו תיאר הובס, מצב שבו לא קיימת רשות שלטונית מרכזית בעלת עצמה, שיכולה לכפות את החוק. במקרה כזו יהיה זה בלתי רציוני עברור מדינות לרسن את עצמן ולהימנע מלמש ככל האפשר את האינטראסים הלאומיים שלhn ולהגדיל את עצמתן.

האם תמונה המצב הטבעי שמשרטטים חלק מבעלי העמדה הריאליתית אכן מתארת כהלה את היחסים בין מדינות בזירה הבין-לאומית? מבקיריהם טוענים כי תמונה זו חוטאת למציאות, שבה קיימת חפיפה של אינטראסים בין מדינות, ורבות מהן משתפות פעולה ביניהן. מדיניות חותמות על אמנות/msdirot את היחסים ביניהן, הן מנהלות משא-ומתן על הסכמי סחר, והן משתפות פעולה בכוחות שיטור לשמרה על השלום באזרורים שונים בעולם. כל הפעולות הללו אינן מצריכות שלטון עולמי מרכז. כמו כן, הפתחות ההיסטוריות של מוסדות כדוגן ארגון האומות המאוחדות או ארגונים כדוגן ארגון הסחר העולמי וארגוני העבודה הבין-לאומיים יוצרים מציאות שונה, אף מנוגדת, למצב הטבע ההובייני שאותו מתארים הריאליתים. השיקולים המניעים מדיניות בפועלן אינם מותרים אך ורק בקיודם האינטראס העצמי שלhn.

## 138 תיאוריות של צדק חברתי

הגישה השנייה שאציג מכונה העמדה הקוסמופוליטית. בעוד בעלי הגישה הריאלייסטית שוללים את החלטם של עקרונות צדק מתחום תחומי המדינה, המצדדים בעמדה הקוסמופוליטית טוענים כי בשאלות של צדק חלוקתי, העיקרון המוסרי שצורך להנחות אותנו הוא הדאגה לרוחות כל אדם ואדם באופן בלתי תלוי במקום הולדתו ומקום מושבו. באותה מידה שאנו מתייחסים למאפיינים כגוזע, מין, דת ומעמד חברתי כמאפיינים בלתי רלוונטיים מבחינה מוסרית, כאשרנו בוחנים את זכאותם של אורחים לזכויות מדינית לאומ, כך אנו צריכים להתייחס לאזרחות ולמקום מושבם של בני אדם כאלו מאפיינים שרירותיים ובلتיה רלוונטיים מבחינה מוסרית. העמדה הקוסמופוליטית אינה מבחינה בין התחום המדיני-לאומי לבין התחום הגלובלי בהחלטם של עקרונות צדק חלוקתי.

נקודת המבט הקוסמופוליטית היא אינדיבידואליסטית, שוויונית וחרשת פניות. היא מרכיבת מגוון רחב של תיאוריות, שלמרות שותפותן בהנחה על אודות החלטה גלובלית של עקרונות צדק, קיימים בינם הבדלים. חלק מבני ההחלטה הקוסמופוליטית קוראים, לביטולן של מדינות לאום ולכינונו של סדר עולמי חדש, שבמרכזו שלטון עולמי, או לחלופין, לחיזוק משמעותי של המוסדות הבינלאומיים, בעוד עלי-פי תפיסות קוסמופוליטיות אחרות יש לחזק את המוסדות הבין-לאומיים בלי לבטל את הזיקות והנאמניות הלאומיות, שאת קיומן ניתן להצדיק כל עוד הן אין מתנגשות עם עקרונות של צדק גלובי.

"*מאמרו של הפילוסוף האוסטרלי, פיטר זינגר "Famine, Affluence and Morality"*" (Singer, 1972), הוא מן המאמרים הראשונים המבטאים הגנה על החלט עקרונות של צדק גלובי. זינגר, הנוקט גישה תועלתנית, מניח במאמרו שתי הנחות שקבלתן משמעותה, לטענתו, שעל כל אחד מאננו מוטלת מחויבות לסייע לאנשים העניים בעולם. אלה שתי ההנחות שהוא מניח:

1. סבל ומוות כתוצאה מחוסר מזון, מקלט וטיפול רפואי הם דברים רעים.
2. אם יש ביכולתנו למנוע את התרחשותם של דברים רעים בלי להקריב קורבן מוסרי משמעותי – מוטלת علينا חובה מוסרית לעשות זאת.

על-מנת להמחיש את טיעונו מציג זינגר את הדוגמה הבאה: אני מטייל ליד אגם ולפתק עני רואה ילד טובע באגם. יכולתי לkapozen לאגם ולהציל את הילד ב מחיר לכלוך החליפה שאני לובש. במקרה כזה מניח זינגר שכולם יסכימו שהוא חייב לkapozen לאגם ולהציל את הילד. יהיה זה בלתי מוסרי לחוטין מצדדי, אומר זינגר, לא לעשות זאת בתענה שאני רוצה לכלך את חליפתי. משתי ההנחות לעיל ומדוגמה זו גוזר זינגר באופן אנלוגי

את החובה המוסרית של אלה החיים במדיניות העשירות לסייע, נניח, לפלייטים בנגאלים שנאלצו לעזוב את מקום מושבם בגלל שיטפונות ומלחמות, וכתוואה לכך הם גוזעים ברעב. רוב האנשים במדינות העשירות מבוצבים כסף על צדקה ראותנית של מוצרים מיוחרים – עובדה אנלוגית לכלוך החקיפה בדוגמה שהציג זינגר – במקומם לתרום את הכספי הזה לרכישת מזון ותרופות, שיכלו להצליל את חיים של אותם פלייטים רעבים בנגאל.

זינגר סבור, שהחובה המוסרית לסייע לפלייטים חלה עליינו ללא קשר לשאלת האחוריות האישית. העובדה שאנשים אחרים או אסונות טבע שאינם בשליטתו של איש הם האחראים למצבם של פלייטים אלו, אינה פותרת אותנו מן החובה לסייע להם. כמו כן, העובדה שאנו, למשל, חיים בישראל, ומדובר בכך בינו לבין הפלייטים בנגאל, אינה מחלישה את חובתנו המוסרית.

בקשר זה נשאלת השאלה: מהו היקפה של החובה המוסרית המוטלת עליינו לסייע לפלייטים? זינגר מאמין عمדה מרוחיקת לכת ואומר, שאנו מחויבים לסייע לפלייטים "עד לאotta נקודה שמעבר לה הענקת הסיווע תגרום לך ולתלויים כך סבל רציני, או אולי אפילו מעבר זהה, עד לאותו מצב שבו התועלת השולית שתצמץ מהסיווע שלך" (Singer, 1972, p. 234).

המבקרים את עמדתו של זינגר טוענים כי הוא מציב דרישות מוסריות טובעניות מדי. יש לשער, שאם אסע היום לאזרע אסון טבע באינדונזיה או לאזרע אסון אחר בעולם, יוכל לסייע לאנשים רבים יותר מאשר אם אשאר בישראל עם משפחתי ואמשיך ללמידה סטודנטים. אולם לטענת המבקרים,صدق איינו מהחיבב אותנו לנוקוט عمדה ניטרלית להלוטין כלפי כל מהוביותינו המוסריות. למשל, הדאגה לרוחות ילדיי אינה מנוגדת לעקרונות הצדק, גם אם באותו מצבם כלכליים שאני מקדים לרוחותם יש באפשרות לשפר במידה רבה יותר את רוחותם של ילדים הוריהם לי להלוטין, החיים במדינות אחרות.

כדי להבהיר את ההבדל בין החובות שלי לילדי לבין חוביי לילדים זרים, אציג את הבדיקה בין שתי קטגוריות של חובות – חובות שליליות וחובות חיוביות. חובות שליליות משמעותן איסור על עשיית מעשה כלשהו, וחובות חיוביות משמעותן – חובה לעשות מעשה כלשהו. חובות חיוביות הן חובות פחות טובעניות, מבחינה מוסרית, מחובות שליליות. פגיעה באחרים או גניבת כספם על-מנת לסייע לילדי תפיר חובה מוסרית שלילת שיש לכפי אנשים אחרים. חובות שליליות מוטלות על כל אחד. אלו הן חובות מהיבאות, וה הפרtan מוצדק רק במקרים מעטים יחסית. לעומת זאת, באשר

## 140 תיאוריות של צדק חברתי

לחובתי החיובית לסייע לאנשים ורים כמו הפליטים בכנגל, הרי זו חובה פחותה טובענית, מפני שחוותי לסייע לבני משפחתי גברת, אף שמצבם טוב יותר ממצבם של הפליטים, והרוווחה שתצמץ לבני משפחתי מהטייען שלו תהיה מזו שתצמץ לפליטים.

ביקורת מרכזית נוספת נגד טיעונו של זינגר מופנית כלפי קביעתו כי על אנשים מוטלת מחויבות לצמצום אי-שוויון ולתת סיוע, גם כאשר לא קיימים בין אנשים אלו שום יחסי של שיתוף פעולה. טיעון כזה מעלה ג'ין רולס באחד מספרו היותר מאחרים, *The Law of Peoples* (2001). תארו לכם – כותב רולס – שקיימים שני אחים, ואַב ומשOPER האנשים החיים בכל אי והעשור ההתקלתי העומד לרשות כל אחד מהם שווים. במהלך השנים, בשל העדפות שונות של אוכלוסיות שני האחים הללו ביחס לזמן שכל אחת מהן מקדישה לעובדה לעומת הזמן שבו היא מקדישה לפנאי, נוצרים בין שתי האוכלוסיות הללו פער עוזר. בעוד אוכלוסיות אי א' משגשגת ומצלילה ליצור עוזר רב, אוכלוסיות אי ב' בקושי מצלילה לספק את צרכיה הבסיסיים. שואל רולס: מדו"ע יש לאנשים בא' הראשון חובה מוסרית להתחלק במשאבים עם אוכלוסיות הא' השני? גם אם נניח שMOTE של האנשים החיים בא' הראשון חובה מוסרית לסייע לאנשי הא' השני לממש את זכותם האנושית הבסיסית למימוש צרכים בסיסיים, יהיה זה בלתי הוגן שאם מעבר לחובה לדאג לסייע לצרכים בסיסיים של אנשי הא' השני, גם נתיל על אנשי הא' הראשון את החובה להתחלק במשאבים עם אנשי הא' الآخر.

פילוסופים כצ'ארלס ביין (Beitz, 2004) ותומאס פוגי (Pogge, 2002), התומכים בתפיסה קוסמופוליטית של צדק גלובלי ומעוניינים להחיל את עקרונות הצדק על פי תורתו של רולס בתחום הגלובלי, מנסים להצדיק את קיומן של חובות מוסריות כלפי זרים באמצעות הפרצת ההנחה על היעדר יחסי בין אוכלוסיות המדינות העניות לאוכלוסיות המדינות העשירות. בעוד על-פי רולס (שבעמדתו ביחס לצדק גלובלי העסוק בהמשך), יש להגביל את החלטת עקרונות הצדק לתחום הפנימי של מדינות, מפני שעקרונות צדק צרכים לחול בחברה שאיתה הוא מגידר כעוסקת ב"פעולות משותפת לקידום תועלת הדדית", הרי לדעת ביין ופוגי תיאור זה אינו משקף את המיציאות בנווגע ליחסים בין מדינות.

גם ביין וגם פוגי מסכימים שהמחוייבות שלנו כלפי בני בני אדם שעם אנחנו מקיימים יחסי של שיתוף פעולה חזקות יותר מהמחוייבות שצרכות להיות לנו כלפי אלה שאין לנו עמו קשרים של שיתוף פעולה. אולם בניגוד לROLSS, הם סבורים שהמצוות הבינ-לאומית מאופיינית בקיום קשרים, יחס תלוות ושיתופי פעולה כלכליים, פוליטיים ותרבותיים בין מדינות רבות. תהליכי הגלובלייזציה, בעיקר בתחום הסחר העולמי, יוצרים מערכות קשרים מושעפות בין אוכלוסיות שונות בעולם, קשרים אשר יוצרים מחויבויות

מוסריות לצדק חלוקתי, מעבר לתחום המדינתי הצר. לכן, לדעתו של ביבין, הצדדים למשאים מתן מהורי מסך הבعروת, כפי שמתאר אותם רולס בתיאורית הצדק שלו, אינם צריכים לדעת שהם חברים ביחס מדינית אחת, שUberה הם בוחרים בעקרונות צדק. הם צריכים להתייחס אל עצםם כאל מי שאינו יודעימם באיזו מדינה הם חיים ומהילאו אומיותם, ולכן שימושתם היא לבחור בעקרונות צדק גלובלי.

בקרב בעלי הגישה הקוסמופוליטית לצדק גלובלי אפשר להבחן בשתי גישות: הגישה הבין-אישית והגישה המוסדית. אלה המחויקים בגישה הבין-אישית טוענים כי גם בהיעדר קשרים, שיתוף פעולה ומוסדות פוליטיים וככללים משותפים, עדין מוטלת علينا חובה מוסרית להחיל עקרונות של צדק מעבר לגבולות המדינה. פיטר זינגר, למשל, מטיל חובה מוסרית על היחידים לפעול למען צדק גלובלי באמצעות תרומה של חלק מהכנסותם לטבות עניות במדינות אחרות.

לפי הגישה המוסדית, לעומת זאת, התנאי לייצירת חובות מוסריות כלפי אנשים החיים מחוץ למדינתנו הוא קיום מערכות קשרים, שיתוף פעולה ונטילת חלק במוסדות כלכליים פוליטיים ותרבותיים משותפים. התפתחותו של קפיטליזם גלובלי וגידולמשמעותו בהשפעתם של מוסדות כלכליים גלובליים על חייהם של בני אדם בכל העולם, יצרו לדעת מצדדי הגישה המוסדית חובות של צדק חלוקתי בין כל בני-האדם השותפים למערכת גלובלית זו – חובות צדק מקבילות לאלו החולות על אנשים שה חיים באותה מדינה. לכן, לדעת חלק מהחויקים בגישה הקוסמופוליטית המוסדית, עקרון הפער, שהוא אחד מעקרונות המשנה של עקרון הצדק השני של רולס – עיקנון הקובל שאידי-שווין בנסיבות כלכליים כמו עושר והכנסה ניתן להצדקה כל עוד אי-השוויון מיפור את מצבם של אלה הנמצאים בתחום הסולם החברתי-כלכלי – צריך לחול גם בתחום הגלובלי. אחרים טוענים, כי אין להסתפק בהחלטתו של עקרון הפער, אלא יש להחיל באופן גלובלי גם את עקרון המשנה השני של עקרון הצדק השני של רולס – עקרון שוויון ההודמנויות ההוגן. לטענתם, החלט עקרונות צדק אלו של רולס אידי-השוויון הכלכלי השורר כיום בעולם.

תומס פוגי משתמש בהבחנה בין חובות שליליות לחובות חיוביות על-מנת לבסס את הצדתו לכינונם של עקרונות צדק גלובלי. פוגי טוען שאחת החובות המוסריות המוטלת علينا היא להימנע מלתמוך במוסדות בלתי צודקים. לאנשים "יש חובה שלילית להימנע מלתמוך או לתרום או להפיק רוח מאידך הגורם להתרוששותם של אחרים". זו חובתנו כחברים בארגונים ובמוסדות משותפים. פוגי מניח את קיומה של מערכת מוסדית גלובלית, הכוללת מוסדות לאומיות העניות ושינוי רדיקלי במצב של אידי-השוויון הכלכלי השורר היום בעולם.

**142** תיאוריות של צדק חברתי

קרן המطبع הבינ-לאומית, הבנק העולמי, ארגון העבודה הבין לאומי ומוסדות אחרים. קיומם של מוסדות אלו מטיל עליו ועל המדינות שאנו אורה להן, השותפות למוסדות וארגונים אלו, חובה לא להשתתף בהסדרים גלובליים בלתי צודקים ולא לתמוך בהם. לדעת פוגי, מערכת מוסדיות גלובלית זו נושאת באופן חלקי באחריות לקיום של עוני ואי-שוויון מתמשכים. הוא מסכימים שגם גורמים פנימיים, כמו שחיתות כלכלית ופוליטיית, הם בין אלה הגורמים לעוני ולא-השוויון ברבות מן המדינות העניות, אולם לדעתו, תרבות של מינהל ציבורי מושחת ומבנים פוליטיים לא דמוקרטיים בחלק גדול מן המדינות העניות אינה מנוקת מהקשר פוליטי וככלוי עולמי רחב יותר. לדעתו, האחריות של מדינות עשירות למתרחש במדינות העניות נובעת מספר גורמים:

- הכרה רשמית של ממשלות המדינות העשירות בשליטים עיריצים, מושחתים, שלא נבחרו באופן דמוקרטי על-ידי אורהיהם.
- הכרה פוליטית ומשפטית המאפשרת לשליטים הללו למכור את משאבי המדינה, בדרך כלל משאבי טבעיים בעלי ערך בנפט ומחזבים אחרים, על-מנת להעשיר את עצם באופן אישי ולעשות שימוש בכיס לרכישת נשק וקיים צבא שיתמוך בשלטון היחיד שלהם.
- הכרה בין-לאומית זו על-ידי המדינות העשירות מאפשרת לשליטים הללו גם ללוות כספים בשוק הבינ-לאומי, מה שמטיל חובה על מדינותיהם של אותם שליטים להחויר את חובן במישור הבינ-לאומי גם לאחר הסתלקותם של הדיקטורים. כדוגמה לפראקטיקה זו מציג פוגי את קונגוז: "ההערכה היא שעדי לטילוקו מהשלטון של מובוטו סס סקו, שליט קונגוז, הוא גנב 6 מיליארד דולר, חצי מהסיווע הזר שהעניקה קרן המطبع הבינ-לאומי לארציו במשך 32 שנים שלטונו. את החוב הענק היו צריכים לשלם אורה מדינתו". כך הכרה במשטרים בלתי לגיטימיים תורמת לביסוסם של משטרים רודניים בלתי לגיטימיים, הפעלים בנגדם לאינטראסים של רוב אורה המדינה, משטרים הטורמים באופן משמעותי לבסוטו של עוני ולהרחבתו של אי-שוויון.

הצדקה נוספת לתפיסה הקוסМОפוליטית של צדק גלוצלי, מלבד זו המתבססת על האנלוגיה של צדק תור-מדינתי לצדק בין-מדינתי, מתייחסת לחלוקת המשאבי הטבעיים בעולם. לטענת חלק ממצדי התפיסה הקוסМОפוליטית, חלוקת המשאבי הטבעיים בעולם היא שരירותית לחלוין מבחינה מוסרית. לפיכך, אנשים החיים, למשל, בכוכוית, אינם יכולים לטעון שהם זכאים מוסרית לכל מאגרי הנפט הנמצאים במדינה, וכך גם אנשים החיים במדינות אחרות שבahn קיימים משאבי טבעיים בעלי ערך. לטענותם, אם אנחנו מקבלים את הנחות היסוד העומדות בסיס תיאורית הצדק של רולס, ולפיהן מן הצדדים למשאי-ומתן מאוחרי מסך הבערות האמורים להכריע באילו עקרונות צדק חילוקתי לבחור צרייך להישלל מידע שריורי מבחינה מוסרית כגון מינם, גזעם, מעמדם

החברתי והכלכלי ומאפיינים אחרים, מאותו טעם יש לשולב מן הצדדים מידע על אודוטה המדינה שבה הם אמורים. שלילת מידע זה תבטיח שהם יבחרו בעקרונות צדק חלוקתי גלובליים, המאפשרים לכל המדינות לפתח מוסדות פוליטיים צודקים וליצור סדר כלכלי הוגן, עקרונות שיבתו כל אזרח את מימוש הזרים הבסיסיים שלו. הצדדים למשאים מתן ידחו את ההסדר הקיימים, זה אשר לפיו מדינה זכאית לכל פירות המשאים הטבעיים הנמצאים בטריטוריה שלה, מפני שיראו בו הסדר בלתי צודק.

אכן, חלק מן ההצעות לעקרונות צדק גלובלי מתייחסות באופן ישיר לחלוקת של משאים طبيعيים או לשימוש בהם. פוגי, למשל, מציע להנגן מס שהוא מכנה בשם (Global Resources Dividend) GRD – מס על שימוש שאנשים עושים במשאבים طبيعيים הנמצאים בתחום הטריטוריה המדינה שבה הם חיים. כספי המסים הללו יוקצו לשיפור מצבם של העניים בעולם. מס כזה יפח, לדעת פוגי, על השירותיות שבחלוקת משאים طبيعيים בעולם ויסיע לפטור את בעיתת אי-הצדקה הגלובלי. פילוסופים אחרים, מן המונח הליברטריани השמאלי שבו עסקתי בפרק השלישי, טוענו כי לכל אדם יש זכות לחלק שווה במשאבים הטבעיים של כדור הארץ, והנחה זו היא הצריכה לשמש בסיס להסדרים מסוימים לחלוקת המשאים הכלכליים בעולם.

כלפי התפיסה הקוסמopolיטית מופנות מספר ביקורות. כאמור, הצדדים בתפיסה הקוסמopolיטית מתייחסים בהנחה מרכזיות הקובעת שאין הבדל מהותי במאפייני שירות הפעולה ואופי הקשרים בין אורהים השיכים לאוֹתָה מדינה לבין אלה המתקיים בין מדינות. אי-יקומו של הבדל מהותי כזה משמעתו, שאין הצדקה להחלתם של עקרונות צדק שונים בשני התחומים. אולם המתנגדים להנחה מרכזית זו של הגישה הקוסמopolיטית טוענים כי קיים הבדל משמעותי בין צדק תוך-מדינתי לצדק בין-מדינתי. כזכור, עקרונות הצדקה של חברות, למוסדות מתייחסים למוסדות המהווים את מה שהוא מכנה "המבנה הבסיסי" של החברה. לתומת זאת, למוסדות וארגוני בין-לאומיים הערכיהם והזהות של אנשי אותה חברה. לעומת זאת, לארגוני בינלאומיים וקשריהם ושיתופם פועלה בין מדינות אין אותה השפעה על אנשים החיים באוטן מדינות שעילן חלים הכללים והנורמות של מוסדות אלה. מוסדות וארגוני בין-לאומיים אינם עוסקים, למשל, בחינוך ילדים והקשרם להיות אורהים. לדעת המבקרים, יש הבדל משמעותי ב מידת שיתוף הפעולה, בטבעם של המוסדות וב להשפעתם על אלה השותפים בהם, בהקשר המדינה ובקשר הגלובלי. כמו כן, ההסכמה בין מדינות שונות בעולם על ערכיהם משותפים היא הרבה יותר מזו הקיימת בין אנשים השיכים לאוֹתָה חברת. לדוגמה, קיימות בעולם מדינות המפלות חלק מאורהיהם. הן אינן מתייחסות אליהם בכלל שותפים בעלי מעמד שווה וככבי זכות שווה ליהנות מן המשאים החברתיים

והכלכליים. אלה האוחזים בתפיסה קוסמopolיטית, המצדדת בהענקת לגיטימציה גם למשטרים של חברות באלו, אינם מציעים לנו דרכיהם ברורות כיצד לדעתם יש לפטור את הקונפליקט בין עקרונות הצדקה הקוסמopolיטיים לבין עקרונות הצדקה של החברות הבכתי שוויוניות הללו. לטענת המבקרים, הגישה הקוסמopolיטית כוללת אוסף של הצעות כלליות, מופשטות, שאין נוتنות מענה לשאלות מדיניות קונקרטיות בוערות, כגון כיצד יש להתייחס לשאלות של הגירה בין-לאומית, הגירת עבודה ופליטים? מה הקשר בין עקרונות הצדקה גלובלי לשאלות של סחר עולמי? כך גם ביחס לשאלות כלכליות ופוליטיות מעשיות אחרות.

הגישה השלישית ביחס להחלת עקרונות הצדקה מכונה הגישה הלאומית. גישה זו כוללת עמדות מגוונות, אולם באופן כללי ניתן לומר, שעלה-פה שיקות לאום מסוים יוצרת אצל חברי אותו לאומי מחויבויות מסוימות הדדיות.

הഗדרה של לאומי שנואה בחלוקת. קיימות תיאוריות שונות המנסות להציג הגדרה של לאומי, אולם בכל זאת אפשר לציין מספר קווים מרכזים המבחנים בין אומה לקולקטיב אחד של אנשים: ניתן להבחין בין מרכיבים סובייקטיביים למרכיבים אובייקטיביים של לאומי. במרכיבים סובייקטיביים הכוונה היא לתחות השיכוך וההודחות שחשים זה כלפי זה אנשים השיככים לאוֹם. כל אחד מחברי לאומי חש סולידריות עם שאר האנשים השיככים לאומי, שאתם הוא חולק, בין היתר, זכרונות משותפים ומסורת משותפת. המרכיבים האובייקטיביים של לאומי כוללים, בין היתר, שפה, היסטוריה ותרבות משותפות.

הפילוסופים אבישי מרגלית וヨוסוף רוז (1990) מציינים את חשיבותה המרכזית של תרבויות משותפות להגדרה של לאומי. ההגדרה שלהם לתרבות היא רחבה מאוד וכוללת אס派קטים רבים באורחות החיים של בני אדם, כמו יהסים בין-אישים, עיסוקים, פעילויות, מטרות, מסורות אמנותיות, שירה, מוזיקה, ספרות וסגנונות ארכיטקטורה. אנשים הנולדים בתחום לאומי יאמצו את תרבות הלאום, והעדפותיהם וערכיהם יעצבו במידה רבה על-ידי אותה תרבות לאומי. כמו כן, לאומיים יש ממד פוליטי. בדרך כלל, קבוצות לאומיות שואפות ללבונות פוליטית אקסקלוסיבית ולכינונה של מדינה עצמאית. אולם במדינות רבות, שהן רב-לאומיות, חלק מן הקבוצות הלאומיות אין דורשות לכונן מדינת לאומי בלבד, אלא להשיג מידת אוטונומיה פוליטית בתחום מדינת לאומי.

עמדת מעניינת לבחינה בהקשר זה היא גישת הלאומים הליברלית. לגישה זו שותפים פילוסופים כמויקל וולצ'ר, מייקל סנדל, ויל קימליקת, דיוויד מילר ויעל תמיר

הישראלית. (בביטוי "לאומיות ליברלית" אני משתמש במונח "ליברלי" במובן הרחב יותר, הכוול גם הוגים קהילתיים שתורתייהם תומכות בקיומה של מדינת לאום דמוקרטית, בעלת הסדרים מוסדיים המכבדים זכויות אדם בסיסיות).

ולצ'ר, אחד השותפים לגישת הלאומיות הליברלית, טוען שצדק תלו依 בכך שהברית הקולקטיב, שעליום חלים עקרונות הצדק, מייחסים לטובין החברתיים והכלכליים – מושאי החלוקה – משמעויות משותפות (טעוון זה מופיע בתיאוריות השוויון המורכב של ולצ'ר, המוצגת בפרק השישי). לדעתו ההסכמות וההבנות המשותפות בנוגע לטעעם של הטוביין החברתיים והכלכליים אינן מנת חלקם של אלה החיים מתחוץ לקולקטיב הלאומי; ככלומר, לטענת ולצ'ר ואחרים, חברות בקולקטיב לאומי היא תנאי הכרחי להחלתם של עקרונות צדק. זו גם הסיבה לביעתיות עקרונות צדק על אנשים שאינם שייכים לאותו קולקטיב.

ביקורת מלפני טיעון זה של ולצ'ר היא, חברות בקולקטיב לאומי אינה תנאי לשותפות ולהסכמה באשר לטעעם של טובין ראשוניים. לדוגמה, התוכנית לפיתוח אנושי של האו"ם משתמשת ברשימת היקולות שפיתחו אמרטיה סן ומרתה נוסבאום (ראו לעיל: פרק ה, עמ' 84–85), רשימה הכוללת יכולות כמו תוחלת חיים, הכנסה, תמותת תינוקות, אוריניות ועוד. רשימה זו משמשת לבחינת רמת החיים ואיכות החיים של אנשים במדינות שונות בעולם. הרשימה זוכה להסכמה רתבה ואניינה מעוררת מחולקות חריפות בין אנשים החיים במדינות שונות. טובין ויכולות אלו הם בסיסיים, ואנשים בעלי אורחות חיים וערבים שונים מעוניינים בהם על-מנת לספק את צורכיהם הבסיסיים.

טעוון דומה לזה של ולצ'ר מעלה הפילוסוף מייקל סנדל (Sandel). לטענתו, כפיפות לעקרונות של צדק מהיבת תחושת שייכות לחברות משותפת בקהילה מוסרית. סנדל כותב שעקנון צדק "חייב להניח קשר מסויר קודם בין אלה שרוכשים הוא מושא הצדק ושאת מאמצייהם הוא מעונייןagiיס" (סנדל, 1992, עמ' 22). בעוד אומות הן קהילות היסטוריות החולקות תרבות, שפה ואורח חיים משותפים, שיוצרים קהילה מסוירת, העולם הגלובלי אינו מהויה קהילה מסוירת שחברותיו וחבריו חולקים מאפיינים המשותפים למדינה הלאום. טיעון זה של סנדל דומה לטענתו של ג'ון סטיוארט מיל, שכמעט בלתי אפשרי לקיים מוסדות חופשיים במדינה המורכבת ממספר לאומים. על-מנת שמוסדות דמוקרטיים יפעלו כראוי, ככלומר, שבHIRות יתנהלו באופן הוגן, שZOיותו של המיעוט יהיו מוגנות, ושבאופן כללי החיים הפוליטיים יתנהלו על-פי NORמות דמוקרטיות, כדי לשורר אמון בין האזרחים. אמון זה, לדעת מיל, מתבסס

בעיקר על אהדה משותפת (shared sympathies), שיכולה להתקיים בעיקר בין אנשים השyiיכים לאותו לאום. לכן, במדיניות המורכבות ממספר לאומים שורר בדרך כלל חיל חסד בין אוזחים השyiיכים לקבוצות לאומות שונות.

מאותם טעמים, לאומות היא תנאי להחלתם של עקרונות צדק חברתי הבאים לידי ביטוי במדינת הרווחה המודרנית. הנכונות של אנשיםקיימים מערך של הסדרים חברתיים וככלכליים, הכוללים שירותים חברתיים מקיפים בתחום כמו חינוך, בריאות, דיור ועוד, ורשת בייחון סוציאלי המבטיח לאנשים את קיומה של רמת חיים סבירה גם כאשר הם נמצאים מחוץ למעגל התעסוקה, מבטאת סולידריות חברתיות המבוססת על זהות משותפת ועל עיקרון של ערכות הדדיות, סולידריות שיכולה להתקיים בעיקר בין אנשים החשים תחושת שייכות חזקה לאותו קולקטיב פוליטי.

אליה הדוחים הנחזה זו של סנדל והאחרים טענים, קשרים וזיקות בין אנשים אינם דבר קבוע, ותפקידם של מדינאים ואזרחים הוא להרחב ולחזק את הייקות והקשרים של חברי האום עם אנשים אחרים, אלה שאינם חברי באותה מדינת האום. תפקידם הוא להרחיב את גבולות עולם המוסרי של יהודים מעבר למשפחה, לשבט ולאומה – "לטפח את ההומניות" שלהם, כשם אחד מספריה של הפילוסופית מרתה נוסבאום. כמו כן, עם הרחבת שיינוף הפעולה הפוליטי, הכלכלי והתרבותי בעולמנו הגלובלי, הזיקות ותחושים השyiיכות לקולקטיבים רחבים יותר מן הקולקטיב הלאומי רק יילכו ויתחזקו.

נוסף לכך – טענים המבקרים – עקרונות של צדק חברתי אינם מחייבים שייכות לאום ותחושים הזדהות עם בני אותו לאום. עקרונות של צדק חברתי יכולים להיות מבוססים גם על תחושת הזדהות ושייכות לאוֹתָה קהילה פוליטית, ולאו דווקא לקהילה פוליטית לאומית, מה שיאפשר גם לאנשים השyiיכים לקבוצות מיעוט לאומות או אתניות אחרות לחשות שייכות לאותו קולקטיב.

רעיון זה בא לידי ביטוי בתפיסת "הפטרווטיים החקותי" של הפילוסוף הגרמני יורגן הברמס. לדעתו, הנאמנות של אוזחים בדמוקרטיה אינה צריכה להיות נאמנות למאפיינים אוניברסליים או לאומיים, אלא לעקרונות פוליטיים, שבאים לידי ביטוי בחוקתה של אותה מדינה. אולם השאלה, מה מידת השותפות התרבותית הנחוצה לפועלם של מוסדות דמוקרטיים היא שאלה אמפירית, שאין לה תשובה חד-משמעות.

קבוצות טיעונים אחרות של גישת הלאומיות הליברלית נגד החלתם של עקרונות צדק במישור הגלובלי מתבססת על עיקרון ההגדרה העצמית. טענה אחת כזו קובעת שהזיקות

להגדירה עצמית של מדינות לאום ממשמעותה, שמדיניות ריבוניות נהנות מזכות לשליטה מלאה על משאבים הנמצאים בתחום הטריטוריאלי שלן, ורק להן שמורה ההחלטה האם להתחלק במשאבים אלו עם מדינות אחרות.

טענה נוספת נשענת על עקרון ההגדירה העצמית קובעת, שם שמעותו של עיקרונו והיא שמדיניות חייבות לשאת באחריות למיניותם הכלכלית ותוצואתית. עקרונות זדק גלובליים, היוצרים חלוקה- מחדש של משאבים בין מדינות, פוגעות באחריות זו, והם עלולים לפצות מדינות שעוניין הוא תוצאה של מדיניות גרוועה ובלתי אחראית.

נגד הטענה הראשונה, נשענת על עקרון ההגדירה העצמית, הועלתה ביקורת ולפיה אם הצדקה ללאומיות נשענת על ערכי יסוד ליברליים, הרי גם עקרון ההגדירה העצמית צריך להיות מוגבל על ידי ערכיהם ליברליים בסיסיים כשוויון. לפיכך, מדינה הממשת את זכותה להגדירה עצמית חייבת לנוהג בהגנות ולהשתמש במשאבים הטבעיים העולמיים – משאבים שחילוקתם המקורית בין מדינות היא שירותית ובلتז' צודקת – באופן שיאפשר גם למדינות אחרות ליהנות ממשאבים מסוימים, שיאפשרו להן למש את זכותן שלן להגדירה עצמית.

כלי הטענה השנייה שמעלים מצדדי גישת הלאומיות הליברלית, על אודות הסתירה שבין הדגישה מדיניות לשאת באחריות למיניות שלן, הנובעת מעקרון ההגדירה העצמית, לבין החלתם של עקרונות זדק גלובי, טענים המבקרים, כי מצדדי עיקרונות ההגדירה העצמית מתעלמים מן החשיבות המכרצה שיש למציאות הגלובלית על מדיניות הפנים של מדיניות ותוצואתית. מימוש עקרון ההגדירה העצמית של מדיניות והטלת האחריות למיניות עליהן מחייבים שתנאי היסוד הפליטיים, הכלכליים והחברתיים של המדינות יהיו צודקים, וזו אחת המטרות המרכזיות של עקרונות זדק גלובי.

עקרונות זדק גלובי אמורים להבטיח שהחלטותיהן של מדינות עניות יהיו חופשיות מכפייה ולחצים של מדיניות עשריות, ורק לאחר מכין יהיו ממשמעות והצדקה להטלת השuldויות מלאה על מדיניותן. משמעו של עקרון ההגדירה העצמית אינה שלילת החלתם של עקרונות זדק גלובי. אדרבה, העקרון הזה נוטן טעם להחלתם של עקרונות כאלה, על-מנת ליצור מבנה בסיסי-פליטי, כלכלי וחברתי צודק, מבנה שהוא תנאי הכרחי למימוש הזכות השווה להגדירה עצמית של מדינות.

הגישה הרביעית והאחרונה שאבחן היא גישתו של ג'ון רולס, אותה הוא מכנה "אוטופיה ריאלית". רולס מציג עדות בינו לבין התפיסה הקוסמופוליטית לבין העמדה המדינית-לאומית, אותה הוא מפרט בספרו *שהוכרנו The Laws of Peoples*.

רולס מתייחסים לחוקים הבין-לאומיים כאל חוקים של עםמים (peoples) ולא של מדינות (states), ובביטוי people הוא מתיכוון ליישות שאין לה ריבונות מוחלטת, ישות בעלת תפיסת טוב חברתי, שפעולותיה מוגבלות על-ידי שיקולו סבירות שבאים לידי ביטוי בתרבותה הציבורית הפוליטית. לצורך הדיוון, ניתן להשתמש במונח people כמתיחס לחברה בעלת תרבויות פוליטית משותפת ואופן ארגונה הוא מדינה.

רולס משתמש באותה מתודולוגיה שבה השתמש בספריו תיאוריה של צדק – גזירת עקרונות צדק בחברה אחת לצורך גזירת עקרונות צדק בתחום הבין-לאומי, אלא שהפעם עקרונות צדק אלו אינם אמורים לחול על היחידים, אלא על מדינות. עקרונות הצדק הבין-לאומי יוסכמו על-ידי הצדדים למשמעותם מאחרי מסך התרבות, והצדדים למשמעותם הן מדינות. הצדדים להסכם כוללים מדינות ליברליות ומדינות לא ליברליות. אמונה שתכלול רק מדינות ליברליות היא אמונה שתגלה חוסר סובלנות כלפי אורחות חיים שונים ומגוונים הנהוגים במדינות אחרות. הצדדים למשמעותם decent ("hierarchical peoples") – חברות בעלות תפיסות טוב וערבים שונים מآلלה הקיימים בחברות ליברליות. מדינות הוגנות בעלות היררכיה מכובדת זכויות אדם, אולם הן אינן מתייחסות לאזרהן כלל אזרחים שווים וחופשיים. למשל, חלק מדינות אלו אינן מעניקות מעמד אזרחי שווה למיעוטים תרבותיים או לנשים, ומקור הlegalitimacy השלטונית שלהם אינו דמוקרטי. רולס סבור שעקרונות של צדק גלובלי צריכים לגלו סובלנות לחברות כאלה ולכלול אותן כשותפים שווים בקביעת עקרונות הצדק שיחולו על כל המדינות.

אילו עקרונות צדק גלובליים יבחרו נציגים סבירים והוגנים של מדינות? רולס סבור, שנציגים אלו יבחרו עקרונות שאינם שונים באופן משמעותי מעקרונות המשפט הבין-לאומי הקיימים. לדעת רולס, הצדדים למשמעותם מאחרי מסך התרבות יבחרו שמות עקרונות:

1. מדינות (peoples) הן חופשיות ובلتיה תלויות, חירותן ואי-תלותן צדיקות לזכות בהכרה ובכבוד של מדינות אחרות.
2. מדינות חייבות לצוית לאמנות ולמחוייבות שהן נוטלות על עצמן.
3. מדינות הן בעלות מעמד שווה וצד להסכם שמהיברים אותן.
4. מדינות חייבות לצוית לחובת אי-ההתקשרות.
5. למדינות יש זכות להגנה עצמית, אולם אין להן זכות ליום מלחמה, אלא מטעמים של הגנה עצמית.

6. מדינות חייבות לכבד זכויות אדם.
7. מדינות חייבות לשמר על מגבלות ספציפיות כאשר הן מנהלות מלחמה.
8. למדינות יש חובה לסייע למידנות אחרות, שאנשיהן חיים בתנאים בלתי ראויים, תנאים המונעים מהם לקיים משטר פוליטי וחברתי צודק והוגן.

כבוד זכויות האדם והחובה לסייע למידנות הנזקקות לכך לצורך קיום משטר צודק והוגן הם עקרונות מרכזיים בתרורת הצדקה הגלובלי של רולס. רשות זכויות האדם בתחום הבינלאומי היא מצומצמת יותר מזו הכלולה עקרון הצדקה שחל בתחום מדינה אחת. היא אינה כוללת, למשל, זכות חשובה בזכות של שלטון דמוקרטי. היא גם אינה כוללת את הזכות לערך הוגן של תרויות פוליטיות. את המדינות שאינן מכובדות את זכויות האדם מכנה רולס "Outlaws" – מדינות הנמצאות מחוץ לתהוםו של החוק, באשר להובת הסיווע, רולס אינו מקבל את עדותם של פילוסופים קוסמופוליטיים כצ'ארלס ביין, ותומס פוגgi, הטוענים שיש להחיל את עקרונות הצדקה החברתי שלו, כמו עקרון הפער, מעבר לגבולותיה של המדינה בתחום הגלובלי. עקרונות הצדקה הגלובלי אינם מיועדים, לדעת רולס, לצמצם את אי-השוויון בעולם, אלא לדאוג לספק צורכיהם המינימליים של בני אדם.

ספרו של רולס על צדק גלובלי עורר ביקורות לא מעטות. חלק מן המבקרים טענו ש"האוטופיה הריאליתית" שהוא מציע אינה אלא גרסה מעודנת והומניסטית יותר של התפיסה הריאליתית הותיקת שאotta הזכرتה בתחילת הפרק. מבקרים אחרים טענו, שהעמדה שלו באשר ליחסים בין מדיניות מגיננה תמיינות מוסרית, והוא שאפילו טענו, כי הספר אינו אלא דוגמה נוספת לאמפריאליום ליברלי, חלק מפרויקט ההשלה האירופי, שמטרתו לכפות ערכיהם מערביים על חברות לא-מערביות בעלות ערכים שונים. טענה אחרת שהופנה כלפי רולס הייתה, שהוא זנחה העמדה הליברלית ואימץ למעשה עמדה קהילתנית, שאינה מעמידה את היחיד במרכזו, אלא קהילות המאורגנות במדינה. לפי טיעון זה, הצדדים למשאי-ומתן על עקרונות הצדקה הגלובלי מאחוריו מסך הבעיות אינם פרטניים, אלא נציגים של קהילות פוליטיות שונות, שאמוריםקדם את האינטרסים של קהילותיהם. לכן, לטענת המבקרים, נקודת פתיחה זו של רולס היא בעייתית, כיון שהיא מעניקה קדימות ערכית לאינטרסים של קהילות על-פני אינטרסים של היחידים המרכיבים אותן. מtower האנלוגיה שעורך רולס בין יחידים לבין מדיניות נגור, שכפי שבתפיסה הליברלית ניצב העיקרונו המרכזי הקובל שיכבד את האוטונומיה של הפרט ולאפשר לו לבחור את אורח החיים והערכים שבהם הוא מעוניין, כך – הוא טוען – יש לכבד את עצמאותן של מדיניות ליברליות ולא-ilibרליות לנחל את ענייניהן על-פי תפיסתן וערכיהן. אולם לדעת המבקרים, האנלוגיה שעורך רולס בין

פרטים למדינות מופרכת, מפני שכבוד העצמאות של מדינות לא-liberalיות משמעוito מתן הצדקה ולגיטימציה לאנשים שחווים ושולטים במדינות אלו לשולב את האוטונומיה ואת חירותיהם של אחרים באותה המדינה; כלומר, כבוד העצמאות של מדינות לא-liberalיות משמעוito כבוד זכותם של השליטים באותו מדינות לשולב ערך מוסרי ליברלי מרכזיא אוטונומיה.

כבוד זכויותהן של מדינות לא-liberalיות לנחל את עניינהן – כך טוענים המבקרים – בא לידי ביטוי גם בתפיסה ה"רוּהַ" של זכויות האדם, המגולמת בעקרונות הצדקה הגלובלי של רולס. למשל, הזכות הבסיסית להשתתפות דמוקרטית, או החירות לחופש הצפון איןן כוללות ברשימת הזכויות של רולס. לטענתם, תפיסה זו של רולס היא תפיסה שמרנית המתעלמת מן הקונצנזוס הבין-לאומי המתגבש בשנים האחרונות סביב ה策רת זכויות האדם של האו"ם, כמוék הכלול רשות זכויות רחבה יותר מזו שמציג רולס. רשותה רחבה זו של זכויות אדם משמשת בזירה הבין-לאומית כלי מרכזי לביקורת משטרים שאינם מכבדים זכויות אדם.

לפי ביקורת נוספת, שכבר הוזכרה בהציג העמדה הקוסМОפוליטית, עמדת רולס ביחס לעקרונות צדק גלובלי אינה מתייחסת ברצינות אל ערך השוויון. רולס אינו מציג הסברים מספקים לא-החלתו של עקרון הצדקה השני שלו, הכלול את עקרון הפער ועקרון שוויון ההודמנויות ההוגן – עקרונות שיש הצדקה להחילם בתוך גבולות המדינה, ובאותו אופן גם בהקשר הגלובלי.

**פרק 10**

## **ישראל וזכויות האדם**

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## רות גביזון

### פרק י"ג

#### **מדינה יהודית, דמוקרטיה ושוויון\***

כל חברה מתלבשת בבעיות ההתנגשות בין זכויות האדם הבסיסיות לחיים ולביטחונו, לחירותו, לשוויונו, לבבורה ולהליך הוגן לבין זכויות אחרות ואינטרסים אחרים. ההתנגשות הלו אינן נובעות מרצון רע או מהעדר רגשות לזכויות אדם. אכיפת החוק, למשל, ברוכה בהגבילות מסוימות על זכויות אדם (כגון מעוצר חשורדים). אבל היא חיונית להגנה על זכויות האדם מפני פגיעותיהם של אחרים. חלק גדול מן ההתנגשות הלו מושתף לכל חברה אנושית מאורגנת. משאבים חסרים תמיד, ותמיד יש מי שմבקש להפר את הנורמות ונחוץ להגן על זולתו מפניו, תמיד יש מחלוקות לגבי המידה הרואה של חופש ביתוי כאשר זה פוגע או מעלייב. יתר על כן, בכל חברה לוקים לפחות חלק מאנשי המישל – שבידם הכוח להגן על זכויות האדם – בנטייה تحت משקל גדול לאינטרסים שלטוניים המתנגשים בזכויות האדם. לפיכך יש צורך, בכל חברה, בעירנות ובנכונות למצב כדי להגיע לשקלול נכון בין האינטרסים השונים לבין זכויות האדם. לאחר המאפיינים המוחדרים של החברה האנושית בימינו הוא המחייב, לפחות במעטם, להגנה על זכויות האדם. האידיאל של זכויות האדם מקובל בימינו בחלוקת נבדים של העולם באידיאל כלליו ואוניברסלי. במובן מסוים מקובלות העמלה לפיה המחייבות לזכויות האדם איננה מפלגתית, וכיום חברה שבה נשמרות זכויות לשוויון, לחירות ולבבורה הוא אינטראס של כל האנשים בלי קשר לדעותיהם, לאותם או מינם. זכויות האדם זכו למעמד מוערך זה הודות לתפישה האומרת כי ההגנה עליהם היא מרכזית ובסיסית לחיים הטובים. עם זאת אין זכויות האדם כוללות, מטבע הדברים, גורמים רבים אחרים החשובים לאיכות החיים, ואשר נעדרת עצם הכלליות והאוניברסליות של זכויות האדם.

\* גביזון, רות, "מדינה יהודית, דמוקרטיה ושוויון", בתוך: **זכויות אדם בישראל**, ירושלים: האגודה לזכויות האזרח, עמ' 147-160.

בישראל. קיימות הבעיות הכלליות והרגיליות של הגנה על זכויות אדם שגם מדיניות אחרות נתקלות בהן: התנגשויות בין חופש הביטוי ובין הזכות לשם הטוב ולפרטויות. בעיות של פגיעה בלתי-מצודרת בזכויות חסודים, בזכויות נשים, בזכויות חולמים בכלל וחולי נפש בפרט וכיוצא בהן. אם נשווה את הישגי ישראל לאלה של מדיניות אחרות בכל הנוגע לסוגיות כלליות אלה נמצאת, כי ישראל עומדת בצורה סבירה במחן של שמירה על זכויות אדם בದ בבד עם המאמץ לשמר על צורכי החברה וצורכי השלטון. מדינת ישראל יכולה להשתבח בהישגים ניכרים בהגנה על זכויות האדם בנושאים כלליים אלה, אף על פי שאין לה חוקה ואין לה היסטוריה של מאבק לזכויות אדם. מובן שקיים בישראל ליקויים שנייתן לתקנם, אולם המצב בכללו אינו גרוע מאשר במדינות מערביות דמוקרטיות אחרות. ראייה טובה ביותר לכך תשמש העובדה כי בדרוג ביןלאומי של בעיות זכויות אדם במדינות שונות הוכיחו לגבי לישראל (ללא השתחים המוחזקים) שתי בעיות בלבד: גiros חובה לצבע, הנתפס כהגבלה חמורה על הזכות לחופש התנועה ולחופש השליטה על החיים לגבי חלקים ניכרים מאוד מן האוכלוסייה, ומהונופולין הדתי בדיני הנישואין והגירושין המגביל זכותו של אדם להינשא לבחיר ליבו, או ליבת, בלי הבדלים של דת או מוצא לאומי.

יש המסתפקים בכך. אחרים סבורים, כי לאור לקחי ההיסטוריה היהודית אנו חייבים בקני מידה מיוחדת לגבי ההגנה על זכויות האדם. עמדה זו קשורה לוויכוח גדול, עקרוני ובלי עלי תפישת מהותה של מדינת ישראל: האם אנחנו מבקשים להיות מדינה ככל המדינות, מדינה שיש להעיר את הישגיה בקני מידת "הרגילים" של מדינות? או אנו שואפים להיות "עם סגולת", ויש לנו מתחיבות מיוחדת לזכויות האדם, אם בשל ייחודנו המוסרי ואם בשל היותנו במשר דורות קורבנות לפגיעות קשות בזכויות האדם. ויכול זה חורג, כמובן, ממסגרת שיחותינו אלה. קיימת גם מחלוקת בשאלת, האם תיאורים של מצב זכויות האדם בישראל הם הוגנים, או שמא חוטאים בلفינו ב"קנה מידת בפול" ומקברים אותנו על התנהגוויות שהן מקובלות למדי במדינות אחרות ואין מגנים אותן? גם בחלוקת זו לא נטפל בכך. האם علينا לlect לאור ההשוואת למדינות ולחברות אחרות? מבחינתנו חשוב לנשות ולראות, האם

## זכויות אדם בישראל 149

פגיעות בזכויות אדם הנעשות בישראל מוצדקות, והאם השכלנו לקיים את המוסדות והחוקים שיצמצמו בכל האפשר פגיעות בלתי-מוסדקות.

את שארית שיחת הסיכום אקדים לנושאם, שבhem המ Zub בישראל בתחום זכויות האדם הוא מיוחד במינו משום האופי המוחדר של המדינה ותנאי קיומה. יש לישראל שלושה מאפיינים מיוחדים וקשורים שכולם יוצרים בעיות של זכויות אדם. ראשונה: מדינת ישראל, שלא במדינות רבות אחרות, נתונה כל שנות קיומה באיום ביטחוני מתמיד. עצמת האיום אمنت משתנה, אולם עד עתה התקיימה המדינה בתוך סביבה עוינת, ויש כורך של ממש לשומר על ביטחונה וביטחון תושביה. שני היבטים האחרים קשורים לאופי של מדינת ישראל כמדינה יהודית. מדינת ישראל מוגדרת על ידי רוב אזרחיה היהודים ומקובלת עליהם כמדינה יהודית. הגדרתה של ישראל כמדינה יהודית יוצרת לפיך הן בעיות לגבי מעמדם של אזרחיה שאינם יהודים ולגביהם זיקתה של המדינה ליהודים שאינם אזרחיה או תושביה, והן בעיות של היחס בין הדת היהודית ובין המדינה.

יש במדינת ישראל מיעוט לא קטן (כשיעור מן האוכלוסייה) של תושבים, רובם אזרחי המדינה, שאינם יהודים. ובקשר זה עולה שאלות נוקבת של זכויות אדם: כיצד מיישבים את קיומו של המיעוט הגדול הזה עם הרווחתיה? איך מבטיחים שווון לפחות יהודים במדינה יהודית? ההיבט השני של להיות ישראל מדינה יהודית הוא היחסים המורכבים בין דת ומדינה. למה מתבוננים באשר אומרם שישראל הינה מדינה יהודית? האם מתבוננים בכך שהוא "מדינה הלהבה", שעיקריה נקבעים לפי הדת היהודית? ואם כן, מי קובע מה הם עיקרי הדת היהודית לצורך זה? המיסד הדתיאו-תודוקסי מוסדר ממלכתי או אולי זהה מדינת העם היהודי? ומה היחס בין זהות הלאומית היהודית ובין זו הדתית? היכול מי שאינו יהודי באמונתו הדתית להשתיר לעם היהודי והאם יכול אדם יהודי דתי לא להיות חלק מן העם היהודי? מהו היחס בין המדינה היהודית לבין יהודים שאינם חיים בה? מהו היחס בין יהודים שאינם חיים בישראל ושוכנים במושב מסויים למדינה היהודית לבין לא-יהודים הגרים בישראל ועל כן שייכים

### במובן אחר למדינה היהודית?

בעיות קשות אלה נוגעות לשורש מהותה וקיומה של המדינה. חשוב גם לראות כיצד מתקשרים שלושת המאפיינים הללו זה לזה, ובאיזה אוצל קשר זה על עמדתה של מדינת ישראל בנושא זכויות האדם. הקשר בין הדברים מודגם בצורה הבוטה והדרמטית ביותר בפירוש שנטנו בהנה והপּרֶוֹגְרָמָה הַפּוֹלִיטִית שלו למסמר היסודי של הקמת המדינה – להכרזות העצמאות. הכרזות העצמאות כוללות שלושה יסודות: נאמר שם שמדינה ישראל מחייבת לדמוקרטיה, שהיא מדינה יהודית, ושhaija מעניקה שוויון זכויות מדיני וחברתי מלא לכל אזרחיה. הרוב בהנא גרט, כי בהכרזות העצמאות יש סתירה פנימית; אי-אפשר לקיים דמוקרטיה יהודית, ואיל-אפשרקיימים מדינה יהודית יחד עם שוויון מלא לכל האזרחים בלי קשר לדתם או לאומיותם. לדעתו, אנו חייבים לבחור בין האידיאלים של הכרזות העצמאות: אם אנחנו רוצים בדמוקרטיה – נ██ן את המדינה היהודית; ואם אנו רוצים מדינה יהודית (כפי שהוא גורס) – علينا לחדר ממחוקבות לדמוקרטיה או לשוויון זכויות ללא-יהודים. המתח הפנימי הזה נעשה קשה מפני שהמייעוט הלאומי והדתי הלא-יהודי הוא גם חלק מאותו עם המהווה עבורנו איום ביטחוני. בהנא, בנאומיו ובברבי התעמולה שלו, השתמש לצרכיו' בציরוף הזה. הוא הזכיר לנו כי אנו מסתכלים על הלא-יהורי, הערבי במקרה שלנו, לא רק בעל הור, الآخر, שאינו משתמש לממשלה היהודית, אלא אנו רואים אותו גם כמקור לסכנה מידית או פוטנציאלית. גישתו כלפי העربים אינה מבוססת רק על תחושת ייחוד או שונות, אלא מלבים אותה תחושות מעורבות של שנאה ופחד שיש לאנשים כלפי מי שהםTopics כאובייהם הקמים עליהם להזיק להם ואף להרוגם.

אם צורך בהנא, אין ישראל יכולה להיות מחייבת, בעת ובעונה אחת, גם למדינה יהודית וגם לדמוקרטיה, בעיקר אין היא יכולה להעניק שוויון אזרחי ומדיני מלא לכל תושביה. לדעתו, גם אין היא יכולה להעניק חופש דת וחופש מדרת לאזרחיה היהודים. חשיבות עמדותיו של בהנא בכך שהן מחרdot את הבעייה. ואכן, ישראל חייבת לתת תשובה לשאלות שהוא מעציג: האם ניתן למש בישראל את החלום ואת השאיפה של העם היהודי להגדרה עצמית ועם זאת לשמר על המדינה כדמוקרטיה המגינה על

## זכויות אדם בישראל 151

זכויות האדם של כל תושביה, בלי הבדל של לאום ודת או השתיכות לזרם דתי או חילוני זה או אחר? זהה השאלה בהא הידיעה של זכויות האדם בישראל.

אילו היו ערבי יישראלי, בקבוצה ובדרכו כלל, מאויימים באורה פיסי על קיום המדינה או על ביטחון תושביה – היה מתח זה קל יותר במובן מסוים: מותר להשכים ולהרוג, או לפגוע בדרך אחרת, למי שכם להורגך. הגנה עצמית, כפי שראינו, אינה נתפסת כפגיעה בלתי-מוסדרת בזכויות התוקף. הפגיעה בחירותו של מי שמנסה לפגוע ברך היא על פי רוב מוסדרת. כפי שראינו, יכולים צורכי ביטחון ממשיים להצדיק פגיעות מסוימות בזכויות אדם. אולם ההיגיון הזה אינו ניתן להרחבה. קלה על איוומים מסווג אחר (ראו דיוון בהיקף ההגנה העצמית בפרק ג'), להיפך: הנטייה לזהות כל בן לקבוצה שונה באוים ביחסוני היא לאחר המנגנונים הנודעים ביחס לפגיעה בלתי-מוסדרת בזכויות האדם של המשתייכים לקבוצות פגיאות. תוכיח זאת נטייתם של אנשים כואבים להגביל על פגיעים רצחניים שבוצעו בידי ערבים בפגיעה אלימה בכל ערביה הנקרה על דרכם. רוב מומחי הביטחון בישראל אומרים, שחלק גדול מבניו של המיעוט הערבי בישראל לא היו מעולם סיכון ביחסוני, ממשי או מעשי, לקיומה של המדינה. בני המיעוט הערבי אינם בהכרח נאמנים לממדינה או שמחים להיות מיעוט בה; יתרבן שצייתנותם נובעת בעיקרו של דבר מפחד ומפיקוח ייעיל של שירות הביטחון. אולם ערבי יישראלי, בדרך כלל, לא תירגמו את חוסר שביעות הרצון שלהם להטלת סיכון ביחסוני של ממש על קיומה של המדינה או לחמי תושביה יהודים. מירת המעורבות שלהם בפעולות של טרור אלים כלפי יהודים קטנה ביותר.

כדי לחדר את השאלה הבה נניח שעברי יישראלי, שהם כשית מתושבי המדינה, מכarians על מחזיות מלאה לשינוי פוליטי בלבד, וכי התנהגותם תואמת את הכרזותיהם. הבה נניח גם, כי רוב עברי יישראלי היו רוצים לראות מדינה ישראל דמוקרטית וחילונית של כל תושביה (דומה, כי שאיפה זו אינה משקפת את דעתו רוב העربים). מה תהיה עמדת מדינת ישראל כלפי אזרחיה שאליה שאיפותיהם הפוליטיות? מדינה דמוקרטית חילונית (או אולי מדינה דומיננטית ורב-דתית) תהיה שונה מאוד מדינה שבה מתממשת זכותו של העם היהודי להגדרה עצמית. מאידך גיסא,

## 152 אוניברסיטה משודרת

מחויבות לדמוקרטיה ממשעה מחייבות לקבל את הכרעת הרוב ולאפשר חילופי דעתות מלאים וחופשיים בנושא המבנה המדיני. יתרה מזו, ניתן בהחלט לטעון כי, בהתאם להגדרה, אין מדינית לאום יכולה تحت שווון זכויות חברתי ומדיני שלם לאזרחות שאינם בני האום שלו; אנשים כאלה הם אזרחים או תושבים שאינם שייכים, במובנים חשובים, ליישות המדינה שבה הם חיים. כאמור, שיקולי ביטחון סייעו לנו להתחמק מן הבעייה. פגיעות בזכויותיהם של ערבים הועגו בדרך כלל כנדרשות לצורך שמירת ביטחון המדינה. כאשר לא היה אפשר לחתן העדקה כזאת, הוסו הסתויות מעקרון השוויון באמצעות חוקים "נייטרליים" (כגון המבחנים להכרזה על רכוש כרכוש נפקדים, או התניינית טובות הנאה מסויימות בשירות צבאי). כך, למשל, נהגו להצידק הטלת הגבלות מינהליות על מנהיגים של תנועות פוליטיות ערביות בשיקולי ביטחון. אך האם מדובר בסכנה אמיתי לביטחון הפיסי של תושבי ישראלי או שמא יש התנגדות לכינון הנהגה פוליטית שהמסר הפוליטי שלו מאיים על התפישה שלנו את מדינת ישראל כמדינה יהודית? אם האפשרות השניה היא הנכונה – אולי אכן אין ישראל, כמדינה יהודית, יכולה تحت שווון זכויות דמוקרטי, פוליטי, מלא לכל אזרחיה?

ענין זה עלה בכל חריפותו בהקשר של הבחירות לכנסת. עד 1984 לא כללו חוקי הבחירה הגבלות תוכניות על מצען של מפלגות. הרשימות היו חייבות לעמוד במספר דרישות פורמליות (חתימות תומכים ופיקדון כספי מסוים), אולם החוק לא הוציא מצע או עמדות פוליטיות. ב-1965 פסלה ועדת הבחירה המרכזית רשימה ערבית בשם "אל-ארד" ("האדמה"), אף על פי שהחוק לא נתן לכך הסכמה מפורשת. שופטי הרוב, השופטים אגרנט ווזסמן, קבעו – בעקבות ועדת הבחירה המרכזית – כי מצע מפלגת יש בו איום על ישראל כמדינה יהודית אינו מתиישב עם ה"אני המאמין" החוקתי של המדינה, ולפיכך הייתה פסילת מהשתתפות בבחירות – למرات העדר חוק מפורש – מוצדקת. לפני בחרות 1984 פסלה ועדת הבחירה המרכזית שתי רשימות: את הרשימה המתקרמת לשлом, בשל אותה הלבנה של "אל-ארד", ואת רשימת "בר" של מאיר כהנא. בית המשפט העליון הפך את שתי החלטות, ושתי הרשימות השתתפו בבחירות וזכו במושבים בכנסת. הבסיס

## זכויות אדם בישראל 153

להחלטה לגבי הרשימה המתקדמת היה ראייתי, בעוד לגבי "בר" נקבע, כי בית-המשפט אינו מוסמך לפסול רשימות בגלל איום על הדמокרטיה או בגלל גזענות ללא הסמכה מפורשת בחוק.

העדר מחסום חוקתי נגד רשימה פוליטית שנחטפה בגזענית היה בלתי-יקביל בעיני רוב חברי הכנסת. המומ"ם הפליטי הניב תיקון ל"חוק יסוד: הכנסתת", תיקון המחייב לפסול רשימה מלהרוץ לבנטה אם היא מסתירה לגזענות, מאימית על הדמокרטיה או שוללת את קיומה של ישראל במדינת העם היהודי. בשנת 1988 פסלה ועדת הבחירה את "בר" בלבד, ובית-המשפט אישר את ההחלטה. בית-המשפט העליון התבקש גם לפסול את הרשימה המתקדמת לשולם בעונתה, שמצאה איןנו מתישב עם ראיית ישראל במדינתו של העם היהודי, והוא דחה את הבקשה ברוב של שלושה נגד שניים. המיעוט, שהחליט כי יש לפסול את הרשימה המתקדמת לשולם מהשתתף בבחירות, נתן פירוש אשר לפיו פרוגרמה, אףיו אינה אלימה, החותרת להגדיר מחדש את היחס בין מדינת ישראל והפזרה היהודית מחד, ואת מעמדה של המדינה בפנים תושבייה הלא-יהודים מאידך – אינה מתישבת עם דרישות החוק.

חשוב לציין, כי אין מחלוקת בין השופטים, ושופטי המיעוט בכללם, על בר שיש בישראל מחייבות אמיתיות לשווון אזרחי לכל האזרחים ללא הבדל בהשתיכות דתית או לאומי. אולם, לדעתם, שווון זה הוא ייחידי, אינדיבידואלי; وهو שוויון הזדמנויות, שוויון בחופש התנועה, בחופש הדיבור ובחופש הדת, שוויון בפיתוח לשוני ותרבותי, שוויון בהשתתפות בתהליכי הפוליטי. על פי עמדת שופטי המיעוט בפסק-הדין הזה אין שווון אזרחי מלא כולל הכרה בתביעת הערבית להפוך את מדינת ישראל לממדינת כל אזרחיה, מדינה שתהיה מחייבת במירה שווה לחיזוק הקשר בין העם היהודי ובין ארצו ובין העם הפלסטיני ובין אותה ארץ עצמה. קשה להגשים בחשיבותה של נקודה זו. הסתירה שמצויה בהנה בין ייסוד המדינה היהודית מצד אחד ובין השווון והדמокרטיה מצד שני שונה מאוד מזו שמצואים שופטי המיעוט בפסק הדין הנוגע לרשימה המתקדמת לשולם. אולם הניסוח של "מדינה יהודית" מניח חופש גדול יותר מאשר הביטוי שנבחר בחוק היסוד, זה של "מדינה העם היהודי". "מדינה העם היהודי" היא תיאור המדגיש גם את ההן וגם את הלאו. בחוק היסוד החדש, הנוגע לכבוד האדם

## 154 אוניברסיטה משודרת

וחירותו, מთוארת ישראל כ"מדינה יהודית" ולא כ"מדינה העם היהודי". סביר להניח כי שינוי הנוסח אינו מקרי, וכי הוא משקף רצון להשאיר את השאלות שהעלינו לאן פתוחות. מדינת העם היהודי כוללת גם את בניו שאינם חיים בישראל, ואינה מדינמת של לא-יהודים, גם אם הם אזרחי ישראל ותושביה. "מדינה יהודית", לעומת זאת, היא מדינה שבה משתמש העם היהודי את חלום ההגדרה העצמית שלו. יהודי שאינו חי בארץ הבחירה בידו לבוא למדינה, שבה יש ליהודים רוב וכוח שלטון, ואשר סמלי החיים בה הם יהודים. לפיכך יכולה ישראל, במדינה יהודית, למלא תפקיד חשוב בחיו של היהודי שאינו חי בה. אולם היא אינה מדינתו כל עוד לא בחר לקשר את גורלו בגורלה. מדינת ישראל, לעומת זאת, למורת היהתה מדינה יהודית, משומש שיש בה רוב יהודי ומשום שהוקמה מתוך חזון ציוני, מחייבת לדאוג לרוחותם ולשלומם של כל אזרחיה ותושביה, בלי הבדל דת ולאום.

מהות האופי היהודי של המדינה קשורה גם בנושא הרת. העמדה של כהנא עושה את הקישור בין שני אלה באופן הבוטה והחד ביחס. ברינויים הבינלאומיים בתחילת המאה ה-20 דובר בעיקר על מיעוטים לאומיים ועל תנועות להגדרה עצמית לאומיות. מרכזו התייחסות נראה דוקא בהשתיכות הלאומית, בין היתר בשל תהליכי הילוץ שעברו על החברה ובשל העובדה שלקבוצות לאומיות רבות יש עבר רתי מסוות והוויה לאומי שבו חלק מן האוכלוסייה אינם מגדיר עצמו כמשתייך לדת. הנזיצים ומלחמות העולם השנייה גרמו לرتיעה נדירה מתרומות גוע ומגענות. המאבק המודרני למען קידמה זכויות אדם, לפחות עד תחיית הפונדמנטליזם הדתי, נפרש במאבק נגד גזענות ובعد הגדרה עצמית לאומיות. כהנא, מתוך אמונה או מתוך עמדה טקטית מחווכמת, התגונן מפני האש灭תו בגזענות, או באפליה בغال השתיכות לאומיות, על ידי הרגשת טענתו, שקינה המידה היחיד לפיו הוא פועל הינו *השתיכות דתית*. הוא טוען, כי אינו חפץ בהתייחסות שונה לאנשים בשל מוצאם או צבע עורם – מאפיינים שאין לאנשים שליטה עליהם. הוא תומך בשוויון זכויות מלא ליהודים. אם רוצים אזרחי ישראל לא-יהודים להתגify, לבארה לא תהיה לבנה ולתמכו התנגדות. כהנא טוען כי לא זו בלבד שעדותו היא העמדה המקובלת על ההלכה היהודית, אלא היא

## זכויות אדם בישראל 155

עمرה המתחייבת מ תפישה רצינית של חופש דת: מדינה יהודית, על פי הגדרה, היא מדינה הנשלטת על ידי הדת היהודית ומנוולת על פיה, ובמסגרת הדת היהודית קיימת התייחסות שונה ליהודים וללא-יהודים.

העמדה הפוליטית הרשמית בישראל מתנגדת להגדרת האופי היהודי של המדינה כמדינה הلقה ושל אימוץ העמדה הרתית לפיה מותר להפלות בין יהודים ולא-יהודים. לבית-המשפט העליון לא היה קושי לפסול, פה אחד, את כהנא ומפלגתו מלהשתתף בבחירות לבנטה ב-1988 ולחזור על החלטה זו לפני הבחירה של 1992. עם זאת אסור לנו לחשב שהaims של סתייה פנימית בין מדינה יהודית ובין דמוקרטיה ושווון הינו שטхи, פרי דמגוגיה צינית.

עובדיה היא כי יהודים דתיים רבים, כולל אלה שיש להם מחויבות יסודית לשווון ולזכויות אדם, אינם יכולים להתחesch לחלום שבו המדינה היהודית נועשית למדינה הلقה. חלק מן הדוברים הדתיים נימקו את העבעות נגד חוכה כתובה ומגילת זכויות בטענה, לפיה אין ישראל זוקה למגילת זכויות מפני שיש לה כבר חוכה, הלווא היא תורה ישראל. אחרים צינו בምפורש כי אינם יכולים להסכים בקלות להכרזה האומרת כי מקור החוקה במדינת ישראל הינו המחוקך הדמוקרטי.

מחויבויות אידיאולוגיות אלה אינן משפיעות, בדרך כלל, על פרטי החקירה במדינה. אנשים שומרין מצוות, לרבות נציגי מפלגות חרדיות, מתפרקם היטב במערכת השלטון האזרחי בישראל. יחד עם זאת אין חסירות דוגמאות לכך שההסדרים, שנקבעו בישראל בשם הרצון לשמר על האופי היהודי של המדינה, אינם מבקרים תמיד את האילוצים של שמירה על זכויות האדם של כל התושבים, לרבות לא-יהודים. דוגמא טיפוסית אחת הינה הגישה לנישואי תערובת. יכול יהודי להיות מחויב עד מאד לזכויות אדם, אך להעדריף כי בנו או בתו יינשאו בתוך עמים. אין בהעדפה זו יותר מן המשאלת הטבעית עד מאד כי בנים ילכו, במובן תרבותי עמוק, בעקבות הוריהם. אין גם פגם בקביעה כי אחד מן היתרונות הגדולים של חיים כיהודי בישראל הינו הקטנת הסכנה לנישואי תערובת בהשוואה למתיים בפוזרה, בעיקר בפוזרה המערבית. אולם העדפות כאלה במשמעות האישית שונאות מאוד מאימוץ הסדר

## 156 אוניברסיטה משודרת

משפטי, כמו זה הנוהג בישראל, לפיו נישואין תערובת בישראל אינם אפשריים כלל מבחינה משפטית.

הסדר זה, המקובל על חוגים רחבים בישראל, יוצר מצב שבו זהות הדתית והזהות הלאומית נעות במין מחסום לראייתו את הזולות באדם, למרות שנותו מבחינה דתית או לאומית. הדגשת הבדלים בין הקבוצות מחזקת את הנטייה לקבוצתיות וגורמת להמעטה הערך של הדמיון הבסיסי בין בני אדם לבני אדם. מחויבות לזכויות אדם בנזיה על הכרה בדמיון הזה ועל הכרה כי כל אדם, ללא הבדל דת או לאומי או גזע, זכאי לכבוד, לחירות ולשוויון. גם הדמוקרטיה מחייבת שוויון. מבחן הדמוקרטיה היהודית, שהיא יכולה וחייבת לעמוד בו ולשאוף אליו, הוא בהתעלות מעלה הקבוצתיות ויישוב הדמוקרטיה היהודית, הנשענת על רוב היהודי ועל חלום היהודי של הגדרה עצמית. עם ההכרה באנושיות של כל בני האדם ובמה שמתחייב ממנו לשוויון אורחיו ופוליטי מלא בין האזרחים. זהו המבחן הייחודי לישראל. מידת ההצלחה של ישראל לעמוד בו היא שתקבע, בטוחה הארוך, את יכולתה להיות מדינה שיש בה מחויבות לזכויות אדם.

להבדיל מביעות הביטחון, שהן תלויות-עצמה, הרי הבעיות הקשורות באופי היהודי של המדינה ובהשפעתו על היחס לפחות יהודים ועל יחסיו הרת והמדינה הן מהותיות לקיוםה של ישראל. בעיות הביטחון ביום זה דוחקות ומרוכזות. טבעי וראוי להתרכו בשמירה על ביטחון המדינה. עם זאת ניתן לעשות ניסוי מחשבתי: לחשוב על ישראל ללא בעיות שתצדקה פגיעה בזכויות אדם מטעמי ביטחון. עדין תישארנה לנו שתי הבעיות של היחס לא-יהודים ושל משמעות היהודיות של המדינה, שייהיו המבחן בהא הידיעה ליכולתה של מדינת ישראל לקיים את זכויות האדם.

כאמור, הבעיה המרכזית בישראל בתחום היחסים בין הדת והמדינה היא עניין זכויותיהם של לא-יהודים, וגם זכויותיהם של יהודים לא-אורתודוקסים. עיקר הפגיעה ביום אינו בתחום החירות הפרטיות או ההתנהגות האישית. הפגיאות בזכויות האדם נובעות בעיקר ממחלוקת על סמלים: על האופי הממלכתי והציבורי של החיים בישראל. לפי פירוש אחד אמרה מדינה יהודית להיות מדינת הלבנה. לפי פירוש זה אין מדינה יהודית מתישבת עם דמוקרטיה, שכן מקור הסמכות האחרון בה אינו

## זכויות אדם בישראל 157

העם במחוקק הריבוני. "מדינת הלכה" אינה מאפשרת לאזרחה להשתתף באופן פעיל בקביעת גורלם ולהיות הפסיקים האחראונים בשאלות הנוגעות לחייהם הציבוריים. אזרחית, יהודים ולא-יהודים באחד, מאברים את "חירותם החיוונית". "מדינת הלכה" מקבלת על עצמה מקור נורמטיבי אחר – מקור נורמטיבי אלוהי. שולט בה מי שמייצג מקור זה עלי אדמות.

לכוארה אין פירוש זה מקובל בישראל, והריבונות היא בידי המחוקק הנבחר – הכנסת, אולם בנסיבות המצב מורכב יותר. על פי עמדתן המוצהרת של חלק, לפחות, מן המפלגות המשתתפות במשחק הפוליטי העיקרי העליון הוא אכן דתי, והסמכות העלונה אינה של נבחרי העם, אלא של "מוסדות גדולי תורה". אצל מפלגות אחרות מקובלת העמדה כי במצב של התנגשות בין החוק ה"אזרחי" של הכנסת לבין החוק ה"אלוהי" כפי שהוא מתפרש על ידן – גובר "החוק האלוהי".

עמדה מוצאה אשר לפיה אין חוקי הכנסת מחייבים, אלא פסקי הלכה או טקסטים קדושים, מעוררת קושי עקרוני עבור הדמוקרטיה: מצב שבו טקסטים קדושים קבועים את חי המדינה איננו מתישב עם זכותם של אזרחי המדינה לקבוע את גורלם. אולם הבעייתיות שלו ושל יישובו עם המחויבות לזכויות אדם גוברת כאשר פסקי ההלכה, או הפירוש שניתן לטקסטים הקדושים, פוגעים בזכויות האדם הנגורות מן התפישה הכללית ששורטטה לעיל. זהו המצב, למשל, לגבי חלק מפירושי ההלכה ביחס ללא-יהודים ולנשים. המתח עם הדמוקרטיה ועקרונותיה גובר שבעתים, שכן מידת ההשפעה של הציבור או של טיעון רצונלי על קבוצות המחויבות לסמכות עלינה אחרת היא זניחה. קבוצות אלה אינן מסתפקות באילכילת הערכיים המהווים העומדים ביסוד מחויבות לזכויות האדם בתחום המחויבות שלהם. קבוצות אלה גם אינן מקבלות את העיקرون של יכולות ציבורי פתוח ושל קבלת החלטות בדרך של דיוון, שבנון, התאגדורות ובחרירה. על כן יש בפירוש זה ליהדותה של המדינה, ובאיידיאולוגיה של קבוצות אלה בפוליטיקה הישראלית, أيام ערכי עמוק על הדמוקרטיה ועל הזכויות הבסיסיות ביותר של שוויון ואוטונומיה. أيام עקרוני זה הוא, כאמור, עמוק ומרחיק לבת יותר מאותן פגיעות בזכויותיהם של לא-יהודים או של לא-יהודים הקיימים בישראל.

## 158 אוניברסיטה משודרת

גם אם נדחה את הפירוש הזה למדינה יהודית, לא ייעלם המתח שבין עמדות אלה לדמוקרטיה. בישראל יש כבר כיום מיעוט לא-יהודי גדול, והוא אף עשוי לגדול ולהפוך ברובות הימים לרוב. אם לא נגביל את חופש הפעילות הפליטית הלא-אלימה בארץ, סביר להניח, כי תהיה קבוצה לא קטנה של אזרחים, ברובה הגרול לא-יהודים, שישמו להם למטרה להפוך את ישראל למדינה חילונית דו-לאומית. השאלה המרכזית בהקשר זה היא, מה מותר לנו לעשות כדי לשמר את עצמנו כמדינה יהודית, ועד כמה יפגעו הניסיונות הללו לשמר את עצמנו כמדינה יהודית באופןינו הדמוקרטי. השאלה האמיתית שלנו היא, באיזו מידה מותר לנו לפגוע בזכותו של ערבי, להיבחר, לטעון לפrogramma לאומית ולשוויון מלא, כל עוד הם פועלים באופן בלתי-אלים ומתר מחויבות כנה לדמוקרטיה. האם הדמוקרטיה מחייבת כי נאפשר לערבי ישראל, בדרכים של שלום, שכנו, גידול לכלRob והתגיות פוליטית לשנות את תמיינות הדעים השוררת היום לפיה צריכה מדינת ישראל להיות מדינה יהודית?

יש המנסים להפוך את השאלה להיפוטטית בטענה האומרת, כי אין ולא תהיה לערבי ישראל מחויבות אמיתית לדמוקרטיה, וכי מצע דמוקרטי הוא אצל עמלה טקנית בלבד, ומשום כך מותר לפסול התארגנויות פוליטיות שלהם מטעמי חשש לפגיעה בביטחון המדינה או לפחות בדמוקרטיה. אני יכול לנ��וט עמדה בטוגיה עובדתית מורכבת זו, אולם ביחס ההתארגנויות לקללה. יתרה מזו, כפי שציינתי, נראה כי גם בקרב ההתארגנויות היהודיות בישראל יש קבוצות שמחויבותן לדמוקרטיה היא בעיתית. מי שروعה להכשיר מפלגות דתיות ולפסול מפלגות ערביות חייב לפיכך להתרכז בהבדלים ביניהן ביחס לאים הפיסי על הביטחון והשלום, לא על הדמוקרטיה. ראיינו כי קשה מאוד להוכיח הבדלים כאלה. יש המצדיקים הימנעות מלדון בשאלת זו בעליית היהודים מרוסיה ובמאן הדמוגרפי בתחום הקרו הירוק שאינו מעורר דאגה בעtid הנראה לעין.

אם השאלה כיום, ובשנים הקרובות, היא היפוטטית, הריה נוגעת בשורש הקיום של ישראל כמדינה יהודית. אטור לזנוח את הטיפול בה דוקא באשר נמצאים בפתחו של הילך מדיני, שבו תעלינה שוב שאלות כגון זכות השיבה לבתיהם של פלסטינים

## זכויות אדם בישראל 65

שמוצאים מקומות הנמצאים בשטחה של ישראל ביום. חשוב גם לראות, כי הנטיה של יהודים ישראלים לא מעתים לעזוב את ישראל והתגברות המודעות של הערבים לזכויותיהם הקבוצתיות, יחד עם הכרה גדולה יותר בחופש התנועה, חופש הביטוי וחופש ההתארגנות של ערבים, שבאה עם דמוקרטיזציה גוברת של ישראל ועם מחויבות חזקה יותר שלה לשווון – כל אלה מחדדים את הבעייה יותר משήيتها בעת הכרזות העצמאות. אז ניתן היה לומר שההתחייבות לשווון זכויות מלא הייתה פעולה של נדיבות וניסיון לעמוד בדרישות שהציב ארגון האומות המאוחדרות. ביום יש לבן את הבעייה לאור הניסיון שהעטבר ולתת לה תשובה עקרונית ומעשית.

הבעייה אינה קיימת לגבי מי שרצה לשמור רק על אחד משני היסודות: הדמוקרטיות או היהודיות. בשתי הinterpretations ניתן לקיים פתרון עקבי. מדינה יהודית לא-דמוקרטית, כמו מדינה אסלאמית, אינה חייבת להיות משטר מדכא, אולם במקרה מובנים חשובים לא תוכל להיות מדינה השומרת על כל זכויות האדם האזרחיות והפוליטיות של כל אזרחיה ותושביה, ללא הבדל דת או לאום. האם ניתן לקיים דמוקרטיה שתהלום גם את חלומו של העם היהודי להגדרה עצמאית? ואיך ניתן להשיג זאת בלי להטיל על אף

יהודים הגבלות שאינן מתוישבות עם הדמוקרטיה? אני מאמינה בנוסחת פלא שתאפשר הרבה את העיגול. ראוי לזכור, כי גם הזכות להגדרה עצמאית הינה זכות יסוד. מימושה באמצעות ישות מדינית, כאשר נתקיים תנאים מתאימים, הינו יסוד חשוב ברוחותם של הפרטים השיביכים לקובעה המנסה להגדר עימה בדרך זו. לבן מותר לקובעת לאום, בהתקיים אוטם תנאים, להגן על מימוש זכותה להגדרה עצמאית. אולם להגנה על זכויותיו של אדם יש מגבלות הכוללות איסור פגיעה חמורה מדי בזכויותיהם של זולתו. מותר להגן באופן חוקתי, אף בנגד רוב מסויים, על ראיית ישראל כמדינה הממשת את זכות העם היהודי להגדרה עצמאית. מאידך אין הדמוקרטיה מתוישבת עם מניעה מוחלטת של שינוי חוקתי בתפישת המדינה. לפיכך לא תהיה ההגנה האמיתית על ישראל, מימוש זכותה להגדרה עצמאית של העם היהודי, בדרך של איסור חוקי על כל ניסיון לשנות מצב זה בדרכי שלום ושבנווע, אלא בדרך של שמירת הרוב הגדול הותומך

## 160 אוניברסיטה משודרת

בתפישה זו של המדינה. אסור ששמירת דמותה היהודית של המדינה תיעשה בדרך של הגבלה על זכויותיהם הפוליטיות והازרחיות של המתנגדים לדמות זו של המדינה, בראש ובראשונה של הלא-יהודים שבתוכה. מדינת ישראל צריכה לשאוף למעב שבו כל תושביה ואזרחייה, יהודים ולא-יהודים כאח, חבים לה חובת נאמנות מוצדרת. ישראל פעלת, במידה רבה, למען מעב זה וכך הגיעו לבמה הישגים מרשימים, אולם המתחים לא פגו, ויישראלי צריכה להיות ערוה לצורך התמידי לאין בין האופי היהודי לבין האופי הדמוקרטי שלה.

## ספרות מומלצת

הספרות בנושא זכויות אדם בכלל וזכויות אדם בישראל התפתחה מאוד בשנים האחרונות. אי אפשר לעשות צ'לך בספרות זו ברשימה קצרה. האגדה לזכויות האזרח קיבעה מקורות רבים, ראשונים ומשנים, במרקאה מקיפה. הקוראים המעוניינים מופנים אליה להשתלמויות.

**זכויות האדם והازרח בישראל – מקראה,** (כרבים א-ג), 1992-1991, עורכים: רות גבעון ו坎坷, האגדה לזכויות האזרח, ירושלים.

**יוסי בילין**

### **מדיניות חוץ ומוסר\***

#### **א. מי קובע את הנורמות?**

הויכוח הפילוסופי-היסטורי בין אסכולת הובס לאסכולת רוסו באשר למצב הטבעי שלפני יצירת ההסדר המלכתי או המריני, לא ישתיים נראה לעולם. האם הייתה זו מלחמת הכל בכל, שבה אדם לאדם זאב, והסדר כפוי הוא שהביא לסיומה, או שמא הייתה זו תקופה אידיאלית שבה היו אנשים בחופש מוחלט, עד שנכפה עליהם עליה של מלכות?

שאלה נוספת היא, כיצד נקבעו בעולם הנורמות המוסריות בין העמים – מה נכון ומה לא נכון, מה מותר ומה אסור בין עם לעם? בעניין זה נמשמעותו "המצב הטבעי" זמן רב אחרי שהאנרכיה בתוך כל חברה הוחלפה במשטר כזה או אחר. מי שקבע באמצעות הנורמות היה העם השליט בעולם – הבבלים, המצרים, האשורים, היוונים, הרומיים, כל אחד בחרו. כך נקבע כיצד להתנהג אל שבויים ושבויות, ומה לעשות בשל האויב וברכושו. הפיכת הצד השני לעבדים ולשפחות, הגלית עמים שלמים למקום, יחס לנשים של האויב כרכוש – נורמות אלה היו מקובלות, וגם הצד המובס נאלץ להשלים עמן. במשך אלפי שנים היסטוריה התעצבו נוהלים מחייבים, כמו למשל הנכונות של הצדדים הייריבים לקבל את תוצאותיו של דורך בין שני אנשים המיצגים אותו, כאלו היו אלה מזאות המלחמה בינם (דור וגולית!).

אחר כך, וקצת במקביל, הגיעו הדתות. ליהדות, לנצרות ולאסלאם היו תפישות משלهن באשר להתנהגות בעת מלחמה וכיובש. למשל, האסלאם, שכבש חלקים גדולים באגן הים התיכון במאה השביעית, העניק לבני הדתות האחירות את מעמד הדימוי. מצד אחד היו הנכברים בבחינת אזרחים מוגנים, אך מצד שני לא נהנו מהזכויות האזרחיות של המוסלמים, ובאותו עולם היה זה טבעי, שמי שהובס איבד את זכויותיו. המרת הרת היפה להיות

חוון נפרץ. המובסים היו יכולים לשקם את מעמדם בנסיבות יחשית על ידי הצליפות לדת המנזרים. שיאו של תופעה זו היה בספר של המאה ה-15, כאשר הנוצרים כפו על המוסלמים ועל היהודים להכריע בין המרת דתם לבין גירוש.

בתקופות מאוחרות יותר חזרו האימפריות לקבע את הנורמות. כמו מדינות נטלו על עצמן את המשימה של קביעת הנורמות הבינלאומיות. כך ונציה בראשית תקופת הריננסנס; כך בריטניה הגדולה, שראתה את האימפריאליזם הנאוור שלו כדבר שנועד לטובת העולם ולטובת הנכברים על יהה, יותר משנווער לטובתה שלה. השאלה למי "שייכת" הארץ שתחת השלטון האימפריאלייטי, למי שייכים משאביה וממי רשאי למשול על אנשיה, הוכרעה על ידי הקובש, כמידת הפתיחות השורה עליו.

במאה ה-19 היה ניסיון, שהצליח במידה רבה, להקים קואליציות בינלאומיות שניסו לקבע נורמות על בסיס אידיאולוגי. כיבושיו של נפוליאון הובילו לשינויים מרחיקי לכת בתחום החקיקה והתרבות בכל ארצות שלטונו, ויצרו אוירות שחזרו ושוינו זכויות. עם חבוסת נפוליאון הקים קונגסראט וינה ב-1815 את "הברית הקדושה". הייתה זו ברית נוצרית מושלת בהשראת הצאר אלכסנדר הראשון, בין רוסיה, פרוסיה ואוסטריה, למען שימור הערכיהם הדתיים והמלוכניים ו"ניקוי" אירופה מחילומות החופש והלאומיות. ברית זו, שקרה אליה גם את בריטניה (במסגרת "הסכם הארבעה") וגם את הנסיכות האירופיות הקטנות, הטביעה את חותמה עד 1848 וקבעה את הנורמות באירופה באשר לזכויות האדם וחירותו הדתית והמדינית. הייתה זו ריאקציה אמיתית לרוח המהפכה הצרפתית ותקופת נפוליאון, והצלחתה הממושכת התאפיינה ביציבות אזורית ובמניעת שפיכות דמים.

במחצית השנייה של המאה ה-19 עלה הלאומיות והיתה למושלת בכיפה. תביעות לאומיות ואחדות לאומי הפקו להיות לגיטימיים, ושאיפות לאומיות שפרצו גבולות והביאו לכיבושים אימפריאלייטיים מחוץ לגבולות אירופה – באמריקה, באסיה ובאפריקה – התקבלו כנורמה. מירוץ החימוש היה תוצאה של הימים ההן, ו"שלום חמוץ" היה התפישה המקובלת.

עד מלחמת העולם הראשונה נחתמו אמנות שקבעו חלק מחוקי המלחמה בין עמים (אמנת האג, 1907) והתייחסו בעיקר למותר

ולא Sor באשר לשביי מלחמה ולשתחים כבושים. לאחר חום המלחמה גברה בקרב ובבים התחששה, שהעולם צריך לעשות צעד נוסף ולקבוע נורמות בינלאומיות ביחסי החוץ ולמען מניעת מלחמה נוספת. 14 העקרונות של נשייא ארצות-הברית וודרו וילסון, שהוצעו בסנאט ארצות-הברית בינוואר 1918, היו בעלי השפעה רגילה, ועל רקע עקרונות אלו הוקם הארגון הבינלאומי המדיני החשוב ביותר עד אז – חבר הלואומים.

רוב העקרונות של וילסון דנו בנושאים קונקרטיים מאוד, שנקבעו מהתוצאות הטריטוריאליות של מלחמת העולם הראשונה (בלגיה, רוסיה, צרפת, טורקיה), אך היה בהם גם עיסוק עקרוני בצוותם הדיפלומטי גליה, בחופש השיט, בשחרור מחייבות כלכליות בינלאומיות, וב讹כה בזכות ההגנה העצמית. וילסון עסוק בצוותם ב"התאגדות כללית של האומות".

הקמת חבר הלאומים הייתה ניסיון ראשון להכთיב נורמות הנהגות בעולם כולו, כולל סנקציות כלכליות (שהופלו נגד איטליה בעקבות כיבוש אתיופיה); לגבות נכונות ליישום עקרון הביטחון הקולקטיבי, תוך שלילה אוטומטית של הזכות להילחם, אשר נתפסה כਮובנת מלאיה בעניין כל מדינה ריבונית. עקרונות חבר הלאומים עסקו במאזן עולמי לצמצם את הנשק ולשיקיפות של הנשק הקיימים, וראו בכל מלחמה עניין הנוגע לשalom העולם כולו ולא רק לצדדים הניצים; لكن כל הכרזת מלחמה היא הכרזה כנגד העולם כולו. נקבעו עקרונות של העברת הסכוסוכים הבינלאומיים לפישור ולבוררות, וב-1921 הוקם בית המשפט הבינלאומי הגבוה לצדק, בזיקה לחבר הלאומים, אשר הכריע ב-32 מקרים במהלך 18 שנים קיומו.

חבר הלאומים נחשב, היסטורית, לכישלון, הן מושם שמדינתם חשיבות כמו ארצות-הברית לא היו חברות בו, והן מושם שלא הצליח למנוע את המלחמה הנוראה ביותר בהיסטוריה האנושית, 21 שנה בלבד לאחר שנסתימה מלחמה נוראה אחרת. אך הוא יצר תקנים של מאזן עולמי, הנמשך מאז – לעיתים באופן מעורר חמלת, לעיתים באופן מוצלח יותר – לחנן את העולם, לקבוע מה מותר ומה אסור, להעניש את הערביין, ובעיקר לוודא שהמוסדר הבינלאומי איננו מוסר יחס.

**ארגון האומות המאוחדות** נוסד ב-1945, והוא מנשה ללמידה

משמעות חבר הלאומים. מטרת היסוד שלו היא קביעת הנורמות הבינלאומיות, והחלטותיו והאמנות שהוא יוצר בתחום הפיקוח על סוגי הנשק ובתחומי אחרים הם המאץ האנושי המתקדם ביצור לעצב את נורמות ההתנהגות הבינלאומית.

בעידן המלחמה הקרה התקיימו בעולם שני גושים עיקריים, ולכל אחד מהם הייתה מערכת נורמטיבית שונה – בין השאר בשאלת השקיפות והפתיחות של המוגנות המדינית בפני העולם. הגוש הקומוניסטי קידש את המאבק לשחרור לאומי על חשבון וכיוות האדם, והאו"ם שימש זירת ההtagושות בין הגושים. מאז סוף שנות ה-80 קיימת דומיננטיות מערבית, שבאה לביטוי, למשל, בהחלטות ביחס למלחמה המפרץ ולפעילות הבינלאומית ביוגוסלביה. רומה שעלה סף המאה ה-21 מתחדרת מגמת האוניברסלייזציה של הנורמות הבינלאומיות ומגיעה לרמה שלא הייתה קודם, אך היא עדין רחוכה מאוד מהקיף את העולם כולו. אלא שלצד הרחבת המנגנון המשותף הנורטטיבי בקרב האומות, מחריפה בסוף המאה ה-20 ועל סף המאה ה-21 השאלה של הפנתה הנורמות הללו על ידי שחוקנים שאינם מדינות, ואשר השפעתם חשובה לא פחות – החברות הגדולות, החברות הרבי לאומיות. חברות אלה פועלות במדינות שונות, ומטבע הדברים מתרנן היא אך ורק רוח, והן אינן מחויבות בקודם המוסריים הנקבעים במוסדות בינלאומיים. אך גורמים כאלה, המגלגים מיליארדים רכיבים של דולרים, משפיעים הרבה יותר ממדינות בעלות תל"גBINONI או קטן המקובלות החלטות ממשלה או פרלמנט לאחר ויכוחים קשים. החלטות על החרמה או סנקציות אחרות על מושטים>Rודניים, גזעניים או אלה המפירים החלטות בינלאומיות, אינן מחייבות חברות ענק עסקיות.

לפיכך, אחד האתגרים של ראשית המאה הבאה יהיה למצוא דרך לשילוב החברות הללו הן בקבלה החלטות והן ביצוען. יתכן שבמוסדות בינלאומיים כגון האו"ם היה צורך לחת מושבים גם לגורמים אלו, לצד המדינות המאבדות את אט מהשפעתן. עם זאת, " הפרטת מדיניות החוץ" אסור לה שתחבטה בהפקרת מדיניות החוץ ובאופן שליטה של ביצוע צרכי עונשין כנגד מי שאינם עומדים בקני המידה המוסריים שקובעת הסתכמה העולמית.

## ב. המוגבלות של מדיניות החוץ הישראלית

שם מדינה איננה "שחקן חופשי", וראוי לא מדינה קטנה, וראוי לא ישראל, בנסיבות הקמתה הייחודיות, כמדינה אשר חיה כל שנותיה בסכנת השמדה, וכמדינה אשר רואה עצמה כמדינה העם היהודי כולו. התהווות הסובייקטיבית של ישראל היא שמרחבי התרומות שלה מוגבל מאוד.

מוגבלה אחת היא החלטות האו"ם, בעיקר בתחום הסנקציות, המכתיבות את היחס כלפי מדינות אחרות. יחסה של ישראל לאו"ם היה תמיד מסווג. מצד אחד, ישראל נולדה בעקבות החלטת האו"ם, אך מצד שני האו"ם קיבל נגודה שורה ארוכה של החלטות שנדראו לה בלתי צודקות. הקיצונית מכלן הייתה ההחלטה שהשוויטה את הציונות לגזענות, ואשר בוטלה רק בדצמבר 1991, 17 שנים לאחר שהתקבלה.

אחד מההחלטות האו"ם שישראל הפרה, הייתה האיסור לעשות עסקות נשק עם משטר האפרטהייד של דרום אפריקה. למורת ההחלטה שהתקבלה ב-1977, המשיכה הממשלה הישראלית לקיים קשרים בייטחוניים עם דרום אפריקה עד 1987, ועוד אدون בכך בהמשך. אך היה זה יוצא מן הכלל שהheid על הכלל: בדרך כלל מקיימת ישראל את החלטות האו"ם, וכך לגבי כל מדינה אחרת במשפחת העמים, זהה מוגבלה על מדיניות החוץ.

מוגבלה אחרת קשורה ב"משטרים מיווחדים", ובזומות שהועלו בשנים האחרונות באשר לפיתוח טילים ושימוש בסוגי נשק שונים (למשל האמנה בנושא הנשק הכימי). מדבר בהסכם בין מדינות, שמי שאינו חותם עליו ואיןו מבצעו מסתכן באובדן מידע או באית קבלת חומרים בעלי חשיבות מדעית ואחרת. גם כאן מדבר ב策momם מרחב התרומות של המדינה על ידי מוגבלה שהיא מטילה על עצמה, כדי להבטיח שהיא חלק ממועדון המדינות הלגיטימיות. לארצות-הברית יש השפעה רבה על מדיניות החוץ הישראלית.

הדבר בא לידי ביטוי בהצבעות האו"ם, שבהן ישראל מצטרפת לארצות-הברית בתמיכת סנקציות נגד קובה, למשל, ובשורה ארוכה של החלטות אחרות. למורת ישראל אינה "לוויין" אמריקאי, ובתחומים רבים היא חייבת לפעול בשונה או אף בנגד עמדתה האמריקאית, היא זוקה לשיבת טובה במוחך כדי שלא

להיענות לבקשת אмерיקאית. כך, למשל, תומכת ישראל במדיניות "הבלימה ההפולה" של ארצות-הברית נגד איראן ועיראק, אף שרוב מדינות המערב אינן מתיחסות לכך ברצינות, וגם בארצות-הברית יש ביקורת רבה על תפישה זו, ובישראל נוטים רבים לסביר כי זו מדיניות שנכשלה ויש להחליפה בגישה מעשית יותר.

השפעה מסוימת על ישראל, קטנה הרבה יותר, יש לארגונים בינלאומיים, כמו האינטראנציונל הטוציאלייטי, בשעה שמלגאת העבודה נמצאת בשלטון. מדווקע בכך כי חס הארגונים אלה למשטרים רודניים (ציילי וארגנטינה בשנות ה-70, ברומה בעת

הזאת, ועוד), ולהופעות של ניצול כלכלי המזמין גינוי נחרץ.

מורשת התחלה של ההשפעה של מסגרות אזרחיות. השיחות הרוב-צדדיות בנושאי בקרת נשק, פליטים, שיתוף פעולה כלכלי, מים ואיכות הסביבה, שהחלו בעקבות ועידת מדריד, ונפסקו לאחר עלייתו של נתניהו לשפטון, יצרו תהליך חדש של התחשבות בשכנים. במשך עשרות שנים חינו בمعין אי בודד, ללא יכולת – ואולי גם ללא רצון – לתאם עם שכנים את הטיפול בתחום החיים השונים. ככל שהחפתה תהליכי השלום גבר הצורך לתיאום בינינו, וגברת ההבנה באשר ליתרונות הגלומים בו – החיסכון הכספי הטמון בחיבור רשות החשמל, למשל; האפשרות לטפל בבעיות הסביבה מ恐惧 שיתוף פעולה; והיתרון הכלכלי הנובע מחבילות תיוור משותפות. שיתוף פעולה אוזויה מהיבק קבלת סטנדרטים משותפים, עדכונים בנושאים כמו מחלות בעלי חיים, זיהום אויר או ימי, וכיו"ב, וכך כן קבלת החלטות הנוגעות לבחירת מועדים בסיסות בינלאומיים.

### הזהות היהודית

לנושאים היהודיים יש השפעה לא מברטلة על מדיניות החוץ הישראלית. פרישת נציגויות ישראל בעולםמושפעת מאוד מגודלן של הקהילות היהודיות השונות ומأופיין. ישראל מחזיקה לעלה ממאה נציגויות בעולם, וזה מספר העולה בהרבה על מה שיש למדינות גדולות ממנה. אחת הסיבות העיקריות לכך היא הרצון שהשגריר הישראלי או הקונסול הכללי יהיה כתובת קהילה המקומית, יביא אליה את דבר מדינת ישראל, וישמש גם שגריר

הקהילות הללו בישראל.

לא רק אירועים אנטישמיים מחייבים את ישראל להגיב ולמחוות, אלא גם החלטות של גורמים יהודים, מקומיים ועולםיים. למשל, כאשר הוחלט הקונגרס היהודי העולמי להחרים את קורט ואלדהיים, נשיאו לשעבר של אוסטריה, לאחר שהתגלתה מעורבותו בקצין במלחמת העולם השנייה, לא יכולה ישראל לעמוד מן הצד. היא החזירה את שגרירזה מווינה והחרימה גם היא את נשיא אוסטריה. היה זה מקרה קלסטי שבו גופו היהודי קיבל החלטה ללא הייעוץ בминистр ישראל, ומאלץ למשה את ישראל לפעול בדרך מסוימת, גם אם האינטרסים הישראלים המידניים עלולים להיפגע.

דוגמה אחרת היא פרשת טוג'מן, נשיא קרואטיה. מאז הוכרזה קרואטיה למדינה עצמאית היה לה עניין בכינון יחסי דיפלומטיים עם ישראל. לישראל אין קשרי בקשרית יחסים אלה, בלבד מהעוברה שפרניה טוג'מן הוא נשיא מדינה זו. טוג'מן, פרופסור להיסטוריה, הוציא בשנות ה-80 ספר היסטורי, שבאחד מפרקיו תיאר את השואה כאיירוע שבו נהרגו כמה אלפי יהודים בין מיליון קורבנות המלחמה, ואשר היהודים הפקחו לאסון שבו שישה מיליון מאהחים שילמו בחיהם, לכוארה. לדבריו, היהודים מנצלים את סיפור השואה כדי לקדם את ענייניהם. מאוחר יותר, במהלך מסע הבהירות שלו לאראת תקופת כהונה נוספת, אמר טוג'מן באחת מהופעותיו, כי הוא מאשר שאשתו אינה סרבית ואני יהודיה... לטוג'מן היה חשוב מאוד לקדם אתיחסו עם ישראל, וכך אמר מתחם אמונה, שאנטישמים רבים שותפים לה, כי ישראל יכולה "להפיעיל" את ארצו-הברית. הוא הקים לובי בישראל למען קרואטיה, הוציא לאור איסיים ישראליים, לאו דווקא חשובים ביותר, ופרש לפניהם שטיח אדום, והסביר להם שאיננו אנטישמי. הוא השמיט מתרגומם ספירו לאנגלית את הפרק על הכחשת השואה, והוא מוכן להחנצל על הסבל שגרמו האוסטיאשים לייהודים במהלך המלחמת העולם השנייה. אך הוא מעולם לא חזר בו מן הדברים שכותב. רק הממשלה הלاآמנית של נתניהו החליטה ב-1997 לחדר את היהודים עם קרואטיה. עד אז, במהלך כשמונה שנים, נמנעה ישראל מכך, כחלק מובוקן של מדיניות חוץ יהודית.

ישראל יודעתשמי שרוצה לפגוע בה יכול לעשות זאת דרך

פגיעה בקהילות יהודיות בעולם. במידה רבה מדובר ב"בטן הרכה" של ישראל – מוסדות יהודים בתפוצות, שאינם מוגנים כמעט שמאוגנים מוסדרות ככל בישראל, ואין זה בסמכותה של ישראל להגן עליהם. הפגיעה בבית הקהילה היהודית בארגנטינה ביולי 1994, לאחר שיישראל חופשית לפעול רק על פי האינטראס הלאומיות, מבליל קחת בחשבון את ההשלכות שיש לכך על האינטראס הלאומי היהודי. זהה "חולשה" הידועה לאויבינו, אך והוא גם ייחודה כמדינה יהודית.

במהלך תולדותיה של ישראל הרגשנו צורך להשלים עם מושטים בעיתאים מאד, כדי שלא יאונה רע ליהודים שחיו בתוך מושטים אלה, וכך שיטור להם לעלות ארצה. הדוגמה הבולטת ביותר היא רומניםיה של ניקולאי צ'אושסקו. הרודון הרומי נחשב למי שהוא "טוב ליהודים". הוא מאפשר ליהודים לקיים אתמצוות דתם והרשה להם לעלות לישראל (תמורה תשולם עבור כל מי שהורשה לצאת). ישראל היללה ושיבחה את צ'אושסקו; ראשי המדינה, מימין ומשמאל, הציגו אותו כידיד אמיתי, כמניג נערץ, חכם ורודף שלום, וייצאו מגדрам כדי להבטיח שהקונגרס האמריקאי יאריך מרדי פעם את המעדן הכלכלי המועדף שניתן לרומניה, שהיא אמרור להתקטל בשל הפגיעה בזכויות האדם בארץ זו.

מדיניות החוץ היהודית שאנו מנחים עשויה לנבוע גם במדינה דמוקרטית כמו איטליה באמצע שנות ה-90. לדוגמה, הממשלה של שלושת השרים הניאו-פאשיסטיים שצורפו לממשלה ברלוסקוני. כאשר הודיעו, כסוגן שר החוץ, שאנו נחרים את השרים הללו, התעורר ויכוח גדול בישראל, האם מותר לנו לעשות זאת בהתחשב בקיומה של קהילה יהודית באיטליה, אשר עלולה להיפגע מעמדה שלילית חד-משמעות של ישראל כנגד חברי הממשלה החדש. בסופה של דבר אכן נמנענו מהייפגש עם משלחת נציגי הימין הקיצוני, ולשםחנו ממשלה ברלוסקוני לא האריכה ימים. אך אילו המשיכה זו לתפקיד, היינו מוצאים עצמנו במצב לא פשוט, מול קהילה יהודית, שבעצמה הייתה חלוקה בשאלת כיצד להתייחס לפאשיזם המודען" הזה.

## מגבלות אזוריות

מנכלה אחרת היא המדיניות השכנית של ישראל. אנחנו רוצים להיות בשלום עם שכנוו, וביננו יכולים להתנות את השלום עם אופי מושטריהם. ברוב מדינות ערב המושטרים הם אוטוקרטיים, וקיים בהם בעיות חמורות של זכויות האדם, על פי כל הדו"חות השנתיים המתפרסמים מטעם המסדרות המטפלות בכך. הפרודוקט בישראל הוא, שדווקא הגורמים הליברליים, שרצוים בשלום ומאמינים כי ניתן לקיים אותו עכשו, הם שנזהרים מביקורת על המושטרים השכנים, וכשהם שוקלים את האפשרות למנוע את המלחמה הבאה אל מול הצורך לעמוד על קיומן של זכויות האדם בכל מקום בעולם, גובר האינטנס הרាជון ומופיע על השני. דווקא גורמי הימין וספקני השלום מבקרים בחופיות תופעות לא-דמוקרטיות באזוריינו, כיוון שהדבר משרת את התנגדותם לווייתנים למען שלום.

ישראל רואה עצמה כמדינה קטנה הזוקה להכרת העולם ולסייעו, ועל כן אינה רשאית, לכארה, להיאבק בתופעות שביעניה נחפשות כחמורות. כך, למשל, הטבח בטין-אן-מן בכיג'ין לא הרעד את אמות הספרים בישראל ב-1989, ונשיא המדינה דואז, חיים הרץוג ז"ל, היה מראשוני המנהיגים במערב שביקרו ביקורו רשמי בסין, מבלי שתהיה על כך ביקורת מתוך החברה הישראלית. החושתנו היה, כי מדינה קטנה כמו ישראל, שהקשרים הדיפלומטיים עם סין העממית היו חלומה המדינה מזה עשרה שנים, אינה יכולה להרשות לעצמה לנוהג כעצמה בთווה עצמה ולהטיל סנקציות "פרטיות" על מדינה עצומה כמו סין. את המרניות המוסרית השארנו למדינות הגדולות, ושכנענו את עצמנו, כי מדינה רווית בעיות קיומיות כמו שלנו אינה יכולה להיות שופט העולם, כיוון שאז פשוט תישאר מבודדת.

כך, לא היינו מוכנים לארח בدرج בכיר את הדרái למא, המנהיג הגולה של חב"ל טיבט, לא מתוך הצדק של מה שקרה בטיבט, אלא משום שידענו שזה ירגיז את סין. לא הסכמנו לארח את נשיא טיוויאן, אףלו כעולה רגל, לא מפני שהדמוקרטיה הצעירה בטיוויאן אינה מוצאת חן בעיניינו, אלא משום שידענו שזה ירתיח את סין הגדולה. לא פצינו את פינו בעניין מורה טימור והאלימות

הקשה של אינדונזיה נגד תושבי האי החופפים בעצמאות, משומש ש�认נו שאסור לנו להתעמת עם המדינה המוסלמית הגדולה בעולם, גם אם מעולם לא היו בינוינו יחסים דיפלומטיים.

רבים מאיתנו היו פשוט אדישים או בוררים באשר לבעיות הפנימיות של מדינות אחרות. אותם מעטים שידעו וכאבו, ראו בהתעלמות מפגיעה בזכויות אדם במקומות אחרים בעולם מעין המשך מדיניות ה"אין ברירה" של ישראל. בודדים בלבד מחו בפועל.

#### ג. קדאיותה של מדיניות חז' מוסרית

ספרו של האנס מורגןطاו פוליטיקה בין האומות הרUIL דורות של סטודנטים ליחסים בינלאומיים, כיוון שנלמד כתורה אחת שאין לה מתחרים. הספר נכתב על רקע מאורעות שהיוו את השפל העמוק ביותר בתולדות האנושות, ומורגןطاו הסיק בו מסקנה פשטנית למדי, שאומצה באורח פשטי עוזר יותר על ידי תלמידיו: המדיניות הבינלאומית היא פוליטיקה שכולה כוח, גם אם היא מוצגת בדרך אחרת. זהה מדיניות של אינטראסים חשופים וערומים, וכי משחק

אחרת את המשחק משלם בירוק.

טענה זו, שאינה חדשה ואין מהפכנית, הפכה את מה שהוא תיאור מצב לכל אידיאולוגיה של רבים, שהפכו להיות מורים ופוליטיקאים. הם הצדקו את מדיניות האינטרסים על פי התיאוריה של מורגןطاו, ולא הבינו כי זהה תפיסה טאוטולוגית מובהקת ותו לא.

לומר שככל מדינה פועלת, בסופה של דבר, על פי האינטרסים שלה, זה כמו לומר שאדם קרוב אצל עצמו. ומה בכך? וראי שארם קרוב אצל עצמו, וכל מה שהוא עושה נובע מהמחשבה שהדבר משרת אותו באופן הנכון ביותר. כאשר אדם מעניק זכות קידמה למשהו אחר, או מוותר על משהו מסוילו, או תורם כסף או דם, או אף מסלים בחיו כדי לקדש מטרה כלשהי, כמו שמירה על גבולות ארציו, הוא עושה זאת משום שהוא סבור שלא יוכל לחיות עם שום חלופה אחרת. גם זה סוג של "אגואיזם". אך הוא חלק מטאוטולוגיה שלפיה, כל מה שאתה עושה, על פי הגדרה, הוא

**משמעות האינטראס** שלך, כפי שהוא נראה לך בזמן נתון ובהקשר נתון. האינטראס הזה יכול לבוא לידי ביטוי בפשרה או בהשתלשות, ברצח או בהתאבדות. מכאן, שמרניות חוץ מוסרית גם היא סוג של פוליטיקה ושל אינטראס לאומי, כשם שמתן נדבה לקבוץ גם הוא סוג של אגואיזם. נכון שמרניות עושות תמיד מה שטוב להן לדעתן, אבל במקרים רבים מאוד, מה שטוב להן הוא מדיניות חוץ מוסרית.

### מהי פוליטיקה ריאלית?

הדוגמה המוחשית ביותר שאני יכול להציג מניסיוני היא מדיניות ישראל כלפי דרום אפריקה. ההתקרכות בין השתיים הייתה "ישראל פוליטיק", שלא קsha להזכיר אותה. כמעט כל מדינות אפריקה יתקו את יחסיה עם ישראל בעקבות מלחמת יום כיפור, כאשר ישראל הגיעו לצד המערבי של תעלת סואץ ותקעה יחד באפריקה, למשך חודשים אחדים. היה זה אחד הצערדים הציוניים ביותר של העולם, אשר העניש את ישראל לא על עצמותה, כפי שבאה לביטוי ב-1967, אלא דווקא על חולשתה, כפי שבאה לביטוי ב-1973. ישראל נותרה ללא קשרים דיפלומטיים עם. מדיניות הגוש הקומוניסטי ועם רוב מדינות העולם השלישי, שלא לדבר על כך, שעד אז לא הצליחה לפתח קשרים דיפלומטיים עם מדינות כמו ספרד, פורטוגל ויוג'ן. בשנות השפל הלווי, שבמהלכן התקבלה גם החלטה הציונית של האו"ם המשווה את הציונות לגזענות, היה זה טבעי בעיני ממשלה ישראל לחזור למדינות "מצורעות" אחרות, ולהדק את הקשרים עם גורמים בעולם שהוחרמו מסיבות שונות.icia

שייא הקשר הגלוי עם דרום אפריקה התרחש כאשר ראש ממשלה, ד"ר בלטזר יהנס פורסטר, ביקר בישראל באפריל 1976 כאורח ראש הממשלה, יצחק רבין ז"ל, על רקע הפגנות (מאופקות מאור) של השמאלי שנה לאחר מכן, כאשר הגיע הליכוד לשפטונו, התחדקו היחסים הביטחוניים, וישראל הפרה, כאמור, את הסנקציות שהורה האו"ם בדבר הפסקת קשרי הביטחון של כל מדינות העולם עם מדינת האפרטהייד, שהוחלט עליו ב-1977. ישראל של מלחמת בגין ז"ל חשה שהאו"ם הפנה לה עורף, ולכן היא אינה חייבת להחיזס אליו ברצינות יתרה. כך נחתמו עסקות נשק בהיקף גדול בין ישראל ודרום אפריקה, וישראל אף שימושה "מכבטה" להעברת

סחורות מן העולם אל דרום אפריקה המוחרמת.

בנובמבר 1986 התרמנתי למנכ"ל המדייני של משרד החוץ, חודשים אחדים לאחר מהומות בדרום אפריקה שהובילו להחרפת הסנקציות הבינלאומיות נגד משטר האפרטהייד. רק אז נודע לי כמה עמוקים הקשרים בין שתי המדינות, והתחלתי לפעול באינטנסיביות על מנת לשים להם קץ. ממשחך קבוע בקבינט המדייני, שוחחת על הנושא עם שר היליכוד ועם שר הכלכלה. כמעט כולם סבירו, שישראל אינה צריכה לקבל החלטה על הטלת סנקציות על דרום אפריקה, מאחר שמדובר במדינה המטיעת לנו, שחיים בה כ-100 אלף יהודים, ואשר הפסקת קשרי הביטחון עמה עלולה לפגוע קשה בישראל.

לאחר שהكونגרס האמריקני קיבל החלטה, שעלה הנשיא לדוח לו מידי חצי שנה על מדיניות שאינן ממציאות את הסנקציות כלפי דרום אפריקה, נעשה המאבק קל יותר, אך עדין כמעט בלתי אפשרי. יצאתי בהכרזה פומבית, כי לא יתכן שהדמוקרטיה הישראלית תהיה היחידה שלא הצטרפה למחוקק הסנקציות נגד דרום אפריקה הגזעית, וכי המדינה היהודית היחידה בעולם לא יכולה להרשות עצמה להימנע מכך. הוויכוח יצא החוצה, ומעתה הופעלו עלי שורה של חצאים. אנשי מערכת הביטחון הוותיקים והטוביים באו להסביר לי, כי תהיה זו פגיעה בכוחנו. אנשי ההסתדרות הגינו אליו ואמרו, שרבים יפוטרו בישראל כתוצאה מיוזמת החוץ עם דרום אפריקה, בעיקר בתחום המתכת. מנהיגי הקהילה היהודית בדרום אפריקה טענו, כי החלטה ישראלית כזו תסכן אותנו ותציג אותנו כאובי המשטר.

לבסוף, במרץ 1987 הורתה ישראל, כי במשך 10 שנים הפרה את החלטת האו"ם, וכי מעתה לא תחרש שום חוזה ביטחוני עם דרום אפריקה. הקבינט הקים ועדת בין-משרדית בראשותי, כדי להחליט על צעדים בתחום הכלכלה והתרבות. הלחצים גברו עוד יותר. שיאם היה בשיחה שהתקיימה במשרדי של שר החוץ דאז, שמיעון פרט, עם אחד האישים הבכירים ביותר במערכת הביטחון, שהוקראי אותו מאד. האיש אמר לנו, כי ההחלטה על סנקציות תרבותיות וככללות קשה לדרום אפריקה יותר מההחלטות הקודמות על סנקציות בתחום הביטחון. העולם כולו נוטש את המדינה הזו, ובאמת גם ישראל תעשה זאת, ייחשב דבר זה לבגידה. הלבנים מונחים

כ-5 מיליון נפש, הם חמושים עד שיניהם, ולוולם לא יתנו לשחורים להשתלט על דרום אפריקה. החלטה על סנקציות היא אונדון בעל ברית אסטרטגי לשנים רבות, מבלתי שנוכה לאחדת השחורים, המושפעים מאוד מASH"ף. הוא אמר כי הצביעות חוגגת: בדרום אפריקה מסתובבים נציגי מדינות שונות הקשורים קשורים עט שלטונות מתחתי לשולחן. כל העולם מבין שהלבנים לא יוותרו על שלטונם לעולם, ויהיה זה נראה אם ישראל תנקוט מדיניות שלIFI נפש וחירה לעצמה ברגל, רק ממשום שימושו החליט לנקטוט מדיניות מוסרית בעולם בלתה מוסרי.

האיש סיים את דבריו ויצא מהחדר. נותרתי עם פרט. "נו, מה אתה אומר?" שאל השור. אמרתי לו, שהטעות האמיתית תהיה אם דוקא אנחנו לא ננקוט סנקציות נגד מדינות גזענית מוצהרת, ודוקא נחרצותו של אורחינו אומרת לי שאני צודק. איני יכול לומר, כמובן, שהשחורים יכולים להשתלט על דרום אפריקה במהלך השנים הבאות, אך מי יכול להתחייב שהלבנים ישילטו שם לעולם? לבסוף, ההחלטה הקונגרס האמריקאי תעשה את זה, ושרי הקבינט יקבלו את הצעותי לסנקציות לא משום שהן הצעותי, אלא בכלל מילת הקסם "לחץ אמריקאי", למרות שלחץ שכזה לא הופעל.

ההחלטה על הסנקציות התקבלו בקבינט בספטמבר 1987, וישראל חקרה אל העולם. נמנעו בקרים רשמיים בדרום אפריקה, ואף הוחלט על מימון קורסים למנהיגים שחורים בתחוםים מקצועיים שונים. ההחלטה, שהתקבלה לאחר ויכוח ממושך, ונחמכה על ידי ראש הממשלה דאז, יצחק שמיר, זכתה להרעד עצום בדרום אפריקה, ולהרגד בארץ-הברית ובעולם.

עד מהרה התברר כי לא שלימנו מחיר יקר בגינה. דרום אפריקה לא ניתהה את הקשרים הדיפלומטיים, כי לא היה לה כל ברירה. יהודים לא אוניה דע, ורוב המפעלים שעבדו בשבייל דרום אפריקה מצאו לעצם חלופות שמנעו פיטוריהם מסיביים.

בדיקת כבוד שנתיים וחצי, בפברואר 1990, שוחרר מנדרלה, ותווך ארבע שנים הפך להיות לנשיא דרום אפריקה. הקשרים שפיתחנו עם הקונגרס הלאומי האפריקאי, הסנקציות שנקטנו, ואף הוויכוח הקשה שהיה בארץ לפני קבלתן, היו גשר שעליינו עברנו כדי להבטיח שהמשטר החדש בדרום אפריקה לא יראה בישראל אויב

ומשתף הפעולה הקרוב ביותר לשיטון האפרטהייד.

יתכן שגם דוגמה נדירה, וברור שפרק הזמן קצר שבו המרחשו המאורעות נדיר גם הוא. לעיתים עליין לשלם הרבה יותר בעבו ביצוע מדיניות מוסרית, ולעתים מתברר שהיא גם מדיניות כדאית רק לאחר זמן רב, ומקבלי החלטות כבר אינם בחיים. אבל כיוון שבידיו הווה עובדה, אני יכול לומר, כי בשנות ה-80 לא הייתה כל החלטה אחרת שיכלנו לקבל כלפי דרום אפריקה, שיכלה למנוע את הופעתו של אויב חדש ובעיתי לישראל, אותה החלטה, שנראתה כה לא "ריאל פוליטית" כאשר התקבלה.

ליישרל יש תועלת רובה בנקודת מדיניות מוסרית:

1. ישראל עצמה היא מדינה קטנה ומואימת. היא עלולה להזדקק לתוכיתן של מדינות אחרות, אם תיקלע למצוקה. הסיעם לאחררים במצוקתם מגדייל (גם אם לא מבטיח) את הסיכויים שישינו גם לך.
2. החשיבות הרבה שאנו מיחסים להגנה על היהודים בעולם מחייב אותנו לקחת בחשבון, שמדיניות מוסרית שלנו תסייע לתביעותינו להגן עליהם מפני אנטישמיות, ולהתבונן בנסיבות השונות שמירה תקיפה עליהם.
3. כמו בדוגמה של דרום אפריקה, כך גם במקרים רבים אחרים, החמיכה בחלש הופכת להשכעה כאשר הוא מגיע לשיטון. הדבר נכון לגבי ארגון כמו "סולידיריות" בפולין, לגבי האופוזיציה לפראנקו בספרד, שכמה ממנהיגיה (כמו פיליפ גונולס) נתמכו על ידי ישראל, ולא שכחו לה זאת בהגעים לשיטון.
4. משטרים דמוקרטיים הם תרומה לייצבות העולם ולרווחתו, הם מוסריים יותר, כי הם עומדים למשפט הציבור, ותמייה בהם פירושה תמייה ביציבותם בעולם, החשובה, כמובן, גם לישראל.
5. העולם היום שקטן מאד, ומשודר בשידור ח. בעולם כזה קשה מאוד להיות מתרניך. ל"ריאל פוליטיק" יש הופעה תלוייזונית גורעה ביותר. מדינה החשופה ללוייני התקשורת אינה יכולה להרשות לעצמה להשתמש במדיניות כזו, וטוב שכן. "ריאל פוליטיק" הוא לשון נקייה למדיניות תועלתנית וצינית לטוח קצר, אשר מזיקה בטוחה הארץ. לעיתים אתה

חייב לעשוה מעשים שאינך שלם איתם, כדי לטפל במצב חירום, כדי להציל מישהו או למנוע קטסטרופה. אך כאשר התחנחות בלתי מוסרית נעשית מוצדקת ולגיטימית, אתה מאבד את צביונך ועלול לגרום נזק כבד למינוחך.

אנו נהגים להשלים עם מנהיגים דיקטטורים, לעיתים על סף הטירוף, רק משומם שהם מנהיגים "לגייטימיים" של ארצותיהם. המשחק ידוע ומקובל. הללו מגיעים לשולטן כתוצאה מהפיכה צבאית או השתלטות כוחנית אחרת. הם מקימים להם מוסדות הנקראים בשמות דמוקרטיים, עורכים בחירות שבהן אין איש מתמודד נגדם, חיים בתנאי חיים נוחים במיחוד, זוכים להערכתם, להפגנות חמיצה ואהדה ולימי הולדת מרוגשים. העולם מכבר אותם בביקורים רשמיים, בחילופי מתנות ובങאנומים רציניים באירועים ערבי, שבhem מרכיבים לדבר בשחבי הערץ ובתוכנותיו הטרומיות. יום לאחר שהוא פורש מהעולם, בדרך הטבע או בדרך אחרת, או נאלץ לגלות מארצו, יוצא עמו בהפגנות שנאה כלפיו, והעולם מציג אותו כדיקטטור מטורף.

בספרו של בוטروس בוטרוס ראלி מקהיר לירושלים הוא מתאר פגישה משונה מאוד עם אידי אמין באוגנדה, בשנת 1978, ומפרט את השיחה איתו, את הצעתו הנדריבה לראלי לנוח על מיטתו לצדוניו, וכיו"ב. בקريا ראשונה הרבר נראה כפיליטון, אך במחשבה שנייה אתה אומר לעצמך: הרי דברים אלה נכתבו כאשר אידי אמין כבר איננו שליט אוגנדה, וכאשר בוטروس ראלי הוא מדינאי בדים. אותו בוטروس ראלי נתן לגיטימציה לטירוף של אידי אמין, כאשר קיים את הביקור. עולם שלם ידע מי הוא אידי אמין, כשהם שעולם שלם יודע מיהו סדרם חסין ומיהו מועמר קרافي, ולא נמנע מלblkך אצלם ולהללו.

אבל בביקורת זו אין צורך להרחיק מהבית. אני זכר היבט אחד חיים ברלב ז"ל, שכיהן כמוש"ל מפלגת העבודה, בשובו מكونגרס המפלגה בקומוניסטית ברומניה של צ'אושסקו. ברוח ההומו הטובה עליו, תיאר ברלב את הקונגרס, את ההמון המוחאים כפיים לניקולאי והלנה צ'אושסקו ולבנם, שר הספורט הצער, וקוראים "צ'אושסקו פה צה רה". עד היום מצלצל באוזני קולו של ברלב, הלועג להציג הערצה הוו לדורן הרומי, המוחא כפיים ומחקה את הקRIAה של ראש התיבות של המפלגה הקומוניסטית,

לקול צחוקנו הרם.  
אילו במקום לצחוק היינו אומרים: לא עור! אין ביקורים  
ברומניה, אין לנו חלק בנסיבות הזו של הערצת המנהיג הזה! –  
אולי היינו תורמים במשהו לטילוקו מוקדם יותר.  
במאה ה-21 זה יהיה קל יותר. הגוש הקומוניסטי כמעט שאינו  
קיים, וסין של היום שונה מאוד מסין שידענו. העולם שוקף,  
וחלקו הגדול מכוסה בשידור חי. אפשר יהיה לפעול יחד יותר  
קלות מאשר בעבר, כדי לא להסתכן בביטחון על מנהיגים בלתי  
נסבלים רק לאחר היעלמותם.  
שיתוף פעולה כזה יהיה הביטוי הבהיר ביותר לכך, שמדיניות של  
”יפי נפש” היא גם המדיניות הגדאית ביותר.

# ישראלים על ספסל \* הנאשימים?

השלכות כניסה לתקוף רומי מבחן מדינת ישראל

העודה לדין בפני ה-ICC. למרות זאת, אנשה להראות כי בפועל החשש מפני העודה לדין של מספר גדול של ישראלים הנו מופר וכי אין להניח שבית הדין החדש יתמקדם בהפרות קלות יחסית של הדין (במיוחד במקרים שבהם ספק אם ההפרות בוצעו לאחר כניסה החוקה לתקוף, ונדרש על ידה).

בין הטיעון בדבר חשיבותה המורכנית של חוקת רומי לבן הטיעון העוסק ביישומים הפסיכיפיים של הנוגעים לישראל, אעומד בקשר לעסוקים שבין ישראל (וממדינות אחרות, בראשן ארצות הברית), אינה צד לחוקה, נכון לעכשיו. העודה שאציג, בחלוקתagan, הנה כי אף שחלק ניכר מהחששות הישראלים בנוגע לחוקה אינם מוצדים, הרי העודה שלפיה רצוי לישראל "להמתין על הגדר" עד אשר יתרבו פרטים נוספים בית הדין (זאת השופטים והותבע, מגמות פרשניות בפסק הדין וכדומה), הנה עודה סבירה.

## ב. חשיבותה של חוקת רומי

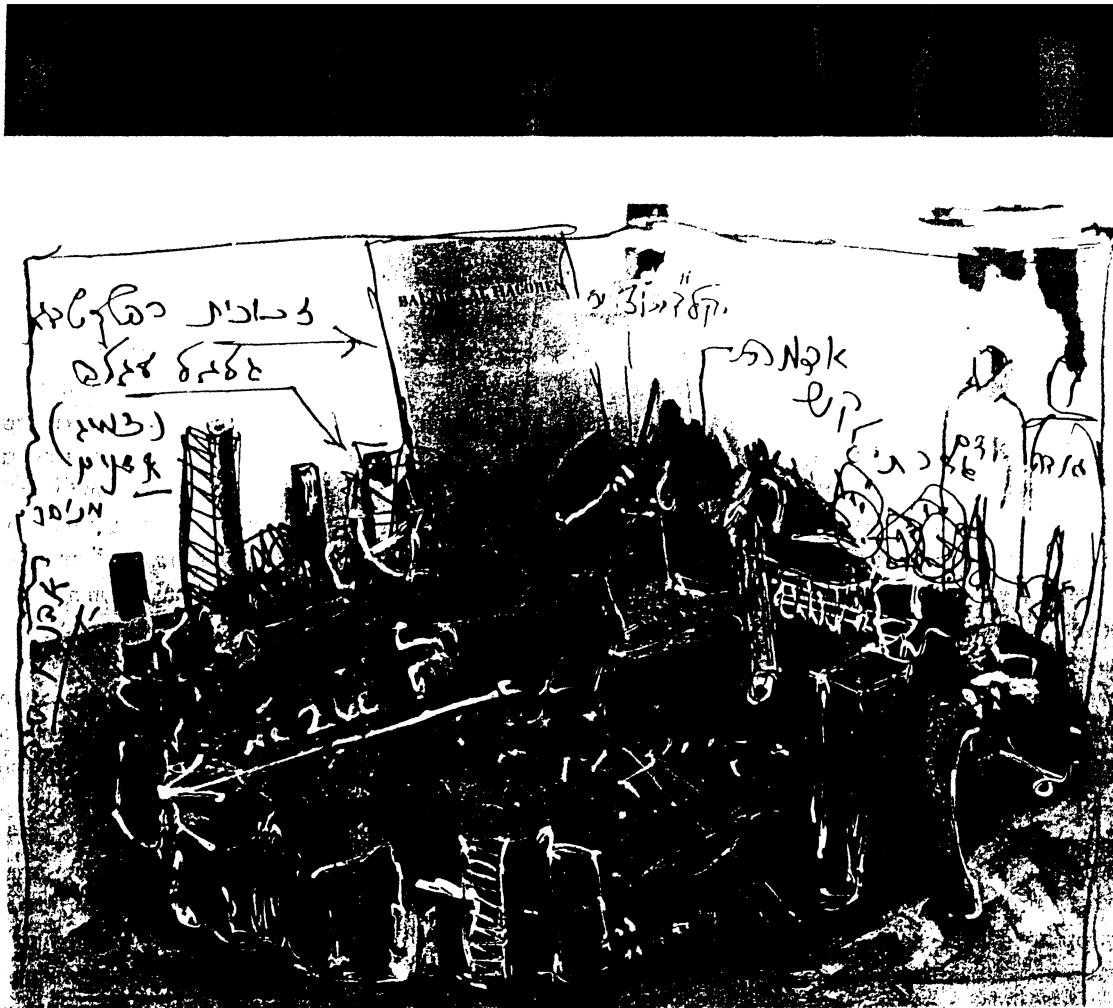
קשה להפריז בחשיבותה של חוקת רומי ובוגדול המהיפה שהיא, מחוללת במשפט הבינלאומי, בכלל, ובמשפט הבינלאומי הפלילי, בפרט. כניסה לתקוף של החוקה מסמלת "קיימת מדינה" בכל הקשור למיערכות היהודים בין המשפט הבינלאומי למשפט המדינתי, להתחממות הנורטימיטיבת של המשפט הבינלאומי הפלילי ולרמות האפקטיביות של מגנוני האכיפה שלו.

ראשית, החוקה יוצרת דיוויניות בינלאומית חדשה, בעלת סמכויות מוחיקות לכל, לבירור אשותם של פושעים מלוחמה ומציע פשעים בינלאומיים אחרים (השמדת עם ופשעים נגד האנושות). בכך מגבירה החוקה, באופן ניכר, את התשתבותם להעמדות לדין של אנשים אלה, ודרכן מוחזקת את יכולת החריטה של הקהילה הבינלאומית ומעניקה לה אמצעי רבעצמה להגנה על ערכיהם הבינלאומיים בסיסיים.<sup>19</sup> למעשה, בפעם הראשונה בהיסטוריה נוצרה ערכאת שפיטה פלילית בינלאומית קבועה בעלת פוטנציאל תחולת אוניברסלי, וזאת בגין לבתי הדין הבינלאומיים בעלי האופי "האי-לאומי" שפעלו לאחר מלחמת העולם השנייה (בניינברג ובטוקו) ואלה שהוקמו בעשור האחרון (בתי דין ביגונברג, ברואנד, בסיריה לאונגה ובמרוח טימור), אשר סמכותם הוגבלה למקום ולזמן מסוימים.<sup>20</sup> יתר על כן, בגין הדין שהוקמו "אי-החוק" באו-עלום, בכלל, לאחר ביצוע חלק ניכר מן הפשעים בזירת האירועים שבתחום אחריותם, ואילו ה-ICC, כמוסד של קבוע, יהיה קיים בעתיד בעת

**A. מבוא**  
ביום 1 ביולי 2002 נכנסה לתקוף חוקת רומי המקימה את בית הדין הפלילי הבינלאומי (ICC)<sup>1</sup>, זאת לאחר שיוור מ-60 מדינות אישרו את החוקה (נכון למועד כתיבת הרשימה, כבר אישרו את החוקה 87 מדינות). מיד לאחר תאריך זה החלו פעילות נורצת במספר מוקדים בעולם (בעיקר בהאג – מקום מושבו של ה-ICC) על מנת להבאיה להשלמת הרכנות לקראות חילת פועלתו של דין במחצית הראשונה של שנת 2003.

כידוע, ישראל חתמה על חוקת רומי ביום 31 בדצמבר 2000 (מספר דורות לפני שג המועד האחרון לחתימה על החוקה), אך לא אישרה אותה למרות זאת, לחוקת רומי יש השלכות מרחיקות לכת בנוגע למדינת ישראל. כפי שאטען ברשימה זו, חוקה פוטנציאלית השפיעה רב על מערכת היחסים הבינלאומיים, בכלל, ועל המשפט הבינלאומי, בפרט. מכאן, בישראל עשויה להיות מושפעת בעקבינו, חברה בקהילה הבינלאומית, מהשינויים ומהתהליכים שיתרחשו בתחום מכניזם של החוקה לתקוף. מעבר לכך, כפי שאראה בחלוקתישראל לא עצרפה לחוקה. באופן דומה, אטען גם כי ישראל יכולה לעשות שימוש "אפקטיבי" בחוקה, אף שהיא צד לה, כדי להוביל להעודה לדין של טורISTICS פלשטיינים בפני ה-ICC. מסקנתני זו בדבר תחולת החוקה בנוגע למאורעות המערבים או רוחים ישראליים למרות אי-העציפות ישראל אלה מתבססת בעיקרה הערתני כי ה-ICC יבחר בשיטת הפרשנות האפקטיבית, המרriba את תחולת טעפי סמכות השיפוט שלו, והוא כי יש לו סמכות לדון, בתנאים מסוימים, בעבירות שבוצעו בשטחים שכבשה ישראל בשנת 1967. הוואיל וחוקת רומי קובעת כי העברת אוכלוסייה המדינה הכבשת אל השטח הכבוש על ידה מהווה פשע מלחמה (להלן: "סעיף ההתנהלות"), הרי שמסקنتי זו חושפת, באופן תאורטי, מספר רב של ישראלים המעורבים ב"מפעל ההתיישבות" בשטחים שנכבשו על ידי ישראל במהלך מלחמת ששת הימים לסנתן

\* דוקטור למשפטים, חבר סגל ההוראה בבית הספר למשפטים, המסלול האקדמי של המכללה למשפטים, המחבר מורה לעורח המחבר שלו, מר רפי רודניק, על הסיווע הרוב בחנות המאמר ולבן יערה אלון, חברה מרכזית בתחום המשפט, על גבוחה בהכנות המאמר לדפס. כמו כן, מבקש המחבר להודות לד"ר ארונה בן נתלי וליעיד קרן מיכאלי על העורחות המועילות לטיעות קורומות של המאמר.



סקירות לבילוי על הגונן, יאל תומරקין 1983 – 2002 עבודות רצוף

"סבירת התבן של אהבות-הילוות מוגלה כשרידי אסון... מגל הגדנום מאולס, בין השאר, בחורבן, דם, קני-מקלעים ובכ אדים... לפני תומרקין, מעגל המיתוס של "השיבה הנעשית" (מורע'ה לאידאה) מחרירן אל שואה מחורית, שהמקום גור בדין עמדו התייאוגר-מטאPsi - מקום מובטח" וקטלוג התערוכה, עמ' 80.

1994, S.C. Res. 955, 8 Nov. 1994, U.N. Doc. S/RES/955 (1994), 33 I.L.M.

1598 (1994)). נהג מוסס למגמה זו הן בית הדין לפשעי מלחמה בוגנסלאביה (ICTY)"', אמר הויסמן לדור בפשעים שבוצעו בשטחה של יוגוסלביה לשעבר (להלן: "ICTY").

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, 25 May 1993, U.N. Doc. S/RES/827 (1993).

1203 משפטם, אין בוחק זה ICTY הנגילה טופוליה על טכנות של בית הדין ללחשת וקבע תקדים קבועים בקשר לפשעים שבוצעו לאחר הקמתה.

G.E. O'Connor "The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court" 27 *Hofstra L. Rev.* (1999) 927, 973; D. Scheffer "The United States and the International Criminal Court" 93 *A.J.I.L.* (1999)

.12. 13 רק למשל, ה-ICJ פרסם במהלך המשבר בקוסובו כתוב אישום נגד סלוובאן מילוטוביץ', נשיא יוגנסלאביה דאז, בגין אחזרות לפשעי מלחמה שבוצעו בקוסובו על ידי הכוחות היוגוסלאביים. יש הסבורים כי להגשת כתב האישום הייתה רומה של ממש להחולתו של מילוטוביץ' לקבל את נתניה נסאי ליטס הלהקה (הלהקה שתקלה עיטה מדם לאחר מכן).

J. Leaning "Kosovo: Case Study" *Crimes of War* [URL:<http://www.crimesofwar.org/archive/archive-kosovo.html>] (last visited on 15.10.2002)

13 רק מראיין, רואן: JR. Bolton *The United States and the International Criminal Court, Remarks made at the Aspen Institute* (16 Sep. 2002) [URL:<http://www.state.gov/u/us/rm/13538.htm>] (last visited on 1.11.2002) ("The most basic error is the belief that the ICC will have a substantial deterrent effect against the perpetration of crimes against humanity")

התרכשותן של הפרות של המשפט הבינלאומי, וכל להגב ב"זמן אמיתי" לפשעים המבוצעים בזירות שונות בעולם. בכך הוא ידר מסר נורומי וorthyuti לצדדים לסכסוך ויכול להשיע על תהליכי קבלת ההחלטה על ידם במהלך הסכסוך". כפי שאראה בהמשך, ▲

Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999 (1998).<sup>1</sup>

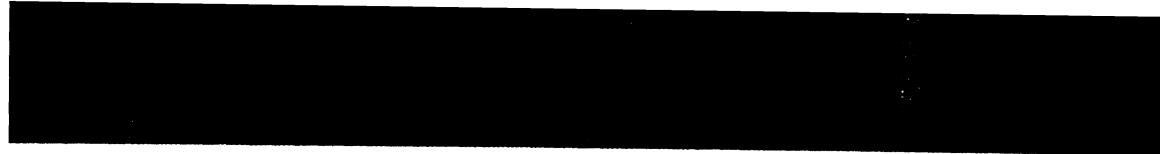
M.C. Bassiouni *Speech made at the Ceremony for the Opening of Signature of the Treaty on the Establishment of the International Criminal Court* (18 July 1998), reprinted in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden, 1999) XXI: O. Triffterer "Preliminary Remarks: The Permanent ICC – Ideal and Reality" *Ibid* at p.17, 26<sup>2</sup>

כך, למשל, הויסמן בית הדין הצבאי בינירנברג (IMT) לדין בפשעי הנאצים ובעלי Charters cellpadding="0" style="display: inline-block; width: 1em; vertical-align: middle;">3

Charter of the International Military Tribunal (IMT) in Charter of the International Military Tribunal (IMT) in Agreement for the Prosecution and Punishment of the Major War

Criminals of the European Axis (London Agreement), 8 Aug. 1945, 82 U.N.T.S.280<sup>4</sup>, ובית הדין לפשעי מלחמה בוארז'ה (ICTR) בפשעים שבוצעו במהלך שנת 1994 בשתה של רوانדה ויל וו רואנדיס במדיניות שכנות לרואנדה Statute of the International Tribunal for the Prosecution of Persons Responsible

for Genocide and Other Serious Violations of the International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 Jan. 1994 and 31 Dec.



החוód בפניו<sup>12</sup>. מכאן שההתקפות זה מציבה אתגר מעשי בפני מערכות משפט שונות בעולם, לרבות מערכת המשפט בישראל, לבחון את ההליכים המתיקיים בהם לאור הנורמות הدولניות הבינלאומיות, על מנת שיוכלו "לחסן" את אוווחיהם החשודים ביצוע פשעים בינלאומיים מפני העמדה לדין בפני ה-ICC.

#### ג. המחלוקת בנוגע להצטרופת לחוקת רומי

על אף הנימה החיובית שבאה תוארו עד כה התהליכים שחוקת רומי מעודדת, הרי שהקמתו של ה-ICC אינה נקייה ממלחמות, במיוחד על רקע הסדרים ספציפיים המצוים בחוקה. למעשה, בעוד שקיים קוננסוס נרחב למדי בכל הנוגע לעצם הצורך בשחיזוק המשפט הבינלאומי הפלילי ובעהותם לדין של מבצעי פשעים בינלאומיים, קיימים חילוקי דעתות בנוגע לטיבן של כמה מן הוראות המרכזיות של חוקת רומי.

ודוק, אין מדובר במחלוקת אקדמית גרידא. כבר 87 המדינות שהצטרופו לחוקה (ברום, מדינות אירופה ואמריקה הלטינית), ישנן מספר מדינות, ובראשן ארצות הברית, אשר הוינו כי אין בכוונתן, בשלב זה, לאשר את חוקת רומי. לא אף זו, ארצות הברית היא נקתה מספר עצדים שנעו לפגוע במעמדת של חוקת רומי ולהקטין את ההסתבות כי ה-ICC יעדיד לדין אזרחים אמריקאים. במסגרת עצדים אלו אימץ באסיאו החוץ המוענק למדינות ורות המצטרופת את הנשיא לказץ בסיוו החוץ המוענק למדינות ורות המצטרופת לחוקת רומי, ולאחר להשתמש בכך על מנת לשחרר אזרחים אמריקאים המוחזקים במעצר לצורך העמדה לדין בפני ה-ICC<sup>13</sup> (בשל הוראה אחרתה זוהה החוקן כלו בכינוי הלעג לא פורמלי – "חוק הפלישה להאג"<sup>14</sup>). במקביל ערכה ארצות הברית מספר הסכמים בילטרליים עם מדינות שונות בעולם המונעים הסגרת אזרחי המדינות הנוגעות לדבר לדין ה-ICC (ישראל הנה אחת המדינות הראשונות בעולם שהצטרופה להסדרים אלו)<sup>15</sup>.

לעתנט ארצות הברית, החזקה סובלת מספר ליקויים בסיסיים אשר הופכים את ה-ICC למאך בעייתי ואך מסוכן<sup>16</sup>.

ראשית, אין בחוקה ערובות נאותות נגד האפושות כי התובע, האחראי על הגשת כתבי אישום לבית הדין, יעשה שימוש לרעה בסמכויות הנרחבות העומדות לרשותו<sup>17</sup>. כך למשל, קיים חשש כי התובע יזכיר תלונות שהוא, אשר יונשו ממענים פוליטיים על ידי אויביה של ארצות הברית, נגד ראש השולטן בארצות הברית וחווילים אמריקאים, וזאת על מנת להשתמש בוירה המשפטית שמציע ה-ICC כדי לנוכח את איזות הברית<sup>18</sup>.

שנית, החזקה אינה כוללת עובות נאותות לשם הגנה על חייבים הפעילים בשמה של הקהילה הבינלאומית על מנת להשכנן שלום באווים שונים. בעולם (ובחט' חיילים אמריקאים ובטים). העודה כי חיילים אלו חשופים לסנתה העמדה דין בפני ה-ICC עלולה להרתיע מדינות מהשתתף בפעולות לשפירה על השלום, וכן

לסקן את הביטחונות הבינלאומיות<sup>19</sup>.

הרי שלביה הדין סמכויות גם בנוגע למדיינות שלא העתרו לחוקתו, ובכל זה ישראל, ומכאן שהאפקט הרטעה של קים גם בנוגע לאזרחים הישראלים. אכן, בחודשים האחרונים נדמה כי מקבל החלטות בישראל מודעים יותר מעבר לאפשרות שפועלותיהם של ישראלים, לרבות של מקבלי החלטות עצם, יבחנו על ידי בית הדין החדש<sup>20</sup>.

שנית, חוקת רומי יכולת את הפירוט המופיע ביותר שנitin למצוא, נכון להיום, בינהלאומית כלשהי של רשות הפשעים הבינלאומיים (הנוגם שהרשות המופיעה שם אינה מתימרת להיות, ואכן אינה מלאה<sup>21</sup>). הויל והחוקה משקפת את עדתן של מספר גדול של מדינות בעולם (87 המדינות המאשרות, ובונע לרובות הנושאים הכלולים בחוקה, גם של 50 מדינות נוספות שחתמו על החוקה מבלי לאשר אותה), הר שلتמיכת הנחתת בעקרונות החוקה יש פוטנציאל להוביל להתגבשותם של סטנדרטים משפטיים מנהיגים אשר יהייבם מוסיפות אשר לא העתרו לחוקה<sup>22</sup>. מכאן, ישראל עשוי למצוא עצמה בסוף של יום מוחיבת בחלוקת מהוראות החוקה גם אם לא תצטרוף אליה (למעשה, כבר כו�ן ישראל מחייבת בחלוקת ניכר מהוראותיה של החוקה – אותן הוראות דקלרטיביות המצהירות על הדין הקיים<sup>23</sup>).

לפנ הnormativi של החוקה יש גם חשיבות רבה בעידוד השיח הבינלאומי ובחברת המודעות הפנים-מדינית בתחום להתקפות זו המשפט הבינלאומי הפלילי במצבי מלחה ושולום. להתקפות זו ערך משפטי מובהק, שכן בתם שפט פנים-מדינתיים רבים (במיוחד או בתם המשפט בישראל<sup>24</sup>) שואבים נורמות ועריכים, במישרין או בעקיפין, מהמשפט הבינלאומי. מעבר לכך, יש להתקפות האמורה גם ערך חינוכי ורב בכל הקשור להפצת ערכי המשפט הבינלאומי ההומניטרי בקשר ל██ אוכלוסיות נרחבות בעולם.

שלישית, הקמת ה-ICC מוסיפה נוכחות לתוך ה"חוקתייה" של המשפט הבינלאומי<sup>25</sup> ולהגברת תפוקתו של המשפט בגיןטרקיה בין מדינות ו"שחקנים" בינלאומיים אחרים. בסיס תחlik זה, אשר ניתן להבחין בו גם במספר תחומי משפט בינהלאומי אחרים, כגון זכויות אדם ודיני סחר, מצויה התפיסה כי הדין הפני וכתו המשפט הפנימי של מדינות העולם כפויים מבחינה נורמטיבית למשפט הבינלאומי ולבתיה הדין הבינלאומי. תפוקתו של המשפט הבינלאומי, על פי מודל מבני זה, הנו להענין רשות ביטחון משפטית נוספת זו הקיימת במשור הפנים-מדינתי לצורך הגנה על עולם וועל אינטראסים בינלאומיים<sup>26</sup>. משמעות הדברים הנה, כאמור, כי החלטתה של מערכת משפט פנים-מדינית שלא להענין לדין חדש ביצוע פשיי מלחה כפופה לביקורת שיפוטית מצד ה-ICC. אם זה האחרון סבור כי ההחלטה אינה ראויה, הרי שהוא יכול לפחות על מנת להענין לדין בעצמו את החשוד. באופן דומה, אם ראה לא-ICC שהליך משפטי פלילי פנים-מדינתי אינו עולה בקנה אחד עם הסטנדרטים הבינלאומיים הקיימים (למשל אם מדובר ב"משפט דומה"), הרי שלא תהיה מניעה משפטית להענין לדין שוב את



- ס' 17 לחוקת רומא.  
22 U.S.C. §§ 7421-7433 (the American Servicemembers' Protection Act) 12  
Human Rights Watch U.S.: 'Hague Invasion Act' Becomes Law (Press 13  
Release, 3 Aug. 2002) [URL:<http://www.hrw.org/press/2002/08/aspa080302.htm>] (last visited on 15.9.2002)  
הסכם אלו מבוססים על ס' 98 לחוקת רומא, הקובע כי מדינת יהו פטורות משיטו 14  
פעילה עם ה-ICC, אם הרו יפע בעסקים בינלאומיים אשר הן צד להם, הפטרות 15  
אוחותם וויס ששלוחו אילוין מהעמותה. לין בלטמן, בקבוקה על חוקיותם של 16  
הסכם אלו, וא�: Coalition for the International Criminal Court, *Memo on Bilateral agreements proposed by US government* (23 Aug. 2002) 17  
[URL:[http://www.ICCnow.org/html/cICCart98memo2\(2\)020823.doc](http://www.ICCnow.org/html/cICCart98memo2(2)020823.doc)] (last visited on 15.9.2002)  
ראו מילר סקופיה לשעה ה-ICC, *The United States of America and the International Criminal 18  
Court* 50 Am. J. Comp. L. (2002) 381; Scheffer, *supra* note 4  
A. Levy "Israel Rejects Its Own Offspring: The International Criminal 19  
Court" 22 Loy. L.A. Int'l & Comp. L. Rev. (1999) 207, 215; M. Grossman  
*American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies* (6 May 2002)  
[URL:<http://www.state.gov/p/9949.htm>] (last visited on 1.11.2002) ("the placing... of unchecked power in the hands of the prosecutor would lead to controversy, politicized prosecutions, and confusion")  
ל מדברת מהו יקרה אם בודע שרinfeld ידריך תטרור או פואולו ואומספלד להאג' 20  
J.R. Bolton "Reject and Oppose the International Criminal Court?" 26.9.2002 (ארכון הוראות) וראנו: 21  
*Three Options Presented as Presidential Speeches* (New-York, A. Frey ed., 1999) 37, 43; S.M. Minikes U.S. Views Regarding the International Criminal Court, Statement to the OSCE Permanent Council (4 July 2002) 22  
[URL:<http://www.state.gov/p/eur/rsl/rm/2002/11726.htm>] (last visited 23  
O'Connor, *supra* note 4, at pp. 954-955. ש. כהן: 24  
זהאה כי היטין הגיבור בבלגיה בין שנות 1999 – השנה בה הוחרב החוק המקובל לבטח המשפט והבלים המכונן שיטוט אנטיבריטולן בענין לפשיי כלוחמתה, פשיטים נד אנשיות ושפי עזה עם לילא לא דקה בין עברה לבירה, לרשות 2002 – בה פסק בית דין בלילווערטס כי לא ניתן להgesch כתם אישום על פיה חוקק נד אשים נזאים פיסית בבלגיה – מאשש את החששות האמריקאים בדבר השתת תלותם ממיניעם פוליטיים. בשלוש העשיות והמוראות הוושע בבלגיה עשוות תעבויות נד מניהים פוליטיים מכל רוחם העולם (לרובות אריאלו שרון, יאסד ערפאט, סאד חוסיין, פירל אסטרו וווער). נרוב המקרים גונשו התביעות כדי מטלוננס הקשוורטי לתביעות ואומץ-חיזיתם בדרך כלל שבותם של היוצרים או מושליכיהם לבג'ו'ן "בלמה מתהנתה בעמומה אכזרית ה- "British exiles act against " 3.7.2001 (ארכון הוראות) 25  
"Castro" CNN.Com/World 4.10.2001 [URL:<http://europew.cnn.com/2001/WORLD/europe/10/04/belgium.castro/>] (last visited on 1.11.2002)  
D. Scheffer Testimony Before the Senate Foreign Relations 26  
Committee (July 23 1998) [URL:[http://www.state.gov/www/policy\\_remarks/1998/980723\\_scheffer\\_ICC.html#\\_external](http://www.state.gov/www/policy_remarks/1998/980723_scheffer_ICC.html#_external)] (last visited O'Connor, טהון: 27  
ראנו: 1.11.2002); Scheffer, *supra* note 4, at pp. 18-19  
supra note 4, at pp. 952-954  
Communication from the State of Israel to the Secretary General of the 28  
UN (28 Aug. 2002) [URL:<http://untreaty.un.org/ENGLISH/bible/englishinternethome/partI/chapterXVIII/treaty10.asp#N3>] (last visited on 25.9.2002) ("In connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998... Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000")  
D. Scheffer America's Stake in Peace, Security and Justice (Aug. 31 29  
1998) [URL:[http://www.state.gov/www/policy\\_remarks/1998/980831\\_scheffer\\_ICC.html](http://www.state.gov/www/policy_remarks/1998/980831_scheffer_ICC.html)] (last visited on 1.11.2002); H.P. Kaul  
"Preconditions to the Exercise of Jurisdiction" *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, A. Cassese et al. eds., 2002) 583, 611 (Hereinafter: Rome Statute of the ICC 30

שלישית, החוקה מנוגדת לעקרונות בסיסיים של הגנות והדדיות, בכך שהוא מאפשר למינותו שאין צד לחוקה להסכים באופן סקלובי להעודה לדין של פושעי מלחמה מסוימים.<sup>20</sup> כך, למשל, עיראק (אשר אינה צד לחוקת רופא) תוכל על פי החוקה להסמיד את בית הדין להעמיד לדין טיסים אמריקאים המבצעים הפצצות מן האויר מעל שטחה, במסגרת סכום בין ארצות הברית לבין עיראק, מבלי שתידרש להסכים לסמוכות בית הדין להעמדו לדין אזרחים עיראקיים אשר יתכן שביצעו פשעים חמורים בהרבה במסגרת אותו סכום.<sup>21</sup>

ראו למשל א' דין "سورיה כבר מתעניינת בהגשת תביעות נגד מנהלים בחו"ל" (14.5.2002) (ארכון הוראות); ב' אלון "היוזע: ביה"ד בהאג עשוי לשפט מנהלים בחו"ל" (12.6.2002) (ארכון הוראות). יתכן שאורת האנרכיות לאשרות הגדלה לדין של ישראלים נהגה הגדלה המושתת לאשרות הגדלה לדין של ישראלים נהגה הגדלה המושתת המושפט העליון מפרוסט החלות שבותות בוגשאות הקשיושים למשפט הבילויי באחר האינטראנס שלו, בשפה האנגלית, בכך, מקווה בית המשפט העשייל השפיע על השינוי ביחסים מנהליים בעוצם גבור כל הנזע לאירועי ישאים לדין.

חוות רומה אינה יכולה למשל למשל את הפשעים הבילויים הבאים: שווים (שאים) נפלים בידי פשי מלחמה או פשעים נד האונשות), טורי, שור ובני אדם, פリストות וסחר כסמים.

המשפט הבילויי המנחה נוצר כחומרה מקומה של פרטיקה ממשוכת, ככלית ועקבת על ידי הרוב המכריע של מדינת העלים, המלהו בהוחשת מחייבות פעועל באורה והר' ב. 18: *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at p. 18 (בג'ז 785/1927 עמו י' מפקד כחוזה צה"ל בדוחה מדיניות פ"ד מובן מדורו של המנהג מקובל כי מדינות יצאו זאה, מדינות ייכות להוציא את עצמן מדורו של המנהג מקובל כי מדינות יצאו בסופו ובאותם עקב נד כל תחוננות, עיר ההגבשות לני' יהו' לא יהו' בכלל *Fisheries* (persistent objectors) (לכלל). האמור, אלא יהושבו למחנחות עקבותיו, לדורות אוט. עיר. 1951 I.C.J. 116, 131 לא ניתן להתנגד לנורמות שחקילה הבילויית וזהו כורומת M.N. Shaw *International Law* (Cambridge, 4<sup>th</sup> ed., 1997) 97

רשות פט', לעיל העירה, 7, בע' 37-38 ("אמנה בדילואמית אינה הופכת לחוק משפט הארץ אלא... מדור על הוראות אוט אין אליה או הוראה על הוראה על הוראה מדיניות קיים, היינו, אם המדור בקיופיאציה של מנה קיים"). בין הוראות וחוק רומי, המשפטית דין מנהיג, בין, מן כרבת ההוראות השוואות בתורת העברות ס' 8-8 לחוקה ולעקרונות המשפט הבילויי הפליל (ס' 33-22 בחוקה). בישראל, המשפט הבילויי המנהיג נקל מושער לין חוקה רשות סותרת. ע"פ 175/54 שטפפורר ל' ח'י, פ"ד (1), 5, 15, 2040, 2033 (3) (1970). לעומת זאת, המשפט הבילויי הפליל נקל דין הפניימי כמיושן רק באמצעות חקיקה רשותית ע"פ 148, 145, 25/55 האמתודוטש לכלי נפקדים י' סמרה, פ"ד י' 1829, 1828; פושט עט, בע' לעיל העירה, 7, כי' 38. עט, זאת, זה רון הוכמי ווון דון המונחים נקל מושער לדין הפליל. במאצעות חקוק ההתאמנה הפרשנית בין הדין הישראלי לביילויי. גנ"צ 279/51 7048/97 ר' שד תבשחון, פ"ד ד' (2), 721, 743-742 (בג'ז 2599/00 יעד – עמותת וחירות לילדי שמוטה דואן לו שד תבשחון, פ"ד וו' (5) 846, 834).

ראו למשל: J. Delbrück "Prospects for a 'World (Internal) Law?': Legal Developments in a Changing International System" 9 Ind. J. Global Leg.

*Stud.* (2002) 401; E.U. Petersmann "How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society" 20 Mich. J. Int'l L. (1998) 1; E.U. Petersmann "Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?" 31 N.Y.U. J. Int'l L. & Pol. (1999) 753

B.S. Brown "U.S. Objections to the Statute of the International Criminal Court: A Brief Response" 31 N.Y.U. J. Int'l L. & Pol. (1999) 855, 878; Trifsterer, *supra* note 2, at p. 27; W. Schabas *An Introduction to the International Criminal Court* (Cambridge, 2001) 19-20



להעמיד את חוקיותם של הצדדים האמורים לבחן שיפוטי בפני ערכאה זורה (ודוק, חלק מרשותות השלטון סבורות כי הנושא אף אינו שפיט בבעג"ץ<sup>30</sup>). מכאן, שבעיתו הנוכחי, ההחלטה של ICC לאינה נוכה למדינת ישראל. עביני העמורת הפלטית והביטחונית הישראלית משמעותה של ההחלטה עלולה להיות הception דרכיה הלחימה בטורו למגבלות משפטיות נוספות על אלה הקיימות כו"ם, ומכאן צמוץ נוסף של מרווח הפעולה העומד לרשות הצבא. החלטת ICC אף עלולה להתפרש כהסכמה מצד ישראל לחיפוי מפקדי צה"ל וחיליו לסכנתה העמודה לדין בחו"ל, דבר המונגד לתפיסה שליפה על המדינה להגן על חיילים הפעלים בשמה (והנותלים סיכוןים אישיים כדיים לשם כך)<sup>31</sup>.

עם זאת, הגורם ההיסטוריה העיקרי שהוביל לעמדתה המשפטית של ישראל כלפי ה-ICC היה החילתן של המדינות שהשתתפו בוועידה לניסוח חוקת רOME, שנערכה ביולי 1998, לצרף לרשימת פעיעי המלחמה הקבועים בחוקה את "טערת התנהלות" – סעיף 8(2)(ב)(8), הקובע כי העברת אוכלוסייה הכבוש לשטח כבוש, במישרין או בעקיפין, תיחשב כפשע מלחמה<sup>32</sup>. על רקע החלטתו של סעיף זה בחוקה (על פי הצעתה של מצרים) ותחשיתה של מדיניותו של מצרים ("נתפר



שדרוג שלישייה ממשפט מלומבי. אורכין הארץ.

למידותה") וכי אין לו מקום בקרב רשות הפשעים הבינלאומיים החמורים ביותר, התנגדה ישראל בזועמת רOME לנוסח החוקה כולה.<sup>33</sup> גם כיו"ם, החשש כי בית הדין יעשה שימוש "יצירתי" (בטעית) התחנהלות נגד אזרחים ישראלים מנסה על ישראל להעתוף בחוקה, ולקבל אגב כך את סמכות השיפוט של בית הדין בנוגע לאזרחה המעורבים ב"פעולת ההתיישבות" בשטחים.

הג שיש ממש במרבית הטענות נגד ה-ICC שנ汇报ו עד כה, הרוי בדעה כי החששות הישראלים (ואהmericאים) הם מופרדים במידה רבה ואינם יכולים להוביל להtanנות גורפת להחלטות חוקה. דבריים אלו הנם נכוונים בעיקר בכל הקשור לסכנות הפליטית של היליכים. בהקשר זה, בחינת פעילותם של בתיהם "אד-הוק" שהוקמו בעשר השנים האחרונות מצביעה, בדרך כלל, על גישה מקצועית ונטולת פניות לשפטות הפליטית<sup>34</sup> (האם שניתן להוות כמה החלטות מיוחדות בעיתות<sup>35</sup> והאם שניתן לטעון כי העברת סכסוכים בינלאומיים למשורר המשפטיא היא כשלעצמה אקט

ריבועית, החוקה סותרת כמובן עקרונות בסיסיים של משפט בינלאומי, שכן שהיא מתירה לבית הדין להפעיל סמכות שיפוט בגין לאומיות שלא קיבלו את סמכות השיפוט שלו<sup>22</sup>. פגמים אלו מצדיקים, לשיטה של ארצות-הברית, לא רק הימנעות מאשרור החוקה, אלא אף מאבק אקטיבי נגד בית הדין. גם ישראל נocket גישה מסווגת לפני בית הדין. על אף ISRael הייתה בעבר בין התומכות הבלתי נמנחות ברעיון הקמתו של בית דין<sup>23</sup>, הרי שבזועמת רOME הייתה ישראל בין שבע המדינות היחידות אשר הצבעו נגד נספח החוקה (יחד עם ארצות-הברית, סיון, קטאר, עיראק, לב ותימן)... יתר על כן, על אף ISRael חתמה על חוקת רOME בסוף שנת 2000, היא לא אישרה אותה, ואף הדיעה לאחרונה לומות'ל האו"ם, בדומה לארצות-הברית, על כך שאין בכוונתה לאשרר את החוקה<sup>24</sup>.

גם שלישראל ביקורת על מספר הסדרים ספציפיים המצוים בחוקת רOME (כגון אופן מינוי השופטים, הליכי גilio מסמכים ועוד)<sup>25</sup>, הרי שעמדתה השילית בגין החלטות החוקה נובעת מושווה גורמים עיקריים. ראשית, ישראל שותפה לחלק מן החששות האמריקאים בנוגע לסכנות הפליטית-ציה של בית הדין<sup>26</sup>, ונראה כי חששות אלו אף התעצמו בקרב מключи ההחלטה בקשר לחייבי ההחלטה

בישראל כתוצאה מההליכים שנוהלו נגד ראש הממשלה שרון בבלגיה, בגין מעורבותו בטבח שהתקיים בשנת 1982 במחנות הפליטים בסרביה ושתיליה<sup>27</sup>. לדעת צוות המשפטנים שמנתה ישראל לטפל בפרשה, התلونה שהגיבו כמה מניצולי הטבח וההילכים שננקטו בבלגיה בעקבותיה היו נוגעים ברמה גבוהה של פוליטיזציה ויינטו ניסיון להעיבר את זירת המאבק הישראלית-פלשנית לבתי משפט זרים<sup>28</sup>. על כן, כל עוד קיים חשש כי יישנה שימוש דומה ב-ICC, הרי שיש להניח כי ישראל תחטוף אליו.

הסבר שני להוור נוכנותה של ישראלי להחלטה, לפחות בשלב זה, ל-ICC נוצע בהתלקחות מחדש של מעשי האיבה בין ISRael לפלשתינים ("אין-יפאדת אל-אקזה")<sup>29</sup>. במסגרת מאבק עקוב מדם זה, נקבעה ISRael של צעדים אשר חוקותם מביתת המשפט הבינלאומי שנניה בחלוקת (למשל, חיסולים/סילומים מוקדים), הריסות בתים ותיחום מגורייהם של בני משפחותיהם של מחללים מתאבדים). ספק רב אם מключи ההחלטה בישראל מעוניינים



ראו למשל: בג"ץ 02/2002 קאן (Law) – תארון הפלסטיין להגנה על זכויות האדם ואיסות הסבירות' מפקד כוחות צה"ל במחוז המערביות, פ"ד נו(3) 9. בית המשפט העליון קובל עורה זו, ובו אף חגי בגב' 01/5872/01 בדת"ל רשות הממשלה, פ"ד נו(3) 1. לסקירה קצרה של הטיעונים בעד ונגד שפטות, בהקשר לאי-רוייני איינטיפאדת אל-אקצא, ראו מ' נורלי "כבוד השופט ברק מבקש להזכיר תאריך 7.5.2002 (ארצון הארץ)".

ראו למשל "יעתק'ם בלבד' במחסום ובמשפט" טוקין 1.11.2002. בטוי קיומו לאוטוס, היה הגה העתיד חוק שנותנה על שלוחן הנכסות לעדי ח'ג' ואב בימי קדשנו להעודה לו לישראליים המשושים ל'ICC' או מעברם לו מידע על אורותיהם ישראליים. העתיד חוק אישור סיווע לחייב הדין הפלילי הבנלאומי, תשס"ג-ג'. 4175, 2002.

.Blumenthal, *supra* note 25, at pp. 596-597

Nathan, *supra* note 23 ("[H]ad sub-para. viii not been included my Delegation would have been able proudly to vote in favor of adopting the Statute. Now, we have no choice, [but] to cast our vote against the Statute. Now, we have no choice, [but] to cast our vote against the Statute as a whole") הבהיר:

"At the 1998 Rome Conference, Israel expressed its deep disappointment and regret at the insertion into the Statute of formulations tailored to meet the political agenda of certain states. Israel warned that such an unfortunate practice might reflect on the intent to abuse the Statute as a political tool. Today, in the same spirit, the Government of the State of Israel signs the Statute while rejecting any attempt to interpret provisions thereof in a politically motivated manner against Israel and its citizens. The Government of Israel hopes that Israel's expressions of concern of any such attempt would be recorded in history as a warning against the risk of politicization, that might undermine the objectives of what is intended to become a central impartial body, benefiting mankind as a whole" [URL:<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>] (last visited on 20.9.2002) Levy, *supra* note 17, at p. 218; וא"ז: הכללת סעיף ההתקלחיות בחוקת תושיה, ראו: מ. Both "War Crimes" *Rome Statute of the ICC*, *supra* note 21, at pp. 579, 413; Panel Discussion "Association of American Law Schools Panel on the International Criminal Court" 36 Am. Crim. L. Rev. (1999) 223, *ibid*, at pp. 260-261. אך ראו: 233-234 (remarks by Prof. M. Halberstam) שולץ סעיף ההתקלחיות בחוקת תושיה, ראו: מ. Sadat-Wexler (remarks by Prof. L. Sadat-Wexler) על סעיף ההתקלחיות בחוקת מזכקת בא' קוש לסקון והשאיל'ע'ירוב).

K. Roth "The Court the US Doesn't Want" N.Y. Rev. Books, 19 Nov. 1998, at p. 45; *extracts in International Human Rights in Context* (Oxford, H.J. Steiner & P. Alston eds., 2<sup>nd</sup> ed., 2000) 1195, 1196

כך למשל החולתו של שווית החבעה של ICTY שלא העמיד מי מחייב או מחייב כוחות נאצ'יו לדין בגין פעילות האונר נס יונסלבה ב-1999, הנה מומחה Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) [URL:<http://www.un.org/icty/pressreal/nato061300.htm>] (last visited on A. Laursen "Nato - 15.9.2002) לבקשת עולם האוורדים הנושא שפצע במהלך המלחמה. המד"ר, חוות לאור טרסטן הוגה שפצע במהלך המלחמה.

R. Hirschl "Restituting the Judicialization of Politics: Bush v. Gore, the US as a Global Trend" 15 Can. J.L. & Juris. (2002) 191

L. Condorelli & S. Villalpando: "לawn ביחסים בין ICC-ו לארץ", ראו: "Relationship of the Court with the United Nations" *Rome Statute of the ICC*, *supra* note 21, at p. 219

פליטי<sup>36</sup>). ה-ICC, אשר בניגוד לבתי הדין הפליליים הקודמים אף אינו חלק אינטגרלי ממנגנון האו"ם<sup>37</sup> (אשר הנה גוף פוליטי מובהק), צפוי להיות עצמאי ומקצועי לא-phorts. מעבר לכך, יש להניח כי בין מודעותן של המדינות השותפות להקמת בית הדין (ברובן המכרייע דמוקרטיות מערביות) לבעיית הלימיטיות של בית הדין בעניין ארצאות-הברית ומדינות אחרות שבחוור שלא להציגף להוקה, הן תתאפשרה להבליט את אופיו הפליטי של בית הדין. לשם◀

Levy, *supra* note 17, at pp. 210, 212-213; Scheffer, *supra* note 4, at p. 18

22 אך ראו: O'Connor, *supra* note 4, at p. 958 (אין כל בסיס לטענה כי הוקה מונחת לעקרונות משפט בינלאומי, שכן המשפט הבינלאומי הפלילי מא' ומועלם לא דרש הסכמת מדינה כלשהי כנתניה להעמדת לדין של פוטיס בפני סדרת אהרת). Brown, *supra* note 11, at pp. 869-873; O'Connor, M.P. Scharf "The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position" 64 *Law & Contemp. Prob.* (2001) 67, 72-76, 98-116; Kaul, *supra* note 21, at p. 608; G.M. Danilenko "ICC Statute and .Third States", *ibid*, at pp. 1871, 1877-1882

Statement of Judge Eli Nathan, Head of the Delegation of Israel to the Rome Conference, 17 July 1998, para. 2-3 [URL:<http://www.un.org/ICC/speeches/717/isr.htm>] (last visited on 20.9.2002); Levy, *supra* note 17, at p. 208

על פי 18 לאמנת וינה בדבר דרי אמנות (אשר ישראל אינה צד לה, אך מחייבת לעקרונותיה, שכן האמנה משקפת בורמה דין נהג), מדינה החותמת על אמנה מסוימת מליקוט בפרק והן שבען חתימה לאשרו בפסקה ששה בה כדי לשלט לאלה טשא Vienna Convention on the Law of Treaties, 23 May 1969. (להלן: "אמנת האמנות"). עם זאת, מדינה המודעה על כוונתה שלא להציגף לאמנה (כפי שיעשו ארצאות-הברית וישראל בונגעו לחוקת רומי), אינה חברה עד בורבות הקבועות ס' 18.

D.A. Blumenthal "The Politics of Justice: Why Israel Signed the International Criminal Court Statute and What the Signature means" 30 GA. J. Int'l & Comp. L. (2002) 593, 596

25 דרא' י' הלמן "טוטו של בית משפטן" 17.12.2000 (ארצון הארץ). יש לציין, כי בצד התולוה נגד שרון, נעשו ניסיונות להטלותן נס אנשי צבא וכחידם בכיריהם ישראלים במספר מדיניות באירועה. ראו למשל ד' סולבמן "ארגוני מוסלמי בבריטניה יוזם הזואת נס מעירב" 14.1.2002; ש' שדה ו' סולבמן "ארגוני מוסלמי בבריטניה יוזם הזואת נס לטעמו הרשות השותה שם" 30.10.2002 (ארצון הארץ). ראו גם: D. Sharon, Barak sued by Palestinians in Belgium in new case" Middle East Times 26 21.11.2001 [URL:[http://www.metimes.com/2K1/issuc2001-47/reg/sharon\\_barak.htm](http://www.metimes.com/2K1/issuc2001-47/reg/sharon_barak.htm)] (last visited on 1.11.2002) כהו, כהו, הנושא מספר תביעות נזקיות בדורל נגד פקידי ממשלה שווא' ב' קרא' תביעות נס יושאים גם באירועות-הברית ודרא' פ' חרוץ" 26.9.2002 (ארצון הארץ).

27 ראו למשל י' הורוביץ "ישראל מסיים במסקנות מדיניות נס במליה" חרוץ" 31.10.2001 (ארצון הארץ); י' הורוביץ "גבילים מתייחסים ליעטם ברצינות, או מה" חרוץ" 7.6.2002 (ארצון הארץ); י' שגב "משפט שוו בלבביה: העויה" חרוץ" 2.12.2002 (ארצון הארץ). יש הסברים נס כי העיטה נסאים הקיימים לסתורן ישראל-עירוב למשרו הפלילי וקשה עוד יותר על התייחס מטה ומתן בין הצדדים. ראו למשל:

Bolton, *supra* note 18, at p. 40 28 Blumenthal, *supra* note 25, at p. 604 האיבה הפהיתה גם את הסיכון כי הצדדים ימייעו להסדר בונגעו לשאלות חוקות התחנלוות – ובכך נותרה בעה משפטית זו, המקשה על הציגף לישראל לחוקת רומי, על כהה.



יש להבין, עם זאת, כי החלטתה של ישראל שלא להצטרף לחוקה בעיתוי הנוכחי יש ממש פגעה בכמה מן האינטרסים הלאומיים שלה. איהה ה策טרופת לחוקה, שאליה ה策טרופו הרוב המכريع של הדמוקרטיות המערבית, פוגע בתקדמתה של ישראל בעניין העולם מדיניה נאורה (פגיעה אשר השכלות קשות יותר מבחן ישראל מאשר מבחינת עצמה כגון ארכזות-הברית) וממצב את ישראל בעמדת מדינית<sup>40</sup>, והוצרך של התובע לקבל את אישור בית הדין לפני פтиיחת חקירה נגד חשודים<sup>41</sup>, המפחיתה את סכנת ניצולו לעזה.<sup>42</sup> גם באשר לשאלת התחנוליות, הרי כפי שיספר להלן, הניגריה מחייבת חוקה נספה אשר יש להן מה להסתיר). הנה פעללה בלתי הכרחית העשויה לזרום נוק ודקומי נספה לישראל. כמו כן, יתכן שגם ללא ה策טרופת לחוקת רומי ניסוונות להעמיד אורחים ישראלים לדין פנים-מדיניים על בסיס סמכות השיפוט האוניברסלי (לפי המודול שבו פועלו בת החלטה לאשרה את בוגר הראש הממשלה שרון). במובן זה, ההחלטה לאשרה את ה-ICC מגבירה דוקא את הסיכוי כי יתקימו הליכים בת ה-ICC עלולה להיות אפוא שחשדות נגד ישראלים יתבררו בהלים פנימיים, שכן אילו ישראל הייתה נוהגת סמכות השיפוט האוניברסלית היו מותרות על העמידה לדין בשטחן, לטובת ה-ICC. התוצאה הסופית עלולה להיות אפוא שחשדות נגד ישראלים יתבררו בהלים פנימיים מדיניותם בבית דין זה, נטול כל זיקה לפשע הנדון, ואשר עלול לפעול על פי שיקולים פוליטיים, ולא בפני ה-ICC, אשר על אף מנגנון מיוחד לנשאים שורה אורכה של זכויות דיניות והגנות מפני ניצול דעתה של החלטה. משמע, יתכן כי בטוחה הארון, דוקא הרצון של המדינה להעניק הגנה טוביה יותר לחילים ולמפקדים הישראלים, יחייב ה策טרופת ה-ICC.

#### **ד. האם אזרחים ישראלים חשופים לסכנות העמדה לדין בפני ה-ICC?**

##### **1. סמכויות השיפוט של ה-ICC**

בפתח רשימה זו טענתי כי אף בישראל אינה צד לחוקת רומי, הריישראלים עדין חשופים להעמדה לדין בפני ה-ICC. בחלק זה של הרשימה אפתח טענה זו, תוך התמקדות בשאלת הסמכות הפרסונלית של בית הדין. עוד אבחן בקצרה חלק זה את תחולת הסעיף שבחוקת רומי הדן בהעברת אוכלוסייה לשטח כבוש ביחס למדייניות התחנולות בשטחים, בעיקר בכל הנוגע לסמכות הטמפלרית (סמכות בזמן) של ה-ICC.

כאמור, ל-ICC תהיה סמכות שיפוט רק בגנו לעברות הכלולות בחוקת רומי. ההחלטה כוללת לנו ליום שלישי שלוש קבוצות של עבדות: השמדת עם-<sup>43</sup>, פשעים נגד האנושות (פשעים ווגדים, בעלי

כך, הן צפויות לבחור לאייש את המשרתות המרכזיות בבית הדין באישים בעלי שיורר קומה – כנדרש בחוקה<sup>38</sup> – ויעודדו את עצמאותו השיפוטית של בית הדין<sup>39</sup>. יש לציין גם כי בחוקה מספר הגנות נגד פוליטיזציה בתטי ראייה של החלט (למשל, עקרון השינויים [complementarity] של פעליו בית הדין יפעל רק במקרים שבהם לא מתקיימים הילכי חקירה והעודה לדין נאותים בפני בית דין מדינתיים<sup>40</sup>, והוצרך של התובע לקבל את אישור בית הדין לפני פתיחת חקירה נגד חשודים<sup>41</sup>, המפחיתה את סכנת ניצולו לעזה<sup>42</sup>). גם באשר לשאלת התחנוליות, הרי כפי שיספר להלן, הניגריה מחייבת חוקה נספה אשר יש להן מה להסתיר). הנה עמדה זהירה וסבירה. הוואיל וקיימת אפשרות (האם בו ועוד), הנה עמדה זהירה וסבירה. שיטת הפרשנות הנהוגה (זהות השופטים והתובע, עצמאות ההליכים, שיטת הפרשנות הנהוגה בו ועוד), הנה עמדה זהירה וסבירה. והואיל וקיימת אפשרות (האם שהוא העומדה שבייקת ההחלטה כמוסד נגע בפוליטיזציה ובאנטי-ישראליות, הרי שגישת "ההמתנה על הגדר" עד אשר יתר侃ל מידע נספה אינה בלתי מתאפשרת על הדעת. הדברים מקבלים משנה תוקף לאור העומדה כי ישראל מוצאת קרע בעיצומו של סכסוך חמוץ קשה שבו קיימים להצים בדברים מתקבלים נקוט אמצעים צבאיים אשר חוקיותם תלויות באימוץ פרשנות יצירתיות למדייניות כליל המשפט הבינלאומי ההומניטרי. בנסיבות אלה, הסכמה לסמכות בית דין שדריך הפעלת שיקול דעתו וכוכנותו להתחשב באתגרים הניצבים בפני מדינה כמו ישראל אין ידועים, עשויה להיחשב כהימור גדול למדי.

ומומלץ, עם זאת, כי בתקופת "ההמתנה על הגדר" שבה אנו נמצאים ינקטו פעולות מתאימות אשר יאפשרו לישראל להצטרף בבוועדת לחוקה או להתמודד עם מציאות שבה אדון במשפט. על כן, רצוי גם بلا ש策טרופה אליה (אפשרות שבאה אדון במשפט). על רצוי לדעתו לקלוט לדין הישראלי כמה שיותר מההוראות המהוות של חוקת רומי, ולזרו דרך כך את תהליך הפנמת הנורמות הבינלאומיות הכלולות בה על ידי מקבלי החלטות בישראל ועל ידי אנשי כוחות הביטחון. כמו כן, רצוי לחזק את מערכת אכיפת הדין הצבאי נגד חילים החשודים בהפרה של כללי המשפט הבינלאומי, ההומניטרי (זואת על רצוי נתוניים המצביעים על חש Ci מאז תחילת אירופי אנטיפאדי אל-אקצא, מערכת התביעה אינה פעולת באופן נמרץ דיו<sup>43</sup>). אמצעים אלו צפויים להוביל לירידה במספר הഫרות של חוקת רומי מצד אנשי כוחות הביטחון הישראלים ולאכיפה נמרצת יותר של הדין הבינלאומי הפלילי על ידי ישראל, ועקב לכך יפחיתו באופן ניכר את הסיכוי כי ה-ICC יהיה מעוניין להעמיד לדין הישראלים<sup>44</sup>.



SHIPOT UL HAVERA SHBENDO, ASHER KIYMA AO MKIYIMAT HAKIRAH AO HILKHA  
MASHPETI BAOTU UNIIN MESH, VELBEM CI HILKHA MEDINATI HNO AMITI  
VAFKUTIBI<sup>35</sup>. MCAA, SHLBTHI HILKHA MEDINATIM "ZOKT KEDIMA" B'KUL  
HNOGU LEHAMDATH L'DIN SHL MABZUFI FSHIIM BINLAOMIM VOFENIAH L'  
ICC HNA BGDR AMTUI ACHRON B'LBD L'MEZUOT AT HILKHA UM HACHOS.  
BKRAH SHBO MEDINATI HNGOUOT BDAR NMGUOT MULOSHOT CN.  
LBSSOF, L'SHM HSLMTH HATMONAH YISH LZ'YON SHI NKODOTH NOSFOT.  
RASHIAT, SUP'F 24 L'HOKHT ROMA KOBU MIFORSHOT SHSMCHOT HSHIPOT

<sup>36</sup> ס' 36(3)(א), (3)(42) ל'HOKHT ROMA. UPI SHU'IPIM ALU HSHOFETIM VOT HTOBU CHALIFIM  
L'HIOT AISIM B'KL ROME MORTERI VOKUTIUT NBHOT. BASHO L'SHOFETIM, HOKHTA SH KOGUOT  
CI ULIMM L'HIOT BEUL CISRIOT L'THMUNOT L'SHEDDA HSIPHTIUT HBCIRAH BIYOT BATZUT  
MACHAM. B'CHIRIM SHL SHMUNAYE'SHOR SHOFET HICCC HOSLMAH B'YOM 7 B'PFRDAAH, 2003,  
LA'ACHOR HORDAT RISHIMA VOT L'DUFOT.

<sup>39</sup> LEUNIN HESHTI HREU'U SHL HOSHOTOT VOT HPELISHTIUT HICCC, RAO NM: Brown,  
*supra note 11*, at pp. 883-885  
.Roth, *supra note 34*, at p. 1995  
40  
ס' 16 L'HOKHT ROMA.  
41

O'Connor, *supra note 4*, at pp. 963-970; Panel Discussion, *supra note 33*, at p. 244 (remarks by Prof. L. Sadat-Wexler); P. Kirsch & D. Robinson "Initiation of Proceedings by the Prosecutor" *Rome Statute of the ICC*, *supra note 21*, at pp. 657, 663

<sup>43</sup> LIPI HSHOFETI B'UTNUTOT, B'SHTUTIM VOT HASHUTOT SHO'OT HILKHA UTIDOT AIYUTI AVIYUTADOT AL.  
AKHZAH NGHOTU RK 30 L'HOKHT MZ'ICH BKSHD L'HSHUDOT LB'ZUOT UBROTA SHIMOSH LA' HOKHT  
BNASH MZ'DZ CHOTOT ZAL VOGUSSH V'R CHMSHA TB'GI ASHOT B'GUN UBROTA MASHOT VOG, ULP  
DIBBI HAFZIR, AL'RUV MUNOT PIKLSHESIIM, MABZU HILHOSH HPEL SHSOTIM VIBZ SHIYI NMDIUT  
HOKHTI UTIDIM HAM B'ME'UZ AZHOTIM PFLSTIUTIM (CABUR HILHOSH HOKHTI MZ'ICH  
B'APUN ASHTOMUTI B'MIKRUTIM TALAH), V'IMOT B'MUTHAT HOKHTA PFLILAT KOT SHM TAKHRI PFEI  
MIYUL MEL GUTR ACHOR MULLA CHUD LB'ZUOT UBROTA PFLILAT RAO L'ME'UZ 'ALDOD 'UYIDA  
BINLAOMIM, VUG L'PFI B'CHIDROT 'ASUCH 15.10.2002 (ARICKON V'AZYR). US V'OT, SH L'ZIVI  
CI ACHORINA HORAH HOKHTI, L'HAL HOKHTI PFEI, B'KL MKHOT ACHD TO'NGMOT ADATH  
BKVR AZHOTIM HORAH HOKHTI. LI HAL 'AZUL HILHOSH HOKHTIM SHL HORAH HOKHTI 'ASUCH  
8.10.2002 (ARICKON AZYR).

<sup>44</sup> HICCC PFLUL LI PI KHRON HSIPHTIUT (complementarity) VUMIYAK UDPEFT HLEPHET  
MASHPETIIM HMTKUTIIM B'SHM HPEITIM-MIDUTIIM MATA, SHBHUDR HOKHTA VOT HUMDAH LD'IN  
B'SHORLA B'GUN HSHTOT LB'ZUOT HOSHOT SHL HOKHT ROMA, ANI MZHUA CI HICCC PFLUL  
SHSMCHOT HSHIPOT SEL.

<sup>45</sup> HOKHTA HUKKUTIIM HMTLUT L'DIMIA HOSHOT SHL AMTNA VOT ALA SHADHOT OTNAH, HNA  
CAMHOT, HAMGUOT MAFUOLOT SHISH B'TON CIY L'SHEL ATZMAN. RAO L'UL HURSA 24.

<sup>46</sup> ס' 6 L'HOKHT ROMA. SHOU: ס' 2 L'AMNAH DBOT MASHUT VOT HOSHOT SHL HPEU SHMDOT UM,

<sup>47</sup> 9 V'DZMCH 1948, CA 1, S' 5, L' 65.

<sup>48</sup> ס' 7 L'HOKHT ROMA.

<sup>49</sup> ס' 5(2) L'HOKHT ROMA.

<sup>50</sup> ס' 12-13 L'HOKHT ROMA. NM CAN MDRSHOT HTHLTA SHL MOUTAT HPSHON UL PI MFKD V'LMLAT  
AZHOTIM.

<sup>51</sup> ס' 17 L'HOKHT ROMA. RAO NM S' 18 L'HOKHT ROMA (HOKHT HTOBU L'AFSEH MEDINAT  
MUNIYUT L'UTNUT B'KLICIM PIYAT-MIDUTIIM) ס' 19 L'HOKHT ROMA (UDIYAT MEDINA L'UTNUT  
VOT HCHLTA KLIIM HICCC UL AFQ KOM L'KLICIM PIYAT-MIDUTIIM). LIYON B'KURIM  
HSIPHTIUT, RAO: J.T. Holmes "Complementarity: National Courts versus the ICC" *Rome Statute of the ICC*, *supra note 21*, at p. 667

AOFI CHMOR B'MIYUD, HMBOTZUIM NGD AKCOLUTSIYA AZORCHIT, CHALK  
MMTHKHPH NORCHBET AO SHITITIYAH<sup>47</sup> VOFSHI MLHOMA. L'MUSAHA KTGORAH  
ACHORONA ZO SHL PESEWIM KOLLET HAMISHIM UBROTA SHUNNOT HNCOTOT B'SUFI  
8 L'HOKHT, HMTCHLKOT B'AOPEN GS L'SHTI TTAKUBOT - UBROTA  
HMBOTZUIM B'MSGRAT SCSSOK HMOUSH SHAINO BINAGAI (CGUN MLHOMAH  
HMBOTZUIM B'MSGRAT SCSSOK HMOUSH SHAINO BINAGAI) (CGUN MLHOMAH  
AZORCHIM AO MRIDAH). UL AF SHAHOKKAH MZINTYAH<sup>48</sup> HOKHT HAYA  
CGUIRON SMCHOT L'HUMDID LD'IN GM ANSHIM HOSHADIM B'VIZUIM MEU  
SHL TOKEFNOT (aggression), SMCHOT ZO HOSHATHA UD L'ACHR  
SHAHMDIYOT HCHBROT B'HOKHT YIZLICHU L'GEU LNOSTA B'YALBUTCSHIM SHL HGDROT  
HUBRERA<sup>49</sup>. B'UTIDI YTCHN SHITOSPO UBROTA NOSEPH HAZOT ZOKHRA, CGUN UBROTA  
TEUR VOTCHER B'SIMIM, AK CIVIM ANI L'ICC SMCHOT B'NOASHIM ALLO (ALIA  
AM CN HPEUILOT HUBRINYAH HROLONNTIYAH NOLFAT GET BGDRN SHL UBROTA  
ACHOROT HCKIMOT B'HOKHT).

UL MNAT SHINUN YIHUA LHUMDID ANSHIM SHBIZUO OT UBROTA HCLLUTOT  
B'HOKHT ROMA B'PNI HICCC, YIS L'UMOD ABADCH MONTANIA HOKHTA HBAIM  
(TNAI HSMCOT HPROSTONIYT): (A) HSCHMOT HMDINA HTERITORIALIT, ASHER B'SHTOHA B'ZUCHA HUBRERA SHL  
HCHOSHOD; AO (G) AISHOR MOUCZAT HBVTICHON SHL HA'OT, HNTIN TON  
SHIMOSH B'SHMCOT HCHIROM HMKONOT L'MOUZCHAH<sup>50</sup> PI FPK Z' LMONGLUT  
HA'OT<sup>51</sup>. AT HSCHMOT HMDINA HTERITORIALIT, AO MDINAT HAZORHOT  
NITON L'KBL B'SHTO DIKIM: B'AMCUTOT HOKHTA, PFLORSHUT METUMAH AO  
L'HOKHTA MUCZIM HYO'THA ZD L'HOKHTA, HAZTUTIOT<sup>52</sup> ZO, MESHA'AH KBLAT  
SMCHOT B'TH HOKHT B'NGU' AZORCHI HMDINA HMTUTROT VOT B'NGU' UBROTA  
SHBUTCHA. MCAAN SHL MDINA BE'ULOMIM RASHIAT L'HESMKR AT B'TH  
HOKHTA. MCAAN SHL MDINA BE'ULOMIM RASHIAT L'HESMKR AT B'TH  
HOKHTA. MCAAN SHL MDINA BE'ULOMIM RASHIAT L'HESMKR AT B'TH  
HSCHMOT B'LTI MONGBLT L'HCPFIM CL ADOM SMCHOT HSHIPOT SHL HICCC  
B'MILIM AZHOTIM, PFLONCIYL SMCHOT HSHIPOT SHL HICCC  
AINO MONGBL MBBHINNA AGOGIFT, VOTUBRA HCLLUTA B'HOKHT, HMBOTZU  
B'KL MKOM B'ULOMIM, UZOVA, B'AOPEN TA'ORUTI, L'YFL B'DGR HSCHMOT  
HSCHMOLNIT SHL B'TH HOKHT, BHAKKIM TNAI HSCHMOT HMDINA HTERITORIALIM.  
NITON LZ'YON, CI L'HSDOR SMCHOT HSHIPOT SHL HICCC SHLOSH HOKHTIM  
UIKRIYIM. UL PI S'U'F 124 L'HOKHT, MDINA RASHIAT L'HZTROF HOKHT,  
TON HSHTIYUGOT SMCHOT HSHIPOT SHL B'TH HOKHT B'KL HOKHTOR L'PFSH  
MLHOMAH SHIBOZUO B'MHALK SEBU SHNIM MMODUD HAZTUTROT. RK SHTI  
MDINOT (ZRFAT VOKLOMBHIA) UZO UD CA SHIMOSH B'HSTIYUGOT ZO,  
SHAFAKHT HMEUSSI SHALE UZO LI HOKHT MONGBL (SHCN UDINI NITON LHUMDID  
CHOSHODIM LD'IN UL B'SIS ZIKOT HSHIPOT AZHOTIM, VOT B'GUN PESEWIM AZHOTIM  
HNOFILIM TCHOT SMCHOT HICCC). HZRG HSHNI, KSHOR LSCHMCOT MOUCZAT  
HSCHMOLNIT L'UCB CL HILK B'PNI HICCC LMASH SHNA (SMCHOT ZO NITNT  
HSCHMOLNIT L'UCB CL HILK B'PNI HICCC LMASH SHNA (SMCHOT ZO NITNT  
L'HOKHT B'KL SHNA V SHNA)<sup>53</sup>. HZRG HSHNI, VOT B'GUN PESEWIM AZHOTIM  
L'UKRORN HSHTIYUGOT HKBUT B'MBVA L'HOKHT. PI UIKRON ZO, B'TH  
HOKHT L'YKNA SMCHOT HSHIPOT B'MKRMIM SHBHM YMDINA, SHALE SMCHOT



איןונגרציה כלכלית או זכויות אדם) ואשר הנם בעלי סמכיות שיפוט שבוחנה בוגר למדיניות החברות במשפט המשפט הרולוני (משמעותו, קיימת הסכמה כללית למסמכותו של בית הדין ואין צורך בהשגת הסכמה מוחודשת של הצדדים בוגר לכל סכסוך וכסוך). כך למשל, קבוע בית הדין האירופי לזכויות אדם בפרשת *Loizidou*<sup>56</sup>, כי הסתיגנות שיפרה טורקיה להכרזה, המכירה בסמכות השיפוט שבוחנה של בית הדין, שלפיה לא יהיה בית הדין מוסמך לדון בעניינן בדבר הפטור זכויות אדם שהתרחשו מוחץ לשטחה הריבוני של טורקיה (מתוך כוונה למנוע פיקוח מטעה על הנעשה בצדן קפריסין), הנה בטלה. לדברי בית הדין, הסתיגנות הטורקית מנוגדת לתקנון האמנה האירופית לזכויות האדם (שבמסגרתה פועל בית הדין) לקדם באופן אפקטיבי הגנה על זכויות אדם מצד המדינות החברות, ועל כן אינה תקפה<sup>57</sup>. מטעמים דומים, קבוע בית הדין כי יש לפרש את סעיף סמכות השיפוט מתחת סמכות השיפוט של המדינות את הוראותה על כל שטח המציג גומחות צפוק-קפריסין (שבית החברות, באופן מרחיב הכלל במסגרתו גם את צפוק-קפריסין) (בבושא הדין הנדרש כسطح טורקי כבוש)<sup>58</sup>. מגמה דומה של נטייה להרחבת משיקולי אפקטיביות את תחולת אמנה היסוד ואת סמכויות בית הדין הפועל לפיהן, ניתן למצוא גם בחחלותיהם של גופים כגון בית הדין האירופי לצדק (ה-ECJ), הפועל במסגרת הקהילה האירופית<sup>59</sup>, ועדת האו"ם לזכויות אדם (Human Rights Committee<sup>60</sup>) ומנגנון הבוררות של המרכז לשיפור סכסוכי השקעות (הפועל לצד הבנק העולמי)<sup>61</sup>.

קובוצה מיוחדת של בית דין ביןלאומיים הפועלת על פי עקרון האפקטיביות הנה בת הדין הפלילי אשר הנקנו "אדר-חוק". כך, למשל, קבוע בית הדין נירנברג בשנת 1946 כי סמכותם של ליטופוט פרטימי בגין הפטור של אמנה ביןלאומית שנערכו בין מדינות, ולא כללו כל התיחסות לאחריות אינדיבידואלית, נובעת מכך העובדה כי זו דרך האפקטיבית היחידה לאכוף את הסטנדרטים הקבועים באמנות: "פשעים נגד המשפט הבינלאומי מבוצעים על ידי בני אדם, לא בידי ישות ערכיטאלית, ורק על ידי הענשת הפרטימם שביצעו את הפשעים הללו ניתן לאכוף את הוראות המשפט הבינלאומי"<sup>62</sup> (התרגום שלי – י.ש.). באופן דומה, קבוע בית הדין לפשיי מלחמה ביוגוסלביה (ICTY) בפרשת *Celebici*, בשנת 2001, כי יש לפרש את הוראות התחולת של אמנת נבנה הריבונית באופן מרחיב, כך שדרישת "האורחות הנגדות" הקבועה בסעיף 4 לאמנה (שלפיה האמנה מגינה רק על בני אדם שאינם אזרחי הצד الآخر לסכסוך) תחול בוגר למלחמה האזרחים בbosnia<sup>63</sup>. הרצון לבחור בפרשנות אפקטיבית אשר תנשים ככל האפשר את המטרות החומניות של האמנה, הוביל את בית הדין לקבוע כי העובדה שהצדדים לסכסוך ראו זה את זה בפועל כאויבם והימה חשובה יותר מאשר העובדה כי, מבחינה פורמלית, כל המעורבים בסכסוך חלקו את אותה אורחות (של bosnia-הרצגובינה).

ה-ICTY אף התבטה באומה פרשה בזורה ברורה בתחום כללי

של ה-ICC אינה רטרואקטיבית. משמע כי לא ניתן לדון בו בעברות שהתבצעו לפני מועד כניסה החוקה לתוקף – ה-1 ביולי 2002 (או להתבצע על חברות מדינה בחוקה לשם רכישת סמכות על עברות שהתבצעה לפני מועד הצטropolis להחוקה). שנית, לתובע שיקול דעת רחוב בכל הנוגע להגשת תביעות לבית הדין. החלתו לפתח בחקירה נגד חדש יכול להתבצע על בקשה מטעם מדינה אחרת או מעצמה הביטחון של האו"ם, אך גם יכולה להתבצע על החלטתו העצמאית של התובע, המוסמך לפעול על בסיס מידע שהגיע לרשותו מכל מקור שהוא<sup>52</sup>.

## 2. פרשנות סעיף סמכיות השיפוט שבוחרת רומי

האיל וישראל אינהצד לחוקה, הרי שכן ל-ICC סמכות אוטומטית להעמיד לדין אזרחים ישראלים או אזרחים זרים אשר פעלו בשטח ישראל. לעומת זאת, ישראלים בעלי אזרחות זורה עלולים להיות חשופים להעמדה לדין אם מדינת האזרחות שלהם הנהצד לחוקה או אם נתנה הסכמה מפורשת לכך<sup>53</sup>. מכאן, שנראה כי ישראלים אשר אינם בעלי אזרחות זורה אינם צפויים להעמדה לדין בפני ה-ICC בגין עבירות פנים (היינו, עבירות המתחבעות בשטח ישראל), אלא אם כן ממשלה ישראלי תאשר (תרוחש בלחט סביר) או אם מעצמה הביטחון של האו"ם תתריר ל-ICC לעשות כן (תרוחש בלתי סביר גם כן, בין היתר בשל עדותה הצפואה של ארצות הברית – בעלת זכות וטו במועצה – بعد ישראל ונגד חיזוק מעמדו של ה-ICC).

הבעיה, מנוקות הראות היישראליות, הנה כי מרבית הטעונות נגד ישראלים בין ביצוע פשעים ביןלאומיים, בכלל, נוגעות לאירועים שהתרחשו בשטחים שנכbsו על ידי ישראל ב-1967. מכאן, שמעטם הטריטורייאלי של שטחים אלו הנו חינוי להכריע מי הוא הגורם המוסמך של ה-ICC, ועל בית הדין יהיה להכריע מי האמורים לקיים את זיקת השיפוט הטריטורייאלית בוגר לשליחים האמורים. במקרים אחרים, יש לפרש את הוראות זיקת השיפוט הקבועות בחוקות רומי, ולבחון לאורן מי מוסמך להסmic את ה-ICC לדון בפושעים שבוצעו בשטחים.

נראה לי כי נקודת המוצא לדין צריכה להיות שאלת המדיניות הפרשנית שיאמץ ה-ICC בכל הנוגע לסמיכות השיפוט שלו. מודל פרשני אפשרי אחד המוכר בפסיקת הבינלאומית הנ"ז מודל הפרשנות האפקטיבית" (או, לחופין, הטלולוגית, או בטורמונולוגיה של הנשיא ברק – המודל החקלאי-אובייקטיבי<sup>64</sup>). על פי מודל זה, יש לפרש טקסטים משפטיים, ובכללה, טקסטים המכוונים סמכות שיפוט, באופן המunik אפקטיביות ובה ככל האפשר למטרות המרכזיות של המשפט המשפט הרולוני ושל המוסמך היוצר אותו<sup>65</sup>. לפיכך יש לפרש את לשון הנורמות באופן גיש, בין היתר, להתאים את הכלל המשפטלי למציאות המשתנה.

מודל הפרשנות האפקטיבית מקובל כיום בבתי דין בינלאומיים קבועים העוסקים בקידום אגנדה ספציפית (כגון



52 ס' 13 - 15 לחוק רומי.

53 עם זאת, ניתן שבדין יפרש את המונח אזרחות באופן מוגבל  
כמתיחס אך ורק לאזרחות האפקטיבית של החשודה. השוו:

*Nottebohm (Liechtenstein v. Guatemala)*, 1954 I.C.J. 4

*Celebici* (Nottebohm case); *Prosecutor v. Delalic*, Case No. IT-96-21-T, ICTY T.Ch. II, 16 Nov. 1998(case

54 א' בראק פרשנות במשפט (תשנ"ג, כרך ב: פרשנות החוקה) 143  
ליישום שני במלחמות של שיטת הפרשנות החקלאית לנורמות  
בנולאות. רוא: מושת עט, לעל הערא ? הכללת 'ט' אמתן 49  
גנבה הריבית הנה למניע ירושים המוניים בלבד).

55 השוו לכלל ה-"mischief rule" ("נווגה בממליה")  
*Attorney General v. Prince Ernest Augustus of Hanover* [1957]

A.C. 436, 461

*Loizidou v. Turkey*, 20 E.H.R.R. 99, 136 (1995)

56 השוו ט' 19 (ג) לאמנת האמנות

57 יש לציין, כי גם לאקטיביזם של בית הדין האירופי לזכויות אדם  
יש גבולות (ש אשרינו – נבולות פוליטיים). כך למשל, בפרשנות *Bankovic* נקבע  
כי המונח "אנשיים המצויים תחת סמכות השיפוט של המוניות החברות" הקבע בט' 1  
לאמנה האירופית בדבר זכויות אדם אויל אורייס המצויים בשיטה של יונסלביה  
(אשר דעינו אינה חברה באמנה) אשר היו קובן להפנות מדיניות אוטרי (אשר מרביתן  
חברות באמנה). (*Bankovic v. Belgium*, Decision of 12 Dec. 2001 (European  
Court of Human Rights) [URL:<http://hudoc.echr.coe.int>] (last visited  
.on 31.8.2002))

58 רואו למשל: Case 26/62 *Van Gend en Loos v. Nederlandse Administratie* 59  
des Belastingen [1963] E.C.R. 1 (הצוות *לקרואו* באהן אפקטיבי את אמנה הקהלה  
האירופית מהיב העתק מעמדו מחיבlein הקהלה דין היפויו של המוניות החברות).

60 רואו למשל: Human Rights Committee, General Comment 24(52), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994)  
ומידיוות או לפוטוקול הראשון, אמנה דבר זכויות אזרחית  
ולזכויות האדם בטלוות, מכיוון שסמכויות אלו הכרחיות להנחתת מטרת האמנה  
והפרטוקול).

61 רואו למשל: *Amco Asia, Pan American Development Ltd. v. Indonesia*, 1 ICSID Rep. 389 (1983)  
(יש לזרות בשולחה מקומית של חברה וזה משומש  
משקיע ו לצורך החלטת האמנה הבינלאומית לישוב נכסיו השקעות).

62 רואו Judgment of the Nuremberg International Military Tribunal, 30 Sept. 1946, in 22 Trial of the Major War Criminals Before the International Military Tribunal (1948) 411, 466.  
את ט' 3 המשוחף לאמנה גנבה בפועל כזה שהפרתו תעמיד אחוריות פליליית Case IT-94-1-AR72 *Prosecutor v. Tadic*, 35 I.L.M. (1996).  
.32 (Interlocutory Appeal on Jurisdiction) (Appeals Chamber, 1995)

.*Celebici case*, supra note 53, at para. 233-266

63 רואו: .*Celebici case*, supra note 53, at para. 170

64 Ariel Incident (Israel v. Bulgaria), 1959 I.C.J. 127; *Nottebohm* case, supra note 53; Aegean Sea Continental Shelf (Greece v. Turkey), 1978 I.C.J. 3; Fisheries Jurisdiction (Spain v. Canada), 1998 I.C.J. 4

65 רואו למשל: 6; Nuclear Tests (Australia v. France), 1974 I.C.J. 253; East Timor (Portugal v. Australia), 1995 I.C.J. 90



הקמת מאוחם חדש בגדרה. ארץ הארץ.

הפרשנות החלים על מסמכי היסוד שלו וקבע: "The International Tribunal is an *ad hoc* international court, established with a specific, limited jurisdiction... *The interpretation of the provisions of the Statute and Rules must, therefore, take into consideration the objects of the Statute and the social and political considerations which gave rise to its creation...* [G]rave violations of international humanitarian law which were the motivating factors for the establishment of the Tribunal continue to occur in many other parts of the world, and continue to exhibit new forms and permutations. The international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a *purposive interpretation* of the existing provisions of international customary law"<sup>64</sup>

של י.ש.).

בצד מודל הפרשנות האפקטיבית, אשר ניתן לאפיינו כמודל "קטיביסטי" המרחב את סמכויותיהם של בתי הדין הבינלאומיים, קיים מודל שמרני יותר לקביעת סמכות שיפוט, שלפיו פועל בית הדין הבינלאומי בהאג (ICJ). בית דין אחרון זה נוגה בזירות ובנה בעית פרשנות מסוימים בעלי פוטנציאל להקנות לו סמכות שיפוט וכבר קבוע במספר לא מבוטל של מקרים כי לא ניתן לחוץ ממשמעות שהוצעו בפנוי כוונה ברורה של הצדדים להסתדר להתקדים בפנוי (במקרים אלו יושמה בדרך כלל גישה רקסונטורקטיביסטית או תכליתית סובייקטיבית – המשוחררת את כוונות הצדדים). במקרים אחרים, קבוע בית הדין כי על אף קיומה של סמכותلقוארית, הרוי שההתביעה אינה קבילה מטעמים שונים (כגון חוסר שיפוט)<sup>65</sup>.

66 כיצד ניתן להסביר את ההבדלים בגישות בין בתי הדין השונים? לדעתך הבדל מצוי בfrmטורים שנקרו קודם לפן באשר למאפייניהם של בתי הדין המיישמים את שיטת הפרשנות האפקטיבית. בתי דין



את הסיכוי להגשה מטרת המשפט המשפטי האמור. גם כאן, יש להניח כי השופטים אשר ימונו לבית הדין (לפי החוקה – מומחים למשפט פלילי, משפט הומניטרי או דיני זכויות אדס<sup>68</sup>) יהיו מוחייבים באופן אישי לתחילה האמורה ויחשוו אחריות לקידומה. כמו כן, יש להניח שבית הדין ישבב השראה פרשנית בעבודתו המשפטית מהחולות קונקרטיות של בית הדין "אד-הוק" המתפלים במתיהה משפטית דומה, ואשר אימצו, כאמור, את מודל הפרשנות האפקטיבית. לבסוף, לפחות בראשית הדרך, יש לצפות כי בית הדין יהיה "יעב" לתיקים על מנת להציג את קיומו, והוא נכון לאenu פרשנות יצירתיות אשר מעודד את ההתקינות בפניו.

אמנם יתכן שה-ICC, דומה ל-ICJ, ישול שיקולים אסטרטגיים וימנע, לפחות בתחלת דרכו, מלאמץ פסיקות שנויות במחלוקת, העולות להגביר את העוינות כלפי מצד מדיניות כגון ארצות-הברית, ולהפחית את הסיכוי שמדינות מסוימות יצטרפו לחוקה או יקבלו באופן "אד-הוק" את סמכות השיפוט שלו. הגם ש淺יקול זה יכול להוביל במקרים מסוימים לפרשנות שמרנית של סמכות השיפוט, נראה לי כי קיימת סבירות גבוהה יותר מדיניות זו תישם, אם בכלל, בנוגע לתיקים הנוגעים במשרין לאינטරסים של מעצמות כגון ארצות-הברית (או סין ורוסיה, אשר אף הן צד לחוקה), אשר הנן בעל השפעה על עתידו של ה-ICC, מאשר בנוגע לדיניות קטנות כגון ישראל. לנוכח מדיניות אחרונות אלו, נראה לי כי השיקולים בעד הפעלת סמכות שיפוט יכינו את הক. עמדת אהרון זה, המציג חשלה סקלטיבית של הוראות החוקה בנוגע למיניות מסוימות, נסמכת, בין היתר, על הבדלים שניכרו בהתייחסותם של רשותות התביעה של ה-ICTY לחוזדים מדיניות יוגסלביה לשעבר ולחזדים מדיניות ברית נאט"ז. בעודו שלגביו הרasons קשה לאטור מדיניות של זהירות יתרה בהגשת כתבי אישום, הרי שהኒוקים שבביסיס החלטת התבעה שלא להגיש כתבי אישום שכנגד מי מחייב או מפקדי נאט"ז בגין פגעה באזרחים במהלך המתקפה נגד יוגסלביה ב-1999, מואלו צים למדוי ומצבעים, לטעמי, על זהירות מופלגת מצד התביעה בפרשנות הוראות הדין הפלילי החל על האירועים, וחאת מטור רצון להימנע מיצירת קונפליקט בין בית הדין לדיניות נאט"ז.<sup>69</sup> נדמה לי כי גם הפעם בהתייחסות בית הדין האירופי לזכויות אדם לשימוש כוחו מצד טורקיה בczfon קפריסין (לגביו נטל בית הדין סמכות לדון בתיק) לעומת התקייסותו להפצעות מדיניות נאט"ז על בלבד (מרקחה שבו סיוב בית הדין ליטול לעצמו סמכות לדון בתיק) תומך בהערכה זו.

### **3. מעמד הטריטוריאלי של השטחים שנכबשו על ידי ישראל בשנת 1967**

הנחתתי היא, כאמור, כי ה-ICC יאמץ את מודל הפרשנות האפקטיבית בבוואר להכריע בשאלת אם יש לו סמכות לדון בנסיבות שאירעו בשטחים המוחזקים על ידי ישראל. לאור זאת, יש לבדוק מהן הקונסטרוקציות הפרשניות שבחן יכול בית הדין לעשוות שימוש

הפעלים במסגרת משטר משפטי ספציפי מלאים שתו פונקציות – יישוב סכוכיים וכיודם מטרות המשפט לו הם שייכים. מכאן שהם חשים, בין שבמחדוון ובין שבאופן בלתי מודע, כי מוטלת עליהם, בין היתר, אחריות לפועל בדרך משפטית אשר תקדם את האגדנה של המשפט המכונן שלהם – אינטגרציה כלכלית, קידום הגנה על זכויות אדם או הענשת פושעי מלחמה (בדרכם כלל הרקע המקורי של השופטים מוביל לכך שם אף מזדיינים אישית עם מטרות אלו). כתועאה מכך, קיימת הטיה בפסקת בית דין דין ספציפיים אל עבר טילת סמכות לדון בסכוכיים הקשורים למטרות המשפט המכונן, וזאת על מנת שבית הדין יוכל לתרום תרומות לקידום הצלחת המשפט. לעומת זאת, בית דין כללי, כגון ה-ICJ, שמרתתו המוצהרת הנה אך ורק יישובם של סכוכיים בימי-דיניתים פטור מהשפעות הכללה ובוחן את קיומה או הייעדרה של סמכות שיפוט בזירה "נקיה" יותר. מעבר לכך, יש נפקות לכך שה-ICJ איינו נהנה כלל מסמכות שיפוט שבחובה, וההתקינות בפניו מותנית בקבלת סמכות השיפוט של ידי הצדדים (וזאת בגיןו בתבי הדין הספציפיים הפעלים בדרך כלל במסגרת משטר המותנה את ההטריפות אליו בקבלת סמכות השיפוט שבוחנה של בית הדין שלו). התנהלוותם ריבוניות, נשאה פרשנות פוזיטיביסטית, המיחסת משקל רב למוסדות ריבונות המדינה, תסייע לבית הדין להיתפס על ידי הצדדים פוטנציאליים כפורים אוטקטיים לשיכוב סכוכיים. כאמור, שפרשנות הסכמתם לסמכות השיפוט של. הוואיל והצדדים הנם מדיניות ריבוניות, נשאה פרשנות פוזיטיביסטית, המיחסת משקל רב למוסדות ריבונות המדינה, תסייע לבית הדין להיתפס על ידי הצדדים פוטנציאליים כפורים אוטקטיים לשיכוב סכוכיים. כאמור, שפרשנות אקטיביסטית של סעיפים סמכות שיפוט מצד ה-ICJ עשויה בטוחה אקטיביזם לאפשר לבית הדין לדון במספר רב יחסית של סכוכיים, אך תרתו מדיניות הנגרות לbatez הדין בעל כורחן לקבב בעtid, באופן אונטוני, את סמכות השיפוט שלו.<sup>70</sup> במקרה אחדות, גישה שמרנית מבטיחה כי מדיניות יקבלו את סמכות בית הדין מבלי להשווים ה-ICJ ייטול לעצמו אגב כך סמכות רחבה מזו שהוקצתה לו (באמצעות פרשנות מרחיבה של מסמכים יוצרו סמכות), ואילו גישה אקטיביסטית מעודדת מדיניות שלא להסתכם לסמוכות השיפוט מלכתחילה (היוון, לא להסתכם לסמוכים יוצרו סמכות כלשהם). מובן כי בית דין כגון ה-ICTY או בית הדין האירופי לזכויות האדם, שסמכוותם אינה תלולה בהסכם הצד נתבען לדין, אינם כפופים למערכת שיקולים זו, וככלים לבחור במודל הפרשנות האפקטיבית, ללא שתיגע גנטיה להשתמש בהם, בטוחה הארץ.

להערכתי, ה-ICC יאמץ את מודל הפרשנות האפקטיבית, ובדומה לכך הוראות החוקה הנוגעות לסמוכות רחבות שלו. הערכתי זו מבוססת על הקربה הרווענית (ובחלה מן המקרים גם הגאוגרפיה) בין ה-ICC לבין ה-ICTY. גם ה-ICC הוקם על מנת לקדם אגדנה מסוימת – הענשת פושעים בינלאומיים. אשר על כן, יופעלו על השופטים לחצים, גליים וסמיים, לבחור בפרשנות המגבירה



מעונש של מבצעי [הפשעים החמורים ביותר] ועל ידי כך לתרום למניעתם של פשעים כאלה”<sup>77</sup> (התרגום שלי – י.ש.). יש לזכור, בהקשר זה, כי תכליתם של טעפי הזיקה הנה להבטיח כי בית הדין יפעל בשמן של מדיניות המוסמכת להעמיד לדין את העberyינים בעצם בגין זיקה של ממש שיש להן לפשע הנדון (שתי זיקות השיפוט שנבחרו על ידי החוקה – אורותות וטריטוריה – הן הזיקות שלגביהם קיימת הרמה הגבוהה ביותר של קוננסוס<sup>78</sup>). בכך איזונה למשעה החוקה בין הצורך להעניק לבית הדין סמכות נרחבת להעודה לדין, לבין הדרישת השעהולה בעת נסוחה החוקה להגן על ריבונותן של מדינות שלא הצטרפו לחוקה, בכלל הנוגע לעברות המבווצעת בשטחן, על ידי אזרחיהם שליהם<sup>79</sup>. מכאן, שבקרים בהם אין פגעה ביריבונו, מונון האמור, ניתן לנורס שיש לפרש את הסעיפים באופן מרחיב, ולהסתפק בזכקה של ממש לטריטוריה ◀

<sup>67</sup> כך למשל, לאחר החלתו השנואה במחלוקת של ה-ICJ בפסקת מקרנהה לאו"ת הבritis (1984), פילה יש לו סמכות שיפוט לדין בתיק, והודעהಆרכוטה-תבנית כי היא מובלلة את הזרחה לפני (2) לחוקת בית הדין, בה קיבלה ארכוטה-תבנית את סמכותה בת דין לדין בסכומים אשר היא נה דן (בכפוף למיניותם). *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, 1984 I.C.J. 392 (Jurisdiction and Admissibility of the Case).

<sup>68</sup> ס' 36 לחוקת רומה.

<sup>69</sup> ראו גם: *Laursen, supra note 35*, at p. 794. הצעון של ה-YIT להציג מעימודו עס מדיניות אטטי אוינו מחייב על רעם היובדה כי מדיניות נאטטי אחורית למים נחנה נכם מתקייב בית הדין, והן בעלות השפעה פוליטית ניכרת במעמדת הביטחון של האס"ם – הנוגע שסייד את בה"ד ומפקח על המשפט, השיפוט והמנהלה חוק רומן הגולן, חמץ-ב' 1981. הוקח חיל על רומה או המשפט, השיפוט והמנהלה של מדינת ישראל, ובכך ייחפה הזכות למשעה לשפט המדינה.

<sup>70</sup> ראו גם: *U.N. Security Council Resolution 242*, 22 November, 1967; *U.N. Security Council Resolution 338*, 1967 (8 preamble para. 2, UN SCOR, 22nd Sess., 1967) Blumenthal, *supra note 25*, at p. 606.

<sup>71</sup> ראו גם: *Rome Statute of the ICC*, 1998, art. 1382nd para. 2. Blumenthal, *supra note 25*, at p. 606.

<sup>72</sup> לדעה שונה ראו 'בלום ציון' במשפט הבינלאומי מפרטה' הפקולט (טשל"א) 315.

<sup>73</sup> לדעה שונה ראו 'דרשטיין' 'ציון' במשפט הבינלאומי מ涕פה' הפקולט (טשל"א) 5.

<sup>74</sup> *Jordan: Statement concerning Disengagement from the West Bank and*

*Palestinian Self-Determination* (31 July 1998), reprinted in 28 ILM

(1998) 1637.

<sup>75</sup> חוות שלום מן מדינת ישראל בין המלכה הדרנית האשפתית, 26 אוקטובר 1994,

<sup>76</sup> כ"א, 32, מס' 1069, י' 271.

<sup>77</sup> המבוא לחוקת רומה, פסקה 5.

לසוח, יש לציין כי, להלחותו האט"ס הקובעוט כי מדיניות התחנחות של ישראל בשטחים שנתפסו על ידי ב-1967 (כולל מזרח ירושלים) הנה בלתי חוקית אין מעמד מחייב, אך זו לא סק יהוו מקור השאלה מפניICC בבודאו לבחון את חוקיות המ丑ב Shaw, *supra note 7*, at pp. 90-92.

<sup>78</sup> P. Kirsch & D. Robinson "Reaching Agreement at the Rome Conference" . *Rome Statute of the ICC*, *supra note 21*, at pp. 67, 84

<sup>79</sup> Schabas, *supra note 11*, at pp. 61-62; S. Bourgon "Jurisdiction Ratione Locii" *Rome Statute of the ICC*, *supra note 21*, at pp. 559, 562; Kaul, *supra note 21*, at pp. 583, 584-586

על מנת הגיע אל התוצאה, אשר אליה אני מאמין שהוא יגיע, ולפיה יש לו סמכות שיפוט על השטחים האמורים. ודוק, אין מדובר בكونסטרוקציות אשר הנן לדעתך בהכרה נכונות או ראיות, אלא כמובן אשר קיימת הסתבות ממשית כי בית הדין יבחר לאמץ. ניתן לחלק את הדיון ל-4 חלקים – בהתאם למעמד של אזורים שונים המוחזקים בידי ישראל. באשר לרמת הגולן, נראה כי הרמה נחשבת מבחינה משפטית לשטח סורי, וזאת למורות שיפוח הרמה למדינת ישראל בשנת 1981<sup>70</sup>. הסיפוח לא הוכר על ידי אף מדינה אחרת בעולם, והוא עומד בניגוד לכל המנהג הבינלאומי המקבול, לפחות לא ניתן לרכוש שטחים בכוח מדינה אחרת (זאת גם כאשר הכוונה מופעל במסגרת הנגה עצמית חוקית)<sup>71</sup>. מכאן נראה שהסכם סובייט להפעלת סמכות השיפוט של בית הדין בנוגע לפעולות ישראלית ברמת הגולן, תקנהICC סמכות שיפוט להעמיד לדין אורותים ישראלים בגין חזרות לפשעים המבווצעים באזור זה<sup>72</sup>.

שאלה קשה יותר מתעוררת באשר לשאלת סמכות בית הדין בוגרעות שבוצעו בשטחי יהודה ושומרון. בניגוד לרמת הגולן, שם קיימים ריבון קודם המוכר על ידי הקהילה הבינלאומית אין ריבון כזה ביהודה ושומרון. ישראל אל ריבונותם לא תבעה ריבונות על השטח (וגם לו הייתה תובעת יש להנני כי הקהילה הבינלאומית הייתה דוחה את התביעה, מכוח העיקרון כי אין רוכשים טריטוריה בכוח<sup>73</sup>). עד מהרה של ישראל הייתה וודונה כי מעמדו של השטח יקבע בשיחות הקבע עם הפלשתינים. ירדן, שמננה נכבש השטח בשנת 1967, אמונה שיפחה את השיטה בשנת 1950, אך סייפה זה מהשכ כלתי חוקי (הוא לקרה בפגמים זמינים לאלו של הטפה) הישראלי של רמת הגולן – חוסר הכרה הבינלאומית – רק שתי מדיניות אחרות בעולם הכירו בחוקיות השיפוט; והפרת האיסור בדבר רכישת טריטוריה בכוח – במקורה זה, כיבוש לאחר מלמה תוקפנית<sup>74</sup>). יתר על כן, ירדן ויתרה למשעה על תביעותיה בנוגע לשטח הגדה בהכרזתו של המלך חוסיין משנת 1988<sup>75</sup>, ומאותר יותר בהסכם השלום עם ישראל משנת 1994<sup>76</sup>. באשר לרשומות הפלשתינית, הרי שזו אינה מדינה, בשלב זה, ומכל מקום שליטות בשטחה הנה מוגבלת ביותר (על פי ההסכם עם ישראל, לרשות יש סמכויות שלטוניות בפחות מחצית השטח; בפועל – הרשות שלטת כיום שליטה של ממש בחלק קטן בהרבה מן הטריטוריה, אם בכלל).

עליה אם כן, שאין אף גורם אשר ניתן לראות בו בבירור כריבון החקי בשטחי יהודה ושומרון. מסקנה זו מובילת לארהה לתוצאה האבסורדית כי האזור הננו "שטח הפק", בכל הקשור לאכיפת הדין הפלילי הבינלאומי וכי אף מדינה אינה מוסמכת להתרן לבית הדין להפעיל את סמכותו שם. אולם נראה לי כי זהו מקרה מובהק שבו בית הדין יפרש את סמכויות השיפוט שלו על פי מודל הפרשנות האפקטיבית – הינו, יפרש את תנאי הזיקה הטריטוריאלית באופן שיגשים ככל האפשר את תכלית החוקה – "לשימים קע להימלטות



ניתן לטעון כי בידי יחידה פוליטית הזכאית להפוך למדינה בעלת ריבונות על שטח נתון, מציה באופן אינטורנטי הסמכות להלול היליכים פליליים נגד מוצעים עבירות בשטח האמור<sup>86</sup> או הסמכות להסмир גורם אחר לעשותות בן מקומה. מכאן, לדעתו, קיימת אפשרות סבירה שבית הדין יקבע כי הרשות הפלשתינית תוכל להסתמך אorו להעמיד לדין ישראליים בגין עבירות שבוצעו בשטחי יהודה ושומרון (או רצעת עזה).

אפשרות פרשנית שלישית, עשויה לבסס את זיקתה של ירדן לשיטה. למרות חלשותה המשפטית של הקונסטרוקציה שתוצע להן, הרי שיש לה פוטנציאל ה-"זק" הרב ביותר, מוקודת דואת השם של ישראל, וזאת מכיוון שרדן כבר העניקה לחוקת רומה. מכאן, הכרה בהודה וושומרון כשתה השיריך לירדן, ولو לצורכי חוקת רומה בלבד, תגבור הסמכה אוטומטית של בית הדין לדין בעבירות המבצעות באזורה זה. על פי הקונסטרוקציה המוצעת, יש לפרש את סעיף הזיקה הטוטויריאלית של חוקת רומה המתיחס לשיטת כבוש לאור דיני היכובש של המשפט הבינלאומי – אמנת גנבה הריבועית<sup>87</sup> ותקנות האג 1907<sup>88</sup>. דינם אליו שומרים על המשך/zika של המדינה שמננה נכבש השטח לשיטת הכובש (למשל, מגבלים את זכותו של הכובש לשנות את הדין אשר היה קיים ערב היכובש<sup>89</sup>). על אף שמדובר במשפט של מדינה אשר גנבה הריבועית, לא ניתן לטעות את מדינתה של ישראל כי אמנת גנבה הריבועית אינה חלה באזורה היהודית וושומרון, הרוב המכרי של מדינות העולם רואה באזורה זה שיטה שנככש מידי ירדן (גם, כאמור, היכובש הירדי של האזור לא הוכר אף הוא על ידי הקהילה הבינלאומית)<sup>90</sup>. מכאן, שבית הדין עשוי לקבע כי די בחזקה הירידנית בשיטת, עבר היכובש, על מנת להכיר בזיקה הירידנית לטוטויריה, לצורך הקנייה סמכות שפט על פשעים ביןלאומיים המבצעים שם. במילים אחרות, הcourt להיאבק בפשעים ביןלאומיים המבצעים בשיטה כבוש, עשויה להצדיק, על פי מודל הפרשנות האפקטיבית, הכרה בזיקת המחזק הקודם בשיטה לצורך העמדה דין, גם אם ריבונותו על השיטה שנויות בחלוקת. ניתן אף לטעון כי ישראל, בכך שהותירה את החקיקה הירידנית באזורה היהודית וושומרון על כנה, הכרה בעקיפין בהמשך תוקפה של זיקה זו.

באשר לשני האורים האחרים אשר נקבעו בידי ישראל ב-1967 – רצעת עזה ומזרח ירושלים – הרי שהדין שנערך לעיל ישים גם לבגיהם, בשינויים קלים. רצעת עזה נמצאת במעמד דומה לזו של אזור יהודה וושומרון בשני הצדדים – ערב מלחמת ששת הימים האזרור היה בשליטה מצרית ולא ירדנית; ומצרים, בניגוד לירדן, מעילם לא תבעה בשטוח ויבנות. עם זאת, ניתן לבסס באמצעים פרשניים, זיקות טוטויריאלית לישראל, לרשות הפלשתינית ולמצרים – בתווך המחזק הקודם בשיטה, עבר היכובש (אך מצרם, שלא כמו ירדן, אינה צד לחזקת רומה). באשר למזרח ירושלים, הרי שבניגוד לשאר אזוריו יהודה וושומרון, מזרח העיר סופח לשיטה מדינת ישראל ב-1967<sup>91</sup>. עם זאת, הויאל גם מעשה הסiphon הזה לא התקבל על ידי הרוב המכרי של מדינות העולם<sup>92</sup>, יש לתניח כי

מצד המדינה המסימכה, גם אם זו אינה עולה כדיRibonot Formelit (ובאופן דומה, יתכן שניתן יהיה להסתפק בזיקות פרטוניות בין פרט למדינה שאין עלות כדי קשר של איזורחות פומלט). במקרה שלפניינו, עסקינו בעבירות הנופלות מחוץ לשטחה הריבוני של מדינה כלשהי, ומכאן במאובט שבו אין לראות אינטנסיבי לגיטימי מנקודות ראותה של החוקה שלא להפעיל סמכות שיפוט. יש גם לציין כי מילא העברות הכלולות בחוקת רומה נופלות בגין הסמכות האוניברסלית של כל מדינה ומדינה, ומכאן אין בהרחבת הצעופה של רשותה המדיניות המוסמכת להתייר ל-ICC להעמיד לדין פיעעה בעירון הבסיסי שלפיו הוא פועל בשמה של מדינה אשר המשפט הבינלאומי מתיר לה להעמיד לדין את החשוד בעצמה.

עליה מכך, שה-ICC עשוי לקבע כי אין לקרו את הביטוי "שטחים השיכים לו" ("territory of which") הקבע בסעיף 13 בחזקה כתתייחס רק לRibonot – אלא גם לזיקה וופפת יותר של חזקה או סוג אחר של אחירות משפטית. מכאן, ישראל עצמה, כמדינה שהשטחים נמצאים בחזקתה, עשויה להיחשב, לצורך הסמכת בית הדין, כמדינה אשר השטחים שייכים לה. אולם קיימת מחלוקת משפטית באשר למעמדם של אורי (A) אוריים אשר נמסרו לשיטת פלשתינית בלבד, על פי הסכם אוטולו) שלא נקבעו מחדש על ידי ישראל, שכן יש הסבורים, ואני בתוכם, כי ישראל אינה אחראית מבחינה משפטית להפעלתו של מרבית הסמכויות השלטוניות בונגעו לנעשה אוריים אלו<sup>93</sup>. עם זאת, יש לציין כי לפחות בכל הנוגע להשdot המועלם נגד אוריים ישראלים, וכיום זה אינו בעל חשיבות פרקטית רביה, שכן הסכם ישראל להעמדות דין, בתווך מדינת האזרחות שלהם, מיתרת מילא את הצורך בסיסוס זיקה הטוטויריאלית. מכל מקום, הויאל והסכם ישראל לסטמות בית הדין בונגעו לאזרחה או לשטחים המצוים בחזקתה אינה נראה סבירה, בשלב זה, בית הדין יצור לבחור באפשרות פרשניות אחרות על מנת לקנות לו סמכות העמדה דין.

אפשרות פרשנית נוספת העומדת בפני ה-ICC הנה לפרש את הביטוי מדינה (state) באופן גמיש, כולל גם ישות פוליטית, כגון הבסיסיים של מדינה (שליטה אפקטיבית בשיטה, אוכלוסייה וכשור לקרים, באופן עצמאי, יחסן חוץ<sup>94</sup>), וזאת אף שהשות לא הכריזה על עצמה כמדינה (גם שניתן לטעון כי יש משקל להכרזת העצמות הפלשתינית משנת 1988<sup>95</sup>). את שיקות השטחים לרשות הפלשתינית, יכול בית הדין לבסס, בונגעו לאוריים הנתוונים בפועל לשיטת הרשות, מכוח פרשנות מרחיבה של מושג השicity (כלול, כאמור, גם שליטה בפועל), או, בונגעו לכל שטחי יהודה וושומרון, מכוח עקרון ההגדרה העצמית המקנה לפלשתינים זכויות משפטיות על השיטה<sup>96</sup>. עיקרונו זה, הנחשב כיום לעירון מחיב במשפט הבינלאומי המנהגי<sup>97</sup>, קבוע כי לעמים יש זכויות משפטיות ליצור מסגרות פוליטיות – כולל מדינה עצמאית, באזור שבו הם מתגוררים (ובגלד שאין בכך ממשום פגיעה בRibonot של מדינה קיימת<sup>98</sup>).



- לעומדה דומה בוגרנו לצורך לאם פרשנות מרחיבת של המדרת המוניה "מדינה" (בחקשו S. Rosenne "The Perplexities of Modern International Law" 291 *Recueil des cours* (2001) 9, 105-106 חוקת ICJ), ראו: Palestinian Declaration of Independence, 15 Nov. 1988 [URL:<http://www.mideastweb.org/plc1988.htm>] (last visited on 15.12. 2002) 82 כי העומדה כי הסכמי הביניים בין ישראל לרשות הפלשתינית איננה עונה מודעה שפק אם ההסכם יעדות תקפים לאור הפרות השווות על ידי שני הצדדים. בכלל מקרה, שפק אם ההסכם מחייבים את ICC בזמנו לפרש את עטיפי סמכויות שלו עצמו (זורך – אין מודור בהכרה בראשות כמדינה לכל דבר ועניין).  
83 השוו "דינשטיין" והפירה לא נסורתה או לא הפגונה אלא מעשים "הפרקлист" צו (תש"א) 519.
- Shaw, *supra* note 7, at pp. 181-182; A. Cassese *Self-Determination of Peoples* (Cambridge, 1995) 315-338; R.A. Falk "The Right of Self-Determination under International Law: The Coherence of the Doctrine and the Incoherence of Experience" *Self-Determination and Self-Administration* (Boulder, W. Danspeckgruber & A. Watts eds., 1997) 47, 50-61 84 רוא למשל: Declaration on Principles of International Law Governing Friendly Relations and Cooperation Among Nations, U.N.G.A. Res. 2625. UNOGAR 25th Sess., Supp. No. 28 (1970) 121, UN Doc. A/8028 (1970) 85 עס' זאת, קושי מסוים נוצר עקב הסכמי הביניים בין ישראל לפלשתינים השוללים את סמכותם של אלו האוחרים להעמידר לפני אורהיים ישראלים. ס' 1(2)(ב) (להלן ה'ז') לשכם הביניים הישראלי-פלשטייני בדבר מהה המעורבת ווצעת עוז, 28, לסתטember בעקביפין") – ניסוח החורג מנוסחים של עשייפים קודמים בנוסח התנהליות – וכן החלטתה שנטקבלת ברומה בדבר חוסר האפשרות להשתיג מסעיפוי החוקה (פרט לאפשרות להשעות לפיק זמן של שבע שנים את ההצעה למסמכות השיפוט של ICC בוגרנו משלמה מישראל את האופzieה מלכה"). החלטה אחרונה זו מנעה למעשה מישראל את האופzieה של אימוץ חלקו של החוקה.  
86 Hague Convention and Regulations Respecting the Laws and Customs of War, 18 Oct. 1907, Regulation 42, 36 Stat. 2277; T.S. 539. הא".  
87 ס' 43 לתקנות האג' 89 רוא למשל: Declaration of the Conference of the Parties to the Fourth Geneva Convention, (5 December 2001) [URL:[http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc/docum2.Par.0006.UpFile.pdf/.jng\\_011205\\_4gdeclam\\_e.pdf](http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc/docum2.Par.0006.UpFile.pdf/.jng_011205_4gdeclam_e.pdf)] (last visited on 8.6.2002) 90 עז סדרי השלטון ומשפט (ס' 1, תשכ"ד-1967, ק"ת 2690. דוא ב'ג' 01/01. 91 רשות נ' ביהם' לניינום מקומות ירושלים, פ"ד (נ' 2) 930. 92 רוא למשל: Security Council Resolution 478 (1980), 20 Aug. 1980. UN Doc. S/RES/478 (1980); General Assembly Resolution 56/31 on Jerusalem, 3 Dec. 2001, UN Doc. A/RES/56/31 (2001) 93 יתכן ווואר נקטות לעמשה הסיפה לצורק הסמכת בית הדין על ירי ישראל לדון – בעשויים שבցו על ירי אשים שאים אורהיים ישראלים בסחס מוח רשות – במקרה זה, קל יותר היה לטעון כי לצורק הסמכת בית הדין, ישראלי אשר מחזיקה בשטח ותובעת לעמשה ריבונות עליון, הנה בעל וקה טריטוריאלית מוספקת. J. Pictet (ed.) *The Geneva Conventions of 12 August 1949: Commentary*, Geneva, vol. 4, 1960) 283. 94 ס' 49 לאמנת נבנה הרבעית. 95 ס' 124 לחוקת ורמא. 96

ה-ICC יתייחס למזרח ירושלים כל שאר חלקי יהודה ושומרון.<sup>93</sup>

#### 4. שאלת ההתנהליות – האם מתנחלים צפויים לעמוד לדין ב-ICC?

כפי צוינו קודם לכן, אחת מהסיבות המרכזיות לאי-הצטרופותה של ישראל לחוקת רומה נערן בנוסחו של סעיף 8(ב)(8) לחוקה – "סעיף ההתנהליות".ensus, שתכליתו היא למנע שינוי דרמטי של הרכב האוכלוסייה בשטח הנכוש<sup>94</sup>, מגדיר כפשי מלחמה: "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies" הכללת הסעיף עצמה בחוקה לא הייתה אמורה להפתיע את נציג ישראל בוועידת רומה (על אף עדמתה העקרונית של ישראל כי העברה נופלת בחומרתה מיתר העברות הנכללות בחוקה), שכן איסור על העברת אוכלוסייה לשטח נככל כבר באמנת ונבנה הרביעית<sup>95</sup>, אשר ישראל הנה צד לה. כמו כן, נכללה הוראה, הוראה בהפרת האיסור משום פשע בינלאומי, בפורוטוקול הראשון שנוסף בשנת 1977 לאמנות גנבה (ישראל לא הצרפה אליו). עם זאת, "אזכורה" של ישראל מן הסעיף קשורה לנוסח המרחב במיוחד שנבחר בעת ניסוח חוקת רומה לשם הגדרת העברה ("במיישרין או בעקביפין") – ניסוח החורג מנוסחים של עשייפים קודמים בנוסח התנהליות – וכן החלטתה שנטקבלת ברומה בדבר חוסר האפשרות להשתיג מסעיפוי החוקה (פרט לאפשרות להשעות לפיק זמן של שבע שנים את ההצעה למסמכות השיפוט של ICC בוגרנו משלמה מישראל את האופzieה מלכה"). החלטה אחרונה זו מנעה למעשה מישראל את האופzieה של אימוץ חלקו של החוקה.  
לאכזרה, סעיף ההתנהליות מנוסח באופן רחב ביותר, אשר עשוי לאפשר ל-ICC להעמיד לדין אורהיים ישראלים ובמים♦

יש לציין כי עמדת הרשימות של מדינת ישראל בנושא מעמדם של טהו A אינה עקבית. כך למשל, הכריז נצעי המדינה בפני וקידות או"ם הכוונות את מצב ובויהו האם בישראל ובשטחים המוחזקים על ייה, כי אורים שהובכו בידי הרשות הפלשתינית אינם מצויים עוד באחירות ישראל. Second Periodic Report of the State of Israel under the International Covenant on Civil and Political Rights, para. 8. UN Doc. CCP/C/ISR/2001/2 (2001); Second Periodic Report of the State of Israel under the International Covenant on Economic, Social and Cultural Rights, para. 6-8. UN Doc. E/1990/6/Add.32 (2001) מנגד, בפרשת העכרת בני משפחותיהם של מוחלטים מתאדים לעזה היו נצעי ה"ם عمדה שפטית, שאח התקבלה בבית המשפט, לפחות חושבי איר"ש לעזה ונשבת למלחמות גורמים בתוך השטח הכובש על ירי ישראל. בג"ע פסקאות 9-10 לפיק זון של השופט ברק. הרשימה המוקלטת של התנאים לקיומה של מדינה מושיה באמנת מונטברדו משנת 1933, שנרכבה בין מדינות אמריקה, ונוחשב כו"ם לאמנה דגליטטיבית (היו – Convention on Rights and Duties of States (Montevideo Convention), 26 Dec. 1933, art. 1, U.S.T. 145).

את תחולתו באופן נicer. נראה לי, אפוא, כי גם מנימוק זה, פועלות עקיפה שיש בהקדם באופן נזיה את מפעל ההתיישבות בשטחים לא טיפול בגדר הסעיף.<sup>106</sup>

**שלישית**, ספק מסוים בעניין אם בנסיבות החלות בענייננו מתיקיים כל התנאים הקבועים בסעיף 8(2)(ג) – החולש על תחולתו של סעיף ההתקלחויות – ובחלק הרלוונטי של מסמך יסודות העברה. באופן ספציפי, אין זה ברור אם כל ההתקלחויות בשטחים מתקיימות: "בהקשר למועדן עם סכום חמוץ **בינלאומי**" התרגום וההדגשה שלו – י.ש.<sup>107</sup>. הוואיל ומקרים חותמה על הסכם שלום עם ישראל בשנת 1979 וירדן בשנת 1994 (וכאמור, יתרה מעשה על תבניותיה נוגע ליהודה וشומרן כבר ב-1988), הרי שניתןטעון כי עברת ההתקלחויות אם בוצעה לאחר תאריכים קוביעים אלו (1979 בוגנע לרשות עזה ו-1988 בוגנע ליהודה וশומרן) אינה קשרה כלל לסכום **בינלאומי**, כי אם לסכום בין-ישראל לפלשתינים אשר ניתן להגדירו כסכום חמוץ שאינו **בינלאומי**<sup>108</sup>. ניתן, אפוא, לטעון כי גם אם אמתה גיבנה הריבית ממשיכה לחול על השטח (מכוח הרכזונל ההומיניטרי המצו בבסיסה), הרי שאופי הסכום השנתה לאחר שמדינותו שמהן נקבע השטח במקרה "צאו מן התמונה". מכאן, שהתקלחויות בשטח כבוש ועדן אסורתו (מכוח סעיף 49 לאמנת גיבנה הריבית), אך הן אין מהות פשע מלחמה. הגם שניתן לעקו מכך פרשוני זה באמצעות פרשנות מרחיבה של המונח "סכום **בינלאומי**" המציין בחוקת רומי ובמסמך יסודות העברה, הרי שודמה כי הקשי הכרוך בכך יהווה שיקול נוסף נגד יישום סעיף ההתקלחויות בהקשר של השטחים המוחזקים בידי ישראל (למעט רמת הגולן, שלגביה אין ספק כי מתקיימת הזיקה לסכום **בינלאומי**).

**לבסוף**, נראה לי כי הפעולות הכרוכות בהקמתן ובאכלהן של התנהלות קיימות, יהיו פטורות מסמכותו של בית הדין, לאור הסעיף בחוקה האוסר על החלה וטרואקטיביות שלה<sup>110</sup>. בהקשר זה, יש להתמודד עם הטענה כי העברת אוכלוסייה לשטח כבוש הנה עברה מתמשכת – דהיינו, עברה השבה ומשתכלה בכל יום שבו מצויים הנערבים בשטח הכבוש<sup>111</sup> או עברת שרשרא – דהיינו, עברה אחת המורכבת מרצף פעולות של העברת אוכלוסין המתבסשות מכלול אחד<sup>112</sup>. טענה מהסוג הראשון נתקבלה על ידי בית הדין האירופי לזכויות אדם בפסקת *Loizidou*, שנכרה לעיל, שבנה נקבע כי סעיף א' רטראקטיביות בכורחו מטעם טורקה אשר קיבל את סמכות *מֶת* הדין, אין מונע דין בעתרה שבה נטען לפגיעה בזכות הקניין בעקבות הפקעה בלתי חוקית שהתרחשה שנים רבות לפני מועד ההכרזה<sup>113</sup>. החסר שנותן לכך בית הדין היה כי ככל יום שבו נמנעת מן העותרת גישה לרוכשה, שבה ומתחדשו הפרת זכותה להנוט מקניינה הפרטי. לדעתו, תקדים זה אינו צפוי לחול באופן ישיר בנגע לעברת התנהלות, שכן זו מנוסחת כעפ"ז התנהלותית (היינו – עברה המשכלה בעת מעבר האוכלוסין).

ב"מפעל ההתיישבות" ביהודה ושומרון, בחבל עזה וברמת הגולן. כך, למשל, ניתן לראות בשרי ממשלה ובפקידיים משלТИים המהיליטים על הקמת יישוב חדש בשטחים, הידועים "מצטיין אקלוס" בשטחים או מאשרים הקЛОות מיסוי לתושבים שם, כאחראים להעbara בעקביפין של אוכלוסייה יהודית לשם בגיןו לסייע (8)(ב) לוחקה. באופן דומה, ניתן לראות בראשי המנהלים המקומיים פעולות שתدلנות לשם הרחבת ההתיישבות היהודית בשטחים כמנדלים לדבר עברות, לפי ס' 25(3)(ב) לוחקה. על פי פרשנות מרוחיבה של הוחקה, ניתן אפילו לדאות בכל תקשורת המפרטים מוזיעות ופרשיות הקוראות לציבור להתיישב באזורי האמוראים ובפקידי בנק המאשרים הלואות למשתכנים בשטחים, ממשיכים לדבר עברות לפי ס' 25(3)(ג) ו'(ד) לוחקה. לבסוף, ניתן לראות בכל אדם המתישב בשטחים המוחזקים על ידי ישראל, מותוק ידיעה כי מדובר בשטחים שאינם מצויים ביריבונות ישראלית, כאמור למצווע עברת ההתנהלות או מכצע בצוותא<sup>97</sup> או כשותף לדבר עברות.<sup>98</sup>

עם זאת, להערכתנו, הסיכויים כי ישראלים יועמדו לדין בפני ה-ICC על פס סעיף ההתקנחות אינם רביים, בין ISRTEL תציג לחוקת ורמא ובין שלאו, וזאת על אף שיש להניה כי בית הדין, אם ייתן דעתו לכך, יקבע כי התקנחות ישראליות בשטחים מוגדרות

למשפט הבינלאומי<sup>99</sup>. עמדתי זו מבוססת על כמה נימוקים:  
**ראשית**, ספק רב אם התנהוגות של חלק ניכר מן האורחים  
 הישראלים שגכו ליעיל הנה חמורה דיה על מנת שבית הדין יהיה  
 מעוניין להעמידם לדין, גם אם ניתן לעשות כן מבחינה טכנית.  
**משפטית**<sup>100</sup>. בית הדין נודע לטפל ב"פשעים החמורים ביותר אשר  
 הנם מעוניינה של הקהילה הבינלאומית בכללות"<sup>101</sup> (התרוגם של  
 – י.ש.). החוקה אף מחייב את הותבע להימנע מהעודה לדין במקרים  
 שאינם חמורים ובמקרים שבהם תפקידו של החוזה בפשע הנה  
 שלו<sup>102</sup>. משמע, בית הדין פועל על פי הכללים ידוע של *de minimis*  
*non curat lex* – פקידי נון (הדין אינו מטפל בזוטות)<sup>103</sup>, ואין זה סביר כי  
 ישאלים שתרומותם להקמת התחנויות בשטחים זוניה (למשל  
 – פקידי בנק, חילימ המאבותיהם התחנויות ואף מתחנלים מן  
 השורה) יהיו מטרה לחקיראה ולהעודה לדין מטעם ורשויות התייעזה

**שנית,** יש מקום להניח כי בית הדין יעניק פרשנות מצומצמת למונח "העברת אכולוסיה בעקביפין" הקבוע בס' 8(ב)(8) לחוקה. ההסביר לכך הנו, שבית הדין מונחה בפרשו את סעיף החקיקה על ידי מסמך נלווה שחייבנו נציגותן של המדיניות אשר השותפות בניסוח החקיקה המגדיר את יסודות העברות השונות הקבועות בחוקה התחנכוויות צירפו הנציגים שהשתתפו בניסוחו הערבה כי יש לקרוא את הסעיף לאחר הפרשנות המקובלת של העברת כל העברות אוכולוסייה לשטח כבוש<sup>105</sup>. משמע, ניתן לטעון כי אין ליחס לצדים לחוקת רומי, למטרת הניסוח המרחיב של הסעיף, כוונה להרחיב

100 רואו גם את סעיף 8(1) לחוק רומי הולן סייג פולו על ה-ICC להשתמש בסמכויותיו על פי השיעין "בעיקר נאסר [הפעשיים] מובוצעים בחקלאות מתקנית או מדיניות או כלקל ביצועו של פעישם כאלה בהוקם ונורח" (התרגום של – י"ש), במילים אחרות –

<sup>101</sup> בכל, מתי הדבר לא נועד לטפל בהפרות מקוריות או ספרדיות הנפוצות בידי החוקה, אלא בנסיבות של הפורת נרחבות או שיטתיות של היהן ההומניטרי. ס' (1) חוקת רומיות. לדוגמה על הכללת סעיף ההנתנהליות בחוקה מסוים זה, ראו: Brown, *supra* note 11, at p. 866.

<sup>103</sup> ראו למשל: Schabas, *supra* note 11, at pp. 21–22, 25; P. Kirsch & V. Osterveld “The Post-Rome Conference Preparatory Commission” *Rome Statute of the ICC*, *supra* note 21, at pp. 93, 96–99.

The term "transfer" (טְעִנָּה, בְּלִיה) in Article 110(1) of the Convention requires interpretation in accordance with the relevant provisions of international humanitarian law.<sup>105</sup>

<sup>106</sup> בלהה שונאי, ראה: Blumenthal, *supra* note 25, at p. 599.

<sup>107</sup> מסמך יסודות העברה, בס' 8(2)(ב)(8), יסוד 3.

Human Rights Inquiry Commission Report on the Question of the 108  
*Violation of Human Rights by Israel in the Occupied Palestinian Territories*, UN Doc. E/CN.4/2001/121 (2001) at p. 12  
יש לציין כי הפטורוקול הראשון לא מנוט בנהה כתול בעקבות סוכרים בגולמיים  
גם מלחמות ללחזרו לאומי. דא עקי שישראל לא העתרה לפוטורוקול, וספק אם  
הוראותיו משקפות די מנהוג. יי' דינשטיין דינע מלוחה (1983) 24, לדעתו המפקחת  
במעמדו המנaging של הפטורוקול הרואשן ראו גם: C. Greenwood "Customary Law Status of the 1977 Additional Protocols" *Humanitarian Law of Armed Conflict* (Dordrecht, J.M. Delissen & G.J. Tanja eds., 1991) 94; T. Meron "Human Rights and Humanitarian Norms as Customary Law" (Oxford, 1989) 62-78  
G. Abi-Saab "The 1977 Additional Protocols: אק מנגן, רוא: 1989) 62-78  
and General International Law: Some Preliminary Reflexions"  
*Humanitarian Law of Armed Conflict*, *supra*, at p. 115; M. Sassoli &  
A.A. Bouvier *How Does Law Protect in War?* (Geneva, 1999) 109; Scharf,  
. *supra* note 22, at p. 93  
ס' 24 לוחות רמה, 109

110 השו למשפט רע' עילם בטי', פ"ד ל(2) 326 (אי-השות דוחה למסתת הנה  
עבירה מושגשת אשר יסודתו מוקחים בכל יום, עד למועד הנחתה הורית).  
111 השו למשפט רע' טרי' 4603/97 סמלוט בטי', פ"ד נ(5) 303-301, 289 (ושורת התנהלות  
בלawyering וואנאי במשפטם של מושגשים).

*Loizidou v. Turkey*, 1996 (ser. VI) Eur. Ct. H.R. 2216 112  
*Legality of Use of Force (Yugoslavia v. Belgium)* 1999 I.C.J. 124 113  
 (provisional measures); *Legality of Use of Force (Yugoslavia v. Canada)* 1999 I.C.J. 259 (provisional measures); *Legality of Use of Force (Yugoslavia v. France)* 1999 I.C.J. 363 (provisional measures); *Legality of Use of Force (Yugoslavia v. Germany)* 1999 I.C.J. 422 (provisional measures); *Legality of Use of Force (Yugoslavia v. Italy)* 1999 I.C.J. 481 (provisional measures); *Legality of Use of Force (Yugoslavia v. Netherlands)* 1999 I.C.J. 542 (provisional measures); *Legality of Use of Force (Yugoslavia v. Portugal)* 1999 I.C.J. 656 (provisional measures); *Legality of Use of Force (Yugoslavia v. Spain)* 1999 I.C.J. 761 (provisional measures); *Legality of Use of Force (Yugoslavia v. U.K.)* 1999 I.C.J. 821 (provisional measures); *Legality of Use of Force (Yugoslavia v. U.S.)* 1999 I.C.J. 916 (provisional measures)

היה בועלות אופי תוצאות (הכולל בחובה התמורות של מצב  
בלתי חוקי).

באשר לדוקטורינת עברת השורשות, הרי שמשמעותו של ציון כי ה-ICJ העשה שימוש בעבר הלא רחוק בדוקטורינה זו ובכע כי יש לראות בסדרת ההצעות שבסיעה נאטו<sup>12</sup> נגד יוגוסלביה (מרץ-יוני 1999) כמכלול עובדתי אחד. על בסיס זה דחפה בית הדין את הטענה כי הסכטוק בין הצדדים נוגע להפרתו של אייסור השימוש בכוח הקבוע במשפט הבינלאומי, מתעורר מחדש לאחר כל הפצתה והפצעתה<sup>13</sup>, ופסק כי המועד הקבוע לצורך קביעת סמכותו לדון בסכטוק בין יוגוסלביה למדינות נאטו<sup>14</sup> סביר וחוקית ההպצאות, הנה מועד תחילת המתקפה. מכאן שהסתכמה של יוגוסלביה למסמכתו ה-ICJ שנייתה המתקפה, ועליה מהיבת הדין סמכות שיפוט וטראואקטיבית, במהלך המתקפה, וכך מה שפוצץ בפירושו מואלצת למדוי (וכאמור לעיל, של ההכרזה). הגם שמדובר בפרשנות מואלצת למדוי (וכאמור לעיל, של בית דין המאופיין בגיןה שמרנית למדי לנושאי סמכות שיפוט), יש

ס' 25(3)(א) לחוקת רומה. 97

ס' 25(3)(ג), (ד) לחוקת רומה.

אי מ��ס הערכה זו על הולשת הטעינום הרשאים נדוחות ס' 49 לאמתן נבנה הרבעית על טוחין סי', מחר, ויל העודה העקבית של הקלה הבוגלאומית בונאש, J.M. Henckaerts, Deportation and Transfer of Civilians in Time of War, 26 Vand. J. Transnat'l L. (1993) 469, 477; General Assembly Resolution 51/133 on Israeli Settlements in the Occupied Palestinian Territory, Including Jerusalem, and the Occupied Syrian Golan, 13 Dec. 1996, UN Doc. A/51/592 (1996); General Assembly Resolution ES-10/9 on Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, 20 Dec. 2001, U.N. Doc. A/RES/ES-10/9 (2001) (הרביעית איה כללה בשתייה יהודית, שומרון והול עזה, הואיל ונחטפו מידי מחזוק קדרת שאנו הייבנו החוקי בשיטה, הרו שלוחוי רשותות ונונה כבלל שנייה, שכן מטרתה העיקרית של מונת' ובבה והובעת הנה להן על אוכלויסטי אויב (ומודה כי אין חולק שהפליטים נטפסים כאוכלויסטי אויב בגען לישראלי). הם שנינו אלי לטענו, דבורוק, כי אין מקום להחלה על שטח כבוש שכחו הוראות העוסקות אך ורק בשימורם על האינטירוסטם של הריבון הקורום, הרו שורה כי לשינוי ההורכט והדומוטי של השטח הכרבש השפיעה על איקוט חי התושבים שם. מכל מקום, לאור הטהיה במושפט הבינלאומי המודרני להשותן בין נזויותיהם של עמים השוואפים להרדה עצמית (בעיר נסיבות של כיבושו ו/or לבן מזויות מדיניות קיימות (ראו למשל Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 3 של הפטוטקטול הירושלמי), יט להנין כי עד הפוגע בכוותה הנדרה העממית על התושבים המקומיים יתאפשר כלתו חוקי, ממש כמו צעד הפוגע בכוותה הנדרה העממית על התושבים המקומיים יתאפשר כלתו

טענה אחרת, לפיו מNUMBER וציוויל של מושבבים אינן נעל במספר האיסור נס העברות האולטוסריה (ואו למלש' at p. 239: *Levy, supra note 17*), מונדרת למינמה שמכורה לעיל בדבר הצורך לפреш בעומק אפקטיבי את הוראות המשפט הבינלאומי ההומיניטרי (יש לנו על האולטוסריה המוגנת גם מפני מעשה מנכז גורדיים פוטיסטים). נראה ומכך הנוכח המוחייב של השעיף שהתקבל בועידת רOMEA, שומות את הקרעם מתחת גולגילה של הטענה.



בחקיקה אשר עשוים לכלול הוספת עברות נוספות, ובכלל זה טרוור, לסמכות בית הדין.<sup>117</sup>

בכל מקרה, עברות טרוור ובות המוניות נגד ישראל חופפות בעברות אחרות המצויות בסמכות ה-ICC. הויל וויתן לדראות בסכום בין ישראל לפלשתינים, מאו פריצתה של אינטיפאדת אל-אקצא, כסכום בעל עצימות גבואה (high intensity), הרוי שחלים על הסכום חלק מדיני המלחמה, והפרת חלק מההוראות אלה על ידי הצדדים לסכום תחישב כפצע מלחמה. כך, למשל, מומדרים בזוקת רומה פשעים כגון פגיעה בחים ובונך של בני אדם שאינם נוטלים חלק פעיל במעשי האיבה ופגיעה מכונות בייעדים אזרחיים.<sup>118</sup> مكان שפיגועי טרוור שמבצעים מפעלים פלשתינים נגד אזרחים ישראליים הנם פשעי מלחמה על פי החקיקה. יתר על כן, על פי חוות דעת שפרסמו לאחרונה ארגוני זכויות האדם אמנסטי ו- Human Rights Watch בישראלי מושם פשע נגד האנושות<sup>119</sup>, המגדיר בזוקת רומה.<sup>120</sup> יש הסבורים גם כי ניתן להראות בחלק מפעולות הטרוור, לפחות של ארגונים איסלמיים פונדמנטיסטיים הקוראים לחיטול ישראל, בסוג רצח עם, המגדירו בסעיף 6 בחוקת רומה.<sup>121</sup> חשוב לציין, כי החקיקה אינה חלה ורק על המבצעים הישירים של הפשע, אלא גם על כל המשתתף ביצועו פשע כאמור (מסיע, משדר וכובב)<sup>122</sup> ועל מפקדים של חברי ארגון צבאי או מעוזר צבאי שביצעו את הפשעים האמורים (אם היו צריכים לדעת על הפשע ולא נקטו פעולות מתאימות למנוע אותו).<sup>123</sup>

מכאן,ישראל רשותה להසמיך את ה-ICC לחקרו ולהעמיד לדין את האחאים לביצוע פגועי טרוור בשטחה של ישראל (ובclud שהפיגועים בוצעו לאחר הדיו בולי 2002). לדעתו, שיטת הפרשנות האפקטיבית של החקיקה צריכה להוביל למסקנה כי סם פגועי טרוור באזרחים המצוים בשליטה ישראלי (התחנוליות בשטחים וכן) מתחבעים בשטח ישראלי, לצורך הפעלת סעיף הזיקה הטריטוריאלית.

### ה. סיכום

כיניטה לתוקף של חקמת רומה מסמלת את שינוי "כללי המשפט" במערכות היחסים הבינלאומיים – מעבר ממודל אופקי של יחסי גומלין, המבוסס על רעיון ריבונות המדינה כמקור הסמכות הבלעדית של המשפט הבינלאומי, למול ארכידומטבי, אשר נבע מהכרה הולכת וגוברת בתకופות של ערכיים אינטנסיביים אוניברסליים ובוצרך להגן על ערכיים אינטנסיביים אלו מפני מנויות העולם כשלב ווסף במחפה החזותית העוברת על המשפט הבינלאומי. באופן ספציפי, תחילית פעילותו של ה-ICC בראשית שנת 2003 הוביל לעלייה דרמטית בהשעתו של המשפט הבינלאומי ההומניטרי. והוא הופך להיות אכיף בהרבה מבניו, וכחותה מכך, נגמר השפעתו על ממשלה, החלטות, על הדין הפנימי ועל השיח הציבורי במדייניות העולם. מובן כי ישראל אינה יכולה להיות (וגם אינה צריכה להיות)

בתקדים זה על מנת להגבר את הסיכוייםograms גם ה-ICC יראה בכל מקומות החקיקה לתוקף – מכלול עותדי אחד, הוא לא ימהר לקבוע כי העברות נופלת בידי סמכותו הטמפלרית. לטיסום, נראה לי כי בית הדין יטה, משיקולי מדיניות משפטית – בעיקר לאור החומרה הקלה יחסית של עברות התחנוליות והקשישים שבஹוחות יסודות העברות – שלא להעמיד לדין "די וקבע" בין הקמת התנהלות קיימות וימנע מהעמיד לדין "די וקבע" המעוורבים בהמשך אקלוט התחנוליות ותיקות וחדות. מאידך, קיימת הסתירות כי אם יוקמו התנהלותיות חדשות או כי תקבע מדיניות מושלתית חדשה שתעדוד אקלוט מסיבי של התחנוליות קיימות, הרי ששיקולי מדיניות המשפטים – הצורך לפרש בעופן אפקטיבי את סעיף התחנוליות כסעיף שנועד למנוע שינוי דמוגרפי משמעותית של הרוב האוכלוסייטה השטח הכבש – יגיבו. במקורה זה, הפליטים מקרים בנדון, כמו גם מניין המתנולות אשר ילחצו לאימוץ המדיניות האמורה, יהיו חשופים לסכנות העמדה לדין בפני ה-ICC.

### ד. הצע הآخر של הזיקה הטריטוריאלית – שימוש

**בחוקת רומה על ידי ישראל כלפי למאבק בטרור**

עד כה, דנו בשאלת פרשנות סעיף זיקת הסמכות הטריטוריאלית של חקמת רומה בהקשר של בחינת האפשרות שישראלים יועמדו לדין בפני ה-ICC. חשוב עס זאת לציין, כי חקמת רומה אינה מוחה רק "אים" המוננה נגד ישראל. החקיקה מאפשרת לישראל ש법 שימוש "אוננסיבי" כדי להסתיע במנגנון האכיפה של המשפט הבינלאומי הפלילי על מנת להיאבק בחלק הטרור המוננה נגדישראלים מאזו ראשיתה של אינטיפאדת אל-אקצא. פעולה כזו יכולה, בין היתר, להוביל להפעלת לחץ בין-לאומי נגד מדינות הנזונות מחסה לטרוריסטים, הנמצאים מעבר להישג ידה של ישראל, להסגורם לידי בית הדין. מעבר לכך, ישראל עשויה להיות מעוניינת, במקרים מסוימים, בקיום הליך שיפוטי נגד ראשי הטרור הפלשתי בפורות זו שעשי להיתפס בעני דעת הקהיל הבינלאומית כדעת, וזאת על רקע הביעתיות המתעוררת בהעמדתם לדין בישראל של בכירים פלשתינים, כגון מרוואן ברגותי, בהליך אשר הרבה בקהילה הבינלאומית וזאים נגע בחתה פוליטית.<sup>124</sup>

עם זאת, יש לציין כי חקמת רומה אינה כוללת הוראה מפורשת בזעג להגדרת פעולות טרוור כפצע הנופל במסגרת סמכות ה-ICC, וזאת אף שמספר ניכר של אמנויות בינלאומיות מדירות גליי טרוור ספציפיים כפושים בינלאומיים.<sup>125</sup> למעשה, האפשרות לכלול עברות טרוור (כמו גם עברות סמים) בחוקה נידונה בדיונים שנערכו לקראת ערכיבת החקיקה ונחתה, בין היתר בגין התפיסה כי בעברות אלה ניתן עדין לטפל בrama המדינית, ללא צורך בהתרומות בית דין בינלאומי.<sup>126</sup> עם זאת, החקיקה הותירה אפשרות למדינות החברות לשקלול, בתום שבע שנים ממועד כניסה החקיקה לתוקף, שינויים



*Court – A Documentary History* (Ardsley, New-York, 1998) 385, 401-402; Rosenne, *supra* note 81, at p. 173; P. Robinson “The Missing Crimes” *Rome Statute of the ICC*, *supra* note 21, at pp. 497, 504, 517. 117 ס' 123 לוחקת רומה.

**Human Rights Inquiry Commission**, *supra* note 108, at p. 13. 118 לדעה מסוימת יותר בונשא, ראו *supra* note 108, at p. 13. 119 ס' 8(2)(ב)(1)(ה)(2)(ה)(1) לוחקת רומה.

**Amnesty International Israel and the Occupied Territories and the Palestinian Authority: Without Distinction: Attacks on Civilians by Palestinian armed groups** (London, 2002) 5; Human Rights Watch Erased in a Moment: Suicide Bombing Attacks Against Israeli Citizens (New-York, 2002) 45-47. 120 פס' 7 לוחקת רומה.

רואו לשלל י' טוס “הרהורם בטעאה ההיינטם והמשפיטים של מאבקה של ישראל בטورو של שנת 2002” **משפט 15** (תשס"ג). 122 ס' 25 לוחקת רומה. 123 ס' 28 לוחקת רומה. 124

mboddtet nun die geschlechte der haupttheorie alio. Kbiuea zo bekommt mesneha tokuf laor die uowoda ci chukot romaa mknna l-ICC smkot shifot nem bengog lemdinot shall arsru at chukota. kpi shifreto bi drshimha zo, har shninten tzafot shviet ha-din yipash baofen merchib ul pi modol ha-prshonot ha-aktevita at smkot yitrof bgein feilut ha-mtbatzut be-shthimim shnafpsu bidiy israel beshet 1967 (hem shani bdua ci ain ao bmaohar, tachet hakira rel reshut ha-hatmiva shel bat ha-din, bespofo shel dror nem ul spesel ha-nashim. baofen domha, kiymet yitcanot svara lmedi ci terrorisztim platzaniim wosholim hem yaoz b'mokadim bitt ha-din, heya wosralal hankash ha-sminic at bat ha-din lshofot avotem. ha-uracha zo, b'dbar tacholot chukot romaa bengog lisraelim, zricha levoror shinui b'mdinot ha-din. hem shahachla shel ha-din nra'at svara, ain ha-dbar poter at makbuli ha-hallot b'jerusalem min ha-zoruk la-hadar machadot umadot shel ha-mashav ha-binaloomi ha-homunitri b'din ha-israeli, b'thalik kavat ha-hallot b'kerbav rashi cohrot ha-betachon w'bthalik chinocim w'kashrot shel lochaim wa-orechim men ha-shora. nadma ci achoriyata shel ha-midina, b'hakshir zo, heya le-hsir makshol b'pni ha-zivur ha-israeli – lamaz mdinot sheuolah b'kena achd us horo'ot chukot romaa, le-hunish beutzmaa toshavim ha-choraim men ha-stundrot ha-amor w'lehatemiut at horo'ot ha-chukka b'kerbav ha-zivur. b'ken, tihya israel namena lko ha-zivur shehanah avotah be-uber li-hiot mahmidut ha-rashonot ha-tomocot b'ravion shel shifot filiilit b'inaloomit, b'kall, v'kamtat bitt ha-din filili kbo, b'prat ♦

114 רואו למשל ד' זוכנשטיין “פראה ברגני נסכה להוות ויי מנדלה” הארץ 11.8.2002 (אורוון הארכן). מצב נוסף בו תחנן הסמכת ha-ICC הוא במרקחה בו הסגרה lisrael העמדה לדיןican עשויה ליצר מתייחס בטיחונית בלתי רצוייה. רואו למשל ג' אלון ואח' “ישראל הקפיאה את בקשתה מרוצותה הבירית להסגר לדיה את ابو מרזק” נאחו 4.4.1997 (ארכיו הארכן).

115 רואו אמנה בדבר ערכות ועשויות מסויימות אחרות המבויעים בכלי טיס, 14 ספטמבר 1963, כ"א, מס' 21, ע' 87; אמנה לדיכוי חיפסה בלתי חוקית של כלי טיס, 16 דצמבר 1970, כ"א, מס' 22, ע' 780; אמנה בדבר דיכוי מעשים בלתי חוקיים נגד בטיחות התעופה האזרחית, 23 ספטמבר 1971, כ"א, מס' 22, ע' 473; אמנה בדבר מניעות ועישות של פעעים נגד אנשי מוגנים מחינה ב'קלואומית, לרבות נזינות International Convention, 14 דצמבר 1973, כ"א, מס' 26, ע' 881; Against the Taking of Hostages, 18 Dec. 1979, 1316 U.N.T.S. 205; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, 27 I.L.M. (1988) 672; International Convention for the Suppression of Terrorist Bombing, 12 Jan. 1998, 37 I.L.M. (1998) 249; International Convention for the Suppression of the Financing of Terrorism, 9 Dec. 1999, UN Doc. A/RES/54/109 (2000)

Report of the Preparatory Committee on the Establishment of an International Criminal Court (vol. I, 1996), UN Doc. A/51/22 (1996), also available in M.C. Bassiouni *The Statute of the International Criminal*

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