STRATEGIC VISIONS FOR HUMAN RIGHTS

ESSAYS IN HONOUR OF PROFESSOR KEVIN BOYLE

EDITED BY
GEOFF GILBERT,
FRANÇOISE HAMPSON
AND CLARA SANDOVAL

ROUTLEDGE

Strategic Visions for Human Rights

Strategic Visions for Human Rights takes a multi-disciplinary approach to future directions for human rights. It looks beyond what international human rights treaties have so far established and considers the context in which rights in the 21st century might develop to meet needs. The book examines how international law might be utilized to protect groups rather than just individual members of the group and it also calls into question the liberal positivist approach to international law that provides the framework for human rights norms.

The book is written and published in honour of Professor Kevin Boyle. It celebrates his long career in human rights law both as an academic and a practising barrister. Professor Boyle has taken numerous cases on human rights issues to the European Court of Human Rights in Strasbourg and has long been involved in human rights aspects of the peace process in Northern Ireland. He has published widely on human rights issues, focusing on freedom of expression and religion and non-discrimination.

The contributors to this volume are well-known academics in the field of human rights and include Francesca Klug, Conor Gearty, David Beetham and Asbjørn Eide. Amongst some of the issues addressed in the book are the future of the European Court of Human Rights, the role academics play in engendering transition to post-conflict democratic states, and human rights and religious pluralism.

Geoff Gilbert, Françoise Hampson and Clara Sandoval are all members of the School of Law at the University of Essex, UK.

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Conor Gearty took up an appointment as Director of the Centre for the Study of Human Rights and professor of human rights law at LSE in 2002. He ceased to be centre director in 2009 but has stayed on at LSE. He has published widely on terrorism, civil liberties and human rights. He is also a barrister and was a founder member of Matrix chambers, from where he continues to practice. He has been a frequent adviser to judges, practitioners and public authorities on the implications of the UK Human Rights Act, and has frequently lectured at home and abroad on the topic of human rights. He has appeared in human rights cases in the House of Lords, the Court of Appeal and the High Court. He has also been a visiting

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Françoise J. Hampson is a Professor in the School of Law and a founding member of the Human Rights Centre at the University of Essex, where she has taught since 1983. She was a member of the UN Sub-Commission on the Promotion and Protection of Human Rights from 1998 to 2007. She has frequently appeared before the European Court of Human Rights in Strasbourg generally on behalf of applicants, including in cases arising out of situations of conflict. She is also a specialist in the law of armed conflict and regularly works with the International Committee of the Red Cross as an independent expert.

Francesca Klug is a Professorial Research Fellow at LSE and Director of the Human Rights Futures Project. She was previously a Senior Research Fellow at the Human Rights Incorporation Project at King's College Law School where she assisted the government in devising the model for incorporating the European Convention on Human Rights into UK law reflected in the Human Rights Act. From 2006 to 2009 Francesca was a Commissioner on the statutory Equality and Human Rights Commission. She is a frequent broadcaster and has written widely on human rights, including *Values for a Godless Age: the Story of the UK's New Bill of Rights* (Penguin, 2000). She is currently writing a sequel to this book, to be published by Routledge.

Sheldon Leader is Professor of Law and member of the Human Rights Centre at the University of Essex. He works primarily on non-state actors and human rights, with particular reference to the economy, and also in the field of jurisprudence/political theory. He has been a legal advisor to Amnesty International UK.

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Laurel Townhead is Policy and Campaigns Manager at Women in Prison. Laurel has worked at the Quaker United Nations Office in Geneva where she focused on both conscientious objection to military service and women's incarceration. In 2004, Laurel worked with Kevin Boyle on Osman Murat Ulke's case before the European Court of Human Rights.

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The common introduction

Putting together a collection of essays in honour of an esteemed colleague has both easy and difficult aspects. It is easier than normal when trying to obtain agreement from hard-pressed academics to give of their time and contribute a piece because of the esteem in which the person to be honoured is held. It is more difficult because the first idea is always to put together the collection and draw up the list of contributors, before one tries to determine how to make the finished book a coherent whole. In this instance, because Kevin Boyle and Nigel Rodley would reach retirement age within 12 months of each other, and given the fact that their careers had been inextricably linked at Essex for the past 20 years, the editors gave themselves the additional headache of putting together two collections at the same time – especially since several people who were approached could easily have contributed a chapter to either book. This introduction is common to both books so that the complementary nature of these two giants of human rights can be more readily understood.

Strategic Visions for Human Rights: Essays in Honour of Professor Kevin Boyle

In 1998, the then-Vice-Chancellor of the University of Essex asked Geoff Gilbert to take over as Director of the Human Rights Centre for 15 months while Kevin was on sabbatical. Initially, the request was declined because Geoff Gilbert was 'not a visionary like Kevin' – the VC's response was that many people who have visions are just hallucinating. Kevin is a visionary when it comes to human rights, but he never hallucinates, hence the title, *Strategic Visions*. Kevin has spent his academic life inspiring people to push human rights further than they have gone before and into areas where they had not previously been applied – something that was to the fore in his own life when he started as Senior Adviser to Mary Robinson, then United Nations High Commissioner for Human Rights, the day after the attacks on the United States of 11 September 2001. However, he has always advanced a human rights based approach on the basis of rigorous legal analysis. The chapters in this book reflect his own strategic visions that leave human rights

far more developed than they were when he first started using them in the late 1960s in his native Northern Ireland.

It is the peace process in Northern Ireland that forms the basis for Tom Hadden's chapter, 'War and peace in Northern Ireland: Reflections on the contribution of academic and human rights communities'. Hadden and Boyle were synonymous with the academic involvement in promoting paths toward peace. The chapter is an honest assessment of the achievements and failings of the input of academics and human rights actors to bringing in the Good Friday Agreement of 1998. One is left to reflect on the undoubted stimulus that academic and human rights communities gave to the process, but also to acknowledge that it is difficult to discern how far there was direct advancement as a result of their participation. It is clear that they pointed the way but that other actors had more influence. It is difficult to believe, though, that the Good Friday Agreement could have been shaped the way it was without the contribution of Tom Hadden and Kevin Boyle.

Geoff Gilbert's chapter, 'Law and human rights rather than international human rights law', deals obliquely with one of Kevin Boyle's greatest achievements, the spread of human rights teaching at the university level, particularly to postgraduates. Kevin had established the subject as one worthy of study at the University of Galway before taking leave to establish and direct Article 19, the London-based non-governmental organization focusing on freedom of expression. The founding Head of Law at Essex consulted Kevin who encouraged the School of Law to establish its own Centre for International Human Rights Law, led by Malcolm Shaw, and to start the LL.M. in International Human Rights Law. Kevin joined the School of Law in the late 1980s and immediately brought academics from disciplines outside Law into the mix. In 1989, the Centre for International Human Rights Law was replaced by the interdisciplinary Human Rights Centre and, at Kevin's instigation, Onora O'Neill, Michael Freeman, the late Debbie Fitzmaurice and Geoff Gilbert put the institutional 'flesh' on Kevin's very detailed vision of the MA in the Theory and Practice of Human Rights that allowed students to study human rights from the perspectives of not just law, but philosophy, political science and sociology. Geoff Gilbert's chapter addresses the question of the theory/theories of law in an interdisciplinary context: is it simply a set of rules and procedures, or does law provide a framework or context for the interaction of various actors, actors that the law itself seeks to define? The traditional view is that states are the primary, if not sole, actors in international law, but that is clearly inadequate and inappropriate with respect to international human rights law. This chapter considers natural law and legal positivist approaches to international law, and whether a formalist or instrumentalist analysis better explains how international human rights law should be understood.

Kevin Boyle has strongly asserted the indivisibility of rights and their universality throughout his career. David Beetham's chapter, 'Universality, historical specificity and cultural difference in human rights', provides new

insight into the priorities given to civil and political and economic, social and cultural rights by different political systems in the context of western and non-western cultures.

Conor Gearty's chapter, 'Doing human rights: Three lessons from the field', sees human rights as a vocation, which is probably the best summary of how Kevin has lived his academic life. The chapter is about taking human rights beyond mere law and considers the relationship between law and justice. In the context of the United Kingdom's Human Rights Act 1998, he examines three instances of how law and justice might interact: the right to protest, the right to liberty, and in relation to Northern Ireland. In all three instances, he looks at how human rights law should empower people, secondly the fragility of law and the problems of relying on judges alone to provide protection, such that, finally, in human rights law politics should always matter. He asks how we practitioners of human rights law should be doing our subject in the age of our hegemony, a time when (having been marginalized and distorted by the demands of the Cold War) the idea of human rights has finally come to enjoy the near pre-eminent position that was originally designed for it in the system of international governance that emerged at the end of the Second World War.

The following few chapters all focus on Kevin's expertise in civil and political rights, in particular, in the area of the four freedoms. Francesca Klug's chapter, 'Rights and righteousness: Friends or foes', examines whether rights go against the faith idea of duties to each other. The chapter provides a wide-ranging discussion of the issues from a legal and historico-religious perspective, before moving on to consider the limits on freedom of religion and freedom of expression. The conclusion asserts the links between human rights and a spiritual framework: our ability to think and reason and our capacity to care, to feel empathy for others.

Sheldon Leader in his chapter, 'Human rights, power and the protection of free choice', addresses whether rights should simply be seen as a way of constraining power, usually state power, or rather, as he argues, that they should be seen as intervening when alternatives facing individuals are brought into relation with each other. The question is not one of human rights stepping in to protect the individual in a situation of unequal power, but rather how the European Court of Human Rights, the focus of the study, perceives there to be a restriction on the freedom to choose that is deemed wrong in certain circumstances.

Rachel Brett and Laurel Townhead examine the related topic of 'Conscientious objection to military service'. It is a comprehensive review and analysis of the 'right' to conscientious objection as found in international and regional human rights instruments and the developing jurisprudence and other norm-setting activities by European and international bodies. Recent case law has led to a divergence in interpretation and practice between the European Court of Human Rights and the Human Rights Committee, and this chapter carefully examines the various positions of all the international actors in this

sphere of human rights law. Given Kevin's long-term involvement in cases brought before the European Court of Human Rights, this chapter not only deals with one of his specialist areas of interest, but also evinces the sort of detailed analysis of the case law that marks out his memorials and arguments before the Court.

Asbjørn Eide goes back to Roosevelt's four freedoms and focuses on the third, freedom from want. The chapter highlights the original integration of civil and political with economic, social and cultural rights seen in the Universal Declaration of Human Rights, 1948. It shows the difficulties of universalizing rights to do with freedom from want caused by the Cold War and the free-market policies much in evidence in the 1970s and 1980s. It goes on to show how globalization has marginalized freedom from want. Remedying such failings, though, would require a stronger role for representative international agencies. The likelihood of this seems remote, but Asbjørn Eide sees the global food crisis, the global financial crisis and global warming as possibly encouraging states to address freedom from want in a way that would have seemed impossible just a few years ago.

The title of the volume, though, is *Strategic Visions*, and Kevin's esteem and reputation are based on successfully effecting those visions. The final two chapters speak to that part of his career. Richard Maiman's chapter shows how there may be more than one way to achieve the vision. The usual focus has been on litigation, as especially evidenced by the series of cases taken by Kevin with Françoise Hampson and Aisling Reidy to the European Court of Human Rights on behalf of Kurds from South-East Turkey during the 1990s. This chapter, though, looks at the campaign by the American Civil Liberties Union against the USA PATRIOT Act that focused on lobbying members of Congress and grassroots involvement in persuading Senators and Members of the House in various key states. Ultimately, the project was not as successful as had been hoped, but it did reflect a change in activity that will have a longer-lasting impact on the ACLU.

Fittingly, the final chapter in the book is by Françoise Hampson. With Kevin, she was awarded the 1998 Human Rights Lawyer of the Year award by Liberty for the way they advanced the jurisprudence of the European Court of Human Rights with respect to situations of acute crisis. Along with Nigel Rodley and Geoff Gilbert, they established the name of the University of Essex as the pre-eminent place in the world to study international human rights law throughout the 1990s, as was recognized by the award in 2010 to the University of the Queen's Anniversary Prize, the citation to which speaks of 'advancing the legal and broader practice of international human rights'. Françoise Hampson's chapter, 'The future of the European Court of Human Rights', addresses how the Court will need to develop if it is to be fit for use in the 21st century, looking at the role and functions of the Court, especially with regard to widespread or systematic violations of a serious character and systematic failure to provide a remedy. The second half of the chapter, though, looks at the perceived key problems facing the Court, especially the

number of cases being submitted and related aspects. Kevin's strategic vision of protecting human rights through the law has always depended on an effective judicial process, and this chapter highlights his ideas, plans and achievements – never mere hallucinations.

The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley

Sir Nigel Rodley received his knighthood for services to international law and human rights. As befits someone who was legal director of Amnesty International (International Secretariat) for 17 years, United Nations Special Rapporteur on Torture and is currently a member of the Human Rights Committee, the array of chapters in his book, *The Delivery of Human Rights*, ranges across several different areas. In all, though, his focus is and always has been on ensuring that the rights are implemented. Paper rights are anathema to Nigel because of his commitment to ensuring the greatest protection to the individual victims.

The opening chapter of the volume directly addresses this issue of designing rights that achieve their ends. Sheldon Leader has written on the difficulties concerning the attempt to attribute human rights obligations to commercial enterprises. He examines three aspects: the problem of derivation; the problem of institutional location; and the problem of adequate balance. His discussion explores several theories that compete and interact with each other, and how success will depend on ensuring implementation of the rights within all the various constraints and challenges.

David Weissbrodt's chapter, 'United Nations Charter-based procedures for addressing human rights violations: Historical practice, reform and future implications', provides a comprehensive review and survey of the United Nations Commission of Human Rights and the Human Rights Council, and the extent to which the Council represents a change and/or an improvement. The chapter moves on to give a particular emphasis to the Human Rights Council Complaints Procedure and the Thematic Mechanisms (something explored further in Paul Hunt and Rajat Khosla's chapter, below); their efficient response to information supplied leads to effective implementation in their thematic areas. Most importantly, though, this chapter provides lawyers with advice and guidance on how to use all of these various procedures – there is little point in having effective mechanisms if there is no one with the necessary skills to utilize them to implement the rights for victims of human rights violations.

As indicated, Paul Hunt and Rajat Khosla have looked at the role of Special Rapporteurs. The chapter, 'Holding pharmaceutical companies to account: A UN Special Rapporteur's mission to GlaxoSmithKline', draws on Paul Hunt's experience as Special Rapporteur on the right to the highest attainable standard of health; Rajat Khosla was a member of his research team, the Right to Health Unit at the University of Essex. The work of

Special Procedures at the United Nations is primarily with states, but in the case of the Special Rapporteur on the right to the highest attainable standard of health, access to medicines is so important to effective implementation that Paul Hunt negotiated a 'visit' to GlaxoSmithKline. Not traditional, this innovative visit certainly expands the concept of delivering human rights.

If David Weissbrodt looks at the Charter-based mechanisms, Michael O'Flaherty looks at treaty body reform, including the possible creation of a Human Rights Court at the United Nations level. Implementation of the rights in the various multilateral international human rights law instruments is often dependent on the work of the relevant treaty body, so reform is the central to improvement in this procedure. The chapter, having set out the various problems, analyses in depth the Dublin Statement of December 2009, in which Nigel played a part. It is worth noting that the Dublin Statement took as its starting point that reform must only be for the purpose of 'enhanced protection of human rights at the domestic level'.

One of Nigel's principal areas of work throughout his illustrious career has been in the field of preventing torture, first at Amnesty International and then, more directly, as United Nations Special Rapporteur on Torture. It is most appropriate, therefore, that there should be a chapter on this subject, 'The OPCAT at 50'. As with Michael O'Flaherty's, Malcolm Evans' chapter on the 50th ratification of the Optional Protocol to the United Nations Convention against Torture is extremely topical, since the Swiss ratification occurred in September 2009. The consequence of the 50th ratification is that the Subcommittee for the Prevention of Torture (SPT) expands from 10 members to 25. The chapter explores the problems and potential for the SPT, in relation to its operational practices, the consequences of exponential growth in numbers of members so early in its existence, and the financial constraints of the United Nations and their impact on its modus operandi. This clear and comprehensive analysis of the work of the SPT that includes the innovative 'in-country engagements' with National Preventive Mechanisms once again highlights how important the effective delivery of rights is to any proper understanding of international human rights law.

Clara Sandoval and Michael Duttwiler's contribution, 'Redressing non-pecuniary damages of torture survivors: The practice of the Inter-American Court of Human Rights', deals with one of the most important aspects of delivering human rights, an effective and comprehensive remedy. It is undoubtedly the case that the Inter-American system leads the field in reparations that try to address all elements of loss that victims suffer and for which they need an adequate remedy. This comprehensive study shows how important careful consideration of the needs of victims should be to implementing and enforcing rights – the finding of a violation is but the first step in what should be an attempt to restore the victim, in so far as that is possible. This chapter's detailed and careful analysis should be read by all treaty monitoring bodies at the international and regional levels.

Another of Nigel's areas of interest is dealt with by Matt Pollard's chapter,

'A lighter shade of black? "Secret detention" and the UN Disappearances Convention', which provides comprehensive coverage of enforced disappearances and secret detention and the difficulties in defining such terms, even with 'constructive ambiguity'. Part of the problem is that there are several definitions, not just in the sphere of international human rights law, but also international criminal law and the international law of armed conflict. Given the different approach each of those areas of international law adopts, it is unsurprising that, for the moment, complete clarity is lacking – the problem is that this may mean that there is not effective implementation even when the International Convention for the Protection of All Persons from Enforced Disappearances comes into force.

The final human rights chapter is provided by Françoise Hampson: 'The scope of the extra-territorial applicability of international human rights law'. The European Court of Human Rights and the Human Rights Committee have addressed the issue. The question of the scope of the extra-territorial applicability of international human rights law is both topical and controversial. It does not appear to be an argument between general international lawyers and human rights lawyers, but seems to be taking place within the latter group. The chapter engages with a debate to which Nigel has been a contributor in his role as a member of the Human Rights Committee and as an academic. And, of course, the extra-territorial remit of international human rights law instruments is fundamental to the delivery of rights.

The remaining three chapters examine the delivery of rights outside the confines of international human rights law. Geoff Gilbert's chapter, 'Implementing protection: What refugee law can learn from IDP law . . . and Vice Versa', explores the discrepancies between the Convention Relating to the Status of Refugees 1951 and the practice of protecting refugee rights, and how various aspects of the law relating to internally displaced persons might indicate how to better deliver necessary human rights to refugees. To what extent does implementation in practice come down to field developments that have given rise to legal obligations for states and non-state actors? And how far has a set of guiding principles drafted by a group of academics at the request of the United Nations Secretary General, but never considered by states in international conclave before their promulgation in 1998, now developed into customary international law when they might not even have constituted soft law at their outset? Is the model of the Guiding Principles on Internally Displaced Persons one that could usefully be adopted to deliver rights to other marginalized groups?

Noam Lubell in his chapter, 'Still waiting for the goods to arrive: The delivery of human rights to the Israeli–Palestinian conflict', explores how human rights are being delivered in the context of human rights violations that are much discussed within United Nations bodies. He examines four aspects of Israeli practice: torture; targeted killings; settlements in the Occupied Palestinian Territories; and the right to health. The chapter explores the interaction of international human rights law and the international

law of armed conflict. His conclusion is that it seems that there are also real obstacles to converting the rules into reality. In some cases, the difficulties of achieving protection of human rights in the Occupied Palestinian Territories are an embodiment of weaknesses and debates within the human rights system itself, while in others they are due to complex questions arising from the particular situation of the Israeli–Palestinian conflict. Nonetheless, if the Israeli–Palestinian conflict is to be viewed as a test case for the ability of the international human rights mechanisms to do anything more than monitor violations and cry foul when these are found, then a legitimate disappointment is in place, and it is clear that there is still a long path ahead.

The final chapter is written by Başak Çalı. It brings Nigel's career almost full-circle, as one of his first-ever publications, written with the late Tom Franck in the *American Journal of International Law*, was on humanitarian intervention. Başak Çalı's chapter, 'From Bangladesh to Responsibility to Protect: the legality and implementation criteria for humanitarian intervention', bridges international law and international relations. It is an amazingly clear analysis of the role and function of international law in general, as well as an insightful study of how far the developing doctrine of the 'responsibility to protect' could conform with other elements of international obligations to deliver human rights in the most acute of crises. At a time when the authority of international law has been challenged, it reasserts its centrality to states and to the protection of the individual.

Geoff Gilbert
Françoise Hampson
Clara Sandoval

Colchester, February 2010

1 War and peace in Northern Ireland

Reflections on the contribution of academic and human rights communities

Tom Hadden

There are many questions to ask – and even more answers – about the conflict and the peace process in Northern Ireland. This contribution to the ever expanding literature on the issues is focused on two more specific and limited questions: first, who contributed most to the eventual resolution, and in particular the contribution of those of us in the academic and human rights communities; and secondly what lessons can usefully be drawn from our experiences. Indirectly, as is appropriate in this collection, it includes some reference to the part played by Kevin Boyle, and later the Boyle/Hadden partnership,[1] as the civil rights movement degenerated into communal and armed conflict and eventually gave rise to the peace process and the current fragile political settlement.

From civil rights to communal conflict

The origin of the conflict in Northern Ireland dates back to the 17th century and beyond and can best be explained, as will be argued, by the intermingling of two peoples in an ethnic frontier zone between the largely Catholic 'native' Irish and the incoming Protestant Ulster Scots in the north-eastern six or more counties. For many years this was a vicious side-show to the wider domination and coercion by the Protestant ascendancy throughout Ireland and resistance to it by the Catholic majority. Following the partition of Ireland in the 1920s the Ulster Unionists maintained that domination and coercion within Northern Ireland.

The latest round in this continuing political and social conflict with which this account is concerned began in the 1960s with a civil rights campaign focused on the ending of political and economic discrimination under the

1 A significant aspect of their collaboration was that one had his roots in the nationalist and the other in the unionist community, though neither would have been regarded as representative of those communities' concerns or aspirations.

dominant unionist regime and the reform of the electoral and judicial structures within the existing constitutional framework.[2] Much of the initial work on collecting and compiling statistics on discrimination was carried out by the Campaign for Social Justice, run by a local doctor and his wife in Dungannon.[3] When the attempt to persuade the British Government in London to intervene and to secure legal aid for a challenge in the courts failed to produce any positive action, there was a resort to direct action in the form of a sit-in in some new council houses in the Dungannon area, which had been allocated to Protestants in preference to more needy Catholic families. This led to a series of protest marches under the auspices of the Northern Ireland Civil Rights Association and the student-based People's Democracy at Queen's University, in which Kevin Boyle played a leading role. These demonstrations and marches soon led to confrontations with the police and to loyalist counter-demonstrations. During the winter and spring of 1968–69 the confrontations escalated into more serious attacks, notably by the police on a march in Derry and by Loyalists on a People's Democracy march at Burntollet. These events gave rise to the erection of barricades in 'Free Derry', calls for support from sympathizers in Belfast and other towns, serious attacks on Catholic streets by Loyalist mobs, and the deployment of British troops in August 1969.

This is not the place for yet another attempt to apportion blame for these developments. There is, however, a significant issue in respect of the strategy and responsibility of civil rights and human rights activists in situations where direct action may be expected to lead to serious confrontations, intercommunal violence, and deaths. To what extent should they be expected to limit their activities in order to avoid or minimize unlawful conduct by others in response to their campaigns?

These issues were addressed during the Cameron[4] and Scarman[5] inquiries in parts of their reports that have not been given much attention. There had clearly been intense and difficult discussions within the Northern Ireland Civil Rights Association on the advisability of pressing ahead with the New Year march to Derry, and also on what to do in response to the calls for street protests to take the pressure off those maintaining the barricades around Free Derry in August 1969. Kevin Boyle was by all accounts on the side of caution rather than confrontation, but his view did not prevail. The Cameron Commission concluded in September 1969 that both the Northern Ireland Civil Rights Association and the People's Democracy were at fault in allowing politically extreme, militant and revolutionary elements to provoke and

2 A good account of this period is in R. Rose, *Governing without Consensus: an Irish Perspective*, Faber, 1971.

3 Campaign for Social Justice, *Northern Ireland: The Plain Truth*, 1964 and 1969.

4 *Disturbances in Northern Ireland*, Cmd. 532, 1969.

5 *Violence and Civil Disturbances in Northern Ireland in 1969*, Cmd. 566, 1972.

foment disorder and violence in the guise of supporting a non-violent movement (para. 229). The Scarman Tribunal, reporting several years after the events, accepted the evidence on behalf of the Association from Frank Gogarty that they had underestimated the strength of militant unionism and from Kevin Boyle that the outbreak of serious communal rioting had set back his ideals. But it concluded that the Association bore a heavy, albeit indirect, responsibility for the horrors that occurred in August (para. 2.8).

During this stage of the conflict it seems clear that, while a more academic approach to the publication of data on discrimination and other governmental abuses was important, it was direct action in the form of sit-ins and marches that forced a governmental response.[6] It is also clear that there were dangers in a communally divided society in providing or seeking opportunities for confrontation. State forces are now expected under human rights law to take appropriate action both in planning and implementing their operations to avoid any loss of life and to protect the rights of others. It is not unreasonable to suggest that in pursuit of a commitment to non-violence the same principles should be followed by human rights activists.

The armed conflict

Following the initial welcome for the British troops deployed in August 1969 to impose order on the streets, the situation rapidly deteriorated into a terrorist campaign of shooting and bombing by the reconstituted Provisional IRA and its loyalist counterparts. The British Army responded with a version of its counter-insurgency doctrine developed in Malaya and Aden and given a theoretical basis in Frank Kitson's *Low Intensity Operations*.[7] This involved gathering intelligence from widespread screening of the population and systematic house searches, mainly in Catholic areas, interrogation in depth and often internment without trial of those suspected of active support for or involvement in terrorist activity and, when the occasion presented itself, 'taking out' or shooting to kill high-level gunmen. The result was widespread antagonism within Catholic areas and increased recruitment for the IRA. There was less Army activity in Protestant areas in which the police were regarded as more acceptable and effective against the less-well organized loyalist paramilitaries who directed most of their attacks against civilians in Catholic areas.[8]

During this period a series of academic research projects on security policies and practices were carried out by a team based in the Law Faculty at Queen's

6 For a general account of these issues see B. Purdie, *Politics in the Streets: the Origins of the Civil Rights Movement in Northern Ireland*, 1990.

7 *Low Intensity Operations: Subversion, Insurgency and Peacekeeping*, Faber 1971.

8 K. Boyle, T. Hadden and P. Hillyard, *Ten Years On in Northern Ireland: the legal control of political violence*, Cobden Trust, 1980, ch. 4.

University.[9] Some of this material[10] may have contributed to the decision by the official Gardiner Committee to phase out internment without trial and to rely on prosecutions in the non-jury 'Diplock Courts'.[11] The recommendation by the Committee to abandon any special status for paramilitary prisoners and to treat them as ordinary criminals, however, led inexorably to the 'dirty protest' – smearing their cells with excrement – in support of a claim to prisoner-of-war status, and then to the hunger strikes in 1981.

It was during this period that the initial cases from Northern Ireland were dealt with under the European Convention on Human Rights. Some complaints alleging discrimination had been initiated during the civil rights campaign by an American lawyer but had not been effectively pursued and were eventually dismissed after an ill-tempered exchange of letters between the lawyer and the Strasbourg officials.[12] The most significant proceedings were those taken on an inter-state basis by the Irish Government in respect of the widespread resort to internment in 1971 and the associated use of the 'five techniques' of interrogation in depth by the British Army.[13] The European Commission on Human Rights decided in 1976 that the techniques amounted to torture, but the Court judgment in 1978 reduced the finding to one of inhuman or degrading treatment. Both bodies held that the use of internment, though largely directed against members of the Catholic community, had been justified. And as the proceedings dragged on for seven years they had less immediate impact on security policies and practice than might have been expected. It was not these legal proceedings but the investigations by Amnesty International on ill-treatment of suspects in Army and police interrogation centres followed by a formal governmental inquiry[14] that led to more effective preventive measures at an administrative level. In these years, there were also a number of more specific investigations into an alleged 'shoot to kill' policy by the Army and later the police.[15] But there were few prosecutions of those allegedly responsible and most led to acquittals. For the most

9 K. Boyle, T. Hadden and P. Hillyard, *Law and State: The Case of Northern Ireland*, Martin Robertson, 1975; much of this material had already been published in *Fortnight* magazine, which had been founded by Tom Hadden in 1970.

10 *Ibid.*, ch. 5. An unrecorded aspect of the submission was a question by members of the Committee as to what the Provisional IRA's response to the ending of internment might be; contact was made by the Boyle/Hadden team with representatives of the IRA and an agreed paper was relayed back to the Committee.

11 *Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland*, Cmnd. 5847 (1975).

12 *Law and State: The Case of Northern Ireland*, pp. 155–56.

13 *Ireland v United Kingdom*, Report of the European Commission on Human Rights, 25 January 1976; Judgment of the European Court of Human Rights, 18 January 1978, 2 EHRR 25.

14 *Police Interrogation Procedures in Northern Ireland*, Cmnd. 7497 (Bennett Report), 1979.

15 *Ten Years On in Northern Ireland*, pp. 28–29; K. Boyle and T. Hadden, *Ireland: A Positive Proposal*, Penguin Books, 1985, pp. 69–70.

part any remedial action was carried out under political direction at an administrative level.

In the 1970s, further international human rights litigation on a strategic and principled basis through individual complaints was pursued by Kevin Boyle in association with another American lawyer, Hurst Hannum. In a series of cases they established the important principle that it was not necessary to exhaust domestic remedies where it could be shown that the alleged abuses were part of an administrative practice.[16] But other cases by them and others were less successful in curtailing potentially or actually abusive security policies. In one of these, a potential finding of a violation in respect of the shooting-dead by soldiers of bank robbers was thwarted by a friendly settlement of compensation to the complainant.[17] A further case on a similar issue of the legitimacy of the use of lethal force against suspects driving through a road checkpoint was also dismissed.[18] And in a highly politically sensitive case in respect of republican prisoners involved in the dirty protest in support of a campaign for prisoner-of-war status, it was decided that the claim was without foundation in international law.[19] As a result, it was not formal human rights complaints but action by relatives and a local priest that led to the eventual resolution of the hunger strikes. A challenge to the media ban to prevent Sinn Fein from appearing on radio or television was also dismissed.[20]

It is difficult to avoid the conclusion that few of these human rights cases had much impact on the most serious and politically significant issues. The fact of independent international adjudication and the few decisions in which a violation was found did help to set some limits to the strategies and behaviour of the security forces. But in many cases the result was more a matter of procedure than any underlying change in security policy, notably in respect of the requirement of reasonable suspicion to justify arrests[21] and of a derogation to justify a seven-day power of arrest for questioning.[22] The more demanding decisions in respect of the use of lethal force[23] and the requirement of an effective investigation, though they set important standards for other future conflicts, came long after the main military confrontations in Northern Ireland had ceased.[24]

The regional human rights advisory body established in 1975, the Standing Advisory Commission on Human Rights, was similarly ineffective in respect of the conduct of the security forces during the conflict. Though its formal

16 *Donnelly v United Kingdom*, 4 DR 4 (1975).
17 *Farrell v United Kingdom*, 30 DR 96 (1982) and 38 DR 44 (1984).
18 *Kelly v United Kingdom*, Commission Report of 13 January 1983.
19 *McFeeley v United Kingdom* (1981) 2 EHHR 161.
20 *Brind and McLaughlin v United Kingdom* (1994) 77-A DR 42.
21 *Fox and others v United Kingdom* (1991) 13 EHRR 157.
22 *Brogan v United Kingdom* (1989) 11 EHRR 117.
23 *McCann v United Kingdom* (1996) 21 EHRR 97.
24 *Jordan v United Kingdom* (2003) 37 EHRR 2.

mandate was focused on issues of discrimination, on which it did have a significant impact,[25] the Commission was in practice able to carry out investigations, prepare reports and submit advice on security issues.[26] But none of these were taken very seriously by the security authorities, and the Commission regularly complained of its lack of impact in this area.

From a somewhat different perspective the leading human rights NGO in Northern Ireland, the Committee on the Administration of Justice (CAJ), also carried out effective research and campaigning on issues of equality and discrimination. It too produced numerous reports on abuses by state forces. But few of these had much impact. And the CAJ found it difficult to maintain a balance in its response to state and non-state paramilitary violations. By maintaining the position that only state forces could be guilty of human rights violations and that bodies like the IRA and its Loyalist counterparts could only be held accountable under the laws of armed conflict, and then deciding not to use its limited resources to monitor their activities, the CAJ lost the confidence and support of many in the unionist community. In so doing they contributed to a more general suspicion within that community that the protection of human rights was a nationalist rather than a cross-communal issue.

This is not to say that no lessons were learned. From the early 1980s the British Army gradually moved to the view that it was not realistic to expect to achieve a military victory against an insurgency founded on deeply held communal concerns and aspirations. As a result it came to accept that its proper role was to maintain security and protect the public as best it could while others sought a political settlement. Following the widespread communal and electoral support over the treatment of republican prisoners in the early 1980s the IRA and Sinn Fein came to the conclusion that exclusive reliance on the armed struggle was unlikely to achieve any of their objectives. Accordingly they developed a combined military and political strategy, initially encapsulated in the question: 'Who will object if, with an Armalite in one hand and a ballot paper in the other, we take power in Ireland?'[27] As their political strategy became increasingly successful, this was developed into what became known as the TUAS strategy – the 'tactical use of armed struggle'. In the later stages of the peace process it could perhaps be described as the tactical but unspoken threat of a return to the armed struggle.

The approach of the two governments was also deeply affected by the communal trauma of the hunger strikes in 1981. Accordingly they both set about developing a more proactive strategy in the search for a viable political settlement. Some other activists, and with them the Boyle/Hadden

25 Notably in the *Report on Fair Employment* Cm. 237 (1987), and the *Second Report on Religious and Political Discrimination* Cm. 1107 (1990).

26 Regular reports were submitted on the Northern Ireland (Emergency Provisions) Acts as well as specific analyses on problems with inquests and lethal force.

27 Attributed to Danny Morrison in his speech at Sinn Fein's annual conference in 1981.

partnership in the light of the failure of their attempts throughout the 1970s to assist in the restoration of stability by documenting and campaigning on human rights abuses, were coming to a similar view: that these abuses were symptoms of a deeper problem and that it would be more productive to focus their efforts on the political future rather than past and current human rights abuses. For that, a more realistic assessment of the nature of the problem was clearly needed.

Academic analysis

From the outbreak of serious communal violence in 1969, the search for an achievable political settlement had been bedeviled and thwarted by differences in the underlying analysis of the situation, and thus in the longer term policy objectives of the two governments and their dependent communities in Northern Ireland.

This was reflected in the more popular academic analyses of the nature of the conflict as the situation deteriorated. Some of the more journalistic commentators focused their commentaries on the religious basis of the conflict between Protestants and Catholics and cast their readers' minds back to the similar conflicts throughout Europe in the sixteenth and seventeenth centuries. The implication was that the two communities in Northern Ireland were stuck in the past and needed to be brought up to date, though how that was to be done was not always made clear. A more popular analysis among Irish nationalists and many socialists was that the problem was essentially colonial and that the British should follow the established procedures for decolonization by preparing for withdrawal and the unification of Ireland.[28] A third analysis was focused on the problems of discrimination and security abuses under the notorious Special Powers Act, pointing to the need for an effective reform programme within the existing constitutional framework.

That was the approach initially adopted by the British Government in putting pressure on the Unionist Government to adopt a series of internal reforms in 1969 and 1970. After the patent failure of mass internment in August 1971 and the Bloody Sunday killings by British Paratroopers in Londonderry/Derry in January 1972, however, it suspended the devolved government and embarked on an attempt to establish power-sharing between elected representatives of the two main communities with an added Irish dimension in the form of a Council of Ireland modeled on what had been proposed but never implemented in the Government of Ireland Act 1920. This package, agreed at Sunningdale in 1973, was no more successful. The proposed Irish dimension coupled with the continuing claim in the Irish

28 For example, G. FitzGerald, *Towards a New Ireland*, Charles Knight 1972, and Liam de Paor, *Divided Ulster*, Penguin Books, 1970.

Constitution to jurisdiction over the whole island triggered unionist opposition to the new power-sharing Executive established in 1974 and led eventually to the Workers' Council communal strike which brought it down in the summer of 1974.

Following this setback the British Government reverted to a revised security strategy linked to one of economic support and a drive to eliminate discrimination in employment. But the decision to deny IRA and Loyalist prisoners any special status and to treat them as ordinary criminals and the ensuing hunger strikes of 1980 and 1981, as outlined above, led to a surge in electoral support for Sinn Fein. The response of the Irish Government was to establish the New Ireland Forum with a view to countering and providing an agreed democratic alternative to the armed campaign for a united Ireland. All the main nationalist parties, North and South, took part, oral and written evidence was taken from a number of unionist politicians, and a number of academic studies were commissioned. The Forum Report concluded in 1984 that there were three viable options: a United Ireland, a Federal Ireland with special provision for the North, and Joint Authority with the British Government. At the same time, a less official but politically representative report was produced in Britain by the Kilbrandon Committee, which also recommended a form of joint authority under which British and Irish ministerial appointees would share power with elected Northern Ireland politicians.[29]

Academic analysts in this period, like the military leaders on both sides and the two governments, were learning as they went along. An important development in forward thinking was made by John Whyte, of the Politics Department at Queen's University Belfast, in a review of the already extensive literature giving greater emphasis to the internal relationships between the unionist and nationalist communities within Northern Ireland in preference to those focusing on a colonial or all-Ireland explanation.[30] This was further developed by Frank Wright's work in the same department on the concept of an ethnic frontier zone in which members of two distinct nationalities and cultures were intermingled with each looking for support from their 'metropolitan' centres in London and Dublin.[31] In cases like this, he argued, special accommodations were likely to be needed rather than apparently more simple solutions based on exclusive territorial sovereignties. Only a few commentators were putting the case for redrawing the ethnic boundaries – and perhaps encouraging some population movement – with a view to creating more homogeneous communities, though a study on the idea was commissioned and summarily rejected by the Labour Government in the 1970s.

It was in this context that the initial, more politically focused Boyle/Hadden paper, subsequently published as *Ireland: A Positive Proposal*, was submitted to

29 *Northern Ireland: Report of an Independent Inquiry* (1984).

30 *Interpreting Northern Ireland*, Oxford 1990, drawing on an earlier paper of 1978.

31 *Northern Ireland: a Comparative Analysis*, Gill and Macmillan, 1987.

the New Ireland Forum.[32] It argued that none of the 'simple solutions' were likely to work and that joint authority, while theoretically attractive, was both undemocratic and financially impractical as the Irish Government could not at the time have borne its share of the overall cost. Instead, it argued that new structures should be created to reflect the underlying demographic, political and economic realities and the balance of military and paramilitary power. Accordingly it recommended that the two governments should enter into a new Anglo-Irish Treaty, for which an outline was provided, committing them to a common constitutional framework within which internal power-sharing could be sustained. It should be added that this approach was already under active consideration in London and Dublin and that the formal Anglo-Irish Agreement followed towards the end of 1985.[33]

As with the Sunningdale package of 1973–74, the new Agreement did not go down well with unionists who had not been involved in or prepared for what it contained, notably an increased formal involvement by the Irish Government in certain aspects of the governance of Northern Ireland. But this time the British and Irish Governments were fully committed to the implementation of the new arrangements and were able to maintain them under direct rule from Westminster until a new power-sharing deal could be negotiated. Over the ensuing decade there were repeated attempts to persuade and encourage the main Northern Ireland parties to agree on how this should be done and later to persuade and encourage the main paramilitary bodies to create the conditions in which that might be possible.

Dealing with obstacles

In the early 1980s the main emphasis was on political persuasion. The Northern Ireland Assembly had been reinstated in 1982 under what was intended to be a programme of rolling devolution. But the Social Democratic and Labour Party (SDLP), the main constitutional nationalist party, boycotted its proceedings and it became a powerless talking shop for unionists. The Assembly was suspended in 1986 following the reaction of the unionists to the Anglo-Irish Agreement. Under the 'Ulster says No' slogan they adopted a concerted policy of non-cooperation with British ministers and officials. And in 1988, in the aftermath of a particularly serious bomb attack by the IRA, Margaret Thatcher introduced the so-called 'media ban', seeking to deny the IRA and Sinn Fein all access to the 'oxygen of publicity' on television and the

32 K. Boyle and T. Hadden, *Ireland: A Positive Proposal*, Penguin Books, 1985; it was at this time that they developed a strategy of discussing the issues with government officials and circulating drafts of their analysis to those they wished to influence rather than relying on academic peer review.

33 For a detailed analysis see T. Hadden and K. Boyle, *The Anglo-Irish Agreement: A Commentary*, Sweet & Maxwell, 1989.

radio. Active political negotiations were in effect suspended until the 1990s when 'talks about talks' were initiated by Peter Brooke, the new Secretary of State for Northern Ireland. This led to the initiation in 1991 of three-strand negotiations – Strand 1 between the Northern Ireland parties, Strand 2 between the Northern Ireland parties and the two governments, and Strand 3 between the two governments. These discussions were complemented by an unofficial consultative body, the Opsahl Commission, which heard evidence from all quarters and reported in March 1993 that there was widespread communal support for a negotiated peace and, in particular, for some way to be found to involve Sinn Fein in the process.[34]

In the meantime efforts, both public and undercover, were being made to bring Sinn Fein and by extension the IRA into the political process.[35] The groundwork was laid by confidential contacts initiated by a Catholic priest, Father Alex Reid, with Sinn Fein and IRA leaders, and later by a Protestant minister, Roy Magee, with the Combined Loyalist Military Command. What became known as the Hume–Adams talks were initiated in 1987 by Alex Reid in a lengthy letter to John Hume and Charles Haughey, then leader of Fianna Fail, the largest nationalist party in the Irish Republic, urging an attempt to bring Sinn Fein into the political process. The first public steps were made in 1988 when, despite widespread opposition, papers were exchanged between John Hume and Gerry Adams as leaders of the SDLP and Sinn Fein. They were soon abandoned, but resumed in 1992–93. However, it is increasingly clear that much of the momentum was provided by separate governmental contacts and negotiations with Martin Mansergh on behalf of the Irish Government and with MI5 officers for the British Government. In 1992 and 1993 numerous messages and documents were passed backwards and forwards through bilateral and confidential channels, and would then form the basis for public statements designed to encourage or persuade the Sinn Fein leaders to move towards a ceasefire and engagement in public, all-party negotiations. At the same time, Roy Magee was conveying the concerns of loyalist paramilitaries to Albert Reynolds, the Irish premier (Taoiseach), including a list of rights which they saw as an essential component of any settlement.

These covert negotiations, carried on while both governments were publicly condemning any such contacts, notably in a notorious claim by John Major that he would be sickened by anything of the kind, eventually resulted in the Downing Street Declaration of December 1993.[36] One key element was the carefully phrased statement about how self-determination by the Irish people, an essential demand from Sinn Fein, was to be carried out. The compromise,

34 *A Citizens' Inquiry: the Opsahl Report on Northern Ireland* (1993).

35 A useful account of this period is given in *Albert Reynolds: My Autobiography*, Transworld Ireland 2009, which includes verbatim accounts of their part in these negotiations by most of the major participants.

36 Published jointly by the two governments on 15 December 1993.

initially proposed by John Hume, was that parallel referendums would be held in Northern Ireland and the Republic, thus incorporating the consent principle that Northern Ireland would not cease to be part of the United Kingdom without the consent of a majority of its voters, an essential issue for unionists. Another important statement by the British Government was that it had no selfish strategic or economic interest in Northern Ireland and would respect any vote for unification. Albert Reynolds ensured that the list of rights demanded by Loyalists was also included.

This delicate process was a key element in what might be called the 'peace first' strategy – that effective political negotiations with the main democratic parties could not be completed while paramilitary violence continued. Though this approach was not shared by all,[37] it was successful in achieving declarations of ceasefires by the IRA and one of the main Loyalist paramilitary organizations. But the main unionist parties still refused to engage with Sinn Fein without a clearer repudiation of violence which soon became a demand for decommissioning of arms as a precondition for inclusive talks. Much of the credit for finding a way around this issue was due to Senator George Mitchell, who had been appointed as the United States envoy to Northern Ireland by President Clinton and who drafted the so-called Mitchell Principles requiring all parties to the negotiations to declare their commitment to exclusively peaceful and democratic means of pursuing their political objectives. The unionist proposal for the creation of an international body to oversee the process of any decommissioning also played an important part. However, the protracted disputes on the issue of decommissioning prevented the start of effective all-party negotiations for several years after the initial ceasefires. Frustration over the issue among some Sinn Fein and IRA commanders may have led to the resumption of the IRA bombing campaign in 1996.

As an interim measure, the Irish Government established a new Forum for Peace and Reconciliation in Ireland in which Sinn Fein was granted full participation. The overall objective of the other parties in the Forum, including the SDLP and the cross-communal Alliance Party from Northern Ireland, was to bind Sinn Fein to the consent principle. But an ancillary aspect of the Forum contributed in a small way to its collapse. The Boyle/Hadden team was commissioned to prepare a report on how human rights could best be protected within a general settlement.[38] In addition, Asbjørn Eide, a leading Norwegian human rights expert, was commissioned to advise the Forum on how best minority rights could be protected. Unfortunately he included in his draft report a paragraph asserting that the right of self-determination had

37 It was argued that this might not be either necessary or achievable in K. Boyle and T. Hadden, *Northern Ireland: The Choice*, Penguin Books, 1995, pp. 214–16.

38 K. Boyle, C. Campbell and T. Hadden, *The Protection of Human Rights in the Context of Peace and Reconciliation in Ireland*, Stationery Office, Dublin, 1996.

not become part of international law until after 1945.[39] This was unacceptable to Sinn Fein, given that the IRA campaign was based on the argument that the Irish people had already exercised its right to self-determination in 1918, and when agreement on the disputed paragraph could not be achieved, Sinn Fein withdrew from the Forum. Though this withdrawal was probably the result of a separate politically motivated decision to resume the IRA bombing campaign, the highly formal and legalistic approach to the human right of self-determination was clearly not helpful to the overall context and objectives of the Forum.

Negotiating the agreements

The renewed bombing campaign by the IRA in 1996 inevitably caused a hiatus in the peace process. The election of a new Labour Government in Britain in 1997 created a fresh opportunity to restart the process.[40] Tony Blair and the new Irish Taoiseach, Bertie Ahern, both viewed the achievement of peace in Northern Ireland as a major objective and set about a new round of negotiations. A key requirement was an understanding that IRA and Loyalist prisoners would be released and this was assisted by a personal visit to the main prison by the new Northern Ireland Secretary, Mo Mowlam. A second was to ensure that all the major players would be entitled to take part in the political negotiations when the ceasefires had been restored. This had already been provided for in the legislation for the Forum election, which took place in May 1996.[41] Since it was known that there was very little popular support for the political wings of the two Loyalist paramilitary bodies – in the result, they each secured only 2 per cent of the total vote – the Act guaranteed a place in the negotiations for the top 10 parties, an arrangement which unexpectedly allowed the newly formed Northern Ireland Women's Coalition to play a significant role in the negotiations. A third was the appointment of an impartial chair with sufficient understanding and authority to secure an agreement. Senator George Mitchell, the special United States envoy who had the full support of President Clinton, proved to be a highly effective choice.

There are many accounts of the tortuous negotiations leading up to the final Good Friday Agreement, and of the particular contributions by individuals and parties. It seems clear, however, reading between the lines, that much of the practical work of drafting was carried out by the Mitchell team and the two governments, all of whom were working within a fairly narrow framework set by the Downing Street Declaration and a subsequent inter-governmental

39 A. Eide, *A Review and Analysis of Constructive Approaches to Group Accommodation and Minority Protection in Divided or Multicultural Societies*, Stationery Office, Dublin 1996, p. 6.

40 A detailed account of this period is given by Tony Blair's chief negotiator, Jonathan Powell, in *Great Hatred, Little Room: Making Peace in Northern Ireland*, Vintage Books, 2009.

41 Northern Ireland (Entry to Negotiations, etc.) Act 1996.

document entitled *A New Framework for Agreement*.[42] In that sense it is not entirely true that the representatives of the political parties and others directly or indirectly involved had a major influence rather than a relatively minor impact on the wording that was eventually produced. Nor is it true that the governmental participants were acting merely as honest brokers. In practice they were engaged in a delicate negotiation designed to bring the main parties with them in making detailed provision for the elements that had already been prescribed. This involved a good deal of persuasive maneuvering and an opportune call by Senator Mitchell that the proceedings needed to be brought to a conclusion by the Easter weekend.

The actual content of the Agreement was therefore a mixture of precise details on some issues, the effective postponement of some other more difficult issues and a good deal of relatively uncontroversial wording designed to please and bring on board one or other of the various participants. The most precise and detailed provisions were on the revised formulations of the constitutional position of the two sovereign states and the mechanisms for power-sharing. There were carefully formulated and constructively ambiguous provisions on the number and nature of North/South bodies and decommissioning. Agreement on some other issues, notably policing and the nature of any specific bill of rights for Northern Ireland, was deferred to be dealt with by newly created bodies. And the document as a whole was decorated with the rhetoric of human and communal rights. Nonetheless, sufficient had been achieved to secure positive votes in the parallel referendums in Northern Ireland and the Republic that had been devised as a means of finessing the different conceptions of self-determination by the Irish people.

In deciding on the award of the Nobel Peace Prize, the Norwegian jury rightly gave prominence to the leaders of the two main Northern Ireland communities, though their contributions were very different: John Hume for laying some of the groundwork for the settlement in the 1980s, and David Trimble for taking enough unionists with him to achieve the deal. In so doing both sacrificed their own futures and parties as the Ulster Unionists and the SDLP were subsequently overtaken by their more demanding political rivals within their own communities. In deciding on the allocation of what might be called the Good Friday awards, it would probably be best to say that – as in the Dodo's Caucus Race in *Alice in Wonderland* – everyone involved deserved a prize. At this stage in the process it was political and negotiating skills rather than academic or human rights activity that were most relevant. However, the work of Brendan O'Leary and John McGarry in arguing for and helping to design the highly structured format for consociational power-sharing deserves some recognition.[43] A team at Queen's University led by Colin Irwin also

42 Published on 22 February 1995 along with a separate British Government document, *A Framework for Accountable Government in Northern Ireland*.

43 B. O'Leary et al. *Northern Ireland: Sharing Authority*, IPPR 1993; see also J. McGarry and B. O'Leary (eds), *The Future of Northern Ireland*, Oxford, 1991.

assisted in the run-up to the negotiations by mounting a series of public opinion surveys designed to show what was tolerable to a majority in both main communities.[44] These findings were made particularly relevant to the parties by involving them in the formulation of the questions and giving them breakdowns of the views of their own supporters. In this context, the thesis developed by Lijphart[45] that consociation is dependent on political leadership and cross-cutting ties between the main communities may need to be somewhat amended, given the evidence that it was pressure from the two governments and clear support for power-sharing from the public that were the determining factors. Human rights activists and bodies assisted in ensuring the inclusion of the many references to rights and equalities throughout the final text.

Post-agreement issues

In the years that followed it has been the fragility rather than the stability inherent in the 1998 Agreement that has been most prominent. The elected Assembly and the power-sharing, four-party Executive have been formally suspended – or in suspended animation – for more months than they have been actively working. Devolved government in Northern Ireland continues to be marked by successive crises and stand-offs rather than sharing and integration of the kind advocated in the most recent Boyle/Hadden publication.[46]

The most encouraging achievement on this level has perhaps been the gradual transformation of the divisive and unionist-dominated Royal Ulster Constabulary into the more communally balanced Police Service of Northern Ireland, and the creation of the cross-party Policing Board to which it is formally accountable.[47] However, there have been continuing disputes over issues of language and education, and the long-running saga of decommissioning – or putting weapons beyond use – by first the IRA and later the UVF and the UDA. The newly constituted Northern Ireland Human Rights Commission and the wider human rights community have also signally failed to secure cross-communal support for, and thus to deliver, the promised Northern Ireland Bill of Rights. By ignoring the clear wording of the Agreement, which pointed towards a relatively limited set of communal and individual rights to meet the particular circumstances of Northern Ireland as 'add-ons' to the formal incorporation of the European Convention on Human Rights, and by attempting to secure the adoption of a free-standing 'all singing, all dancing' bill of rights covering a wide range of social and economic rights not

44 Colin Irwin, *The Search for a Settlement: the People's Choice*, Fortnight Educational Trust, 1998.
45 A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, Yale, 1977.
46 K. Boyle and T. Hadden, *Northern Ireland: The Choice*, Penguin Books, 1995.
47 This process was recommended in the Patten Report, *A New Beginning – Policing in Northern Ireland* (1999).

available in the rest of the United Kingdom and the Republic, they not only alienated many in the unionist community but also succeeded in losing the support of both the British and Irish Governments.[48] As in the Agreement itself, too much emphasis on the rhetoric of human rights – rather than the reality of what was provided for in the Agreement and might have been delivered – has resulted in the effective failure of the enterprise.

Strict adherence to the human rights principle of 'no impunity' for serious human rights violations has also caused difficulties in reaching a compromise on how to meet the demands of victims of the conflict and of wider civil society for some way of 'dealing with the past'. A series of public inquiries into specific high-profile incidents have been initiated, though at great expense and with limited progress to date. But successive proposals for a more general truth recovery process on a broader basis, linked to some form of amnesty or immunity from prosecution as a means of encouraging leading players on all sides to acknowledge their part in human rights violations during the conflict, have been rejected because they might breach the 'no impunity' principle.[49]

In this period, the maintenance of the structures provided for in the Agreement has been attributable mainly to what Jonathan Powell, Tony Blair's chief negotiator, has called the 'bicycle theory' of conflict management or resolution – the strategy of keeping the show on the road at all costs rather than allowing the momentum to stall and the whole operation to fall to pieces.[50] But this has resulted in successive concessions – first to Sinn Fein, and later to the Democratic Unionists – and the consequent sidelining of the more moderate Ulster Unionists and SDLP. It has also led to the marginalization of the non-communal and cross-communal sections of the population, who in the longer term may be essential to avoid a potential resurgence of conflict as the population balance between the more segregated unionist and nationalist communities changes.

As this account of the various stages in the war and peace process in Northern Ireland of necessity ends at the close of 2009, the Executive is facing one of its more serious crises over the devolution of policing and justice, the unresolved reform of educational administration and the dispute

48 The final advice of the Commission was delivered in December 2008. A senior Irish negotiator has stated that the reference to rights additional to the ECHR reflecting the particular circumstances of Northern Ireland was drawn from earlier recommendations by Boyle/Hadden during unpublicized meetings with the major parties sponsored by the Standing Advisory Commission on Human Rights in March 1993 and June 1994 at Kells in County Antrim (personal communication).

49 Notably in respect of the proposals at the Weston Park Conference by the British Government for dealing with the 'on the runs' – IRA suspects who had fled from Northern Ireland – and the more recent report of the Eames/Bradley Consultative Group on the Past, published in 2008.

50 *Great Hatred, Little Room: Making Peace in Northern Ireland*, p. 5.

over the need for an Irish Language Act. It remains to be seen how or whether these difficulties can be overcome. Most of us in the academic and human rights communities are optimistic that they will.

Some final reflections

Assuming that all goes as well as may be expected, what can be said at this stage about the relative contributions of academics, human rights activists and political negotiators?

One is that academic and historical analysis was most helpful in setting attainable objectives for politicians and their military enforcers when those engaged in this analysis were able to ensure that it was actually conveyed to those making political and military decisions. Current engagement at this level was generally more fruitful than *ex post facto* academic pontification.

Another is that human rights campaigning was perhaps most productive in raising the need for political action – notably in the early stages by keeping up the pressure on issues of discrimination and inequality, and at the later stages in the peace process by providing a rhetorical focus for the Agreement. It was less successful in curtailing the seriousness of the communal and armed conflict once it had started, or in setting the framework for a resolution. Nor in the aftermath of the Agreement has the human rights community managed to reach a consensus with the governments and political parties on what was deliverable in respect of a Northern Ireland Bill of Rights. In this it has perhaps reinforced the argument that formal human rights commitments may be less significant than political compromises in creating the conditions in which human rights values are actually respected.

A third is that once the conflict had escalated into serious inter-communal and paramilitary violence, it was political negotiation rather than military action that provided the basis for de-escalation and eventual demilitarization. Strict adherence to human rights principles on self-determination and the rejection of any form of impunity did not prove to be either necessary or helpful in this process. It was flexibility and inventiveness in the search for a settlement and a readiness to bargain with the principles of retributive and preventive justice that were of most assistance. And it has been the relative success of the peace process and the increasing stability that it has fostered that has done most to deliver human rights and human security on the ground.

Some more general lessons for conflict resolution

It may also be useful to draw attention to some more general lessons which might be learned from experiences over the past 40 years of conflict and the search for stability in a divided society like that in Northern Ireland. All conflict situations are obviously unique. But comparisons are unavoidable

and often used by policy makers to variable effect. Here are a few bullet points which might prove helpful:

- the importance of avoiding the pursuit of civil and political rights in ways which may trigger a descent into serious communal violence, as that may thwart their realization and provide justification for repressive measures;
- the limitation of military security strategies in dealing with deep-rooted ethnic or communal conflicts – the role of state security forces should rather be to hold the ring and protect the population at large while others seek a political settlement;
- the corresponding limitation of human rights monitoring during serious armed conflicts – that too can focus too much attention on the symptoms of the problem rather than ways of resolving them;
- the need to understand and address the underlying history and causes of the conflict and to establish an achievable objective that reflects the demographic, political and economic realities, rather than one that meets some external or theoretically attractive model;
- the benefits from involving all sides to the conflict, if necessary by covert contacts and negotiations, with a view to maximizing the acceptability and legitimacy of any settlement;
- the drawbacks from relying too heavily or too often on simple democratic elections which may entrench divisions – it may be better to focus on the kind of electoral process that may assist in achieving an acceptable outcome and to make use of more flexible opinion polls and referendums in the search for a settlement;
- the need to recognize that peace with compromise rather than peace with justice is likely to be the outcome, since the long-term objectives of the parties are usually incompatible;
- build on the rhetoric of human rights while accepting that the reality will depend more on the success and stability of the political settlement than the formal provisions in any agreement;
- make space for integration rather than separation, and include measures to recognize the identity and contribution of those who do not belong to, or do not wish to be treated as members of, the major communities.

A chronology of Boyle/Hadden and related publications

1970 *Fortnight: an Independent Review for Northern Ireland* (1970 and continuing, available at: http://www.fortnight.org/index.html)

1973 Hadden, T. and Hillyard, P., *Justice in Northern Ireland: a study in social confidence*, Cobden Trust, 1973

1975 Boyle, K., Hadden, T. and Hillyard, P., *Law and State: the case of Northern Ireland*, Martin Robertson, 1975

1980 Boyle, K., Hadden, T. and Hillyard, P., *Ten Years On in Northern Ireland: the legal control of political violence*, Cobden Trust, 1980

1985 Boyle, K. and Hadden, T., *Ireland: A Positive Proposal*, Penguin Books, 1980
1989 Hadden, T. and Boyle, K., *The Anglo–Irish Agreement: A Commentary*, Sweet & Maxwell, 1989
1994 Boyle, K. and Hadden, T., *Northern Ireland: The Choice*, Penguin Books, 1994
1996 Boyle, K., Campbell, C. and Hadden, T., *The Protection of Human Rights in the Context of Peace and Reconciliation in Ireland*, Stationery Office Dublin, 1997
1997 Irwin, C., Hadden, T. and Boal, F., *Separation or Sharing: the People's Choice*, Fortnight Educational Trust, 1997
1997 Hadden, T. and Donnelly, A., *The Legal Control of Marches in Northern Ireland*, Community Relations Council, 1997
1998 Irwin, C., *The Search for a Settlement: the People's Choice*, Fortnight Educational Trust, 1998
2000 Hadden, T. and Craig, C., *Separation and Sharing: Rights in Divided Societies*, Fortnight Educational Trust, 2000

2 Law and human rights rather than international human rights law

Geoff Gilbert

In the area of human rights, lawyers tend to focus on rights, remedies and actors: what is the content of the right? is it justiciable? and, if so, who can enforce it? For some, doubts concerning either the availability of a remedy for a breach or the standing of the claimant call into question whether there is a right. However, as is discussed below, law should not be seen as simply a set of rules to be applied; rather, it provides a framework or context for the interaction of various actors, actors that the law itself seeks to define. The traditional view is that states are the primary, if not the sole, actors.[1] Under this understanding, 'international' law is something of a misnomer; it should really be 'interstate' law because international law primarily regulates the relations of states,[2] not nations.[3] That 'primarily' in the previous sentence, though, is to the fore when one discusses international human rights law, because the individual has a much fuller standing than is usual. Allott in *Eunomia*[4] proposes that the state should not be the central actor, the primary authority: 'that the ever-increasing well-being of the whole human race can, must, and will be promoted'. As Scobbie has pointed out:[5]

> States are neither conscious nor sentient. States neither bleed nor starve nor are forced to flee for their lives. [. . .] This is precisely the point of Allott's *Eunomia*. Having looked at the world and found it sadly wanting,

1 The state as the principal actor in international law emerges in Europe in the 16th to 18th centuries through the writings of, amongst others, Grotius and Vattel.

2 On the definition of a state, see below.

3 On the definition of a nation, see E. Gellner, *Nations and Nationalism*, Blackwell 1983, pp. 55–56. *Cf.* A.D. Smith, *Nations and their Pasts*, Gellner, 'Do Nations have Navels?'; Smith, 'Memory and Modernity: Reflections on Ernest Gellner's Theory of Nationalism', 2 *Nations & Nationalism* 358–88 (1996); Smith, *Myths and Memories of the Nation*, OUP 1999; J.A. Hall, *The State of the Nation*, CUP 1998.

4 P. Allott, *Eunomia: New Order for a New World*, OUP: 2001, paragraph 12.5 at p. 180. See also Booth, 'Three Tyrannies', in T. Dunne and N. Wheeler (eds), *Human Rights in Global Politics*, CUP: 1999, p. 52.

5 I. Scobbie, 'Wicked Heresies or Legitimate Perspectives?', in M. Evans (ed.), *International Law*, OUP: 2nd edn. 2006, pp. 83 *et seq.*, p. 107.

> *Eunomia* provides a blueprint for making it better. Its idealism is not about thinking the unthinkable, it is about thinking the unthought, and then grasping the challenge to put these thoughts into practice. Thinking, after all, is what theory is all about.

There is no self-evident or innate reason why international law should be so heavily state-centric, but traditionally it has been.

While people refer to international human rights law as an element in any interdisciplinary study of human rights, it would be more accurate for the lawyer to speak of *international law* as providing the framework in which one aspect of human rights is to be understood. From that perspective, however, law would simply be just another discipline, like philosophy or political science, from which to analyse human rights.[6] It is the object of this paper to consider how law is merely just another discipline with a variety of understandings of human rights and their sources, yet that it is also inherently different from all other disciplines because, at one level, it is an independent actor in the process, sitting at the table, saying little out loud, but wielding an immense influence. This is not to claim that the law is neutral as regards the other parties at the international table because, '[clearly,] international law exists for [. . .] decision-makers'.[7] However, while it might be a tool of social engineering for international actors, it also constrains those various 'other' parties at the international table.

Part of the problem of giving a legal perspective or, more specifically, an international legal perspective, is that there is more than one approach adopted by lawyers towards human rights and this shapes the analysis and how it might fit with other disciplinary understandings. Natural law theories[8] would, at first blush, seem to provide the most obvious foundation for analysing international human rights law. That human rights can be rooted in an idea of a higher order of law that does not depend on legislative or judicial creation is uncontestable. Article 1 of the Universal Declaration of Human Rights, 1948,[9] reverberates with the language of natural law.

> *Article 1* All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

However, basing one's argument on the Universal Declaration of Human Rights, 1948 will be met with the instant retort from the legal positivist that

6 As to whether law itself might adopt different approaches, political, philosophical, or sociological, see M. Koskenniemi, *The Gentle Civilizer of Nations*, CUP: 2002.

7 See M. Koskenniemi, 'What is International Law for?', in Evans, *supra* n. 5, p. 64.

8 See, for example, J. Finnis (ed.), *Natural Law*, Dartmouth: 1991.

9 Adopted by UN General Assembly Resolution 217A (III) of 10 December 1948.

that document is a mere declaration of the United Nations General Assembly and is not, *in and of itself*, legally binding, constituting little more than Eleanor Roosevelt's 1948 wish list to Father Christmas. Legal positivism, which developed out of the Enlightenment, focuses on law as a product of some law creator, whether that be the legislature, the courts, or, sometimes, depending on the language of the domestic Constitution, international law documents that have been created by states in international conclave but which are treated as law of the land.[10] Article VI, paragraph 2 of the United States Constitution, for example, provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

And in *Edye and Another v Robertson, Collector; Cunard Steamship Company v Robertson*, 112 U.S. 580 at 598–99, the United States Supreme Court held:

> *A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it*. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. [. . .] The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. (Emphasis added.)

The legal positivist view of law is, as Koskenniemi puts it, agnostic.[11] Law

10 And see H. Kelsen, *General Theory of Law and State* (trans. Wedberg, A.), Russell and Russell: 1961.

11 *Supra* n. 7, p. 58. Koskenniemi refers to the Treaty of Westphalia, 1648, which is often seen as the foundational document of modern international law. It is famous for its solution to the Thirty Years War, *cuius regio, eius religio*.

does not have an ultimate goal, it is a tool to be used by those creating the various laws: at least until recently, that meant states, even in the field of international *human* rights law.

The only rider to add to the legal positivist understanding concerns the place of customary international law and, especially, *jus cogens*. Customary international law is recognized by Article 38 of the Statute of the International Court of Justice as one of the sources of international law alongside treaties. As such, it is binding on states and, unlike treaties, there is no need to opt in as with the ratification process. Customary international law results from state practice and *opinio juris sive necessitatis*, that is, the state follows this practice because it believes it is legally bound so to do.[12] So far, the legal positivist has little or no problem because the law derives from state practice. However, *jus cogens* is more problematic. *Jus cogens* is a peremptory norm of international law binding on all states that can only be refuted by another such norm. Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331) provides as follows:

> Article 53. [. . .] For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

It is general international law binding on all states, but no state can dissent through persistent objection.[13] As such, the sovereign equality of states which stipulates that any state can opt out of or into a specific part of the legal regime, because each state is part of the law-making process, is called into question: *jus cogens* norms are of a higher order and bind all states, challenging the traditional horizontal legal order of public international law for the legal positivist.

Simply deciding whether to adopt natural law theories or legal positivism as the source of international law, however, does not address how that law is to be used and implemented, which, in the area of international human rights law, has more profound significance. Does a formalist or instrumentalist analysis better explain how international human rights law should be understood? Before explaining each approach, it is worth noting that formalists and instrumentalists can be naturalist or positivist. Formalism uses law to measure the behaviour of 'other' international actors – it is more static, with the law seen as a set of rules. From that perspective, international law is an independent player that provides guidance to those with international legal personality. Instrumentalism sees law as a dynamic tool of social engineering

12 *North Sea Continental Shelf* case, ICJ Reports 1969, p. 3, at paragraph 77; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) Merits, Judgment*, ICJ Reports 1986, p. 14, at paragraphs 183 and 207.

13 *Anglo-Norwegian Fisheries* case, ICJ Reports 1951, p. 116.

to be used by the other international actors in pursuing their own ends. The formalist is much more concerned with the status and provenance of the alleged rule than the instrumentalist.

> The instrumental perspective is typically that of an active and powerful actor in possession of alternative choices; formalism is often the perspective of the weak actor relying on law for protection.[14]

Thus, on that analysis, in the field of international human rights law, the state will take an instrumentalist approach while other international actors, the individual, NGOs and international organizations, ought to try to rely on formalism to defend themselves against states. That, however, would be an overly simplistic analysis, because states will often want to preserve the *status quo* by relying on previous legal decisions, precedent, so as to avoid, for example, positive obligations, while on the other hand lawyers for the victim of the alleged human rights violation will want the decision-maker to take a progressive or dynamic approach in order to enhance the scope of protection for all victims in a legal regime dominated by states. In effect, however, instrumentalism relies on formalism to provide authority for the social engineering carried out under the guise of law, and a formalist who recognizes the independent character of 'the law' wants to be able to use the law to constrain state behaviour.

Should international human rights law, then, be viewed as a constraint on states (formalism), not dependent on the intervention of other states, for the *good* of non-states in international law (instrumentalism)?[15] Various examples of this balancing process from different areas of international human rights law suggest that a singular analysis based on either formalism or instrumentalism does not suffice. International human rights law would seem to be the classic example for the formalist. A state that has ratified a human rights treaty has voluntarily agreed to constrain its behaviour towards all those within its jurisdiction, that is, those under its effective control. The treaty is a measure against which to judge state behaviour[16] and, subject to

14 For a much fuller discussion of this debate, see Koskenniemi, *supra* n. 7 – quotation from p. 69. See also R. Higgins, *Problems and Process: International Law and How to Use It*, OUP: 1994, Chapter 1.

15 The idea of law restraining state behaviour is very old. Marco Polo (1254–1324) writes that 'the Great Khan had no legal title to rule the province of Cathay, having acquired it by force'. *Marco Polo – The Travels*, trans. R.E. Latham, Penguin Classics: 1958, p. 133. See now Article 2(4) United Nations Charter.

16 Subject to derogations clauses. Article 4 of the International Covenant on Civil and Political Rights, 999 UNTS 171, 1966, provides as follows:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not

the treaty-monitoring methods established and adopted, the individual may be able to bring the state before some supranational body to determine whether a violation of the treaty has occurred.[17] However, a formalist approach is not inherently dynamic and human rights treaties have to be continually revisited to ensure that they respect the current values of society, not only those that date from the time of the drafting of the treaty. Article 8 of the European Convention on Human Rights (ECHR) provides as follows:

> Everyone has the right to respect for his private and family life, his home and his correspondence.

When first drafted in 1950, it was a response to the intrusive activities of Nazi Germany that had not respected the privacy of the individual. However, through a series of cases brought by individuals, the Strasbourg machinery developed the idea of a right to a private life that states parties to the ECHR have to respect and protect. As an example of how human rights develop, that is, how human rights law can be used as a dynamic tool of social engineering, the United Kingdom used to maintain that a person's gender was fixed at birth and registration certificates could not be altered after gender confirmation surgery. While the European Court of Human Rights was originally prepared to hold that failure by the United Kingdom to amend some official documents was not a disproportionate interference in the private life of the applicant,[18] the developments in scientific understanding of gender led to the European Court of Human Rights subsequently finding the United Kingdom to have violated the rights of someone who had undergone gender confirmation surgery.[19] The United Kingdom went on to legislate in this area in the Gender Recognition Act 2004. None of the drafters of the ECHR ever envisaged that Article 8 would be used in this context, but the persistent argument of human rights lawyers before the European Court of Human Rights formed the basis for a dynamic interpretation of the Convention that led to a change in United Kingdom domestic law. However, the instrumentalist use of the ECHR could only succeed because of its formal authority.

Minority rights in international law present a different set of issues for the lawyer. States parties to human rights treaties might confer rights on

> inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Certain rights, such as freedom from torture (Article 7), are non-derogable.

17 See Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, as amended by Protocol 11, ETS 155.

18 See *Sheffield and Horsham v United Kingdom* (31–32/1997/815–816/1018–1019), 30 July 1998, at paragraph 76.

19 *Goodwin v United Kingdom*, 28975/95, European Court of Human Rights, Grand Chamber, 11 July 2002.

individuals, but that does not benefit the minority group as a group. Thus, the law privileges the individual over the group. At present, there is no extant treaty providing rights for the minority *qua* group.[20] There are only human rights for individuals who belong to the minority group. Article 27 of the ICCPR provides as follows:

> 27. In those States in which ethnic, religious or linguistic minorities exist, *persons belonging to such minorities* shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. (Emphasis added.)

The consequence, however, is that formalism has regard only to the individual, whereas the applicant, through an instrumentalist approach, would want to advance the cause of the group through international human rights law that provides no such right. This lacuna in legal protection for sub-state entities has left decision-makers using indirect methods to protect the minority group. Article 27 does not accord collective rights, but it should be noted that the United Nations Human Rights Committee (HRC) when interpreting Article 27 on behalf of a person belonging to the minority, took into account the countervailing needs of the group[21] – the HRC spoke in terms of Article 27 requiring 'States parties to accord protection to *ethnic and linguistic minorities* [. . .]'. Thus, while the group has no rights, the state has obligations to protect and promote its identity so that persons belonging to the group can enjoy their own culture. Decision-makers have also protected the group through international human rights law by allowing the individual to represent the group or by granting *locus standi* to the group to bring claims that, as a group, it is a victim of a violation of international human rights law. In *Ominayak v Canada*,[22] the HRC allowed the tribal chief of the Lubicon Lake Band to bring a claim on behalf of all members of the tribe to deal, in part,

20 The Minorities Treaties promulgated in Europe at the end of the First World War had some clauses that accorded rights to the group. See, for example, the Treaty of Versailles with respect to Poland, UKTS 8 (1919), Cmd. 223 (including a letter from Clemenceau to Paderewski); the Treaty of St Germain with Czechoslovakia, 1919 (UKTS 20 (1919), Cmd 479); the Treaty of St Germain with the Serb-Croat-Slovene State, 1919 (UKTS 17 (1919), Cmd 461); the Treaty of Trianon with Hungary, 1920 (UKTS 10 (1920), Cmd 896); Treaty of Sèvres with Greece, 1920, UKTS 13 (1920), Cmd 960; and Treaty of Lausanne with Turkey 1923 (UKTS 16 (1923), Cmd 1929). For a full list, see the Commission on Human Rights, *Study of the Legal Validity of the Undertakings Concerning Minorities*, E/CN.4/367, 7 April 1950, pp. 2–3.

21 In *Lovelace v Canada*, UNGAOR, 36th Sess., Supp. No. 40, 166 (1981); 2 HRLJ 158 (1981), at para. 7.2 (emphasis added).

22 *Communication No. 167/1984, Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, Views adopted 26 March 1990, UNGAOR, 45th Sess., Supp. No. 40, A/45/40, 11 HRLJ 305 (1990).

with the loss of traditional tribal lands. The European Court of Human Rights is in a slightly different position from that of the Human Rights Committee. The HRC only permits communications from individuals,[23] but Article 34 of the ECHR has a much broader notion of a victim of a violation with *locus standi*:

> The Court may receive applications from any *person, non-governmental organisation or group of individuals claiming to be the victim of a violation* by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right. (Emphasis added.)

Accordingly, procedural aspects of international human rights law can influence substantive interpretation and the scope of protection. In *TBKP v Turkey*,[24] the European Court of Human Rights unanimously held that the dissolution by the Turkish Constitutional Court of the Turkish Communist Party was a violation of Article 11 of the ECHR, freedom of association. The party itself, despite its dissolution under Turkish law, was recognized as one of the applicants in the case. The decision in 2001 of the European Court of Human Rights in *Stankov and United Macedonian Organisation 'Ilinden' v Bulgaria*[25] went further. It held that ethnic groups not only had the right to political recognition, but also political activity under Article 11.[26]

> 89. The inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics. The fact that an association asserts a minority consciousness cannot in itself justify an interference with its rights under Article 11 of the [ECHR].

Freedom of assembly under Article 11 protects demonstrations that might

23 Optional Protocol 1 to the ICCPR, Article 5.

24 *Case of United Communist Party of Turkey and Others v Turkey* (133/1996/752/951), European Court of Human Rights, 30 January 1998.

25 *Stankov and the United Macedonian Organisation Ilinden v Bulgaria, App. Nos. 29221 and 29225/95*, European Commission of Human Rights, 29 June 1998, European Court of Human Rights (First Section), 2 October 2001.

26 At paragraph 89 – in this case, marches, meetings and demonstrations. See also, *Case of the Freedom and Democracy Party (ÖZDEP) v Turkey*, European Court of Human Rights, 23885/94, 8 December 1999, at paragraph 44, where the Court held 'there can be no justification for hindering a political group'; and *Ignatane v Latvia*, Communication No. 884/1999, Human Rights Committee, 25 July 2001, where the author of the communication to the Human Rights Committee had been arbitrarily barred from standing for election contrary to Article 25 ICCPR on the basis of language skills which were inappropriately tested. The Human Rights Committee held that discrimination based on language was prohibited under Article 2 ICCPR, so only if the difference in treatment were reasonable and objectively justifiable would it not amount to a violation – paragraph 7.3.

annoy or give offence.[27] According to the Court in *Stankov*, minor incidents threatening public order should not lead to a ban on an organization's meetings – any isolated incident could be dealt with through individual criminal prosecution. Where *Stankov* goes further is that it states that a group of persons might request secession, and democratic principles demand that the state permit such assertions;[28] this does not recognize a right to secession, merely that states cannot exclude the topic from political debate.[29] The combination of rights to freedom of expression and freedom of assembly for minority *groups* shows how political participation for such groups can be upheld through a judicial process using international human rights law;[30] procedural rules facilitate the balancing of formalism and instrumentalism. In some ways, the Inter-American system of human rights has progressed even further in this regard in terms of recognizing the rights of groups. In the *Case of Sawhoyamaxa Indigenous Community v Paraguay*,[31] the Inter-American Court of Human Rights found that Paraguay had to return the traditional lands to the applicant community.

> In view of its conclusions contained in the chapter related to Article 21 of the American Convention [. . .], the Court considers that the restitution of traditional lands to the members of the Sawhoyamaxa Community is the reparation measure that best complies with the *restitutio in integrum* principle, therefore the Court orders that the State shall adopt all legislative, administrative or other type of measures necessary to guarantee the members of the Community ownership rights over their traditional lands, and consequently the right to use and enjoy those lands.[32]

Even where procedural rules do not provide an appropriate framework for allowing the group to initiate a claim, there are cases where decision-makers use the authority of the treaty (formalism) to further instrumentalist approaches. The Human Rights Committee can only receive complaints from individuals, so it has no competence to hear complaints under Article 1

27 *Supra* n. 25, at para 86.

28 At para 97.

29 Incitement to violence, rejection of democratic principles, and seeking the expulsion of others from the territory would allow for restrictions on the Article 11 right – *Stankov*, at paras 97 and 100.

30 See also G. Gilbert, 'The Contribution of the European Court of Human Rights to the Promotion of the Effective Participation of National Minorities: Groping in the Dark for Something that May not Be There', 16 *IJMGR* (Special Issue) (2009), 611–19.

31 Judgment of March 29, 2006. Series C No. 146, at para 210.

32 In fact, while the Court held that 'the fact that the Community's traditional lands is [*sic*] currently privately held or reasonably exploited, is not in itself an 'objective and sufficient ground' barring restitution thereof', it allowed Paraguay various means to meet its reparations obligation. See paras 214–15.

ICCPR because self-determination is a right of peoples, not individuals. Thus, although the claim in *Ominayak*[33] was made under Article 1, the HRC decided it under Article 27. In *Apirana Mahuika*,[34] the HRC went further and used Article 1 self-determination to interpret Article 27 and the enjoyment of the minority culture. The HRC is taking an instrumentalist stance as the treaty monitoring body of the ICCPR, an approach that it can adopt only because states have voluntarily ratified the ICCPR and recognize its independent formal authority.

In the area of the protection of refugees and other displaced persons in international law, there is an obvious constraint on state behaviour from the outset. International law allows states to control entry to their territory, but in ratifying the Convention Relating to the Status of Refugees 1951,[35] states have made an exception for those who qualify as refugees. The debate to be considered here, though, is more specific and concerns Article 1F(c) of the Convention.[36]

> 1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> [. . .]
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

A purely formalist legal analysis has its limits. Sometimes, international law as laid down in treaties or by custom is unclear. It may prescribe more than one standard of behaviour. Equally, an instrumentalist approach may leave room for manoeuvre because there may be several objectives. Under Article 1F(c), an applicant for refugee status may be excluded from the protection offered in the 1951 Convention if there are serious reasons for considering that he or she is 'guilty of acts contrary to the purposes and principles of the United Nations'. The purposes and principles of the United Nations are to be

33 *Supra* n. 22, at para 32.1.

34 *Apirana Mahuika et al. v New Zealand*, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2000), at paragraph 9.2.

> As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.

35 189 UNTS 137.

36 On Article 1F, see Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, with Explanatory Background; Special Issue, Volume 12, *International Journal of Refugee Law*; G. Gilbert, 'Current Issues in the Application of the Exclusion Clauses' in E. Feller, V. Türk and F. Nicholson, *Refugee Protection in International Law*, CUP, 2003, pp. 425–78.

found in Articles 1 and 2 of its Charter.[37] Those purposes include the maintenance of international peace and security (Article 1.1) and the self-determination of peoples (Article 1.2). Therefore, it is readily apparent that a rebel movement engaged in armed conflict within a state might threaten international peace and security, particularly if there is a mass influx in neighbouring states of those displaced by that conflict or the conflict spreads over borders, while at the same time its leaders could assert that theirs is a war of liberation in order that they might achieve self-determination for their peoples against a despotic regime. If the rebel leaders are forced to flee to another country fearing persecution based on their political opinion or their ethnicity, are there serious reasons for considering that they were guilty of acts contrary to the purposes of the United Nations or, in the alternative, were they seeking to further those very purposes? On that decision turns whether they can be afforded refugee status. And that would be a political choice for the decision-maker, something to which this paper returns later. For the moment, what needs to be noted is that neither a formalist nor an instrumentalist approach can provide a resolution of this contradiction.

As can be seen, the source of law does not advance the understanding of international human rights law in practice and while formalism and instrumentalism both play a part in that practice, they do not provide a complete picture individually or together. Without wishing to come off the fence, one might suggest, from a more formalist and traditional legal stance, however, that recognizing the independent status of the law is currently the only defence against the international antinomians who determined United States foreign policy during the Bush regime at the beginning of the 21st century.

On the other hand, some might argue that even discussing international human rights law within international law is to have surrendered before one starts.[38] It accepts the primacy of states on the international plane and the participation of individuals and sub-state entities, such as peoples, nations, indigenous peoples and minorities, only with the consent of states.

> The emphasis in international relations on the centrality of the state is at least a mistake, if not a tragedy, because it encapsulates a fundamental misconception about what matters: it authorizes the pursuit of specifically state interests to the detriment of those of humanity.[39]

37 Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945.

38 P. Allott, *supra* n. 4. See also Ferron Foisy, *It won't take long*, 1995:

> And you who dream of liberty
> must not yourselves be fooled,
> before you get to plead for freedom,
> you've agreed to being ruled.

Taken from the Indigo Girls' album, *Rarities*, 2005.

39 Scobbie, *supra* n. 5, p. 103.

That leads one back to an issue from the start of this chapter and the very source of international law. One of the benefits of natural law theories is that the individual has much more prominence, something that legal positivism has denied the individual in the international arena. Although a natural law understanding is not the solution, there is nothing that inherently requires states to have sole authority as to who should be recognized as an international actor. It is worth noting that the first three words of the United Nations Charter are 'We the Peoples [. . .]', not 'We, the States'. The only advantage to the current system is that it makes recognition more straightforward – it is a state or it is something else and only states automatically have international legal personality. The accepted definition of a state is to be found in the Montevideo Convention on the Rights and Duties of States 1933.

> Article 1. The State as a person in international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) a capacity to enter into relations with other States.[40]

The state as so defined may be a legal fiction, but nations, peoples and minorities are all political fictions that are more or less undefined.[41] Fortunately for international human rights law, though, the human is usually reasonably recognizable. In this context, Booth[42] has noted the value of the Universal Declaration of Human Rights, 1948, as a reassertion of the position of the individual over the 1648 Westphalian State. Higgins has gone further and argued that states are not the only actors in international law – if international law is a process, 'a continuing process of authoritative decisions',[43] then there are various participants in that process and some interests are principally bilateral, state issues, but others, including human rights, involve individuals or sub-state entities.[44]

> Thus, the topics of minimum standard of treatment of aliens, requirements as to the conduct of hostilities and human rights, are not simply

40 The final qualification is tautologous, a state is something that can enter into relations with other states. There are difficult cases usually involving very small states, such as Liechtenstein or the Holy See. See *Admission of Liechtenstein to the League of Nations*, Report of the 5th Committee to the First Assembly of the L.N., 6 December 1920. 1 Hackworth 48–49; *cf. Nottebohm Case* (*Liechtenstein v Guatemala*), ICJ Reports 1955 p. 4.

41 See G. Gilbert, 'Autonomy and Minority Groups: A Right in International Law?' 35 *Cornell Int'l LJ* 307–53 (2002), esp. at pp. 310–11.

42 See Booth, *supra* n. 4, at pp. 31 *et seq.*, esp. pp. 64–66.

43 R. Higgins, 'Policy Considerations and the International Judicial Process', 17 *International and Comparative Law Quarterly* 58 (1968).

44 Higgins, *supra* n. 14, at pp. 39–55, especially pp. 51 *et seq*.

> exceptions conceded by historical chance within a system of rules that operates as between states. Rather, they are simply part and parcel of the fabric of international law, representing the claims that are naturally made by individual participants in contradistinction to state participants.[45]

Therefore, on this understanding, it is not the case that the individual only has rights and standing when states so confer them, but she or he participates in the process of international law such that, in certain circumstances, the individual has the right in her/his own capacity but is, at present, procedurally – but only procedurally – disabled from enforcing it.

If the theory of international human rights law is a little better perceived, then it must equally be recognized that law does not operate in a vacuum. In addition, if the law is a player at the table, as this paper has suggested, then it can be the object of interdisciplinary study like any other international actor. Nevertheless, that interdisciplinary study must be carried out with all the integrity that academia can muster.

> These structures of action and interaction, dependence and interdependence, effortlessly transcend national and ethnic boundaries and allow men and women the opportunity to pursue common and important projects under conditions of goodwill, co-operation, and exchange throughout the world. Of course, one should not paint too rosy a picture of this interaction. Such groupings exhibit rivalry, suspicion and divisive controversy as well; but no more than any common enterprise and certainly no more than the gossip and backbiting one finds in smaller, more localized entities. It is community on this global scale which is the modern realization of Aristotelian friendship: equals who are good at orienting themselves in common to the pursuit of virtue.[46]

So, while the law may be an independent player in any international interaction, which is something other disciplines cannot claim for their subject area, it operates in the context of those other disciplines, most obviously, international relations theory.[47] It is this aspect of the law that entails that both formalist and instrumentalist approaches are essential to a full understanding of how it should be comprehended with respect to human rights, in terms of their formulation, promulgation as well as their implementation and application.

45 Higgins, 'Conceptual Thinking about the Individual in International Law', 4 *British Journal of International Studies* 1 at p. 5 (1978).

46 J. Waldron, 'Minority Cultures and the Cosmopolitan Alternative', in W. Kymlicka, *The Rights of Minority Cultures*, OUP: 1995, pp. 93 *et seq.*, at p. 102.

47 See Higgins, *supra* n. 14, pp. 3–4. See also Dunne and Wheeler, *supra* n. 4.

> Law and legal theory do not exist in a value-free vacuum but are inevitably concerned with political concerns and conditions.[48]

The lack at the global level of an effective enforcement mechanism for international law is also consistent with the first rule of international society, sovereign equality, that is, all states are equal . . . but some are more equal than others.[49] Nevertheless, this is not to accept that international law is but part of international politics, that it might be used or laid to one side as states think best. It is true that any legal decision, such as a judicial opinion, is a political act, 'a choice between alternatives not fully dictated by external criteria',[50] but the relevant criteria include sets of rules that states cannot ignore or even interpret just as they wish. Furthermore, there is still a legal result from applying law to a previously unanalysed situation where political choices are made by the decision-makers. In that vein, states have established various bodies – the International Court of Justice (ICJ), the United Nations Human Rights Committee, the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, and the African Commission, and now Court, of Human Rights – whose role is either to uphold international law generally or the relevant international human rights treaty. The judges sitting on the ICJ adjudicate between states in those cases where the ICJ has been accepted by the parties as having jurisdiction, while the human rights treaty monitoring bodies, to a greater or lesser extent, can make decisions in complaints by individuals against states that there has been a human rights violation. For the international lawyer, a higher level of development was reached in 1998 when Protocol 11[51] to the ECHR came into force and provided for every individual within the jurisdiction of one of

48 Scobbie, *supra* n. 5, at p. 92. See also, Higgins, *supra* n. 14, at p. 5, quoting R. Higgins, 'Integrations of Authority and Control: Trends in the Literature of International Law and Relations', in B. Weston, and M. Reisman (eds), *Towards World Order and Human Dignity*, Free Press: 1976, p. 85.

> Policy considerations, although they differ from 'rules', are an integral part of that decision making process which we call international law; the assessment of so-called extra-legal considerations is *part of the legal process*, just as is reference to the accumulation of past decisions and current norms. A refusal to acknowledge political and social factors cannot keep law 'neutral', for even such a refusal is not without political and social consequences. There is no avoiding the essential relationship between law and politics.

49 It is one of the crushing ironies of the 21st century that the attacks on the World Trade Center and the Pentagon on 11 September 2001 created the spark that led to the necessary number of states ratifying the Rome Statute of the International Criminal Court, but the United States refuses lest its nationals have to appear in The Hague. Done at Rome, 17 July 1998, 37 ILM 999 (1998) – as corrected by the *procès-verbaux* of 10 November 1998 and 12 July 1999; http://www.icc-cpi.int/home.html&l=en. See A. Cassese, P. Gaeta, and J. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, OUP: 2002.

50 Koskenniemi, *supra* n. 7, at p. 72.

51 ETS 155.

the member states of the Council of Europe the capacity to bring a case directly against the state before an international court, the European Court of Human Rights. The Court can adjudicate between an individual and a state and, for the most part, Council of Europe states respect the decision of the Court. It might be that all of the above is only possible because all of these states have ratified the ECHR and have conferred this international legal personality upon the individual (or, alternatively, that Higgins is right), but it also indicates that the law of international society dynamically constrains states and indirectly imposes compliance. Perhaps interdisciplinary studies of international human rights law should be premised on *Eunomia* rather than the Montevideo Convention.[52]

52 Geoff Gilbert gratefully acknowledges the support of the British Academy in providing him with an Overseas Conference Grant to attend the meeting of the American Political Science Association (Chicago) where an earlier version of this paper was delivered.

3 Universality, historical specificity and cultural difference in human rights

David Beetham

The purpose of this chapter is to defend the project of universal human rights, in all their dimensions – economic, social and cultural, as well as civil and political – against two kinds of 'culturalist' challenge. One, which tends to be identified with non-Western sources, is directed against the individualist foundation of the human rights project in general, and the so-called 'freedom' rights of the civil and political rights agenda in particular. The other, identified more with the West, and its neo-liberal economic doctrines, is directed against the agenda of economic and social rights, and their place in the human rights canon. Both challenges raise important considerations, which require us to take care in how the case for universal human rights is presented; this chapter argues, however, that both need to be resisted if the integrity of the human rights agenda is to be preserved. The chapter will conclude by showing how both types of objection have been advanced since the idea of human rights first attained currency in the 18th century; it will argue that they represent ongoing ideological divisions *within* societies as much as *between* them.

Justifying the universality of human rights

Many human rights activists regard the universality of human rights as self-evident, and the deduction of a specific list of rights from the 'equal dignity' of all human beings as unproblematic. Once this self-evidence is questioned, however, and the claim to universality is challenged, the agenda and practice of human rights stand in need of a principled justification, and an elaborated philosophical grounding.[1] This is particularly necessary in order to identify what precisely is being challenged by the critics or sceptics, and to assess how

1 Ever since 1948, there has been a consistent strand of scepticism within Western philosophy about the possibility of a theoretical grounding for human rights, for reasons usefully summarized by Susan Mendus in 'Human rights in political theory', in D. Beetham (ed.), *Politics and Human Rights*, Blackwell, 1995, pp. 10–24.

serious such challenges might be. It is to this justificatory task that the first section of this chapter is devoted.

Any justification for human rights in the contemporary world can no longer rely on the concept of 'natural rights', with its presumption of a fictional state of nature prior to government, and the ahistorical idea that every infant since the dawn of history has entered the world endowed with these rights. Even such a basic idea as the right to due legal process is the product of a complex evolution in legal thought and institutional arrangements. Human rights are a manifestly historical product, and the only sense we can give to the idea of their universality is that they apply to all human beings in the present era, not to past ages. Indeed, part of the challenge to their justification is to show how they can be both universal and the subject of historical evolution at the same time. Or, to express the paradox even more forcefully, it is to show how the idea of human rights and their universality could not have been entertained without the experience of profound social and historical changes. Indeed, it is precisely to express their evolutionary character that we now use the language of 'human' rather than 'natural' rights.

Recent work in moral philosophy has done much to expose the complex structure involved in the idea of claiming or having a right; and this structure will provide a useful framework for exploring the basis of human rights justifications.[2] Three different components to the idea can be distinguished:

1 A right is an entitlement due to a person by virtue of some relevant qualification, characteristic or status, such that there is an integral link between the content of the entitlement and the possession of the appropriate characteristic. Human rights are entitlements due to people simply by virtue of their being human. We therefore need an account of what the relevant characteristics are that they all share, and how these relate to the content of the entitlements claimed on their behalf.
2 Asserting a right, or according someone a right, is necessary because of the need for protection in the face of some vulnerability, or some threat to the exercise of a valued capacity or the possession of a needful resource. Without the existence of vulnerability, and the need for protection against threats, the assertion of a right is meaningless. In the case of human rights, we require an account of the recurrent threats and

2 What follows is my own synthesis from a wide range of authors, including: M. Freeden, *Rights*, Open University Press, 1991, ch. 1; A. Gewirth, *Human Rights: Essays on Justification and Applications*, University of Chicago Press, 1982; A. Gewirth, 'The epistemology of human rights', *Social Philosophy and Policy*, 1, 1984, pp. 1–24; J.W. Nickel, *Making Sense of Human Rights*, University of California Press, 1987, ch. 2; H. Shue, *Basic Rights*, Princeton University Press, 1980, ch. 1.

generalized vulnerabilities to which everyone is acknowledged to be potentially subject.[3]

3 Rights claims are vacuous without the recognition of a corresponding duty on the part of a responsible agent or institution to act, or refrain from acting, in a way that makes the rights effective. The obligation recognized may be either a moral or a legal one, or both, though typically in the modern world a framework of legal enforcement is required to make duties, and hence rights, effective. Human rights presuppose generally acknowledged moral obligations which can be realistically given legal enforcement; and the justification for human rights requires an account of what these obligations are, and how they might realistically be enforced.

Common humanity

The basis for the claim that there are entitlements due to all human beings, and for the specific content of these entitlements, lies in a set of common human characteristics which all share, despite differences of culture, social position and circumstance. Most obvious are the shared human needs for subsistence, security and respect, which underpin much of the human rights agenda – economic, social and cultural, as well as civil and political. Equally important are the shared capacities, which help define what gives human beings their distinctive value, and which also underpin the so-called freedom rights – to free movement, expression, association, choice of livelihood, and so on. These capacities can be variously described, but all involve some conception of distinctive human agency, such as the capacity for reflective moral judgement, for determining the good for one's life, both individually and in association with others, for choosing goals or projects and seeking to realize them, and so on. These can be summed up in a concept such as 'reflective moral and purposive agency'.[4]

Why do we need an account of human capacities as well as needs? This is essential for the distinction we make between humans and other animals, on the one hand, and between adults and children, on the other, and the respective rights that are appropriate to each. All are entitled to welfare rights, by virtue of their distinctive needs. But freedom is only of value, and its protection a corresponding right, to the extent that its agents have the capacity for self-determination; for identifying and understanding their own interests, and for making reflective choices in matters of importance to their lives, both individually and collectively. The agenda of freedom rights presumes that

3 The idea of protection against what he calls 'standard threats' is a central element in Shue's account, see above.

4 A. Gewirth, *The Community of Rights*, Chicago University Press, 1996, ch. 1; R. Plant, *Modern Political Thought*, Blackwell, 1991, ch. 7.

this is a generalized human capacity, but one which also requires a period of development in childhood, during which children need a measure of paternalistic guidance while they learn to weigh alternatives and make a realistic appraisal of their consequences in lesser matters before they are allowed to determine more serious ones, such as entering into binding contracts, choosing political representatives, and so on.

To arrive at the idea that the capacity for reflective choice in important matters of life is a universal human capacity, rather than being confined to a special few, and that freedom is a generalizable right rather than a particular privilege, required the breakdown of a social order in which people were assigned determinate roles at birth; and in which the qualities appropriate to the exercise of these roles were assumed to be given *by nature*. It was a characteristic of this social order that its intellectual justification had all the logic of a self-fulfilling prophecy: deny whole groups of people access to certain social roles, and to the training necessary for these roles, and it follows that their incapacity for fulfilling them must appear a matter of natural rather than socially constructed disability, hence justifying their exclusion. Some are simply born for slavery, manual labour, domesticity, or whatever. It took profound social changes before the circular logic justifying these arrangements was exposed to view, and it became clear that the capacity to exercise freedom was a universal one, and that the limitations on it had been socially constructed.[5] This was the rationale for the claim of the natural rights theorists, that 'all are born equal' prior to their future social roles, and for the anti-discrimination principle which stands at the heart of the human rights agenda.

To be sure, it has taken time for the human rights agenda to move on from the simplistic Enlightenment assumption that equality denotes sameness, and to recognize that the capacity for self-determination is precisely a capacity to be *different*, and that the need for respect is precisely a need for respect for one's *distinctive* identity, whether individual or collective. We now have a much richer and more complex realization of what our common human needs and capacities actually are. But it is also here that one of the key problems in human rights thinking is located, when we find that the principle of respect for difference seems to require us to accord respect to cultures that may not themselves endorse aspects of the human rights agenda, sometimes even central ones such as the principle of equal respect itself. This is a key problem in this subject, which will be returned to below. For the moment it is sufficient to note that the necessary idea of a common human nature, of the existence of shared needs and capacities, embraces and does not exclude the fact of difference. The slogan 'All different, all equal' is not in principle a self-contradictory one.

5 I explore the circular logic of legitimation more fully in my book, *The Legitimation of Power*, Macmillan, 1991, ch. 4.

Shared threats

The idea that claiming a right presupposes the existence of a threat, either direct or indirect, on the part of other people to some needful activity or resource, was well understood by Karl Marx, who mounted the most systematic 19th-century attack on the whole idea of human rights. He denounced them as 'egoistical', because they entailed seeing other people, whether in civil society or in government, as an obstacle to the realization of one's needs. In the future communist society there would be no need of rights, he maintained, because everyone would work cooperatively to meet each other's needs, and government would act as a responsible agent for administering the common affairs of the whole society. The language of rights and rights claims, in contrast, presupposed scarcity, the conflict of interests and mutual antagonism, and belonged to a lower stage of historical evolution.[6]

The practice of communist states in the 20th century exposed Marx's conception of a conflict-free society and benign government as a utopian fantasy. Yet he was perfectly correct on one point: without the existence of a threat, there is no need for a right, nor any sense to the language of rights. In a pre-industrial world, for example, the idea of a 'right to clean air' would have been wholly meaningless, since this was a good which everyone enjoyed without qualification. For clean air to be articulated as a 'right', all of the following things had to happen: the experience of widespread air pollution through the burning of industrial and domestic fuels; the scientific demonstration of the damage caused by this pollution to people's health; finally, the realistic possibility of eliminating the cause through preventative or remedial measures. In other words, before a right could be articulated, a threat to a necessary human good had to be recognized, and a realistic means to its elimination had to be discovered. Such preconditions for a right are anything but 'natural'.

What exactly are the historically evolved threats, and protection against these threats, that lie behind the human rights agenda? Most obvious is the historical record of the absolutist state and the experience of its abuses which lay behind the first declaration of the rights of man in revolutionary France: arbitrary detention and imprisonment, punishment without trial, retrospective legislation, confiscation of property, oppressive taxation, censorship of journals and books, etc. And the means to combat these abuses were also well understood: due legal process, the separation of powers and an elected legislature deriving its sole authority from the people. It is a good starting point for any society today which claims that the idea of human rights is alien to its traditions, to write down a list of the painful experiences it has suffered under an oppressive regime, which it does not want repeated, and it will soon evolve an agenda similar to the original French declaration. Oppressive states

6 The relevant texts are collected and commented on in J. Waldron (ed.), *Nonsense Upon Stilts*, Methuen, 1987, chs. 5 and 6.

behave similarly everywhere, and the need for protection against the threat they pose to human wellbeing and security is now universal.

The other main source of threat to human wellbeing in the modern era has been the experience of unfettered market forces – not the market as such, but the threat posed by unregulated market forces to established means of livelihood, forms of property and the health and safety of workers, consumers and communities. It was the historical experience of these threats that led to the development of the economic and social rights agenda of the 20th century at an international level, first through the ILO and then in the Universal Declaration of Human Rights in 1948.[7] The inclusion of these rights in the human rights canon has been stoutly resisted, both by economic liberals and by those who see them as an obstacle to a narrowly defined conception of development as simply economic growth. There are also those who have argued that their traditional forms of society have been able to guarantee people's wellbeing and economic security through customary norms and kinship networks, and that they consequently have no need for the alien idea of human rights. Unfortunately, such traditional forms of security have been disappearing fast under the inexorable march of market pressures and the displacement of personal networks by the mobilities and impersonal relations of a market society. And it is precisely to provide protection against the new forms of insecurity it has brought that the economic and social rights agenda has proved necessary.

Of course there are new threats besides the two main sources mentioned above against which people need protection, and old threats under new guises, such as the threat of civil war and the collapsed as well as oppressive state, or the threat to physical security posed by other people within civil society. The key point, however, is that these threats can be both historically evolved and also universal, in the sense that they have become generalized to all societies, and that all people now stand in potential need of protection from them.

Generally acknowledged obligations

It is often said of human rights that they emphasize demands or entitlements in place of duties, and that this emphasis reinforces a self-interest-maximizing ethic at the expense of social responsibility and collective solidarity. As it stands, however, this criticism is based on a misconception. There can be no rights without corresponding duties; rights can only be realized where there is an acknowledged duty on the part of a responsible agent or institution to respect and protect them. So rights and duties belong together. What gives the criticism plausibility, however, is that under the international

7 See I. Brownlie and G.S. Goodwin-Gill (eds), *Basic Documents on Human Rights*, 4th edn., Oxford University Press, 2002, parts 1 and 3.

human rights treaties rights are assigned to individuals, and the duty to protect them to the states which are signatory to the relevant convention. There is thus an asymmetry between rights and duties with regard to their respective agency.

There are a number of difficulties with the proposition that states are the agents with rights-protecting obligations. One difficulty is this: how can states, which are often among the chief violators of human rights, also be expected to protect their citizens against such violations, as well as those originating within civil society? The answer, that one part of the state (the judiciary) should deliver protection against another (the executive), without compromising the latter's ability to maintain a wider social protection, requires a sophisticated set of institutional arrangements to secure, and a complex balance to be struck between executive effectiveness and accountability. This is a key issue for human rights implementation in practice.

More immediately relevant here is a second difficulty, that giving states the obligation to protect human rights conveys the impression that *only they* have such obligations. Yet this is mistaken. States cannot simply enforce norms which are not endorsed within their respective societies. If citizens do not generally acknowledge any responsibility to respect the person, the property or the freedom of others, then no amount of legalized force on the part of the state will secure their human rights. And if people acknowledge no responsibility to help fellow citizens when in need, then states will not be able to command the tax-based resources necessary to secure economic and social rights for all. In this respect states, and especially democratic states, are simply a proxy for their citizens; and human rights are only in practice as secure as the obligations which citizens acknowledge to one another, obligations which states can and should certainly enforce, but cannot themselves create.

So the foundation for human rights has to be sought in the normative basis of obligations which people acknowledge to one another. As a matter of fact, almost all cultures respect the norms of obligation on which human rights are based: not to harm others, and to assist those in need. Although these norms are universal, however, their scope or reach is not. They tend to be limited in application to those with whom people stand in a reciprocal or potentially reciprocal relationship – family, kinship or ethnic group, fellow citizens – and do not extend to the whole of humankind. This is not so fatal an objection to human rights as it might appear, however, for two reasons.

First, as Henry Shue has shown in respect of economic and social rights, the obligation towards others presumed by a system of public welfare provision is not unlimited, since most needs will continue to be met through a mixture of self-help, exchange relations, the family and other informal social networks. The obligations towards others necessary for the state to guarantee a minimum means of livelihood for all, in the eventuality that these other arrangements prove inadequate, are not particularly demanding or heroic,

although they may encounter substantial practical or institutional problems of realization.[8]

Secondly, the limitations on the reach of our obligations towards others can be modified through education, and the extension of our sympathies beyond those recognized as 'one of us'.[9] One of the chief tasks of human rights and other forms of civic education is to build on the norms we already acknowledge, and to extend their reach, such as through a demonstration of the increasing interdependency of people and their fates across the globe. Despite all the hatred and violence we witness daily on our television screens, the capacity of people in all societies to respond generously to the needs of those they have never met is evidence that the normative basis of the human rights agenda is not lacking. Once again, the problem is how to organize institutional arrangements so as to make acknowledged obligations effective – and in a continuous manner – rather than the absence of the normative basis itself.

The case for universality

The case for the universality of human rights, then, rests on a triple foundation, each element corresponding to a key component of the logic of rights discourse. First is the existence of common human needs and capacities, as the basis for equal entitlement to protection of the resources and activities necessary to their realization. Second are the historically experienced and evolving threats to the realization of these needs and capacities, threats which are now generalized across the globe, but without which the demand for rights would be unintelligible. Third are the universal norms of obligation which provide the necessary moral support to legal systems of rights enforcement, and without which the agenda of the human rights conventions would be merely a wish list, not a statement of realizable entitlements. Together these three dimensions of argumentation provide a reasoned justification for human rights universality.

As has also been demonstrated, however, each component of this argument for universality has an essential *historical* dimension. Without the slow erosion of social systems based on statuses ascribed at birth, and their assumption of innate differences justifying these statuses, the idea of human equality and the anti-discrimination principle at the heart of human rights could not have been entertained. Without the threats to human wellbeing and security posed by the authoritarian state and unfettered market forces, and the hard-won means to protect against them, much of the human rights agenda would be unintelligible. Without the historically evolved necessity in more impersonal urban societies to underpin socially recognized obligations by legal enforcement, and without the legal institutions to do so, the human rights agenda

8 H. Shue, op. cit., ch. 2.

9 See P. Singer, *The Expanding Circle*, Oxford University Press, 1983.

would be one of wishful aspirations, not realizable rights. In each respect, therefore, the basis of human rights' universality can be seen to be a historically given product, and far from 'natural'.

Once the intellectual basis for human rights' universality, with its tripartite structure, has been established, it is possible to identify more clearly where precisely the challenges to it are located, and how they might be answered. This will form the subject of the second and third parts of the chapter.

Challenges to universalism from non-Western cultures

It would be mistaken to suppose that the cultures outside the European tradition, with all their richness and diversity, are intrinsically antithetical to the human rights project, or that support for it cannot be found within them. Nevertheless, there are distinctive intellectual challenges to human rights' universality that have been advanced from non-Western sources, which merit examination and assessment.[10] This section will look here at three arguments in turn: the argument from origins, the argument from cultural incompatibility, and the argument from diversity.

The argument from origins

This argument is based on the proposition that to identify the origins and context of any cultural norms is also to define the limits of their applicability, since all cultural practices only make sense within the determinate environment within which they were formed, and to which they are a continuing response. In the case of human rights, the identification of their origins in a distinctively Western tradition of thought and cultural practice is also held to define the appropriate context for their application. It follows that any claim made for their universality, or that they have normative force beyond the area of their origin, should be seen as part of an imperializing project to extend Western values beyond the societies where they properly belong.

This is an argument that is also frequently heard among Western students and some academics, especially those of a relativizing, post-modernist or anti-foundationalist persuasion.[11] There is not the space here to explore the deeper

10 From the huge literature on this subject the following are particularly useful: J.R. Bauer and D.A. Bell (eds), *The East Asian Challenge for Human Rights*, Cambridge University Press, 1999; S. Caney and P. Jones (eds), *Human Rights and Global Diversity*, Frank Cass, 2001; J. Donnelly, *International Human Rights in Theory and Practice*, Cornell University Press, 1989, part III; M. Freeman, *Human Rights*, Polity Press, 2002, ch. 6.

11 For example, R. Rorty, *Contingency, Irony and Solidarity*, Cambridge University Press, 1989; R. Rorty, 'Human rights, rationality, and sentimentality' in S. Shute and S. Hurley (eds), *On Human Rights*, Basic Books, 1993, pp. 111–34.

epistemological issues which it raises. Suffice it to say that, if the origin of human rights thinking in a distinctively Western tradition is conceded, then its claim to have a universal applicability or validity can be read in a number of different ways. One is the claim to the superiority of Western values over those of other societies. However, a quite different reading is possible, which follows from the analysis given in the first section of this chapter. This is that the West has all too successfully exported the threats to human wellbeing and security to which the agenda of human rights is a necessary response. If that agenda has universal applicability, it is only because the conditions which make it appropriate have also been generalized.

Although no society has a monopoly on human suffering or the causes of it, the history of the West has been characterized by the development of a number of features which have proved a scourge both to its own peoples and to others. There has been the development of the modern state with its monopoly of the means of violence, and its technically advanced capacity for communication, surveillance and control, which provides the potential for oppression on an enormous scale. There have been the doctrines of racial and national supremacy, which have produced and legitimated systematic slavery and extermination in both the New World and the Old, as well as wars on a global scale. There has been the development of the competitive market economy, driven by the pursuit of profit, which has ruined livelihoods, destroyed environments, and tolerated living and working conditions which have undermined the health of populations. If the West has also developed human rights as a modest antidote to these scourges which it has itself produced and exported, that is hardly a token of great moral superiority. Human rights are reactive, rather than proactive. Universality in this context means in the first instance the generalization of the conditions against which populations need protection, and only secondarily the means to secure that protection.

The image of Western moral superiority is only sustainable because of selective blindness in the reading of its history, and a failure to grasp the logic of human rights as a defensive response to experienced evils. It is also because in the contemporary world human rights have become an instrument of power, through the unilateral conditionalities imposed on weaker states. Here the charge of neo-imperialism (not to mention double standards) has some validity. There is a deep irony in this. Human rights originated as a resource for the relatively powerless and disadvantaged against the powerful and advantaged, yet now (at least in the form of civil and political rights) they have become enlisted in the service of hegemonic power. It is hardly surprising that this provokes resistance. Yet, if my analysis is correct, the conditions against which the human rights agenda was designed as a protection will themselves continue to generate support for that agenda among new generations of the oppressed and disadvantaged. In this sense, human rights constitute a universally applicable and available resource in people's struggles against oppression and insecurity.

The argument from cultural incompatibility

This is the argument that the individualist premise on which the idea of human rights is based is incompatible with those cultures which give priority to the collective good over individual freedom, and to the recognition of social responsibilities over the assertion of individual rights. This emphasis is held to be an essential component in the maintenance of social order and harmony, in contrast to the many disorders of Western societies, which derive from placing individual freedom at the heart of their culture.[12]

There are different ways of reading this argument, not all of them damaging to the human rights project. For example, as a necessary corrective to the extremes of individualist assertion, the need to acknowledge the collective good already finds a place within the texts of the human rights conventions themselves. There, no individual freedoms are unconditional, but find their limit in considerations of the public good. So the standard phraseology of the International Covenant on Civil and Political Rights (as well as the European Convention on Human Rights) holds that restrictions on the individual's right to a given freedom may be imposed in conformity with the law where they are 'necessary in a democratic society in the interests of national security or public safety, public order, the protection of health or morals or the protection of the rights and freedoms of others'.[13] That this limitation is open to abuse is evident from the example of Western governments themselves, some of which have used the argument from public security in the so-called 'war on terror' to make serious inroads into fundamental rights and freedoms, and to discriminate between citizens and non-citizens in their level of human rights protection.[14] Yet, in a democratic society, a recourse to the courts is always available to test whether any restriction of individual rights is justifiable in the context; and there exists a long record of jurisprudence under the European Convention to establish what the justifiable conditions for such restrictions might be.

There is a further way in which recent developments in human rights have recognized the legitimate claims of the collectivity, and that is where the preservation or protection of valued ways of life or cultural identity requires support against erosion from the logic of individual choice and competition. So states use their powers to support minority language schooling, religious education, indigenous forms of collective ownership, traditional law, and so on, even where this seems to privilege the collective over the individual. All these measures find endorsement in such statements as the UN Declaration

12 See for example the discussion by J. Chan, 'A Confucian perspective on human rights for contemporary China' in Bauer and Bell, op. cit., ch. 9.

13 Brownlie and Goodwin-Gill, op. cit., pp. 188–89.

14 See R. Ashby Wilson (ed.), *Human Rights in the 'War on Terror'*, Cambridge University Press, 2005.

on the Rights of Minorities, because they are seen to be necessary to the preservation of valued ways of life. Yet these ways of life are ultimately justified in terms of their value to the individual, and the rights invoked are those of the *individuals* who belong to the relevant groups. Here it is not only a matter of a socially desirable diversity or pluralism, but of maintaining the possibilities of individual choice in the future, through the preservation of vulnerable forms of life in the present.[15]

In the end, then, the human rights conventions come back to the individual and to his or her rights. And here there can be no compromise on those conventions' basic assumption, that all adult human beings have the capacity to make reasoned choices for their lives, and merit an equal opportunity to make the most of them in the way they see fit, both individually and in cooperation with others, subject to respect for the rights of others. If the argument for the importance of the collective good is interpreted so as to deny this assumption, whether in the name of preservation of established social hierarchies or paternalist forms of government, then it is indeed incompatible with the basis of human rights thinking.

At this point defenders of human rights do not have the option to say, 'well, our claims about human capacities stop short of Western or other shores, and are not universal.' If claimed for some, they are valid for all. If claimed for all within a given country, they cannot logically stop there, except on some notion of racial or other inferiority which has long been discredited. This is a fundamental point about arguments in defence of individual freedom and democracy alike: the grounding they require in the decisional capacities of all adults within a given country apply with equal force beyond it. Defenders of individual freedom and democracy have no option but to be universalistic in their claims.[16]

To be sure, the assumptions about human nature underpinning these claims have been stoutly resisted at times within Western societies themselves. British and French conservatives at the end of the 18th century and into the 19th were adamant in their rejection of the anthropological foundation of human rights. In place of the ideal of individual self-determination, they emphasized the necessary discipline of received and unquestioned moral codes for the emotional wellbeing of individuals, and the maintenance of established social hierarchies for the preservation of

15 A. Gutman (ed.), *Multiculturalism and the Politics of Recognition*, Princeton University Press, 1992; W. Kymlicka, *Multiculturalism and Citizenship: A Liberal Theory of Minority Rights*, Oxford University Press, 1995; W. Kymlicka (ed.), *The Rights of Minority Cultures*, Oxford University Press, 1995. For a critique of these and other works in the same vein see B. Barry, *Culture and Equality*, Polity Press, 2001.

16 The argument here is at odds with the writings of the later John Rawls, and his optimistic conception of 'well-ordered hierarchical societies'. See J. Rawls, 'The law of peoples' in Shute and Hurley, op. cit., pp. 41–82, and *The Law of Peoples*, Harvard University Press, 1999.

public order.[17] Such ideas continue to be held, and they re-emerge with some force in debates about education, the family or sexuality, or whenever there are scares that individualism is running out of control. Yet they have progressively lost ground over the past two centuries, and there is good reason to think that they have been doing so in non-Western societies also. This is because of the individualizing effects produced by increasingly globalized economic forces and communication possibilities, which encourage individuals to take more responsibility for their own lives, and societies to open up life opportunities to all their citizens from whatever social station, and to educate their children to think for themselves. For this reason the issues at stake between cultural liberals and conservatives properly form the subject of debate *within* all contemporary societies, rather than as an argument *between* them.

The argument from diversity

Here the challenge is not to the foundational assumptions of human rights as such, but to claims of the universality of particular contested rights or prohibitions on particular social practices which are long-standing within a given society. These include such practices as the prohibition on leaving the religion of one's birth, female circumcision, the use of certain forms of punishment, and so on. They have their parallels in contentious disputes within Western countries also, over issues such as abortion, capital punishment, same-sex relationships, and others.

Here two general points can be made. The first is that, in confronting any discrepancy between the agenda of human rights and long-standing social customs, some test of the seriousness of the harm incurred by the denial of a right is needed; and one important test is whether the practice infringes upon the anti-discrimination principle at the heart of human rights. A second point is that exposure to human rights norms at least allows for the opening up of debate within a country about the desirability of maintaining a given practice. An example from the UK is instructive here. One of the many cases which the UK government lost in recent years at the European Court of Human Rights concerned the physical punishment of children. Many had taken their stand on the traditional right of parents to beat their children, and

17 Classic versions of this position are to be found, in the 19th century, in J. Fitzjames Stephen's critique of J.S. Mill in *Liberty, Equality, Fraternity*, Smith Elgard, 1874; and, in the 20th century, in Lord Patrick Devlin's criticism of the Wolfenden Committee's recommendation on the decriminalization of homosexuality, in *The Enforcement of Morals*, Oxford University Press, 1965, ch. 1. See also H.L.A. Hart, *Law, Liberty and Morality*, Oxford University Press, 1963. A different version of this position is to be found in recent 'communitarian' critiques of liberalism. See D. Bell, *Communitarianism and its Critics*, Oxford University Press, 1993; S. Mulhall and A. Swift, *Liberals and Communitarians*, Blackwell, 1992.

to have them disciplined in the same way by their teachers; they appealed, in other words, to the legitimacy of established social norms and the distinctive British way of life. But it was salutary to be confronted with the European ruling, and to be asked why only we of all European societies needed this form of discipline when others managed perfectly well without it.

Although the idea of allowing societies to interpret the human rights agenda in their own way might seem attractive in this context, it also carries the danger that the impetus to reform which comes from the potentially creative tension between the received culture of a country and international human rights standards, where these markedly diverge, will be lost. Such tension is best negotiated and resolved internally, however, and over time, and cannot be abolished by imposition from outside.[18] The force of human rights is a moral one, and as such is only effective to the extent that people are persuaded of their value for themselves.

The challenge to universalism from within Western culture

The idea that the universality of the human rights agenda might be challenged by beliefs and values which are rooted within Western culture may seem surprising. To Westerners it is typically other cultures that pose a 'problem' for human rights, not their own. This misconception is only sustainable because of a persistent tendency to equate human rights with the civil and political rights agenda, and especially its freedom rights, and to ignore or downgrade the agenda of economic and social rights. It is also because the body of ideas which challenges these rights – economic neo-liberalism – is not held to have the same epistemological status as the belief systems of other cultures: it is regarded as a matter of scientific doctrine rather than of culture-bound customary norms, and it carries the stamp of 'modernity' rather than of 'traditionalism'.

There is no reason, however, to regard the challenge to human rights which comes from within Western culture any less seriously than those that supposedly originate outside it. Economic neo-liberalism involves a set of beliefs which, if accepted as valid, undermine the claims of the human rights agenda as surely as beliefs in gender or racial superiority, the doctrine of the supremacy of the collective over the individual, or the beliefs which sustain the paternalist right of the few to decide what is good for everyone else. This is because they deny economic and social rights, particularly in the form of welfare rights, a legitimate place in the human rights canon, so undermining the integrity of its agenda and challenging its universal applicability. Such a denial, as is well

18 For a sensitive account of such a process as regards Islam, see M.A. Baderin, *International Human Rights and Islamic Law*, Oxford University Press, 2003, especially chs. 1 and 5.

known, reinforced the Cold War tension between the two human rights covenants; but it has not been silenced by the collapse of the Communist system. Indeed, if anything, it has been reasserted with renewed confidence.

In response, it is not enough for defenders of economic and social rights to resort merely to assertions about the 'indivisibility' of the human rights agenda. Nor is it even enough to defend the connection between the two main sets of rights by showing that one set is a precondition for the other. Of course it seems self-evident that, to exercise our civil and political rights, we have to be alive to do so, and we have to possess the education and basic resources to understand and defend them. Unless our basic needs are met, in short, we cannot exercise our distinctively human capacities.

However, although this justification for the agenda of economic and social rights in terms of an anthropology of human needs is a strong one, it is not the point at which economic neo-liberals level their critique. They can accept this account of human needs perfectly well; what they reject is the assumption that the existence of human needs is sufficient on its own to generate any rights. This is because, for a right to exist, there has to be a corresponding duty, and neo-liberals reject the idea that there can be general or open-ended duties to meet the needs of others. Their argument here is supported by two further claims: one about property rights, and the other about the operation of economic markets.[19] Since each of these claims forms part of the common sense of the economic elites who currently rule the world, they have to be answered if the agenda of economic and social rights is to be successfully defended. For reasons of space, they can only be answered briefly here.

Duties to aid

For neo-liberals there are only two kinds of duty or obligation that can be rationally defended. These are, first, the general obligation not to harm others or obstruct them in their lawful purposes; and, second, the specific obligations we incur through our own acts, whether explicitly, through entering into contracts, or implicitly, through such acts as procreation. There can be no general obligation to provide aid to others from our own time and resources, especially where the others are strangers or stand in no reciprocal relationship to us. Since an agenda of welfare rights depends on the existence of such obligations, the inability to provide any intellectual grounding for them would be fatal to the case for economic and social rights as human rights.[20] At best they might be a subject of charitable concern, but they could not count as rights.

19 The classic and deeply influential statement of this position is to be found in R. Nozick, *Anarchy, State and Utopia*, Blackwell, 1974.

20 A strong, but not to my mind conclusive, argument to the effect that economic rights at an international level can be derived from the duty not to harm is made by Thomas Pogge in *World Poverty and Human Rights*, Polity Press, 2002.

This neo-liberal position depends upon a radical separation between negative duties, not to harm or obstruct others, and positive duties to aid them. From one point of view there is some intuitive plausibility to the distinction. If 'ought' entails 'can', then duties which simply require restraint on the agent's part can always be fulfilled, while duties of assistance may reach beyond the capacity to fulfil them. And we do make a common distinction between sins of commission and sins of omission; in legal terms, responsibility for the former is much more easily assignable. From another point of view, however, the distinction between the two types of duty looks quite arbitrary. If the justification for the duty not to harm or obstruct others is the value we place on their wellbeing and on their ability to attain their chosen purposes, then why should this require only restraint on our part, and not also mutual assistance where we have the capacity and opportunity to provide it at relatively little cost to ourselves? And why cannot this duty be realized and enforced by the same institutional framework that enforces our negative duties to one another, that of government?[21] The arbitrariness of the distinction between the two types of duty turns out here to hinge on a quite different point, the neo-liberal theory of property.

The 'natural' right to property

Despite all the difficulties with the idea of 'natural rights' that have already been discussed, the neo-liberal believes that there is a natural right to private property, such that we each have an entitlement to the full value of whatever property we acquire through market exchange or gifts freely given. No one else can have any legitimate claim on this property, and to be required to surrender any compulsorily is a violation of a basic right equivalent to forced labour or servitude.

Now the idea of a natural right to property is simply incoherent. Property is a social institution, resting upon an elaborate social framework, including a socially guaranteed right of exclusion, involving a restriction on the freedom of others.[22] It follows that the terms on which this exclusion is arranged, including the rules governing the acquisition, use and disposal of property, have to be socially validated as fair, if there is to be any generalized duty of respect for the property of others. Even John Locke, who is looked to as a source for the neo-liberal theory of property, acknowledged that a condition for the legitimacy of the enclosure of common land was that 'enough and as good' should be left for others. To put this in terms of a modern context, it is a

21 J. Waldron, 'Liberal rights: two sides of the coin' in *Liberal Rights*, Cambridge University Press, 1993, pp. 1–34.

22 This point is developed systematically by Gerry Cohen in his paper 'Justice, freedom and market transactions' in *Self-ownership, Freedom and Equality*, Cambridge University Press, 1995, pp. 38–66.

legitimating condition for the social institution of property rights that a basic means of livelihood be guaranteed to all; and therefore a system of compulsory taxation on income or property to secure this condition cannot constitute an infringement of fundamental rights.[23]

The self-regulating market

A final objection made by neo-liberals to a system of economic and social rights which includes residual guarantees for welfare and security through taxation, is that it is unnecessary, since a market functioning without artificial obstructions should be able to guarantee employment at a living wage for all who seek it, except for the sick, disabled or elderly, who should be covered by a system of social insurance. If it is functioning properly, a free market offers an opportunity and a promise, not a potential threat, as is assumed by the agenda of economic and social rights.

Here the argument tends to take off into the academic stratosphere of economic modelling and the behaviour of 'perfect' markets. Two simple points, however, can be made in response. First, of course people should have the opportunity to meet their subsistence and other welfare needs for themselves and their dependents by their own efforts, and market exchange is an important mechanism for this. However, second, all experience of unregulated market systems from the early industrial period onwards is that they are accompanied by intensified inequalities, both within and between countries, and by threats to health, to living and working conditions, and to employment, especially for those occupied in traditional economies and at the margin of employability. It is for this reason that state regulation and supplementation, and the provision of public services funded from taxation, are necessary both to meet basic needs and to deliver the fairer equality of opportunity which even neo-liberals espouse in theory.

The credit crisis and the collapse of trust in financial institutions from 2007 onwards have once again blown a hole in the doctrine of the self-regulating, self-correcting market system, and have required tax payers to bail out failing private banks for fear of a wider collapse.[24] Even those who formerly excoriated the state are now calling for tighter public regulation of financial markets. However, the legacy remains of the neo-liberal, self-justificatory belief that the wealthy have an absolute right to whatever gains they make from economic exchange, and have no obligation to the societies which make these gains possible, or to those less fortunate than themselves.[25]

23 For this reading of Locke see Pogge, op. cit., pp. 137–39; Waldron, op. cit., pp. 21–22.

24 L. Elliott and D. Atkinson, *The Gods that Failed: How Blind Faith in Markets Has Cost Us Our Future*, Bodley Head, 2008.

25 As an example, see the focus-group comments by wealthy people reported in P. Toynbee and D. Walker, *Unjust Rewards*, Granta Books, 2008; extracts in *The Guardian*, 4 August 2008.

The enormous sums lost to welfare systems in all countries through the use of off-shore tax havens and other methods of tax avoidance are a very practical consequence of these beliefs, which do more than anything else to undermine the realization of economic and social rights as a universal resource for all.[26]

Conclusion

What exactly is the point of rehearsing these well-worn arguments between neo-liberals and social democrats in a paper on cultural difference and human rights' universality? It is my contention that debates about cultural difference and human rights' universality should properly be understood as reflecting a set of basic ideological disagreements which take place *within all societies* where the issue of human rights is on the agenda of public discussion. These ideological disagreements have become misleadingly configured as contests between cultures, or between regions, whether East versus West or South versus North. These disagreements typically revolve around two poles:

1 disagreements between cultural liberals and conservatives about the value and limits of individual freedom, which turn on their respective conceptions of human nature and its relation to the collectivity, and involve the freedom rights of the civil and political rights agenda;
2 disagreements between social democrats and economic liberals, which turn on their respective conceptions of social obligation, private property and the market, and involve the welfare rights of the economic and social rights agenda.

To defend human rights universality, and the integrity of their full agenda, we have to take sides in both of these debates: to side with cultural liberals in the first, and with social democrats in the second. This is not just a matter of arbitrary choice, but because there are compelling reasons for doing so, as I hope this chapter has demonstrated.

26 The Tax Justice Network's publication on its website home page, *Tax Havens Cause Poverty*, estimates the amount of tax lost annually from tax havens at about US$250 billion. 'This is five times what the World Bank estimated in 2002 was needed to address the UN Millennium Development Goal of halving world poverty by 2015.' Online. Available at: http://www.taxjustice.net (accessed 23 February 2010).

4 Doing human rights

Three lessons from the field

Conor Gearty

Introduction

I first met Kevin Boyle in 1981. 'Met' is a rather grandiose term to use for an interaction which involved one question from a master's student in a large crowd to an academic whose effortless presentation to the Cambridge Irish Society had already dazzled, enthused and intellectually intimidated all those present. I do not remember what the theme of the talk was, much less my question or the answer that was given, but I do vividly recall the style of the man: fluent, charming, intelligent, engaging and – perhaps above all these to my mind – committed. Here seemed to be a new way to do law: get on top of all the stuff, the cases, the statutory provisions, the complex scholarship – all the ramparts with which law protects itself from external scrutiny – and then deploy them not to mystify and stifle the people, but rather to empower and therefore to enrich them. Years later, when we were both serving on the same British–Irish Association committee, I have another strong image: of Kevin Boyle and me wandering up and down some college quad, with him lecturing me sternly but with great sympathy about an intellectual cul-de-sac I was motoring up (maybe it was Herbert Marcuse), which he had reversed out of, spotting the dangers, 20 or so years before. All said in the nicest possible way, enthusiasm taking the place of pomposity or of any sense of superiority. I could have been anyone as Kevin Boyle recalled his dalliance with the extreme left, his intellectual growth, his belief in the possibility of practical action to build a better world not through the defeat of law or its subversion, but through this valuable use that could be made of it, in the right hands.

It was through reading Kevin Boyle and scholars like him that I came to learn three things about law and human rights that have stayed with me through my professional career. The first of these is that the proper function of human rights work should be the empowerment of the vulnerable and the marginalized. Of course, it is a subject that is interested in philosophical ideas like autonomy and liberty, and which might indeed also rightly require of its proponents a display of technical virtuosity in the field of legal analysis from time to time, but what ultimately makes this body of work tick is the beating

heart for the weak that lies at its core. This insight has (for me anyway) the important consequence that human rights talk should itself be viewed as functional, that it (like the values of equality of esteem and dignity that lie under it) stands for a perspective on the world that is as particular and challenging as it is virtuous: the poor not only need and deserve but *are entitled to* their life chances, just as much as are those whose various accidents of birth, genetic make-up and education mean that that they are able to do much with their freedom and autonomy. Second, and Kevin Boyle could hardly avoid this growing up where and when he did, there is the self-evident fragility of law, its vulnerability to being captured by the powerful, even in a decently functioning democratic society, all the more so in one that is pock-marked by sectarian division. What this means for human rights lawyers is that judges often disappoint, that – in the fleshing-out of the grand instruments of right and wrong – courts can sometimes open up disturbing gaps between law and justice. Judges can in this way wrongly ignore the demands of law, but can also be wrong (in a wider, non-legal sense) when they have reluctantly buckled before those demands, submitting to a law that is harsh but unavoidable. Of the two, the first is the greater wrong, it being personal to the decision-maker on the bench rather than systemic, but the activist lawyer needs always to be alive to the possibility of judicial decisions being wrong in both senses. The first requires a legal response, the second a political one. This is the third of 'Boyle's laws' – that, in human rights law, politics should always matter. The rights, rules and regulations that bubble to the surface in a case, framing the principle that needs to be identified and the context in which the facts are first found and then applied, exist always in a particular here and now. Cases in the law reports are like skeletons laid bare, but you need the rest of the body if you want to know truly what has gone on in the particular life laid out before you in all its cadaverous opacity.

In this chapter, I ask how we practitioners of human rights law should be doing our subject in this the age of our hegemony, a time when (having been marginalized and distorted by the demands of the Cold War), the idea of human rights has finally come to enjoy the near pre-eminent position that was originally designed for it in the system of international governance that emerged at the end of the Second World War. Of course, among Kevin Boyle's many lives has been an internationalist one, strongly dedicated as he has been (especially in his work with Mary Robinson) to the nurturing of the universalistic potentiality of human rights. However, my focus here is narrower, on the interaction between law, politics and human rights that has been played out in Britain's Human Rights Act. Since it finally came fully into force in October 2000, we have now experienced some 10 years of its impact. Taking three areas close to Kevin Boyle's heart – the right to protest, the right to liberty, and Northern Ireland – the chapter assesses (within an inevitably limited space it is true) how the Act has performed in these fields, how it has connected with politics, how the judges have engaged with power in ways that might otherwise not have been possible, above all how (if at all,

as they say in exam questions) it has served the weak and the vulnerable. Does the Human Rights Act represent a respectable, indeed a productive, way of doing human rights? At a time of flux, not all generated by the Right but from the Left as well, should it stay or should it go?

The right to protest

An odd spin-off of the energy of Britain's civil society is that its activist members worry a great deal about whether the country has become or is becoming deeply illiberal, more hostile to freedom at best, a downright police state at worst. The Human Rights Act rarely figures into such pessimistic reflections, yet it led directly to a House of Lords decision that helped to democratize policing in (at least) England and Wales. In *R (Laporte) v Chief Constable of Gloucestershire*,[1] a large-scale protest had been planned outside a particular air base and the police had prepared under various statutes to cope with the demands of the occasion. When local police became aware that among those travelling in three coaches from London were members of a 'hard core activist anarchist group'[2] (alluringly known as the 'Wombles'[3]), they stopped and searched the vehicles some way from their destination. The senior officer on the spot then insisted that the buses – together with all their occupants – return immediately to London, ordering a police escort just to make sure. This is what did for the authorities when the matter eventually worked its way to the House of Lords via a judicial review of the decision. The imposed reversal was way over the top, but so too had been stopping the buses in the first place. Turning to the language of human rights, the Law Lords held that the restriction on the claimant's freedom had not been prescribed by law. It had been quite wrong to fall back on old common law powers in a situation like this and in any event it had been misapplied, there having been no imminent breach of the peace when the buses had been brought to a halt. All those old cases which appeared to empower the police to do what they want (chief amongst them *Piddington v Bates*[4] and *Moss v McLachlan*[5]) – so excoriated over the years by generations of civil libertarian students and lecturers – needed to be critically revisited. Lord Bingham went so far as to describe *Piddington* (under which picketing has been controlled by these common law powers for over 40 years) as an 'aberrant decision'.[6]

It seems clear from reading *Laporte* that the Law Lords felt that the police

1 *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, [2007] 2 AC 46.
2 *Ibid.*, para. 5 (Lord Bingham of Cornhill).
3 White Overalls Movement Building Libertarian Effective Struggles – it may be that their brand strategists started with the acronym first and worked backwards.
4 *Piddington v Bates* [1961] 1 WLR 162.
5 *Moss v McLachlan* [1985] IRLR 76.
6 *Supra* n. 1, para. 47.

had now so much statutory capacity when it came to managing protest that there was absolutely no need for them to continue to fall back on the common law, that they could not continue to be the beneficiaries of new and wider laws while clinging to the old informal ways whenever it suited them. *Laporte* is a fine decision, but what impact will it have? The key police officer who had made the decision to turn back the buses admitted to the court that he had not thought a breach of the peace imminent at the moment he stopped the buses; rather, he had sought to obviate the imminence that he was sure would arise later, if the buses were allowed to proceed. However, suppose he had written a different kind of statement, which emphasized how fearsome the Wombles were and how perpetually on the edge of violence the security briefings had told him these 'terrorists' invariably were? On this occasion, fortified by the way earlier cases had embedded themselves in the collective police mind, he did not think he had to. As *Laporte* works its way into the training manuals, his successors in this type of situation will know that their mantra must henceforth not be 'what is reasonable' but what is 'imminent'. Even Lord Bingham, in robustly sceptical form in *Laporte*, 'acknowledge[s] the danger of hindsight, and [. . .] accept[s] that the judgment of the officer on the spot, in the exigency of the moment, deserves respect'.[7] The case will only work effectively when every police officer knows that his or her assessment of what is imminent, and then of what is reasonable to pre-empt that which is judged imminent, is open to being carefully reviewed in court especially where the effect of the police power has been to interfere with or otherwise undermine what appears on the face of the facts to be the exercise of a right of peaceful protest. To bed down the victory in *Laporte*, more cases are needed, as is more determined civil activism to test its effect. The police need also to be brought into the frame, with senior officers being involved in the task of inculcating civil libertarian values and a strong understanding of imminence into their junior officers.

This tendency towards judicial deference to the constables on the spot, doing their best in the throes of what they say is an unexpected crisis, has always been the biggest obstacle to accountability in the field of public protest. It is an understandable if frustrating feature of all such *ex post facto* analyses. The Human Rights Act story disappoints with less justification when a case offers a larger dilemma than that of a police officer handling the unforeseen, and the judges fail to see (or choose to ignore) it. One of the most disturbing decisions of all under the Act was *R (Gillan) v Metropolitan Police Commissioner*.[8] The power under scrutiny here was the highly controversial one in sections 44–47 of the Terrorism Act 2000, enabling the police to exercise stop-and-search powers over persons and vehicles without the need for the usual reasonable suspicion with regard to the specific individual being

7 *Ibid.*, para. 55.

8 *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL, 12 [2006] 2 AC 307.

subjected to them. The law – driven by the imperatives of counter-terrorism – was recognized by Parliament as draconian and as a result an authorization procedure of some complexity was embedded in the Act. In particular, the procedure sought to limit the reach of the provisions both geographically and in terms of their duration. However, from the moment of their coming into force, the Metropolitan Police sought and were given the right to use these powers throughout London, and then simply continued to renew them as and when the time-period for their exercise came close to expiring. The extra-ordinary had become the norm with disconcerting speed and power. Section 44 pushed its way to the front of the arsenal of powers available to the police – ostensibly only aimed at terrorism; its breadth and manipulability made it the provision of choice for the harassed officer in search of a justification for an action thought necessary or even merely desirable. The matter reached the Lords by way of a judicial review launched by a student cycling to an arms protest and a press photographer covering the same event, both of whom were stopped and searched under its provisions. It might have been expected that the key issue would have revolved around the abuse of Parliament's will, arguably revealed by the automatic rather than highly selective deployment of these provisions. There was nothing happening when the two claimants had been stopped, no breach of the peace or unfolding emergency to which police officers had to react. The protest at issue had nothing to do with terrorism or any of the controversial matters said to underlie the use of subversive violence as a political tool. Instead, impressed by the evidence they heard from the police and the Home Office of the importance of these kinds of disruptive powers and of the scale of the ongoing terrorist threat, and citing the 'relative institutional competence' of the authorities in the field,[9] the Law Lords unanimously concluded not only that the powers were being lawfully used, but also that their deployment was *in accordance with* the human rights of those subjected to them. There was no 'deprivation of liberty' at all for article 5 purposes and the rights to privacy, expression and assembly in articles 8(1), 10(1) and 11(1) had been properly and proportionately restricted in the public interest, that is if they were engaged at all. Mildly concerned though certain their Lordships were about the possible manipulation of the law in a discriminatory fashion (against persons of Asian origin particularly[10]), the tragic trump card in the hands of the defendants had surely been the London terrorist attack of 7 July 2005, which occurred a little over six months before argument in the case. The idea of ruling out spot checks on entry to the tube network – or, to put it another way, of insisting that all those entering the underground be searched[11] – did not appeal. But as a result, little thought was given or concern expressed about the chilling effect of the law on

9 *Ibid.*, para. 17 (Lord Bingham).
10 *Ibid.*, para. 47 (Lord Hope of Craighead); para. 80 (Lord Brown of Eaton-under-Heywood).
11 *Ibid.*, para. 77 (Lord Brown).

ordinary protest, despite the clear way in which the factual matrix with regard to each claimant demonstrated this possibility. Section 44 has continued to dog the work of journalists and the activity of protesters ever since, inoculated against domestic human rights attack as it now appears to be.[12]

It is tempting to suggest that the claimants pursued the wrong legal route in *Gillan*, that they should have launched a common law action for assault or even false imprisonment.[13] However, this approach was tried and found wanting in the more recently decided *Austin v Metropolitan Police Commissioner*,[14] another salutary warning not to put all one's human rights eggs in the judicial basket. The facts were so long ago that they preceded 11 September 2001, arising as they did out of the May Day protests of that year, during the course of which very large numbers of people (including passers-by as well as demonstrators) were held by the police for some seven hours in and around Oxford Circus. The action was said to be necessitated by the exigencies of the moment and of the police inability otherwise to control the thousands of protestors converging on Oxford Circus at that time; but the authorities had known all about the likelihood of demonstrations in London that day and on the police's own estimation, there were six-to-12 times as many police officers on the ground as there were 'hard core demonstrators looking for confrontation, disorder and violence'.[15] So how could matters have been allowed to reach a point where such a vast crowd of civilians could find themselves trapped by the police within a small area for so long without food, water, toilets or access to shelter? The Lords found (once again unanimously) that there had been no advance intention to cordon the area off, that it had been an on-the-spot response to a developing situation, and that (here is the bizarre point from the human rights perspective) because the purpose had been well-intentioned there had been no 'deprivation of liberty' of those affected for the purposes of article 5. As Lord Hope put it, 'there is room, even in the case of fundamental rights [. . .] for a pragmatic approach to be taken which takes full account of all the circumstances'.[16] Their Lordships felt on the facts that the police had no alternative, so looked into the right to liberty in search of an appropriate exception to deploy, and finding none decided to invent one by the device of attenuating the meaning of 'deprivation', albeit to the point (it might be thought) of absurdity.[17]

12 See the continued controversy over its use against photographers: 'Snap that tested terror laws to breaking point', *Guardian*, 12 December 2009. The inoculation in the text has not been effective against the European Court of Human Rights: **Gillan v United Kingdom**, 12 January 2010, and this has renewed pressure on the provision.

13 *Supra* n. 8, para. 36 (Lord Bingham).

14 *Austin and another v Commissioner of Police of the Metropolis* [2009] UKHL 5, [2009] AC 564.

15 *Ibid.*, para. 4 (Lord Hope).

16 *Ibid.*, para. 34.

17 'It would appear to me to be very odd if it was not [to] be open to the police to act as they did in the instant circumstances, without infringing the article 5 rights of those who were constrained.' *Ibid.*, para. 64 (Lord Neuberger of Abbotsbury).

Gillan and *Austin* both fail by engaging with the facts before them too generally. Viewed narrowly, each case deals with police officers exercising their discretion at a particular moment, to cope with events as they are unfolding before them – a protest is under way outside an arms fair; the throngs are converging on Oxford Circus. But in neither case ought the issues to be viewed in isolation in this way. In each factual situation that is thrown up by the two decisions, a proper assessment requires a broader picture to be taken into account: the overly easy manipulation of terrorism laws and their potential for discriminatory treatment in the first; the aggressive treatment of protestors by over-hyped police believing themselves to be otherwise at an operational loss in the second. Each case would seem to be wrong in both the senses discussed above, wrong in their analysis of the law and wrong, too, in the injustice of their results. *Laporte* shows that this wider contextualisation is achievable even within the courtroom. *Gillan* and *Austin* remind us that human rights cases can do harm as well as good, and that, appreciating this, human rights activists should be careful not to become too dependent on litigation as a tool of change. The idea of human rights functions both effectively and quite separately from litigation: the Convention moderated the law on proscription, between publication of the relevant white paper in 1998 and enactment of the consequential law in 2000, by forcing the insertion of an independent control on the banning of associations which was afterwards to allow the *People's Mojahadeen Organisation of Iran* successfully to challenge their own banning order.[18] Like Chris Patten in Northern Ireland before them,[19] two senior police officers – Hugh Orde[20] and Denis O'Connor[21] – have been able to pin the label of 'respect for human rights' on progressive changes they have sought to bring about within the police force. Just as a human rights victory in court may be the start of a struggle, so a defeat does not prove the uselessness of the term, particularly in these days when progressive politics has precious few other phrases to hand.

18 *Lord Alton of Liverpool (In the matter of the People's Mojahadeen Organisation of Iran) v Secretary of State for the Home Department* (PC/02/2006, 30 November 2007). See further, confirming that no appeal was possible, *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] EWCA Civ 443.

19 *A New Beginning: Policing in Northern Ireland – The Report of the Independent Commission on Policing for Northern Ireland* (September 1999). Online. Available at: http://cain.ulst.ac.uk/issues/police/patten/patten99.pdf (accessed 22 February 2010). See ch. 4: 'It is a central proposition of this report that the fundamental purpose of policing should be [. . .] the protection and vindication of the human rights of all' (4.1).

20 'New Acpo chief wants Human Rights to be put at Core of Policing', *Guardian*, 22 June 2009. Online. Available at: <http://www.guardian.co.uk/politics/2009/jun/21/hugh-orde-acpo-human-rights> (accessed 13 December 2009).

21 Her Majesty's Chief Inspector of Constabulary, *Adapting to Protest*. 'A number of recommendations have been made throughout the report to ensure that relevant human rights principles are firmly embedded within the framework of Public Order policing', p. 65. Online. Available at: <http://inspectorates.homeoffice.gov.uk/hmic/docs/ap/G20-final-report.pdf?view=Binary> (accessed 13 December 2009).

The right to liberty

Nowhere is the importance of the interrelationship between law, politics and human rights clearer than in the story of how the policy of *de facto* internment introduced in the UK after 11 September 2001 has proved unavailing. In the febrile atmosphere that followed the al-Qaeda attacks in the US on that day, it can hardly be doubted that without the constraining hand of human rights, the British authorities would have gone for an even more draconian response than that speedily encapsulated in the Anti-terrorism, Crime and Security Act 2001 (hereafter, 'the 2001 Act'). This measure introduced a form of executive detention for foreigners suspected of terrorist activity against whom it was not thought criminal proceedings could be taken. It was not internment proper because those affected could notionally choose instead to leave the country, albeit it was clear that the only states likely to receive them would put at risk their rights to life and/or not to be tortured. Indeed this was why they were being held rather than expelled after 11 September, a human rights advance in itself that had been made possible by the extra-jurisdictional effect the Strasbourg court had given to the European Convention as early as 1989 and then again in 1994.[22] The law also represented a derogation by the state from its human rights obligation to ensure the right to liberty, as the executive knew when asking Parliament to enact the legislation. The state's human rights commitments would require such a derogation to be a proportionate and necessary response to a public emergency threatening the life of the nation.[23] Once again, it is not difficult to guess the unconstrained powers that the emergency may have been thought to warrant in the absence of such human rights obligations. In the legislative debates themselves, anxiety about the law was reflected in the deployment of the language of human rights side-by-side with a more traditional British emphasis on liberty and freedom.[24] Despite the intensity of feelings generated by the 11 September attacks and the urgent timetable imposed by the government, the bill emerged from the process with a parliamentary commitment to review its most controversial features (particularly the detention powers) within one year of its coming into effect.[25]

Under the usual rules of parliamentary sovereignty, the courts would have had no involvement in oversight of the fundamentals of this system of detention – their role would have been at best to act as a kind of sceptical *ultra vires* referee positioned well back from the field of play. The Human Rights

22 *Soering v United Kingdom* (1989) 11 EHRR 439; *Chahal v United Kingdom* (1996) 23 EHRR 413.

23 Under article 15, and embedded in the (UK) Human Rights Act at s. 14.

24 I have discussed this at greater length in C.A. Gearty, 'Human Rights in an Age of Counter-terrorism: Injurious, Irrelevant or Indispensable?' (2005) 58 *Current Legal Problems* 25–46.

25 (UK) the 2001 Act at s. 122.

Act, though, permitted a direct frontal challenge and, after one false start in the Court of Appeal[26] and following a powerful report from the statutory review team which would no doubt have calmed nerves,[27] the House of Lords produced its famous Belmarsh decision on 16 December 2004.[28] As is well known, however, and crucially from the perspective of the argument about the intertwining of law and politics that I am making here, their Lordships did not strike down the law and free the Belmarsh detainees. Rather, their declaration of incompatibility in respect of the relevant provisions of the 2001 Act left the matter of what to do next squarely with ministers, Parliament and the court of public opinion. The judges did not deny there was an emergency, something which the majority considered would have been beyond their 'relative institutional competence'.[29] Rather, the Lords insisted that the ongoing terrorism crisis should be addressed within the broad framework of human rights law, including its emergency wing, and that throwing foreign suspects into prison indefinitely while taking no action against their exact British equivalents had been neither rational nor proportionate. The government did act after the Belmarsh verdict, introducing a general law intended to supersede the offensive detention powers in the 2001 Act with a regime of 'control orders' that fell short of detention, but which was designed nevertheless to impose a range of restraints on 'suspected terrorists' (British and non-British alike) against whom it was still not considered possible or desirable to proceed under the criminal law in the normal way. The measure was greeted with great hostility in Parliament, particularly in the House of Lords, and was much amended before it could escape the clutches of its sceptics and receive the Royal Assent as the Prevention of Terrorism Act 2005 ('the 2005 Act').

There is a strong argument that in the width of its reach and in the range of controls it can impose, the 2005 Act was, and is, in some ways worse than the more draconian but more narrowly focused law that it supplanted. However, once again this is to ignore the ameliorating effect of human rights. Extreme control orders (which require derogation from the European Convention) were so hedged about with additional safeguards when the law was going through Parliament[30] that not one has been made since the Act came into force.[31] All

26 *A and Others v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2004] QB 335.

27 Privy Councillor Review Team, *Anti-terrorism, Crime and Security Act 2001 Review: Report* HC 100 18 December 2003.

28 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

29 Lord Bingham at para. 29; cf Lord Hoffman at paras 88–97 who, famously, took a different view.

30 Frequently invoking the language of rights, it should be noted.

31 See Lord Carlile of Berriew QC, Fourth Report of the independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (3 February 2009), especially para. 12. Online. Available at: http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/lord-carlile-fourth-report.pdf?view=Binary (accessed 14 December 2009).

other (non-derogating) control orders have been subject to what must have seemed at times to government ministers to have been perpetual judicial review, both as to the procedure before they are made and as to their individual content.[32] Five years on, we can say with reasonable confidence that the judges have slowly suffocated to death the anti-terrorism control order system, with the handy pillow being the Human Rights Act. In the early cases, the system itself was allowed to survive unscathed while the judges picked around its edges.[33] Then came *Secretary of State for the Home Department v AF, AE and AN*.[34] In this case, the core of the non-derogating control order regime was undermined, possibly fatally, by the unanimous decision of a nine-strong Lords' bench that such orders could not be made on the basis (solely or to a decisive degree) of evidence given in closed sessions to which the person to be made the subject of such an order did not have access. This was to be the case even where the evidence against the proposed controlee appeared to be overwhelming, and it could, moreover, be achieved by reading down the Prevention of Terrorism Act 2005, that is, by enforceable interpretation rather than an unenforceable declaration. True, some of their Lordships were reluctant to go this far, but they felt their hand had been forced by clear Strasbourg authority on the matter, recently delivered.[35]

What are we to make of this story? The government seems close to giving up the ghost on control orders completely.[36] If this is the eventual outcome, it will have been a triumph of concentrated and determined defence of freedom and liberty which would certainly not have happened without a large coterie of committed parliamentarians (from both houses), civil libertarian activists and engaged members of the media, but which also owes its existence to a surprisingly progressive judicial branch armed with a Human Rights Act

32 As an example, only slightly extreme, the subject of a control order – AF – has had eight substantive hearings and been to the House of Lords twice: see *Secretary of State for the Home Department v AF, AE and AN, infra* n. 34.

33 Principally *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46, [2008] 1 AC 440; *Secretary of State for the Home Department v JJ and Others* [2007] UKHL 45, [2008] 1 AC 385; *Secretary of State for the Home Department v E* [2007] UKHL 47, [2008] 1 AC 499.

34 *Secretary of State for the Home Department v AF, AE, and AN* [2009] UKHL 28, [2009] 3 WLR 74.

35 *A v United Kingdom*, European Court of Human Rights, 19 February 2009, about which Lord Hoffmann in particular is scathing: see [2009] UKHL 28 at para. 70 *et seq*. Lord Rodger of Earlsferry contributes a three-sentence speech, the last of which reads: 'Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed' (para. 98).

36 Even before the judgment in the case, the Counter-Terrorism Act 2008 had marked a shift towards a renewed emphasis on the criminal process. The Home Secretary has responded to the decision by ordering a review of the powers. See: *Guardian*, 16 September 2009. Online. Available at: http://www.guardian.co.uk/politics/2009/sep/16/control-orders-review-alan-johnson (accessed 14 December 2009).

that was able to turn mere dismay at government action into a tangible legal product. It could not have done this without the oversight of the Strasbourg bench able to keep at least some of their recalcitrant British colleagues up to the mark. We should remind ourselves that this story could change at any moment: one of the tragedies of a liberal democracy's treatment of subversive violence is how easily it allows atrocity to set the legislative and executive agenda. But the evisceration of the control orders has survived the serious attacks of July 2005, and it is surely not being unduly optimistic to believe that if there are future mass attacks then it may be that the criminal law will be what will be reached for first.

Northern Ireland

Our third area involves three cases, the first very disappointing, the second a triumph in the way it was shaped (if not in its result, from a technical human rights law point of view), and the third a decision that seems at first sight to have nothing to do with Northern Ireland. However, this last case has made possible the recovery of what should have been, but scandalously was not, one of the enduring lessons of 'the troubles'.

The disappointing case is *In re Mc E*.[37] As a result of covert electronic surveillance of solicitor–client discussions at a police station in Northern Ireland, a solicitor was charged with incitement to murder and acts tending to pervert the course of justice. Serious certainly, but what is this about covert surveillance? The antennae of the Northern Ireland legal community are rightly sensitive to attempts to intrude upon the privileged communications between a lawyer and his or her client, with this having been one of the main battle lines in the fight for justice over 30 years of civil strife. No explicit legislation could be found authorising such action, and when the case reached the House of Lords, the senior Law Lord, Lord Phillips, was emphatic that it should not be allowed, or should be allowed only with the introduction of specifically designed safeguards. His view was that legal professional privilege was embedded as a human right in the common law and was not capable of being destroyed as a side-effect of legislation not directly addressing the issue. However, this is what his four colleagues decided had happened here: to Lords Hope, Carswell and Neuberger and Baroness Hale, the Regulation of Investigatory Powers Act 2000 had an approach to 'intrusive' surveillance which could be said to apply here, it having been formulated in sufficiently wide terms in that Act to reach the challenged surveillance. While this did not mean that the evidence generated by it could be used in court, no common law bar could be imposed on the workings of the statute. If certain of the senior judges, Baroness Hale for

37 *In re Mc E* [2009] UKHL 15, [2009] AC 908.

example, thought this result unpalatable but unavoidable,[38] their dissenting colleague had shown in his speech how the logic of their reluctant argument could have been resisted. Against a background of conflict and mistrust between sectors of the legal profession and the police in Northern Ireland, surely this would have been the wiser approach to have taken. The decision smacks just a little too disturbingly of those old times when the Law Lords took an overly benign view of what the authorities felt they had to do in Northern Ireland. At best it is an example of a case which – like *Austin* and *Gillan* previously – takes too narrow a view of the factual and legal task before it.

The second decision is important not because of its outcome, but because it happened at all in the way that it did. *In re E (A Child)*[39] arose out of the appalling mob violence that accompanied children on their way to school at Holy Cross Girls' Primary School on the Ardoyne Road in north Belfast during much of the early summer and autumn of 2001. The school was a Catholic one and the harassing crowds were from an estate of Protestant/loyalist families that bordered parts of the road on both sides. Reaching for language to capture the degree of horror and upset that these young school children were required to endure, albeit under police protection, to get to their classrooms, all sides found descriptive clarity in the statutory abhorrence of 'inhuman and degrading treatment' which is contained within the absolute prohibition on torture and inhuman and degrading treatment to be found in article 3 of the European Convention on Human Rights. This in itself was valuable, equipping the judges with a means of expressing their disgust in a way that can rarely be found in the dispassionate common law. Particularly important, and given its source (a Law Lord from Northern Ireland where he had been a long-serving Lord Chief Justice), these remarks from Lord Carswell were especially powerful:

> The behaviour of the loyalist crowds along Ardoyne Road which I am about to describe has been termed a 'protest' in the documents before the House. It is said that the *fons et origo* was a protest from the loyalists about an issue about which they felt concern [. . .] Whatever the initial cause may have been, however, it is entirely clear that the behaviour complained of far exceeded the bounds of that which could be associated with any legitimate protest. It was utterly disgraceful and was condemned by Kerr LCJ in strong terms in paragraph 63 of his judgment. The term 'protest' is accordingly inappropriate, as may also be the term 'demonstration' in the circumstances of this case. Nor is it readily apparent that the events should be classified as a 'dispute', as referred to in some of the affidavits sworn by police officers. Since those events are described in so

38 *Ibid.*, para. 67 (Baroness Hale of Richmond).
39 *In re E (A Child)* [2008] UKHL 66, [2009] AC 536.

> many material documents as a protest, I shall continue to use the term, but subject to the caveat which I have expressed.[40]

There is a second point of interest about this case. There was no dispute that the crowds were engaged in actions within article 3, the case reaching the House of Lords on the point of whether the police could have done more to have prevented the ill-treatment. The five House of Lords judges who heard the case were unanimous that the authorities had done what they could. Lawyers for the school children and their families were wrong to argue that the positive obligation to act to prevent third-party breaches of article 3 was absolute, as were the interveners of the Northern Ireland Human Rights Commission.[41] This must be right – to say otherwise is to forget that rights cannot be turned into obligations so onerous that their blanket protection causes more damage than the original violations.

The point does not arise, of course, where it is the state itself that is doing the ill-treating. In our third case, *Al-Skeini v Secretary of State for Defence*,[42] six Iraqi civilians were killed by British armed forces personnel in Basra, southern Iraq, one of them after what Lord Bingham observed in the case had been 'brutal maltreatment'.[43] When the government refused a public inquiry, the father of one of the deceased, Mr Baha Mousa, was able successfully to argue for such an investigation before the House of Lords, with the remit of the Human Rights Act being found to extend to the situation in which the deceased had found himself, in custody in a UK military detention facility and entirely at the mercy of his jailors. As a result of the sequence of events set in motion by this case, and made possible only on account of enactment of the Human Rights Act, there is now sitting on a regular basis in London an inquiry into the death of Baha Mousa, chaired by the retired Court of Appeal judge Sir William Gage.[44] It would seem that the lessons of that best-known of all Strasbourg cases, *Ireland v United Kingdom*,[45] that techniques of sensory deprivation have no place in the arsenal of the British military, have been forgotten. Also apparently lost has been any collective recall of the 'solemn and unqualified undertaking not to reintroduce' the techniques at the heart of the *Ireland* case which Her Majesty's government gave in the course of that litigation, on 8 February 1977.[46] It is a salutary reminder of the fragility of law that so great a victory as that secured by the *Ireland v United Kingdom* proceedings in the 1970s should have been so casually cast aside. There can be

40 *Ibid.*, para. 21.
41 *Ibid.*, paras 47–48 (Lord Carswell).
42 *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153.
43 *Ibid.*, para. 1.
44 Source online. Available at: http://www.bahamousainquiry.org/index.htm (accessed 16 December 2009).
45 *Ireland v United Kingdom* (1978) 2 EHRR 25.
46 *Ibid.*, para. 153.

no better indicator of the fact that case law, even great cases, can achieve very little in isolation, that – in order to work – judicial decisions have to be drilled down, into the training and understanding of those with the responsibility of adhering to them, and done so in a way that makes compliance part of common sense rather than seem to be a buckling before a hostile agency. Lawyers cannot do this on their own; they can create platforms for action, but others must then act.

Conclusion

Domestic human rights legal scholarship can and should operate at a number of different levels. There is certainly plenty of scope – indeed need – for technical analysis of the various, sometimes complex, issues that the case law under the Human Rights Act has thrown up.[47] Barristers seeking to win cases for their clients must make do with what they find, while academics – standing back a little – can try to rework and remould, their driving force being clarity, not victory. This is quite a service for the state to have put at the disposal of the professional advocates and the judges who must choose between the adversaries before them. Human rights scholarship, on the other hand, should also always strive to acknowledge the wider context of the cases it puts under scrutiny, their place in the (political, historical) moment that has produced them, the principles that drive (or should have driven) the outcomes that have been arrived at, and the values that underpin the judicial performance. All human rights legal work of this sort should be socio-legal, even if this dimension must sometimes (on account of the technical focus of the discussion) be only in passing. However, behind even apparently abstruse discussions of complex human rights points are elderly people about to be removed from their care homes or a travelling family trying to remain on their chosen site: there are no 'black letter' cases in human rights law. It follows from all of this that the academic human rights lawyer should never be afraid to criticize outcomes on grounds of justice in the two senses of the word as we have used it here: a case that is wrong because it has misinterpreted the law, and one that is wrong because it has got a bad law right. Nor should such a lawyer reify the language of human rights, regarding every argument made on the term's behalf as necessarily a good one. An understanding of what lies behind human rights can sometimes – perhaps often – lead in the direction of an apparent human rights defeat: *In re E* is a good

47 E.g., the mess into which a succession of cases have got housing law and human rights. For the most recent instalment, see *Doherty v Birmingham City Corporation* [2008] UKHL 57, [2009] AC 367. A similarly challenging but difficult area is the application of the Convention rights to private bodies; see *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.

example of this. The human rights lawyer should bring passion to his or her subject, but also nuance and a capacity for hard analytical work. The Human Rights Act provides a credible route into the law for such law-activists to demonstrate their skills. Ten years on, its record suggests that in these relatively barren times for radical, emancipatory politics, it has done a good job on behalf of many – some discussed in the course of this chapter – whose voices would otherwise not have been so clearly heard (perhaps even heard at all). But to stay healthy, the Human Rights Act will need generations of lawyers as skilled and committed as Kevin Boyle has been through his long and varied career.

5 Rights and righteousness

Friends or foes?

Francesca Klug[1]

Two years after the Second World War a little-known, but remarkable, symposium of philosophers and writers was published by UNESCO. Giants in their field, including Harold Laski, Aldous Huxley and Mahatma Gandhi, contributed their reflections on the meaning and nature of rights, and their inter-relationship with duties, to a Committee of Experts in Paris.[2] The following year their deliberations fed directly into the drafting of the founding document of the modern international human rights movement, the Universal Declaration of Human Rights.

Six decades later, many of the same issues are still the subject of fraught debate in the UK and beyond – the relationship between rights and duties, legitimate limitations on individual rights, the role of culture and religion in the articulation of rights, and whether human rights are necessarily secular. Looking back at the historical development of rights, this chapter considers the relationship, if any, between religious values and human rights.

Rights and righteousness

Before I worked for Professor Kevin Boyle as a Research Fellow at Essex University in the early 1990s, I had little exposure to the values that drove the development of international human rights law. Until then, I had understood human rights to be a set of legal entitlements by the individual against the state. Kevin Boyle's scholarship revolutionized my understanding of international human rights as a set of ethical values which shaped the law.

1 Francesca Klug is a Professorial Research Fellow, LSE. This paper is based on Klug's keynote speech to the 'Rights and Righteousness: Religious pluralism and human rights' conference, in Belfast, 1–2 November 2007, organised by the Northern Ireland Human Rights Commission and the Irish School of Ecumenics. Her speech has subsequently been published by the Irish School of Ecumenics.

2 *Human rights: comments and interpretations*, A Symposium edited by UNESCO, with an introduction by Jacques Maritain, Columbia University Press, 1949.

His insights into faith-based values, and their influence on human rights discourse, were a revelation to me.

To mark the 60th anniversary of the UNESCO symposium, Kevin and I were invited to Belfast to address a conference, organized by the Northern Ireland Human Rights Commission and the Irish School of Ecumenics, on the theme of 'Rights and Righteousness'. This intriguing pathway into discussing religious values and human rights led me to research the etymology of both terms to explore whether they shared a common ancestry. The Oxford English Dictionary defines righteous as 'just, upright, virtuous, law-abiding'. The word 'right' has many definitions, with 'just and fair treatment' amongst them. This suggested that there was enough common ground between the two to explore whether, in the modern world, rights (or specifically *human* rights) and righteousness can be understood as inter-related ideas with common roots, or alternatively potential antagonists – staring at each other across a gulf of incomprehension and mistrust.

According to the *Book of Proverbs* 'he who is steadfast in righteousness [defined as uprightness and right standing with God] attains to life'. The Psalms tell us that 'the righteous shall inherit the land, and dwell therein for ever', and the *Gospel of Matthew* proclaims 'blessed are they who hunger and thirst for righteousness, for they will be satisfied'.[3] If the 19th-century evangelist and writer Dr Herbert Lockyer is correct, the root meaning and essential idea of the term 'righteousness' is that of 'rightness, or being right or just in all things'.

Rights, on the other hand, have an altogether different connotation in public discourse. The legal theorist, William Edmundson, in his monograph, *An Introduction to Rights*, describes human rights as rooted in the recognition of 'extraordinary, special basic interests', which 'sets them apart from [. . .] even moral rights, generally'.[4] Michael Freeman, in his introductory textbook, defines human rights as 'just claims or entitlements that derive from moral *and/or legal* rules'.[5]

Rights as selfish interests?

The association between human rights and individual interests, or technical legal rules – and, by extension, individualism and selfishness – has a long and varied pedigree. Former Archbishop of York, Lord Habgood, spoke for many ecclesiasts when he argued in a lecture at Westminster Abbey in the same year the UK Human Rights Act (HRA) was introduced that:

3 See: http://nccbuscc.org/nab/bible/matthew/#foot7.
4 W. Edmundson, *An Introduction to Rights*, Cambridge University Press, 2004.
5 M. Freeman, *Human Rights*, Polity Press, 2002, p. 6.

> [T]he indiscriminate use of the concept of rights can undermine morality at its very core by focusing attention on what the world owes us, rather than on the network of mutual obligations and shared assumptions which compose the fabric of a healthy society.[6]

Lord Jakobovits, the late Chief Rabbi, made a similar point when he argued:

> [C]ould it be that the greatest moral failure of our time is the stress on our rights, on what we can claim from others – human rights, women's rights, workers' rights, gay rights and so on – and not on our duties, on what we owe to others? In our common tradition, the catalogue of fundamentals on which our civilisation is based is not a bill of rights, but a set of ten commandments, not claims but debts.[7]

The former pope, John Paul II, lamented that human rights are being reduced to simple 'self-centred demands'. He said in 2004:

> [O]ver the last 40 or so years [. . .] while political attention [. . .] has focused on individual rights, in the public domain there has been a growing reluctance to acknowledge that all men and women receive their essential and common dignity from God and with it the capacity to move towards truth and goodness [. . .] detached from this vision.

He continued, 'rights are at times reduced to self-centred demands'.[8]

Cambridge professor of philosophy, Onora O'Neill, who has described human rights as the 'idol of our age', warned in her 2002 Reith lecture that 'it was dangerous to be looking at rights without looking at obligations'.[9] And the current Chief Rabbi, Jonathan Sacks, has likewise called for a new politics which would 'think more expansively about the citizen as a bearer of *duties*, sharing responsibility for the civic order and not merely as bearer of *rights* [. . .] and the pursuit of claims-as-rights'.[10]

All these commentators might be surprised to learn that they share their exception to a framework of rights devoid of duties with Karl Marx and Friedrich Engels. Marx's 'Statutes of Organization of the International Federation of Labour' stated that: 'The Federation recognizes that there shall

6 Lord Habgood, The Sydney Bailey Memorial Lecture, Westminster Abbey, London, April 1998.

7 Debate on 'society's moral and spiritual well-being', House of Lords *Hansard*, vol. 573, col. 1717, 5 July 1996.

8 Address of John Paul II to the Bishops of the Church in Colorado, Wyoming, Utah, Arizona, New Mexico and Western Texas on their 'Ad Limina' visit, 4 June 2004.

9 O. O'Neill, *A Question of Trust: The BBC Reith Lectures 2002*, Cambridge University Press, 2002.

10 J. Sacks, *The Politics of Hope*, Jonathan Cape, 1997, p. 233.

be no rights without duties and no duties without rights'.[11] Engels complained that 'instead of "everyone shall have equal rights", we would suggest "everyone shall have equal rights and duties" '.[12]

It is no exaggeration to say that the rights/responsibilities nexus has become a central feature of modern political discourse. But whilst the portrayal of a society plagued by rights inflation and devoid of responsibilities or mutual obligations (the antithesis of righteousness perhaps) will resonate with many people, this is, I would suggest, largely based on a misconception of the history and nature of *human* rights; it is as profound a caricature as describing religion as 'the opiate of the masses'.

Human rights as secular?

Virtually every serious modern scholar of human rights traces the roots of the idea that every human life is of equal worth and dignity to the biblical notion that human beings are created in the image of God or the divine; an idea replicated in most of the world's major religions. It follows that every human being has inalienable value, which is why no human being should ever be instrumentalized or treated as a means to an end, the foundational idea of human rights.

However, many of the early 'natural rights' theorists of the European Enlightenment went further than expounding this ancient doctrine in new terms. They saw God or the creator as the literal *source* – and explicit *justification* – of the idea of 'natural rights'.

The words of the *American Declaration of Independence* have echoed down the generations, but its reference to a higher authority is often overlooked: 'We hold these Truths to be self-evident, that all Men are created equal; that they are endowed by their *Creator* with certain inalienable Rights; that among these are Life, Liberty and the Pursuit of Happiness' (emphasis added).

The revolutionaries of the Enlightenment may have been in revolt against the apparent divine right of kings and the established church to control their minds as well as arbitrarily curtail their freedoms, but it was to their 'maker' that many of them turned for legitimization of their cause.

For all his championing of individual rights, Jean-Jacques Rousseau, for example, maintained that religious belief was a necessary foundation of virtue. 'It is not enough, believe me,' he wrote 'that virtue should be the basis of your conduct, if you do not establish this basis itself on an unshakable foundation.'[13] Although their emphasis was on the God-given rights individuals

11 Quoted in I. Szabo and others, *Socialist Concept of Human Rights*, Budapest: Akademiai Kiado, 1966, pp. 52–61.

12 Quoted in Erica-Irene Daes, 'Freedom of the Individual Under Law', UN, 1990, p. 40.

13 Jean-Jacques Rousseau, *Julie, ou La Nouvelle Héloise* (1761).

were supposedly born with (well white, European, Christian men anyway), the moral obligations individuals supposedly owed to each other were not entirely absent from the world view of the early rights theorists.

Tom Paine, the famous 18th-century English radical, wrote that when the 1789 French Declaration of Rights was debated in the National Assembly there was a call for a Declaration of Duties to accompany it. His response: 'A Declaration of Rights is, by reciprocity, a Declaration of Duties also. Whatever is my right as a man, is also the right of another; and it becomes my duty to guarantee, as well as possess.'[14]

The American academic theologian, Michael Westmoreland, whose wife is a Baptist minister, traces the idea of 'human rights' as a source of political struggle to the divinely inspired Levellers who emerged during the English civil war. 'Human rights are a Christian heritage', Westmoreland argues, 'and yet, today,' he says, 'this concept of basic justice for everyone' is regarded as 'secular thinking' by the Christian community itself.[15]

This portrayal of human rights as essentially secular – in the sense of being sceptical or opposed to religious belief – is not uncommon amongst human rights activists either. It is sometimes worn as a badge of pride. This label can be adopted as an attempt to capture the universal features of human rights, a means of signalling that they are not the property of any particular belief or creed. The term 'secular' does not sufficiently convey the nature and historical evolution of human rights.

The separation between church and state in France and America (and, for that matter, in modern Turkey) has driven this association between human rights and secularism. However, this is to confuse a constitutional arrangement in a few countries with the values which drive an idea of global force. All over the world, religion has of course been a prime force behind campaigns for human rights, often explicitly so.

The role of the American and English Protestant churches in anti-slavery campaigns is well known. There have also been links of equal significance between Hinduism and the embracing of human rights in post-colonial India, Catholicism and liberation struggles in South America, Islam and modern-day protests against human rights atrocities in Palestine and Sudan, and between Buddhism and the ongoing struggles in Tibet and Burma. The Israel-based peace movement, Rabbis for Human Rights, speaks for itself.

Some years ago, I wrote a book with the worst-judged title in history, *Values for a Godless Age*, to coincide with the introduction of the HRA.[16] A snappy title, which helps to sell books, but one I would not use again. Less than a year after it was published, the events of 11 September 2001 crashed

14 T. Paine, *Rights of Man* [1791], Penguin, 1984, p. 114.

15 See: http://blog01.kintera.com/christianalliance/archives/2006/12/international_h.html.

16 F. Klug, *Values for a Godless Age: The story of the United Kingdom's new bill of rights*, Penguin, 2000.

onto our world and God was back as a driver of passions and disputes across the globe.

The point of my title was *not* to portray human rights as essentially a *secular* idea, as some people understandably thought. On the contrary, my intention was to suggest that the way to understand human rights is not, primarily, as *legal* entitlements for individuals, but as ethical values for a diverse society – values which stem from some of the same insights that have guided the great religions.

I am far from alone in this view. The Islamic scholar and Iranian law professor, Hossein Merphour, has declared that 'apart from that aspect of religion which consists of the important duty to spiritually guide and instruct, there are no serious differences or contradictions [. . .] between religious teachings and [. . .] human rights'.[17]

Renee Cassin, one of the prime drafters of the Universal Declaration of Human Rights (UDHR) of 1948, was more specific still. He maintained that:

> [T]he first article in the UDHR that all human beings 'should act towards one another in a spirit of brotherhood,' corresponds to the injunctions familiar to the Abrahamic religions that we should 'love thy neighbour as thyself' and 'love the stranger for you were strangers once'.

'We must not lose sight of fundamentals,' Cassin wrote, in noting that 'the concept of human rights comes from the Bible.'[18]

Human rights as ethical values?

The ethical ambitions of the UDHR were widely shared amongst its drafters. H. Santa Cruz, the Chilean delegate, expressed his hope that 'the International Bill of Human Rights should not just be a Bill but rather a true spiritual guide for humanity enumerating the rights of man which must be respected everywhere'.[19] When the Declaration was finally adopted by the UN in 1948, Cassin said 'something new has entered the world . . . the first document about *moral* value adopted by an assembly of the human community'.[20] This conception of human rights as rooted in an ethical vision for humanity, stands in stark contrast to their portrayal as steeped in selfishness and individualism.

17 H. Mehrpour, 'Human Rights in the Universal Declaration and the Religious Perspective', in *Reflections on the Universal Declaration of Human Rights*, Kluwer Law International, 1998, p. 196.

18 R. Cassin, 1972. See M. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era*, University of California Press, 2004, p. 19.

19 E/CN.4/AC.1/SR.2/p.3, 13 June 1947.

20 Quoted in J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, 1999, p. 33.

The link between human rights and ethical values – or, put another way, the link between human rights and the right way to behave, or righteousness – is easier to understand if we trace the evolution of the idea of human rights over time. The influence of the UNESCO symposium on the drafting of the UDHR is stark. An extract from the 1947 papers amply demonstrates the convergence of the common themes of individual dignity and mutual respect:

> [F]aith in freedom and democracy is founded on faith in the inherent dignity of men and women [. . .] these rights are claims which all men and women may legitimately make, in their search, not only to fulfil themselves at their best, but to be [. . .] capable [. . .] of becoming in the highest sense citizens of the various communities to which they belong and of the world community, and in those communities of seeking to respect the rights of others, just as they are resolute to protect their own.[21]

Both the UNESCO publication, and the drafting of the UDHR the following year, were driven by a set of cataclysmic events which were, of course, very different from those which preceded the first wave of rights Charters in late-18th-century Europe and America; although it is the latter, more distant, era which is probably more rooted in the modern public consciousness.

The UDHR (like its Enlightenment counterparts) was aimed at protecting individual freedoms and liberty from arbitrary power and state tyranny. But the context was new. Present in the minds of the drafters were the immediate horrors of the Second World War, the death camps and the persecution and dehumanisation of non-Aryans, which led thousands of fellow citizens to 'walk on the other side'. If the main target of the 'first wave' Enlightenment era was to set people free, in the post-war period it was to create a sense of *moral purpose* for all humankind. In the words of Mary Robinson, the former UN High Commissioner for Human Rights and former President of Ireland, the UDHR was 'an elevating force on the events of our world'.[22]

Since this time, the drafters of international human rights treaties (including the European Convention on Human Rights) have sought to establish a framework of ethical values driven not just by the *ideals* of liberty, autonomy and justice, but also by normative *values* like dignity, equality and mutuality. One obvious lesson drawn from the descent into barbarism that had given impetus to the development of an International Bill of Rights, the collective name given to the UDHR and the two binding treaties which flowed from it,[23] was that the same individuals who require protection from tyranny can also contribute to it. Creating mechanisms to prevent states from abusing the

21 *Supra* n. 2, p. 260.

22 Mary Robinson, 'A Declaration of Human Rights: A Living Document', address at the Symposium on Human Rights in the Asia-Pacific Region, Tokyo, 1998.

23 The 1966 International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights.

rights of their citizens was crucial, but plainly not enough to guarantee liberty. The thinking was that individuals *themselves* needed to be inculcated with a sense of *moral purpose* if there was 'never again' to be a genocide like the one unleashed by the Nazis.

Rights and duties

The question was, how to achieve this sense of 'moral purpose'? Jacques Maritain, one of the contributors to the UNESCO papers, maintained that rights and duties are correlative: '[. . .] a declaration of rights should normally be rounded off by a declaration of man's obligations and responsibilities towards the communities of which he is a part, notably the family group, the civil society and the international community'.[24]

For similar reasons, Latin American states in particular were in favour of including a list of duties in the UDHR. The Chinese delegate, Dr Peng-chun Chang, was also supportive because:

> The aim of the United Nations was not to ensure the selfish gains of the individual but to try and increase man's moral stature. It was necessary to proclaim the duties of the individual for it was a consciousness of his duties which enabled man to reach a high moral standard.[25]

There was considerable debate amongst the UN delegates about who owed rights and obligations to whom. Was it just the state which owed obligations to individuals, who are the sole bearers of rights, or do individuals have duties to the state? In the end they agreed to a framework rooted in mutual obligations based on what individuals owe each other and the community in which they live (as distinct from what they owe the state).

This approach is directly reflected in Article 29 of the UDHR, which states simply that: 'Everyone has duties to the community in which alone the free and full development of his personality is possible.' The wording of this article expresses two intertwined ideas. First, that if human rights protection is to be effective, this involves an appreciation that all individuals have responsibilities to each other, as well as rights that must be protected by the state, as Tom Paine remarked 150 years earlier.

Second – and this was to some degree a departure from the earlier 'natural rights' framework – that individuals do not exist in the world as isolated beings, but live in societies, or more specifically communities, on which they depend. In this sense the sometimes false dichotomy between individual and collective rights can miss the point. Human beings don't usually flourish

24 *Supra* n. 2, p. 76.
25 Ninety-Fifth meeting of Third Committee, 6 October 1948, E/800, p. 87.

in dysfunctional communities so there is little purpose in granting individuals' rights if the cost is the demise of the community in which they live. Nevertheless, all communities are not the same, of course, and the responsibilities individuals owe will differ, depending on the context.

The word 'alone' in Article 29 is significant here. It was added to Article 29 at the suggestion of the Australian delegate, Alan Watt, and was supported by the UK delegate because it 'stressed the essential fact that the individual could attain the full development of his personality only within the framework of society'.[26] According to Professor Johannes Morsink, the word 'alone' 'may well be the most important single word in the entire document for it helps answer the charge that the rights set forth in the Declaration create egotistic individuals who are not closely tied to their respective communities'.[27]

So important was the content of Article 29 to the UDHR that it was originally drafted as the first article of the Declaration. Cassin had placed the 'responsibilities Article' first because he thought it 'essential' before defining the concrete rights, such as the right to life, to define 'values which were higher than life itself'.[28] Others supported this proposed sequence to emphasize to the reader from the outset that the rights and freedoms in the Declaration were to be enjoyed within the framework of a functioning society.[29]

The communitarian themes of Article 29[30] – there is no more accurate word for them – partly reflected the political, philosophical and religious backgrounds of the drafters of the UDHR which, in addition to liberalism, social democracy and socialism, included Islam, Judaism, Christianity and Confucianism.[31] But the reflections on responsibilities, as well as rights, mainly stemmed from the same mission that influenced so much of the contents of the Declaration. This was not just to set the people free, but also to find common values in which the liberties of individuals would be respected without weakening the bonds so necessary for human flourishing. It was a different understanding of the concept of freedom. In other words, the

26 Hundred and Fifty-Fourth meeting of Third Committee, 24 November 1948, E/800, p. 660.

27 *Supra* n. 20, p. 248.

28 E/CN.4/AC.2/SR.2/p.6, 5 December 1947.

29 E/CN.4/SR.77/p.2–3, 28 June 1948.

30 The pinpointing of community as a central political idea can be traced to a group of thinkers known as communitarians. For decades, a debate raged in the US between academic communitarians like Michael Sandel and liberal philosophers like John Rawls. The communitarians quarrelled with the idea that states should provide a neutral framework of rights and freedoms within which individuals can pursue their private ideals. For communitarians, good government involves recognizing and conserving the networks to which individuals belong. Rights entail a responsibility to participate in these networks and to care about the moral tone of society as a whole. See, for example, M. Sandel, *Liberalism and the Limits of Justice*, Cambridge University Press, 1982; C. Taylor, *The Ethics of Authenticity*, Harvard University Press, 1991.

31 *Supra* n. 20, chapters 1, 2 and 8.

earlier 'natural rights charters' were not simply being replicated in a global bill of rights. In the words of Renee Cassin, the UDHR was not 'a mere offshoot of the eighteenth century tree of rights'.[32]

There is no better illustration of this evolution in the human rights framework than in the contrast between the First Amendment of the American Constitution, which declares that 'Congress shall make no law [. . .] abridging the freedom of speech', and the responsibilities-driven right to free expression in Article 10 of the European Convention on Human Rights (ECHR). The latter explicitly recognizes that the exercise of free expression 'carries with it duties and responsibilities' by individuals, as well as states, so that the right to free speech can be legitimately limited to protect the rights and reputation of others and various other social goods, like public safety or the prevention of crime.[33]

Addressing tensions and conflicts between rights

At the root of the mischaracterization of human rights as essentially individualistic or egoistic lies the failure to appreciate that the post-war human rights framework was partly designed to address tensions and conflicts *between* rights – and between individuals and groups – that are inevitable in diverse societies and in the global community. This is the practical purpose – the utility – of human rights, which has been achieved with varying degrees of success.

Protecting individual freedoms from an overweening state is only one element of the post-war vision of rights, therefore. For as well as potential violators, states are given the prime role as *protectors* of human rights in international law – referees, if you like, between competing needs and interests. Human rights values are intended to provide a framework through which to umpire differences. Case law from the European Court of Human Rights (ECtHR), and domestic courts applying legislation such as the HRA, provides countless examples of how this framework of competing values can play out in practice.

When Mark Anthony Norwood, a British National Party member, placed a poster in the window of his house, which depicted the New York twin towers in flames with the phrases 'Islam out of Britain' and 'protect British people' emblazoned on the poster, he was convicted of a 'religiously aggravated' offence under the Public Order Act.[34] The ECtHR found that he could

32 *Ibid.*, p. 245.

33 A similar reference to duties and responsibilities is found in the right to freedom of expression in the International Covenant on Civil and Political Rights (ICCPR), which gave legal enforcement to the civil and political rights of the UDHR.

34 *Norwood v DPP* [2003] EWHC 1564 (Admin).

not claim his right to free speech had been violated because his anti-Islam images were a public attack on all Muslims.[35] The ECHR (Article 17) explicitly prohibits individuals from using human rights as a pretext to violate the rights of others.

However, in this case, the attack was against a religious (or some would say ethnic) *group* rather than a religious *belief*. Attacks on ideas or beliefs raise more complex issues. The ECtHR has often emphasized that freedom of expression is a fundamental right that applies not only to ideas that are inoffensive, but also to those which 'offend, shock or disturb', and that pluralism demands tolerance of views critical of religious beliefs.[36] Nevertheless, the state also has a responsibility to protect the right to freedom of conscience and religion, which can exist in tension with free speech. The ECtHR refused to interfere when the Austrian state seized copies of a film by the Otto-Preminger Institute, which satirized Jesus as a mental defective attracted to the Virgin Mary.[37] The Court affirmed that even the devout must tolerate and accept the denial by others of their religious beliefs, but the *manner* in which religious beliefs and doctrines are opposed by private individuals can become the responsibility of the state if it inhibits freedom of worship or belief. The Court declared that governments have a duty, in extreme cases, to prevent portrayals of religious objects that are so provocative as to be a malicious violation of the spirit of tolerance which lies at the heart of the ECHR. *Otto-Preminger* was a controversial decision to many, as it clearly involved a considerable incursion into free speech. Nevertheless, it is possible to elaborate on the *principles* this judgment articulated without supporting censorship or bans (outside the context of incitement to violence or hatred).

Human rights values, such as those just described, potentially provided a way through the morass that surrounded the so-called 'cartoon controversy' that engulfed Europe and the Middle East in 2005–06. The European editors who published the Danish cartoons that suggested an association between Islam and terrorism explicitly sought to make a stand against self-censorship in the name of what they saw as a threat to the supreme Enlightenment value of free speech. They maintained that freedom of expression *must* include the licence to offend – licence in the sense of complete freedom rather than just legal permission.

However, the human rights framework suggests that self-restraint can be necessary to prevent the demonizing or denigration of minorities in certain contexts, whilst maintaining a free and uncensored press. The right to free expression is the *only* right in the ECHR and the ICCPR[38] which explicitly refers to *individual* responsibilities. As the Nazi Holocaust, the Rwandan

35 *Norwood v UK* (2005) 40 EHRR SE11.
36 *Handyside v UK* (1976) 1 EHRR 737.
37 *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34.
38 *Supra* n. 33.

genocide, and the Bosnian massacres demonstrated, we now *know* that free speech, the cornerstone of a democratic society, can also be used to deny, or even obliterate, the rights of others in certain circumstances. They may not have known that in the Europe of the Enlightenment, but we cannot shun this knowledge today. The post-war human right to free expression encompasses the *totality* of this perception.

Exercising the right to free expression in 'a spirit of brotherhood', in the words of Article 1 of the UDHR, sometimes involves refraining from speaking – or indeed drawing – when it is not the state or other sources of power that are being attacked, but vulnerable individuals whose core identity is at stake.

Any serious debate about religious belief or doctrine should expect to be protected by the ECHR. Serious debate was entirely absent, though, from these graphics which caused fear and outrage, not just to those they lampooned. The principles of tolerance and dignity that define plural societies can also provide the basis for necessary and proportionate limitations on free expression.

The exercise of religious freedom does not begin and end with belief, of course. Although international human rights law provides *absolute* protection of the right to religious (and non-religious) thought and conscience, the *manifestation* of belief can be limited to the extent that is necessary (but not more than that) to protect the fundamental rights of others, and in some circumstances, the common good. This is the doctrine of proportionality that lies at the heart of the post-war human rights framework and the ECHR, in particular. Whilst there are some values, like freedom from torture and slavery, which are absolute, most rights are limited or qualified in line with the communitarian approach established by the 'responsibilities Article' of the UDHR.

After a bitterly contested case in the domestic courts, Shambo, an ill-fated holy bull who lived in a Welsh Hindu temple and tested positive for the bacterium that causes bovine TB, was slaughtered under the authority of the Welsh Assembly. The Court of Appeal ruled that Shambo's slaughter was potentially a grave and serious breach of the Hindu community's manifestation of religious expression, but it was a *necessary* limitation on religious freedom to protect public health, making the slaughter regrettable but proportionate.[39] It is possible to agree or disagree with this decision, of course, but the point is that in pluralistic societies with diverse beliefs and creeds it is essential to have a transparent framework of consistent principles – rooted in a search for what is just and fair – to address different, and sometimes directly conflicting, perspectives.

The sometimes tortuous debate over the degree to which it is 'just and fair' for religious bodies to opt out of laws prohibiting discrimination, underlines the difficulty of applying such a framework in practice. There was equal

39 *R (Suryananda) v Welsh Ministers* [2007] EWCA Civ 893.

controversy over *exempting* religious organizations from complying with sexual orientation regulations to avoid conflicting with the 'strongly held religious convictions' of (a significant number of) their members,[40] as there was over *requiring* publicly funded bodies, like Catholic adoption agencies, to comply with them.[41] Righteousness in action requires practical solutions to difficult dilemmas. A human rights framework is an attempt to root such solutions in 'the right thing to do' rather than simply what the majority wants, or what is easier or cheaper to achieve.

Conclusion

What is the justification for such a framework – who is to say a human rights approach is of more value than any other? It is absolutely true that, in contrast to the early 'natural rights' theorists, modern human rights charters do not rely on a creator, or God, to justify the ethical value system that human rights proclaim. The concept of dignity has replaced the idea of 'God' or 'nature' as the foundation of 'inalienable rights'. The essential dignity of all humanity is sufficient to warrant equal treatment, the argument goes, regardless of whether you believe that human dignity stems from a higher being or not.

However, this emphasis on dignity rather than the divine does not mean that human rights are fundamentally individualistic *or* necessarily secular in orientation. The idea of human rights is rooted in a belief that there is sufficient common ground between all humanity – between men and women of *all* religions and beliefs and none – to establish a set of bottom-line values rooted in respect for the equal worth of everyone.

Human rights are not the same as religious belief, of course. There is no truth to promote beyond the inherent dignity of all human beings, no doctrine beyond fair and equal treatment. Human rights are very much rooted in the here and now rather than the afterlife. The purpose is not to *compete* with the spiritual values and *private* convictions heralded by the world religions. It is to seek agreement on what values we can share so that we can live together in peace – and mostly in harmony – in a diverse world where people of many creeds and philosophical beliefs share the same political and geographical spaces.

The very first article of the UDHR recognizes that we humans are more than material beings with definable needs and rights, natural or otherwise. It proclaims that human beings 'are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. Our essential nature as human beings is rooted in two elements, it is proposed. Our ability

40 Equality Act (Sexual Orientation) Regulations 2007.

41 *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales*, Charity Tribunal decision, 1 June 2009.

to think and reason, in the classical Enlightenment mould, but also our capacity to care, to feel empathy – 'to suffer with', in the ancient Greek conceptualization of the term.

This insight into the human condition underlines the whole enterprise of the UDHR. If human beings were only capable of rational thought, but couldn't feel empathy for others, the project to create a fairer and more just world would have been doomed from the outset – or even more doomed than it has proven to be.

Where a human rights and a religious or spiritual framework seemingly overlap the most, therefore, is where they require us to stay in touch with our conscience. The strongest confluence is where they drive us to be aware of more than we can see with our eyes – whether this concerns deporting or 'rendering' people to places where they will be tortured out of sight, or fundamental questions about end-of-life decisions that take place in the twilight. It is this search of our conscience that I understand to be at the root of the quest for righteousness, as well as human rights. It is arguably why, as the dictionary suggests, there may well be common roots to both terms.

6 Human rights, power, and the protection of free choice

Sheldon Leader

Human rights, we are often told, are there to control abuses of power. That is true as far as it goes, but much depends on how far we are to stretch the point. It is sometimes taken to imply that if there is no power to be abused – if institutions and the people affected by them stand on a footing of roughly equal capacity to engage with and resist one another – then there is no need for human rights standards to intervene. This view has influenced understandings of the place society should accord to the basic civil and political rights, including the right to freedom of religion – a field in which Kevin Boyle has taken a strong and fruitful interest over the years.

The general argument to be advanced here is that the law of human rights which deals with the basic liberties is not best understood, in its most fundamental form, as a way of controlling imbalances of power. Of course, concerns about abuses by organizations able to dominate the vulnerable are crucially important to human rights. However, they are a portion, not the whole of the territory – and are certainly not the starting point for an understanding of the range of principles at work. When we see the law being developed via the judiciary – and we will draw our examples primarily from European Convention on Human Rights jurisprudence – it is clear that these rights are imposed in several situations in which there is no problem of abuse of power; and, conversely, where there is clearly an imbalance of power between the parties, the judiciary sometimes refuses to intervene to protect a basic right, and does so, surprisingly, in the name of respecting the respective freedom of the parties to negotiate the terms of their engagement.

The view argued for here is that human rights principles protecting the basic liberties are aimed at dealing with situations in which certain alternatives facing individuals have been brought into relation with one another in a way that is found objectionable. It is the bare fact that those alternatives have been brought together that triggers a violation of a particular right: it is not the fact that one of these alternatives is that the victim will be subjected to abusive power. Sometimes one of the alternatives is indeed objectionable because it has the power of a state or other institution standing behind it, but sometimes the alternatives are found illegitimate on human rights grounds even though none of them is in any way coercive. To be free, in the Court's

view, is to have appropriate sets of alternatives between which to choose, and to have your liberty wrongly restricted is to have the wrong set of objects of choice on your plate.

In order to see this principle at work, we can start with the surprises in store when we watch the European Court of Human Rights grapple with situations in which there is an imbalance of power, and then move on to areas in which this imbalance is not a concern.

Unequal power

A good place to examine the protection afforded by basic liberties when vulnerable individuals meet powerful organizations is in the law governing the workplace. This source of examples is no accident, since it is in the employment relation that balances and imbalances of power present some of their most subtle challenges. The European Court and Commission (as it then was) of Human Rights have held that if a private or public employer obliges its employees to join a trade union as a condition of keeping work, then a national law which permits this to happen violates the employee's right to freedom of association.[1] Similarly, it was decided that the firing of a television announcer, Mr Fuentes Bobo, for denouncing his employer's personnel policies over the airwaves violated his right to freedom of expression.[2] On the other hand, the Commission did not uphold a similar claim of freedom of expression when a Catholic hospital dismissed one of its doctors, Dr Rommelfanger, for criticizing in public the hospital's policy on abortions.[3] The Commission also rejected a complaint of violation of the right to freedom of religion when a Muslim teacher, Mr Ahmad, was refused by his secular school an hour of time off on a Friday in order to comply with his obligation, as he understood it, to attend the local mosque.[4] There was the same result in a case brought by a Christian employee, Ms Stedman, whose employer required her to work on Sunday and would not make an exception for church attendance.[5]

This is a selection of decisions, not an exhaustive account. It is designed to bring out the varying attitude of the judiciary to imbalances of power. First of all, the judiciary is very aware of these imbalances. In our first example, it

1 *Young, James and Webster v UK*, Applications Nos. 00007601/76; 00007806/77, decided 13 August 1981 (Court of Human Rights). The law actually emerging from this decision in *Young* about freedom of association is narrower than is stated here, but this is not a relevant issue for these purposes. For further discussion of the case, see Leader, *Freedom of Association* (Yale University Press: 1992) Ch. 6.

2 *Fuentes Bobo v Spain*, Application No. 39293/98, 29 February 2000.

3 *Rommelfanger v Federal Republic of Germany*, Application No. 12242/86, 6 September 1989.

4 *Ahmad v United Kingdom*, Application No. 8160/78, March 1981.

5 *Stedman v United Kingdom*, Application No. 29107/95, 9 April 1997.

demanded that the state act to stop private as well as public employers from impinging on the basic right to freedom of association – which was interpreted to include freedom from association. It will not allow an agreement between employer and employee to narrow the scope of that freedom.[6] The television announcer was similarly protected. On the other hand, in the other decisions it is precisely the choice made by the *weaker* party that determines the shape of his basic liberty in the eyes of the Court and Commission. In the case of Mr Ahmad, for example, while his right to freedom of religion was at stake, it was properly limited because he had taken up work that carried this restriction 'of his own free will'.[7] He could have resigned, '[. . .] if he found that his teaching obligations conflicted with his religious duties'.[8] Similarly, in the case of Ms Stedman's demand that she be free to go to church every Sunday and not have to pay the penalty of being fired from her job, the judiciary replied that the choice put before her did not amount to pressure to change her religion, nor did it prevent her from manifesting her belief since she was free to resign in order to carry on holding to her spiritual commitments.[9]

It is tempting to think that the judges quietly forget in the latter two cases what the first two decisions tacitly affirm. Mr Ahmad's and Ms Stedman's freedom of religion shrinks because they accepted the conditions set by the employer 'of their own free will'; whereas that free will somehow disappears when it comes to the liberties of the trade unionist and the television announcer – their rights override any attempt to waive them by agreement in their contracts of employment. As strange as this set of results is, it is not plausible to put it down to selective judicial amnesia: that the judges are saying of one and the same employer that he is not able to oblige his employee to sign an agreement shrinking his trade union rights, but that he can oblige him to sign one reducing the scope of his right to worship as he pleases. There is another possible reading of these results. It is that the judiciary remains quite clear that there is an imbalance of power in all of these situations. However, that is one factor among others that it has to consider. On some occasions, the court refuses to enforce an agreement which purports to narrow these basic liberties *because* of that imbalance of power; and on other

6 Some rights can be waived. See, e.g., *Le Compte, van Leuven and De Meyere v Belgium*, Application number 00006878/75; 00007238/75 1983 para. 59, and the discussion of these cases in G. Morris, 'Fundamental Rights: Exclusion by Agreement?', *Industrial Law Journal* Vol. 30, No. 1, 2001, p. 49. Morris argues that agreements to exclude a basic liberty should not be given effect when the restriction strikes at its 'very substance' (55).

7 *Ahmad v UK, supra* n. 10, p. 134, para. 9. Indeed, it used the conclusion that Mr Ahmad had freely taken up this job as a reason for saying that the state had therefore not interfered *at all* with his religious liberty, rather than – as in other similar cases – being deemed to have interfered and having to justify the interference for valid countervailing reasons of protecting the rights of others and other elements of the public interest.

8 *Ibid.*, p. 235.

9 *Stedman v United Kingdom*, Application No. 29107/95, 9 April 1997 para. 1.

occasions it is prepared to allow the agreement to have that effect *even though* there is that imbalance. What is it in the legal reasoning across this range of decisions that yields this mixed reception to choices made by vulnerable individuals as the judiciary fixes the shape of their liberties? Before turning to that question, we need to consider the law's approach to the other half of our range of issues: the protection of freedom where all would agree that power is evenly balanced.

Equal power

We would expect here to enter a terrain in which the parties involved should indeed be able to shape the impact of the basic liberties on their relationship. This is again not so in practice. In at least two situations, choice is not allowed by democratic societies to affect the incidence of fundamental liberties, even though there is at stake no need to protect a weaker party.

Consider first the hypothetical case of Florence, a highly paid executive who can easily find work elsewhere. She is not vulnerable to having to comply with her employer's wishes in the same way an employee would be whose only option is, say, unemployment if he does not keep his present job. Florence is offered a new condition of employment, and if she fails to agree she will be dismissed: she must agree not to have a child for the course of her engagement. Assume further that she has in her pocket an offer from another employer who would not make this demand of her. Florence refuses to accept the condition but wants to keep her present job – or be paid compensation for losing it because of this demand made of her. In the EU and USA it is illegal for an employer to set this condition. It prevents women from enjoying the right to family life.[10] It would be irrelevant to argue that Florence could easily find another job without this condition attached.[11]

It might be argued here that the law is taking aim at the vulnerable condition of most, if not all, employees and does not examine the imbalance of power facing each and every one, for fear of becoming bogged down in difficult line drawing, case by case. However, I shall argue below that the better way to understand this feature of the law's protection comes from a quality of certain basic liberties that, once appreciated, requires them to be protected against all sorts of attempts to waive them, be this attempted waiver freely agreed to or coerced.

There is another kind of situation in which society protects the basic

10 As specified in Article 8, European Convention on Human Rights. For the protection of the right to family life in these circumstances see P. Craig and G. de Burca, *EU Law*, 2nd edn (OUP, 1998) p. 861.

11 See, e.g., the case of a highly paid and mobile employee making a claim of sex discrimination in the allocation of bonuses: *Ms L Barton v Investec Henderson Crosthwaite Securities Limited*, Appeal No. EAT/18/03/MAA, 6 March 2003.

liberties even though the pressures on those liberties do not come from an abuse of unequal relationships of power. These are situations in which choice risks defeating the social significance of a liberty. Consider again the example of Florence, but imagine this time that she has been offered a contract by Smith whereby, if she agrees not to join a trade union, she will receive an increase in salary. She is not threatened with dismissal, as in our earlier case about freedom of association, or in the example of her agreeing not to have a child, but is instead offered a reward. The Court of Human Rights, in the case of *Wilson and the NUJ v UK*, found that those who are denied such rewards because they refuse to accept this condition can complain of a violation of the right to freedom of association.[12] How might we understand this as an interference with *freedom* of association, here understood as a violation of the complainant's right to a free choice about union membership? I have kept to the assumption that there was no inequality of bargaining power between the rich and highly mobile employee and the employer. Furthermore, as indicated, Florence is not responding to a threat of a sanction, but to a promised bonus. Nothing in the reasoning that led the Court to condemn the reward offered in *Wilson* would have led it to a different result in Florence's situation than it did in that of the actual employees involved in the case. The Court was not concerned about the power lying behind the offer of reward but rather with the fact that this reward was coupled with an inappropriate objective: the objective of inducing withdrawal – free withdrawal – from a trade union.

Permitting and forbidding sets of alternatives

We need to see why certain choices are allowed by the judiciary to shape the basic liberties where there is an imbalance of power, while these basic liberties unexpectedly reach into situations where there is no such imbalance. If we are to make sense of this range, it might be useful to see basic rights as manifesting a concern to preserve people from having to choose between some alternatives, while allowing them to make decisions between other alternatives. How can we identify that it is about certain sets of choices that are objectionable to the judiciary and those that are permitted or even favoured?

The right to combine certain liberties

We can first go back to the example of Florence and her employer's requirement that she promise that she would resign if she had a child. Should her promise be binding? This was a question faced by the European Court of Justice (ECJ) when it decided that a Mrs Webb could not be legitimately dismissed from her job on the ground that her employer had clearly indicated

12 *Wilson, National Union of Journalists and Others v the United Kingdom*, Applications Nos. 30668/96, 30671/96 and 30678/96 decided 2 July 2002.

that he could not use her if she became pregnant.[13] It had been argued on behalf of the employer that she was simply in front of a choice between priorities. An analogy was drawn by counsel with someone who was an athlete and who might wish to take time off to play her sport. She would have no right to demand that she be able to do so against the wishes of the employer, so why should the pregnant employee? The parallel was rejected by the Court in these terms: 'a sportswoman [. . .] is confronted with a normal choice reflecting [her] needs and priorities in life; the same cannot reasonably be said of a pregnant woman, unless the view is taken – but it would be absurd – that a woman who wishes to keep her job always has the option of not having children.'[14]

Now, why exactly is the second view absurd? Why is not having a child in order to pursue a career any less of an option than not engaging in a sport in order to pursue that career? It cannot be that playing sport is more easily rejected as an alternative than is having a family. For certain individuals, the opposite would be true: their sporting lives are that important to them.

The wrong being done here, it is submitted, consists in asking the employee to choose between two sets of basic rights: the right not to be removed from work for an inadequate reason, and the right to found a family.[15] For any given person these interests can either complement or compete with one another, and the Court can be taken in *Webb's* case to be saying that she is entitled to do her best to treat them as complementary. There is no equivalent set of alternatives in the case of the sports enthusiast. In this case, there is one fundamental right in play, not two. She continues to enjoy her right to work, but when being asked to sacrifice her preferred time to do sports, she is not being asked to sacrifice a basic entitlement. At that point, it is legitimate to put her to a choice, and to say that if she chooses to give up the sport period in order to keep her job, then this is a legitimate trade.

It would make no difference to this reasoning if there were another job available to which the employee could have gone that did not carry the same condition that she not have a child. Why, the Court in *Webb* can be taken to be asking, should she have to accept a second-best way of exercising her fundamental right to retain her employment, by taking a job other than the one she prefers, just in order to preserve her ability to exercise another basic right: the right to found a family? One could ask the same question about other trade-offs one is invited to make. Should a student who is qualified to

13 *Webb v EMO Air Cargo (UK) Ltd* (Case C-32/93) [1994] ECR I-3567.

14 Opinion of the Advocate General [1994] ECR page I-03567, para. 14.

15 Protection from arbitrary removal is one feature of the right to work, as guaranteed by Article 6, International Covenant on Economic, Social and Cultural Rights, cf. S. Deakin and S. Morris, *Labour Law* (5th edn). The interest of the employee in playing a sport in this hypothetical case could conceivably be elevated to the position of a fundamental right in some constitutional orders, but this would not change the nature of the argument, only the location of the example.

study at the best science faculty, but who is under an obligation to wear religious dress that the faculty forbids, be required to choose a less-good science faculty that does not impose the same restriction?

Of course, one sometimes has to make hard choices – committing oneself in one direction or the other, and this positioning between a rock and a hard place may involve choosing between the exercise of two basic rights. Because of the character of the particular setting in which they compete, it may be impossible to enjoy both rights at the level one would prefer. That is a field of legitimate required sacrifice of one right in favour of another. For example, at present levels of technology, certain core activities of a particular company might present unavoidable and permanent health hazards to women who decide to become pregnant. On the other hand, fundamental rights are in artificial conflict when they are *turned into* alternatives, rather than being available for simultaneous enjoyment, simply by the device of asking that one choose between them. The pregnant employee in the *Webb* case, like Florence in our earlier hypothetical example, had been asked to choose between options that would not have presented themselves as items in competition had they not been bundled together by the employer.[16] Of course, the employer might have a special and legitimate need to bundle them together. But that is a countervailing reason for limiting the choice of the employee that demands that a special justification be provided for doing what is, *prima facie*, a wrong. That was also a feature in *Webb* and subsequent litigation. We are here concerned with that first stage – the *prima facie* case.

The principle that emerges from this example is that one is entitled to avoid the limitation of one basic right as the price to pay for enjoying another. Work and family life should not be placed in competition with one another, but should be treated as complementary and sometimes simultaneous lines along which people are entitled to develop. The *Webb* decision is implicitly saying that. The ECJ does not want people to have to choose between the enjoyments of their basic rights but rather to combine those enjoyments – so long as the costs to the employer are not drastic.

It is the same view taken by the European Commission and Court of Human Rights in *Young*. Here, we see the Court and Commission willing to treat some rights as items that individuals are entitled to combine. They are allowed both to refuse to join a trade union and to continue in their employment. Other rights, however, such as those in *Stedman* and *Ahmad*, are treated as objects between which employees must choose: either they keep their jobs and relinquish their religious convictions, or they hold to their convictions and give up their employment. The key variable here is once again not power, but rather the sets of choices that are being made. The key distinction that is

16 For further development of these arguments, see S. Leader, 'Freedom and Futures: Personal Priorities, Institutional Demands, and Freedom of Religion' (2007) 70(5) *Modern Law Review*, 713–30 *passim*.

being drawn is between some alternatives that can be legitimately placed before the individual and other alternatives that may not be. There is no difference, in working with this principle, between situations of equal power and situations of unequal power.

The social significance of certain liberties

How are we to understand the decision in *Wilson*, which forbids the offer of a reward by an employer to employees in return for their staying out of a trade union? It seems at first glance legitimate to allow someone to purchase someone else's willingness to refuse to exercise certain liberties, such as the right to join a trade union. The purchase is, as was indicated earlier, not a punishment. If this is so, then what might be the basis for the decision? The answer has to do again with inappropriate alternatives between which someone is asked to choose. No single alternative in this situation is a coercive one, nor is it in any other way objectionable on its own. There is nothing inherently wrong with promising to do or not to do something in return for a reward, so long as the action or inaction is not independently illegal. However, if one can buy another's right to accept or refuse trade union membership, then the whole point of having this right in civil society is undermined. The right, as inscribed in the European Convention and other instruments, is designed to be exercised based on the qualities of the union offering itself as a representative of employee interests. The individual concerned should therefore decide for or against union membership on its own merits, not on the basis of its merits as mixed with the collateral attractions of accepting a reward. This makes this right to join a union like the right to vote: the latter designed to reflect the voter's evaluation of candidates. A reward for voting a particular way is objectionable because of the extraneous motives it introduces. These basic liberties are not simply protected from the predations of the powerful in a civic order. Even if the parties were equally strong as they transacted, the objection to this offer of a reward would remain.

We can see here a further feature of the principle being followed by the decisions: their aim is to avoid both an artificial *sacrifice* of alternatives – of having to forgo one basic right in order to enjoy another – and to avoid an artificial *widening* of alternatives, adding extraneous reasons for choice which weaken the ability of certain rights to occupy their appropriate roles in society.

Critique

These considerations throw into relief some problems with the decisions about freedom of religion, such as *Stedman* and *Ahmad*. As has been seen, the Commission rejected their claims to be absent from work for the purposes of worship. They had to choose: either resign and continue with their convictions, or stay and forgo them. The difficulty is, why exactly is it right to place

these elements – work and worship – into the category of alternatives between which the employee has to choose, while other elements, work and refusal to join a union, or work and founding a family, are those which the employee is entitled to do their best to combine? To say, as the Court and Commission have, that this is a matter of their choice is only the beginning of an answer. *All* of the elements we have considered are potential items of choice. The issue is, which are to be treated as items *between* which one must choose, and which are to be treated as items which one may try to *combine* in the particular ways that one's convictions or plans of life call for. Unless some further, special argument can be advanced – which one does not see in the decisions – religious interests seem to be placed on the wrong side of the divide. Playing sports and employment are options between which one is rightly made to choose; being true to one's religious convictions, founding a family, and employment are options which, *prima facie*, one should be entitled to integrate with one another. The judiciary adopts this view for some basic rights, and could be legitimately expected to do so for others.

Conclusion: choice and basic rights

We are sometimes told that a free society is one which maximizes the citizen's scope and capacity for choice.[17] That may be a view that skates over several distinct ways of configuring such choices, and if we fail to do this we produce a society that has actually sacrificed some of the core freedoms it purports to prize. The cases we have considered show that there are three directions in which choice can function, and they cannot all be pursued at once. First, it is clear that most of the basic liberties are aiming at preventing the state from narrowing options unduly. Freedom of religion, freedom of association, and free speech all outline areas in which the state should not shut down your options unless you are doing undue damage by pursuing one of them. However, that is only one of the three dimensions we need to consider. The second is choice that functions to commit people down one path as opposed to another. If you choose to work at this school or company, some of the cases are saying, then you have committed yourself to obeying its rules, which forbid your being absent from work or wearing certain apparel. Here, your choice is an instrument of separation: it separates you from some options in order to allow you to pursue others. Finally, there is a third conception of choice that is directed in the opposite direction to the second: it is an integrating, rather than a separating species. To preserve free choice here is to permit the individual to seek to integrate the various parts of his or her life, each of which may attach to a distinct fundamental right. The challenge for human rights law is to see where the second conception of choice rightly

17 See, e.g., J. Raz, *The Morality of Freedom* (OUP, 1986) *passim*.

prevails, and where the third, integrating conception is the most important to encourage.

As we watch various parts of people's lives make inroads on one another, human rights come into the centre of attention in a new way: not as items to be satisfied one by one, but as items to be brought together into a synthesis that may well vary from person to person, and from group to group – and all of that against the force of a wider society that sometimes prefers to hold onto uniformity rather than witness this variety.

7 Conscientious objection to military service

Rachel Brett and Laurel Townhead

Introduction

For centuries there have been individuals who have opposed violence for religious or philosophical reasons and states that have sought to compel them to serve in the military. The problem this raises is one that runs throughout the human rights discourse, namely: what duties can states require of those who live within their territory? The struggle for recognition and realization of the right of conscientious objection is the struggle between state compulsion and individual conscience.

Denial of the right of conscientious objection and further human rights abuses flowing from the non-recognition of the right affect hundreds of individuals around the world today. One such individual, Osman Murat Ülke, a Turkish conscientious objector, challenged the Turkish government in the European Court of Human Rights.[1]

Ülke was called up for compulsory military service in August 1995; he refused because of his pacifist convictions and publicly burned his call-up papers. Since then Ülke has been charged, tried and sentenced by military courts for inciting conscripts to evade military service, for desertion, and for persistent disobedience because of his refusal to wear military uniform or follow military orders. A cycle developed in which Ülke would be transferred from detention to barracks where he would refuse to wear military uniform or follow orders and as a result would be detained and prosecuted again.[2] By the time of his application to the European Court of Human Rights in 1997, Ülke had served 701 days in military prison. He was wanted by security forces to complete a further sentence of seven months and 15 days and as a result he was living in hiding. He could neither legally marry his fiancée nor be recognized as the father of his son.

1 Kevin Boyle was amongst the legal team bringing this case.

2 Each of the convictions is detailed in the judgment, *Ülke v Turkey*, no. 39437/98 [2006] ECHR 73 (24 January 2006), paras 9–41.

In January 2006, the European Court of Human Rights ruled that the Turkish Government's actions violated Ülke's human rights. The Court ruled that Ülke had been subjected to degrading treatment contrary to Article 3 of the European Convention on Human Rights (ECHR). Whilst European litigation provided no quick remedy for Ülke (indeed his actual situation has not yet changed),[3] the judgment made a significant contribution to the development of the international recognition of the right of conscientious objection to military service. Ülke's case was the first on this issue to be heard by the European Court of Human Rights, all previous cases having been brought in the time of the European Commission of Human Rights.[4] Examination of the prior and subsequent European jurisprudence indicates what an important step this judgment was, even if it fell short of stating a Convention right of conscientious objection.

Conscientious objection to military service and the Council of Europe

European case law

The right of conscientious objection to military service is grounded in the right to freedom of thought, conscience and religion, a right articulated in Article 9 of the European Convention on Human Rights. However, the European Commission of Human Rights consistently failed to consider conscientious objection under Article 9, choosing instead Article 4, which makes explicit reference to conscientious objection to military service. Article 4 covers the prohibition of slavery and forced labour and expressly exempts from the definition of forced labour 'any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service'.[5]

The codification of the prohibition of slavery in this manner, with a list of exclusions, is a result of the split between the 'enumeration' and 'definition' schools of thought in drafting the Convention. The restrictive language of 'in countries where they are recognized' in respect of conscientious objectors was only inserted in the final draft and no record exists in the *travaux préparatoires*

3 As of December 2009.

4 The European Commission of Human Rights (ECommHR) was established by the Convention as part of its enforcement apparatus along with the European Court of Human Rights and the Committee of Ministers. Originally individuals were not able to petition the Court directly. They could petition the Commission, whose role was to assess the admissibility of the case, place itself at the Parties' disposal to facilitate friendly settlements and express an opinion on the merits of the case if no such friendly settlement could be reached. The Commission was abolished and the Court expanded by Protocol 11 to the Convention, which came into force on 1 November 1998.

5 European Convention on Human Rights and Fundamental Freedoms, Article 4(3)(b).

of discussions as to the reasoning behind the introduction of this language. Therefore, the Commission and Court have been unaided in the interpretation of Articles 4 and 9.[6]

In 1966, the Commission decided *Grandrath*,[7] which laid the foundation for a line of cases that interpret the Convention as not guaranteeing a right of conscientious objection because of the language used in Article 4. In an individual opinion, Commissioner Eusthidades stated that 'the necessity for compulsory military service or alternative service falls to be considered under art. 9(2) and that the margin of appreciation is extended as a result of art. 4(3)b'.[8] Although not favourable to the full recognition of the right of conscientious objection, this reading at least allows for consideration to be given to it under Article 9. It is also consistent with the facts of the case, which were not a claim for recognition of conscientious objection to military service *per se*, but to aspects of an alternative service system.

The applicability of Article 9 in conscientious objection cases was accepted by the Commission for some time, albeit not without interpreting Article 4 as placing limitations upon its exercise. In *N v Sweden* (1985), the Commission found that the Convention did not guarantee a right of conscientious objection, accepting the applicability of Article 9 but reading Article 4 into it to deny the right.[9] However, all of the cases considered by the Commission related to states which made provision for conscientious objection, and the claim related to some aspect of that provision.

The Commission subsequently moved away from even this limited recognition of the applicability of Article 9 to conscientious objection cases, choosing to take Article 4 as the *only* applicable provision. In *Johansen v Norway* (1985), the Commission was asked to consider Article 9 in connection with a case brought by a conscientious objector but only took account of Article 4 in its decision that the Convention did not grant a right for conscientious objectors to be exempted from civilian service.[10] In *A v Switzerland*, the Commission used Article 4(3)b to find that punishment of a conscientious objector for refusal to perform military service was not a violation of Article 9 because the Convention 'leaves each contracting state to decide whether or not to grant such a right'.[11]

Following this line, the Commission found inadmissible the application of a conscientious objector from Belgium complaining under Articles 9 and 10

6 For a full discussion of the drafting history of Article 4 see D.C. Decker and L. Fresa, 'The Status of Conscientious Objection Under Article 4 of the European Convention on Human Rights', 33 NYU *Journal of International Law and Politics* 379 (2000).

7 *Grandrath v Federal Republic of Germany* (No. 2299/64) (1967) 10 YB 626, paras 32–33.

8 *Ibid*, para. 39.

9 *N. v Sweden*, Application No. 10410/83, 40 ECommHR Dec. & Rep. 203, 207 (1984).

10 *Johansen v Norway*, Application No. 10600/83, 44 ECommHR Dec. & Rep. 155, 156 (1985).

11 *A. v Switzerland*, Application No. 10640/83, 38 ECommHR Dec. & Rep. 219, 223 (1984).

of the Convention and stated that the Convention does not prevent a Contracting State from imposing sanctions on those who refuse such service.[12] Thus, the Commission prevented recourse under Article 9 and appeared to legitimize sanctions by the state against those who refused to perform military service for reasons of conscience.

Recognition of conscientious objection by the Council of Europe

Despite the interpretation by the European Commission of Human Rights, other Council of Europe bodies have recognized the right of conscientious objection as being protected by the right to freedom of thought, conscience and religion. In a 2001 report, the Committee on Legal Affairs and Human Rights considered the *de jure* and *de facto* recognition of conscientious objection throughout Council of Europe member states, examined the case law of the Commission and concluded that a right of conscientious objection might not be guaranteed by Article 9, but that: 'It is in fact a fundamental aspect of the right to freedom of thought, conscience and religion.'[13] The report called for a number of measures to ensure the implementation of the right to conscientious objection. These were picked up by the Parliamentary Assembly of the Council of Europe, which observed that: 'The right of conscientious objection is a fundamental aspect of the right of freedom of thought, conscience and religion enshrined in the Universal Declaration of Human Rights and the European Convention on Human Rights.'[14]

The Parliamentary Assembly recommended that the Committee of Ministers amend Articles 4(3)b and 9 of the Convention by means of a protocol clarifying the protection of the right of conscientious objection to military service.[15] The strategic benefit of the adoption of such a protocol is questionable given that Article 9 in its current form should be understood as protecting conscientious objection. The elaboration of a protocol could delay the full recognition of the Convention's protection and allow for selective ratification by states. The Committee of Ministers decided against this recommendation,[16] preferring instead to focus on implementation of their previous

12 *Heudens v Belgium*, Application No. 24630/94 (unreported) 22 May 1995, para. 4.

13 Exercise of the right of conscientious objection to military service in Council of Europe member states, Committee on Legal Affairs and Human Rights, Doc. 8809, 4 May 2001, para. 15.

14 Parliamentary Assembly Recommendation 1518 (2001), Exercise of the right to conscientious objection to military service in Council of Europe member states, para. 2.

15 Ibid, para. 6.

16 Committee of Ministers' reply to Parliamentary Assembly Recommendation 1518 (2001) on the right to conscientious objection to military service in Council of Europe member states.

recommendation calling for measures to be in place in all states to ensure a right of conscientious objection from military service.[17] Recognition of conscientious objection and the provision of alternative service is now an entry condition for membership of the Council of Europe.[18]

The increasing recognition by states of conscientious objection – a growing number of which have abolished conscription – and the clear support from the Council of Europe's political bodies for the implementation of a right of conscientious objection to military service, suggested that a strategy of pursuing the recognition of the right through the Commission/Court might be successful.

The Ülke *case*

The first challenge for *Ülke* was to convince the European Court of Human Rights that Article 9 applied to conscientious objection cases. Notwithstanding the positive developments in the European political institutions, this was not guaranteed to succeed.

Between the submission of the case and the decision on its admissibility, a positive development came in a discrimination case brought by a Greek conscientious objector, in which the Commission recognized that the 'crime' of refusing to perform military service due to conscientious objection was not the same as other crimes.[19] In *Thlimmenos v Greece*, the Commission did not examine Article 9, but found that treating a criminal record arising from refusal to perform military service on grounds of conscience the same as any other criminal record was a form of discrimination. The Commission found that the right not to be discriminated against is violated 'when States without an objective and reasonable justification fail to treat differently persons whose situations are different'.[20] In the admissibility decision in an earlier case against Finland, the Commission found that the discrimination complaint fell 'within the ambit of Article 9 of the Convention which protects the right to freedom of thought, conscience and religion'.[21]

Although the jurisprudential situation had advanced between the submission of the *Ülke* application and the decision on its admissibility, the European Court of Human Rights still presented a challenging arena.

17 Recommendation No. R (87) 8 of the Committee of Ministers to Member States Regarding Conscientious Objection to Compulsory Military Service.

18 For example Council of Europe, Parliamentary Assembly: Opinion No. 222 (2000), Azerbaijan's application for membership of the Council of Europe; see especially Art 14 iii. g.

19 *Thlimmenos v Greece*, Application No. 34369/97, Report of the Commission adopted on 4 December 1998, para. 49.

20 Ibid, para. 49.

21 *Raninen v Finland* (App 20972/92) (1996) 84 DR 17.

Significantly, in the *Ülke* admissibility decision, the Court did not dismiss the issue out of hand, but attached the issue of the applicability of Article 9 to the merits of the case for consideration.[22]

Developing the jurisprudence of *Thlimmenos* regarding the proportionality of treatment of conscientious objectors, the European Court of Human Rights in *Ülke* stated that:

> In the present case, the numerous criminal proceedings brought against the applicant, the cumulative effects of the ensuing criminal convictions and the constant alternation between prosecution and imprisonment, together with the possibility that he would face prosecution for the rest of his life, are disproportionate to the aim of ensuring that he performs his military service. They are aimed more at repressing the applicant's intellectual personality, inspiring in him feelings of fear, anguish and vulnerability capable of humiliating and debasing him and breaking his resistance and will. The clandestine life, amounting almost to 'civil death', which the applicant has been compelled to adopt is incompatible with the punishment regime of a democratic society.[23]

The Court went on to find that this treatment 'constitutes degrading treatment within the meaning of Article 3 of the Convention'.[24] This was a success both in terms of winning the case and a significant finding in regard to Article 3. Unfortunately, the Court declined to address the question of whether forcing Ülke to perform military service was a legitimate aim for the state to pursue given his conscientious objection.[25]

In a press conference given shortly after the release of the judgment in January 2006, Ülke expressed regret that the case had not been considered under Article 9, but emphasized the domestic importance of what had been decided:

> The European Court of Human Rights, prioritizing the article 3 of ECHR, has revealed that there is a problem here in terms of the general principles of law. Accordingly, crime and punishment must be proportional and each act can only have a single sanction. I would like to particularly draw your attention to this point. Before the discussion even gets to conscientious objection, this is the point we are stuck at.[26]

22 Council of Europe: European Court of Human Rights Second Section: Judgment as to the Admissibility of the Application No. 39437/98 by Osman Murat Ülke against Turkey.

23 *Ülke* Judgment, para. 62.

24 Ibid, para. 63.

25 Ibid, para. 68.

26 Osman Murat Ülke, statement to press conference, January 2006.

Next steps at the European Court of Human Rights

The judgment had significance beyond its specific facts, in that the Court made clear that the repeated imprisonment of conscientious objectors for offences arising from their beliefs is not justified. By placing limitations on the punishments that states can mete out to those who refuse to be compelled to perform military services for reasons of conscience, the Court has begun to involve itself in governing the manner in which states can and cannot treat conscientious objectors. Although the Court opted not to address the issue of the applicability of Article 9, their consideration that the punishments were aimed at 'repressing the applicant's intellectual personality' suggests that the Court recognized the connection between Ülke's beliefs or 'intellectual personality' and his reasons for committing the offences, and found that, in attempting to break his will through a potentially endless cycle of prosecutions and detention, the state was violating Article 3 of the Convention. Furthermore, the Court did not *exclude* the possible relevance of Article 9, merely declining to consider it in this specific case. It is important to note this because the Court, coming to this issue for the first time and in relation to a case in which the state does not provide for conscientious objection to military service at all, did not follow the Commission's line on Article 4 and did not rule out the applicability of Article 9. This seemed to provide a useful foundation for future cases, which was significantly strengthened by the UN Human Rights Committee's subsequent interpretation of the equivalent articles of the International Covenant on Civil and Political Rights as requiring provision for conscientious objectors to military service (see below).

In the only subsequent related case to date, the Court joined the question of Article 9 to the merits of the case for full consideration. However, in that October 2009 Chamber judgment, the Court held by majority that Article 9 does not provide a right of conscientious objection.[27] In doing so, the Court chose to follow the Commission's case law and to ignore developments in the Human Rights Committee's interpretation of the Covenant. It is not clear why the Court chose to dismiss the applicant's argument that as a living instrument the Convention should now be interpreted as guaranteeing the rights of conscientious objectors, as Judge Ann Power argued in her dissenting judgment.

UN action on conscientious objection to military service

There are similarities and differences in how the question of conscientious objection to military service has been dealt with at the United Nations and

27 *Bayatyan v Armenia*, Application No. 23459/03, European Court of Human Rights, 27 October 2009, at para. 63.

the Council of Europe. Neither the Universal Declaration on Human Rights nor the International Covenant on Civil and Political Rights explicitly recognizes the right of conscientious objection to military service.

Early action and interpretation

Following the adoption of the Universal Declaration in 1948, work began on drafting the Covenant (at that time, only one Covenant was contemplated). In 1949, the non-governmental organization (NGO) Service Civil International submitted a statement[28] to the UN Commission on Human Rights with a proposed provision on conscientious objection to military service for inclusion in this Human Rights Covenant.[29] The following year, the Philippines proposed for inclusion: 'Persons who conscientiously object to war as being contrary to their religion shall be exempt from military service'; but this was withdrawn after a short discussion. In the end, the only reference in the International Covenant on Civil and Political Rights is in Article 8, defining the prohibition of forced labour as not including compulsory military service and any alternative service required of conscientious objectors.[30]

While excluding alternative service for conscientious objectors from the definition of forced labour for the purposes of the Covenant makes sense, the problem was in the drafting, as it was with the equivalent provision in the ECHR. Thus, Article 8 of the Covenant prohibits forced labour with certain specific exceptions. Its paragraph 3 states that for these purposes, the term forced or compulsory labour does not include: 'Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors'. At the same time, Article 18 of the Covenant protects the right to freedom of religion or belief:

> Article 18:
>
> 1 Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2 No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3 Freedom to manifest one's religion or beliefs may be subject only to

28 E/CN.4/NGO/1/Add.1.

29 Friends World Committee for Consultation (Quakers) made their first statement to the Commission on the subject in 1950.

30 See R. Brett, 'Persistent Objectors at the United Nations', *The Friends Quarterly*, Vol. 35, No. 7 (July 2007), pp. 301–09.

> such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> [. . .]

Thus, the Covenant mirrors the provisions in the ECHR with regard to conscientious objection to military service. Although the Covenant was adopted in 1966, it did not come into force until 1976, and only then could the Human Rights Committee, established to oversee states' implementation of it, begin work.

In 1985, the Human Rights Committee followed the same line of interpretation on conscientious objection to military service as the European Commission on Human Rights. This is not surprising given that there was an overlap in the membership of the two bodies at that time. Therefore, in *L.T.K. v Finland*, the Committee declared the case inadmissible, stating that: 'The Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3(c)(ii) of article 8, can be construed as implying that right.'[31]

This appeared to preclude the interpretation of the Covenant to cover conscientious objection. It also illustrates that 'coherence' of regional and international systems can sometimes be disadvantageous. This precise problem arose again in a 2005 decision of the Inter-American Commission on Human Rights,[32] its first on conscientious objection, which followed the same line just before the Human Rights Committee's landmark ruling to the contrary.

Consequentially, much of the UN action on conscientious objection was instead taken up by the UN Commission on Human Rights, through a series of resolutions, and by its Special Procedures – in particular, the Special Rapporteur on Freedom of Religion and Belief and the Working Group on Arbitrary Detention. This parallels the work of the Council of Europe (and European Union) political bodies.

Process of change

The Covenant provides the Human Rights Committee with a number of different functions, of which deciding on individual complaints is only one. Thus, it is possible to seek ways to change the Committee's interpretation of the Covenant without immediately having to directly challenge its earlier case law.

The process by which states parties to the Covenant periodically report on

31 *L.T.K. v Finland*, Case No. 185/1984 (9 July 1985) at para. 5.2, UN Doc. CCPR/C/OP/2 at 61 (1990).

32 *Cristián Daniel Sahli Vera et al. v Chile*, Case 12.219, Report No. 43/05.

the implementation of their obligations to the Committee means that the Committee is constantly considering a broad range of issues, not only those that are 'litigated'. In doing this, it is exposed not only to state practice and interpretation, but also to material from NGOs that identifies problems in state legislation and practice, and can be used to 'educate' Committee members about issues or less obvious problems, including serious consequences of apparently unremarkable provisions, developments in different fora, and so on. In this way, the Committee could slowly adapt its position in the course of considering state reports, and in the development of its General Comments.

Another significant difference is that the Covenant has always contained a free-standing non-discrimination clause, whereas the European Convention on Human Rights arguably only provided for non-discrimination in relation to rights recognized in the Convention.[33] Thus, the Committee continued to address conscientious objection cases where the issue could be considered as a non-discrimination one in relation to national provision in law or practice, for example, the question of the relative lengths of alternative and military service. Shortly before issuing General Comment No. 22, the Human Rights Committee had addressed the question of discrimination between conscientious objectors in the case of *Brinkhof v The Netherlands*.[34] Although the Committee found against the applicant on the facts, the Netherlands' complete exemption from all national service of Jehovah's Witnesses – while excluding others from any possibility of a claim for complete exemption – was considered to raise issues of discrimination.

A crucial development was the drafting and adoption in 1993 of the Committee's General Comment No. 22 on Article 18 (the right to freedom of thought, conscience and religion). Vojin Dimitrijevich, the drafter of the General Comment, argued persistently and ultimately successfully for including conscientious objection, based on the increasing state practice in this area. The final paragraph of the General Comment provides:

> 11. Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can

33 Adopted on 4 November 2000, however, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177) added to the ECHR a general prohibition on discrimination. The protocol entered into force on 1 April 2005, following its tenth ratification.

34 *Godefriedus Maria Brinkhof v The Netherlands*, Communication 402/1990, UN Doc. CCPR/C/48/D/402/1990 (1993).

> be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service.[35]

The importance of this relatively weak paragraph cannot be overemphasized, because it both legitimized and provided the framework for the Committee's subsequent action on the issue. Notable in this respect is that from 1994, when it started adopting Concluding Observations, on no fewer than 45 occasions the Committee specifically referred to conscientious objection to military service, and under Article 18 of the Covenant in every case, even if the state had reported on the subject under Article 8 (prohibition on forced labour). Issues frequently raised by the Committee relating to conscientious objection concern the recognition of the right to conscientious objection, the basis on which conscientious exemption from military service can be granted, the process for obtaining such exemption and recognition of the right of conscientious objection without discrimination. For example, in relation to Tajikistan:

> The Committee is concerned that the State party does not recognize the right to conscientious objection to compulsory military service (art. 18). The State party should take all necessary measures to recognize the right of conscientious objectors to be exempted from military service.[36]

In this way, the Committee was already making clear that it considered that there was a state obligation to provide for conscientious objectors. At the same time it built up its own interpretation of the issue, including that this was an issue of freedom of religion or belief, before it was again required to address the fundamental question of recognition in an individual case.

During this period, the Committee was also deciding individual cases that addressed a range of related issues (for instance, differences in length between alternative service and military service), although not the central issue of whether failure of the state to provide for conscientious objection was itself a

35 Human Rights Committee, General Comment No. 22, Article 18 (Forty-eighth session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 35 (1994).

36 Human Rights Committee Concluding Observations on Tajikistan (CCPR/CO/84/TJK), 18 July 2005, para. 20.

violation of the Covenant. These related cases demonstrate the way interpretation develops, as the Committee did not reach what it now applies as its settled test until 1999 (*Foin v France*). That test starts from an expectation of the equal duration of alternative and military service, but in particular cases does not preclude a difference in length, 'provided that the differentiation is based on reasonable and objective criteria, such as the nature of the specific service concerned, or the need for a special training in order to accomplish that service'.[37]

Because of the previous case law, and the important precedent that such a ruling would make, it was essential to find the right case to bring – both so that the Committee would have the strongest and most straightforward legal and factual case, and so that it would have to address the central issue of whether the Covenant protects conscientious objectors to military service, in contrast to *Ülke* where the European Court of Human Rights could evade the question by finding a violation of the Convention on other grounds. This required a degree of care and patience, first to identify the ideal criteria, second to find the specific case(s) in a country which was a party to both the Covenant and the First Optional Protocol (which mandates the Committee to consider individual complaints from that country), and third to wait for the case(s) to work their way through the country's legal system to ensure that they had exhausted 'domestic remedies', as is required before a case can be brought to the Human Rights Committee.

The substantive criteria for the ideal case were:

1 A country:

- where military conscription (compulsory military service) was being practiced;
- with no provision at all for conscientious objection to military service;
- where persons were actively seeking recognition as conscientious objectors;
- in which such persons suffered a significant penalty for their objection.

2 A conscientious objector:

- who was a pacifist (i.e., objected to all wars/military service, rather than being a selective objector);
- whose objection was based on readily understandable grounds, ideally a member of a religious group known for its commitment on this subject;
- whose credibility was not in doubt.

37 *Foin v France*, Communication No. 666/1995, ICCPR, A/55/40 vol II (3 November 1999) 30 at para. 10.3.

Human Rights Committee decision

The ideal cases arose in the Republic of Korea: two of the many Jehovah's Witnesses imprisoned for their refusal to undertake military service. The cases went through the Korean courts until rejected by both the Supreme Court and the Constitutional Court, and were then promptly submitted to the Human Rights Committee in autumn 2004. Two years later, on 3 November 2006, the Human Rights Committee decided that the Korean Government was indeed violating Article 18 of the Covenant by not accommodating the religious/conscientious beliefs of these Jehovah's Witnesses, and that it had to provide these individuals with a remedy, including compensation and steps to ensure that such a violation did not recur.[38]

The Committee explicitly addressed both its earlier case law, and the 'problem' of Article 8 of the Covenant in deciding the Korean cases. In doing so, it made clear that only Article 18 is relevant to the question of conscientious objection:

> 8.2 The Committee notes the authors' claim that article 18 of the Covenant guaranteeing the right to freedom of conscience and the right to manifest one's religion or belief requires recognition of their religious belief, genuinely held, that submission to compulsory military service is morally and ethically impermissible for them as individuals. It also notes that article 8, paragraph 3, of the Covenant excludes from the scope of 'forced or compulsory labour', which is proscribed, 'any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors'. It follows that the article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of article 18 of the Covenant, the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purpose.[39]

Having disposed of Article 8, the Committee was able to address the substance of the claim under Article 18:

> 8.3 The Committee recalls its previous jurisprudence on the assessment of a claim of conscientious objection to military service as a protected form of manifestation of religious belief under article 18, paragraph 1. (3) It observes that while the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3,

38 *Yeo-Bum Yoon and Mr Myung-Jin Choi v Republic of Korea*, CCPR/C/88/D/1321-1322/2004, 1 December 2006.

39 *Ibid.*, para. 8.2.

> against being forced to act against genuinely-held religious belief. The Committee also recalls its general view expressed in General Comment 22 (4) that to compel a person to use lethal force, although such use would seriously conflict with the requirements of his conscience or religious beliefs, falls within the ambit of article 18. The Committee notes, in the instant case, that the authors' refusal to be drafted for compulsory service was a direct expression of their religious beliefs, which it is uncontested were genuinely held. The authors' conviction and sentence, accordingly, amounts to a restriction on their ability to manifest their religion or belief. Such restriction must be justified by the permissible limits described in paragraph 3 of article 18, that is, that any restriction must be prescribed by law and be necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. However, such restriction must not impair the very essence of the right in question.[40]

Having found that the case fell within Article 18 as a protected manifestation of freedom of religion or belief,[41] the Committee addressed the state's arguments justifying limitations:

> 8.4 The Committee notes that under the laws of the State party there is no procedure for recognition of conscientious objections against military service. The State party argues that this restriction is necessary for public safety, in order to maintain its national defensive capacities and to preserve social cohesion. The Committee takes note of the State party's argument on the particular context of its national security, as well as of its intention to act on the national action plan for conscientious objection devised by the National Human Rights Commission (see paragraph 6.5, supra). The Committee also notes, in relation to relevant State practice, that an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service, and considers that the State party has failed to show what special disadvantage would be involved for it if the rights of the authors under article 18 would be fully respected. As to the issue of social cohesion and equitability, the Committee considers that respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in

40 *Ibid.*, para. 8.3.

41 One Committee member, Ruth Wedgwood, dissented on the basis that she did not believe 'the right to refrain from mandatory military service is strictly required by the terms of the Covenant, as a matter of law'. One other Committee member, Solari-Yrigoyen, dissented with regard to the possibility of conscientious objection being subject to any limitations or restrictions, considering that it fell squarely within the freedom of religion or belief itself, and not as a manifestation of it. *Ibid.*, appended dissenting opinions.

> society. It likewise observes that it is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service. The Committee, therefore, considers that the State party has not demonstrated that in the present case the restriction in question is necessary, within the meaning of article 18, paragraph 3, of the Covenant.[42]

The Committee thus found violations of Article 18(1) of the Covenant, that the State party was under an obligation to provide the authors with an effective remedy, including compensation and to avoid similar violations of the Covenant in the future.

The significance of the Human Rights Committee's decision is clear in that it finally lays to rest the arguments that conscientious objection to military service is not protected under the Covenant.

At the same time, this is clearly not the end of the matter since the Committee suggested that some restrictions might be permissible and, because of the nature of the cases, the Committee only addressed religion-based conscientious objection, in the case of conscripts at the time of call-up.

The Committee stated clearly in General Comment No. 22 that no discrimination is permissible on the basis of the religion or belief on which the conscientious objection is grounded,[43] that religion and belief are to be 'broadly construed',[44] and that the individual has the right to change his or her religion or belief. Assuming that it is consistent in applying these principles, the Committee can be expected in its subsequent cases to clarify that an individual can become a conscientious objector after joining the armed forces (whether as a conscript or as a volunteer), and that the basis of objection cannot be limited to religion in a restrictive sense. Indeed, these are issues it has already addressed in its Concluding Observations in relation to state reports, for example:

> The Committee notes with concern the information given by the State party that conscientious objection to military service is accepted only in regard to objections for religious reasons and only with regard to certain religions, which appear in an official list. The Committee is concerned that this limitation is incompatible with articles 18 and 26 of the

42 *Ibid.*, para. 8.4.

43 Human Rights Committee, General Comment No. 22, Article 18 (Forty-eighth session, 1993), para. 11. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 at 204 (Vol. 1, 2008).

44 *Ibid.*, para. 2.

> Covenant. The State party should widen the grounds for conscientious objection in law so that they apply, without discrimination, to all religious beliefs and other convictions, and that any alternative service for conscientious objectors be performed in a non-discriminatory manner.[45]
>
> [. . .] the Committee is greatly concerned to hear that individuals cannot claim the status of conscientious objectors once they have entered the armed forces, since that does not seem to be consistent with the requirements of article 18 of the Covenant as pointed out in general comment No. 22(48).
>
> The Committee urges the State party to amend its legislation on conscientious objection so that any individual who wishes to claim the status of conscientious objector may do so at any time, either before or after entering the armed forces.[46]

Furthermore, the Committee has already taken the step of specifically addressing the repeated punishment of conscientious objectors, in its General Comment No. 32 on Article 14 of the Covenant:[47]

> IX. *NE BIS IN IDEM*
>
> 54. Article 14, paragraph 7 of the Covenant, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of *ne bis in idem*. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal. Article 14, paragraph 7 does not prohibit retrial of a person convicted in absentia who requests it, but applies to the second conviction.
>
> 55. *Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience*.[48] [emphasis added]

45 Human Rights Committee Concluding Observations on Ukraine (CCPR/CO/73/UKR), 12 November 2001, para. 20; Human Rights Committee Concluding Observations on Kyrgyzstan (CCPR/CO/69/KGZ), 24 July 2000, para. 18.

46 Human Rights Committee Concluding Observations on Spain (CCPR/C/79/Add.61), 3 April 1996, paras 15 and 20.

47 General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32) of 23 August 2007.

48 *Ibid.*, paras 54–55. See also: UN Working Group on Arbitrary Detention, Opinion No. 36/1999 (Turkey), E./CN.4/2001/14/Add. 1, para. 9; and Opinion No. 24/2003 (Israel), E/CN.4/2005/6/Add. 1, para. 30.

Conclusion

The recognition that conscientious objection to military service is protected by Article 18 of the International Covenant on Civil and Political Rights does not mean that the position under the ECHR is no longer relevant. One of the particular strengths of the European system, in contrast to the UN one, is the binding legal nature of the judgments of the European Court of Human Rights. Although the Court failed to address the question of the protection of conscientious objection to military service under Article 9 of the ECHR in the *Ülke* case, it did not exclude this possibility. With the Human Rights Committee's interpretation that conscientious objection to military service is a protected manifestation of religion or belief under Article 18 of the ICCPR, there was an expectation that the European Court would follow this example when next faced with a case on this subject. The Chamber judgment in *Bayatyan v Armenia* appears perverse in this context in its insistence on following old Commission case law. It is to be hoped that the anticipated appeal to the Grand Chamber will bring the interpretation of the ECHR into line with that of the equivalent provisions of the International Covenant on Civil and Political Rights.

8 In search of the third freedom – 'everywhere in the world'

Asbjørn Eide

Four freedoms

What triggered the preparation and subsequent adoption of the Universal Declaration of Human Rights was the initiative taken in January 1941 by Franklin D. Roosevelt, then president of the United States, in his State of the Union Message to the US Congress, against the background of the Second World War and the prospects that the United States would be drawn into it. Roosevelt was deeply concerned with ways to prevent such wars from erupting in the future. These were his words:

> In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression – everywhere in the world. The second is freedom of every person to worship God in his own way – everywhere in the world. The third is freedom from want – which, translated into universal terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants – everywhere in the world. The fourth is freedom from fear – which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor – anywhere in the world. That is no vision of a distant millennium. It is a definite basis for a kind of world attainable in our own time and generation. That kind of world is the very antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb.[1]

Kevin Boyle has devoted tremendous work and commitment to the promotion and realization of the first two of those four freedoms. In this contribution I shall focus on the problems and prospects for the recognition and realization

1 Franklin D. Roosevelt, State of the Union Message to the Congress, 6 January 1941.

of the *third* freedom, the freedom from want. It has found its place under the heading of economic and social rights in the contemporary normative system of human rights, but has had difficulties in being fully recognized and implemented.

It is generally recognized that the cradle of discourse on rights, properly speaking, can be found in British, French and American thinking and early practice during the 17th and 18th centuries. Looking back in 1950 on these developments, T. H. Marshall (then professor at the London School of Economics) focused on the historical development of those attributes which were vital to effective 'citizenship'.[2] He distinguished three stages in this evolution, tracing the formative period in the life of each of these types of rights to a different century, and he related it to an evolving concept of citizenship. Civil rights had been the great achievement of the 18th century, laying the foundation of the notion of equality of all members of society before the law; political rights were the principal achievement of the 19th century by allowing for increasingly broader participation in the exercise of sovereign power; social rights were the contribution of the 20th century, making it possible for all members of society to enjoy satisfactory conditions of life.

In the United States, the Great Depression – the name given to the worldwide misery caused by the wild speculations that ended with the crash on the New York stock exchange in 1929 – created the ground for the election of Franklin D. Roosevelt as president in 1932, and for the introduction of the 'New Deal' policy. The 'New Deal' implied the promotion of social rights, which were new to the United States and faced considerable resistance, including constitutional challenges in the US Supreme Court.

Through his 'Four Freedoms' address in 1941, Roosevelt sought to elevate such rights to a concern for the whole world – the freedoms should be enjoyed by everyone, 'everywhere in the world'. In his subsequent State of the Union Address in January 1944, he argued even more explicitly that economic and social rights had become self-evident.

> This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights – among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty. As our nation has grown in size and stature, however – as our industrial economy expanded – these political rights proved inadequate to assure us equality in the pursuit of happiness. We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men.' People who are hungry and out of a job are the stuff of which dictatorships are made.

2 T.H. Marshall, *Citizenship and Social Class and other Essays*, Cambridge University Press, 1950.

> In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all – regardless of station, race, or creed.[3]

What is often overlooked is that an initial preparation for what later became the Universal Declaration of Human Rights took place during the Second World War, in the United States. Inspired by the 'Four Freedoms' address of 1941, the American Law Institute (ALI) and its director, William Draper, took the initiative to establish a committee under the ALI to draft a document entitled 'Statement of Essential Human Rights', in the years 1942 to 1944.[4] Louis B. Sohn, a renowned American Professor of International Law, was closely associated with this process and has given us highly interesting information about the discussions,[5] including the active role of the American participants in the promotion of economic and social rights.

When the UN Commission on Human Rights started negotiating the UDHR in 1947, the director of the Human Rights Division of the Secretariat was John Humphrey, a Canadian Professor. He prepared for the Commission an initial working paper where he found the Statement of Essential Human Rights to be the most useful, and he writes in his memoirs that this is the document on which he relied most heavily in the preparation of his draft for the Commission. Much of the substance of the rights in the UDHR, except for Articles 1–7, was already in the draft presented by John Humphrey, drawing mostly on the American Law Institute's Statement of Essential Human Rights.[6] The comprehensive list of human rights in the UDHR, and thus the present normative system of human rights, was the result of the evolution of thinking and political practice in the early industrializing countries of the West.

The initial platform was the assertion of a set of inalienable and inherent 'rights of man' in the sense of freedom from arbitrary state power. On that basis, the rights had expanded at the national level in some (but not all) Western countries into more comprehensive citizenship rights. This could be seen as the maturation of the evolving social contract, reflecting the evolution of social cohesion inside the early industrializing states. The fundamentally

3 Franklin D. Roosevelt, State of the Union Message to Congress, 11 January 1944. The Public Papers & Addresses of Franklin D. Roosevelt (Samuel Rosenman, ed.), Vol XIII (NY: Harper, 1950), 40–42.

4 The text of the draft by the Committee set up by the American Law Institute (but never formally adopted by the Institute) can be found in *The ANNALS of the American Academy of Political and Social Science* 1946; 243; 18; and downloaded from http://ann.sagepub.com/cgi/reprint/243/1/18.

5 Louis B. Sohn, 'How American International Lawyers Prepared for the San Francisco Bill of Rights', *American Journal of International Law*, vol. 89, no. 3, pp. 540–53.

6 John Humphrey has described this process in his book, *No Distant Millennium: The International Law of Human Rights*, UNESCO, 1989.

new step taken by the adoption of the UDHR was to proclaim these rights as *universal* human rights that should be applied everywhere in the world. This was indeed a daring and ambitious step. Very clearly, conditions elsewhere were not ripe for an immediate implementation of the whole package of rights that had taken several centuries to mature in a few countries.

The UN General Assembly can nevertheless be shown to have had a realistic perspective on this. While the rights were called 'universal', the General Assembly proclaimed the Declaration, in its preamble:

> [. . .] as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measure, national and international, to secure their universal and effective recognition and observance [. . .].

The project of the United Nations, in adopting the Declaration, was therefore to make human rights universal.

Freedom of expression, political rights, and freedom from want: their relationship

It is sometimes argued that if there is respect for freedom of expression and democratic governance in a society, the prospects are good that there will also be freedom from want. One famous variety of this view has been the oft-quoted conclusion drawn by Amartya Sen, based on extensive studies of occurrence and dynamics of famines, that famine has never occurred in a democratic society.[7] It is sometimes quoted as a justification for concentrating only on civil and political rights, assuming that material needs will then also be met to a reasonable degree.

A statement of such generality is obviously untenable, but in fairness to Amartya Sen, he has never claimed anything so far-reaching as that. It is a misinterpretation of his important and path-breaking work on famines, a misinterpretation sometimes used to downgrade the importance of economic and social rights as part of the human rights system.

A telling case is that of the Irish famine. The United Kingdom was, relatively speaking, a democratic country in the middle of the 19th century, when the Irish famine erupted and escalated into one of the worst famines in recorded history. Ireland was then under Britain, the 'mother' of parliamentary democracy. The famine, which lasted from 1846 to 1849, started as

7 A. Sen, *Freedom, Rationality, and Social Choice: The Arrow Lectures and Other Essays*, Oxford University Press, 2000, pp. 51–53.

the result of a prolonged potato blight, which over several years caused the potatoes to rot. While this occurred not only in Ireland, but also in other parts of Europe, it had a particularly devastating impact in Ireland.

Four factors caused the disease to become a tragedy of enormous proportions: as a result of the British occupation and Cromwell's wars, most of the Irish had been reduced to peasants engaged in subsistence agriculture. The potato was their staple food. They had little income beyond whatever minuscule amounts they could get from sale of potatoes and other farm products. Secondly, they did not own their farmsteads, but were tied to Protestant or British landlords who insisted that they should continue to pay their rent even when no income could be obtained. As they could not pay, hundreds of thousands were evicted. Third, Ireland was not an independent country with its own government, which might have recognized its responsibility to take remedial action; Ireland was under British rule.

The most serious obstacle to the prevention of the famine was the stubborn belief in British political circles at the time in the 'laissez-faire' ideology, the ultra-liberalistic theory that government should not interfere in economic activity. In her book on the history of the Irish famine, the eminent historian Cecil Woodham-Smith writes:

> Not only were the rights of property sacred; private enterprise was revered and respected and given almost complete liberty, and on this theory, which incidentally gave the employer and the landlord freedom to exploit his fellow man, the prosperity of nineteenth-century England had been unquestioningly been based.
>
> The influence of laissez faire on the treatment of Ireland during the famine is impossible to exaggerate. Almost without exception the high officials and politicians responsible for Ireland were fervent believers in non-interference by Government, and the behaviour of the British authorities only becomes explicable when their fanatic belief in private enterprise and their suspicions of any action which might be considered Government intervention are borne in mind.[8]

Subjected to absentee landlords and to the fervent ideology of 'laissez-faire' by the government controlling them, the Irish were doomed. The governmental inaction when it should have interfered in the economic dynamics, coupled with marginal and misplaced efforts to give some relief, caused 1 million persons to die from starvation and related illnesses; nearly 2 million emigrated, a large part of them to the United States. Ireland's population dropped from 8 million before the famine to 5 million a few years after.

The lack of appropriate public action in the Irish case was extreme, and nothing similar could conceivably happen in the future. But the underlying

8 C. Woodham-Smith, *The Great Hunger, Ireland 1845–9*, Hamish Hamilton, 1968, p. 54.

attitude, that markets should be left to their own dynamics with as little public interference as possible, has dominated the neo-liberal process of globalization since 1980 and remains one of the reasons why massive hunger and malnutrition continue to exist in a world with enormous wealth and where there is food enough for all if access to it were evenly distributed.

That famine can occur in non-democratic states due to mismanagement or lack of freedom of expression, is beyond doubt. But how far can the claim be sustained that it does not occur in democratic countries?

India is a country that has been persistently democratic – with some minor aberrations – since its independence, and it has a vocal and diversified press giving ample place for freedom of expression. The economic development has been formidable during the last decades after India opened wide its economy and embraced the process of globalization.

However, this economic development has benefited only a minor part of the Indian population; a large part of the ordinary people are still poor. When it comes to hunger and food insecurity, the situation in parts of the country is severe. Nearly a quarter of the world's bottom billion of seriously hungry and malnourished live in India, in spite of its thorough integration in the globalization process and its staggering growth in GDP. Thirteen of the 17 Indian states have been shown to have alarming levels of hunger, one of them, Madyar Pradesh, warranting the label 'extremely alarming', comparable to Ethiopia and Chad.[9]

The problem, however, is the definition of the 'famine'. If it is defined narrowly to include only extraordinary events, emerging very quickly (over a couple of years) and causing a substantive number of deaths within the area defined as the famine area, then the claim is substantiated. Such famines have not occurred in India since independence, and this probably holds for all self-governing, democratic states.

The assumption underlying Amartya Sen's claim that famines have not occurred and will not occur in democratic societies is that an independent and active media will provide early warning of impending food crises and imminent risks of starvation, and that – in a pluralist, multiparty system – governments will be criticized for inaction or failure to tackle such crises.

However, where hunger is not the result of a sudden crisis, but part of the everyday life over longer periods of time – and widely spread, but affecting only the poorest part of the population – chronic hunger may not attract the same attention by the media nor will the politicians necessarily see it as their priority to prevent or stop hunger.

9 P. Menon, A. Deolalikar, and A. Bhaskar, 'Comparison of Hunger Across States – India State Hunger Index' (Washington, DC/Bonn/ Riverside: IFPRI/Welthungerhilfe/ University of California Riverside, 2008). Online. Available at: http://www.ifpri.org/pubs/cp/ishi08.asp.

Amartya Sen's theory has been tested in theory and practice in a doctoral thesis by Dan Banik. His conclusion is that if a situation is defined as a crisis constituting a famine threat, public action is taken in India hindering the famine from escalating. But this has not prevented more than 200 million from suffering chronic malnutrition and under-nutrition, and more than 2.5 million children dying every year before the age of 5. Banik writes:

> Indeed, there seems to be a general consensus among successive ruling parties in India that the term 'starvation' must be avoided at all costs. In comparison, 'malnutrition' is a relatively safe term to use, given that it is widespread not just in India but throughout the world. Ruling parties in India are confident that they will not be held politically accountable for failing to tackle malnutrition.[10]

The main point I want to make here is that democracy and freedom of expression do not necessarily lead to an effective commitment to prevent widespread, chronic hunger and malnutrition. It must be supplemented by a commitment of the political elite to the realization of economic, social and cultural rights. The political elite will not be given the authority or political space to take effective public action against hunger and malnutrition unless there is an acceptance among the influential sectors of the public of a human-rights-based duty to act. Democracy and the related civil and political rights, including freedom of expression, are necessary but insufficient for the creation and preservation of a cohesive and just society. Recognition of the principle of interdependence and interrelationship of all human rights is therefore fundamental, but its acceptance remains limited.

Globalization processes: cooperative, corporate-driven, or emergence of a global community?

The initial vision of intergovernmental cooperation

The proclamation of the Universal Declaration of Human Rights by the United Nations General Assembly in 1948 was part of the globalizing vision underlying the United Nations Charter, a vision formed during the Second World War. It was a vision of future global multilateral cooperation towards common security and common wealth, intended to replace unilateral self-assertion and power games. Among the purposes set out in the UN Charter was promotion of international cooperation in solving problems of an

10 D. Banik, *Democracy, drought and starvation in India: Testing Sen in theory and practice*, Dissertation at the Department of Political Science, University of Oslo, 2003, p. 434.

economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.[11] A shared responsibility by all states and the international community to cooperate in creating the conditions which make this possible was set out in UN Charter Articles 55 and 56.

The UN Charter envisaged a process of cooperative development by interlinking national and international efforts. Governments of the South called early on for a 'New International Economic Order' (NIEO), intended to be more egalitarian in nature than the one prevailing. In 1974, the UN General Assembly adopted the Declaration and Program of Action of the New International Economic Order,[12] followed in December 1974 by General Assembly approval of the Charter of Economic Rights and Duties of States.[13] The NIEO Declaration envisaged substantial changes in the international system, allowing developing countries significant opportunities to improve their economy to escape out of poverty.[14] But in the late 1970s this effort was broken by the onslaught of the neo-liberal backlash.

Neo-liberal globalization, 1980–present

The re-emergence around 1980 of 'laissez-faire' ideologies after decades of socially conscious policies had their own internal reasons in the USA and UK. They became 'global' because they coincided with the debt crisis which effectively paralyzed the movement for a new international economic order and marginalized its theoreticians. This gave the Bretton Woods institutions an entirely different role than originally envisaged, with an unprecedented power to prescribe and to implement economic and monetarist policies for developing countries. Governmental decision-making concerning social issues related to regulations, taxation, public spending, and social security arrangements were closely watched, particularly by the IMF. The links between the US Treasury and the international financial institutions during the Reagan/Thatcher era led to the emergence of the 'Washington Consensus',[15] requiring developing countries to privatize public enterprises, deregulate the economy, liberalize trade and industry, avoid or reduce taxation of corporations, adopt monetarist measures to keep inflation in check, maintain strict control of labor, reduce public expenditures (particularly social

11 UN Charter, Article 1.3.

12 UN General Assembly Resolution 3201 (S-VI) (1974).

13 UN General Assembly Resolution 3281 (XXIX) (December 12, 1974).

14 Richard Jolly, Louis Emmerij, Dharam Ghai and Frédéric Lapeyre, *UN Contributions to Development Thinking and Practice*, United Nations Intellectual History Project, Indiana University Press: Bloomington and Indianapolis, 2004, pp. 120–24.

15 Regarding Washington Consensus, see: http://www.cid.harvard.edu/cidtrade/issues/washington.html.

spending), downsize government activities, open up for unregulated international trade, and remove controls on global financial flows.[16]

The persistent demands for these structural adjustments had crippling effects on many poorer countries. They served mainly to pressure or encourage developing states to adapt to the expanding global market for direct private investments and unregulated ('free') trade. The harmful effects on the economic and social rights of poor people have been extensively documented. Raising fees for social programs in areas such as health, education, income support, and housing is one illustration. Pressure to keep workers' wages low is another; water privatization and full-cost water pricing are a third.[17]

Perhaps the most depressing manifestation of the neo-liberal process of economic globalization is the growing global and national inequality including massive hunger and malnutrition in various forms, contributing to child and other premature deaths and acute or chronic and disabling diseases, which seriously affect human and social development. Around a billion people in the world do not have enough to eat,[18] have little or no access to primary health care and often live under dangerous unsanitary conditions, all contributing to manifest hunger, malnutrition and ill-health.

The legacy of economic globalization: a world divided

The initial UN vision has been replaced by a mostly unregulated, market-driven globalization, causing an increasing social cleavage between the rich and the poor of the world. Poverty has made stark hunger a reality for more than a billion people while global wealth reached unprecedented levels until the financial crisis erupted in 2008. The financial crisis has had only minor consequences for the rich, but has been devastating for many who were already on the brink of poverty when it erupted.

There is now in existence a predominantly *urban* 'Global North', which in the last two or three decades expanded to include economic elites in places like Shanghai, Mumbai and Seoul, in addition to the traditional seats of dominant economic power on Wall Street in New York, in the City of London, and similar places in Frankfurt, Tokyo, and a range of other prosperous cities around the world. Facing the Global North is a predominantly *rural* 'Global South',[19] mostly in developing countries and to a lesser extent in

16 M. Steger, *Globalization: A Very Short Introduction*, Oxford University Press, Oxford, 2003, p. 41.

17 M. Rodwan Abouharb and D. Cingranelli, *Human Rights and Structural Adjustment*, Cambridge University Press: Cambridge/New York/Melbourne/Madrid/Cape Town/Singapore/São Paulo/Delhi, 2007.

18 The State of Food Insecurity in the World 2008 (Rome: FAO, 2008).

19 The distinction between 'the Global North' and 'the Global South' has been used and elaborated by the Ethiopian scholar Tewolde Berhan Gebre Egziabher in a paper to be published in the 4th report of FAO Panel of Eminent Experts in Food and Agriculture (forthcoming).

the 'countries of transition', with associated urban slums which are quickly growing in number, though the growth is expanding or contracting in line with global financial speculations and regressions. The dividing line between the rich and the poor now goes *through* countries, not (only) between them. In developing countries it goes mostly between the urban and the rural, but also in urban areas between the expanding slums and the more complacent urban neighbourhoods of the beneficiaries of globalization.

A world divided both on wealth and on greenhouse gas emissions

The division of wealth and poverty is closely correlated with the division between high and low greenhouse gas emissions. It has been proved beyond reasonable doubt that there is an accelerating process of global warming, that it is mainly manmade, and that the main cause is the emission of greenhouse gases. It is also generally agreed that it is urgent to slow down the global warming, and that a further increase in temperature of 2 degrees Celsius would be very harmful. It is further generally agreed that those who would be most strongly affected, and with the least capacity to adapt to it, are the poorer part of the population in developing countries.

Against this background, it is a sobering exercise to compare the ranking of states on two supposedly very different indicators: GDP/capita on the one hand (which is the main indicator of the distribution of wealth and poverty among states) and the list ranking countries on greenhouse gas (GHG) emissions, particularly through emissions of carbon dioxide, on the other.

The list on GDP/capita is maintained by the IMF, the World Bank and the United States CIA factbook;[20] the list on GHG emissions is maintained by the International Energy Agency (IEA) and the US Department of Energy's Carbon Dioxide Information Analysis Center (CDIAC), in turn drawn from country agencies by the United Nations Statistics Division.[21]

On the top of both lists we find, with a few exceptions, the industrialized countries of the West, Australia and Japan, and on the bottom of both lists we find the poorest countries of the world, mostly in sub-Saharan Africa and a few others such as Haiti. The clear message is that the wealthier a country is, the more it emits greenhouse gases, which in turn is due to the level of energy consumption.

The harm of greenhouse gas emission, however, is on the other hand almost inversely correlated with GHG emission. The poorer parts of the population

20 Tables showing the ranking by IMF, World Bank, and US CIA of countries on GDP (PPP) per capita can be found at: http://en.wikipedia.org/wiki/List_of_countries_by_carbon_dioxide_emissions_per_capita.

21 A presentation based on those sources is found on http://en.wikipedia.org/wiki/List_of_countries_by_carbon_dioxide_emissions_per_capita.

in developing countries are those who are most affected, partly (1) because of their location – in tropical areas where increases in temperature are particularly harmful, in low-lying coastal areas with very dense settlements (e.g. Bangladesh), in areas where drought is already an increasing problem and is likely to worsen (large parts of Sub-Saharan Africa) – and partly (2) because they have less capacity to adapt to the consequences of the global warming.

The correlation between wealth, energy consumption and GHG emission to a large extent applies also if we explore the internal situation of countries. Without having explored the data, it is fair to believe that in China, most of the wealth is amassed in the eastern and south-eastern part of the country where there has been a rapid industrialization and where much of the wealth is accumulated, while the rural parts of western China are lagging far behind. There is a high probability that wealth and greenhouse gas emission are correlated when comparing the different regions of China and their different levels of wealth.

There are undoubtedly exceptions to this. Countries in which there is extensive oil extraction, but mostly for export, do not necessarily retain much of the wealth for themselves.

However, apart from such exceptions, the general picture is clear: development is associated with energy consumption, and energy consumption is associated with greenhouse gas emission. This raises fundamental questions of justice when looking towards the future. During the period of neo-liberal globalization it has been possible to argue that, even if inequality is growing, the increasing productivity caused by free trade and free investments helps also to increase the income of the poorer part of the population. It is a dubious argument, but it has been difficult to get hard evidence to disprove it, because of the problem in determining what would have happened if there had been more regulations and restrictions.

But now, with incontrovertible evidence that we are reaching the ceiling of permissible GHG emissions, and knowing that GHG emissions are closely correlated with the use of energy that determines levels of material development, we face a new situation: the harm caused by the greed of the highest producer of GHG is a direct threat to the poor. It is now a zero-sum game, and it cannot be obfuscated by rhetoric.

Some adjustments can be made through scientific and technological advancement whereby 'clean' (non-GHG-emitting) energy is developed. Some improvements can also be achieved if many individuals within rich countries 'go green' in their lifestyle by reducing their energy consumption. But this will be of marginal significance compared with the unavoidable expansion of energy consumption and thereby greenhouse gas emissions, if economic growth continues in the rich countries and developing countries seek to catch up in their energy use.

Towards a global community for common public goods?

There is reason to believe that the current crises will force the world to cooperate in a different way than before. If we assume that we have reached the ceiling of GHG emissions, and that wealth and energy consumption are closely correlated, there will be a much stronger pressure for a revised allocation of development opportunities. It will not come easily under the present structure of semi-sovereign states where the choice of politicians and their agendas is determined by the internal dynamics of each state, not yet by the global necessities. But this may change.

The greatest challenge is to start reducing, or at least to stop increasing, energy consumption among the rich, while allowing greater energy consumption among the poor. If we are to take seriously the right of everyone to an adequate standard of living, we have to recognize that nature forces us to equalize our consumption, irrespective of economic theories.

Contemporary challenges and their human rights implications

The economic globalization described in the preceding section has weakened the capacity and discouraged the commitment of national governments to protect and promote freedom from want of their own populations. It has caused some groups to become more impoverished, while others – often those who were already relatively well off – have become wealthier. The effect of this 'bloodletting' of state responsibility, and the unequal distribution of benefits and harms, has had disastrous consequences for large numbers of vulnerable groups during the last decade.

Sadly, the situation is now further and quite seriously deteriorating. In quick succession, the world has faced three crises with a cumulative harmful impact on the poorest people. As a result, in absolute numbers, there are probably more people now deprived of the freedom from want than at any other stage in human history.

This must of course be assessed against the background of the growth of world population. At the time of Roosevelt's 'Four Freedoms' address, there were around 2.2 billion people on the earth. When the UDHR was adopted in 1948 the world population was approximately 2.5 billion. Today we are approaching 6.8 billion.

In terms of the proportion of people suffering from hunger and poverty in the world, considerable improvements were achieved during most of the post-Second World War history, until the reversal started in recent years. The substantial reductions since the Second World War were due to great advances in science, technology, and organizational and deliberate efforts at including the poorest. The reduction was faster before the onset of neo-liberal globalization, and has since slowed down and now reversed: not only the number, but also the proportion of those in extreme poverty is going up.

From 1969 to 1979, the percentage who were food insecure was reduced by nearly 10 per cent, from 34 to 25 per cent, an annual reduction of nearly 1 per cent each year. During the next decade – from 1980 to 1990, which is the first decade of neo-liberal globalization, the reduction was only 5 per cent (down to 20 per cent), about half the speed of the previous decade. The reduction slowed down more during the 1990s, when only a 3 per cent further reduction of the food insecure was achieved, down to less than one third of a percent reduction each year. And worse was to come: from 2000 to 2009, not only has the reduction stopped, but also the percentage of the food insecure in the world population has started to increase and in 2009 now stands again at nearly 20 per cent of the whole world population.[22]

The increase in food insecurity, expansion of slums and homelessness has been most rapid in developing countries, but has also affected the more developed states. Even within the wealthiest societies such as the United States, the number and the proportion of food-insecure families and the homeless have increased substantially during the last few years.[23]

The three crises described below are all related to and accelerated by the one-dimensional process of economic globalization since 1980, which has undermined the capability of many developing countries to take mitigating and adaptive measures to stave off the worst consequences.

The food crisis

The cost of food increased rapidly from 2006 to 2008. While it has since decreased slightly due to factors associated with the financial crisis, it is still much higher than it was before 2006, and is unlikely to return to that low price.

Even before the dramatic rise in the cost of food, some 850 million people were hungry because they did not have economic or physical access to enough food; with that increase, at least an additional hundred million persons are now food insecure, and the number is further increasing because of the financial crisis.

Before the recent price increases, many families in developing countries already spent 60–80 per cent or more of their incomes on food. For them,

22 FAO: State of Food Insecurity, 2009, p. 11. Online. Available at: http://ftp.fao.org/docrep/fao/012/i0876e/i0876e02.pdf (accessed 22 February 2010).

23 According to Children's Health Watch, a United States organization, food insecurity in the USA rose from 18.5 per cent to 22.6 per cent between 2007 and 2008 in a five-city sample of low-income families with children under 3 years old. The criteria used for food security are different from those of FAO's State of Food Insecurity, and not all of the 22.6 per cent would necessarily be defined as food insecure by FAO. See: http://www.childrenshealthwatch.org/upload/resource/FoodInsecurityBrief6_09.pdf.

the price increase is dramatic. A study prepared at the International Food Policy Research Institute in 2006 projected that the number of people suffering from undernourishment would increase by 16 million people for each percentage point increase in the real price of staple food.[24] The increasing price and later the financial crisis have also significantly reduced the ability of the World Food Program and other food aid agencies to meet the needs of the millions they traditionally tried to help, let alone the large numbers of newly hungry people who used to be able to take care of their own needs.

The financial crisis

The financial crisis that exploded in 2008 had its direct origin in the housing bubble in the United States, caused by excessive speculation in the so-called sub-prime lending. The UN Special Rapporteur on the Right to Adequate Housing, Raquel Rolnik, described in a February 2009 report (A/HRC/10/7) how the speculation and reckless lending built up from the 1990s, and particularly from 2006. She has also related this to the broader development of neo-liberal globalization, including the move by states away from social housing, as well as from regulation and control of the market.

Homeownership has become the dominant strategy, resulting in a commodification of housing – making housing a major source of speculation and profit-seeking which ultimately caused a bubble that was bound to crash. The outcome has been extensive foreclosures, evictions and homelessness. The evictions and homelessness, and the fear of it, have been particularly severe for women and children.

Due to the stage of economic globalization reached in 2008, the financial crisis has had serious reverberations throughout the whole of the global economy, with particular impact on the poor of the developing countries, but also on the weaker part of the population in some of the rich countries. It has aggravated the gap between human rights standards and the reality faced by many millions of people. Most directly it has severely affected the enjoyment of the right to housing, water and sanitation, but it has had wide-ranging harmful human rights consequences in many other areas.

Hopefully, the harsh consequences of the housing crisis will lead to a more serious consideration within states and in the international community to reconsider the policies of housing, bringing speculation under control and ensuring access to social housing in order to complement homeownership.

24 M. Rosegrant, S. Msangi, T. Sulser, and R. Valmonte-Santos, 'Biofuels and the Global Food Balance: Bioenergy and agriculture promises and challenges'. Online. Available at: http://en.scientificcommons.org/37597372 (accessed 22 February 2010).

The climate change/global warming crisis

We are now in the midst of a third crisis, which comes on top of the two others. It is a crisis that has been building up for a long time, the effects of which are now widely recognized and already escalating. As was stated above, the man-made increase in global warming would have a disproportionately damaging effect on the poorest parts of the population in developing countries.

As pointed out in the previous section, the rich are those who cause the greatest emission of greenhouse gases, but the poor are those who are most negatively affected. The Office of the High Commissioner for Human Rights has produced a study containing a survey of the human rights implications of climate change (A/HRC/10/61, 15 January 2009). In the study, it is pointed out that climate change will exacerbate weather-related disasters, which already have devastating effects on people and their enjoyment of the right to life, particularly in the developing world. For example, an estimated 262 million people were affected by climate disasters annually from 2000 to 2004, of whom over 98 per cent lived in developing countries. Tropical cyclone hazards, affecting approximately 120 million people annually, killed an estimated 250,000 people from 1980 to 2000.

The study also points out that threats to the right to life, generally and in the context of climate change, are closely related to threats against other rights, such as those related to food, water, health and housing.

What is important, given the incontrovertible fact that global warming already has caused massive harms for the enjoyment of human rights, and is likely to do so even more in the future, is to develop the understanding of the nature of state obligations in protecting against the harms of global warming and facilitating the best possible adaptation to it. This will require increased attention to the realization of economic and social rights, and the ensuring of access to information and participation in decision-making.

Retrospect and prospects

The inclusion within human rights of the specific economic and social rights, which seek to guarantee freedom from want, was due to developments in the early industrializing countries of the West, as a result of a long and drawn-out battle with the unmitigated 'laissez-faire' ideology, whose roots go back to John Locke but whose major authority was Adam Smith. This ideology dominated developments particularly in Britain and the United States – sometimes blending with Social Darwinism – until it gradually was pushed back by an increasing awareness of the social costs. Liberal thinking increasingly merged with social consciousness, which found its strongest expressions in the aftermath of the wild speculations in the 1920s, which led to the Great Depression. The introduction of the New Deal policy in the United States and the notion of the welfare state, with its positive symbolic meaning, laid

the groundwork for the comprehensive notion of human rights, including the freedom from need when the UDHR was adopted in 1948.

It was a major problem; however, to lift these rights – which had emerged as a consequence of the evolution of cohesive nation-states in the early industrializing states – to a universal concern that could be upheld as standards of achievements throughout the world.

I have pointed out that there was an effort to develop, through the concept of a NIEO, a more egalitarian world, but that it failed for several reasons – since it coincided with the East–West cold war, and was badly affected by that; and because of the reemergence of 'laissez-faire' ideologies in the USA and Britain at the end of the 1970s and throughout the 1980s. Together with the debt crisis, which had its own particular reasons, the reemergence of this ideology broke the back of the efforts to create a more egalitarian world.

Since 1980 there has been a one-dimensional economic globalization where the concern with freedom from want as a moral imperative was almost completely sidelined. It is one-dimensional because it has until now focused only on the economic dimensions without paying adequate attention to social, environmental and cultural dimensions, which are at least as important as the economic. There has been much talk about poverty reduction, but this has mainly been structured to facilitate economic penetration and globalization, without being able to reduce the number or proportion of poor people in the world.

I have demonstrated that this has culminated in three crises coming in rapid succession: the food crisis, the financial crisis, and the crisis of global warming and related environmental problems.

Where can we expect to go from here?

One option would be to restore inter-state cooperative globalization. Its main point would be to restore the space for sovereign decisions by countries, but combined with interstate cooperation to deal with issues of common concern. It would be expressed in terms such as food sovereignty coupled with international agreements in order to avoid unnecessary hardships for net food-importing countries.

It is unlikely to succeed because of the profound inequality in the global system; the inequality in power is staggeringly high and will be very difficult to modify through international cooperation if each state maintains a high level of sovereignty.

A second option is to continue one-dimensional economic globalization.

Its main feature would be the continuation of maximally free trade, free access to investment, and strong enforcement of investment treaties, even where it can be shown that their impact highly benefits the rich over the poor. The resistance to this model is growing, however, and is likely to be further strengthened due to the awareness of global warming and of who is responsible for the emissions taking place.

A third option is to move from present economic globalization to more inclusive social, economic and cultural globalization. This would broaden the

globalization to include the dimensions that have largely been neglected. It would require global responsibility towards those who are negatively affected by international trade, a reorientation of international trade to be more fair rather than simply 'free', a recognition that unnecessary long-distance trade implies unnecessary GHG emissions. It would imply an overhaul of the international system for the protection of patents and other intellectual property, making sure that everyone has the same possibility of enjoying the benefit from advances in science and technology.

It would require that international agencies, rather than individual countries, have the authority to determine the scope and duration of patents and the space for the pricing policy of the corporations.

It would imply a global regulation of the consumption of energy and of permissible emissions, gradually equalizing these by enforcing a reduction by the high emitters and allowing a slow and increasing emission by the low emitters.

Above all, it would imply a stronger role for truly representative international agencies to adopt decisions that countries would be required to implement.

Is it realistic that there can be a move in this direction? The world of today is structured through the existence of more or less sovereign states, where the political leaders are (at best) chosen by their own people, and are expected by their electorate to promote and protect the interests of their own people (in reality, the interests of the most influential among them). There is an enormous difference in the power of different states, based on a combination of technology and capital, capacities of organization and communication, size and resources of territories and the number of people.

Due to this structure, the solution of common problems of the world community is secondary to the promotion of the interest of each state. The possibility for leaders to subordinate their national interests to the common concerns of the world as a whole is still very limited.

It is possible that the three crises mentioned above can make an inroad into this. The factors that may push in this direction are the dual concerns with human rights and with the prevention of global environmental catastrophes, particularly the problem of global warming.

It is an encouraging sign that the United States under the Obama administration appears committed to a stronger reliance on multilateral diplomacy. It is also encouraging that President Obama on 10 December 2009, in his Nobel lecture in Oslo, reiterated what President Roosevelt said 68 years earlier: that freedom of speech and faith must be coupled with freedom from want to ensure peace and freedom from fear.

In President Obama's own words:

> I believe that peace is unstable where citizens are denied the right to speak freely or worship as they please; choose their own leaders or assemble without fear.

[. . .] [A] just peace includes not only civil and political rights – it must encompass economic security and opportunity. For true peace is not just freedom from fear, but freedom from want.

It is undoubtedly true that development rarely takes root without security; it is also true that security does not exist where human beings do not have access to enough food, or clean water, or the medicine and shelter they need to survive. It does not exist where children can't aspire to a decent education or a job that supports a family. The absence of hope can rot a society from within.

And that's why helping farmers feed their own people – or nations educate their children and care for the sick – is not mere charity.[25]

25 Nobel Lecture by Barack H. Obama, Oslo, 10 December 2009. Online. Available at: http://nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html (accessed 22 February 2010).

9 Lobbying for rights during the 'war on terror'

The American Civil Liberties Union after 9/11

Richard J. Maiman

This chapter examines the strategies and tactics of a major United States rights advocacy group, the American Civil Liberties Union (ACLU), in its campaign against a major piece of post-9/11 domestic security legislation introduced by the Bush administration – the USA Patriot Act. There is a substantial literature analyzing the work of interest groups devoted to human rights advocacy in both national and international contexts, much of which has focused on test-case litigation, the core activity of such groups domestically.[1] The scholarly literature has given much less attention to legislative lobbying by human rights organizations, even though such groups typically are active in the legislative arena as well as in the courts. This study attempts in a modest way to redress that imbalance. By analyzing the ACLU's congressional lobbying activities during a particularly challenging period for human rights advocates, it contributes empirically to an understanding of how rights organizations do their work.

The ACLU[2] is an appropriate focal point for this study because it is generally regarded as the pre-eminent civil liberties pressure group in the United

1 That literature is reviewed in a recent study of the strategies and tactics of the ACLU's closest counterpart in the United Kingdom, the pressure group Liberty. See R. Maiman, ' "We've Had to Raise Our Game": Liberty's Litigation Strategy Under the Human Rights Act,' in S. Halliday and P. Schmidt (eds), *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Oxford: Hart Publishing, 2004).

2 The most comprehensive single work on the American Civil Liberties Union is S. Walker, *In Defense of Liberty: A History of the ACLU* (New York: Oxford University Press, 1990), a highly sympathetic account of the organization's history. Another useful source focusing on the organization's founder is R. Cottrell, *Roger Nash Baldwin and the American Civil Liberties Union* (New York: Columbia University Press, 2000). J. Kutulas, *The American Civil Liberties Union and the Making of Modern Liberalism, 1930–1960* (Chapel Hill: University of North Carolina Press, 2006) looks at the tension between the strongly anti-communist views of the ACLU's national leaders – including Baldwin – and the more radical commitments of some affiliate activists. Strongly negative assessments of the ACLU and its record, including its claims to be politically non-partisan, are W. Donahue, *The Politics of the American Civil Liberties Union* (New Brunswick: Transaction Books, 1985), and R. Morgan, *Disabling America: The 'Rights Industry' in Our Time* (New York: Basic Books, 1984).

States.[3] Since its founding in 1920, the ACLU has aggressively used constitutional litigation to establish the Bill of Rights as a bulwark against restrictions on personal freedoms by both the US government and (in combination with the Fourteenth Amendment) the individual states. In the aftermath of the First World War, the ACLU pioneered the use of the First Amendment to challenge statutory limits on the free speech of political dissenters.[4] The organization steadily expanded its brief between the 1930s and the 1960s to encompass the First Amendment's religion clauses, the panoply of due process rights included in the Fourth, Fifth, and Sixth Amendments, and the protections of personal privacy grounded in various provisions of the Constitution. Along the way, the ACLU also deployed the Eighth Amendment's prohibition against 'cruel and unusual punishment' in a failed attempt to abolish the death penalty. More successfully, it worked to embed the principle of equality in constitutional and statutory law, first for racial, ethnic, and religious minorities and more recently for other groups victimized by invidious discrimination. It has been estimated that the ACLU was involved, either directly or as *amicus curiae*, in more than three-quarters of the landmark civil liberties cases decided by the Supreme Court in the 20th century.[5]

These dramatic successes in court have often overshadowed the ACLU's congressional lobbying activities, which are notable in their own right. Since 1950 the organization has staffed an office in Washington, DC, to work on national legislation affecting civil liberties. The ACLU has helped shape a number of important US statutes, including the Civil Rights Act (1964), the Voting Rights Act (1965), the Foreign Intelligence Surveillance Act (1978), and the Americans with Disabilities Act (1990).[6] Like other rights-oriented

3 The ACLU's prominence in its field is perhaps best reflected in the frequency with which it is used by its ideological opponents as a whipping boy. During his 1988 presidential campaign, for example, Republican nominee George H.W. Bush tried to shore up his support among conservatives by describing his Democratic rival Michael Dukakis disdainfully as a 'card-carrying member of the ACLU.' In 2005, Bill O'Reilly, a conservative television pundit, called the ACLU: 'the most dangerous organization in the United States of America right now. By far. There's nobody even close to that. They're, like, second, next to al-Qaeda.'

4 See Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998), pp. 49–51.

5 A list of ACLU cases that resulted in victories in the Supreme Court is available at: http://www.lectlaw.com/files/cur59.htm.

6 The Americans with Disabilities Act (ADA) prohibits discrimination against qualified persons with physical and mental disabilities in employment, commerce, and public services, and obliges employers and others to make 'reasonable accommodation' to assure that their facilities were accessible to persons with disabilities. The ACLU was part of the broad coalition of interest groups that worked closely with Congress to get the law enacted. The organization was clearly proud of its role in that process. In the early 1990s the author was present when a new member of the ACLU's national board asked Ira Glasser, the organization's executive director, whether the organization had lobbied for the ADA. Glasser replied with mock incredulousness: '*Lobby* for it? We *wrote* it!'

pressure groups, however, the ACLU most commonly operates from a defensive posture where legislation is concerned, and over time has probably had more influence on what has *not* become law than on what *has*. In the 1970s, for example, the organization helped defeat a proposed wholesale revision of the federal criminal code that would have significantly increased the government's law enforcement authority. In the same period, when the ACLU was heavily involved in drafting the Foreign Intelligence Surveillance Act (1978), it helped derail a proposal that would have permitted warrantless wiretapping in national security investigations.[7]

The ACLU and 9/11

Despite the ACLU's long history of challenging the government's authority on national security issues and advocating for such countervailing values as freedom of speech, personal privacy, and minority rights, such issues were not particularly prominent on the ACLU's agenda immediately before 9/11. The ACLU Foundation's 2001 Workplan – a fundraising document distributed to its members – had identified the 'key areas where we believe the threats to fundamental rights and liberties will be the most imminent' as 'voting rights, reproductive rights, gay rights, racial profiling, separation of church and state, internet censorship, and the death penalty.' Only one of the topics on that list – racial profiling – had any connection to the issues that would preoccupy the organization after September 11, 2001. A few months after the attacks, the ACLU published an 'Emergency Action Plan' which set out an entirely different set of priorities: 'defending the rights of non-citizens,' 'restoring checks and balances,' 'safeguarding the Fourth and Fifth Amendments,' and 'protecting the right to dissent.' These issues would dominate the ACLU's agenda for the rest of the decade, as President George W. Bush's so-called 'war on terror' merged with (or was diverted by) the wars in Afghanistan and Iraq. As one ACLU staff lawyer put it: 'The ACLU's highest post-9/11 civil liberties priority has been post-9/11 civil liberties.'[8]

As it undertook the task of shifting its legislative priorities, the ACLU was greatly assisted by the massive influx of new financial support that resulted from its robust early response to the Bush administration's policy initiatives. Between 2001 and 2006, the ACLU's paid membership nearly doubled, from 300,000 to 573,000. This dramatic expansion in its membership, coupled with some large grants from private foundations, allowed the ACLU to

7 The final version of the law contained an ACLU-sponsored provision requiring that judicial warrants be sought for such wiretaps within 72 hours of their being put in place.

8 The quotations used throughout this chapter are drawn verbatim from a series of personal interviews conducted by the author with current and former ACLU staff members in 2008 and 2009. These individuals are identified not by name but generically, for example, as 'an ACLU lawyer,' 'an ACLU lobbyist,' or 'an ACLU organizer'.

double both its national staff, from approximately 200 to around 400 employees, and its operating budget, from US$14 million to $28 million. These enhanced resources solidified the ACLU's leadership position among rights advocacy groups and allowed the organization some flexibility in rethinking its strategies and tactics in response to the post-September 11 political environment.

On the morning of September 11, 2001, most of the ACLU's top leaders were in Washington, DC, holding a meeting with major financial donors to introduce the new executive director, Anthony Romero, who had begun work the previous week. The ACLU's New York City offices, located in a lower Manhattan office tower about 10 blocks from the World Trade Center, were evacuated after the attacks; they remained closed for about two weeks while telephone and other services were reestablished in the area. Although the Pentagon, located just outside of Washington, was also hit that same morning by a hijacked plane, life in the capital city was not so significantly disrupted as in New York; thus, the Washington legislative office became the ACLU's temporary base of operations. Within a few hours of the attacks, the ACLU received an enormous number of requests for media comment; the organization was clearly seen as an important player in the unfolding drama. On September 12, Executive Director Romero issued a statement praising the 'eloquent words' spoken by President George W. Bush and Attorney General John Ashcroft the day before, calling particular attention to their promises 'to preserve the free and open society that has made this nation great.' Pledging that the ACLU would work with the government 'to help the nation achieve its goal of protecting the security and freedom of all Americans,' Romero added pointedly that the organization would 'urge our leaders to continue to uphold the principles of liberty the nation holds dear as they pursue those responsible for this devastating attack on American soil.'[9]

While publicly expressing hope that the government would honor 'principles of liberty,' behind the scenes the ACLU was preparing for a very different kind of response. Recalling the Clinton administration's reaction to the 1995 Oklahoma City bombing, several veteran staff members predicted that the White House would soon ask Congress to enhance its wiretap authority and to augment its powers to deal with non-citizens. ACLU leaders immediately convened a meeting of organizations with widely divergent political views but common interests in issues such as personal privacy, immigrant rights, electronic surveillance, racial equality, and criminal justice. Many of these same groups had previously joined forces to oppose parts of the anti-terrorism legislation that followed the Oklahoma City tragedy. On September 20, a coalition of more than 130 organizations released a joint

9 ACLU news release, 'ACLU Joins Nation in Horror Over Terrorist Attacks,' September 12, 2001, available at: http://www.aclu.org/national-security/aclu-joins-nation-horror-over-terrorist-attacks.

statement entitled, 'In Defense of Freedom at a Time of Crisis,' which listed 10 'general principles' that should guide the government's response to the attacks. Among these were the following: 'We can, as we have in the past, in times of war and peace, reconcile the requirements of security with the demands of liberty'; 'We should resist efforts to target people because of their race, religion, ethnic background or appearance, including immigrants in general, Arab Americans and Muslims'; and 'We affirm the right of peaceful dissent, protected by the First Amendment, now, when it is most at risk.'[10]

Lobbying the USA Patriot Act

President Bush meanwhile had sent Congress a hastily assembled legislative package that soon came to be called the USA PATRIOT Act ('Patriot Act').[11] The proposal consisted mainly of enhanced powers for federal investigators and prosecutors. Most of these provisions were not brand new. For more than a decade, the Justice Department had been requesting such tools to help fight white collar and computer crime, but without ever generating a positive response in Congress from either party. Quickly repackaged by the Bush administration as 'anti-terrorist' legislation and presented to Congress in an atmosphere of urgency bordering on panic, the proposals now found a much more receptive audience on Capitol Hill. In a quick review of the bill's several hundred pages, the ACLU found multiple violations of the principles spelled out in its 'In Defense of Freedom' statement. Of particular concern were provisions that gave the attorney general the authority to detain non-citizens, minimized judicial oversight of wiretaps and physical searches, and expanded the definition of terrorist activity. The ACLU expressed its disappointment that the proposal 'weakens essential checks and balances on the authority of federal law enforcement in a manner that is unwarranted.' Its lobbyists then swung into action to try to persuade Congress to make changes in the proposal.

It normally would have taken many months, if not years, for Congress to craft legislation as sweeping as the Patriot Act, which proposed to amend no fewer than 11 federal laws.[12] Public hearings would have provided an opportunity for supporters and opponents of the legislation to stake out their

10 ACLU news release, 'In Defense of Freedom at a Time of Crisis,' September 20, 2001, available at: http://www.aclu.org/national-security/defense-freedom-time-crisis.

11 The law's formal title is an acronym standing for 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism'.

12 These were the Immigration and Nationality Act (1952), the Fair Credit Reporting Act (1968), the Bank Secrecy Act (1970), the Family Educational Rights and Privacy Act (1974), the Right to Financial Privacy Act (1978), the Foreign Intelligence Surveillance Act (1978), the Computer Fraud and Abuse Act (1984), the Victims of Crime Act (1984), the Electronic Communications Privacy Act (1986), the Money Laundering Control Act (1986), and the Telemarketing and Consumer Fraud and Abuse Prevention Act (1994).

positions. One or more committees in each house would have reviewed multiple versions of the proposal in minute detail; throughout the process, members and their staffs would have consulted closely with important interest group representatives. Those lobbyists would have been busy providing public testimony, coordinating presentations by other groups and individuals, meeting personally with members and their staffs to argue for and against particular provisions, and even drafting specific language changes for members to consider.[13] Like most interest groups with a longtime presence in Washington, the ACLU is well equipped to play this 'inside game'. Its lobbyists are well acquainted with key lawmakers and their advisors. Indeed, many ACLU staffers are themselves former Capitol Hill staff members who have as much technical knowledge of the issues as those writing the legislation. And, unusually among major pressure groups, the ACLU is also known for strictly avoiding party politics; by refusing to endorse or oppose political candidates at any level, the organization is free to form (often temporary) alliances on both sides of the aisle.

The Patriot Act was not drafted in the usual way, however. Under intense pressure from the Bush administration to act with dispatch, congressional leaders decided to bypass public hearings and send the proposal directly to the judiciary committees in each house for 'mark-up'. The Senate Judiciary Committee, narrowly controlled by the Democrats, made only a handful of changes before approving the bill. The committee's influential chair, Patrick Leahy of Vermont, normally a strong pro-civil liberties voice, disappointed the ACLU's lobbyists by putting aside his admitted reservations about the bill to support its passage. One senator, Russell Feingold of Wisconsin, attempted several times to amend the bill on the floor to bring it more into line with what the ACLU had been hoping for; none of his proposals attracted more than 13 votes from his fellow senators. The bill that quickly passed the Senate by a vote of 98-1 (Feingold being the only dissenter) was, in the ACLU's view, only a slight improvement on the administration's initial proposal.

Ironically, the Bush administration's bill initially received a much rougher reception in the Republican-controlled House of Representatives, where the ACLU initially worked with Judiciary Committee members from both parties to make significant changes in the proposal. This normally highly fractious

13 Indeed, this is very much how the process unfolded after the 1995 Oklahoma City bombing. During the full year that it took the Clinton administration's anti-terrorism bill to get through Congress (where it encountered considerable opposition from both Republicans and Democrats), the ACLU and other civil liberties groups were able to weaken some of the administration's proposals to augment government wiretap authority and to deport aliens suspected of terrorist activities. By the time the anti-terror legislation became law in April 1996, Timothy McVeigh, a white American military veteran with a variety of grudges against the US government, had been indicted in federal court for carrying out the Oklahoma City bombing.

committee produced a compromise proposal that differed markedly from what the White House had asked for. For example, it discarded the 'sneak and peak' provision that permitted the FBI to conduct physical searches without the target's knowledge. The ACLU's lobbyists were preparing to help House members defend those changes in the conference committee where the Senate and House bills would be reconciled, when House Republican leaders, acting under strong White House pressure, stepped in. The marked-up bill was summarily withdrawn and replaced with the version that the Senate had already passed, thus eliminating the need for a conference committee. The bill then was put before the full House with no debate or amendments permitted. The Patriot Act was adopted by a vote of 357 to 66 and signed into law by President Bush on October 26, less than six weeks after it had been introduced.

Having managed to secure only a few of its desired changes in the bill, the ACLU was left expressing its disappointment with the new statute and vowing to carefully monitor its implementation. From the ACLU's perspective, one of the few positive outcomes was the inclusion of so-called 'sunsets' in 16 of the law's most controversial provisions; unlike the rest of the law, these portions would expire in approximately four years (on December 31, 2005) unless they were explicitly reauthorized by Congress.[14]

Over the years, the ACLU has hardly won all its battles in Congress, but seldom has the organization emerged from the fray with as little to show for its efforts as with the Patriot Act. The experience prompted a year-long period of reflection by the organization's leaders. With so many of the ACLU's former allies in Congress now convinced that it would be politically suicidal to oppose the Bush administration efforts to protect 'homeland security,' it was obvious that the organization needed to find new ways of exercising influence on Capitol Hill. The ACLU's traditional 'insider' strategy, resting in large part on its reputation for legislative expertise and political nonpartisanship, seemed no match for the administration's apparent capacity to rally public support for ever-greater executive authority. Moreover, it seemed likely that the ACLU's usual trump card – the threat of constitutional litigation – would also be less potent in the future. Even before 9/11, federal courts were following the lead of the US Supreme Court in applying much tougher standing requirements in a variety of civil liberties cases. Now, with the secrecy rules authorized by the Patriot Act in place, it would be difficult for a potential plaintiff even to know that a search or surveillance had occurred, much less to argue that it had violated the law.

14 Not all of the ACLU's staffers believed that getting these sunsets included in the final bill was an effective legislative strategy. One suggested that the sunsets worked against the ACLU's interests by making it easier for some wavering House members to vote for the bill.

The ACLU's new approach

In October 2002 ACLU leaders launched a new initiative called the 'Safe and Free Campaign'. At its most ambitious level, the project was aimed at shifting public opinion – and with it, congressional sentiment – by demonstrating that national security could be protected and even improved without sacrificing civil liberties. More immediately, the ACLU wanted to identify and mobilize those portions of the public who *already* believed that the Bush administration had gone too far in protecting national security, and to ensure that those voices would be heard more clearly in the future than they had been during the Patriot Act 'debate.' While the campaign's first legislative goal was to block any efforts by the Bush administration to enlarge its new Patriot Act powers, the ACLU also hoped that Congress might be persuaded to 'fix' some provisions of the Act even before the 'sunsetted' portions of the law came up for reauthorization late in 2005.

At the heart of the Safe and Free Campaign was a technique that the ACLU had never used before: full-scale political organizing. The ACLU had occasionally asked its members to communicate with their senators and representatives about pending legislation, but such requests had been piecemeal and sporadic, never part of a large-scale, coordinated campaign. Now, in the words of one participant, the organization decided that 'we were really going to have to mobilize the muscle of the membership, and more, to go beyond the membership.' In January 2003, the ACLU hired four new staff members designated as 'Safe and Free Organizers.' Their job, as one of them described it, was 'to try to raise public awareness about the Patriot Act in any way that we could,' and then to channel that greater awareness into an opposition movement that members of Congress could not ignore. Dividing the country into four parts, the field organizers spent 2003 and 2004 on the road, targeting states whose members of Congress were seen as potential ACLU allies, willing either to co-sponsor 'good' legislation or to oppose additional 'bad' proposals. Through these organizing efforts, the ACLU hoped to demonstrate to Congress that there was substantial public support for a more moderate, nuanced approach to the balance between security and liberty than the one President Bush had taken.[15]

Borrowing an idea from an independent campaign already running in

15 In the view of one ACLU lobbyist, who was hired around the same time as the field organizers because of his background as a state legislator, the organization's shift from its traditional insider approach was long overdue. As he put it:

> Basically, ACLU lobbyists were almost resistant to being lobbyists. When the Democrats ran the House and Senate for so long, a lot of ACLU lobbyists were just attorneys. They would review drafts that the committee clerk would send over and send it back, but there was no lobbying. It was in-house lawyers looking at bills and sending them back. And they realized pretty quickly under a Republican administration and a Republican Congress that nobody really cared what our legal opinion was.

Massachusetts, the ACLU set a goal of persuading the legislature in each targeted state to pass a formal resolution calling on Congress to 'fix the Patriot Act.' One of the ACLU organizers typically would kick off a state campaign by working with the state affiliate staff[16] to organize a public forum involving a group of speakers, usually drawn from the local area, representing groups that had a variety of reservations about aspects of the Patriot Act. Frequently these panelists were located with the help of national groups in Washington, DC, who were part of the ACLU-led legislative coalition. Two of the groups frequently represented on these panels were gun owners, some of whom saw the Patriot Act as a step toward federal gun control, and professional librarians, who opposed a provision that allowed the government access to their users' records through secret subpoenas called National Security Letters. In large cities, national figures would sometimes be added to the panel to generate greater media interest. Attendees would be provided with step-by-step instructions about how to put together their own 'resolutions' campaign. Model resolutions would be made available, along with lists of state legislators, Patriot Act fact sheets, and other supporting materials. Whenever possible, the organizers would work with and through existing groups in the local community, including but not limited to the ACLU state affiliate itself. The organizers: 'very deliberately didn't do debates. Instead we did panels of differing viewpoints about why the Patriot Act is bad.' Their goals were to demonstrate that there was anti-Patriot Act sentiment across the political spectrum; to introduce people with such views to each other; and to help mobilize them into a group that could effectively lobby their state legislature. After the public forum, the ACLU field organizers remained available for advice by phone and email; however, their intention was to leave behind a well informed and highly motivated group of local activists who, because they knew their own community and state, could take the campaign forward better than outsiders could. As a field organizer put it, despite the ACLU's heavy involvement, 'we didn't want these to be ACLU resolutions, we wanted them to be resolutions around the Patriot Act.'

Two years later – by mid-2005 – eight state legislatures and about 400 local councils had passed resolutions demanding that their members of Congress amend the Patriot Act by removing or altering some of its provisions. The ACLU's website carefully tracked the resolutions campaign, giving prominent notice to such 'milestones' as the fiftieth local resolution, the hundredth, and so on. When ACLU lobbyists made their rounds on Capitol Hill, they made certain that both congresspersons and staff members were aware of what was happening in their home states and cities. As time went

16 The ACLU has an affiliate in each of the 50 states and two in California. The state affiliates appoint their own staffs but their operating budgets are provided by the national organization. In practice, most affiliates function with a substantial degree of autonomy from the national ACLU.

on, the lobbyists found that more of the politicians were monitoring such developments themselves. How effective were the resolutions at influencing the views of members of Congress? According to one of the ACLU's Washington staffers, 'the work on the ground was getting us in the door.'

> The resolutions made a big difference in terms of access. (Senator Lisa) Murkowski (Republican, Alaska) was a great example. She put in (a Patriot Act-revision bill) . . . after a lot of these resolutions started going through Alaska. We even got a meeting with (Senator Ted) Stevens' (Republican, Alaska) office after some of these Alaska things went through. The Idaho stuff was making a huge difference; in Montana they made a huge difference.

As they worked on the resolutions campaign, a form of traditional 'grassroots' organizing, the ACLU's field staff members were also identifying another group that they called 'grasstops': community activists, often but not always ACLU members, who had personal ties to individual members of Congress. According to one organizer:

> We did a lot of trying to figure out who's connected to whom. We did a lot of researching members of Congress and what was their background, might they be sympathetic? Would so and so be sympathetic to hearing from veterans? From clergy? And then hoping that some of these people might then get fired up and talk to their congressperson, or helping orchestrate their meetings with their congresspeople.

When a specific lobbying need would arise – for example, an ACLU request that a member of Congress co-sponsor a bill, offer an amendment, or vote in a particular way – the designated grasstop would be asked to make direct and personal contact with the congressperson.

During 2003 and 2004, with a considerable boost from this ground-level campaign, the ACLU and its coalition partners were able to dissuade the Bush administration from attempting to augment the Patriot Act. That the Act had become, according to an ACLU lobbyist, 'somewhat radioactive' was demonstrated in 2003, when a Justice Department employee leaked a copy of draft legislation entitled the Domestic Security Enhancement Act, which among other things would have increased the attorney general's authority to deport non-citizens. This document, quickly dubbed 'Patriot Act 2', received a chilly reception on Capitol Hill. Many congresspersons announced that they would not consider any further legislation until the Justice Department began responding to their requests for information about Patriot Act implementation. Some critics suggested that the administration might have been waiting until the beginning of the Iraq War to introduce the bill in hopes of pushing it through Congress. The Justice Department denied having any such plan, describing the document as nothing more than a rough draft of

ideas for the indefinite future. With no apparent enthusiasm either in Congress or in the public at large for strengthening the Patriot Act, the Bush administration made no formal attempt to revisit the issue before the impending reauthorization battle in 2005.

The ACLU and its allies were less successful at achieving their second goal during this period – persuading Congress to take positive legislation to eliminate or reform various provisions of the Act. Several such bills were proposed between 2002 and 2005. The proposal that, in the words of an ACLU lobbyist, 'had everything we wanted,' would have suspended a number of sections of the Patriot Act and subjected them to congressional review. This bill, dubbed the Benjamin Franklin True Patriot Act, was introduced in the House of Representatives in 2003 with 29 co-sponsors. The ACLU formally endorsed the bill, but because its lobbyists concluded that it had no realistic chance of passage, they did nothing to try to move it out of the subcommittee where it languished. Another proposal, called the Security and Freedom Ensured (SAFE) Act, was introduced in the Senate in 2003 and eventually attracted 20 co-sponsors from both parties. SAFE would have amended the Patriot Act in a number of ways – curtailing roving wiretaps, tightening search warrant provisions, limiting FBI access to business records, and exempting libraries from certain disclosure requirements. Because this bill had bipartisan and broad ideological support – in the words of an ACLU lobbyist, 'SAFE was the only one we thought we had a chance of really moving' – the organization devoted considerable resources over the next two years to pushing it forward. According to one lobbyist, the SAFE Act was 'so moderate and reasonable there was actually push-back from a lot of our lobbying partners,' who wondered whether it was really worth supporting. The ACLU, however, saw the situation differently. According to the staff member:

> We had the money and the name to actually be able to push things. I think some of the groups that had no chance to push anything were more reluctant to go for a compromise because they worried that if we got something like that through, that nothing else would be dealt with. We were pushing for that because it was a reasonable place to start and if you get something like that passed, not only do you pick some of the issues, but you break through that aura around the fact that you can't take away any of these powers. Their [the Bush administration's] whole argument was, if you take away any of these powers, the next attack is coming. Even if it was a moderate victory we thought it would open the door to others.

Despite its early promise, the SAFE Act legislation never developed the political momentum that it needed for passage. The ACLU and its allies were not able to transform either their grassroots or grasstops organizing successes into sufficient support on Capitol Hill for Patriot Act reform. There were a number of reasons for this. Congressional Democrats, mindful of the drubbing they had taken in the 2002 mid-term elections, had no desire for a

head-to-head battle with the administration over homeland security, particularly after the Iraq War began early in 2003. Later, as the 2004 national elections approached, the White House pressed its allies in Congress hard to stop Patriot Act reform bills from moving forward. Describing the effects of that pressure, an ACLU Washington lobbyist said that a number of previously receptive congresspersons suddenly 'went quiet.'

> I think we had the support on the House side for a lot of these things, even with the Republicans. I remember a meeting we had with the Republican whip at the time, and we went in and talked to him after that vote where a lot of Republicans had been with us, and when we pointed out to his staff that there seemed to be support in your caucus for some of these things, the staff said, 'Look, some of our caucus just made a very bad mistake.' The conversation was over. There was a lot of party control over this.

In 2004 the ACLU organizers in the field also noticed a decreasing commitment from some of their conservative coalition partners. The American Conservative Union (ACU), for example, had been a staunch ally in the resolutions campaign. But according to a Safe and Free organizer:

> [I]n 2004 I started seeing literature against John Kerry issued by the ACU's political action committee basically saying John Kerry's unpatriotic, he wants to undo the Patriot Act. So you have this conservative organization that had come out very forcefully against the Patriot Act in 2003. Suddenly in 2004, even as they're publicly saying that they're against the Patriot Act, their literature that they're handing out to their activists is using the Patriot Act as a way to characterize Kerry as un-American and to differentiate Kerry from Bush. So I think that maybe part of the reason that the SAFE Act never went anywhere is, first, it became partisan and, second, the left maybe wasn't as excited about it as it needed to be.

By the time the 2004 elections were over, attention had shifted from the SAFE Act to the upcoming fight in Congress over the reauthorization of portions of the Patriot Act. The ACLU's strategy was to try to use the reauthorization debate to make changes in the statute. While these changes were not as extensive as those the SAFE Act would have provided, from the ACLU's perspective they would still improve the Patriot Act considerably. But having won the 2004 election and with strengthened Republican majorities in Congress, President Bush was entering the reauthorization battle solidly positioned to resist such changes. By now, the resolutions campaign had run its course; many local political activists, after redirecting their energies into the 2004 campaign, were too dispirited by President Bush's re-election to re-enlist in the anti-Patriot Act campaign. As a field organizer

observed, the presidential and congressional outcomes: 'took a lot of the wind out of people's sails. I think there was a sense that as long as Bush is president, nothing would change.' Thus, when the Patriot Act was finally ready for reauthorization in mid-2005, much of the momentum that the ACLU had managed to generate behind its Safe and Free Campaign had dissipated. Without public hearings and after only minimal debate, both the House and the Senate voted to reauthorize all 16 of the expiring provisions. While the House bill was virtually unchanged from the original law, the Senate version responded to a few of the ACLU's concerns. Under intense White House pressure, the House–Senate conference committee then struck a 'compromise' that looked almost exactly like the House bill. When that proposal came back to the Senate, four Republicans joined with virtually all of the Democrats in a filibuster that prevented a final vote from taking place. After several months of negotiations, during which time the 'sunsetted' provisions were given a temporary extension, a few of the civil liberties lobbyists' major objections were met by reinstating the Senate language in three of the 16 sections. These three provisions were then given three-year sunsets, while the other 13 were made permanent. In March 2006, the USA Patriot Act Reauthorization and Improvement Act was passed with bipartisan support and signed into law by President Bush.[17]

Conclusion

Based on the foregoing narrative, it must be concluded that the ACLU's efforts between 2001 and 2006 to help shape and reshape the Patriot Act were only minimally effective. Only a small number of the ACLU's concerns were addressed in the original law and a few more dealt with during re-authorization. Beyond that, the organization conspicuously failed to mobilize its members and others in sufficient numbers to persuade Congress to respond to its broader and deeper criticisms of the legislation. Despite the impressive number of resolutions generated by the campaign, most lawmakers in both parties calculated that they stood to lose more than to gain by challenging the Bush administration on terror-related issues. If the 2004 presidential election was in effect a public referendum on the incumbent administration's handling of the 'war on terror,' its outcome confirmed that opposition to some of Bush's anti-terror policies was substantial but not overwhelming.

While Bush's political fortunes declined significantly in his second term, as reflected in his party's loss of control of Congress in 2006, by then it was

17 At the end of 2009, as those three Patriot Act provisions were again set to expire, the ACLU was trying to persuade Congress to use the reauthorization debate to consider more comprehensive changes in the original law. There was little prospect that those efforts would succeed. The Obama administration supported making the three provisions permanent and opposed any reconsideration of the Patriot Act as a whole.

clear that calls to 'reform the Patriot Act' had lost much of their earlier capacity to rally administration opponents. In 2003 and 2004, the anti-Patriot Act campaign had been politically empowering, a convenient way for many – most, but not all, from the political left – to vent their frustration at White House policies. However, the symbolic utility of the Patriot Act proved to be short-lived. One of the features of the law that had once made it an object of fear and suspicion was the thick blanket of secrecy with which it shrouded the government's anti-terrorism campaign. Ironically enough, that same lack of transparency eventually worked to the Act's political advantage because it deprived opponents of specific examples of Patriot Act-related abuses. Without the ability to produce such evidence, the reform campaign foundered before it had any opportunity to influence policy.[18]

Another factor that limited the effectiveness of the ACLU's lobbying efforts around the Patriot Act was the emergence of new and more potent issues and symbols, the most important being Guantánamo itself. Little was known about the US military prison in Guantánamo Bay, Cuba, when the resolutions campaign was at its height in 2003 and 2004. The ACLU itself had initially decided that Guantánamo, in the words of a staff member, 'was not its issue,' thus ceding the representation of detainees seeking *habeas corpus* to a much smaller New York-based group, the Center for Constitutional Rights (CRC).[19] The failure of the ACLU's campaign to significantly alter the Patriot Act was partly the result of the rapidly changing political landscape, as prisoner abuse and torture at Abu Ghraib and Guantánamo made headlines.

Despite the disappointments associated with the Safe and Free Campaign, the experience served as a catalyst for the ACLU to forge a membership-based, participatory lobbying strategy that it has since institutionalized. As the Obama administration began, the ACLU was hopeful that it could combine the impact of its membership with the inside skills of its professional staff to take advantage of what was expected to be a friendlier attitude toward civil

18 Much of the ACLU's post-9/11 litigation has focused on using two federal laws, the Freedom of Information Act and the Privacy Act, to compel the government to disclose information about the results of its anti-terrorism policies. See, for example, *American Civil Liberties Union v United States Department of Defense* (543 F.3d 59); *American Civil Liberties Union v. National Security Agency* (493 F.3d 644). See also the complaint in *American Civil Liberties Union v United States Department of Justice* (filed August 5, 2009, in US District Court, Southern District of New York). Although federal courts have shown some sympathy toward the ACLU's demands for disclosure, the information yielded by these lawsuits has had no discernible impact on the organization's efforts to interest Congress in revisiting – and revising – the Patriot Act.

19 It was the CRC that brought the leading Guantánamo cases to the Supreme Court and won some significant victories against the Bush administration. See *Rasul v Bush* (542 US 466); *Hamdi v Rumsfeld* (542 US 507); *Hamdan v Rumsfeld* (548 US 557); and *Boumediene v Bush* (553 US __). The ACLU did provide *amicus curiae* briefs in some of those cases and in 2008 became heavily involved, through its John Adams Project, in organizing and helping fund civilian representation for detainees seeking *habeas corpus* hearings in federal court.

liberties in the White House and on Capitol Hill. The ACLU's Washington-based staff in 2009 included eight field organizers with responsibility for mobilizing members around the country on a range of issues before Congress. Most of that activity centered on encouraging and facilitating emails and phone calls from members to their representatives expressing their views on particular issues. In recent years, the ACLU has invited its rank-and-file to Washington several times for 'Lobby Days,' in which staff members organize scores of meetings between constituents and their representatives on Capitol Hill to discuss pending legislation. Grasstops continue to be identified from among ACLU members and asked to contact congresspersons whom they know personally. The ACLU's website provides links and sample letters that permit visitors to communicate electronically with members of Congress on a range of issues. To extend its new lobbying strategy to the state level, the ACLU also has increased funding for its affiliates to hire lobbyists and field organizers.

Political scientists have documented a long-term trend away from civic associations that rely upon the active participation of their members, to organizations that are run by professional staff.[20] The ACLU is a prime example of the latter. It has a large and well-educated membership, and is nominally governed at the national and state levels by elected boards of directors. However, the organization's day-to-day work is done – and thus much of its policy is made – by professionals with expertise in such fields as law, fundraising, community organizing, media and public relations, lobbying, and financial management. Despite looking to its ordinary members to help bolster its legislative lobbying, the ACLU still relies on the leadership of its professional staff. Indeed, the ACLU's new lobbying strategy is a deliberate effort by its staff to help them better achieve the organization's goals. Thus, the ACLU's post-9/11 lobbying strategy continues to serve as a test case of how effectively rights-advocacy organizations can mobilize grassroots activism, and whether such an approach can produce better results in the legislative arena.

20 See Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (Norman, Oklahoma: University of Oklahoma Press, 2003); Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000).

10 The future of the European Court of Human Rights

Françoise J. Hampson

Introduction

In marking the 60th anniversary of the European Convention on Human Rights,[1] the Council of Europe has chosen to look forwards, to the future of the Court,[2] rather than backwards. This would appear to be a healthy sign. To look backwards at such a time might imply a lack of commitment to the future of the Court or, at the very least, a troubling degree of complacency and self-congratulation. That said, it is not inappropriate to congratulate the creators and operators of the Court, and previously the Commission,[3] *en passant* for the achievements of what is arguably the most successful human rights mechanism in the world. Much the same problem applies to the focus of an essay to mark the contribution of Kevin Boyle to the field of human

1 This refers to the Convention as amended. Any reference in the text to Convention is to the European Convention on Human Rights. Online. Available at: <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> (accessed 22 February 2010).

2 Any reference to the Court is to the European Court of Human Rights, established under the Convention as amended. Where reference is made specifically to the Court prior to the merger of the Commission and Court, this will be made clear. The merger occurred in 1999. See generally V. Miller, Protocol 11 and the New European Court of Human Rights, *House of Commons Research Paper 98/109*, House of Commons Library, 4 December 1998. Many of the cases referred to were decided before that date. The merger did not affect the substantive Convention rights but it did give individuals a right of direct access to the Court.

3 Under the Convention as originally established, there were two separate enforcement bodies, a Commission and a Court. The Commission determined the admissibility of the application. A decision of admissibility could be overturned by the Court but that was unusual. A decision of inadmissibility terminated the discussion of the case. The Commission sought to resolve the dispute by negotiating a friendly settlement. Where necessary to discharge its responsibilities, it could undertake fact-finding hearings. Where there was no settlement, it produced a report setting out its Opinion as to the violation of the Convention. If the case was not referred to the Court, the Committee of Ministers decided as to the existence of a violation. Either the respondent government or the Commission could decide to refer the case to the Court within a period of three months of the adoption of the Opinion. The Court then delivered a binding legal judgment.

rights at the European level. It would be easy to look back. Kevin has contributed to the work of the Commission and the Court over four decades through the representation of applicants. His cases have come from the North (Norway[4]) to the South (Turkey[5]) and from the East (Serbia[6]) to the West (Ireland[7]), including a number from the United Kingdom.[8] The issues involved have included freedom of expression, torture and other proscribed ill-treatment, the destruction of homes and consequent displacement, the failure to provide effective domestic remedies and the scope of the extra-territorial applicability of the Convention. Many, if not most, of the cases have been highly controversial in the territory of the respondent government. To the best of my knowledge, he has never brought a case about the length of criminal or civil proceedings. Kevin Boyle is not, however, one for looking backwards. The focus of this chapter will therefore be on the future of the Court.

There is a danger of confusing symptoms with causes in any analysis of the difficulties currently facing the Court. There is very obviously a problem with the number of cases being submitted and the resultant delay in dealing with them. This could be, but is not necessarily, the result of the way in which the Court handles the cases. In the past, the reforms and more minor changes in the functioning of the Commission and Court focused primarily on the operation of the machinery.[9] It is clear from the materials produced in the run-up to the Interlaken meeting on the future of the Court that that is not the case this time.[10] Whilst the materials suggest a willingness to examine

4 *Bladet Tromsø A/S and Pal Stensas v Norway*, 21980/93, judgment of 20 May 1999.

5 A large number of cases from SE Turkey including *Akdivar & others v Turkey*, 21893/93, judgments of 16 September 1996 and 1 April 1998.

6 Kevin Boyle was involved in the original submission of the application in *Bankovic & others v Belgium & 16 other NATO States*, 52207/99, admissibility decision of 12 December 2001, but was working for Mary Robinson, then UN High Commissioner for Human Rights, at the time of the hearing.

7 *Purcell & others v Ireland*, 15404/89, admissibility decision of 14 April 1991.

8 The cases include *Donnelly & others v UK*, 5577/72 & 5583/72, first admissibility decision 5 April 1973; final admissibility decision 15 December 1975 and *Stubbings & others v UK*, 22083/93 & 22095/93, judgment of 22 October 1996.

9 E.g. Report of the Group of Wise Persons to the Committee of Ministers, CM (2006) 203, 15 November 2006, (the Woolf Report). Online. Available at: <https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2006)203&Language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864> (accessed 22 February 2010). See also Protocol 14 and Protocol 14 bis.

10 Memorandum of the President of the European Court of Human Rights to the States with a view to preparing the Interlaken Conference, 3 July 2009; Opinion by the Steering Committee for Human Rights (CDDH), 2 December 2009; Memorandum of the Commissioner of Human Rights, 7 December 2009; Conclusions of the Chairperson of the Committee on Legal Affairs and Human Rights, during the hearing held in Paris on 16 December 2009. Online. Available at: <http://www.coe.int/t/dc/files/events/2010_interlaken_conf/default_EN.asp?> (accessed 22 February 2010).

possible causes outside the control of the Court, there is less evidence of any examination of the role and functions of the Court as a prerequisite to the discussion. It may be that it has happened and that the materials reflect options in the light of such reflection. In other words, the materials could be the tip of an iceberg, the submerged part of which does include such considerations. It is also possible that the discussions have not been based on a return to fundamentals, in which case there is a real danger that proposals will include further restrictions on access to the Court simply to reduce the number of applications, without regard to other possibilities. Before seeking to identify the challenges which need to be addressed, it is necessary to establish what should be the role and functions of the Court. This chapter will then identify the challenges and what is needed to meet them, taking account of the proposals of nongovernmental organizations (NGOs),[11] the President of the Court,[12] the Steering Committee for Human Rights (CDDH),[13] and the Parliamentary Assembly of the Council of Europe (PACE).[14]

The role and functions of the Court

There is an on-going debate as to whether what is needed is a human rights court or a constitutional court.[15] Articulating the issue in this way is unhelpful. It requires a comparison between two different types of concerns. It pits substance against selectivity. It also implies the necessity of an 'either/or' choice. It is submitted that it is more useful to identify first all the functions that the Court should discharge, in the light of its overarching purpose, and only then to consider whether that is feasible in the light of practical considerations.

At the time of its establishment, the Court was seen as a means of avoiding

11 NGOs have held meetings to seek to adopt a common position. It does not appear that they will be present at the Interlaken Conference but they have been able to input their views through other channels.

12 Online. Available at: <http://www.coe.int/t/dc/files/themes/protocole14bis/03072009_Memo_Interlaken_anglais.pdf> (accessed 22 February 2010).

13 Online. Available at: <https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2009)181&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75> (accessed 22 February 2010).

14 Parliamentary Assembly, AS/Jur (2010) 06, 21 January 2010.

15 For example, E. Alkema, 'The European Convention as a Constitution and its Court as a Constitutional Court', in Mahoney & others (eds), Protecting Human Rights: the European Perspective, Carl Heymanns Verlag KG, 2000; Wildhaber, Luzius, 'A Constitutional Future for the European Court of Human Rights?', 23 *Human Rights Law Journal*, 161 (2002). Some of the debate regarding the proper approach to interpretation of the Convention appears to be based on assumptions regarding the appropriate character of the Court as either a human rights court or a constitutional court.

a recurrence of the situation in Germany in the 1930s. A government exploited an eventual legislative majority to enact any law it wanted. The absence of effective, normatively superior, constraint ensured the formal legality of such measures. It is not surprising that, in the late 1940s, two separate phenomena may have been linked. Domestic measures which made possible the concentration camps may have been linked with an expansionary foreign policy which, through war, dramatically expanded the area in which such laws had their effect. It is not necessary to establish that repressive regimes are likely to resort to wars of aggression to establish the risk that such regimes pose to international stability. As the preamble to the Universal Declaration of Human Rights makes clear, domestic repression, however 'lawful' in domestic law, is likely to lead to internal political instability.[16] That may in turn cause problems for and in adjoining states, as a result of the flight of large numbers of people. In some cases, resistance to the repressive regime may be organized from adjacent states. In other words, respect for human rights may be inherently beneficial and part of good governance but the systematic violation of human rights is likely to have nefarious consequences not limited to the state in question. It may well give rise to a threat to international peace and security.[17]

If preventive measures are to be effective, it is not sufficient merely to address the problem when systematic or widespread[18] violations are occurring. It is also necessary to ensure that the laws, practices and culture are in place to protect human rights.

If this represents the overarching objective of a human rights system, it suggests that the following elements need to be present in any monitoring or enforcement mechanism. First, most obviously, it must be able to take prompt and effective action when widespread or systematic violations are occurring. Second, where there is a system or practice of violations in specific fields or in relation to particular groups, it must be able to address the systemic character of the violation. Third, where the operation of the domestic rules and practices has resulted in an alleged violation in individual

16 'Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'; Preamble, Universal Declaration of Human Rights. Online. Available at: <http://www.un.org/en/documents/udhr/> (accessed 22 February 2010).

17 In 1991, Turkey seized the Security Council with the problem of the massive influx of refugees from Iraq which gave rise to security concerns owing to the situation in South-East Turkey at the time. Turkey did so on the basis of the threat posed by the situation to international peace and security; see Security Council resolution 688 (1991), 5 April 1991.

18 'Systematic or widespread' is the criterion used in Article 7.1 of the Statute of the International Criminal Court to establish a crime against humanity. Online. Available at: <http://untreaty.un.org/cod/icc/statute/romefra.htm> (accessed 22 February 2010). These terms will be used in preference to the gravity threshold applicable to the ECOSOC 1503 procedure, which is a 'consistent pattern of gross and reliably attested violations'; ECOSOC resolution 1503 (XLVIII) of 27 May 1970 as revised by resolution 2000/3 of 19 June 2000.

cases, the body must be able to determine whether the violation has occurred and to provide effective redress. Where states undertake to 'secure' rights[19] and not merely not to violate them, the enforcement body has an additional function. In relation to each type of case identified above, the body must ensure that the violation will not be repeated. In order to discharge that responsibility, the body has to identify why the violation occurred and why it was not remedied at the national or domestic level. This is the fourth function. Whilst generally it is left up to states to determine how to implement their international obligations, once they have been found to have violated them the position may change. A monitoring or enforcement body is entitled to be more specific as to what is required, at least in those cases where the state has undertaken to secure respect for the rights. The four functions identified above need to be considered in the specific context of the Council of Europe 'system'. It is important to note at the outset that the 'system' may give different bodies the responsibility for dealing with different functions. On the condition that any judicial or quasi-judicial function is performed by a body with those characteristics, there is nothing inherently objectionable in other bodies being given different functions. One of the most striking features of the Strasbourg system is the role of a political body, the Committee of Ministers, in securing the enforcement of the judgments of the Court.[20]

Widespread or systematic violations of a serious character

The term 'serious' in this context is being used to mean causing physical or psychological harm to the human person. It is not being suggested that human rights should be ranked for their importance or that other rights

19 Article 1 of the ECHR provides: 'The High Contracting Parties shall *secure* to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention' (emphasis added). This implies a guarantee of protection of rights and not merely the absence of violation.

20 At first sight, it might seem strange that a political body should have a role to play in the operation of a judicial system. Under the Convention as originally drafted, where the Commission did not refer a case to the Court or where the respondent government had not accepted the jurisdiction of the Court, it was for the Committee of Ministers to determine whether the Convention had been violated. That was objectionable. Under the current arrangements, the only role of the Committee of Ministers is to supervise the execution of the judgment (Article 46.2). It has no role in determining what is contained in that judgment. The experience of the Inter-American Court of Human Rights suggests that it is potentially useful to have the weight of a political body behind the enforcement of the judgment. Whether it is actually useful depends on how that power is exercised. This essay cannot examine, except in passing, the role played by the CDDH, the Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights of the Council of Europe and the other treaty bodies. They should all be seen as part of the European 'system'. The focus here is on the Court and the Committee of Ministers when it exercises its responsibility under the Convention.

matter less. The violations being considered here tend to be of non-derogable rights or of a non-derogable core of an otherwise potentially derogable right.[21]

It is clear that if the Court has to handle such situations, the system has already failed. Theoretically, as soon as such violations start to occur, the system should be seized with the issue. There is a range of reasons why that might not happen. It could be that the violations start occurring after a sudden precipitating event, such as a coup. The obvious example is Greece after the Colonels' regime came to power. The speed of events might make earlier intervention difficult. Another possibility is that the violations were already well established at the time when the state joined the Council of Europe and ratified the Convention. The situation in Chechnya was already one of armed conflict at the time when the Russian Federation joined the Council of Europe.[22] The third example is, at first sight, more troubling. Turkey had been a member of the Council of Europe and a party to the Convention for decades at the time when the situation in South-East Turkey was marked by systematic torture, widespread indiscriminate killings, common targeted killings and a practice of disappearances.[23] That the situation was allowed to deteriorate to such an extent before action was taken does suggest a failure of the system. Even then, the action had to be taken by lawyers and applicants. The European system for human rights protection does not appear to have an equivalent to something that is common at the international level – regular monitoring of implementation and compliance by a judicial or quasi-judicial body.[24] Political monitoring of some form takes place in the Parliamentary Assembly of the Council of Europe. What was established under the Convention is principally an enforcement and not

21 The case law of the Court suggests that unacknowledged detentions or disappearances involve a deprivation of liberty which could never be justified under Article 5 of the Convention, notwithstanding its potentially derogable character; e.g. *Timurtas v Turkey*, 23531/94, judgment of 13 June 2000. See generally Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001.

22 The Russian Federation joined the Council of Europe in February 1996. The Chechen conflict had an impact on the consideration of its application for membership; see Parliamentary Assembly, Opinion 193 (1996). Online. Available at: http://assembly.coe.int/Documents/AdoptedText/ta96/EOPI193.HTM> (accessed 22 February 2010).

23 Turkey ratified the Convention in May 1954. In January 1987, it recognized the competence of the Commission to receive individual applications. In January 1990, it recognized the competence of the Court.

24 Monitoring at the international level is carried out by both Special Procedures and the Treaty Bodies. The former rely on the relevant norm of international law, as articulated in the resolution creating the mandate. The treaty bodies monitor the implementation of the relevant State obligations under the treaty. The Special Procedures can react to a deteriorating situation very promptly. The treaty bodies exercise their functions on a periodic basis but can, in some cases, call for a special report. At the European level, the Commissioner for Human Rights and PACE may be able to sound the alarm bells.

a monitoring system.[25] It is possible for an enforcement body to fulfil a monitoring function if any alleged violation unaddressed at the national level reaches the international level in the form of an individual complaint. At the time of the events in South-East Turkey, Turkey had only relatively recently accepted the right of individual petition and the jurisdiction of the Court.[26] Lawyers in Turkey were unfamiliar with the Strasbourg system and had language difficulties in accessing materials, most notably the case law of the Court. Those in the region who were willing to represent 'victims' were harassed, intimidated and, in several cases, jailed and tortured.[27]

In view of the amount of training of lawyers, judges and prosecutors which the Council of Europe has undertaken in those states which joined after 1989, it is to be hoped that lawyers would be better placed to act should such a situation arise elsewhere.[28] It should, however, be remembered that, in a domestic emergency, lawyers may well not wish to act or be free to represent applicants.

Another possible basis for action existed in both the case of Russia and Turkey but was not used. There is a possibility of inter-state applications. At the international level, where that option is available under Article 41 of the International Covenant on Civil and Political Rights,[29] there has never been an inter-state application to a human rights body.[30] There have been such cases in Strasbourg but, with two-and-a-half exceptions, they have served a different purpose. The most common reason for State A to bring a case against State B is to protect persons in B of A language, ethnicity or

25 Under Article 52 of the Convention, the Secretary-General of the Council of Europe can ask a High Contracting Party to explain how its internal law ensures the effective implementation of any of the provisions of the Convention. On the rare occasions on which the power has been used, the request has generally been made of all parties to the Convention and not just one. For example, he requested information on secret detention and the transfer of detainees from all parties. The power has been used in relation to a single member state in the case of Russia with regard to the Chechen conflict; see *Report by the Secretary General on the use of his powers under Article 52 of the European Convention on Human Rights in respect of the Russian Federation*, SG/Inf(2000)21, 10 May 2000. The initiative was generally regarded as having been ineffective, owing to the very general replies of the authorities of the Russian Federation.

26 *Supra*, n. 23.

27 *Elci & others v Turkey*, 2315/93, judgment of 13 November 2003.

28 It is noteworthy that the large number of individual applications submitted by Georgians against Russia and arising out of the conflict in 2008 have, for the most part, been submitted by individual Georgian lawyers, working on their own or in/with NGOs. Some of them have been assisted by EHRAC, based in the UK.

29 Forty-eight states have recognized the competence of the Human Rights Committee under Article 41 to hear a complaint against them submitted by another state.

30 It should also be remembered that the International Court of Justice can hear complaints based on the alleged violation of international law, including human rights law. It has referred to human rights law both in the exercise of its advisory jurisdiction and its contentious jurisdiction.

nationality.[31] It has also been important for State A to be able to show a domestic audience that it was addressing the situation. It is very rare for one or more states to bring such a case simply to uphold human rights in Europe. The two principal cases are those against the Colonels' regime in Greece[32] and following the military coup in Turkey in 1980.[33] The half example is where Denmark brought a case against Turkey following the alleged torture of a Danish citizen of Kurdish origin and where Denmark also raised the question of the practice of torture generally.[34] What is striking is that no inter-state case was brought against Russia (Chechnya) or Turkey (the Kurds). It should be noted that the two states in question had accepted the right of individual petition, unlike Greece and Turkey at the time of the two inter-state cases. It is not known if this played a decisive role. The recent application of Georgia against Russia shows that individual states will still make use of the possibility but it has obvious reasons particular to itself for doing so.

Whilst cases involving widespread or systematic serious violations are likely to be exceptional, the Court has to be able to deal with the particular challenges they pose. Such situations are usually marked by a breakdown in the operation of the system of domestic remedies, at least with regard to issues arising out of the political crisis. This means that the Court has to play the role of a court of first instance.[35] It is not usurping the role of the domestic courts in so doing, since they have proved to be unable or unwilling to act. It is the failure of the state to fulfil its obligations that gives rise to the need for the Court to fulfil that function. Whilst the occasions may be rare, when they arise they pose huge burdens on the Court system. There is likely to be a huge number of cases, and each individual case takes a long time to handle. Whilst it may not have been envisaged that the Court would have to handle such cases, given the overarching aim of the Council of Europe system it clearly has to find a way of meeting the challenge.

Generally speaking, the cases involve disputes on the facts and not as to the law. The nature of the situations means that it is likely that the violations are

31 *Greece v UK*, 176/56, 1 YbkECHR 139 and 299/57, 2 YbkECHR 182; *Austria v Italy*, 788/60, 4 *YbkECHR* 139; *Ireland v UK*, 5310/71, judgment of 18 January 1978; the four cases brought by Cyprus against Turkey, of which only one, *Cyprus v Turkey*, 25781/94, judgment of 10 May 2001, reached the Court. The Court is currently seized of an application brought by Georgia against Russia.

32 *Norway, Sweden, Denmark, and the Netherlands v Greece*, 3321–3323/67, 3344/67, 12 YbkECHR 1968 *bis*.

33 *France, Norway, Denmark, Sweden, the Netherlands v Turkey*, 9940–9944/82, admissibility decision 6 December 1983.

34 *Denmark v Turkey*, 34382/97, admissibility decision 8 June 1999; striking out (friendly settlement) 5 April 2000.

35 In the hearing before the Court in the case of *Akdivar*, note 5, Mr Golsong, appearing on behalf of Turkey, expressly stated that, if the Court did not hold the case to be inadmissible for non-exhaustion of domestic remedies, it would become the court of first instance for South-East Turkey.

being covered up at the domestic level, whether owing to the connivance or the indifference of the authorities. Any written record is likely to be non-existent or incomplete and/or inaccurate. This requires the Court itself to establish the facts. A body which delivers binding legal judgments should not put the burden of proof on the respondent government by, for example, assuming that the facts are as alleged by the applicant unless they are rebutted by specific evidence to the contrary.[36] Nor, given the serious nature of the violations alleged, would it appear appropriate to make too great a use of presumptions. What is needed is fact-finding, and that requires the cooperation of all the domestic authorities of the respondent government.

The former Commission took up this challenge in relation to the cases from South-East Turkey and coped remarkably well with the difficulties posed by frightened (and in some cases intimidated) applicants and witnesses, most of whom had received very little education and many of whom were illiterate. There were also challenges of both language and culture. The respondent government cooperated to a significant degree at the national level, although some individual officials, notably public prosecutors and gendarmes, refused to attend the hearings. There were also difficulties in obtaining documents which had been requested.[37]

The problem for the Court in the Chechen cases is the significantly worse cooperation of the Russian authorities.[38] This makes it much more difficult to envisage fact-finding hearings in the area. The Court's preferred solution appears to be to insist on receiving documents, notably the file of the relevant prosecutor. The experience in the case of South-East Turkey suggests that these are of limited use. They enable the Court to show what has not been done. The Court, however, has no means of determining the reliability of a document contained in the file. If an illiterate applicant has signed a statement, the Court can only know if the statement is accurate by reading it to the applicant itself. In such a situation, it is easy to understand the temptation for the Court to make use of presumptions. A better solution would be for the Council of Europe as a whole to find means of requiring effective cooperation on the part of the national authorities.

36 The Human Rights Committee (HRC) under the International Covenant on Civil and Political Rights adopts such an approach when a respondent government fails to produce evidence (as opposed to generalized denials) rebutting the claims of the applicant. It should be noted that the HRC delivers 'Views', rather than binding legal judgments.

37 See generally A. Reidy, F. Hampson, and K. Boyle, 'Gross violations of Human Rights: Invoking the European Convention on Human Rights in the case of Turkey', 15 *Netherlands Quarterly Human Rights*, No. 2 (1997) p. 143.

38 The Court has often used the lack of cooperation to draw inferences as to the well-foundedness of the applicant's allegations. Having done that, it does not then consider separately the issue under Article 38.1(a); see for example *Khashiyev and Akayeva v Russia*, 57942/00 & 57945/00, judgment of 24 February 2005, paras. 137–38. In *Shamayev & others v Georgia & Russia*, 36378/02, judgment of 12 April 2005 at paras. 492–504 the Court did address the issue in terms of Article 38.

Even when it has succeeded in determining the facts, this type of case presents the Court with other special challenges. The egregious nature and the widespread scale of the violations imply that they are embedded at the domestic level. They are not isolated mistakes. This is a dimension that the Court should be required to address, not least to assist the Committee of Ministers in securing the enforcement of the judgment and the non-repetition of the violations. This will be addressed further below.

It has to be recognized, however, that if cooperation is not forthcoming the choice will ultimately be between retaining the state as a member of the Council of Europe, however flawed its respect for human rights and its cooperation with the Strasbourg institutions, and expelling it from the organization. There is a precedent in the expulsion of Greece during the military dictatorship, but that was at a time of much clearer common values both within and between Council of Europe member states. Its umbrella now shelters a much greater diversity of experiences and expectations. This may affect the calculations with regard to expulsion.

A system or practice of violation in specific fields or in relation to particular groups

Three different types of situation come within this category of cases. There is first what in Strasbourg parlance is called a 'practice' or 'administrative practice', which implies government connivance or, at the very least, the deliberate and determined turning of a blind eye.[39] The second is a system embedded in legislation which fails to respect rights in a specific field of activity or in relation to a particular group of persons.[40] The third situation is like the second but it is the product of internal rules and practices, rather than legislation. What all three situations have in common is that significant numbers are likely to be affected for the same reason and the violations are foreseeable. They are not the result of individual actions and decisions. Again, these represent a failure of implementation and involve the real risk of recurrence, unless the cause of the violation is identified and addressed. Where that does not happen, Strasbourg is swamped with 'repeat cases', as news spreads of the availability of an international remedy.

'Practice' or 'administrative practice'

The issue of 'practice' arises where the conduct alleged clearly constitutes a violation and the respondent government would not deny that. The

39 *Ireland v UK*, note 31 and *Donnelly v UK*, note 8.

40 That is described as a system breach (as opposed to an application breach) in F. Hampson, 'The United Kingdom before the European Court of Human Rights', 9 Ybk Europ. L. (1989) p. 121.

respondent government is denying the facts and not the interpretation of the Convention. The government can only deny the existence of the facts if there has been no domestic judicial or quasi-judicial determination that they are occurring.[41] This implies erecting barriers to the access to such determinations and/or making it difficult for such bodies to reach a conclusion, for example by withholding evidence. It is unlikely that the government is doing no more than denying the facts, since they would be likely to surface in other ways. Quite apart from the gravity of the violations in question, this category of case raises a serious problem for the Council of Europe system. That is based on governments implementing their obligations in good faith. Strasbourg supervision is subsidiary, but can only remain so if the right to an effective domestic remedy is fully operational. If a 'practice' is found to exist, it necessarily means that the domestic remedies are ineffective. This category poses similar problems to the situations discussed in the previous section, but on a smaller scale and possibly only in relation to a particular issue. The danger is that a 'practice' could too easily become practices. It is the implications underlying such 'practices', rather than necessarily the 'practices' themselves, that makes them so significant. The implications include the active or passive complicity of the state, the inability of the domestic remedies system to deal with the problem and the danger that the 'practices' could spread into other fields. The nature of a 'practice' would also require particular measures to ensure non-recurrence.

The concept of 'practice' gives rise to jurisdictional issues for the Court. An important admissibility criterion for an application is that domestic remedies be exhausted. Where a 'practice' can be established, by definition domestic remedies are ineffective and it is consequently unnecessary to exhaust them. At the admissibility stage, the Commission called the phenomenon an 'administrative practice', reserving 'practice' for a finding on the merits.

If the category is an important one on account of the implications, it would appear to follow that the Court needs to be able to address this dimension of an application. Given the paucity of inter-state applications, it needs to be capable of being raised in individual applications. The case of *Donnelly v UK*[42] appeared to suggest that individual applicants could rely on the concept. More recently, in the cases arising out of the situation in South-East Turkey, the applicants consistently sought to rely on the concept, both in relation to the primary violation (e.g. torture) and also in relation to the right to an effective domestic remedy. Owing to their responsibility to the applicants, the lawyers could not simply rely on the practice. In seeking to argue that the requirement of exhaustion of domestic remedies had been complied with, they had to argue that there was a practice of ineffective remedies, or that

41 For an analysis of how the 'practice' arose in Northern Ireland, see P. Taylor, *Beating the Terrorist*, Penguin, 1980.

42 *Supra* n. 8.

there was no effective remedy in this particular case, or that the applicant had done everything he could be expected to do in the circumstances, or that he did not need to exhaust the alleged remedies because of reasonable fears about the repercussions. This enabled the Commission to find for the applicants without ever determining whether any practices were occurring in South-East Turkey. When it came to the merits, the applicants argued, and provided evidence to support their arguments, that there was a practice of torture in police/gendarme detention. The Commission and Court either found it unnecessary to examine the claim or did not even refer to it. When Denmark raised the case of its citizen of Kurdish origin in an inter-state case, it also raised the issue of practice. That issue was expressly declared admissible.[43] The case was the subject of a friendly settlement. Whilst *Donnelly* has not formally been overturned, more recent developments suggest that the issue of practice will not be examined in individual applications. It is submitted that this policy should be re-examined. Failing to address the 'practice' dimension of a complaint results in the Court failing to identify the specific measures that need to be taken to eradicate what has become embedded in the national culture.

Legislation in violation of rights in specific fields or in relation to particular groups

This category involves a system but it is transparent. It is a system in that the domestic legislation creates a situation in which anyone coming within it will be affected. The respondent government will not generally deny the facts but will argue that the law is not in breach of the Convention. The risk of a large number of repeat cases is considerable. The introduction of the 'pilot judgment' is supposed to address the issue. It has the potential to be effective in relation to legislation but only if a remedial measure is adopted promptly and if it fully addresses the problem identified. That requires the Court in its judgment not only to establish that the law violates the Convention, but also to establish why.

Cases in this category suggest the need to examine the domestic system for evaluating the compatibility of legislation with the Convention. The law should not have been passed or, if it is an old law, it should have been reviewed as part of the process of accession to the Convention. If it was reviewed, did those responsible identify the problem? If so, why were they ignored? If not, why did they fail to pick up the difficulty? It must be acknowledged that pre-legislative scrutiny will not pick up all cases of incompatibility. In some situations, it may raise an issue not covered by existing case law. In other cases, the problem may not be the legislation itself but the way in which it affects a particular group coming within it.

43 *Supra* n. 34, admissibility decision.

Nevertheless, pre-legislative scrutiny can play an important role, at least in cases of accidental violation of the Convention.

A separate issue is why the system of domestic redress did not pick up the violation of the Convention. It is possible that judges were aware of the problem but they did not have the tools, under domestic law, to do anything about it. This does not require judges to be able to strike down legislation but it does require that they should be able to refer the issue to the legislature and the government and that there should be a fast-track procedure for dealing with it. The British system under the Human Rights Act offers a useful model but it cannot be expected to resolve all such problems.[44]

There is a striking contrast between the experience of Finland's accession and that of certain central and eastern European states. The former reviewed all its legislation prior to ratifying the Convention. In the case of the latter, one sometimes has the impression that they decided to use the Strasbourg system as a means of putting their domestic house in order, rather than doing so first. They knew or ought to have known that there were a range of difficulties with the operation in practice of their domestic legal system. Rather than identifying and rectifying the problems, many of which were structural, they appear to have preferred to wait until they were found to be in violation. Many of the repeat cases concern the failure of the domestic system to deal with legislation in breach of the Convention, rather than the legislation itself.

It may be too early to judge the effectiveness of the 'pilot judgment' system, but the continued existence of a problem with repeat cases does raise a concern. It suggests that states are not taking the requisite remedial action. If that is the case, the responsibility lies in three places. It lies with the Court for not making it clear why the legislation was in breach of the Convention; it lies with the Committee of Ministers for being too easily satisfied with what the state proposed by way of remedial action; and it lies with the state itself for not taking the necessary action.

Practices in violation of rights in specific fields or in relation to particular groups

These practices are likely to be harder to detect than legislative violations but that is not because there is necessarily any attempt to cover them up, although that may also be present. The practices concern the way in which something is done. That can include the way in which legislation is applied in practice but it also applies to any conduct undertaken on a routine basis as a result of policy objectives, training, prejudice or any other reason. In order to come into this category the practice has to be widespread. One example is

44 (UK) Human Rights Act 1998, s. 4.

the alleged practice at issue in the case of *Nachova*, where it was alleged that security forces routinely opened fire against Roma suspects in a way in which they did not in the case of non-Roma.[45]

Again, the Court has to ask itself why the domestic courts did not pick up the problem, but it is likely to be more difficult for them to do so than in the case of legislation. A particular domestic court may only see evidence occasionally of what, nationwide, is a widespread practice. The court officials may also share the prejudice underlying the behaviour in question. Whilst the operation of domestic courts needs to be examined to ensure that they have the necessary tools to identify this type of issue, that is not likely to be sufficient to solve the problem.

As in the case of the previous sub-section, the widespread character of the practice means that there are likely to be many cases raising the same issue. It is not clear how effective the pilot judgment system can be where the issue is a behavioural or administrative practice, rather than legislation. The widespread character of the violation is immediately apparent in the case of legislation, but may not be apparent in this case. It might be possible for the Court to adopt an internal practice to try to catch such repeat cases early on. The system for logging cases would need to ensure that cases raising similar issues would be logged in the same way. As soon as it was clear that there were a number of cases apparently raising the same practice, those responsible for the lead case could be alerted. If, upon examination, it turned out that they were simply similar individual cases, rather than evidence of a practice, they would be dealt with in the usual way. Where they did appear to suggest evidence of a practice, they could be treated in the same way as pilot judgment cases. It is possible that such a practice is already in operation.

Again, the effectiveness of the pilot judgment system depends on the identification of why the Convention has been violated and the identification of the appropriate remedial measure. The latter element is more problematic in the case of behavioural or administrative practices than legislation. It involves identifying the combination of factors that have generated the result. Programmes of action, rather than a single measure, may need to be adopted. It will be necessary to monitor their effectiveness, as part of the enforcement process, in order to determine whether they are achieving the desired result. Again, the responsibility for the operation of the pilot judgment system has to be shared between the Court, the Committee of Ministers and respondent states.

45 *Nachova & others v Bulgaria*, 43577/98 & 43579/98, judgment of Section 26 February 2004; judgment of Grand Chamber 6 July 2005.

Individual violations of the Convention in individual cases

This category involves cases in which the application of the law on the facts resulted in a violation, but where the law itself is in conformity with the Convention. The cases are likely to involve the exercise of discretion or the interplay of a rule and an evolving fact situation. Two cases may afford a useful illustration of the category. In the case of *Gillow*, the legislation severely restricting the right of people to buy and live in homes in the Channel Islands, in the particular case Guernsey, was found to be compatible with the Convention, given the particular situation of the islands.[46] The manner in which it had been applied to the Gillows was, however, found to violate the Convention. In order to safeguard his client's interest, the applicant's lawyer will have had to cover both aspects of the case. In other words, he will have had to argue both that the law itself violated the Convention (a system breach) and that the manner of its application to his client also violated the Convention (application breach). It is not unusual to have to plead in the alternative in this way. Another example is the *Sunday Times* case, in which it was alleged both that the system then in existence for dealing with contempt of court violated the Convention and that its particular application in the circumstances also represented a breach of the Convention.[47]

The second type of example is slightly different. On the face of it, the system in place for disciplinary proceedings against doctors in the UK clearly did not violate the Convention. Unlike the *Gillow* case where the legislation might have been found to violate the Convention, no such question arose in *Darnell*.[48] The operation of the system in practice might well in individual cases give rise to unreasonable delay in the determination of a civil claim. This was not widespread or a practice. It depended upon the individual circumstances of the case. There was, however, nothing in the rules at that time to guard against the risk of such a delay and there was nothing the courts could do at the time to rectify the situation. The only issue in the *Darnell* case was the application of the Convention to the facts.

At first sight, this category might appear to be, in some sense, less serious than the other categories. The cases do not involve a widespread pattern of behaviour or an entrenched practice. They are individual violations in particular cases. Those tempted further to restrict access to the Strasbourg Court, whether by creating an additional admissibility requirement or by allowing the Court to pick and choose which cases to deal with, might eye this category with interest. It would be dangerous to dismiss the importance of the cases in this category.

46 *Gillow v United Kingdom*, 9063/80, judgment of 24 November 1986.
47 *Sunday Times v United Kingdom*, 6538/74, judgment of 26 April 1979.
48 *Darnell v United Kingdom*, 15058/89, judgment of 26 October 1993.

> The Court has repeatedly stated that its judgments in fact serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.[49]

Whilst there may not be many individuals affected by the law or practice, a large number may be affected by the reasoning of the Court. It should also be remembered that member states have undertaken to 'secure to *everyone* within their jurisdiction the rights and freedoms' defined in the Convention (emphasis added).[50] The question of additional restrictions on the right of individual petition will be considered further below. At this stage, however, it is suggested that no further restrictions should be introduced until the other measures identified have been tried.

Determining the reason for the failure to provide an effective domestic remedy

The perception of the significance of Article 13 of the Convention, which provides for the right to an effective remedy before a national authority, has undergone a transformation over the 60 years of the life of the Convention. Initially, it was viewed as only relevant where the breach of another Convention right had already been found.[51] The Commission and Court eventually recognized that it was a right with substantive content which could be at issue even if no other violation of the Convention were found.[52] They held that an applicant should be able to raise the issue of an *alleged* violation of the Convention before a domestic authority capable of remedying it. The issue then arose of the threshold at which such a claim should be entertained and, in particular, the relationship between that threshold and the one used to determine the admissibility of an application alleging the violation of a primary right.[53] The

49 *OAO Neftyanaya Kompaniya Yukos v Russia*, 14902/04, Admissibility Decision of 29 January 2009, para. 442.

50 Article 1 ECHR.

51 J. Fawcett, *The Application of the European Convention on Human Rights*, OUP, 1987.

52 *Powell and Rayner v UK*, 9310/81, judgment of 21 February 1990, para. 31.

53 Primary is not here used to suggest a superior right but the issue which arose first. The starting point is the alleged violation of the Convention right. At that point but not until then the secondary or subsequent issue arises, the right of access to a remedy to determine whether the Convention has been violated.

cause of the difficulty was that the Commission acknowledged that it used a high threshold for the determination that a case was not manifestly ill-founded. In effect, it would hold a case to be inadmissible as manifestly ill-founded if it thought there was no chance of their ultimately finding a violation, even if they thought that there was a real case. They had adopted the high threshold as a 'measure of judicial economy'.[54] The Commission wanted to be able to say that there was a right to have the case considered at the domestic level because it was arguable, even if the primary issue had been found to be inadmissible. The Court rejected the argument.

The next dramatic development occurred in relation to the cases from South-East Turkey, in which Kevin Boyle was heavily involved. In the majority of those cases, it was necessary to argue at the admissibility stage that, for one reason or another, the applicant was not required to exhaust domestic remedies. If the remedies were ineffective then logically there must be a violation of Article 13 on the merits. Amongst the witnesses called were public prosecutors, to explain what they had done – or more commonly not done – in relation to the complaint. The Commission obtained a clear picture of the operation in practice of the system of domestic investigations.[55] It was clear that, if the Court was not to continue indefinitely to play the role of a court of first instance, it had to address the failure of the domestic legal system to remedy the violation found. Similar arguments were used by the applicants in the Chechen cases. The Court has understood the significance of examining why the violation was not remedied at the domestic level and now does so in a wide range of cases.[56]

It is not sufficient simply to provide an effective domestic remedy. The violation should not occur in the first place. That said, if the domestic system effectively implemented the obligation to 'secure' the Convention rights, it would provide a remedy in the majority of cases thereby dramatically reducing the case-load of the Court.

If the Court is to identify precisely why the case was not properly dealt with at the national level, this will require each case to be subject to much closer analysis. If the 90 per cent of cases declared manifestly inadmissible and repeat cases were no longer submitted to the Court, it would have the time to give the remaining cases much greater scrutiny. What is required is an examination of why the violation occurred and why it was not remedied at the domestic level. This is necessary to equip the Committee of Ministers with the information it needs to discharge its responsibilities. It would not be sufficient for this to be reflected in the body of the judgment. The conclusions would also need to appear in the *dispositif*, in order to ensure that they were binding. This would

54 *Powell and Rayner*, note 52; see also F. Hampson, 'The concept of an "arguable claim" under Article 13 of the European Convention on Human Rights', 39 ICLQ (1990) p. 891.

55 *Ilhan v Turkey*, 22277/93, Report of the Commission, 23 April 1999, paras. 243–44.

56 Memorandum of the President, note 10.

strengthen the hand of the Committee of Ministers. The diagnosis of what was needed would not be negotiable. Only the sufficiency of the measures proposed by the respondent government would be a matter of negotiation. On occasion, the Court has indicated its view of what is necessary to remedy the breach,[57] but this needs to be done more systematically and in greater depth.

This analysis of the functions of the Court suggests that all the functions are important. None of them can be sacrificed to reduce the number of cases with which the Court has to deal without seriously harming the protection of human rights in Europe. Certain changes have been suggested which would improve the effectiveness of the Court. The next section will consider what is perceived to be the key problem facing the Court.

The perceived key problem facing the Court – the number of cases being submitted

Almost since the creation of the 'new' or merged Court, there has been concern about the ever-increasing cases submitted to it. The Court has often been said to be a victim of its own success. It would be more accurate to say that it is a victim of the failure of the domestic authorities, the Committee of Ministers, and only to a slight extent of the Court itself. At the time of the merger, some commentators questioned whether a full-time body would be able to cope with the work previously performed by two part-time bodies. The reason was the real volume of work done by the Commission, which was more than a 50 per cent, part-time load. That was before the dramatic increase in the number of cases from new members. Some of the new members of the Council of Europe had experience within living memory of being a recognizable democracy committed to the rule of law. Some of them did not. It would not be surprising if those states whose legal systems had never been based on the respect for the rule of law, including by the government, and where law was seen as a tool in the armoury of the state rather than as an independent value, found it hard to adjust to the demands of the Convention system. This should have been addressed before accession rather than after it. The decision to admit states before they were ready for such scrutiny was taken for political reasons.[58]

There is no doubt that the number of cases being submitted is the biggest problem facing the Court.[59] That does not mean that the solution is

57 *Assanidze v Georgia*, 71503/01, judgment of 8 April 2004.

58 The decision of the Committee of Ministers in relation to the admission of the Russian Federation was taken notwithstanding the report of three rapporteurs from PACE, document 7443, 2 January 1996, which indicated that Russia was not ready for membership.

59 About 8,400 new cases were submitted in 1999 but nearly 50,000 cases were submitted in 2008. At the end of 2008, almost 100,000 cases were pending; Memorandum of the President, Note 10.

necessarily to be found in the workings of the Court or by restricting the access of applicants to the Court. An analysis of the figures is interesting. First, it continues to be the case that a very high proportion of the applications submitted (over 90 per cent) are obviously inadmissible.[60] Whilst those cases are not difficult to deal with, they take up a lot of the time of the Court and its secretariat. Second, a significant proportion of the applications are 'repeat cases'.[61] That is to say that they deal with an issue already addressed by the Court, where the result is predictable. Third, a very high proportion of cases come from a limited number of states.[62]

Obviously inadmissible cases

If the number of obviously inadmissible cases submitted to the Court were reduced by 90 per cent, this would have a dramatic impact on the functioning of the Court. It remains the case that over 90 per cent of the cases submitted are inadmissible.[63] There are bound to be some cases which can reasonably be argued to be admissible even if, at the end of the day, the Court decides otherwise. The ambition should not be to eliminate all such cases, but only such a proportion as would allow room for the genuinely arguable cases. These cases may involve serious violations of the Convention rights but, for one reason or another, the Court is unable to deal with them. If, for example, an individual seeks redress for torture one year after the last domestic decision, the case will be declared inadmissible as being out of time no matter how serious the evidence. In other words, it is possible for a case to be inadmissible without any implication that the applicant has not suffered a violation of his rights.

There is a way in which such applications might be significantly reduced without recourse to a filter provided by the government or the constraining influence of an application fee. It could become a requirement that a case could only be submitted by a Strasbourg-licensed lawyer. In order to obtain a licence, the lawyer would have to complete successfully either a Council of Europe course or a course approved by the Council of Europe. There would be

60 The figure is given in several of the Interlaken documents, Note 10.

61 The CDDH in its document for the Interlaken Conference, Note 10, states that around 50 per cent of admissible cases are repeat cases. Mrs Däubler-Gmelin, chair of the Legal Affairs and Human Rights Committee of PACE, states that 70 per cent of the judgments concern repeat cases.

62 Fifty-seven per cent of the pending cases concern four member states (Russia, Turkey, Ukraine and Romania) and about 80 per cent concern only 12 of the 47 member states; Memorandum of the President, note 10.

63 If, out of the 50,000 applications in any given year, 45,000 are obviously inadmissible and if 90 per cent of those were removed (38,000), that would leave about 12,000 cases. If, out of the 5,000 not obviously inadmissible cases, 4,500 cases are admissible and half of them are repeat cases, the disposal of repeat cases would remove 2,250 cases. Taken together, if effective action were taken in relation to the two problems, about 40,250 cases would be removed from the list.

no quota of licensed lawyers. The function of the licence is to ensure qualification and not to restrict the number of lawyers able to submit cases. In general, lawyers are keen to take cases to Strasbourg. They are going to be eager to take good cases. This avoids the problem of a filter under the control of the state, which would be unlikely to have the interests of the applicant at heart. The lawyer would lose his Strasbourg licence if, in two successive years, 20 per cent of the cases he submitted were declared inadmissible. This allows a generous margin for the genuinely arguable cases. On the assumption that lawyers would only seek qualification if they wished to submit and to continue to submit cases, the possible loss of the licence would have a deterrent effect, without prejudicing the submission of good cases. Any lawyer seeking a licence would need to be told that Council of Europe legal aid would not be available unless and until the application was referred to the government. Alternatively, if the number of cases submitted were to reduce dramatically on account of the licensing system, it might be possible to make available Council of Europe legal aid for the initial application. Another possibility would be to provide that at the time of referral to the government (i.e. the time at which an applicant currently becomes eligible for legal aid) the lawyer could claim for time spent in the preparation of the case.

'Repeat cases'

As already indicated, the large proportion of 'repeat cases' is a sign of flawed implementation of the original judgment. Responsibility lies in three places. Some responsibility may lie with the Court, for not making it sufficiently clear what caused the violation and including the diagnosis in the *dispositif*. Some responsibility almost certainly lies with the Committee of Ministers in not putting enough pressure on the respondent government to deal promptly with the issue and in failing to ensure that any measure adopted meets the need. Most responsibility lies with respondent governments. It is possible that some penalty attaching to 'repeat cases' might be sufficient to concentrate the mind of such governments. There could either be a set additional penalty, in addition to any compensation owing to the applicant, which would be payable in relation to any case identified as a 'repeat case' by the Court. The money would be payable to the Court. Alternatively, such penalties could be on a sliding scale, depending on the degree of recurrence. This would not however deal with the whole of the problem of 'repeat cases'. Where the violation concerns the operation in practice of the legal system, the political effort and the cost involved in effecting changes might, in the eyes of the government, be worse than paying the penalty.[64] Either the

64 It is said that Italy prefers to pay any sum, including punitive damages, rather than to attempt to overhaul its legal system to avoid the problem of undue delays in criminal and civil proceedings.

penalty needs to be adjusted to change the balance or some other incentive would need to be found. PACE already plays a role in putting pressure on national delegations to ensure that their governments implement Court judgments effectively. It is not known to what extent members of national delegations take that responsibility seriously. It is not enough to make representations to the government. As Parliamentarians, they are well placed to introduce the necessary legislation.

A failure of pre-legislative scrutiny resulting in foreseeable violations

As already indicated, many cases involve foreseeable human rights violations as a result of a failure of pre-legislative scrutiny at the domestic level. It may be non-existent or it may be ineffective, failing to take account of the Strasbourg case law when determining the interpretation of the Convention, or it may have signalled the problem but been ignored. Whilst the issue is the responsibility of respondent governments, the Committee of Ministers and PACE could play a role in requiring improvements to the system where necessary and monitoring the effectiveness of any changes.

A failure to provide an effective domestic remedy resulting in applicants needing to apply to the Court to obtain a remedy

The increasing importance the Court attaches to the operation in practice of the domestic remedial system has already been noted. The Court needs to analyse in much more detail why the system failed to deal with the alleged violation. In particular, it needs to examine how public prosecutors and the police carry out investigations and why they fail to take the measures deemed necessary by the Court. It could be a question of training or of resources. In certain categories of case, it could be a lack of political will. Where the government claims it does not have the resources necessary, the Court should examine the proportion of GDP spent on the police and the operation of the legal system. There may be a need for a Council of Europe benchmark.[65] Where there is a genuine resources question, the ministries of member states which deal with overseas aid and support for good governance initiatives should see if they can help. The EU may also be able to provide assistance. The Court also needs to subject to equally rigorous scrutiny the operation of the courts. In particular, it should establish whether all

65 The Committee on Economic, Social and Cultural Rights, under the International Covenant on Economic, Social and Cultural Rights, has a sense of appropriate expenditure as a proportion of GDP for issues such as health and education. The proportion is not legally binding but it assists the Committee when evaluating a claim that the state does not have adequate resources to meet the minimum standard required.

courts are required to take account of the Convention as interpreted in the case law. This will have implications for the training of judges.[66] It also means that significant improvements need to be made in providing access to more of the case law in a wider range of languages. If states have the obligation to 'secure' the Convention rights, as opposed to merely not violating them, this would seem to require the judiciary to use the Convention as the benchmark.

Many of the proposals outlined above require member states of the Council of Europe to take a range of measures. This is likely to require the adoption of more rigorous rules by the Committee of Ministers, composed of the representatives of those same states. Whilst some members are having to pay for the cost of the violations of others, through their contributions to the operation of the Court, it is not clear that this will be a sufficient incentive. PACE could assist in creating the necessary political will. This raises more generally the question of the role of the Committee of Ministers in securing the enforcement of the judgments of the Court.[67] In recent years, it has taken its role more seriously and it is the Committee of Ministers, rather than the Court, that took as its test the need to prevent a recurrence of the violation. That is an appropriate test but it is not clear that the Committee of Ministers is well equipped to apply it. It may too willingly accept the assurance of the respondent government. It also appears to have difficulties in securing prompt implementation of general measures. Whilst a large part of the problem is likely to be delay on the part of governments, one may ask whether the Committee of Ministers itself can spend enough time on the issue to maintain the necessary pressure. If that is in fact an issue, it might be possible to envisage a body composed of the representatives of states which would sit on a part-time basis. That might also require the further expansion of the staff of the Directorate of Human Rights, which assists the Committee of Ministers in the exercise of its functions.

Problems in the functioning of the Court resulting in the need for additional cases to be submitted

There are two areas where the way the Court currently functions may result in cases needing to be brought which could have been avoided had an earlier case been handled differently. This is unlikely to be responsible for a large part of

66 It would be interesting to know whether there is any difference in the application of the Convention by national judges depending on the status of judges in the legal system and whether there is a career judiciary. The Council of Europe undertakes a considerable amount of training of judges. It is likely that the duration of the training is a problem. Training is potentially most effective when it is delivered by those within the system, rather than outsiders. A much clearer signal is sent to a judge if the training is delivered by other judges from the same legal system, rather than by a foreign 'expert'.

67 *Supra* n. 20.

the backlog, but may affect the ability of domestic judges to apply the Convention case law appropriately and the ability of the Committee of Ministers to insist on appropriate remedial measures. Throughout this chapter, reference has been made to the need for the Court to provide more rigorous analysis of why the violation occurred and why it was not remedied at the domestic level. Providing this analysis will mean that each case takes longer to process. If, however, the other measures proposed reduce the number of applications being submitted, this should be less of a problem. It is extremely difficult to discern any principle underlying the Court's case law on just satisfaction. The Court should also apply its own case law on the need to ensure conformity with general international law and analyse the provision of just satisfaction in a fashion consistent with international law, as reflected in the ILC principles on State Responsibility.[68] Furthermore, in the long run, such an approach would itself be likely to reduce the number of applications if the Committee of Ministers and respondent governments implemented effectively the diagnosis of the Court.

There is a more general problem affecting the Court. In its early days, it could take its time and give judgments based on reflection and a full analysis of the issue. The pressure of time may be largely responsible for what some have claimed to be a decline in the quality of the reasoning and judgments of the Court. It is also sometimes suggested that there is a problem with the quality of at least some of the judges nominated.[69] In order to be nominated, a judge clearly needs to be very familiar with his or her own legal system. It should perhaps also be a requirement that they establish their competence to work at the international level. A postgraduate academic degree would be one way of demonstrating that, as would participation in a regional or international judicial or quasi-judicial process. It might be possible to envisage the involvement of an independent Bar in the process of nomination. The government could propose candidates, but a national lawyers' committee would determine which names would go forward. Its members would have the advantage of knowing local lawyers and knowing which candidates had been overlooked. Retired members of the Court could perhaps sit on such a committee. The names would then go forward to PACE as at present.

68 ILC, Responsibility of States for Internationally Wrongful Acts, 2001, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> (accessed 22 February 2010). See also the memorial of the intervening government in *Varnava & others v Turkey*, 16064–66/90, judgment of the Grand Chamber of 18 September 2009. On remedies in human rights law, see D. Shelton, *Remedies in International Human Rights Law*, 2nd edn, OUP, 2005.

69 The difficulties associated with the process of nomination have resulted in two advisory opinions, one of 12 February 2008 and one of 22 January 2010.

The way forward

This chapter has identified many reasons having nothing to do with the functioning of the Court which explain the overwhelming number of applications to the Court. If the initiatives proposed were adopted, there is every reason to believe that the Court's case load would be manageable. There is therefore no need to restrict the ability of applicants to access the Court. In the papers prepared for the Interlaken Conference, there has been only limited reference to restrictions of access. One idea being considered is the requirement of the payment of a fee.[70] If the problem is the number of well-founded cases being submitted, such a proposal is bizarre. If anyone is to pay, should it not be the respondent government, rather than the victim of the violation? If the problem is the number of cases without any merit being submitted, the proposal in this chapter for a system of licensing of lawyers would be likely to have the desired result without the chilling effect of a fee. A fee is as likely to deter the deserving as the undeserving.

It is possible that the absence of more drastic proposals to restrict access can be explained by the fact that such a proposal has already been approved. Protocol 14 to the Convention, which can come into force following its recent ratification by the Russian Federation, envisages such a further restriction.[71] It provides:

> The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
>
> [. . .]
>
> b. the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.[72]

This provision is fundamentally objectionable. It creates an additional admissibility criterion, and one which is remarkably subjective. It would not be surprising if the 'significant disadvantage' varied over time, depending on the size of the Court's backlog of cases. An applicant would not spend years going through the Strasbourg process if he did not think that he had suffered a significant disadvantage. There is a danger that this will be perceived in principally monetary terms, whereas harm to the dignity and physical integrity of the person might be thought more significant by many. Given the

70 Not advocated but referred to in the paper of the Secretary-General, Note 10.

71 See generally A. Mowbray, 'Protocol 14 to the European Convention on Human Rights and Recent Strasbourg Cases', *Human Rights Law Review*, Vol. 4, No. 2, (2004) p. 331.

72 Revised Article 35(3) of the Convention.

likely impact of the other measures proposed in this chapter, it is to be hoped that the Court will quietly ignore the additional admissibility criterion.

Perhaps the most striking thing to emerge from this analysis is that the reason for the unmanageable number of applications reaching the Court owes far more to failings in member states than to deficiencies in the operation of the Court itself. This appears to be recognized in many of the papers prepared for the Interlaken Conference. In the past, most reform initiatives focused on the Court. This time, there is a welcome recognition that the key problems lie elsewhere. The bigger challenge is how to assist those states responsible for an overwhelming majority of the cases submitted better to meet the standards of the Convention.

The Interlaken Declaration,[73] perhaps not surprisingly, does not resolve issues but identifies elements in an action plan, within the framework of an 11-point introduction. The action plan addresses the right of individual petition, the implementation of the Convention at the national level, filtering, repetitive applications, the functioning of the Court, the supervision of the execution of judgments and the need for a simplified procedure for amending the Convention. There is a five-stage process for the implementation of the action plan. By June 2011, the Committee of Ministers is to implement the measures which do not require the amendment of the Convention. Before the end of 2011, states parties are to inform the Committee of Ministers of the measures taken to implement the parts of the Declaration which concern member states. In the light of the range of measures which will be needed in some states, there is a risk that by the end of 2011 they will only be able to report on their own action plans. By June 2012, the competent bodies should have proposed measures requiring amendment of the Convention, including a filtering mechanism and a study of the measures which would make it possible to simplify the amendment of the Convention. Between 2012 and 2015, the Committee of Ministers is to evaluate the impact of Protocol 14 and the Interlaken Action Plan. By the end of 2015, the Committee of Ministers should decide whether there is a need for further action. Before the end of 2019, the Committee of Ministers should determine whether the measures adopted have resulted in the sustainable functioning of the Court or whether more radical change is necessary.

It is to be regretted that the Declaration appears to foresee no role for PACE. More specifically, it is not envisaged that it will be involved in monitoring whether states deliver what is needed at the domestic level. This analysis has shown that four issues need to be addressed at the national level. There needs to be effective pre-legislative scrutiny. National courts need to be able to apply the Convention, as interpreted by the Court. There needs to be a

73 http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf. The text up to this point was drafted before the Interlaken Conference took place.

speeded-up process to enable the modification of primary or secondary legislation found to be incompatible with the Convention by domestic courts. Finally, domestic authorities need to implement fully and effectively the judgments of the Court. The Declaration is not sufficiently specific on what needs to be contained in the information from states which has to be submitted to the Committee of Ministers before the end of 2011. Unlike the adoption of a statute to simplify the amendment of the Convention, which just has to be studied, the terms of reference which the Committee of Ministers is called upon to issue to competent bodies should include proposals for a filtering mechanism. When that is added to the discretionary admissibility criterion introduced by Protocol 14 and the threat that, if the measures envisaged do not achieve the desired effect, 'more profound' changes will be adopted, there is cause for real concern. States appear to be being told that, if they do not improve their performance, individual applicants may find their access to the Court further reduced. The penalty would be suffered by the victim not the perpetrator. In order to avoid this outcome, it is essential that civil society is mobilized so as to ensure that states are forced to adopt the necessary measures as a result of domestic pressure. What is at stake is not the principle of individual petition but its practice in any recognizable form.

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